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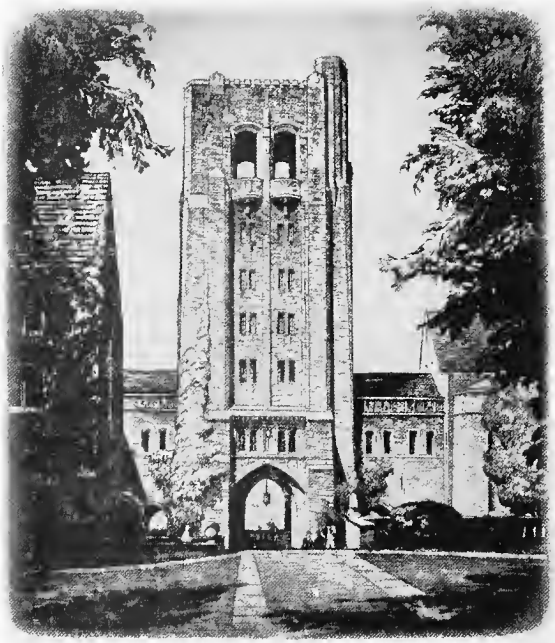

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A TREATISE

ON THE

PRINCIPLES AND PRACTICE

GOVERNING THE

TRIAL OF TITLE TO LAND;

INCLUDING

EJECTMENT; TRESPASS TO TRY TITLE; WRITS OF ENTRY; STATUTORY REMEDIES FOR THE RECOVERY OF REAL PROPERTY;

TOGETHER WITH

THE RESULTING CLAIMS FOR MESNE PROFITS AND IMPROVEMENTS;

EMBRACING A CONSIDERATION OF

COLOR OF TITLE; TITLE BY POSSESSION, AND ADVERSE POSSESSION.

BY

ARTHUR G. SEDGWICK

AND

FREDERICK S. WAIT.

NEW YORK:
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1882.

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PREFACE.

THE principles and practice regulating remedies for the trial of title and recovery of possession of real property are in the main uniform in this country. This may be explained, historically, by the fact that in most of our States the existing statutory remedies are based upon the common law action of ejectment. The system of real actions is practically extinct in America, excepting in parts of New England. It may be stated generally that our modern remedies constitute a single general system of procedure, disguised under a variety of names.

In the United States a number of causes have contributed to produce an immense amount of litigation in connection with titles to real property. Particularly in the Western States, where the recent settlement of the country and the advance of emigration produces continual changes in possession and ownership, the courts have been, and still are, continually occupied with controversies of this nature, in which a system partly derived from feudal times has to be applied under novel circumstances and conditions. Almost every volume of reports contains a considerable number of actions to try title, and we have found ourselves, in the preparation of this treatise, embarrassed by the abundance of authorities.

In the following pages the authors have endeavored, while making the citation of cases as complete as possible, to discuss, whenever occasion offered, the principles of law underlying them—principles which, in some of the newer States, are occasionally obscured or lost sight of.

Simplicity, and convenience for purposes of reference, have been aimed at in the plan of the book. The history of ejectment, of real actions, and of trespass to try title, have been traced; the nature of the interests and character of the wrongs which will support actions for the trial of title to land, or which are insufficient for that purpose, have been considered; and the forms of action which cannot be substituted for remedies in the nature of ejectment discussed.

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The aim of the authors has been to present the questions involved in the action to try title in its various stages; the question of parties; the attorney's authority to institute the action; the complaint and answer (embracing a discussion of the rules which govern in pleading and asserting titles or defenses in the modern procedure); the description; the venue; the verdict; the effect of, and rights secured by, the judgment; and the practice under the writ of possession. To this have been added chapters on statutory new trials, provisional remedies, mesne profits, damages, and improvements.

The treatise is not confined, however, to a consideration of the practice governing actions in the nature of ejectment, as any proper discussion of these remedies necessarily involves a consideration of the titles of the different classes of owners of real property—*e. g.*, the rights of co-tenants, vendor and vendee, mortgagee and mortgagor, landlord and tenant, and municipal corporations. Title by possession and adverse possession have been also discussed, and the vexed question of color of title considered at length; and in this branch of the work an attempt has been made, which the authors venture to hope may prove of some value, to reconcile the conflict in the decisions, and when this was impossible to point out the principles which, as it seems to them, ought to govern. In this part of the work they have received invaluable assistance from Mr. Francis H. Olmsted, of the New York Bar.

Of the value of the work the authors must leave the profession to judge, and only desire to add that the preparation of the treatise has involved an amount of time and labor far beyond their original expectations.

They beg to acknowledge the kindness of professional friends in different States, in furnishing suggestions and aid during the progress of the work, especially the Hon. William P. Ballinger, of the Galveston Bar.

New York, *October*, 1882.

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CHAPTER I.

HISTORY OF THE ACTION OF EJECTMENT.

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3. Practice in real actions.
4. Influence of the statute of forcible entries.
5. Strictness of pleading.
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§ 1. *Origin of the action.*—The action of ejectment, the legal proceeding by which the title to land in most of the United States is now usually tried, was originally an action of trespass brought by a lessee or tenant for years to redress the injury inflicted upon him by ouster or amotion of

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possession. The lessee merely recovered damages for the loss of the term and of the possession, the measure of these being usually the mesne profits of the land from which he had been evicted. It was a purely personal action, in which neither lands nor tenements were recoverable, as opposed to a real action, in which a freehold interest in land was recovered or possession awarded.

§ 2. *Real writs.*—The common law furnished an endless number of real writs to determine the rights of property in, or possession of, a freehold estate. The highest technical skill and learning were requisite to comprehend and define the nature and purposes of these various writs, the distinctions between which were refined, abstruse, and often scarcely perceptible. In personal actions, however, there were never many writs at common law. This very scarcity made personal actions attractive in early times, the pleader being seldom at a loss to know which writ to choose; while, in real actions, the most experienced practitioner, exercising the utmost care, frequently sued out a real writ of the wrong degree, class, or nature, thereby rendering the proceeding of no avail, and frequently imperiling the demandant's right to the proper writ or remedy. Not only were the distinctions between real writs very technical, and the selection of the proper writ a delicate task, but the proceedings under them were so inconveniently long, tedious, and costly, and the resources for delays so numerous, that the judgment, when obtained, was often a tardy and inadequate remedy.

§ 3. *Practice in real actions.*—In real actions the practice required the demandant to set forth upon the record, with the utmost exactness and precision of statement, his legal title.[1] Great technical skill and ingenuity were requisite to select, frame, and adopt the count to the nature and circumstances of each particular case. A variance of scarcely a hair-breadth between the writ and the count (or pleading),

[1] Hodsden *v.* Staples, 2 T. R. 684, per Lord Kenyon. See Stearns on Real Actions, p. 149; Reeves' Hist. Eng. Law (ed. 1880), vol. 4, p. 241.

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or between the count and the evidence, was frequently fatal to the demandant. Equal precision and nicety of statement were required to interpose a meritorious plea, or to defend or defeat the action; while the power of amendment as understood and permitted in modern times was wholly unknown, and even the limited power which the courts possessed was exercised with reluctance. "At common law," says Baron Gilbert, "there was very little room for amendments."[1]

§ 4. *Influence of the statute of forcible entries.*—The Statute of 8 Henry VI, ch. 9, rendering more effectual Stat. 15 Rich. II, ch. 2, furnished a writ of forcible entry to recover possession of land, which is one of the causes assigned by Sir Matthew Hale for the scarcity of real actions, or assizes, in the reports during the reigns of Edward IV, Richard III, and Henry VII.[2] It is the general belief that the idea of giving ejectment the effect of a real action originated from the practice and procedure under this statute concerning forcible entries. Prior to the use of ejectment by tenants for years to recover unexpired terms, the technical learning as to the management of real actions began to be less known and understood, and was speedily becoming a lost art.

§ 5. *Strictness of pleading.*—The same distinguished writer observes, concerning the pleadings at this period (1422 to 1509), that "the pleaders, yea, and the judges too, became somewhat too curious therein, so that that art or dexterity of pleading, which, in its use, nature, and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity and the true use and end thereof, and to become a piece of nicety and curiosity."[3]

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[1] Gilbert's Hist. and Prac. Common Pleas, p. 107.

[2] Hale's Common Law (ed. 1794), p. 301.

[3] Ibid, p. 301.

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Much prolixity and repetition in pleading, and the miscarriage of important causes resulted by reason of small mistakes or trivial refinements, and subtleties in practice. The rules of pleading were so severe that the action abated if the same thing was twice demanded in the writ;[1] or if by mistake too many demandants had been joined;[2] or if the tenant pleaded non-tenure where the demandant claimed more land than the tenant was possessed of;[3] or if the demandant had by mistake declared on the seizin of his father instead of his grandfather.[4] Nor could the demandant abridge his demand.[5] The substantial merits or justice of the cause were frequently overlooked or disregarded by the judges, and the action or defense wrecked by some frivolous variance or captious objection bearing no relation to the merits of the controversy. It was an era of critical precision in pleading and practice, substance being sacrificed to form.

§ 6. *Abuses in practice under real writs.*—Parliament did not interpose to reform these evils, or attempt to rid real actions of the intolerable abuses which sprang from them. The duty devolved upon the courts to correct, without legislative aid, the evils which they had themselves created and fostered. Real writs became not only a source of oppression and injustice to suitors, but of scandal and reproach to the system of remedial law, of which they formed a part. By vouching over, demanding view, and praying aid, a skilful practitioner could prevent the joinder of issue, term after term, for years, and the trial of the action was frequently delayed until one of the parties died, whereupon the whole proceeding abated, and a new writ became necessary.

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[1] Stearns on Real Actions (2d ed.), pp. 86–134; Booth on Real Actions (Am. ed. 1808), p. 2.

[2] See Treat *v.* McMahon, 2 Greenl. (Me.) 120.

[3] See Stearns on Real Actions (2d ed.), p. 181 [208].

[4] Ibid, p. 186 [215].

[5] Com. D. title Abridgment A, 2.

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§ 7. *Advantages of personal actions.*—We can, therefore, easily imagine with what eagerness both court and counsel availed themselves of the loophole which was at length discovered, by means of which the questions, ordinarily raised in a real action, could be brought up and decided in a personal action, and, at least so far as possession was concerned, the results of a real action attained in a simple action of trespass.

§ 8. *Abandonment of real writs.*—It is impossible to trace with precision, at this late day, the immediate circumstances which led to the sudden abandonment of real writs. The reasons assigned by the early writers are fragmentary and imperfect.

Mr. Sergeant Adams, who wrote early in the century, says,[1] that "neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times."

The history of procedure nowhere presents a more curious fact, than that the owners of the soil should have suddenly relinquished a system of remedies which had been matured by the experience of centuries, and have consented to try titles, to the freehold, in a personal action originally devised to protect the precarious estates of the inferior tenantry.

§ 9. *Influences leading to the change.*—The controlling influence undoubtedly was, as we have said, that the forms and pleadings in real actions were minutely varied, according to the source and quality of the demandant's title, or the nature of the alleged disseizin, deforcement, or injury. But this very fact had been the boast of the early writers,

[1] Adams on Ejectment (4th Am. ed. 1854, by Waterman), p. 10, *9. We have, in writing this treatise, made frequent use of Mr. Adams' excellent work on Ejectment. This book is the highest authority as to the early practice and procedure in the remarkable action of which it treats, but it has been superseded by the radical changes effected in our system of remedial law by modern legislation, more especially by the abolition of the fictions.

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who maintained that the assortment of real writs was so varied and complete that a demandant could suffer no injury and sustain no wrong, which there was not a real writ exactly suited to redress. Blackstone says that the provision, Westm. 2, 13 Edw. I, c. 24, for framing new writs, when wanted, was almost rendered needless by the very great perfection of the ancient forms. "And, indeed," he continues, "I know not whether it is a greater credit to our laws to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it."[1] There is no doubt, however, that this supposed merit came, in process of time, to be a crying evil.

§ 10. *Advantages of ejectment.*—In ejectment the form of the action was always the same, without regard to the source or nature of the lessor's title, or the character of the disseizin, deforcement, or ouster.

This dispensed with the delicate task of selecting a writ exactly suited to the nature of each particular case, and the necessity of tracing or disclosing the demandant's title, or specifying the character of the ouster. To fully understand the historical causes which led to the substitution of ejectment for real actions, it must be regarded as part of the general struggle for supremacy going on at about the same period between exact and general forms of procedure, specific and general pleading.

§ 11. *Influence of practice in trover and assumpsit.*—In the personal actions of trover and assumpsit, both of which assumed their modern form about the time that ejectments came into common use, a system of general pleading prevailed. This fact undoubtedly had an important influence in forming and popularizing ejectments. Suitors quickly discovered the advantages to a complainant of a remedy which enabled him to prove any title that he could produce at the trial, without the dangers incident to a vari-

[1] 3 Bla Com p. 184.

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ance, and which deprived the defendant of the right to vouch over, demand view, or pray aid.

§ 12. *Ejectione firmæ.*—The writ of *ejectione firmæ* (probably modeled after *ejectione custodiæ*), out of which the modern action of ejectment has gradually grown into its present form, is not of any great antiquity.[1] In this action every fiction by which questions of title to land could be raised and decided, was encouraged and adopted.

The Court of Common Pleas had exclusive jurisdiction of real actions, while ejectment could be brought in all three of the great common law courts. This fact contributed in no slight degree to the great favor with which the fictions in ejectment were received and encouraged by the judges of the King's Bench, for that court thereby acquired jurisdiction over real property concurrently with the Common Pleas. The practitioners in the King's Bench also encouraged ejectment, for it enabled them to share in the lucrative practice of the Common Pleas.

§ 13. *Freehold estates.*—In feudal times a freehold estate was the only acknowledged title to land. Estates for years were unknown.

A demise of the possession of land for a term of years was not considered as conveying to the grantee any title to the land, but was construed merely as a covenant, contract,[2] or agreement between the lord and the tenant. The termor was considered as a bailiff to the freeholder or reversioner, or mere pernor of the profits,[3] and his term was regarded merely as a chattel.

§ 14. *Imperfect remedies of tenant for years.*—The tenant was not made a party to controversies over the title to the freehold, and if a recovery was had against his lord, whether *bona fide* or covinous, the freehold was discharged

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[1] See § 19.

[2] See Bates *v.* Sparrell, 10 Mass. 323; 2 Bla. Com. p. 140.

[3] See Dorsey on Ejectment, p. 9.

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of the term.[1] The lessee was remediless[2] until the statute of 21 Henry VIII, c. 15, allowed him to falsify fraudulent recoveries.[3] If the tenant was evicted by his lessor, he had a writ of covenant against him by which, under the old practice, he recovered the term as well as damages;[4] but, if ousted of his possession by a stranger, he was, prior to the time of Henry III, without remedy. He had, indeed, his writ of covenant against his lessor, but his only recovery was damages. He did not regain the term or possession.[5] Such a remedy was obviously inadequate, and the lessee frequently recovered nothing on his judgment.

§ 15. *Quare ejecit infra terminum.*—During the reign of Henry III, however, a writ was introduced by Walter de Merton, or William Moreton,[6] chancellor of that king, which furnished the lessee, or termor, a remedy against any one who, claiming from his lessor, evicted him. By this writ, which was called "*Quare ejecit infra terminum*," the plaintiff recovered damages for the loss of so much of the term as the defendant had wrongfully withheld, and the sheriff put the lessee in possession for the unexpired portion of the term.

§ 16. *Provisions of the writ.*—This writ required the defendant to show wherefore he deforced the plaintiff of certain premises which C. had demised to plaintiff for a term not yet expired, within which term the said C. sold the lands to the defendant, by reason of which sale the defendant had ejected the plaintiff.[7]

The writ was drawn either as a *præcipe* or a *si te fecerit securum*. When first introduced the former was considered

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[1] See Stearns on Real Actions (2d ed.), p. 116; Dorsey on Ejectment, p. 9.

[2] Stearns on Real Actions, p. 116.

[3] Reeves' Eng. Law (ed. 1880), vol. 4, p. 349.

[4] 3 Bla. Com. p. 200.

[5] Ibid. p. 200; Reg. Brev. p. 227.

[6] Reg. Brev. p. 227. "Provision was made," says Bracton, "*de consilio curiæ*" (Bracton, f. 220).

[7] Reg. Brev. p. 227; F. N. B. p. 197.

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the better form,[1] but in the time of Edward III the latter was universally adopted.[2]

§ 17. *Against whom the writ lay.*—It is to be noted that the writ ran, "by reason of which sale the defendant, etc." According to the authorities, it was a very essential part of the lessee's case that he should show that the defendant claimed under the lessor, for the writ would not lie against a stranger who ejected the lessee, and who, in so doing, did not rely upon any privity of title or estate with the lessor.[3]

Mr. Reeves[4] quotes Bracton as authority for the statement that the writ lay against *any* person who ejected the lessee, but a careful examination of Bracton's language has shown that he did not consider it so large a remedy.[5] The ancient authorities seem to be overwhelming in support of the view that the lessee must show that the defendant claimed under the lessor.[6]

Furthermore, if *quare ejecit* would run against a stranger, it is difficult to imagine any reason for the introduction

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[1] Bracton, f. 220; Reeves' Hist. Eng. Law (Am. ed. 1880), vol. 2, p. 137.

[2] Reeves' Hist. Eng. Law (ed. 1880), vol. 3, p. 232.

[3] 18 Edw. II, f. 599.

[4] Reeves' Hist. Eng. Law (ed. 1880), vol. 2, p. 136; Bracton, f. 220.

[5] See Adams on Ej. (4th ed. 1854), p. 7, *4, where Mr. Reeves' interpretation of Bracton is shown to be erroneous.

[6] See Stat. Abr. Title "Quare Ejecit." "In *quare ejecit* plaintiff shall recover his term, and damages by him sustained *by reason of the sale.*" Reg. Brev. p. 227: "Sciendum est quod breve (sc. *Quare Ejecit*), * * * habet fieri quando, A dimisit B, decem acras terræ ad terminum decem annorum, & idē A, durante termino illo vendit eandem terram C, in feodo, occasione cujus venditionis durante adhuc termino prædicto, idem C, ipsum B, de prædicta terra ejecit. * * * Fuit hoc breve inventum per discretum virum Wilhelmum de Merton ut terminarius recuperet catalla sua versus feoffatum." See, also, 18 Edw. II, f. 599; Hil. Term, 46 Edw. III, f. 4, pl. 12; Gilbert on Ejectment (2d ed.), p. 123; also, Roscoe on Actions Relating to Real Property, p. [98]: "*Quare ejecit*, &c., only lies where the ejector claims title under the lessor, and not against a mere stranger, for, in the latter case, the remedy was by *ejectione firmæ*." F. N. B. II, p. 197; 19 Henry VI, pp. 56, 19; 21 Edw. IV, pp. 10, 30, per Choke, J.: "Quare ejecit, &c., lieth where one is in by title, *ejectione firmæ* where one is in *by wrong*." See Reeves' Hist. Eng. Law (1880), vol. 3, p. 232, note (*a*).

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of the writ of *ejectione firmæ* more than half a century after *quare ejecit* was devised.

§ 18. *Additional remedies of tenants for years.*—The title of a lessee or tenant for years was not, as yet, of sufficient importance to receive any consideration from the courts in actions affecting real property, nor was the lessee allowed to make his precarious estate the basis on which to raise or discuss questions of title to land with a stranger. That duty devolved upon the freeholder or lord, and the lessee's redress, as against a stranger, was to induce the lord to institute a real action to regain the freehold. If the lord or freeholder neglected to institute the action, or, as frequently occurred, was in collusion with the stranger, the unfortunate tenant for years next applied to a court of equity, to compel a specific performance of the lease or contract by the lessor,[1] and as against strangers for a perpetual injunction to quiet the possession.

§ 19. *Sketch of ejectione firmæ.*—During the reign of Edward II, or the early part of the reign of Edward III, a new writ made its appearance, which gave the termor or tenant for years a remedy against strangers, who, not claiming under the lessor, entered and evicted the lessee. This new remedy was in its nature a writ of trespass. The first mention of it, in the reports, refers to it simply as a writ of trespass.[2] Later it acquired the name of *ejectione firmæ.* The purpose of the writ was to give the plaintiff damages, for the injuries inflicted upon him, in being evicted from his possession by the defendant.

§ 20. *Its requisites*—The writ required the defendant to show wherefore, with force and arms, he entered upon certain lands which C. has demised to plaintiff for a term not

[1] Gilbert on Ejectment, p. 2; Stearns on Real Actions (2d ed.), p. 56 [54]; Runnington on Ejectments, p. 5.

[2] "A certain Adam brings writ of trespass against R. of S., and K. of D., for that with force and arms he ejected him from a manor which he holds for a term under the lease of one B." 44 Edw. III, f. 22, pl. 26.

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yet expired, and ejected the said plaintiff from his farm. There was usually a clause, charging that the defendant had carried off the plaintiff's goods and chattels, and often a clause declaring that he had occupied the premises for a long time.[1] The process, as upon all writs of trespass, was by attachment, distress, and outlawry.

§ 21. *Defined by Blackstone.*—Blackstone says, that, "For this injury (*i. e.*, ouster or amotion of possession from an estate for years) the law has provided him [the lessee] with two remedies, according to the circumstances and situation of the wrong-doer: the writ of *ejectione firmæ*, which lies against any one—the lessor, reversioner, remainderman, or any stranger, who is himself the wrong-doer and has committed the wrong complained of; and the writ of *quare ejecit infra terminum*, which lies not against the wrong-doer or ejector himself, but his feoffee or other person claiming under him."[2] This distinction is not warranted by the authorities, and the commentator's position is not sustained by the form of the writ *quare ejecit infra terminum*, which alleges an ejectment *by the defendant.* The entry and wrongful act of the defendant created the cause of action against him, not any act of his lessor. It would be extraordinary if an alienee of a wrong-doer was liable in damages for the torts committed by his alienor. Damages always constituted a part of the recovery, and when the term had expired the only recovery in *quare ejecit.*[3]

§ 22. *When it issued.*—The writ of *ejectione firmæ* issued in all cases, except that where the ejector claimed under the lessor, resort was usually had to the older writ of *quare ejecit infra terminum.* Even the grantor was liable to be

[1] Reg. Brev. f. 227, 228.

[2] 3 Bla. Com. p. 199.

[3] Mr. Reeves falls into the same error. "The second (sc. *quare ejecit infra terminum*) lay only against the alienee of the ejector." Reeves' Hist. Eng. Law (1880), vol. 4, p. 237. See Bel. p. 159.

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sued on this writ, notwithstanding the old doctrine that a man could not enter, *vi et armis*, into his own freehold.[1]

§ 23. *Recovery in ejectione firmæ.*—In the action of *ejectione firmæ*, the plaintiff at first only recovered damages, as in any other action of trespass. The remedy of damages was, however, often inadequate. The courts, consequently, following, it is said, in the footsteps of the courts of equity,[2] and probably, by analogy with the form of recovery in *quare ejecit*, introduced into this action a species of relief not warranted by the original writ nor included in the prayer of the declaration, which sounded for damages only, and was silent as to any restitution—viz., a judgment to recover the term, and a writ of possession thereupon. Possibly the change was inspired by jealousy of the chancery courts.[3]

§ 24. *Term not recoverable in early practice.*—It cannot be stated precisely when this change took place. In 1383 it was conceded, by the full court, that in *ejectione firmæ* the plaintiff could no more recover his term than in trespass he could recover damages for a trespass to be done.[4]

§ 25. *Extension of recovery to the term.*—The decision shows that the point was then debated. The same doctrine was held in 1455 by one of the judges.[5] But in 1468 it was agreed by opposing counsel that the term could be recovered, as well as damages.[6] The earliest reported decision to

[1] Reeves' Hist. Eng. Law (ed. 1880), vol. 3, p. 233.

[2] Reeves' Hist. Eng. Law (ed. 1880), vol. 4, pp. 237, 238; 3 Bla. Com. p. 200. The nature of this equitable jurisdiction cannot be clearly defined. The authorities usually cited are Lill. Prac. Reg. p. 496, quoting 27 Henry VIII, p. 15; Litt. Rep. p. 166; 3 Bulst. p. 34 (Court of Marches), where it was held that the chancellor and the Counsell del Marches could quiet possessions, but had not the power to determine the title. The same equitable jurisdiction is exercised in some of the courts of the United States.

[3] See Dorsey on Ejectment, p. 10.

[4] Bel. p. 159

[5] Mich. 33, Henry VI, f. 42, pl. 19.

[6] 7 Edw. IV, f. 5–10; Brooke's Abr. Title, "Quare Ejecit," part 2, f. 171. See, also, 21 Edw. IV, f. 11; Jenkins' Centuries Case, pp. 26, *67.

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this effect was in 1499,[1] and is referred to by Mr. Reeves as the most important adjudication rendered during the reign of Henry VII,[2] for it changed the whole system of remedies for the trial of controverted titles to land, and the recovery of real property.

§ 26. *Adoption of ejectment and disuse of real actions.*—The result was not foreseen at once, but in the next reign the action of ejectment came to be commonly applied to the trial of titles. Real actions disappeared save in a few cases where ejectments would not lie, and in the reign of Elizabeth were practically supplanted by the action of ejectment.[3] Real writs gradually sank into disrepute, and at length were chiefly resorted to by speculators and unprincipled practitioners of the law to defraud persons of low condition of their substance under pretense of recovering for them large estates to which they had no color of title.[4]

§ 27. *Early practice in ejectment.*—Blackstone describes the practice under this new writ as follows:[5] "The better to apprehend the contrivance whereby this end is effected, we must recollect that the remedy by ejectment is, in its original, an action brought by one who hath a lease for years, to repair the injury done him by dispossession. * * * When * * * a person who hath a right of entry into lands determines to acquire that possession which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in the pos-

[1] 14 Henry VII; Rast. Ent. f. 252.

[2] Reeves' Hist. Eng. Law (ed. 1880), vol. 4, p. 235.

[3] Alden's Case, 5 Rep. 105 (1601). Plea to a writ of *ejectione firmæ* was ancient demesne. It was answered and resolved that the plea was good, because the common intendment is, that the title and rights of the land will come in debate. "And forasmuch as at this day all titles of land are for the greatest part tried in actions of ejectment, if in them ancient demesne should not be a good plea, the ancient privileges * * * would be utterly taken away and defeated." See Doe *d.* Poole *v.* Errington, 1 Ad. & El. 750; especially the learned note at page 756.

[4] Report of the English Real Property Commissioners, p. 42.

[5] 3 Bla. Com. p. 201.

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session of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land and turns him out, or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages."

§ 28. *A valid lease necessary.*—The plaintiff was required to show that he was on the land rightfully, and that his lessor had executed a valid lease. The title of the lessor, therefore, became an essential part of the plaintiff's case. An actual and formal entry by the lessor was necessary, for, by the old law, one conveying an interest in land, when out of possession, was guilty of maintenance, a penal offense. Indeed, it was doubted at first whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance.[1]

§ 29. *Actual ouster not requisite.*—An actual ouster, by the tenant in possession, was not requisite, for, if, after the lessee's entry under the lease, the tenant remained on the land, he was deemed, without any other act, to have ousted the lessee.[2]

§ 30. *Injustice of the rule.*—It is matter of deep regret that the courts did not require proof that the ouster had been committed by the tenant in possession of the premises, for he was, of course the person most interested in opposing a change of possession. It was held in 1608, that the servant of the tenant in possession was a sufficient

[1] 3 Bla. Com. p. 201; 1 Chanc. Rep. App. p. 39 [*76]; see Stat. 32 Henry VIII, c 9, s. 2.

[2] Lill Prac. Reg. p. 674.

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ejector,[1] but the line was not drawn even here. Any one who came on the land, by chance, after the sealing and delivery of the lease, with no intention of disturbing the possession of the lessee, was considered a sufficient ejector to be made defendant.[2]

§ 31. *Abuses in early practice in ejectment.*—The action as thus regulated was liable to great abuse, for the tenant could be turned out of possession without any notice of the suit, or opportunity of asserting or defending his title, on a judgment rendered by default against an ejector with whom he had no interests in common. The ejector was, in many instances, not affected by the judgment, and being, as a rule, friendly to the plaintiff, he frequently suppressed or concealed from the party in possession all knowledge of the suit.

§ 32. *Notice to the tenant in possession.*—The abuses resulting from these "clandestine ejectments" led to the establishment of a rule that no plaintiff should proceed in ejectment to recover the land against a casual ejector, unless notice of the suit was first given to the tenant in possession, if any there were.[3] The courts refused to sign judgment against the casual ejector, unless proof of such notice was produced.[4] The tenant in possession was uniformly admitted to defend, upon his undertaking to indemnify the defendant, against the cost of the suit.

§ 33. *Inconvenience attending the formalities.*—Much trouble and inconvenience, however, attended the observance of the different formalities. If several persons were in possession of the disputed lands, it was necessary to execute separate leases upon the premises of the different tenants, and to commence a separate action upon each lease.[5]

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[1] Wilson *v.* Woddel, 1 Brownl. 143; Yelv. p. 144.
[2] Lill. Prac. Reg. p. 673.
[3] 3 Bla. Com. p. 202.
[4] Rules B. R. Trin. 14 Car. II; Cooke's Rules and Orders.
[5] Adams on Ejectment (4th ed.), p. [*14] 17.

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§ 34. *Title, lease, entry, and ouster.*—The plaintiff was obliged to establish four points to maintain the action, if a defense was interposed, viz., title, lease, entry,[1] and ouster. *First*, he was compelled to show a good title in his lessor. *Secondly*, that his lessor, having such title, made a lease to him for a term not yet expired. *Thirdly*, that the plaintiff took possession under the lease. *Fourthly*, that the defendant ejected him.

§ 35. *Practice introduced by Chief Justice Rolle.*—To put the question of *title* to land solely in issue, and to eliminate all other controversies which might arise under this practice, a new feature was engrafted upon the action by Lord Chief Justice Rolle, who presided in the court of the Upper Bench in the time of the Protectorate. We have seen that permission was granted by the court to the tenant in possession to defend the ejectment suit only as a matter of favor. The courts could, therefore, couple with the granting of this favor any equitable conditions that seemed proper.

§ 36. *Consent rule.*—Accordingly the practice invented by the Chief Justice, and afterwards generally adopted by the courts, was to require the tenant, as a condition of making him a party, to enter into a rule, called the *consent rule*, by which he agreed to confess, at the trial, the lease, entry, and ouster, and to insist and rely solely upon his title. A further condition was imposed, that if the defendant broke this engagement at the trial, he should pay the costs of the suit and allow judgment to be entered against the casual ejector. It is the general belief that this novel practice was introduced about the year 1656, but we find it referred to in a case in Styles' Reports,[2] decided in 1652 in

[1] An *actual* entry was necessary to avoid a fine. Lord Audley *v.* Pollard, Cro. Eliz 561; see 4 H. VII, c. 24.

[2] Styles' Reports, p. 368. The practice is mentioned in the Court Rules in 1662; Cooke's Rules and Orders, B. R. Trin. 14 Car. II, and was continued under Charles II; see Davies' Case, 1 Keb. 28, P. 13, Car. II.

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C. B., and as the practice was first established in the Upper Bench, the proper date must be somewhat earlier.

§ 37. *Fictions.*—The introduction of imaginary or fictitious persons as parties followed,[1] and was finally adopted as the universal practice, though reprobated by Blackstone,[2] chiefly because the defendant could not collect his costs from an imaginary person. This objection was overcome by framing the consent rule so that in the event of judgment for defendant the plaintiff's lessor should pay the costs. The practice was briefly as follows: A., the claimant of the title, delivered to B., the tenant in possession, a declaration in ejectment, in which John Doe (or Goodtitle) and Richard Roe (or Badtitle) were respectively plaintiff and defendant. John Doe declared on a fictitious lease or demise of the lands from A. to himself for a term of years, and alleged that during the continuance of the term he was ousted from possession by Richard Roe. The title of the action then stood John Doe in the demise of A. against Richard Roe. To the declaration was annexed a notice signed by Richard Roe and directed to B., informing him as "a loving friend" that he (Roe) had been sued as a casual ejector, and advising B. to appear and cause himself to be made a defendant in his stead, otherwise he, Richard Roe, would suffer judgment to be entered by default, and B. would be turned out of possession.[3]

As under the former practice, proof of service of the declaration and notice on B. was an essential prerequisite to the entry of judgment against the casual ejector. If there was no tenant in possession judgment could not be entered. Consequently in cases of vacant possession the old practice was followed, under which notice was required only

[1] See Cooke's Rules and Orders, B. R. Mich. 1654. We find a rule forbidding any attorney from acting as lessee in an ejectment, which shows that the lessee was not then an imaginary person.

[2] 3 Bla. Com. p. 203. The parties were imaginary in many cases in 1678; see Addison *v.* Sir John Otway, 1 Mod. 250-252.

[3] See Archbold's Practical Forms (N. Y. 1828), p. 363.

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in cases where there was a tenant. The plaintiff, on resorting to the old practice, was of course compelled to prove an actual lease, entry, and ouster.

§ 38. *Nonsuit.*—If B. failed to appear, judgment was entered by default against the casual ejector. But, on appearing and entering into the *consent rule*, B. was substituted as defendant in place of the casual ejector, and could plead the general issue. If B. failed to appear on the trial and confess lease, entry, and ouster, the plaintiff was necessarily nonsuited, because the fictitious lease, entry, and ouster were not susceptible of proof.

§ 39. *Judgment by default.*—By indorsing this cause of nonsuit on the postea the plaintiff was entitled to judgment against the casual ejector,[1] according to the condition imposed upon the tenant when he entered into the consent rule. Though the declaration was served only on the tenant in possession, the landlord was admitted to defend[2] with the tenant, and not in his stead.[3] After the statute, 11 Geo. II, c. 19, § 13, the landlord was admitted to defend instead of, as well as with, the tenant in possession. Who was a landlord so as to be entitled to defend, was a subject of much contention in the courts,[4] though the term was ultimately held to include every person whose title was connected and consistent with the possession of the occupier.[5]

§ 40. *Writ of habere facias possessionem.*—If the plaintiff recovered judgment either by default or after verdict, a

[1] Sir Hugh Middleton's Case, 1 Keb. 246.

[2] Styles' Rep. 368; Roch *v.* Plumpton, Casual Ejector of Witherings, 1 Keb. 706; Anon., 12 Mod. 211; Roe *d.* Leak *v.* Doe, Barnes, 193.

[3] Balderidge *v.* Paterson, Barnes, 172; Goodright *d.* Duke of Montague *v.* Wrong, Barnes, 175; see Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, especially the learned argument of Mr. Harvey, one of the counsel, and Lord Mansfield's admirable statement of the nature of ejectment.

[4] See Lamb *v.* Archer, Comb. 208 (5 W. & M.); Jones, Lessee of Pridge *v.* Carwithen, Comb. 339 (7 Will. III); Strike and Dikes, Comb. 332.

[5] See Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, per Lord Mansfield.

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writ *habere facias possessionem* was issued to the sheriff to put him in possession.

§ 41. *Effect of the judgment.*—The judgment, however, did not establish the title or right of property of the plaintiff to the land. He recovered the possession but not the seizin. He became possessed "according to his right." If he had a title in fee simple, he became thereby seized in fee simple; if he had a chattel interest he was in as a termor, but if he had no title he was in as a trespasser, except that he was not liable in trespass for such an entry.[1]

§ 42. *Judgment not conclusive.*—The judgment was not conclusive upon the title or right of property, even between the parties.[2] The action could be repeated and the same questions retried indefinitely, because there was no privity between the successive fictitious plaintiffs, and the record and judgment, unlike a real action, did not reveal the nature of the title that had been established upon the former trial. Each successive ejectment was on a *new* lease, entry, and ouster. The title was never formally or directly in issue, but was tried collaterally. The gist of the action was the trespass of the defendant and the plaintiff's right of possession. Every fresh trespass was a fresh cause of action. As the right of property might be in one person, the right of possession in a second, and the actual possession in a third, a judgment for the possession did not necessarily conclude the title. Under the feudal system a peculiar sanctity attached to a man's right of possession of land, and when ejectments were introduced the courts were reluctant to hold that he must stake his possession upon the results of a single trial, but inclined to afford him ample and repeated opportunity to exhibit his title and prove his rights.

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[1] See Jackson *v.* Haviland, 13 Johns. (N. Y.) 229-234; Wilbeck *v.* Van Rensselaer, 64 N. Y. 27-31; People *v.* Cooper, 20 Hun (N. Y.), 486; Doe *v.* Bluck, 3 Campb. 447.

[2] Clerke *v.* Rowell, 1 Mod. 10.

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§ 43. *Policy in America.*—When this question of the conclusiveness of a judgment in ejectment came up in the Supreme Court of the United States, it was decided that where the fictitious scaffolding of lease, entry, and ouster had been demolished, and the parties made the issue in their own names, the judgment was conclusive without being made so by statute.[1]

§ 44. This was not the rule while the fictions lasted. The principles of this case, though probably sound, have not been universally acknowledged. The general policy in America has been to make the judgment in ejectment conclusive upon the title by statute, the defeated party being allowed one new trial as of right, and in some States a second trial, in the discretion of the court, for cause shown.

§ 45. *Lord Coke's opposition to ejectment.*—Lord Coke strenuously opposed the adoption of ejectments,[2] because they introduced "infiniteness of verdicts, recoveries, and judgments," and "sometimes contrarieties of verdicts and judgments, one against the other," in one and the same suit; and because the suits could be repeated for thirty or forty years, to the utter impoverishment of the parties, all of which tended "to the dishonor of the common law, which utterly abhors infiniteness and delaying of suits, wherein is to be observed the excellence of the common law, for the receding from the true institution of it introduces many inconveniences, and the observation thereof is always accompanied with rest and quietness, the end of all human laws." Yet in real actions, to which this great lawyer clung so tenaciously, the judgments were not always conclusive,

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[1] Sturdy *v.* Jackaway, 4 Wall. (U. S.) 174. This subject is discussed at length in the chapter on the judgment. See, further, Dawley *v.* Brown, 79 N. Y. 390; Doyle *v.* Hallam, 21 Minn. 515; Wilson *v.* Henry, 40 Wis. 594; Phillpotts *v.* Blasdel, 10 Nev. 19; Kimmel *v.* Benna, 70 Mo. 52; Brownsville *v.* Cavazos, 100 U. S. 138; Gordinier's Appeal, 89 Pa. St. 528; Amesti *v.* Castro, 49 Cal. 325.

[2] Ferrer's Case, Coke's Rep. vol 3, 274, part VI, 8 b, 9 a.

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and as was decided in the case just cited, did not bar new actions of a higher degree or nature. If ejectments could be repeated infinitely, a single real action could be prolonged for a lifetime.

§ 46. *Injunctions against further ejectments.*—After a suitor in ejectment had prevailed in several trials, he applied to a court of chancery for a perpetual injunction against further ejectments, which that court, as a rule, seems to have been reluctant to grant, because every new ejectment supposes a new demise, and the costs were a recompense for the trouble and expense to which the possessor had been put.[1] The House of Lords, upon appeal, granted an injunction in the case of Earl of Bath *v.* Sherwin,[2] against further ejectments after five verdicts, in as many successive ejectments, had been rendered in three different counties in favor of the defendants.

§ 47. *Strother v. Lucas.*—An instructive and curious case in our own reports bearing upon this subject is Strother *v.* Lucas,[3] decided in the Supreme Court of the United States in 1838. The controversy was before the same court in 1832.[4] The court refers to the former decision and reaffirms the doctrine that a judgment in ejectment is not conclusive upon the right either of possession or of property, and says that the case now presents new features which the court deems it proper to pass upon and settle, otherwise a court of chancery might not think it proper to enjoin further suits "so long as new or material facts could be developed, or pertinent points of law remained unsettled." The court then proceeded to clear the way for a perpetual injunction against further ejectments by discussing and deciding in all their bearings the various questions in-

[1] Runnington on Ejectment (ed. 1806), p. 12.
[2] Earl of Bath *v.* Sherwin, 4 Brown's Par. Rep. 373.
[3] Strother *v.* Lucas, 12 Peters (U. S.), 410.
[4] See 6 Peters (U. S.), 763.

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volved. This decision, it should be observed, was made before the question was raised as to the conclusiveness of the judgment, where the issue is between the real parties in interest, in their own names.

§ 48. *Method of regulating ejectment.*—Though the general form of proceeding in ejectment was settled in the time of Charles the Second, yet the nature of the action was not clearly understood, nor the rules governing it definitely established until the beginning of this century.

§ 49. *Practice as to abatement.*—The courts adopted an arbitrary system of regulating the action by permitting persons who had not been made parties to become defendants, and continued to exercise this jurisdiction by adopting whatever rules were thought to best accomplish the ends of justice. Thus, when the plaintiff was an actual person, it was held that his death did not abate the action, for the lessor was really the interested party, and the suggestion that there lived a man of the same name in the county was considered sufficient.[1] The plaintiff was not allowed to release the costs, and was held in contempt for so doing,[2] and an attorney who assigned for error the death of the plaintiff in ejectment was adjudged in contempt.[3]

§ 50. *Confusion resulting from caprice of the judges.*—There was a wide divergence between the decisions, the natural result of regulating the action by the mere will or caprice of the judges, who differed frequently as to what rules best accomplished the ends of justice. Some cases were decided upon the theory that the action was, in its nature as well as origin, an action of trespass; that the damages constituted the principal recovery, the restoration

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[1] Addison *v.* Sir John Otway, 1 Mod. 250-252.

[2] Anon. Salk. [*260].

[3] Moore *v.* Goodright, Stra. 899; such release was void. Close *v.* Vaux, Comb. 8.

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of the term and possession being merely an incident.[1] Other cases were decided by analogy to real actions.[2] Thus it was held that the subject of the action must be demisable, and that the plaintiff must have power to demise.[3] On the other hand again an ejectment for a rectory was upheld.[4]

§ 51. *Introduction of equitable principles by Lord Mansfield.*—The action was moulded into a more definite form in the time of Lord Mansfield, who declared[5] "that he had it much at heart to have the practice upon ejectments clearly settled upon large and liberal grounds for the advancement of the remedy." But he brought equitable principles into the trial of this action, as he did into other branches of the law, and favored and encouraged ejectment as an equitable remedy, calculated to subserve the ends of individual justice rather than as a legal action governed by fixed and positive rules and principles. Thus a mortgagee was permitted to maintain ejectment against a tenant claiming under a lease granted prior to the mortgage, where he gave notice to the tenant that he did not intend to disturb the possession, but only to get into the receipt of the rents and profits of the estate.[6] Nor could the legal estate of a trustee be set up against the *cestui que trust*,[7] and an agreement for a lease was held tantamount to a lease as a defense in ejectment.[8] These cases have been overruled in England.[9]

The principles and practice which the Court of King's Bench, during the career of this illustrious judge, sought to impress upon the remedy have been, in some instances since his time, introduced by statute.

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[1] Wright *v.* Wheatley, Cro. Eliz. 854; Ibgrave *v.* Lee, Dyer, 116, b. (71).

[2] Barwick *v.* Fenwood, Comb. 250.

[3] Adams on Ejectment (4th Am. ed.), p. [18.]

[4] Doe *d.* Watson *v.* Fletcher, 8 B. & C. 25; Hillingsworth *v.* Brewster, Salk. 256; see Plowd, 199.

[5] Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290.

[6] See note to Keech *d.* Warne *v.* Hall, Doug. 21-23.

[7] Bull. N. P. 110; Doe *d.* Bristow *v.* Pegge, 1 T. R. 758 n.

[8] Weakly *d.* Yea *v.* Bucknell, Cowp. 473.

[9] See Doe *d.* Hodsden *v.* Staple, 2 T. R. 684, per Kenyon, Ch. J.

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§ 52. *Lord Kenyon's influence.*—Lord Kenyon established the action on a sounder basis. Since his day the courts have held that the plaintiff's lessor must establish a legal title. He must have a right of entry, for if he made the lease without entering on the land it was maintenance, and though in the modern practice an actual entry is unnecessary, yet the right of entry must exist, for that is the question to be tried.

§ 53. *Liberal view of fictions by the courts.*—The courts have generally looked beyond the fictitious form of the action, and have taken judicial notice that the real controversy is between adverse claimants to the possession of land; that the plaintiff's lessor and the tenant in possession (or landlord if made defendant) are the real parties in interest;[1] that the legal title must prevail, and that, as the fictions were "fabricated for the mere purposes of justice," the plaintiff ought not to be defeated in his recovery by technical or captious objections founded on the peculiar and somewhat technical form of the action. It became common practice to allow amendments enlarging the term laid in the declaration when it expired pending the action, Chief Justice Marshall in granting such a motion remarking that there was "every reason for allowing amendments in matters of mere form."[2]

§ 54. *Rules governing personal actions retained.*—In many respects the rules applicable to real actions have been adopted,[3] yet the principles and practice governing personal actions have been in some instances retained unmodified, though apparently not suited to the new issue raised. Thus the description of the premises need not be much more certain than in an ordinary action of trespass. The plaintiff may also recover a part and in some cases an undivided portion of the premises for which he declares.

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[1] Aslin *v.* Parkin, 2 Burr. 665, per Lord Mansfield.

[2] Walden *v.* Craig, 9 Wheat. 576.

[3] Heatherley *d.* Worthington *v.* Weston, 2 Wils. 232; Moore *v.* Fursden, 1 Show. 318 [342]; Mantle *v.* Worllington, Cro. Jac. 166.

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§ 55. *Legislative changes.*—The action is now divested by statute of all its useless forms. The fictitious lease and ouster have been abolished, and the real parties in interest appear in the action as the nominal parties; the defendant being the tenant, or person in possession, or the landlord; sometimes even a claimant to the land or one exercising acts of ownership over it.

§ 56. *Requisites of the complaint.*—An accurate description of the premises is also generally required in the declaration, both to inform the sheriff of what he is to deliver possession, and to apprize the defendant of the extent of the plaintiff's claim. The nature of the estate or interest in the land, whether in fee, for life, or for years, which the plaintiff demands must generally be specified in the complaint, and whether he claims the entire estate or an undivided share or interest.

§ 57. *General principles.*—It is also a fundamental rule that the plaintiff must recover upon the strength of his own title, and not on the weakness or imperfections of the defendant's title. He must ordinarily show a legal title, with a present right of possession, paramount to the title of the defendant. The defendant may avail himself of any imperfections in the plaintiff's title, or may, unless estopped, defeat the action by proving an outstanding title in a third person with which the defendant is wholly unconnected.

§ 58. *Legal title must prevail.*—In some States where the distinctions between legal and equitable redress do not exist, or the jurisdictions have been blended, the defendant can succeed with a superior equitable title, but the general rule is that the legal title must prevail, the holder of the equitable title being remitted to a court of chancery for redress. As against a naked trespasser, having neither claim nor color of title, proof of prior undisturbed possession is sufficient. Nor can a trespasser show an outstanding title in a third person. The principles of the action remain

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essentially unchanged. In form it is still one to recover the possession of land, in which the plaintiff must show a present legal right of possession, though in fact it is an action for the determination of the title.[1] As the action retains many of its ancient characteristics, it is important to study its origin and to remember that in its early form the question of title to land came before the court incidentally and collaterally, the trespass and ouster being the main issue.

§ 59. *Judgment.*—The judgment is, as formerly, that the sheriff put the plaintiff in quiet and peaceable possession, though it now generally specifies the nature of the controverted title.

§ 60. *Writ of possession.*—The courts exercise a species of equitable jurisdiction over the execution of the writ of possession, and sometimes award a writ of restitution where the judgment has been reversed, or the defendant, or even a stranger, has been wrongfully evicted under the writ.

§ 61. *Damages.*—The damages given for the injury suffered by the loss of the term, which originally constituted the only recovery and later an important part of the relief in ejectment, necessarily became nominal when the fictions were introduced, and the practice of making others than the tenants ejectors prevailed.[2] It has been decided in some of the cases, however, that even while the fictions were continued the plaintiff might recover his real damages by giving notice of his intention to proceed therefor,[3] but this practice was much questioned[4] for the reasons stated, and on the further ground that the defendant signed the *consent rule* for the purpose of trying only the right of possession.

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[1] Finnegan *v.* Carraher, 47 N. Y. 493.
[2] Reeves' Hist. Eng. Law (ed. 1880), vol. 4, p. 241.
[3] Battin *v.* Bigelow, 1 Peters' C. C. 452.
[4] Huston *v.* Wickersham, 2 W. & S. (Pa.) 308.

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§ 62. *Mesne profits.*—The successful plaintiff in ejectment brought an action of trespass for mesne profits against the person who had withheld the possession. Now, the claims for damages and mesne profits are generally made by statute part of the recovery in the ejectment suit, though in some States a separate action is still necessary or may be brought at the election of the plaintiff.

§ 63. *Improvements.*—The defendant is permitted in many States to set-off against the mesne profits the value of permanent and useful improvements made in good faith.[1]

[1] See Griswold *v.* Bragg, 18 Bla. C. C. 202, and cases cited.

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CHAPTER II.

SKETCH OF REAL ACTIONS IN THE UNITED STATES.

§ 64. Real actions.
65. How classified.
66. Characteristics.
67. Judgment in real actions.
68. In personal actions.
69. Writ of right.
70. Writs of entry.
71. Writs of formedon.
72. Real actions in England.
73. Ejectment in New England.
74. Unpopularity of the remedy.
75. Objections to real writs.
76. } Their adoption in New England.
77. }
78. Disuse in England.
79. Modern changes.
80. Classes of injuries affecting realty.
81. *Trespass to try title.* Its introduction in South Carolina.
82. What plaintiff must prove.
83. Origin of trespass to try title.
84. Statutory changes.
85. Reason for the change.
86. Aversion to real actions.
87. Trespass to try title abolished in South Carolina.
88. Trespass to try title in Alabama.
89. Statutory changes.
90. Fictions in ejectment retained in Alabama.
91. Trespass to try title in Texas.
92. General principles the same in the various actions.

§ 64. *Real actions.*—Real or feudal actions were the ancient remedies by which the right of property, or of possession, in freehold estates or hereditaments, was determined, and the seizin recovered or possession restored. The complainant, or party deforced, was called the demandant; the defendant, or party in possession, the tenant. The name real actions was used in contradistinction to personal actions, founded upon torts or contracts, such as trover, assumpsit, or debt. At common law, in purely real actions, the demandant counted for and recovered the seizin of land, or an interest in realty, and rarely proceeded for compensation in damages or for personal property.[1] The right to recover damages in real writs was, in some instances, superadded by statute.

§ 65. *How classified.*—Real actions were classified according to the nature of the demandant's title, into actions

[1] Booth on Real Actions, pp. 74, 75; Robert Pilford's Case, 10 Rep. 115 (vol. 5, 459); Stearns on Real Actions (2d ed.), pp. 346 (389), 90 (94); Jackson on Real Actions, p. 99.

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droitural, based upon the demandant's mere right of title—that of possession being lost—and actions *possessory*, which involved the right of possession. The former class was subdivided into writs *droitural*, founded upon the demandant's own seizin, and writs *ancestral droitural*, founded upon the demandant's claim in respect of a mere right which had descended to him from an ancestor. Possessory actions were likewise subdivided into actions founded upon the demandant's own seizin, and actions predicated upon the seizin of an ancestor.[1]

§ 66. *Characteristics.*—The system of real writs had many distinguishing peculiarities. In personal actions, such as trover, assumpsit, or debt, the judgment operated as an estoppel upon fresh suits, involving the same matter in controversy. Unless the plaintiff submitted to a nonsuit, withdrew a juror, or obtained leave to discontinue the action, the only redress for the defeated party was by writ of error, appeal, or motion for a new trial in the same action. It has been supposed that a different rule of action prevailed in real actions, because if the demandant was barred by judgment on a verdict or demurrer rendered upon an inferior writ, he could avoid the estoppel by suing out a real writ of a higher class or nature; for real actions were of different grades, and a judgment upon the merits, founded upon an inferior writ, did not constitute a bar, or an estoppel, to an action between the same parties, brought upon a writ of a higher degree.[2]

§ 67. *Judgment in real actions.*—Lord Coke[3] is responsible for the once prevalent notion that the same title and precise question of right involved in and adjudicated upon an inferior writ, could be retried in the second action upon

[1] Roscoe on Actions Relating to Real Property, p. 2; Stearns on Real Actions (2d ed.), p. 83 [84]; Markel's Case, 6 Rep. 3 b.

[2] Ferrer's Case, 6 Coke, 7 b; Stearns on Real Actions, p. 84; Booth on Real Actions, p. 1.

[3] Ferrer's Case, 6 Rep. 7.

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the higher writ; but this was not true. Each writ, as was shown by Lord Ellenborough in the case of Outram *v.* Morewood,[1] was final for its own purpose and object, and the judgment was conclusive as to the injury complained of or the particular right claimed. Possessory writs settled disputed questions of possession. The higher writs, while including all that was adjudicated on the trial under the possessory writs, went further and established the whole right to the land, both of property and of possession. *Placitum per breve de recto utrumque jus, tam possessionis quàm proprietatis comprehendit.*[2]

§ 68. *In personal actions.*—When the same evidence is required to support two different personal actions, a judgment in one action constitutes a bar to the other.[3] Thus a judgment in assumpsit bars an action of debt for the same demand. This important principle of the common law was not violated by the practice in real actions, for a judgment upon a writ of right, the highest real writ, established rights different from and additional to those conferred by the judgment under a possessory writ.

§ 69. *Writ of right.*—The most important of the real writs was the Writ of Right.[4] This writ was resorted to in the time of the Saxons to recover the right of property in land; the *jus proprietatis* or *jus merum.*[5] It would not lie for incorporeal hereditaments, or for any estate less than a fee simple,[6] and was the exclusive remedy available to the owner of land who had lost the right to recover it by a possessory action. The judgment was final and could be pleaded in bar of a fresh suit involving the same contro-

[1] 3 East, 346, and cases cited.

[2] Bracton, f. 328.

[3] Kitchen *v.* Campbell, 3 Wils. 304; S. C. 2 W. Bla. 827; Martin *v.* Kennedy, 2 Bos. & P. 71, per Lord Eldon; see Sparry's Case, 5 Coke, 61 (iii, 124); Dawley *v.* Brown, 79 N. Y. 390; Stowell *v.* Chamberlain, 60 N. Y. 272, and cases cited.

[4] 3 Bla. Com. p. 193; Fitz. N. B. 1.

[5] Gil. Ten. [47]; see Roscoe on Actions Relating to Real Property, p. *19.

[6] Jackson on Real Actions, p. 276.

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versy, because no other writ could establish any different, higher, or additional rights. For this reason a writ of right was rarely selected by a demandant who was entitled to prosecute one of an inferior grade.[1]

§ 70. *Writs of entry.*—Of the possessory actions writs of entry only were adopted in Massachusetts.[2] These were of various kinds, according to the nature of the injuries intended to be redressed,[3] and were supposed by Blackstone to be the most ancient of possessory actions. Whether or not all the writs of entry were engrafted into the law of that Commonwealth, is a moot question which it is unnecessary now to discuss.[4] Mr. Justice Jackson says,[5] that writs of entry, as conducted in the courts of his State, were considered more simple, convenient, and effectual than the action of ejectment; the writ and declaration were shorter; there were no mysterious fictions to incumber the record, and the judgment effectually settled the right of possession. This opinion was subsequently approved by the Massachusetts law commissioners.

§ 71. *Writs of formedon.*—Writs of formedon, the ancient remedies provided for any one having a right to lands or tenements by virtue of a gift, *in tail*,[6] were not infrequent in some States. As late as 1834 a decision was rendered in an action of formedon in remainder in New Hampshire, in which the defense of a common recovery, levied in 1819, was learnedly discussed by court and counsel.[7] These writs are, however, wholly unsuited to try titles in this country.

§ 72. *Real actions in England.*—The system of real actions is now extinct in England. But an inquiry into the

[1] Booth on Real Actions, p. 1.

[2] Jackson on Real Actions, p. 2.

[3] Roscoe on Actions Relating to Real Property, p. 88.

[4] See Judge Jackson's article on this subject, 2 Am. Jur. p. 65.

[5] Jackson on Real Actions, p. 12.

[6] Stearns on Real Actions, p. 321; Booth on Real Actions (1st Am. ed.), p. 138.

[7] Frost *v.* Cloutman, 7 N. H. 9.

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condition of the remedial law of England, at or prior to the time of the Revolution, is nevertheless important to American jurists, because that law has been adopted in many of our States by statute or constitutional provision, and modern legislation is often framed to perfect or supersede it. We can afford here only the slightest reference to this curious and obsolete branch of our ancient remedial law, and discuss so much of the learning affecting the system as will illustrate the principles governing modern actions in States where dismembered fragments of the old system are still to be found. The influences which led to the disuse and abandonment of these ancient remedies have been considered in part in tracing the history of the action of ejectment.

§ 73. *Ejectment in New England.*—Ejectment was already firmly established in England as the most simple and expeditious method of trying controverted titles when our Atlantic seaboard was colonized. Yet the New England colonists seem to have been disinclined to transplant and foster the remedy.[1] Professor Stearns says:[2] "We should hardly expect them to resort to the indirect method of *making a lease* of their lands in order to try the title. And as to the *confessing a lease, an entry*, and *an ouster*, which never had any existence in fact, they seem (as we should naturally expect) to have regarded it as a *violation of truth*, and therefore wholly inadmissible."

§ 74. *Unpopularity of the remedy.*—The inconclusiveness of the judgment also tended to render ejectment unsatisfactory. Lands in the new world were of little value, and scarcely worth the trouble and expense of a sufficient number of trials to justify a perpetual injunction against further ejectments. Furthermore equity jurisprudence had scarcely any existence in colonial times.[3] Hence only two fictitious

[1] Nor did ejectment flourish in Virginia. New York was then under control of the Dutch.

[2] Stearns on Real Actions (2d ed. 1831), p. 352 [396].

[3] 1 Story's Eq. Jur. § 56 and note.

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actions of ejectment upon the English model are to be found in the court records of Massachusetts.[1]

§ 75. *Objections to real writs.*—But the adoption of the intricate system of real actions as practiced in England was wholly impracticable. The sources of information available to the colonists concerning the practice were few and imperfect; many of the real writs were wholly unsuited to try the titles by which the colonial lands were held, and few of the early settlers possessed the critical skill and precision in practice which the successful management of the writs exacted. Mistakes and vexatious delays were consequently not infrequent. The colonists were not, however, "bigoted to legal forms." They abruptly departed from the ancient precedents (intentionally however rather than from ignorance, as the result shows) and introduced a loose and irregular system of pleading in real writs, altering and adapting the process and writs so as to satisfy the needs and requirements of settlers in a new country. The English system of real actions was transplanted into the colonies practically divested of aid prayers, vouchers, protections, parol demurrers, and essoins, the cumbersome appendages which destroyed it in England. Hence we have in our jurisprudence the remarkable anomaly of a system of feudal remedies which the mother country abandoned as outgrown, impracticable and useless, "rooted in soils that never felt the fabric of the feudal system."

§ 76. *Their adoption in New England.*—The attempt was made to retain what was valuable and useful of the system and to reject what was useless and pernicious.[2] The ancient process and forms were very little regarded, and all real actions were called by the general name of actions of ejectment.[3] Little or no distinction was made, either in the

[1] Stearns on Real Actions (2d ed. 1831), p. 352 [396].
[2] Stearns on Real Actions (2d ed.), p. 92 [97].
[3] Jackson on Real Actions, p. 194.

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declaration or the pleadings, between the different writs of entry, or between possessory writs and the writ of right.[1]

§ 77. Though this loose and irregular practice was undoubtedly the cause of many mistakes which the colonists made in determining the rights of litigants, yet had they clung to the established forms, and sought to apply, in their practice, the mass of ancient learning relating to real writs, the system would necessarily have become as vexatious, oppressive, and unpopular as in England.

§ 78. *Disuse in England.*—The feeling in England toward the system of real actions is reflected in the report of the English real property commissioners, in which they conclude that "it would have been beneficial to the community if real actions had been abolished from the time when the modern action of ejectment was devised."[2]

§ 79. *Modern changes.*—Statutory real actions in various forms are employed in Maine and New Hampshire. Writs of right have been swept away in Massachusetts and a statutory writ of entry adopted as the remedy for trying titles in that State. The entire system is superseded in New York by a statutory action of ejectment. In Virginia writs of right, of entry, and of formedon, have been abolished, and ejectment, as reformed and corrected by statute, retained. In that State, as in New York and West Virginia, the statutory ejectment may be maintained in the same cases in which a writ of right could have been brought. A controversy over a title in West Virginia, in which the parties proceeded by a writ of right, was decided in 1868,[3] but the system of real actions has, since that date, been superseded in that State by statutory ejectment. The influence of the old system is occasionally reflected in the opinions of our courts, and exerts some effect in framing legislative changes in our

[1] Jackson on Real Actions, p. 162.
[2] Report of English Real Property Commissioners, p. 42.
[3] Genin *v.* Ingersoll, 2 W. Va. 558.

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remedial law, but the general system, with most of its peculiarities, is obsolete.

§ 80. *Classes of injuries affecting realty.*—Injuries affecting real property are chiefly of two classes. First, Those that divest the owner of the possession, and usurp his right of dominion over the property. Secondly, Those that injure the land, or diminish its value, or disturb, or impair, the owner's enjoyment of it, without divesting the possession. Trespass, waste, and nuisance are examples of the latter class. The former injury, which is attended with amotion from or deprivation of possession, is denominated an ouster. This elementary principle must not be overlooked in considering the form of remedy for the trial of title to land which will next be noticed.

§ 81. *Trespass to try title. Its introduction in South Carolina.*—Trespass to try title was substituted for ejectment in South Carolina as early as 1791.[1] It was in form an action of trespass *quare clausum fregit*, except that a notice was indorsed upon the writ, to the effect that the action was brought to try the title as well as for damages. This remedy was subject to the principles of law relating to ejectment, which, down to that time, had been the action for trying titles to land in that State.[2] There were, of course, no fictions in this new action, and the names of the real parties appeared as plaintiff and defendant.[3]

§ 82. *What plaintiff must prove.*—The plaintiff was compelled to prove a trespass committed by the defendant, no matter how trifling.[4] Even the cutting or blazing of a tree was held sufficient.[5] The judgment was in form for damages, but the plaintiff, if successful, was entitled to a writ of *habere facias possessionem.*

[1] Stat. at Large, S. C. vol. v, p. 170; since repealed. See Chapter 147, General Statutes, p. 801.

[2] Kennedy *v.* Campbell, 2 Tr. Con. R. (S. C.) 760.

[3] Lynch *v.* Withers, 2 Bay (S. C.), 115–119, *in notis.*

[4] Massey *v.* Trantham, 2 Bay (S. C.), 421; Underwood *v.* Sims, 2 Bailey (S. C.), 81.

[5] Spigener *v.* Cooner, 8 Rich. (S. C.) 301.

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§ 83. *Origin of trespass to try title.*—Trespass *quare clausum fregit* was, of course, a form of action calculated to redress injuries to real property not amounting to an ouster. This remedy, as enlarged by statute in South Carolina, under the name of trespass to try title, usurped the functions, and subserved the purposes of a real action.

§ 84. *Statutory change.*—The result achieved by the use of fictions in ejectment in England, after many years of effort, was thus accomplished summarily in South Carolina by a simple statutory enactment.

§ 85. *Reason for the change.*—The Legislature of that State solemnly resolved,[1] as a justification for the change, that "since the disuse of real actions, the common method of trying titles to land has been by action of ejectment, which, depending upon a variety of legal fictions, is rarely understood by the professors of the law." Still, the name of the new remedy, and the practice requiring proof of a trespass, which certainly had no logical or necessary connection with the trial of the title, occasioned some confusion.

§ 86. *Aversion to real actions.*—The writ of right was never employed in South Carolina,[2] and the profession seem to have shunned the whole system of real actions.

§ 87. *Trespass to try title abolished in South Carolina.*—Trespass to try title has at length been swept away in South Carolina, and an action for the recovery of real property substituted in its stead.[3]

§ 88. *Trespass to try title in Alabama.*—Trespass to try title was introduced in Alabama, in 1821,[4] as a substitute for the fictitious proceedings in the action of ejectment.[5] The

[1] Stat. at Large, S. C. vol. v, p. 170.
[2] Frost *v.* Brown, 2 Bay (S. C.), 133–144.
[3] Revised Statutes South Carolina (ed. 1873), p. 586; Ibid. chap. 147, p. 801.
[4] Session Acts of Alabama, 1821, p. 23 (approved December 17, 1821).
[5] White *v.* St. Guirons, Minor's Rep. (Ala.) 331; Avent *v.* Read, 2 Porter

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act provides that "the mode of trying the right and title to lands, tenements, or hereditaments, shall be by the action of trespass, in which the plaintiff shall indorse on his writ and copy writ, that the action is brought as well to try titles as to recover damages." All the principles and rules relating to ejectment at common law, except the fictitious proceedings, which were abolished, were made applicable to this action.

§ 89. *Statutory changes.*—In 1835,[1] the General Assembly of that State passed an act restoring the remedy of ejectment with the exception of the fictions, and conferring upon the plaintiff the right to elect between trespass to try title and ejectment, damages being added to the recovery in the latter action. Both these remedies were superseded by the Code of 1852,[2] which established a statutory proceeding "in the nature of an action of ejectment." In 1863,[3] the action of ejectment, as established at common law, was restored, and in all actions to recover land the plaintiff was allowed to elect between a writ of ejectment and a writ in the nature of an action of ejectment. This act was embodied in the Code of 1867,[4] and was transferred to the Code of 1876.[5]

§ 90. *Fictions in ejectment retained in Alabama.*—Hence two remedies may now be invoked in that State: the action in the nature of ejectment,[6] and the fictitious ejectment at common law.[7] John Doe, the litigious lessee, appears in his

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(Ala.), 480; Masters *v.* Eastis, 3 Ib. 368; Thrash *v.* Johnson, 6 Ib. 458; Sturdevant *v.* Murrell, 8 Ib. 317.

[1] Clay's Digest (Ala.), p. 320, § 46.

[2] See Code of 1852, § 2209; also § 10; Ib. 1867, § 2610; see Williams *v.* Hartshorn, 30 Ala. 211.

[3] Acts of Alabama, 1863, p. 58, No. 54.

[4] Code of 1867, § 2621.

[5] Code of 1876, § 2970.

[6] Morris *v.* Henshaw, 54 Ala. 300; Olive *v.* Adams, 50 Ala. 373; Ivey *v.* Blum, 53 Ala. 172.

[7] Doe *d.* Hudgens *v.* Jackson, 51 Ala. 514; Doe *d.* Hamilton *v.* Hardy, 52 Ala. 293; Smith *v.* Doe *d.* Carson, 56 Ala. 456; Cantelou *v.* Doe *d.* Hood, 56 Ala. 519.

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old role in an ejectment instituted in that State, as late as 1874 and decided in 1876,[1] but the common law writ of ejectment is now but little resorted to except by the older practitioners, and the statutory action in the nature of ejectment is the remedy generally in use. The writ of right has not been in use, in Alabama, since 1852.[2]

§ 91. *Trespass to try title in Texas.*—Ejectment, with or without its fictions, has never been in use in Texas,[3] trespass to try title being the exclusive action given for the trial of controverted titles in that State.[4] By a proper indorsement on the petition, the action may be brought both to try the title and to recover mesne profits and damages.[5]

§ 92. *General principles the same in the various actions.* —The decisions, rendered while the remedy was in force in South Carolina and Alabama, are, notwithstanding the statutory changes, still important, as illustrating the general principles governing ejectment, and the statutory remedies in other States, especially in Texas; the change being one chiefly of form.

The essential principles governing real actions, ejectment, and trespass to try title, are uniform, in this country, as to the interests for which the actions will lie, the titles that will support them, the pleadings, evidence,[6] defenses, judgments, writs of possession, and new trials. They constitute, practically, one general method of procedure disguised under a variety of names. For this reason cases decided under the different systems will generally be cited side by side in this treatise.

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[1] Doe *ex dem.* Davis *v.* Minge, 56 Ala. 121.

[2] See Ivey *v.* Blun, 53 Ala. 172.

[3] Fisk *v.* Miller, 20 Texas, 572–578.

[4] Dangerfield *v.* Paschal, 20 Texas, 552; Paschal's Digest, Art. 5292.

[5] See Spence *v.* McGowan, 53 Texas, 30. This case discusses the distinctions between trespass to try title, as practiced in that State, and the fictitious action of ejectment. Hillman *v.* Baumbach, 21 Texas, 203

[6] Greenl. on Ev. vol. 2, § 303, p. 286.

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CHAPTER III.

NATURE OF THE RIGHTS UPON WHICH ACTIONS TO TRY TITLE MAY BE BASED.—FOR WHAT INTERESTS EJECTMENT LIES.

§ 93. Distinction between ejectment and trespass.
94. Between ejectment and forcible entry.
95. Ejectment maintainable for corporeal hereditaments only.
96. Early practice.
97. Nature of the interest sought to be recovered.
98. Plaintiff's title and interest.
99. Reservation of right of entry in a deed.
100. Right of possession essential.
101. True test as to when ejectment lies.
102. Rights and privileges appurtenant.
103. Annexation to the soil.
104. Fixtures.
105. Ejectment for a room, chamber, or portion of a building.
106. Theory of the decisions.
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108. Mining rights and interests.
109. Coal mine.
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112. Oil wells.
113. Right and privilege of boring for oil.
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129 Dower.
130. Land subject to an easement, servitude or public use.
131. Cincinnati *v.* White discussed.
132. Ownership of the soil and the right to an easement independent.
133. Character of defendant's occupation.
134. Rights of the owner of the fee.
135. Ejectment for lands applied to unauthorized use.
136. Wrongful use for public purposes not protected.
137. Rule in Illinois.
138. Rule when fee is granted for public use.
139. Municipal corporations.
140. Attempted distinction between public and private easements.
141. Land subject to homestead rights.
142. Ejectment for fishery.
143. Pasturage and herbage.
144. Church property.
145. Common appendant and tithes.

§ 93. *Distinction between ejectment and trespass.*—Ejectment is a remedy designed to redress wrongs amounting to a disseizin or an ouster. The action will not lie for a mere trespass on land; the plaintiff must furnish proof of eviction or amotion of possession. "There is," says the Supreme Court of Connecticut, "a clear land-mark between trespass and ejectment, which should not be broken down by permitting a plaintiff in ejectment, if he fails to prove an ouster, to prove a mere trespass, however trifling, and recover."[1]

[1] Potter *v.* City of New Haven, 35 Conn. 520.

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Neither can the action be sustained upon proof of an unlawful interference with a right incident to property in possession,[1]—*e. g.*, projecting a cornice, a gutter, or the eaves of a building over plaintiff's lands.

§ 94. *Between ejectment and forcible entry.*—An important distinction must be noticed between an ejectment and the statutory action of forcible entry and unlawful detainer, which will, perhaps, serve more clearly to illustrate the nature of the remedy. The title or right of possession is always involved in the trial of an action of ejectment. The party who seeks to change the possession by ejectment, must first establish a legal title to it. But the remedy for a forcible or unlawful entry is designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The forcible entry, even of the owner himself, and still more the entry of any other person, whether forcible or not, is unlawful.[2] The title cannot be drawn in question in forcible entry proceedings, which are frequently conducted in tribunals having no jurisdiction to determine titles to real property.[3] In the one case the question of the unlawful invasion of an actual possession only is involved; in the other the absolute right of possession is to be tried and determined.[4] A forcible entry and detainer proceeding may be supported independent of, and opposed to the title and legal right of possession.[5]

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[1] Vrooman *v.* Jackson, 6 Hun (N. Y.), 326; see Jackson *v.* Pike, 9 Cowen (N. Y.), 69; Aiken *v.* Benedict, 39 Barb. (N. Y.) 400. Ejectment cannot be employed as a substitute for trespass *quare clausum fregit*: per Sharswood, J. Corley *v.* Pentz, 76 Pa. St. 57. Nor can trespass *quare clausum fregit* and ejectment be united in the same complaint. Budd *v.* Bingham, 18 Barb. (N. Y.) 494.

[2] Olinger *v.* Shepherd, 12 Gratt. (Va.) 462; see Thompson *v.* Wolf, 6 Oregon, 308.

[3] Myers *v.* Koenig, 5 Neb. 419; Mitchell *v.* Davis, 23 Cal. 381; Carroll *v.* O'Conner, 25 Ohio St. 617; Jarvis *v.* Hamilton, 16 Wis. 574.

[4] Carter *v.* Scaggs, 38 Mo. 302.

[5] Smith *v.* Hollenbeck, 51 Ill. 223; Milner *v.* Wilson, 45 Ala. 478; Krevet *v.* Meyer, 24 Mo. 107; Dilworth *v.* Fee, 52 Mo. 130; The People *v.* Van Nostrand, 9 Wend. (N. Y.) 50.

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§ 95. *Ejectment maintainable for corporeal hereditaments only.*—At common law, ejectment was maintainable only for corporeal hereditaments,[1] which consist wholly of substantial and permanent objects,[2] and the remedy was a substitute for the assize in cases where the thing sought to be recovered was of a corporeal nature.[3]

§ 96. *Early practice.*—In its original form, as already shown, damages constituted the exclusive recovery in this action, but the increase in length of terms for years, and their growth in importance, induced the courts to allow the writ *habere facias possessionem*, so that the tenant for years might regain his unexpired term and be restored to the possession itself. From this change arose the necessity of confining the action to such things as the sheriff might with certainty have recourse to for the purpose of delivering possession after judgment.[4]

§ 97. *Nature of the interest sought to be recovered.*—The thing sought to be recovered must be visible and tangible,[5] something which, in early times, would have been capable of livery of seizin, and upon which an entry can be made;[6] something capable of physical possession,[7] and of which the owner can be disseized,[8] and of which possession can be delivered by the sheriff to the plaintiff.[9]

§ 98. *Plaintiff's title and interest.*—As will presently appear, the plaintiff must be vested with a present, subsist-

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[1] Child *v.* Chappell, 9 N. Y. 246; 3 Bla. Com. p. 206; Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484; 3 Bac. Abr. (ed. 1860), p. 272, Eject. D.

[2] 2 Bla. Com. p. 17.

[3] Farley *v.* Craig, 3 Green (N. J.), 191.

[4] Runn. on Eject. (Am. ed.) p. 121.

[5] Farley *v.* Craig, 3 Green (N. J.), 191.

[6] Jackson *d.* Loux *v.* Buel, 9 Johns. (N. Y.) 298; Nichols *v.* Lewis, 15 Conn. 137.

[7] Woodhull *v.* Rosenthal, 61 N. Y. 382.

[8] See Marquis Cholmondeley *v.* Lord Clinton, 2 Meriv. 361.

[9] Blake *v.* Hepburne, 2 Yeates (Pa.), 331; Farley *v.* Craig, 3 Green (N. J.), 192; Jackson *v.* May, 16 Johns. (N. Y.) 184; Doe *v.* Alderson, 1 M. & W. 210; Crocker *v.* Fothergill, 2 B. & Ald. 652; Nichols *v.* Lewis, 15 Conn. 137.

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ing title, or corporeal estate in the premises,[1] or with an unrestricted right to the immediate possession,[2] which must be of some duration and exclusive; and the action cannot be maintained unless the interest or estate be more substantial than a mere license to use the land or the right to a standing place thereon.[3]

§ 99. *Reservation of right of entry in a deed.*—In the case of Jackson *v.* Buel,[4] a grantor had made a reservation in a deed to himself, his heirs, and assigns, of "the right and privilege, without any fee or reward, of erecting and building a dam" at a certain place within the granted premises, "to occupy and possess the aforesaid premises without any let, hindrance, or molestation" from the grantee, his heirs, and assigns, "agreeably to the express condition contained in the foregoing clause and reservation." The Supreme Court of New York, in a *per curiam* opinion, held that this reservation created an interest sufficient to support ejectment. The first reason assigned by the court is that the interest would be considered a *tenement* within the decisions under the English settlement law; this test, though sometimes applied in England, can hardly, as we shall presently see, be considered a safe criterion. Another ground suggested—that the grantor possessed a right of entry, and that the interest was tangible—is that upon which the case must probably be supported.

§ 100. *Right of possession essential.*—Whatever takes away the right of possession *in præsenti* is fatal, and constitutes a complete defense to the action.[5] The plaintiff must

[1] Woodhull *v.* Rosenthal, 61 N. Y. 382; see Ferris *v.* Brown, 3 Barb. (N. Y.) 105.

[2] Betz *v.* Mullin, 62 Ala. 365.

[3] See King *v.* Inhabitants of Mellor, 2 East. 190. See Goodtitle *d.* Miller *v.* Wilson, 11 East. 334-345. In Maine it is provided by statute that in certain cases an officer levying on land may convey to his grantee a momentary seizin sufficient to support an action in his own name. Morse *v.* Sleeper, 58 Me. 329.

[4] 9 Johns. (N. Y.) 298.

[5] Hunter *v.* Trustees of Sandy Hill, 6 Hill (N. Y.), 407; City of Cincinnati *v.* White, 6 Peters, 431.

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have a right of entry in virtue of or incident to some corporeal estate or interest in the premises,[1] for the right to take actual possession of the land is the question to be tried, and constitutes the foundation of the action, whatever the character or source of the claimant's title may be.[2] Chitty says: "A party having a right of entry, whether his title be in fee simple, fee tail, or in copyhold, or for life, or years, may support an action of ejectment."[3]

§ 101. *True test as to when ejectment lies.*—"The true test of this action," says the New York Supreme Court, "seems to be that the thing claimed should be a corporeal hereditament, that a right of entry should exist at the time of the commencement of the action, and that the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff in execution of the judgment of the court."[4] Hence rights or interests in land which lie in grant, being invisible and incorporeal, are not, at common law, the subject of this action.

§ 102. *Rights and privileges appurtenant.*—But though ejectment will not lie for a right or privilege which is a mere incorporeal hereditament, yet, when an ejectment is brought for lands, the rights and privileges appurtenant to the lands may be recovered therewith.[5]

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[1] Taylor *v.* Horde, 1 Burr. 60, 119; Price *v.* Osborne, 12 Ired. (N. C.) 26; Jackson *d.* Livingston *v.* Sclover, 10 Johns, (N. Y.) 368; Jackson *d.* Starr *v.* Richmond, 4 Johns. (N. Y.) 483; Reformed Church *v.* Schoolcraft, 65 N. Y. 134, 150; Kile *v.* Tubbs, 32 Cal. 332; Meeks *v.* Kirby, 47 Cal. 168.

[2] Colston *v.* McVay, 1 A. K. Mar. (Ky.) 251; Clay *v.* Ransome, 1 Munf. (Va.) 455.

[3] 1 Chitty on Pleadings, p. *189.

[4] Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484.

[5] Crocker *v.* Fothergill, 2 B. & Ald. 652-661. But see Taylor *v.* Gladwin, 40 Mich. 232, in which case the declaration claimed, and the judgment recited as included in the recovery, the right to use an adjacent alley. This recital was declared to be nugatory, as the easement in the alley was an incorporeal and intangible interest, and therefore not the proper subject of an ejectment. The point actually decided was that the recital of such a right did not impair or affect the validity of the judgment as to the land itself, to which the easement was adjacent. Crocker *v.* Fothergill must, however, be regarded as stating the correct rule.

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§ 103. *Annexation to the soil.*—It is frequently said that ejectment will lie for anything attached to the soil,[1] but this test cannot by any means be regarded as conclusive. It is probably derived from the common law principle with regard to fixtures, that, as between grantor and grantee, anything which was attached to the soil would pass with the realty as a part of it. This is no longer treated as conclusive, however, with regard to fixtures, as to which three criteria are now generally applied: *first*, annexation to the realty; *second*, adaptability to the use or purpose to which the realty is appropriated, and *third*, the intention of the party making the annexation.[2] It is obvious, therefore, that, while ejectment will lie for anything that is a fixture, annexation to the soil is no longer sufficient to settle the question.

§ 104. *Fixtures.*—It has been held by the Supreme Court of Pennsylvania that where a boiler, engine, and stack were erected upon the lands of the plaintiff, at the joint expense of himself and the defendant, under an agreement to use the same as a common source of power, without limitation as to time, the interests thereby created in the fixtures were in the nature of an estate in lands, and that if one of the tenants in common excluded the other from the use and possession of the fixtures, an action of ejectment could be maintained.[3]

§ 105. *Ejectment for a room, chamber, or portion of a building.*—It was contended at one time that the common law definition of land as extending *usque ad cœlum et ad infernos*,[4] was fatal to the prosecution of ejectment in the case of rooms, chambers, or portions of buildings. The land itself including these by definition, it was supposed that the possibility of partial ejectment was excluded; but it is now

[1] Jackson *d.* Saxton *v.* May, 16 Johns. *184.

[2] McRea *v.* Central Nat'l Bk. of Troy, 66 N. Y. 489.

[3] Hill *v.* Hill, 43 Pa. St. 521.

[4] As to the application of this principle to a clay-bed, in an action of trespass on the freehold, see Stratton *v.* Lyons, 53 Vt. 641.

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settled that interests in realty may be created sufficient to support ejectment which fall far short of this comprehensive measure of ownership.[1] Thus the action will lie to recover a room or chamber in a house,[2] even without any grant or devise of land,[3] for possession may be delivered of a portion of a building and there is clearly enough to direct the sheriff in execution.[4]

§ 106. *Theory of the decisions.*—These decisions are founded upon the necessity of the case. In crowded cities different persons sometimes have several freeholds over the same spot. The cellar may belong to one person and the upper rooms to another.[5] "It is manifest," says Mr. Justice Brown of the New York Supreme Court, "that the common law signification of land, that embraces all above as well as below, to an indefinite extent, cannot be applied to such interests."[6] A man may have an inheritance in an upper chamber,[7] and a house may be held separate from the land on which it stands,[8] when placed there by permission of the owner of the soil, and it may be attached or sold on execution as personal property, and the owner will not be liable in trespass for such removal.[9] In Pennsylvania a verdict for the use of a brick-house and store-room has been sustained.[10] So ejectment lies for a "passage-room,"[11] for a

[1] Freeland *v.* Burt, 1 T. R. 701.

[2] White *v.* White, 1 Harr. (N. J.) 202; Anon. 3 Leon, 210, *de una rooma;* Runn. on Eject. pp. 122, 123; Gilliam *v.* Bird, 8 Ired. (N. C.) 280; Doe *d.* Colnaghi *v.* Bluck, 8 C. & P. 464.

[3] Per Parker, C. J., Otis *v.* Smith, 9 Pick. (Mass.) 293. See Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484; 3 Kent's Com. (12th ed.) p. *401 [529], note *e.*

[4] Bacon's Abr. Eject. D.

[5] Doe *d.* Freeland *v.* Burt, 1 T. R. 701; Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484.

[6] Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484.

[7] Coke on Litt. 48 b.

[8] Pullen *v.* Bell, 40 Me. 314; Dame *v.* Dame, 38 N. H. 429; Howard *v.* Fessenden, 14 Allen (Mass.), 124; Doty *v.* Gorham, 5 Pick. (Mass.) 487; Marcy *v.* Darling, 8 Pick. (Mass.) 283.

[9] Ibid. See Gilliam *v.* Bird, 8 Ired. (N. C.) 280.

[10] Miller *v.* Casselberry, 47 Penn. St. 376.

[11] Bindover *v.* Sindercombe, 2 Ld. Raymond, 1470.

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part of a house known by the name of the "Three Kings in A,"[1] for a vestry[2] and for the fourth part of a house in N.[3]

§ 107. *Vaults.*—In Coster *v.* Peters,[4] a controversy arose over the right of possession of a vault beneath the street in front of certain demised premises. The vault had been made by the tenant under a personal license or grant of permission from the city of New York, the fee of the street being in the city. It was held that the space in which the vault in question was built was in possession of the tenant as part of the soil or land as much as if it had been a room in the building; that the right to the possession of the vault was not a mere easement; and "that ownership of the soil extends downwards and upwards from the surface as much as it does over the mere superficial area, and may be subdivided horizontally as well as perpendicularly;" that being land in itself the vault carried with it all the rights of dominion, and not a mere right to a temporary or permanent use of the vault as an incident to the occupation of another adjoining piece of land, and that it was not such an appurtenant as to pass by a mere conveyance of the latter.

§ 108. *Mining rights and interests.*—Ejectment may be maintained for the recovery of the possession of a mine. "It might certainly be contended," says Bainbridge,[5] "when mines form a distinct inheritance that the action of ejectment is possessory; that the object of contention must, at least, be such as to be capable of actual possession from the delivery of the sheriff, that all the excavated parts would be of an incorporeal nature, or, at any rate, would become part of the general freehold, through which a mere right of way would be permissible; and that all the portions which are severed instantly lose the character of land, and become

[1] Sullivane *v.* Seagrave, 2 Str. 695.
[2] Hutchinson *v.* Puller, 3 Lev. 96.
[3] Rawson *v.* Maynard, Cro. Eliz. 286.
[4] 5 Robt. (N. Y.) 192-202.
[5] Bainbridge Law of Mines (4th edition, London), p. 332.

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mere personal chattels. Such an action would certainly not seem to correspond, in such a case, with its exact definition. But in this, as in some other instances, the action of ejectment has been carried beyond its original limits."

§ 109. *Coal mine.*—A coal mine or a coal pit may be recovered in ejectment[1] because it is not to be considered a *profit a prendre*, for the mine comprehends the ground or soil itself which is capable of being delivered in execution.

§ 110. *Tin bound.*—In England the interest of an owner of tin bounds in Cornwall was held not to be a mere easement or incorporeal hereditament, and was declared to be the subject of an action of ejectment, and this where the claimant was not in actual possession at the time of the defendant's wrongful entry,[2] but ejectment will not lie for tin bounds *eo nomine;* they should be described as a mine lying within certain bounds called tin bounds,[3] the tin bound itself being a mere liberty of entry and marking out certain bounds within which the party entering acquires the right to work a tin mine.

§ 111. *Quarry.*—In Ireland a distinction has been suggested between a mine and a quarry; the former being defined as a place where the substratum is excavated but the surface left unbroken, whereas, in a quarry, the surface is opened; and it was intimated by the Irish Court of Common Pleas, that ejectment would not lie for a quarry.[4] Again, the word "mine" is defined to import a cavern, or subterranean place containing metals or minerals. This definition does not include a quarry.[5] The distinction, how-

[1] Comyn *v.* Kyneto, Cro. Jac. 150; Comyn *v.* Wheatly, Noy, 121; Bac. Abr. Eject. D. See Turner *v.* Reynolds, 23 Penn. St. 199; Jenkins, 313; Harebottle *v.* Placock, Cro. Jac. 21; Andrews *v.* Whittingham, Carthew, 277; S. C. 1 Show. 364; 4 Mod. 143; 1 Salk. 255; Grotz *v.* Coal Company, 1 Luz. Leg. Reg. Rep. 53.

[2] Vice *v.* Thomas, 4 Y. & C. 538; S. C. Smirke's Rep. 1.

[3] Doe *d.* Earl of Falmouth *v.* Alderson, T. & G. 543; S. C. 1 M. & W. 210.

[4] Brown *v.* Chadwick, 7 Irish C. L. 101; see Clement *v.* Youngman, 40 Penn. St. 341: see Clark *v.* Brazeau, 1 Mo. 290.

[5] Listowel *v.* Gibbings, 9 Irish C. L. 223.

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ever, is sometimes difficult of application. The question whether a quarry is or is not a mine has been said to be rather a question of fact, to be determined by the method of working.[1]

§ 112. *Oil Wells.*—The decisions in Pennsylvania with regard to oil wells do not seem to be altogether reconcilable with the general principles which govern actions of ejectment, or with each other. A lease granted "for the sole and only purpose of mining and excavating for petroleum, coal, rock or carbon oil, or other valuable mineral or volatile substances," was held to vest a corporeal interest which would support ejectment.[2] On the other hand it was held, in the same State, that ejectment was the proper remedy for the wrongful ouster of a tenant of an oil well, notwithstanding the grant under the lease may have been of an incorporeal nature.[3] But where R. granted W. the exclusive right to bore for oil, reserving a one-fourth interest, with an agreement that, in the event of profitable results, after a reasonable time for experiment, the lease was to become perpetual, otherwise the land to revert to R.; and R. brought ejectment for a part of the land, alleging that the working of that portion had not proved profitable—it was held that ejectment would not lie to test the right to bore for oil.[4]

§ 113. *Right and privilege of boring for oil.*—An agreement conferring "the exclusive right and privilege of boring for salt, oil or minerals," was held by Judge Sharswood to grant the right to experiment for oil, and, if found, to sever it from the land and take it, as a chattel, but not as any part of the realty. The court said that this was a grant of an incorporeal hereditament only, and that the remedy for any disturbance of the rights of the grantee was by action on

[1] King *v.* Inhabitants of Sedgley, 2 B. & Ad. 65, and note.
[2] Barker *v.* Dale, 3 Pittsb. (Pa.) 190.
[3] Karns *v.* Tanner, 66 Penn. St. 297.
[4] Rynd *v.* Rynd Farm Oil Co. 63 Penn. St. 397.

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the case and not ejectment.[1] The case is distinguished by the court from Caldwell *v.* Fulton,[2] where the conveyance in controversy was of the full right, title and privilege of digging and taking away stone coal to whatever extent the grantee might think proper. This was held to be a conveyance of the entire ownership of the coal in place.

§ 114. *Oil regarded as a mineral.*—In Stoughton's Appeal[3] oil was declared to be a mineral like coal or any other natural product which, *in situ*, forms part of the land. The point of contention was the validity of a lease, made by a guardian of his ward's lands, which purported to confer the exclusive right to bore and dig for oil, and gather and collect the same. The guardian's power to lease any property of his ward, of such character as to be the proper subject of a lease, was recognized, but oil, being a mineral, was treated as realty, and the lease was held to be a grant of a part of the *corpus* of the estate, and not of a mere incorporeal right. The guardian having no power to dispose of any portion of the realty, the lease was adjudged void. This decision of the highest court of Pennsylvania, rendered subsequent to the cases already discussed, tends strongly to confirm such of those cases, construing oil deeds or leases, as hold that the rights of grantees or lessees are corporeal, and hence the proper subject of an ejectment.

§ 115. *Vein or lode.*—We have seen already that the ancient common law doctrine that the ownership of land necessarily includes everything above and below it, is now obsolete. This is illustrated in the case of veins and lodes no less than in that of rooms or portions of a building. Thus ejectment lies for a vein or lode beneath the surface; but the plaintiff, if successful, acquires no right to the hoisting works erected for the purpose of taking ore from the vein

[1] Union Petroleum Co. *v.* Blivin Petroleum Co. 72 Penn. St. 173; see Funk *v.* Haldeman, 53 Penn. St. 229.

[2] Caldwell *v.* Fulton, 31 Penn. St. 475.

[3] 88 Penn. St. 198 (decided in 1878).

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recovered, unless the surface upon which the hoisting works stand is also recovered.[1]

§ 116. *Possessory mining claims.*—And ejectment will lie to recover possessory as well as patented mining claims or interests,[2] and for an undivided interest in a mining claim and lode.[3]

§ 117. *Land under water.*—Land under water may be made the subject of an action of ejectment,[4] and where it was originally below high-water mark, in navigable waters or arms of the sea, and has been transformed by human labor or artificial means into dry land, it is subject to all the rights incident to ownership of other land, and recoverable in this form of action.[5]

§ 118. *Made lands.*—In Vermont it has been held that land made by a stranger by filling in earth in front of lands owned by plaintiff, bordering on the waters of Lake Champlain, cannot be recovered in ejectment, because riparian owners have no title to the soil below low-water mark.[6]

§ 119. *Lands under water granted by land office.*—In New York ejectment is maintainable for land under water, the title to which has been granted by the commissioners of the land office for the purpose of erecting docks for commercial use.[7] And in Connecticut the rights of a riparian proprietor to land below high-water mark may be vindicated in this action.[8]

§ 120. *Rivulet or pool.*—A rivulet may be recovered by

[1] Bullion Mining Co. *v.* Crœsus Gold & S. M. Co. 2 Nevada, 168. See §§ 105, 106.

[2] Sears *v.* Taylor, 4 Col. 38.

[3] Mining Company *v.* Taylor, 100 U. S. 37; Waring *v.* Crow, 11 Cal. 366.

[4] Martin *v.* Waddell, 16 Peters, 367; Casey's Lessee *v.* Inloes, 1 Gill (Md.), 430; see Browne *v.* Kennedy, 5 Harr. & John. (Md.) 195.

[5] People *v.* Mauran, 5 Denio (N. Y.), 389.

[6] Austin *v.* Rutland R. R. Co. 45 Vt. 215; but see Ledyard *v.* Ten Eyck, 36 Barb. (N. Y.) 102.

[7] The Champlain & St. L. R. R. Co. *v.* Valentine, 19 Barb. (N. Y.) 484.

[8] Nichols *v.* Lewis, 15 Conn. 137.

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laying the ejectment for so many acres of land covered by water;[1] and so of a pool or pit of water—the words comprehending both land and water.[2]

§ 121. *Bed of the ocean.*—In California the title to the bed of the ocean is vested in the State, and it is said that the latter may maintain ejectment for a wharf constructed beyond low-water mark by defendant without authority.[3]

§ 122. *Tide lands.*—In Oregon tide lands on the Columbia river, which are covered and uncovered by the ebb and flow of the sea, belong to the State by virtue of its sovereignty, and may be recovered by ejectment.[4]

§ 123. *Land swallowed by the sea.*—In Murphy *v.* Norton[5] an interesting question as to the title to lands which had emerged from the sea by natural means was considered by the Supreme Court of New York. The action was instituted to test the ownership of four miles of sand beach extending from Rockaway Beach to Long Beach, on the shore of Long Island. The plaintiff claimed that those through whom he derived title had at all times owned, and had been in undisputed possession of the land bordering upon and extending down to the ocean; that as far back as 1797 the shore or line of the ocean extended outside of the present sea front; that, in 1860, the plaintiff's shore was cut off, washed away, and swallowed by the sea; that since 1870 the beach had emerged from the sea, and reformed outside the mainland, divided from it by a bay of navigable water, but within the plaintiff's original boundaries. The owner of the mainland took possession of the newly formed beach for the reason that it had formed within the limits of his ancient boundaries; while the town of Hempstead, in which the lands were located, claimed the whole of the new beach by

[1] Challenor *v.* Thomas, Yelv. 143; S. C. 1 Brownl. 142.
[2] Ibid.; see, also, Co. Litt. 5 b.
[3] Coburn *v.* Ames, 52 Cal. 385; see People *v.* Davidson, 30 Cal. 389.
[4] Hinman *v.* Warren, 6 Oregon, 408; see Barney *v.* Keokuk, 94 U. S. S. C. 324.
[5] 61 How. Pr. (N. Y.) 197. This case is at present pending on appeal.

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right of sovereignty as an accretion upon Long Beach. The court held that the title of the original owner attached to the restored beach. *In re* Hull & Selby Railway[1] was relied upon by the parties claiming under the town of Hempstead adversely to the original proprietor. That case establishes the doctrine that where the sea, by gradual and imperceptible progress, encroaches upon private land, the title to the land thereby covered with water becomes vested in the sovereign power. The Supreme Court of New York decided, however, in Murphy *v.* Norton, that this principle applied only for the period during which the land remained submerged, and that when it reappeared, or emerged from the water by natural means, within the ancient boundaries, the title of the original owner was revested and restored. This decision rests upon the authority of Lord Chief Justice Hale:[2] "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or if it be by art or industry regained, the subject doth not lose his property; and accordingly it was held by Cooke and Foster,[3] though the inundation continue forty years."

§ 124. *New islands.*—A similar question was decided by the Court of Common Pleas of Delaware county, Pennsylvania, as early as 1815.[4] It appeared that the surface of the lower part of Little Tinicum Island had been washed away by the force of the winds and waves, and consequently overflowed by the water of the river. Subsequently a bar began to form by the deposit of alluvion, and appeared above

[1] 5 M. & W. 327.

[2] De Jure Maris—Hargraves' Law Tracts, p. 15; see, also, pp. 16, 30, 31, 36, 37; 2 Bla. Com. pp. 261, 262.

[3] M. 7, Jac. C. B.

[4] Norris *v.* Brooke, Albany Law Journal, vol. 25, p. 90.

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the water in the same place which had formerly been occupied by the part of Little Tinicum Island swallowed up by the river. The bar began forming below the island, and was for a long time entirely distinct from it, but at length became united with the old island by its own extension upwards through gradual accretions. The defendant procured a grant of the bar or new island from the Commonwealth, but the former proprietor claimed, and the court decided, that the latter did not lose his property in the soil covered by water if it was regained either by natural or artificial means, but that it continued to belong to him, and was not the subject of a new grant from the Commonwealth. In a case in the Supreme Court of Connecticut,[1] it appeared that the plaintiff's ancestor had sunk an old scow filled with stones in a navigable river, on a flat between two channels, and had used it for the purpose of fishing when it was bare at low water. The scow was overflowed, and completely submerged, at high water. By gradual accretion of sand an island had finally formed over the scow, and emerged above the water. Plaintiff and his ancestor continued to use the island for fishing purposes, and each year mowed the grass growing upon it, but it appeared that a large number of people had used the island for fishing, without license from any one, and without paying for its occupation, and that the plaintiff's claim was not generally known or recognized. It was held to be settled law, in Connecticut, that the title to an island emerging, as this did, in navigable waters, vested in the State, and that a grant from the State could be presumed from long continued and adverse possession, but that the plaintiff's possession was not sufficiently exclusive to give him title against the State, or any one else, the island having been treated as common or public property.

§ 125. *Accretions.*—Alluvion has been described by the Supreme Court of the United States as "an addition to riparian land, gradually and imperceptibly made by the water

[1] Tracy *v.* Norwich & W. R. R. Co. 39 Conn. 382.

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to which the land is contiguous. It is different from relliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes make no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature."[1] These accretions constitute a part of the realty, and may be enjoyed and protected as such.

§ 126. *Salt boilery.*—Ejectment for a boilery of salt has been upheld, although the claimant was only entitled to a certain number of buckets of salt water drawn out of a well.[2] By the grant of a boilery of salt it is said that the soil passes, for it is the whole profit of the soil,[3] and the water being fixed in a certain place within the bounds and compass of the well is considered a part of the soil.[4]

§ 127. *Inaccessible lands.*—It was objected in New York to a recovery in ejectment that the lands in controversy, which did not touch upon any road or street, were inaccessible at the time of trial, so that the sheriff could not deliver possession, but the Commission of Appeals held that this was a misconception of a well-known rule of law that where the property is not, *in its own nature*, capable of physical possession, an action of ejectment would not lie, and that the cases lend no countenance to the idea that land itself cannot be recovered in ejectment because it happens to be inacces-

[1] County of St. Clair *v.* Lovingston, 23 Wall. 46–68. See Balt. & Ohio R. R. Co. *v.* Chase, 43 Md. 23; Cook *v.* McClure, 58 N. Y. 437; Garrish *v.* Clough, 48 N. H. 9.

[2] Sanders *v.* Patridge, Noy, 132; Smith *v.* Barrett, 1 Sid. 161; s. c. Lev. 114.

[3] See Comyn *v.* Kyneto, Cro. Jac. 150; Co. Litt. 4 b.

[4] Gilbert on Eject. (2d ed.) p. 62.

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sible at the time the judgment is entered, or during the trial.[1]

§ 128. *Distinct tracts of land.*—Plaintiff may recover in a single action several distinct tracts of land claimed under different titles if he has been unlawfully ejected from them all by the same defendant.[2]

§ 129. *Dower.*—At common law a widow cannot maintain ejectment for dower until it has been admeasured or set off to her, because she is not seized of any part of the land, and has no right of entry, or of present possession, before assignment;[3] nor is her grantee before admeasurement in any better position.[4] And when ejectment is brought, after admeasurement, the validity of the widow's claim to dower, the title of her husband, his seizin, and her marriage, may all be controverted and tried, notwithstanding the admeasurement.[5]

§ 130. *Land subject to an easement, servitude, or public use.*[6]—In general, ejectment lies to recover the possession of the soil subject to either a public or private easement over it.[7] In the leading case of Goodtitle *v.* Alker,[8] Lord Mansfield, after exhaustive argument, decided that the action might be maintained by the owner of the soil for land which

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[1] Woodhull *v.* Rosenthal, 61 N. Y. 382, per Dwight, C. See §§ 96–101.

[2] Den *d.* Williamson *v.* Snowhill, 1 Green (N. J.), 23. See Worrell *v.* Beck, cited in 1 Wils. 1. See Jackson *v.* Woods, 5 Johns. (N. Y.) 278, per Kent, Ch. J.; Jackson *v.* Sidney, 12 Johns. (N. Y.) 185.

[3] Doe *v.* Nutt, 2 Car. & P. 430; Jackson *d.* Clowes *v.* Vanderheyden, 17 Johns. (N. Y.) 167, per Spencer, Ch. J.; Weaver *v.* Crenshaw, 6 Ala. 873; Chapman *v.* Sharpe, 2 Show. 186; Pringle *v.* Gaw, 5 S. & R. (Pa.) 536; Jackson *v.* O'Donaghy, 7 Johns. (N. Y.) 247; Chapman *v.* Armistead, 4 Mumf. (Va.) 382; 4 Kent's Com. 62; Dorsey on Ejectment, 43.

[4] Jones *v.* Hollopeter, 10 S. & R. (Pa.) 326.

[5] Parks *v.* Hardey, 4 Brad. (N. Y.) 15; Hyde *v.* Hyde, 4 Wend. (N. Y.) 630; and see Sparrow *v.* Kingman, 1 N. Y. 242, and cases cited.

[6] For a consideration of the right of municipal corporations to maintain ejectment for the possession of public streets or places, see the chapter on that subject.

[7] Tillmes *v.* Marsh, 67 Penn. St. 507, per Sharswood, J.; Cooper *v.* Smith, 9 S. & R. (Pa.) 26.

[8] Goodtitle *v.* Alker, 1 Burr. 133, per Lord Mansfield.

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was part of the King's highway. In the argument of counsel in this case, reference was made to a ruling, attributed to Lord Hardwicke, that, as no possession could be delivered of the soil of a highway, therefore no ejectment would lie for it; but the judges of the King's Bench seem to have been doubtful whether any such ruling had ever been made by Lord Hardwicke. If made at all, it was clearly overruled by Lord Mansfield's decision.

§ 131. *City of Cincinnati* v. *White discussed.*—The Supreme Court of the United States, however, in Cincinnati *v.* White,[1] intimated the opinion that the supposed ruling of Lord Hardwicke was sound in principle, and that ejectment was not maintainable for lands dedicated to a public use, for the reason that the plaintiff by invoking that remedy seeks to be put in actual possession of the land, which would subject him to an indictment for a nuisance, the private right of possession being in direct hostility with the easement or use to which the public are entitled; and taking possession subject to the easement being utterly impracticable. This action, however, was brought to test the right of the public to an easement in the land, and the remarks of Mr. Justice Thompson on this head must therefore be considered as entirely *obiter*. In addition to the ruling attributed to Lord Hardwicke the court cite only two cases as authority for the proposition that ejectment is not maintainable for land subject to a public use. In Styles *v.* Curtis,[2] the first case cited, certain proprietors of an ancient township had appropriated common lands for a public highway, by laying out the land adjoining thereto and selling the same as being bounded on the highway. At the time of the trial this land had been used as a highway for a century, but was no longer needed for that purpose. One of the adjoining owners inclosed and took possession of a portion of it, and the Supreme Court of Con-

[1] City of Cincinnati *v.* White, 6 Peters, 431, per Thompson, J.
[2] 4 Day R. (Conn.) 328.

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necticut held that ejectment could not be maintained against him by the township proprietors. The grounds of the decision do not clearly appear from the opinions of the judges, but it seems to have been considered a sufficient reason for refusing to maintain the action that the plaintiff, by laying out the highway, had parted with all his title as proprietor. Peck *v.* Smith,[1] the second case relied upon, was an action of trespass, by the owner of the fee in a highway, against a defendant who had obstructed it by maintaining a shop upon it, and the plaintiff's right to support the action was upheld. The remarks of the court concerning his right *to bring ejectment* are *obiter*. These cases, however, are in conflict with the universal current of modern authority, the easement being now regarded as a mere liberty, privilege, or advantage existing distinct from the ownership of the soil.[2]

§ 132. *Ownership of the soil and the right to an easement independent.*—The grantee of such a right is not the owner or occupant of the estate over which the right extends,[3] but the right to the fee and the right to an easement in the same estate are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right; the former to protect and enforce his seizin of the fee; the latter to prevent a disturbance of his easement.[4] It may, therefore, be considered settled that the owner of the fee of a highway, over which the public have an easement for travel, may recover the land within the limits of the highway in ejectment, against one who has illegally appropriated it to a purpose not authorized by the easement or servitude.[5] And

[1] 1 Conn. 103.

[2] Dubuque *v.* Maloney, 9 Iowa, 450; Pomeroy *v.* Mills, 3 Vt. 279.

[3] Cook Co. *v.* C. B. & Q. R. R. Co. 35 Ill. 460.

[4] Morgan *v.* Moore, 3 Gray (Mass.), 319.

[5] Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Wager *v.* Troy Union R. R. Co. 25 N. Y. 526; Goodtitle *v.* Alker, 1 Burr. 133; Etz *v.* Daily, 20 Barb. (N. Y.) 32; Lozier *v.* N. Y. Central R. R. Co. 42 Barb. (N. Y.) 465; Carpenter *v.* Oswego & S. R. R. Co. 24 N. Y. 655; Cooper *v.* Smith, 9 S. & R. (Pa.) 26; Warwick *v.* Mayo, 15 Gratt. (Va.) 528; Bolling *v.* The Mayor, &c. 3 Rand. (Va.)

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the rule is the same with regard to a private way, *e. g.*, an alley,[1] a passage way,[2] and so of a ferry right.[3] The sheriff in such cases delivers possession of the land subject to the easement.[4]

§ 133. *Character of defendant's occupation.*—The occupation of the land by the defendant must, however, to sustain the action, be wholly inconsistent with the public easement,[5] hence proof that at the commencement of the action the *locus in quo* was in use by the defendant as one of the public streets of a city, has been held insufficient to sustain ejectment, such use not affording evidence of any claim of title to, or interest in, the land itself, and being a mere claim of an easement not incompatible with the title or possession of the plaintiff.[6]

§ 134. *Rights of the owner of the fee.*—The right of the owner of the fee to maintain ejectment is founded on his right to continue to use the land in any manner not inconsistent with the public right, or that does not impair the enjoyment of the easement.[7] He may maintain trespass for any injury done to the soil not incidental to the public right of passage,[8] as where the defendant continues a shop, there-

563; Wright *v.* Carter, 3 Dutch. (N. J.) 76; Pomeroy *v.* Mills, 3 Vt. 279; Blake *v.* Ham, 53 Me. 430; Ayer *v.* Phillips, 69 Me. 50; Bac. Abr. Tit. Highways B.: Brown *v.* Galley, Lalor's Sup. 308; Stackpole *v.* Healy, 16 Mass. 35. Writs of Entry,—Hancock *v.* Wentworth, 5 Metc. (Mass.) 446; Morgan *v.* Moore, 3 Gray (Mass.), 319.

[1] Gordon *v.* Sizer, 39 Miss. 805.

[2] Morgan *v.* Moore, 3 Gray (Mass.), 319.

[3] Cooper *v.* Smith, 9 S. & R. (Pa.) 26.

[4] Ibid.

[5] Adams *v.* Saratoga & W. R. R.Co. 11 Barb.(N.Y.) 414. Reversed on another point, 10 N.Y. 328; Dewitt *v.* Village of Ithaca, 15 Hun (N.Y.), 568. See § 135.

[6] Cowenhoven *v.* City of Brooklyn, 38 Barb. 9. But see Strong *v.* City of Brooklyn, 68 N. Y. 1. See Kurkel *v.* Haley, 47 How. Pr. (N. Y.) 75; Dewitt *v.* Village of Ithaca, 15 Hun (N. Y.), 568.

[7] Jackson *d.* Yates *v.* Hathaway, 15 Johns. (N. Y.) 447; Peck *v.* Smith, 1 Conn. 104–130; Babcock *v.* Lamb, 1 Cowen (N. Y.), 238; Stackpole *v.* Healy, 16 Mass. 35.

[8] Chambers *v.* Furry, 1 Yeates (Pa.), 167; Barclay *v.* Howell's Lessees, 6 Peters, 498; Stackpole *v.* Healy, 16 Mass. 35; Harrison *v.* Parker, 6 East, 154;

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on,[1] or ploughs the road, unless it be done merely to make repairs, or keeps goods continuously in the street for the purpose of sale; for the freehold and the profits, the trees upon the land, the right to take the herbage,[2] to remove the soil or sand,[3] to carry water in pipes,[4] to work the mines under the surface, and to utilize the quarries, springs of water, and timber,[5] belong to the owner of the soil. He has a right to all the remedies for the protection of the freehold subject to the easement.[6] In a case which arose in New York plaintiff conveyed a farm to defendant, excepting from it the land embraced in its boundaries included in a highway. The defendant dug up the road, and ran a water pipe across it, set out fruit and shade trees, and piled stones, lumber, and manure within its boundaries, and used a portion of it for farming purposes, and claimed, as against the plaintiff, the right to appropriate the highway to the uses described. Under these circumstances the right to maintain ejectment was sustained by the Supreme Court.[7]

§ 135. *Ejectment for lands applied to unauthorized use.* —A railroad corporation having acquired land under its charter for its own use, and subsequently having discontinued its railroad, deeded the land to a municipal corporation to be used for the purpose of a street. Ejectment was sustained against the latter by the owner of the fee on the ground that he owned a reversionary interest, and was entitled to resume possession on the discontinuance of the use for which the land had been taken, and that it was not lawful to appropriate the land to a new additional use without

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Peck *v.* Smith, 1 Conn. 104; Babcock *v.* Lamb, 1 Cowen (N. Y.), 238; Gidney *v.* Earl, 12 Wend. (N. Y.) 98; Willoughby *v.* Jenks, 20 Wend. (N. Y.) 96.

[1] Peck *v.* Smith, 1 Conn. 103.

[2] Stackpole *v.* Healy, 16 Mass. 33; Adams *v.* Emerson, 6 Pick. (Mass.) 56.

[3] Williams *v.* Kenney, 14 Barb. (N. Y.) 629.

[4] Goodtitle *v.* Alker, 1 Burr. 133–144.

[5] Lyon *v.* Gormley, 53 Penn. St. 261.

[6] Bolling *v.* The Mayor, &c. 3 Rand. (Va.) 563; Chambers *v.* Furry, 1 Yeates (Pa.), 167.

[7] Etz *v.* Daily, 20 Barb. (N. Y.) 32.

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fresh condemnation and additional compensation.[1] So an action may be maintained by the owner of the fee of a street charged with a public easement, against a railroad company which had laid tracks in the street, though the tracks had not been used or connected with the other portions of the railroad.[2] *A fortiori* this must be the rule where a railroad occupies any part of a street for actual use as its roadway.[3]

§ 136. *Wrongful use for public purposes not protected.*—The wrongful possession of land by a railroad company in any such case will not be protected by the courts merely because the lands are devoted to a public use, nor will the owner be remitted to a vexatious litigation to recover compensation.[4]

§ 137. *Rule in Illinois.*—The rule, however, seems to be different in Illinois. In ejectment by the owner of the fee of a country road against a railway corporation, which had laid its tracks on the road, it was decided that the public authorities, who had the superintendance and control of the public roads, may authorize and permit travel over them by means of a railway, and that the plaintiff could not recover the possession in ejectment against the railroad company.[5]

§ 138. *Rule when fee is granted for public use.*—Where the owner, however, parts with the fee of the land to a municipal corporation, or other public body, entitled to hold it for public use, he cannot maintain ejectment while the fee continues in the grantee, but must wait until the title reverts. He has no title to be assailed and no possession that can be invaded. This differs from the case of an ordi-

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[1] Strong *v.* City of Brooklyn. 68 N. Y. 1; S. C. first appeal *sub. nom.* Heard *v.* City of Brooklyn, 60 N. Y. 242. See, however, N. Y. & H. R. R. Co. *v.* Kip, 46 N. Y. 546. See § 133.

[2] Carpenter *v* Oswego & S. R. R. Co. 24 N. Y. 655.

[3] Weisbrod *v.* C. & N. R. R. Co. 21 Wis. 602; Gardiner *v.* Tisdale, 2 Wis. 153.

[4] Graham *v.* C. & I. C. R. R. Co. 27 Ind. 260.

[5] Edwardsville R. R. Co. *v.* Sawyer, 92 Ill. 377.

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nary highway, for in the latter case the public have only a right of way or passage.[1] Ejectment may be maintained for a road-bed abandoned by a railroad company which had originally acquired only an easement over the land.[2]

§ 139. *Municipal corporations.*—It was contended by counsel, in a recent case in New Jersey, that a municipal corporation had not sufficient title to its streets to maintain ejectment.[3] But the court held that where the public easement was such that exclusive possession was essential for its enjoyment ejectment was the only appropriate action to obtain the possession, and the corporation may defend ejectment at suit of the owner of the fee by setting up the right of possession of the street acquired by dedication to the public use.[4]

§ 140. *Attempted distinction between public and private easements.*—In a recent case already cited,[5] the Supreme Court of New Jersey intimated its opinion, that while the existence of a private easement constituted no defense to the action of ejectment by the owner of the fee, the rule was otherwise with regard to a public easement, and that in the latter case, under the decision of the Supreme Court of the United States in Cincinnati *v.* White, *ubi sup.*, the owner of the easement could interpose a valid defense. This distinction seems to have been suggested by the fact that in the case of many public easements, such as streets in cities, the possession, exclusive of all interference by the owner of the fee, is essential for its use, regulation, and enjoyment, and that ejectment, being based upon a right to be put in possession, is not maintainable. But the distinction cannot be supported on principle, for the owner, as we have seen, is still entitled to the use, enjoyment, and pos-

[1] Hunter *v.* Middleton, 13 Ill. 50. See People *v.* Kerr, 27 N. Y. 188.

[2] Phillips *v.* Dunkirk W. & P. R. R. Co. 78 Penn. St. 177.

[3] See § 130, n. 6.

[4] Hoboken Land & Improvement Co. *v.* Mayor, &c., Hoboken, 7 Vroom (N. J.), 540; see Morgan *v.* Moore, 3 Gray (Mass.), 319.

[5] Hob. L. & I. Co. *v.* The Mayor, &c. 7 Vroom (N. J.), 540.

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session of the fee in so far as it does not detract from or interfere with the use of the easement. He may still own, even in a public street in a city, trees and herbage, and he owns the soil under the street as well. He may, as we have already seen, maintain ejectment for a mine, and in such a case—a by no means improbable contingency in a mining community—supposing a street to run over it, the public easement could not be any objection to his recovery. As already stated, the general current of modern authority is to the effect that the two interests are entirely independent of each other, and there is no difficulty in the sheriff's delivering possession of the land subject to the easement.[1]

§ 141. *Land subject to homestead rights.*—In Massachusetts, on a writ of entry against a married woman alone to recover possession of land in which she has a homestead interest, a qualified judgment may, by statute, be rendered for the possession of the land subject to the right of homestead.[2] In that State the owner of land impressed with this burden, in favor of a tenant and his family, may maintain a writ of entry, and recover the land except in so far as the homestead title may exclude him.[3] In Letchfield *v.* Cary, the Supreme Court of Mississippi held that a purchaser of land at execution sale, subject to homestead, could recover it in ejectment, but was entitled to a judgment to the extent of his title only, and could not dispossess the occupants, or affect their rights under the homestead statute.[4] The decisions upon this subject, however, are not uniform. Thus it has been held in Illinois that where the homestead of a debtor was sold under execution without division, although the land was worth over $1,000, the statutory limit, the purchaser acquired no title to any part of it, which was available in ejectment to either a

[1] Tillmes *v.* Marsh, 67 Penn. St. 507; Cooper *v.* Smith, 9 S. & R. (Pa.) 26. See § 132.

[2] Castle *v.* Palmer, 6 Allen (Mass.), 401; Stebbins *v.* Miller, 12 Allen (Mass.), 591.

[3] Swan *v.* Stephens, 99 Mass. 7.

[4] Letchfield *v.* Cary, 52 Miss. 791.

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plaintiff or defendant. The judgment was held to be a lien upon the land over $1,000 in value, but the court said that the creditor's remedy was to proceed under the statute.[1] In a later case, in the same State, it was held that when the homestead was not released in the mortgage it did not pass under a foreclosure sale, and no rights were acquired under it which could be enforced in ejectment where the owner of the homestead right was occupying the land at the time of the sale.[2]

§ 142. *Ejectment for fishery.*—In England, in an early case which arose in the King's Bench, a doubt was expressed by the judges whether ejectment could be maintained for a piscary,[3] and this was followed by decisions that the action would not lie, on the ground that the right was only a *profit a prendre* and incorporeal in its nature.[4] Much confusion has been introduced into this subject, however, in part through a later decision of the same court,[5] distinguishing between a mere common of piscary as incorporeal, and a several fishery united with the right to the soil. This latter case was not an action of ejectment, but turned upon the question whether a pauper had, by the demise of a fishery, taken a tenement within the meaning of a statute relating to settlements. Buller, J., rested the decision of the court expressly on the ground that it was necessary to *presume* in letting a fishery, that the soil passed with it, while Ashhurst, J., said: "There is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it; and it may be recovered in ejectment." It is obvious that this latter statement can hardly be regarded as anything more than an *obiter dictum*, but the presumption referred to, that the owner of a fishery must be taken in the absence of negative proof to be the owner of the soil, has an important bearing on the action of ejectment. Wherever such a presumption is admitted to exist, the owner of a fish-

[1] Stevens *v.* Hollingsworth, 74 Ill. 202.
[2] Asher *v.* Mitchell, 92 Ill. 480.
[3] Molineux *v.* Molineux, Cro. Jac. 144.
[4] Herbert *v.* Laughluyn, Cro. Car. 492; Waddy *v.* Newton, 8 Mod. 278.
[5] Rex *v.* Inhabitants of Old Alresford, 1 T. R. 358.

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ery, independent of the soil, would seem to have the right to maintain ejectment against any one who cannot prove the negative fact that he was not the owner of the soil. In England this presumption has been recognized in several cases,[1] in the last of which Lord Cockburn, though strongly contending on grounds of principle against its existence, admitted that the doctrine was settled law. In this country, however, these precedents can hardly be considered binding, and the dissenting opinion of Lord Cockburn, in the case last cited, may, probably, be taken as placing the matter in its true light. In all these recent cases the only question really involved was whether trespass could be maintained by the owner of a fishery, and as ownership of the soil is not essential to maintain trespass, it was unnecessary for the judges to invoke the presumption in aid of the decision, and their remarks on this head were not called for by the facts before them. Such a presumption is clearly entirely out of place in an action of ejectment. The plaintiff does not rely on any presumptions, but on the strength of his own title, and his allegation of an incorporeal hereditament cannot be supposed to imply a corporeal hereditament in support of it. The general conclusion to which these considerations all point is that where the right to the soil and the fishery are united, the owner of the former can, by bringing ejectment for the one, recover the other; but that where the right to fish is separated from the ownership of the land the action is not maintainable, but resort must be had to other remedies.[2]

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[1] Partheriche *v.* Mason, 2 Chitt. 658; Somerset *v.* Fogwell, 5 B. & C. 875; Holford *v.* Bailey, 8 Q. B. 1000; S. C. in Error, 13 Q. B. 426; Marshall *v.* Steam Nav. Co. 3 B. & S. 732.

[2] In this discussion we have not thought it worth while to go into the distinctions between free, common, and several fisheries, nor to consider the question, once the subject of much controversy, whether the grant of a fishery necessarily carried with it as accessory the right to the soil. Whatever may have been the authority at one time in support of this proposition it must now be considered disposed of. See Angell on Watercourses, § 72; Butler & Hargrave's Co. Litt. 122 a, note 7; Woolrych's Law of Waters, 111; and the dissenting opinion of Cockburn, C. J., in Marshall *v.* Steam Nav. Co. *ubi sup.* The presumption of a united

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§ 143. *Pasturage and herbage.*—The early cases, decided in England, with regard to the right to bring ejectment for pasturage and herbage, are of little value at the present day. They seem to have turned chiefly on questions of evidence and pleading. These rights somewhat resemble fishery rights. With regard to both, it is clear that they may exist separate from the interest in the soil. Lord Coke says[1] that the grantee of *herbagium terræ* has a "particular right" in the land, and "shall have an action *quare clausum fregit*; but by grant thereof and liverie made, the soile shall not passe." Where the right to the soil and the herbage are in the same person, the recovery of the one in ejectment would carry the other with it; but that the owner of the separate herbage or pasturage rights would now be permitted to maintain ejectment may well be doubted. In an early case in the King's Bench, often cited, it was held that *ejectione firmæ* would lie for the pasturage of one hundred sheep,[2] but it does not appear from the report what the interest of the plaintiff in the soil was, and the question may have been only that of the proper description of the subject of the action; and in a later case in the Exchequer,[3] where *ejectione firmæ* was brought upon a demise *de herbagio et pannagio* of so many acres, the court stated as a reason for inclining against the plaintiff, that "herbage does not include all the profit of the soil, but only a part of it," referring to the passage from Coke above cited.[4] In

ownership in the absence of negative proof is, of course, something entirely different. It may be observed here that, as a general rule, the right to fish in any waters gives no rights in the adjoining lands. Cortelyou *v.* Van Brundt, 2 Johns. (N Y.) 357; Ball *v.* Herbert, 3 T. R. 256; Bickel *v.* Polk, 5 Harr. (Del.) 325; Locke *v.* Motley, 2 Gray (Mass.), 267. See Blundell *v.* Catterall, 5 B. & Ald. 268; Casey's Lessee *v.* Imloes, 1 Gill. (Md.) 430.

[1] Coke Litt. 4 b.

[2] Anon. 2 B. & Dal, 95.

[3] Wheeler *v.* Toulson, Hardre, 330.

[4] English cases turning on the meaning of the word "tenement" in statutes relating to the settlement of paupers, though sometimes cited in connection with ejectment have really no bearing upon it whatever. These statutes have been very liberally construed, the judges going so far in one case as to hold the rent-

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Ward *v.* Petifer, and in Parker *v.* Staniland, in the King's Bench,[1] it was said that ejectment would lie for the first crop growing upon land, but in the second case the remark was entirely *obiter*, while in the first it was not needed for the actual decision of the question presented to the court, for the jury were told that if they believed that the plaintiffs had *only* the first crop (and not the entire profits through the year), they should return a special verdict to that effect "and leave it to the law whether an ejectment lies in this manner." The case is chiefly remarkable for containing a suggestion, similar to that above noted, as having been advanced with regard to fisheries, that the owner of the first crop will be presumed, in the absence of evidence to the contrary, to be the owner of the freehold. These decisions cannot certainly be regarded as sufficient to uphold ejectment for herbage or pasturage, when separated from the general ownership of the soil, and existing as a mere right to the profits of the land. Pannage, or the right to gather mast, which cannot be distinguished, in the nature of the interest, from pasturage or herbage, has been held insufficient to support ejectment.[2] In Massachusetts the Supreme Court of that State has decided,[3] that the grantee of the "herbage or feeding" of land cannot maintain a writ of entry, and this decision would be regarded as authority in any State in which the action of ejectment prevails.

§ 144. *Church property.*—When ejectment was first introduced it was held that a church or chapel could not be recovered in the action because it was not a temporal inheritance and not demisable, but was *res sacra.* This doctrine was soon exploded and the practice of demanding and

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ing of cows to create a "tenement"—an interest which obviously could not support an action to try title to land.

[1] Ward *v.* Petifer, Cro. Car. 362; see Parker *v.* Staniland, 11 East, 362, 366. See Dorsey on Ejectment, p. 17; Cook *v.* Gerrard, 1 Saund. 186, C. No. 7.

[2] Pemble *v.* Sterne, 1 Lev. 213.

[3] Rohoboth *v.* Hunt, 1 Pick. (Mass.) 224.

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recovering church property as *messuages* was introduced.[1] Ejectment for a church ground has been upheld.[2] With us church property being held by religious corporations which, like other corporations, may maintain and defend actions for the possession of their real property, the early cases and practice have ceased to be of any practical importance.

§ 145. *Common appendant and tithes.*—In England ejectment has been sustained for common appendant and appurtenant[3] and for tithes.[4]

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[1] Hillingsworth *v.* Brewster, Salk. 256; Thyn *v.* Thyn, Styles, 101; Harpur's Case, XI Coke, 25 b.

[2] City of Hannibal *v.* Draper, 15 Mo. 634.

[3] Black's Lessee *v.* Hepburne, 2 Yeates (Pa.), 331; Mellington *v.* Goodtitle, Andrews, 107; Newman *v.* Holdingfast, 1 Strange, 54.

[4] 2 Wms. Saund. 304, n. 12; Camell *v.* Clavering, 2 Ld. Raymond, 789.

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CHAPTER IV.

INTERESTS FOR WHICH EJECTMENT WILL NOT LIE.

§ 146. Not maintainable for incorporeal hereditaments.
147. Ownership of land and right to easement independent.
148. Interests not recoverable in ejectment.
149. Water-courses and overflowed lands.
150. Mining rights and privileges.
151. Shore lines.
152. Ferry right or franchise.
153. Wharfage.
154. Cloud on title.
155. Room or chamber.
156. Projecting eaves or cornices.
157. Projecting foundation.
158. Party-walls.
159. Claim for improvement.
160. Rent reserved.
161. Claim of easement.

§ 146. *Not maintainable for incorporeal hereditaments.* —Ejectment is not maintainable for incorporeal hereditaments,[1] nor can a writ of entry be supported where the demandant possesses no higher interest in the soil than a mere easement,[2] because there can be no seizin of an incorporeal hereditament; it cannot be delivered in execution by the sheriff, and is not subject to entry. The right to enjoy an easement cannot be vindicated in this action, because an easement "lyeth in grant and not in livery;" the owner cannot be disseized or otherwise ousted of it, and is not vested with the title to the soil.[3] There cannot be actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession.[4] Thus the action cannot be sustained to recover, as an easement to a mill, the right to use a wharf along a canal basin, for the purpose of loading and unloading boats carrying wheat to and from

[1] Farley *v.* Craig, 3 Green (N. J.), 191; Black *v.* Hepburne, 2 Yeates (Penn.), 331; Wilklow *v.* Lane, 37 Barbour (N. Y.), 244; Caldwell *v.* Fulton, 31 Penn. St. 475; Clement *v.* Youngman, 40 Penn. St. 341; Taylor *v.* Gladwin 40 Mich. 232; see Smith *v.* Wiggin, 48 N. H. 105; Le Fevre *v.* Le Fevre, 4 S. & R. (Penn.) 243.

[2] Provident Institution *v.* Burnham, 128 Mass. 458; see 104 Mass. 1.

[3] Judd *v.* Leonard. 1 Chip. (Vt.) 204; Wood *v* Truckee Turnpike Co. 24 Cal. 474; Hewlins *v.* Shippam, 5 B. & C. 221; Northern Turnpike Co. *v.* Smith, 15 Barb. (N. Y) 355.

[4] 3 Bla. Com. pp. 169, 170.

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the mill of the claimant, adjoining the wharf, which right the claimant had occasionally used or exercised, in common with a similar right in others.[1]

§ 147. *Ownership of land and right to easement independent.*—The right to the fee and the right to an easement in the same estate are, as we have seen, rights independent of each other;[2] the easement or servitude not being an estate in land.[3] The most effective remedy for an interruption of the enjoyment of an incorporeal right is by action of trespass on the case,[4] though an action of nuisance is sometimes brought, or an injunction procured, in appropriate cases.

§ 148. *Interests not recoverable in ejectment.*—Ejectment does not lie for a mere *profit a prendre*, as pannage,[5] nor for rent,[6] nor for a privilege of a landing-place held in common with other citizens of a town.[7] The right to the use of an alley adjacent to the land in controversy cannot be recovered in ejectment, and the recital of such a right in the judgment is nugatory.[8] Ejectment is not maintainable for a mere right of way,[9] nor for a right to a road,[10] nor, in England, for glebe after sequestration,[11] nor for an advowson,[12] nor, as was held by Chief Justice Tindal, for a canonry or

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[1] Child *v.* Chappell, 9 N. Y. 246.

[2] Morgan *v.* Moore, 3 Gray (Mass.), 319. See § 132.

[3] Nellis *v.* Munson, 24 Hun (N. Y.), 575; San Francisco *v.* Calderwood, 31 Cal. 585; First Baptist Society *v.* Grant, 59 Me. 245; see 66 Me. 400; Snyder *v.* Warford, 11 Mo. 513; Hewlins *v.* Shippam, 5 B. & C. 221.

[4] Allen *v.* Ormond, 8 East, 4; Cushing *v.* Adams, 18 Pick. (Mass.) 110; Hastings *v.* Livermore, 7 Gray (Mass.), 194; Northern Turnpike Co. *v.* Smith, 15 Barb. (N. Y.) 355; The Seneca Road Co. *v.* A. & R. R. R. Co. 5 Hill (N. Y.), 170.

[5] Pemble *v.* Sterne, 1 Lev. 212; S. C. 1 Sid. 416.

[6] Herbert *v.* Laughluyn, Cro. Car. 492.

[7] Black *v.* Hepburne, 2 Yeates (Penn.), 331.

[8] Taylor *v.* Gladwin, 40 Mich. 232. See § 102, and note.

[9] Northern Turnpike Co. *v.* Smith, 15 Barb. (N. Y.) 355.

[10] Wood *v.* Truckee Turnpike Co. 24 Cal. 474.

[11] Doe *v.* Bluck, 3 Camp. 447.

[12] Peters' Sup. Blac. p. 145.

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ecclesiastical office,[1] nor for a right of common by itself,[2] nor for a free warren.[3]

§ 149. *Water-courses and overflowed lands.*—Ejectment cannot be brought against one who merely claims an easement or right to flow land with water, the plaintiff being otherwise in full possession.[4] Such overflow does not confer possession upon the party causing it, nor does it constitute an ouster of the owner.[5] It has been said, however, in South Carolina, that where one joint tenant overflowed the lands of the joint estate, thereby appropriating it to his own use, it constituted an ouster which would justify an action on the case against him by his companion.[6] Ejectment cannot be brought for diverting a water-course.[7] A water-course or rivulet, though mentioned by name, cannot be recovered in ejectment, because it is impossible to give execution of a thing which is transient and always running.[8] But if the ground over which the rivulet runs belongs to the claimant, the rivulet may be recovered by laying the action for so many acres of land covered with water.[9]

§ 150. *Mining rights and privileges.*—It has been held in England, that one who had a mere liberty, license or power to dig, prospect, mine or search for metals or minerals, could not maintain ejectment, for such license was no more than a mere right to a personal chattel, and did not confer any interest or estate, and was widely different from

[1] Doe *v.* Musgrave, 1 Scott N. R. 451.

[2] Barton *v.* Hamshire, 3 Keb. 738; S. C. Freeman, 447.

[3] Tremain *v.* Sands, 1 Keb. 500.

[4] Wilklow *v.* Lane, 37 Barb. (N. Y.) 244; see Redfield *v.* Utica & Syracuse R. R. Co. 25 Id. 54.

[5] Perrine *v.* Bergen, 2 Green (N. J.), 355, 356; Green *v.* Harman, 4 Dev. (N. C.) 158.

[6] Jones *v.* Weathersbee, 4 Strob. (S. C.) 50.

[7] Black *v.* Hepburne, 2 Yeates (Penn.), 331.

[8] Runn. on Eject. p. 131; Challenor *v.* Thomas, Yelv. 143; Black *v.* Hepburne, 2 Yeates (Penn.), 331.

[9] See Adams on Eject. (4th ed.) p. [*21] 22.

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a grant or demise of the mines, metals or minerals in the land.[1] The action will not lie for a mere license to mine,[2] nor for a privilege to dig in mines,[3] nor, possibly, for a quarry,[4] nor a tin bound *eo nomine*.[5] "A grant or privilege," says Judge Grier, "to dig and carry ore from the land of another, is an incorporeal hereditament."[6] The question whether the soil and minerals, or only a mere liberty or privilege, pass by a grant, conveyance or contract, is often one of much difficulty, and a comparison of the cases in which mining rights have been held insufficient to support ejectment, with those before considered, in which the action has been sustained, shows that it generally depends upon the particular facts attending each case, the character of the subject-matter, and the language employed in the instrument by which the transfer is effected.[7]

§ 151. *Shore lines.*—In New Jersey ejectment will not lie to settle shore line divisions; the remedy being in equity.[8]

§ 152. *Ferry right or franchise.*—A ferry right is incorporeal, and, in legal consideration, not tangible property. Like a right of way or common, or other incorporeal right, no entry in point of fact can, in strict propriety, be said to be possible with regard to it, nor could the sheriff, in case of judgment of restitution, deliver possession. In such a case

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[1] Doe *d.* Hanley *v.* Wood, 2 B. & Ald. 724; see Chetham *v.* Williamson, per Lord Ellenborough, 4 East, 469–476.

[2] Crocker *v.* Fothergill, 2 B. & Ald. 652; see Harlow *v.* Lake Superior Iron Co. 36 Mich. 105.

[3] Beatty *v.* Gregory, 17 Iowa, 109; Union Petroleum Co. *v.* Bliven Petroleum Co. 72 Penn. St. 173.

[4] Brown *v.* Chadwick, 7 Irish C. L. 101.

[5] Doe *d.* Falmouth *v.* Alderson, 1 Gale, 441; S. C. 1 M. & W. 210; S. C. Tyrwh. & Gr. 543.

[6] Grubb *v.* Bayard, 2 Wall. Jr. 81; see Grubb *v.* Grubb, 74 Penn. St. 25.

[7] See Doe *d.* Hanley *v.* Wood, 2 B. & Ald. 724; Muskett *v.* Hill, 5 Bing. New Cases, 694; Chetham *v.* Williamson, 4 East, 469; see Funk *v.* Haldeman, 53 Penn. St. 229–243, where this distinction is discussed. See §§ 108–113, 116.

[8] Stockham *v.* Browning, 3 C. E. Green (N. J.), 390.

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an ejectment would not lie; and, upon the same principle, a warrant of forcible entry would not.[1]

§ 153. *Wharfage.*—A demise by a municipal corporation to an individual of the right to collect wharfage, conveys an incorporeal right,[2] and any interference with the enjoyment of such a right must be redressed by some remedy other than ejectment.

§ 154. *Cloud on title.*—It has been held in a case which arose in New York, that a party holding a tax title covering the *locus in quo*, with other property, but who was not in possession of, and had made no overt claim to, the property in dispute, was not a necessary or proper party defendant in ejectment. A party desiring to quiet the title to land must proceed, in New York, under the statute regulating such proceedings or by bill in equity; that result cannot be accomplished in ejectment, nor can the alleged cloud upon the title be cleared or foreclosed in that action.[3]

§ 155. *Room or chamber.*—Though, as we have seen, ejectment will lie for a room or portion of a building, yet, if the building is destroyed or torn down by order of the public authorities, and the identity of the room or portion claimed is lost, the lessee's right of entry is gone, for his interest is no longer visible or tangible, nor could it be delivered in execution by the sheriff, and hence ejectment will not lie for it.[4] But the New York Court of Appeals, if the report of the case of Rowan *v.* Kelsey on appeal is correct, seems to hold that where the landlord had erected a new and entirely different structure upon the property, not

[1] Rees *v.* Lawless, 5 Litt. Sec. Cases (Ky.), 184; The Mayor *v.* Union Ferry Co. 55 How. Pr. (N. Y.) 138; Bowman *v.* Wathen, 2 McL. 376; State *v.* Wilson, 42 Me. 9; see 12 Am. Dec. p. 295 (Rees *v.* Lawless), and notes; Bowman *v.* Wathen, 1 How. U. S. 189.

[2] The Mayor *v.* Mabie, 13 N. Y. 151.

[3] Pixley *v.* Rockwell, 1 Sheldon (N. Y.), 267 see The Mayor *v.* North Shore, S. I. F. Co. 55 How. Pr. (N. Y.) 154.

[4] Rowan *v.* Kelsey, 18 Barb. (N. Y.) 484; see, however, S. C. on appeal, 2 Keyes (N. Y.), 594. See §§ 105, 106.

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containing rooms corresponding with those previously hired by the lessee of an unexpired term, a recovery in ejectment might nevertheless be had. It is difficult to reconcile this decision with the argument of Hunt, J., who wrote the prevailing opinion, or to understand what could be awarded by the judgment, or of what the sheriff could deliver possession.[1] In another case the lessee of a cellar, after the destruction of the building by fire, refused to surrender possession, and himself constructed a small house over the cellar, which occupied about the space of the room leased by him. The landlord brought ejectment, and recovered judgment, but the case went off chiefly on the point that no title to the land passed by the lease, and that after the destruction of the building by fire the lessee's interest was gone.[2]

§ 156. *Projecting eaves or cornices.*—Where one of the owners of a party wall places a cornice thereon which projects slightly over the lot of the adjoining owner, this constitutes an unlawful interference with a right incident to property in possession, for which ejectment will not lie.[3] Of course, no one can undermine or overhang another's land without violating his rights.[4] A leaning wall[5] and an overhanging cornice[6] constitute nuisances which may be abated by action, or by act of the party. So the branches of a tree which extend over the premises of another, may be cut off by him;[7] but ejectment is not an appropriate remedy to redress such wrongs. If one erect a building, upon the line of his own property, so that the eaves or gutters project over the land of his neighbor, this is not such an en-

[1] See Rowan *v.* Kelsey, 2 Keyes (N. Y.), 594.

[2] Winton *v.* Cornish, 5 Ohio, 477; Kerr *v.* Merchants Exchange Bank, 3 Ed. Ch. (N. Y.) 316; but see Rowan *v.* Kelsey, 2 Keyes (N. Y.), 594.

[3] Vrooman *v.* Jackson, 6 Hun (N. Y.), 326.

[4] 2 Bla. Com. p. 18.

[5] Meyer *v.* Metzler, 51 Cal. 142.

[6] Grove *v.* City of Ft. Wayne, 45 Ind. 429; s. c. 15 Am. Rep. 262.

[7] Earl of Lonsdale *v.* Nelson, 2 B. & C. 302–311.

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croachment as will sustain ejectment.[1] These cases proceed upon the theory that the defendant has taken possession of nothing but an open space of air over the material land of plaintiff. The sheriff could not put the plaintiff in possession of that space; an entry could not be made thereon; nor is the thing sought to be recovered attached to the soil.[2] The proper redress for wrongs of this character has been said to be an action of trespass on the case for the nuisance.[3]

§ 157. *Projecting foundation.* — On the other hand, where some of the stones of defendant's foundation wall projected eight inches over plaintiff's land, it was held with some hesitation, in Wisconsin, that plaintiff might treat this as a disseizin and maintain ejectment.[4] In Stedman *v.* Smith,[5] the plaintiff and defendant occupied adjacent plots of ground, divided by a wall, of which they were owners in common. There was a shed on defendant's ground, contiguous to the wall, the roof of which rested on the top of the wall across its whole width. Defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the top, and built a wash-house contiguous to the wall, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall; and he let a stone into the wall with an inscription on it stating that the wall and the land on which it stood belonged to him. The action being trespass by one tenant in common against another, in which an actual ouster must be shown, the Court of Queen's Bench held that a jury might find an actual ouster from these facts.

§ 158. *Party-walls.*—It seems that, in England, ejectment is a remedy for recovering the ownership of land cov-

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[1] Aiken *v.* Benedict, 39 Barb. (N. Y.) 400; overruling Sherry *v.* Frecking, 4 Duer (N. Y.), 452.

[2] Ibid.; also, Jackson *d.* Saxton *v.* May, 16 John. (N. Y.) *184.

[3] Aiken *v.* Benedict, 39 Barb. (N. Y.) 400.

[4] McCourt *v.* Eckstein, 22 Wis. 153.

[5] Stedman *v.* Smith, 8 E. & B. 1.

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ered by a party-wall.[1] It was held in Pennsylvania, on the other hand, that actual possession of a party-wall, including the strip of plaintiff's land on which it was built, and excluding the strip of defendant's land over which it extended, could not be recovered in an action of ejectment.[2] In New York it is doubtful whether ejectment will lie for land burdened with the servitude of a party-wall;[3] but in Maine the action has been sustained.[4] At all events, the only interest the plaintiff could recover would be the fee subject to the easement, and the nature or extent of his interest should be specified in the verdict or finding.[5] We have already seen that the current of modern authority, in the case of easements of right of way or passage, is strongly in favor of upholding the right to recover in ejectment the land subject to the easement.[6] Where, however, the easement consists in the right to maintain or use a party-wall, although the fee is in the owner of the servient tenement, there is a practical difficulty in the way of putting the claimant in possession of the *locus* without disturbing the enjoyment of the easement, which is somewhat greater than in the case of land over which a mere right of way exists.

§ 159. *Claim for improvement.*—In Pennsylvania, the defendant in ejectment proceedings is entitled to compensation in the same action for any improvements erected by him during his unlawful possession; but this claim for improvements is an equitable lien, and cannot be made the subject of an independent ejectment.[7]

§ 160. *Rent reserved.*—The right to recover possession

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[1] Trotter *v.* Simpson, 5 C. & P. 51.

[2] Robinson *v.* Gunnis, 2 W. N. C. (Penn.) 224.

[3] Kurkel *v.* Haley, 47 How. Pr. (N. Y.) 75; Rogers *v.* Sinsheimer, 50 N. Y. 646; Brondage *v.* Warner, 2 Hill (N. Y.), 145.

[4] Bradbury *v.* Cony, 59 Me. 494.

[5] Rogers *v.* Sinsheimer, 50 N. Y. 646; see Goodtitle *v.* Alker, 1 Burr. 133.

[6] See §§ 130–132.

[7] Paull's Ex'rs *v.* Eldred, 29 Penn. St. 415.

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of lands for non-payment of rent cannot be enforced by ejectment unless the right of re-entry is reserved.[1]

§ 161. *Claim of easement.*—It has been held that ejectment will not lie against a corporation which uses the land for the purposes of a street only, and asserts no other claim or interest than the mere right to enjoy an easement, or right of passage.[2] The principles of this case must, however, be accepted with much caution. Undoubtedly the defendant's claim of title must ordinarily be such that if reduced to possession or enjoyment, it would constitute an actual occupation of the premises, and where only a private right of way is exercised over land, and the existence of the owner's fee in the soil, and his right to the immediate possession, and use, subject to the easement, is acknowledged, ejectment is not the proper form of action.[3] Although, as we have seen, this rule, on principle, ought to apply in cases where a municipal corporation assumes to treat private property as a street,[4] the current of authority is, nevertheless, to the effect that a public easement of such a character embraces so many of the elements of absolute ownership, that possession of the land over which the easement exists, exclusive of any interference by the owner of the fee, is essential for its proper regulation and enjoyment. We shall presently show that the public easement itself can be made the basis of an ejectment by a municipal corporation, and it would certainly seem strange if proof of the assertion of so important and exclusive an interest, upon or over the land by the defend-

[1] Van Rensselaer *v.* Jewett, 2 N. Y. 141 ; see Van Rensselaer *v.* Ball, 19 N. Y. 100; Kenege *v.* Elliott, 9 Watts (Penn.), 258; Johnson *v.* Gurley, 52 Texas, 222; Vanatta *v.* Brewer, 32 N. J. Eq. 268; Fox *v.* Brissac, 15 Cal. 223.

[2] Cowenhoven *v.* City of Brooklyn, 38 Barb. (N. Y.) 9. See §§ 132, 135–140, 158.

[3] Child *v.* Chappell, 9 N. Y. 246; Strong *v.* City of Brooklyn, 68 N. Y. 1; Smith *v.* Wiggin, 48 N. H. 105; Wilklow *v.* Lane, 37 Barb. (N. Y.) 244; see §§ 133, 135, 158.

[4] See §§ 139, 140.

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ant, would not suffice to support an action of ejectment.[1] It should be clearly understood that the rules with regard to ejectment in the case of streets in cities, constitute an exception to the general principles governing the action.

[1] See Armstrong *v.* City of St. Louis, 69 Mo. 309, and cases cited; Strong *v.* City of Brooklyn, 68 N. Y. 1.

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CHAPTER V.

RELIEF PECULIAR TO EJECTMENT NOT TO BE HAD IN OTHER ACTIONS.

§ 162. Character and scope of ejectment.
163. When ejectment, and not a suit to obtain construction of a will, the appropriate remedy.
164. Summary proceedings not proper where the title is involved.
165. When specific performance cannot be maintained.
166. Partition not a substitute for ejectment.
167. Defect in title or adverse title must be disclosed to defeat partition.
168. Bill in equity to recover possession, when not allowed.
169. Ejectment bills.
170. Ejectment not maintainable in the form of a bill in chancery.
171. Equitable title will not support ejectment bill.
172. Party vested with legal and equitable estate cannot proceed in equity.
173. Jurisdiction in equity when remedy at law is incomplete.
§ 174. Injunction not granted when remedy by ejectment is adequate.
175. When mandamus not allowed in aid of judgment in ejectment.
176. Title cannot be tried in assumpsit.
177. Trial of title in condemnation proceedings.
178. Distinction between trespass *quare clausum fregit* and ejectment.
179. When ejectment and not action to remove cloud on title proper remedy.
180. Ejectment converted into action to redeem and foreclose mortgages.
181. Action to determine conflicting claims to land changed by amendment into ejectment.
182. Equitable relief not awarded in ejectment.
183. Writs of entry, and forcible entry proceedings, changed by amendment to ejectment.
184. Reasons for mistakes in selecting remedies.

§ 162. *Character and scope of ejectment.*—The selection of the remedy, appropriate to the character of the injury to real property for which redress is sought, is often a difficult and delicate task. The fundamental rule that ejectment can be maintained only for corporeal estates or interests has already been fully considered, and should never be overlooked. The cases in which the relief peculiar to ejectment has been refused in other actions or forms of procedure will now be discussed. A review of these cases, and of the reasons upon which the decisions are based, will illustrate more clearly the character of ejectment, and its statutory substitutes, and show the extent to which the remedy is favored by the courts.

§ 163. *When ejectment, and not a suit to obtain construction of a will, the appropriate remedy.*—In Post *v.*

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Hover,[1] the New York Court of Appeals held that the heirs at law of a testator did not possess the right to institute a suit to settle the construction of a will; that if the provisions of the instrument are void, the proper remedy of the heirs is to bring a direct action, in the nature of ejectment, to recover the shares to which they claim to be entitled. This case follows the opinion of Chancellor Walworth in Bowers *v.* Smith,[2] which holds that an heir at law of a testator, or a devisee who claims a mere legal estate in real property, unconnected with any trust, will not be allowed to come into a court of equity merely for the purpose of obtaining a judicial construction of the provisions of a will. The decision of such legal questions belongs exclusively to courts of law, unless they arise incidentally in a court of equity in the exercise of its legitimate powers, as where trustees seek instructions or directions as to the proper execution of the trust. In Bailey *v.* Briggs,[3] the action was brought to obtain the judicial construction of a clause in a will devising real estate. The complaint averred an interest in the lands; set forth the will under which the interest was claimed; stated that some of the defendants claimed an estate in the same land under the same will, and that a diversity of opinion existed between the plaintiff and the defendants in relation to the construction of the devise, and the testator's intention in respect to it, and concluded with a prayer for the construction of the will, and for a judgment declaring the plaintiff to be vested with the fee of the land. The court held that the complaint did not state facts conferring jurisdiction upon a court of equity to entertain the case as one asking for the construction of a will. Folger, J., said: "It is when the court is moved in behalf of an executor, trustee, or *cestui que trust*, and to ensure a correct administration of the power conferred by a will, that juris-

[1] 33 N. Y. 593–602; affi'g s. c. 30 Barb. (N. Y.) 312.
[2] 10 Paige's Ch. (N. Y.) 193.
[3] 56 N. Y. 407; Weed *v.* Root, 14 Weekly Dig. (N. Y.) 90.

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diction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts. There is nothing of that sort here. The title and possession of the plaintiff is purely a legal one. The title of the defendants, if they have any, is of the same kind. There is no trust to be enforced, nor a trustee to be directed."

§ 164. *Summary proceedings not proper where the title is involved.*—In a case recently decided in the Supreme Court of Georgia, it appeared that the plaintiff's intestate, who had owned the premises, had formerly resided on them with the defendant; that she died leaving the defendant in possession, and that her administrator sued out summary proceedings to dispossess him. The defendant set up that he had been lawfully married to the plaintiff's intestate, and claimed to hold as her heir. The court decided that the proper method of settling this question of title, which involved the validity of the marriage, was an action of ejectment, and not summary proceedings.[1]

§ 165. *When specific performance cannot be maintained.*—In Jones *v.* Boyd,[2] in the Supreme Court of North Carolina, the vendor of real property, before the last installment of the purchase money was due, brought a suit for specific performance against a vendee in possession, who had defaulted on some of the installments of the purchase-money. It was decided that the remedy was prematurely sought, and ancillary relief in the action was denied, the court saying, however, that the vendor could have maintained ejectment, and protected the property from waste or destruction by any appropriate provisional remedy.

§ 166. *Partition not a substitute for ejectment.*—The Court of Appeals of New York, have decided that an action for partition cannot be made a substitute for ejectment,

[1] Cassidy Admr. *v.* Clark, 62 Ga. 412.
[2] 80 N. C. 258.

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or other action to establish the legal title of adverse claimants to real property. The title of the parties should be first established by the proper action before partition proceedings are instituted.[1] The doctrine of these cases commends itself as sound; the right to partition is based upon a common and not a disputed title or ownership, and the remedy of partition is not adapted to the trial of questions of title. The same principles prevail in other States.[2] It has been said, however, in Wallace *v.* Harris,[3] that the reason for remitting the investigation of conflicting questions of title to a common law court, was one of policy and fitness, and did not arise from any want of inherent power in a court of equity; and where the title had been adjudicated in an action of partition, the judgment should be allowed to stand, especially if the specific objection had been waived, by a failure to urge it, in the court of original jurisdiction.

§ 167. *Defect in title or adverse title must be disclosed to defeat partition.*—But the jurisdiction of equity, to make partition of lands, cannot be defeated by the simple allegation that defendant holds adverse possession, when, in point of fact, he does not, for if this were allowed equity could be defeated at any time, in the exercise of its jurisdiction, by a false allegation in the answer.[4] If the defendant sets up an adverse title, or disputes the complainant's title, he must dis-

[1] Van Schuyver *v.* Mulford, 59 N. Y. 426; Florence *v.* Hopkins, 46 N. Y. 182. Under the New York Code of Civil Procedure, § 1543, in certain cases, questions of title may now be determined in partition proceedings.

[2] Longwell *v.* Bentley, 2 Phila. (Penn.) 157 [284]; Thomas *v.* Garvan, 4 Dev. (N.C.) 223; Jenkins *v.* Van Schaack, 3 Paige Ch. (N. Y.) 243; Longwell *v.* Bentley, 3 Grant's Cases (Penn.), 177; Adam *v.* Ames Iron Co. 24 Conn. 230; O'Dougherty *v.* Aldrich, 5 Denio (N. Y.), 385; Clapp *v.* Bromagham, 9 Cowen (N. Y.), 530; Bonner *v.* Propr's Kennebeck Purchase, 7 Mass. *475; Albergottie *v.* Chaplin, 10 Rich. Eq. (S. C.) 428; Forder *v.* Davis, 38 Mo. 107; Gravier *v.* Ivory, 34 Mo. 522; McMasters *v.* Carothers, 1 Penn. St. 324; Conyers *v.* Davis, 11 R. I. 527; Currin *v.* Spraull, 10 Gratt. (Va.) 145; Daniel *v.* Green, 42 Ill. 471; Hoffman *v.* Beard, 22 Mich. 59; Hassam *v.* Day, 39 Miss. 392; Shearer *v.* Winston, 33 Miss. 149.

[3] 32 Mich. 380–390.

[4] Hudson *v.* Putney, 14 W. Va. 561.

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cover his own title or show wherein the complainant's title is defective. And when the titles are spread before the court upon the pleadings, if the court can see that there is no valid legal objection to the complainant's title, it may proceed to decree partition.[1]

§ 168. *Bill in equity to recover possession, when not allowed.*—In the case of Cavedo *v.* Billings,[2] in the Supreme Court of Florida, it was decided that a bill in equity to recover the possession of lands claimed under a legal title, and for mesne profits, and to set aside certain tax deeds and certificates as illegal and fraudulent, could not be entertained, as the remedy at law was full and adequate. The proper redress was held to be an action of ejectment, in which the illegal and fraudulent character of the deeds or muniments of title could be shown, and the entire relief sought in the bill secured.

§ 169. *Ejectment bills.*—Attempts have frequently been made to obtain the relief peculiar to ejectment, by means of a bill in equity, commonly called an ejectment bill. Such a pleading is demurrable, for the proper redress is at law.[3] This is especially so if, upon the face of the bill, the plaintiff's right to draw a declaration in ejectment is clear. And a court of equity has no jurisdiction to entertain a bill in equity, brought by one tenant in common against an alleged co-tenant, to obtain the possession and enjoyment of mining rights and privileges, founded on a legal title, until those rights have been established at law.[4] Under our modern Code practice, however, as we shall presently see,

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[1] Lucas *v.* King, 2 Stock. Ch. (N. J.) 277; Overton *v.* Woolfolk, 6 Dana (Ky.), 371.

[2] 16 Fla. 261. See Haythorn *v.* Margarem, 3 Hals. Ch. (N. J.) 324; Lee *v.* Simpson, 29 Wis. 333; Gray *v.* Tyler, 40 Wis. 579.

[3] Loker *v.* Rolle, 3 Ves. Jr. 4, and note; Renison *v.* Ashley, 2 Ib. 459-461; see Tillmes *v.* Marsh, 67 Penn. St. 507, per Sharswood, J.; Young *v.* Porter, 3 Woods C. C. 342.

[4] North Penn. Coal Co. *v.* Snowden, 42 Penn. St. 488; Frisbee's Appeal, 88 Penn. St. 144.

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legal and equitable relief may, in some States, be had in the same action.[1] Thus, in New York, it has been held to be settled practice to allow a plaintiff, in an action to recover real property, claiming under a defective deed, and showing sufficient grounds for its reformation, to secure the same relief as if he had brought two actions: one to reform the instrument, the other to enforce it as reformed.[2]

§ 170. *Ejectment not maintainable in the form of a bill in chancery.*—In Lewis *v.* Cocks,[3] the Supreme Court of the United States decided that an action of ejectment could not be maintained in the form of a bill in Chancery. This principle, in English equity jurisprudence, was declared to be as old as the earliest period in its recorded history.[4] And though the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless, if it clearly existed, it was the duty of the court *sua sponte* to recognize it, and give it effect.[5] In such cases the adverse party has a constitutional and common law right to a trial by jury, of which he will not be deprived in cases where the redress at law is complete.[6] Furthermore, questions affecting the title can be better tried at law than in equity, and if it be desired to have any rulings of the court below brought to the Supreme Court for review, such questions can be more effectually presented by bills of exception, and a writ of error, than by depositions, and an appeal in equity.

§ 171. *Equitable title will not support ejectment bill.*—Young *v.* Porter,[7] decided by Mr. Justice Bradley of the

[1] Lattin *v.* McCarty, 41 N. Y. 107; Broiestedt *v.* South Side R. R. Co. 55 N. Y. 220; Van Deusen *v.* Sweet, 51 N. Y. 378; Phillips *v.* Gorham, 17 N. Y. 270; see McTeague *v.* Coulter, 6 J. & S. (N. Y.) 208.

[2] Laub *v.* Buckmiller, 17 N. Y. 626.

[3] 23 Wall. 466. But see Almony *v.* Hicks, 3 Head (Tenn.), 39; Irvine *v.* McRee, 5 Hum. (Tenn.) 554.

[4] Spence's Jurisdiction of Courts of Chancery, 408, note b; Ib. 420, note a.

[5] Ib. citing Hipp *v.* Babin, 19 How. 278.

[6] Ib.; Tillmes *v.* Marsh, 67 Penn. St. 507; Hipp *v.* Babin, 19 How. 278.

[7] 3 Woods C. C. 342.

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United States Supreme Court, sitting at circuit, was a bill in equity to recover land of which the defendants were in possession. Complainants admitted that they did not have the legal title, and claimed only the equitable title, and this constituted their sole ground for coming into a court of equity. There was no allegation that the defendants had the legal title, nor were any facts stated tending to show that they were affected by the equities set up by complainants, the bill merely charging that defendants had wrongfully possessed themselves of the land, and were cutting timber and committing other waste thereon. The bill was characterized as being a mere ejectment bill, the only pretence for bringing which, in a court of equity, was, that the complainants could not maintain an action at law. The court, conceding this proposition, held that it did not prove that a suit in equity could be maintained for that purpose. Complainants could not maintain a suit which was the equivalent of an ejectment, merely because their title was only an equitable one. In addition some connection must be shown between the parties; facts proving that defendants had procured the legal title with notice of complainants' equities, or were in some respect guilty of fraud, or want of equity towards complainants, in withholding the possession, before relief in equity could be afforded. In Fussell *v.* Hughes,[1] decided by Justice Matthews of the United States Supreme Court, sitting at circuit, it was held, that a bill could not be maintained for the recovery of possession of land which asserted no equity against the defendants in possession, but alleged that they were in possession of the premises, which in equity belonged to the complainant, and the legal title to which was in the United States. The proper remedy of the complainant, the court said, was to clothe the equity with the legal title, by a proper application to the public officers of the government for a patent, and then to proceed at law to recover the possession.

[1] 8 Fed. Rep. 384.

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§ 172. *Party vested with legal and equitable estate cannot proceed in equity.*—Where the plaintiff holds both the legal and equitable title he can, of course, assert his rights in ejectment, and will not be permitted to resort to equity.[1]

§ 173. *Jurisdiction in equity when remedy at law is incomplete.*—Romero *v.* Munos,[2] decided in the Territorial Court of New Mexico, and recently reported, furnishes a curious contrast to the case of Cavedo *v.* Billings above cited. The plaintiff had successfully prosecuted an ejectment against defendant, and the sheriff had placed her in possession of the premises. Subsequently, the defendant, in contempt and disregard of the judgment in ejectment, entered upon and took possession of the land, and pulled up and destroyed the complainant's crops planted and growing upon it. Complainant filed a bill praying for an injunction enjoining the defendant from molesting, disturbing, harassing, or driving complainant away from the possession of her lands, and also asking that she be restored to the possession, and secured against future disturbance. The court held that equity obtained jurisdiction where the remedy at law was not plain, adequate, and complete; that it was not always a sufficient reason for denying jurisdiction in equity that there was a remedy at law; and that if the remedy at law failed in some essential quality the aid of equity might be invoked. The complainant had, it was said, pursued her remedy by ejectment, and all that could be accomplished for her in that action had been done; complete execution had been had, and the cause ended. Equity, it was declared, would not leave the complainant to repeat the ejectment, nor remit her to the doubtful redress of a forcible entry proceeding, but on the contrary, as jurisdiction in equity was often exercised to restrain the commission of threatened trespasses, the facts of this case were ample to

[1] Odle *v.* Odle, 73 Mo. 289.

[2] 1 New Mexico R. 314. See Broiestedt *v.* South Side R. R. Co. 55 N. Y. 220.

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sustain an injunction. In some of the States, as will be shown presently, an alias writ of possession is awarded to cover cases of this character.[1]

§ 174. *Injunction not granted when remedy by ejectment is adequate.*—Though an injunction is occasionally issued to restrain constantly repeated trespasses, requiring a succession of actions, yet this remedy cannot be resorted to in cases where ejectment would restore the complainant to all his rights.[2] Hence, where the defendant was a railroad corporation, the court declined to restrain the daily running of its trains, as the injunction would cause great inconvenience to the public, but remitted the complainant to his remedy at law, by ejectment and for mesne profits.

§ 175. *When mandamus not allowed in aid of judgment in ejectment.*—In *ex parte* French,[3] it appeared that judgment in ejectment and for mesne profits, aggregating $6,000, was rendered against a number of defendants who were respectively in the separate possession of specific parcels of land. A writ of error was sued out by all the defendants. Two of the defendants, to render it a *supersedeas* of the judgment, severally gave a bond. The plaintiff applied for a mandamus to have the judgment carried into effect on the ground that if the defendants were entitled to a stay, independently of each other, each must sue out a separate writ of error. The Supreme Court of the United States decided that there was no reason why all the defendants might not join in the writ, and make separate applications when they asked for a stay. But, even if the writ was informal, the remedy was by motion to vacate the writ, and

[1] See chapter on Writ of Possession.

[2] Stevens *v.* Erie Railway, 6 C. E. Green (N. J.), 259–264; see Deere *v.* Guest, 1 Myl. & C. 516. As to the jurisdiction of equity to restrain trespasses, see Echelkamp *v.* Schrader, 45 Mo. 505; Mayor, &c. *v.* Groshon, 30 Md. 436; Livingston *v.* Livingston, 6 Johns. Ch. (N. Y.) 497, per Chancellor Kent; see, also, Murphy *v.* Norton, 61 How. Pr. (N. Y.) 197.

[3] 100 U. S. 1.

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not by mandamus to have the judgment carried into execution.

§ 176. *Title cannot be tried in assumpsit.*—In Richardson *v.* Richardson,[1] recently decided in the Supreme Court of Maine, the principle is reaffirmed, that where the relation of tenants in common is claimed to exist, and one tenant has evicted his companion, the disseizee cannot maintain assumpsit against the disseizor for rents claimed to have accrued during the period of the disseizin. Possession under an adverse claim of title negatives the idea of a promise to pay rent. The disseizor is a wrong-doer against whom a writ of entry or trespass for mesne profits in proper cases will lie, but the disseizee does not have the freehold or possession, on which he must rely in order to prove a promise to pay rent to him. The disseizor is a trespasser and cannot be treated as a tenant. The tort cannot be waived for the purpose of trying title to land, in an action of assumpsit, the general rule being that the right of inheritance, or questions of conflicting titles, must be settled in appropriate actions, devised for that purpose.

§ 177. *Trial of title in condemnation proceedings.*—It has been held in the Supreme Court of California, that conflicting titles to land cannot be tried in condemnation proceedings, and that the parties in actual possession, claiming title, are presumed to be the owners of the land, and are entitled to compensation before the lands can be taken for public use.[2] This subject, however, is largely regulated by statute in the different States.[3]

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[1] 72 Me. 403. See Bigelow *v.* Jones, 10 Pick. (Mass.) 161; Monroe *v.* Luke, 1 Met. (Mass.) 459–465; Miller *v.* Miller, 7 Pick. (Mass.) 133 [138]; Baker *v.* Howell, 6 S. & R. (Penn.) 475; Lady Windsor's Case, 4 Burr. 1985; Sampson *v.* Shaeffer, 3 Cal. 196, and cases cited; Bockes *v.* Lansing, 74 N. Y. 437; Van Alstine *v.* McCarty, 51 Barb. (N. Y.) 326.

[2] Sacramento Valley R. R. Co. *v.* Moffatt, 7 Cal. 577; see Wilcox *v.* Oakland, 49 Cal. 29; Curran *v.* Shattuck, 24 Cal. 427.

[3] See Mills on Eminent Domain, § 160, and succeeding sections.

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§ 178. *Distinction between trespass quare clausum fregit and ejectment.*—The distinction between trespass and ejectment has already been noticed, and it seems to be clearly established that trespass *quare clausum fregit* cannot be employed as a substitute for ejectment.[1] The injury to support an ejectment must be something more than a trespass; it must amount to a disseizin.

§ 179. *When ejectment and not action to remove cloud on title proper remedy.*—In Bockes *v.* Lansing,[2] it appeared that one George Webster, in 1846, made a general assignment of his property, including the lands in dispute, to one Russell, who, in 1847, conveyed the same to Simeon D. Webster. In 1859, George Webster and his wife also executed a conveyance of the same premises to Simeon D. Webster, and plaintiffs claimed to have acquired this title. In 1861 a receiver, appointed in supplementary proceedings instituted by a judgment creditor of George Webster, sold the lands to one Humphrey, through whom the defendants, who were in possession, claimed title. Plaintiffs brought an action to have the receiver's deed set aside and cancelled, as being irregular and a cloud upon his title, and for possession and an accounting as to the rents and profits. It was held that the action could not be maintained, as the receiver's sale and deed were subsequent to the conveyance under which plaintiffs claimed, and that only an instrument or proceeding which, on its face, purported to create or convey a title or estate paramount to that of the party seeking relief, or to constitute an apparently prior incumbrance thereon, could be set aside as a cloud upon the title of a plaintiff in possession.[3] The argument was advanced by counsel that, as all the facts appeared, the court should disregard the form of the pleadings, and adjudge the proper relief; but it was

[1] Corley *v.* Pentz, 76 Penn. St. 57; see Jackson *v.* Pike, 9 Cowen (N. Y.), 69; Potter *v.* City of New Haven, 35 Conn. 520, 522. See § 93.

[2] 13 Hun (N. Y), 38; affi'd 74 N. Y. 437.

[3] See Gunderson *v.* Cook, 33 Wis. 551.

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decided that this remedial rule could not be carried to that extent, and that neither the court nor referee had the power to amend the complaint so as to change the cause of action from one for equitable relief to one in ejectment.

§ 180. *Ejectment converted into action to redeem and foreclose mortgages.*—The suggestion was not, however, entirely unreasonable, for in the case of the Madison Avenue Baptist Church against the Oliver Street Baptist Church,[1] an action of ejectment was brought against a mortgagee in possession, but by answer, supplemental pleadings and subsequent proceedings, the title being found in the plaintiff, the action was substantially turned into an action on the part of the plaintiff to redeem from the mortgages, and on the part of the defendant to foreclose them.

§ 181. *Action to determine conflicting claims to land changed by amendment into ejectment.*—In Brown *v.* Leigh,[2] in the New York Court of Appeals, it was decided that a plaintiff could, as a matter of right, under the practice in that State, amend his complaint, which was framed to compel the determination of conflicting claims to real property, so as to set forth a cause of action in ejectment.

§ 182. *Equitable relief not awarded in ejectment.*—In Vrooman *v.* Jackson,[3] in the New York Supreme Court, on the other hand, it was decided, that where the complaint was ejectment, the plaintiff could not be allowed to amend upon the trial and proceed with the same effect as though the action had been brought to restrain an alleged unlawful interference with a right incident to property in possession.

§ 183. *Writs of entry, and forcible entry proceedings, changed by amendment to ejectment.*—In Fay *v.* Taft,[4] decided in the Supreme Court of Massachusetts, it appeared

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[1] 73 N. Y. 82–95.
[2] 49 N. Y. 78.
[3] 6 Hun (N. Y.), 326. See Broiestedt *v.* South Side R. R. Co. 55 N. Y. 220.
[4] 12 Cush. (Mass.) 448. See Merrill *v.* Bullock, 105 Mass. 486.

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that the demandant was entitled to a legal estate in the premises, but only for a term for years. As the estate was less than a freehold, it was held that a writ of entry would not lie. Leave was granted to amend the writ by changing it into an action of ejectment for a term. The later case of Merrill *v.* Bullock[1] was a proceeding under the forcible entry and detainer statutes of Massachusetts,[2] and was submitted upon an agreed state of facts. It was decided that, as a cause of action under these statutes, the court had no jurisdiction of the proceeding, but upon the authority of Fay *v.* Taft, above cited, the plaintiff was allowed to change the writ into an action of ejectment, and to recover the term to which, by the agreed state of facts, he was held to be entitled.

§ 184. *Reasons for mistakes in selecting remedies.*—It is, perhaps, unnecessary to further multiply this collection of blunders in the selection of the forms of action suitable to test the title to land. Radical changes, such as have been adopted to secure the modern system of civil procedure, are certain to result, at first, in confusion and mistakes in pleading, and stating causes of action, and framing prayers for relief. These errors result in part from the habit of ignoring the landmarks between legal and equitable rights and interests, and overlooking the importance of substantially preserving the ancient and necessary distinctions as to the manner of pleading and asserting equitable rights and titles. While it is true that legal and equitable rights can, in many States, be adjudicated in the same forum and in one action,[3] it by no means results that the distinctions in pleading and in the nature of the relief afforded have been abrogated. No infallible rules can be formulated to govern in selecting the appropriate remedy. We suggest, in addition to the

[1] 105 Mass. 486. See Ferguson *v.* Kumler, 25 Minn. 183.

[2] Gen. Sts. of Mass. c. 137.

[3] See Laub *v.* Buckmiller, 17 N. Y. 626; Lattin *v.* McCarty, 41 N. Y. 107; Broiestedt *v.* South Side R. R. Co. 55 N. Y. 220.

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tests already furnished, that when the facts render the selection of the form of action doubtful, and the title to a corporeal estate in land is involved, it is safer to adopt a remedy in the nature of ejectment, in preference to other less comprehensive, and less favored, forms of procedure.

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CHAPTER VI.

PARTIES PLAINTIFF.

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§ 185. *Who may maintain actions in the nature of ejectment.*—The character of the estate which will support the class of actions which we are discussing, is, in some States, a matter of statutory regulation. As a general rule, any person owning an estate in lands in fee, for life, or for years, having a present right of entry, or any person vested with a right to the immediate possession, incident to some corporeal estate or interest in lands, can maintain an action in the nature of ejectment.

§ 186. *Statutory remedies cumulative.*—When the common law furnishes a remedy, and another is provided by statute, the latter is cumulative unless made exclusive by the

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statute,[1] and as the pleadings are not usually published in the reports of cases, it is often difficult to determine whether the action was framed under the statute, or brought at common law, the word ejectment being sometimes applied indiscriminately. A general tendency to uniformity exists, in the legislation and decisions in the several States, but it is impossible to formulate any rule to govern in determining what persons may prosecute actions in the nature of ejectment, which will not be subject to frequent exceptions, modifications, and limitations. A classification of the particular parties who can maintain these actions, accompanied by a statement of the reasons controlling the decisions in particular cases, is therefore essential.

§ 187. *Joinder of plaintiffs.*—The general rule is that only persons may join in bringing an action at law whose interests are joint or united.[2] Hence, on a joint demise, the title proved must be joint, or the plaintiffs cannot recover.[3] To sustain an ejectment, as already shown, the plaintiff must establish a right of possession *in præsenti* to the premises described in the complaint. If several plaintiffs count upon a joint title and right of possession, the same principle applies. The right of possession must exist in each and all of the plaintiffs, or they cannot recover.[4] If one of the plaintiffs has no title the co-plaintiffs cannot recover, though they may be vested with the whole title,[5] for the joinder of too many plaintiffs is ground for nonsuit on the trial, whether the action be for a tort or on contract.[6] In trespass by joint tenants, Judge Story declared it to be a settled rule that all

[1] Candee *v.* Hayward, 37 N. Y. 653; Wetmore *v.* Tracy, 14 Wend. (N. Y.) 250, and cases cited.

[2] See McKenzie *v.* L'Amoureux, 11 Barb. (N. Y.) 516; Pomeroy's Remedies and Remedial Rights, §§ 190–203.

[3] Taylor *v.* Taylor, 3 A. K. Mar. (Ky.) 19; Hoyle *v.* Stowe, 2 Dev. (N. C.) 318; Tucker *v.* Vance, 2 A. K. Mar. (Ky.) 458; Teal *v.* Terrell, 48 Tex. 491.

[4] Cheney *v.* Cheney, 26 Vt. 606; see Dickey *v.* Armstrong, 1 A. K. Mar. (Ky.) 39; De Mill *v.* Lockwood, 3 Bla. C. C. 56–61.

[5] De Mill *v.* Lockwood, 3 Bla. C. C. 56–61; Murphy *v.* Orr, 32 Ill. 489.

[6] Murphy *v.* Orr, 32 Ill. 489.

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the plaintiffs must be competent to sue, otherwise the action could not be supported.[1] In Massachusetts it has been held, on a writ of entry brought by tenants in common under the statute, that if the right of either joint demandant proved defective, the action must fail,[2] unless an amendment was allowed, before verdict, striking out the name of the demandant who was not entitled to recover.

§ 188. *Hostile claimants cannot join.*—It has been held in New York that two persons, each claiming the whole of a parcel of land, by titles derived from different sources, hostile to each other, cannot unite as plaintiffs, and set forth their separate titles, in ejectment against a third party in possession.[3] The Code of that State has abolished the early practice of naming several lessors, and setting forth various and hostile demises in separate and distinct counts.

§ 189. *Other cases of misjoinder.*—An executor cannot join with the devisees under the will to recover lands of the testator;[4] nor can the widow join with the heirs in ejectment, and if she is joined the latter cannot recover alone.[5] Towns claiming as tenants in common cannot join in a writ of entry.[6] In New York the people and certain individuals claiming to be their tenants, cannot unite in an action to recover land.[7] Reversioners must all join.[8] The general principles which underlie these cases seem to be that hostile claimants cannot be co-plaintiffs, and the absence of a joint

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[1] Marsteller *v.* M'Clean, 7 Cranch, 156.

[2] Chandler *v.* Simmons, 97 Mass. 508; Oxnard *v.* Kennebeck Purchase, 10 Mass. 179.

[3] Hubbell *v.* Lerch, 58 N. Y. 237; S. C. below, 62 Barb. (N. Y.) 295; see St. John *v.* Pierce, 22 Barb. (N. Y.) 362; affi'd in Court of Appeals, 26 How. Pr. 599.

[4] Tarver *v.* Smith, 38 Ala. 135.

[5] Pringle *v.* Gaw, 5 S. & R. (Penn.) 536; Gourley *v.* Kinley, 66 Penn. St. 270.

[6] Rehoboth *v.* Hunt, 1 Pick. (Mass.) 224.

[7] People *v.* Mayor, &c. 10 Abb. Pr. (N. Y.) 111.

[8] Cook *v.* St. Paul's Church, 5 Hun (N. Y.), 293; affi'd 67 N. Y. 594. Parties refusing to join as plaintiffs, may generally, under the modern systems of procedure, be made defendants. McAllen *v.* Woodcock, 60 Mo. 174; see Bliss on Code Pleadings, §§ 77, 78.

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or common interest in all the plaintiffs is fatal to a recovery by those who are properly joined. The difficulties resulting from a joinder of too many plaintiffs may be averted, in some cases, by invoking the power of amendment, so liberally provided by the modern codes of procedure and systems of practice.

§ 190. *Grantee suing in grantor's name.*—Statutes, rendering void for champerty deeds executed by a party out of possession of lands, held adversely by a third party, are in force in many of our States. The adverse possession, to avoid a deed upon this ground, must generally be under a claim of some specific title, and not a mere general assertion of ownership,[1] and must be actual as distinguished from constructive possession.[2] These statutes, which will be more fully noticed hereafter, have certainly outlived their usefulness, and no substantial reason can be assigned for their further retention as a part of the statute law of this country. They were originally introduced partly upon the theory that it would be dangerous to permit the transfer of disputed or "fighting" titles, lest powerful and influential persons might purchase and use such titles as a means of oppressing poor people. There is, however, at the present day, but little reason to apprehend evils of this character; it may be safely asserted that the influence of litigants has but little weight in controlling the decisions of our courts. Because a party vested with the title to land is deforced of the possession, by the illegal act of a wrong-doer, the law should not supplement this wrong by further depriving him of the power to sell or convey the title. But stronger reasons can be assigned in favor of the general repeal of these statutes. They are nearly a dead letter, for, under the decisions, the deed is not held to be void as a contract between the parties, or at least is enforced by applying the doctrine

[1] Crary *v.* Goodman, 22 N. Y. 170; Matter of Department of Parks, 73 N. Y. 560; Higinbotham *v.* Stoddard, 72 N. Y. 94; Williams *v.* Rawlins, 33 Ga. 117.

[2] Dawley *v.* Brown, 79 N. Y. 390.

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of estoppel, and is construed to be a power of attorney, authorizing the grantee to use the grantor's name, as plaintiff in ejectment, to recover the lands even against the will of the latter, so that the only practical result attained by the statutes is a variation of the form of the action as regards the parties.[1]

§ 191. *Ejectment by the king.*—Ejectment at common law was a method of redressing injuries not considered "consistent with the royal prerogative and dignity." "As, therefore," says Blackstone, "the king, by reason of his legal ubiquity, cannot be disseized or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize or an ejectment."[2] The constitutional court of South Carolina, following this principle, held that the State of South Carolina, having succeeded to the prerogatives of the king of Great Britain, the analogy between the State and the king held good, and that the State could not maintain trespass to try title. The court further declared that it would seem inconsistent to prosecute the tenant in possession, as he constituted one of the artificial body which sued as plaintiff.[3] This rule was enforced in England only when the king himself was plaintiff. *Ejectione firmæ* was given to the king's lessee to punish a trespass, and recover the possession of which the lessee had been deforced.[4] The royal prerogative, it was said, did not pertain to the lessee, and hence the reason of the rule failed.

§ 192. *Ejectment by the State or people.*—Chancellor Kent, in the early case of Jackson *v.* Winslow,[5] in the New

[1] Hamilton *v.* Wright, 37 N. Y. 502; Steeple *v.* Downing, 60 Ind. 478; Farnum *v.* Peterson, 111 Mass. 148; McMahan *v.* Bowe, 114 Mass. 140.

[2] 3 Bla. Com. *257.

[3] State *v.* Stark, 2 Bre. (S. C.) 245, *101; see State *v.* Arledge, 1 Bailey (S. C.), 551; see People *v.* Livingston, 8 Barb. (N. Y.) 253.

[4] Lee *v.* Norris, Cro. Eliz. 331. See Payne's Case, 2 Leon. 205.

[5] Jackson *d.* Miller *v.* Winslow, 2 John. (N. Y.) *81; see Chiles *v.* Calk, 4 Bibb (Ky.), 554.

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York Supreme Court, said, in a dissenting opinion, that "the State cannot be disseized;" but the right of a State, or of its people, to recover in ejectment lands of which it is possessed by virtue of its sovereignty, or which have reverted or escheated to it from defect of heirs, is, in this country, generally conferred by constitutional provision or statute, and has been sustained in many cases.[1] When the State, as sovereign, possesses the original and ultimate property in all lands within its jurisdiction, it occupies, in ejectment proceedings, a position somewhat more advantageous than that of an ordinary plaintiff, for it has only to show that within a period necessary to constitute an adverse possession against the State, the disputed lands were vacant and unoccupied, and that the defendant subsequently entered or made claim to them.[2] Indeed, the proposition was strenuously contended for by counsel, in the case of The People *v.* Rector, &c., of Trinity Church,[3] that the State is presumptively the owner of all the land within its borders, and consequently, in an action of ejectment, is always entitled to recover, on proving the defendant to be in possession, unless the latter repels the presumption, by showing that it does not own the particular premises in controversy. This proposition was based: First, upon the Constitution of the State of New York, which declares that the people, in their right of sovereignty, are deemed to possess the original and ultimate property, in and to all lands within the jurisdiction of the State; and Second, upon the admitted principle that in ejectment between private parties, where the plaintiff has been shown to have

[1] People *v.* Rector, &c., Trinity Church, 22 N. Y. 44; People *v.* Rensselaer, 9 N. Y. 319; Wendell *v.* The People, 8 Wend. (N. Y.) 183; People *v.* Livingston, 8 Barb. (N. Y.) 253; The People *v.* Conklin, 2 Hill (N. Y.), 67, per Nelson, J. People *v.* Denison, 17 Wend. (N. Y.) 312; see James River & Kan. Co. *v.* Thompson, 3 Gratt. (Va.) 270; see Coburn *v.* Ames, 52 Cal. 385.

[2] People *v.* Van Rensselaer, 9 N. Y. 291–319; Wendell *v.* The People, 8 Wend. (N. Y.) 183; The People *v.* Denison, 17 Wend. (N. Y.) 312; see People *v.* Arnold, 4 N. Y. 508; People *v.* Rector, &c., Trinity Church, 22 N. Y. 44.

[3] People *v.* Rector, &c., Trinity Church, 22 N. Y. 44.

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been once the owner, the defendant must prove where and how the title has become divested, or establish title by adverse possession. The New York Court of Appeals held, however, in an able opinion written by Chief Justice Comstock, that the provision of the Constitution, above cited, was a mere declaration of political sovereignty, and was not to be regarded as a rule of evidence, and that the people, when they sue in ejectment, are not wholly relieved from the operation of the rule that the person in possession is supposed to have acquired the title which the people, or the sovereign, once held. This presumption is shifted only by showing that the lands have been vacant within forty years.

§ 193. *When the people cannot recover.*—In the case of The People *v.* The New York and Manhattan Beach Railway Company,[1] a curious question as to the right of the people to maintain ejectment was considered by the New York Court of Appeals. By statute in that State,[2] a right of action was given to the people in cases "where any money, funds, credits or *property* * * held or owned, officially or otherwise, for or on behalf of any public or governmental interest, by any municipal or other public corporation, board * * [or] village * * has heretofore, without right, been obtained, received, converted or disposed of, and not actually recovered back and restored prior to the passage of this act." The statute in question, it may be observed, was enacted in view of the fact that the city of New York had been grossly defrauded by the acts of municipal officers, and others acting in collusion with them, and that large sums of money had been taken from the municipal treasury in the perpetration of the frauds thus committed. These sums the city or county had the right to recover, but resort to this method of redress was embarrassed by the fact that the city and county governments were under the

[1] 84 N. Y. 565.

[2] Laws of New York, 1875, ch. 49.

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control of the guilty participants in the frauds. Hence arose the necessity for the enactment of the statute. It was held, in the case under consideration, that the circumstances which led to the enactment of a statute might properly be considered in aid of its interpretation.[1] The complaint in the action set forth that the defendant railway company had wrongfully acquired possession of the lands in controversy, and subsequently by wrongful interference, by its servants and agents, with the action of the town meeting of the town of Gravesend, and by obtaining control of the meeting by the aid and action of persons not legal or qualified voters, procured a vote to be passed authorizing the lands to be conveyed to the defendants, by the town land commissioners, for a grossly inadequate consideration, and that a conveyance had been executed in pursuance of the action of the town meeting. The complaint, among other things, demanded that the defendants be adjudged to surrender possession of the premises. The court held that an action for the recovery of real property was not within the purview of the act above cited, as the word property in the statute followed the enumeration of specific kinds of personal property. The words employed were "money, funds, credits or property." If it had been the intention of the legislature to apply the statute to all property, real and personal, obtained without right, some general and comprehensive words would naturally have been used. The word property, associated as it is with the preceding words of specific description, is to be construed as referring to property of the same general kind with that previously enumerated, upon the maxim *noscitur a sociis*. The court considered that it would be a strained construction of the statute to extend it to the recovery of real estate, belonging to a municipality, the possession of which had been wrongfully acquired, or was wrongfully withheld. Further, as the deed in question purported to be the formal act of the town, executed by its ac-

[1] Citing Tonnele *v.* Hall, 4 N. Y. 140.

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credited authorities, pursuant to a vote of a town meeting, regularly called and held, having authority to direct the alienation of the lands, the court held that the statute in question was not intended to confer jurisdiction to review, revise or set aside the proceedings of towns, in town meetings, upon allegations that the action of a town meeting was induced by corruption, intimidation or violence.

§ 194. *Outstanding Indian title.*—In the case of The People *v.* Snyder,[1] which was ejectment by the people for lands claimed to have escheated to the State by reason of alienage, the court, in answer to the suggestion of counsel for the people, that the fee of the *locus in quo* was still in the Six Nations of Indians, said that if that were true it was difficult to see why it was not entirely fatal to the plaintiff's right of recovery in the action. Clearly, the fact that the title is still in the Indians constitutes no ground of recovery by the people, and the Indians, or one occupying with their consent, could not be dispossessed from lands, the title to which had never been acquired by the State.

§ 195. *Corporations.*—At common law, in the absence of charter restrictions, or statutory prohibitions, corporations, whether created by prescription or legislative act, possess the power to purchase, hold, and convey lands, so far as may be necessary to effectuate the object of their creation. The character and amount of real property which a corporation may hold is usually limited by its charter or by statute. A corporation vested with the power, and having the capacity, to purchase land, may maintain ejectment to recover possession of it.[2] "The modern method of trying the title of land by ejectment," says Kyd,[3] "extends to corporations of every kind, whether in the character of plaintiffs or defendants." Corporations, it has been held, may by

[1] People *v.* Snyder, 51 Barb. (N. Y.) 589; affi'd 41 N. Y. 397.

[2] Henley *v.* Branch Bk. Mobile, 16 Ala. 552; see Jackson *v.* Nestles, 3 John. (N. Y.) *115.

[3] Kyd on Corporations, vol. 1, p. 187; see Angell & Ames on Corporations, §§ 370, 631; Society, &c. *v.* Wheeler, 2 Gallison, 105.

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comity bring ejectment in States other than those which granted their charters, unless expressly prohibited by the statute of such other State from so doing.[1] In Leasure *v.* Union Mutual Life Insurance Company,[2] it was decided that a foreign corporation could sue in the courts of Pennsylvania, to enforce the payment of a loan of money secured by mortgage on real estate within that State. The court remarked that the principle that a foreign corporation could contract with a citizen of that State, and enforce its contract by suit in its courts, had never been controverted.[3] But it was further said that should a foreign corporation resort to the remedy of ejectment, or become a purchaser at a sheriff's sale, a different question would arise. Even that condition of affairs could not release the debt, or destroy the validity of the title, except as against the commonwealth. By the common law alien friends could always sue, and there was no distinction in this respect between natural and artificial persons; and in so far as the opinion of the learned court intimates a doubt of ejectment by a foreign corporation being sustained, it must be regarded as in conflict with the prevailing practice.

§ 196. *Infants.*—Numerous cases hold that ejectment may be brought by an infant plaintiff, who under the early practice was entitled to make a lease, and try the title to his lands.[4] In Pennsylvania an infant has been permitted to maintain an action of ejectment in the name of his next friend,[5] but the Supreme Court in Ohio decided that the next friend of an infant could not make a demise to sustain an ejectment, as he was neither attorney nor guardian, and

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[1] New York Dry Dock *v.* Hicks, 5 McL. 111.

[2] 91 Penn. St. 491.

[3] See Bank of Augusta *v.* Earle, 13 Pet. 519.

[4] Birchman *v.* Noright, Hardw. 51; O'Byrne *v.* Feeley, 61 Ga. 77; Weems *v.* Mackall, 4 H. & M'H. (Md.) 484; Zouch *v.* Parsons, 3 Burr. [1806]; Maddon *v.* White, 2 T. R. 159. See MacPherson on Infancy, ch. xxx, pp. 352–354; Doe *d.* Miller *v.* Noden, 2 Esp. 530.

[5] Heft *v.* McGill, 3 Penn. St. 256.

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had no power to lease the lands of the infant.[1] Ejectment was, however, upheld in Maryland upon the demise of a husband and wife, although the wife was under twenty-one years of age at the time of the demise laid.[2] Of course, in States where the right of an infant to maintain an action in the nature of ejectment is recognized, a guardian *ad litem* must be appointed, so that some person may be before the court who can be held responsible for costs. The right of both the infant and his guardian to maintain ejectment for the same lands will be presently discussed. This double right of action was repudiated by the New York Supreme Court in the case of Seaton *v.* Davis.[3] This action was instituted in the infant's name by her guardian *ad litem*, to recover possession of lands from the tenant, for the life of another holding over his term, and for damages. The court held that the action could only be brought by a guardian in socage, or general guardian, and said that a minor who had a guardian in socage had no right of action to recover the possession of his lands, or the rents and profits thereof. This opinion is evidently based upon the theory that rights of action are not divisible, and cannot as a rule be vested in and enforced by different persons at the same time.[4] The court held, however, that under the then existing practice in that State the defendant, by failing to demur, had waived the objection. So it was held in New York, that an action would not lie by infants, in their own names, by a next friend, against a defendant, for intermeddling with the rents and profits of the infants' real estate. The action must be brought in the name of the guardian in socage or general guardian.[5] The New York Code of Civil Procedure, recently enacted, allows an infant to maintain a real action in

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[1] Massie *v.* Long, 2 Ohio, 287.

[2] Weems *v.* Mackall, 4 H. & M'H. (Md.) 484.

[3] 1 T. & C. (N. Y.) 91. See MacPherson on Infancy, pp. 28–35. See § 201.

[4] "There can exist at the same time but one title of entry." Botts *v.* Shields, 3 Litt. (Ky.) 33.

[5] Beecher *v.* Crouse, 18 Wend. (N. Y.) 307.

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its own name.[1] The statutory action in New York, for the determination of conflicting claims to real property, cannot be brought against an infant defendant.[2]

§ 197. *Security for costs.*—The rule laid down in Doe *v.* Alston,[3] that where an infant sues, the court will require the *prochein ami*, or guardian, to give security for costs, was declared in New Jersey to be peculiar to the action of ejectment.[4]

§ 198. *Disaffirmance of infant's deed.*—An infant who has executed a conveyance of lands during his minority, may, on coming of age, recover the lands back in ejectment, but, before bringing the action, he must disaffirm the conveyance by some notorious act, such as an actual entry, demand of possession, or notice of his election to repudiate the deed.[5]

§ 199. *Guardian in socage and general guardian.*—A guardian in socage may bring ejectment in his own name as guardian for the lands of his ward.[6] Judge Nelson, in a case in the New York Supreme Court, said: "A guardian in socage has the custody of the land of the infant, and is entitled to the profits for his benefit; he has an interest in the estate, and may lease it, and avow in his own name, and bring trespass. He is in possession by right, and may, of course, maintain an action of trespass or ejectment against any person entering upon him without right."[7] Such a

[1] New York Code of Civil Procedure, § 1686.

[2] Bailey *v.* Briggs, 56 N. Y. 407.

[3] 1 T. R. 492.

[4] Cotheal *v.* Moorehouse, 1 Zab. (N. J.) 335.

[5] Voorhies *v.* Voorhies, 24 Barb. (N. Y.) 150; Bool *v.* Mix, 17 Wend. (N. Y.) 119; Doe *d.* Moore *v.* Abernathy, 7 Blackf. (Ind.) 442.

[6] Holmes *v.* Seely, 17 Wend. (N. Y.) 75; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66; Seaton *v.* Davis, 1 T. & C. (N. Y.) 91; MacPherson on Infants, pp. 28, 35; Truss *v.* Old, 6 Rand. (Va.) 556; Wade *v.* Baker, 1 Ld. Raym. 130; Cagger *v.* Lansing, 4 Hun (N. Y.), 812, affi'd 64 N. Y. 417, approving Holmes *v.* Seely, 17 Wend. (N. Y.) 75; More *v.* Deyoe, 22 Hun (N. Y.), 208–216; Shopland *v.* Ryoler, Cro. Jac. 98; see Beecher *v.* Crouse, 19 Wend. (N. Y.) 306.

[7] Holmes *v.* Seely, 17 Wend. (N. Y.) 75; see Quadring *v.* Downs, 2 Mod. 176.

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guardian, in the language of Lord Ellenborough, "has not a mere office or authority, but an interest in the ward's estate."[1] He may maintain actions for injuries to his ward's realty. Being clothed with the duty of managing and protecting the ward's property for his benefit, the law gives him all the necessary legal remedies to accomplish these purposes.[2] Guardianship in socage has gone into disuse,[3] and is practically unknown to our law,[4] for a guardian in socage must be some relative by blood who cannot possibly inherit, and in this country such a case can rarely exist.[5] The common law right of a guardian in socage to maintain trespass and ejectment in his own name, for the possession of his ward's lands, applies to a general guardian at the present day,[6] who possesses similar powers,[7] and may bring ejectment.[8] The right of a guardian in socage,[9] general guardian,[10] or of a chancery guardian,[11] to lease his ward's real estate, is abundantly established. In Michigan a guardian cannot maintain ejectment for the lands of his ward, for his powers in that State are purely statutory, and his control over the real property is limited to leasing it, and to the reception of rents and profits.[12]

§ 200. *Guardians for nurture and by nature.*—A guardian for nurture has neither the right of property nor of pos-

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[1] King *v.* Inhabitants of Oakley, 10 East, 491.

[2] Torry *v.* Black, 58 N. Y. 185; Byrne *v.* Van Hoesen, 5 Johns. (N. Y.) 66.

[3] 2 Kent's Com. p. 224. See, however, N. Y. R. S. (7th ed.) p. 2162, § 5.

[4] Combs *v.* Jackson, 2 Wend. (N. Y.) 153.

[5] 2 Kent's Com. p. 224.

[6] 2 Kent's Com. p. 228.

[7] Thacker *v.* Henderson, 63 Barb. (N. Y.) 271; see Field *v.* Schieffelin, 7 John. Ch. (N. Y.) 150.

[8] Smith, Gen'l Gdn. *v.* Robertson, 24 Hun (N. Y.), 210.

[9] Emerson *v.* Spicer, 55 Barb. (N. Y.) 428; S. C. affi'd, 46 N. Y. 594; Snook *v.* Sutton, 5 Halst. (N. J.) 133.

[10] Richardson *v.* Richardson, 49 Mo. 29; Granby *v.* Amherst, 7 Mass. 1–6; see Huff *v.* Walker, Guardian, &c. 1 Carter (Ind.), 193.

[11] Field *v.* Schieffelin, 7 John. Ch (N. Y.) 150.

[12] Kinney *v.* Harrett, 24 Alb. L. J. 216.

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session, and, it is clear, cannot maintain the action,[1] that privilege not being extended to those guardians to whom belong the custody of the infant's person only.[2] The same principle applies to a guardian by nature.[3]

§ 201. *Ejectment by both infant and guardian.*—In Canada, under the statute 8 Geo. IV, chap. 6, which provides that guardians shall have the charge and management of the estates of their wards, real and personal, and shall appear and prosecute or defend any action in his or her name, it has been held that the guardian might maintain ejectment for the ward's lands, though the court was of opinion that the infant might also have brought the action independent of the guardian.[4] Mr. Adams says: "It is difficult to discover any principle upon which both infant and guardian can have the right of maintaining ejectment for the same lands."[5] The existence of this double authority to sue for and recover the infant's lands is certainly somewhat anomalous. Possibly, if both infant and guardian institute an ejectment at the same time, the courts can restrain one by injunction, and if both are vested with the same title and right of entry, an adjudication for or against one may be considered as controlling upon the other. Still, as already stated, there can exist but one right of entry on land at the same time, and, therefore, the case of Seaton *v.* Davis,[6] above discussed, holding that where the guardian is vested with the estate the infant cannot maintain the action, seems to embody the logical and correct rule.

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[1] Anderson *v.* Darby, 1 N. & M. (S. C.) *369; May *v.* Calder, 2 Mass. 55; Ross *v.* Cobb, 9 Yerg. (Tenn.) 463; Combs *v.* Jackson, 2 Wend. (N. Y.) 153; Magruder *v.* Peter, 4 G. & J. (Md.) 323; Bedell *v.* Constable, Vaughan, 177; see Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631.

[2] See note to Ratcliff's Case, 3 Co. 37 (vol. 2, p. 99); Combs *v.* Jackson, 2 Wend. (N. Y.) 153; Kinney *v.* Harrett, opinion per Cooley, J., 24 Alb. Law Jour. 216.

[3] Ibid.; see Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631.

[4] Doe *d.* Atkinson *v.* McLeod, 8 U. C. Q. B. 344.

[5] Adams on Ejectment (4th ed.), pp. 115, *67.

[6] 1 T. & C. (N. Y.) 91. See § 196.

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§ 202. *Guardian's powers and duties.*—The rights and duties of guardians have been declared and limited, with so much minuteness, by statute in most of our States, that clearly defined questions affecting the nature of their powers at common law rarely arise, and common law guardianship is comparatively obsolete. The tendency of modern legislation, and the decisions of the courts, in matters affecting the ward's real estate, is to clothe the guardian with only the naked authority of an agent, not coupled with any interest in the property. In Pennsylvania, a guardian ordinarily has power to lease but not to sell his ward's real property. Oil, as we have seen, is held in that State to be a mineral, and hence a part of the realty. When a deed or conveyance of the right to bore for and collect oil on the infant's lands is made by the guardian, whether the instrument be called a lease or deed, it is considered to be in effect the grant of a part of the *corpus* of the estate, and not of a mere incorporeal right, and, without the intervention and approval of the Orphan's Court, the conveyance is void.[1]

§ 203. *Committee of a lunatic.*—A committee of a lunatic cannot maintain an action of ejectment in his own name for lands of the lunatic, for the reason that the committee is not clothed or vested with an estate in the lands.[2] "No rule of law," says the Supreme Court of New York, "is better settled than that a lunatic, by the appointment of a committee, loses none of his estate, rights of property, or rights of action."[3] In North Carolina the guardian of an insane person cannot bring the action.[4] It has been held in New York that a committee of a lunatic is not the trustee of an express trust within the meaning of the Code of that State,

[1] Stoughton's Appeal, 88 Penn. St. 198.

[2] Petrie *v.* Shoemaker, 24 Wend. (N. Y.) 85; Knipe *v.* Palmer, 2 Wils. 130; Drury *v.* Fitch, Hutton, 16; *in re* Fitzgerald, 2 Sch. & Lef. 437; Burnett, as Com., &c. *v.* Bookstaver, 10 Hun (N. Y.), 481; Cox *v.* Dawson, Noy. R. 27; S. C. Hob. 215; Fulcher *v.* Griffin, Popham's R. 140.

[3] McKillip *v.* McKillip, 8 Barb. (N. Y.) 552.

[4] Brooks *v.* Brooks, 3 Ired. (N. C.) 389; see Knipe *v.* Palmer, 2 Wils. 130.

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and cannot maintain ejectment, in that capacity, for lands alleged to have belonged to the lunatic prior to the appointment of the committee.[1] "The committee," says Judge Bronson, "is a mere bailiff or servant, and the interest and right of action remain in the lunatic."[2] In Missouri, in an ejectment by an insane person in his own name, the court held that it could proceed with the action without the appointment of a guardian.[3]

§ 204. *Committee may maintain equitable action.*— Though the committee cannot prosecute a purely legal action, he may maintain a suit in equity in his own name, to which the lunatic is not a necessary party, to set aside a deed executed by the lunatic when insane.[4] This doctrine has received the sanction of Kent[5] and Walworth,[6] and is based upon an early case which maintains the principle that the lunatic should not be compelled to stultify himself, and therefore ought not to be joined in an action to cancel his own deed.[7] Though the reason from which this rule originated is an exploded doctrine the rule survives, and the practice still prevails. Even at common law, however, the committee sometimes united the lunatic with him in suits to cancel conveyances of this character,[8] and it has been held in Pennsylvania that ejectment for lands belonging to a lunatic may be brought in the name of the lunatic, as owner, or in the name of the committee alone.[9] The powers and

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[1] Burnett, Com. &c. *v.* Bookstaver, 10 Hun (N. Y.), 481.

[2] Lane *v.* Schermerhorn, 1 Hill (N. Y.), 97.

[3] Allen *v.* Ranson, 44 Mo. 263.

[4] Fields *v.* Fowler, 2 Hun (N. Y.), 400; Person *v.* Warren, 14 Barb. (N. Y.) 488; see McKillip *v.* McKillip, 8 Barb. (N. Y.) 552; Petrie *v.* Shoemaker, 24 Wend. (N. Y.) 85; Davis *v.* Carpenter, 12 How. Pr. (N. Y.) 287.

[5] Ortley *v.* Messere, 7 John. Ch. (N. Y.) 139.

[6] Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24.

[7] Palmer, Attorney-General *v.* Parkhurst, 1 Cases in Chancery, 112; see Ridler *v.* Ridler, 1 Eq. Cases, Abr. 279.

[8] Addison, per Committee *v.* Dawson, 2 Vern. 678; Ortley *v.* Messere, 7 Johns. Ch. (N. Y.) 139.

[9] Warden *v.* Eichbaum, 14 Penn. St. 121.

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duties of a committee closely resemble those of a general guardian of an infant. Our statutory policy tends to clothe him with complete control over the personalty, while his power over the realty is usually limited to leasing and the perception of profits.

§ 205. *Heirs at law.*—An heir at law may bring ejectment for lands of which his ancestor died seized.[1] Under the old practice the demise was laid on the day the ancestor died, for if the ancestor died at five o'clock, the heir might enter at six and make a valid lease at seven.[2] The heir may have the action though the ancestor died out of possession,[3] or was holding by adverse possession,[4] and a writ of right by the heir may be supported though the ancestor was disseized at the time of his death.[5] The heirs of a trustee may maintain ejectment, the action not being adverse to the interests of the *cestui que trust.*[6] After the death of the widow, the heirs may bring an action, in the nature of ejectment, for lands of which the ancestor died seized and which were assigned to the widow as dower.[7] Heirs at law hold as tenants in common, and one of several heirs can recover in ejectment, though the others entitled equally with him do not join in the action.[8] In California the heir has the right of entry upon the real estate left by his ancestor, subject only to the administrator's statutory right of possession, and where a considerable period has elapsed, and there has been no administration, the heir may bring ejectment.[9] No entry is necessary; it is sufficient to

[1] Buck *v.* Squiers, 22 Vt. 484; Uhrick *v.* Beck, 13 Penn. St. 639; Tapscott *v.* Cobbs, 11 Gratt. (Va.) 172; Updegraff *v.* Trask, 18 Cal. 458; Carruthers *v.* Bailey, 3 Ga. 105.

[2] Roe *d.* Wrangham *v.* Hersey, 3 Wils. 274.

[3] Webster *v.* Webster, 53 Penn. St. 161.

[4] Hanna *v.* Renfro, 32 Miss. 125.

[5] Mason *v.* Walker, 14 Me. 163.

[6] Crunkleton's Lessee *v.* Evert, 3 Yeates (Pa.), 570.

[7] Brown *v.* Colson, 41 Ga. 42.

[8] Dowd *v.* Gilchrist, 1 Jones (N. C.) Law, 353; Bronson *v.* Paynter, 4 Dev. & Bat. (N. C.) 393.

[9] Updegraff *v.* Trask, 18 Cal. 458; see Bufford *v.* Holliman, 10 Texas, 564.

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prove his title as heir.[1] One of six heirs of an owner of a rent charge, with condition of re-entry, may, upon non-payment of rent, maintain an action of ejectment to recover an undivided sixth part of the demised premises.[2] The death of the owner, and the descent by operation of law to several heirs, effects a transfer to each, and as already stated they hold as tenants in common.

§ 206. *Devisees.*—A devisee may maintain ejectment.[3] Reference will be presently made to the statutory policy, peculiar to several States, which permits executors or administrators to retain possession and control over the real property of the deceased, during the settlement of the estate, and to protect and recover the possession from even the heir or devisee. In Vermont, where the statute restricted the right to ejectment by heirs or devisees until the estate had been set off to them by the Probate Court, it was held that when it was obvious that no action of the Probate Court could become necessary, and so long a time had elapsed that the executor's lien would be presumed to be satisfied, the devisee might bring ejectment.[4] The same principle applies, in that State, to heirs, if no administrator has been appointed; or if administration has been had, the debts will be presumed to be satisfied after the lapse of nine years, and the heirs may then sue.[5] A devisee has by operation of law, without actual entry, such a seizin as will enable him to bring a writ of entry.[6]

§ 207. *Personal representatives.*—As a general rule, an executor, administrator, or administrator *de bonis non*,[7] can-

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[1] Soto *v.* Kroder, 19 Cal. 87; see Buck *v.* Squiers, 22 Vt. 484; Austin *v.* Bailey, 37 Vt. 219.

[2] Cruger *v.* McLaury, 41 N. Y. 219, and cases cited.

[3] Young *v.* Holmes, 1 Strange, 70; Doe *d.* Saye *v.* Guy, 3 East, 120; see Van Rensselaer *v.* Barringer, 39 N. Y. 9.

[4] Abbott *v.* Pratt, 16 Vt. 626.

[5] Buck *v.* Squiers, 22 Vt. 484; Austin *v.* Bailey, 37 Vt. 219.

[6] Green *v.* Chelsea, 24 Pick. (Mass.) 71.

[7] Brown *v.* Strickland, 32 Me. 174.

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not maintain ejectment to recover real estate in fee simple, for he represents, and is clothed with power to administer, the personal and not the real estate of his testator or intestate, and ordinarily has no concern with or control over real property,[1] and is not vested with the seizin or any estate in fee.[2] Upon the death of an ancestor the title to real property usually vests immediately in the heirs or devisees, whose rights to the remedy of ejectment we have just considered. Exceptions to these rules have been created by statute in several States.

§ 208. *May recover estates for years.*—An executor may maintain ejectment for lands which were held by his testator for a term of years, as such term is a chattel interest,[3] or a chattel real,[4] and is treated as assets in his hands. So under the early practice he was entitled to an *ejectione firmæ* for such an interest.[5] Executors of a testator who held an estate for years in land, and had leased the same for a part of the term, with condition of re-entry for non-payment of rent, may bring the action.[6] So may an administrator of a tenant from year to year,[7] and it seems to be immaterial whether the ouster occurred before or after the death of the testator or intestate. In a case in England, two of three executors were permitted to recover in ejectment, on a joint demise, a mortgage term which belonged to their testator.[8] Ejectment has been upheld in England on

[1] Heirs of Ludlow *v.* Johnson, 3 Ohio, 553; Burdyne *v.* Mackey, 7 Mo 374.

[2] Hathaway *v.* Valentine, 14 Mass. 501; Humphreys *v.* Taylor, 5 Oregon, 260; Morrill *v.* Menifee, 5 Ark. 629.

[3] Duchane *v.* Goodtitle, 1 Blackf. (Ind.) 117. See Williams on Executors (6th Am. ed.), vol. 1, pp. 746, 749; Olendorf *v.* Cook, 1 Lansing (N. Y.), 37.

[4] Mosher *v.* Yost, 33 Barb. (N. Y.) 277; Metters *v.* Brown, 1 H. & C. 686; Murdock *v.* Ratcliff, 7 Ohio, 119; Moreton's Case, 1 Ventris, 30; Slade's Case, Rep. 4, 95, a; Doe *v.* Bradbury, 16 Eng. Com. Law, 115; 2 D. & R. 706; Lewis' Heirs *v.* Ringo, 3 A. K. Mar. (Ky.) 247; Payne *v.* Harris, 3 Strobh. Eq. (S. C.) 39.

[5] Peytoe's Case, 5 Coke, 143; 9 Rep. 78 b; Russel *v.* Pratt, cited in 1 Anderson, 243.

[6] Van Rensselaer *v.* Hayes, 5 Denio (N. Y.), 477.

[7] Doe *d.* Shore *v.* Porter, 3 T. R. 13.

[8] Doe *d.* Stace *v.* Wheeler, 15 M. & W. 622.

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a demise laid before probate granted,[1] and before letters of administration were issued.[2] In Alabama the executor, suing in his representative capacity, and the devisees under the will, cannot join in ejectment.[3] Under the peculiar practice in Pennsylvania, an administrator *cum testamento annexo* may maintain ejectment to enforce payment of the purchase-money for land sold by a deceased executor prior to his death under a power in a will.[4]

§ 209. *Freehold terms or leases.*—But the executor has no interest in freehold terms or leases, and the New York Supreme Court held that where the testator conveyed land in fee, reserving a right of re-entry for non-payment of rent, the executor could not bring ejectment for the forfeiture, because, if successful, he would thereby be invested with the original estate, that is, with a fee simple, a species of property to which the functions and duties of an executor bear no relation.[5]

§ 210. *When executors or administrators may sue.*—Though ordinarily, as we have seen, an executor has no interest in the freehold, yet where, by the provisions of the will, he is authorized to enter on the land, and lease or otherwise dispose of it, he has a right to maintain ejectment.[6] And where lands had been devised to trustees with power to convert the same into money, invest the proceeds, and receive and apply the income for the benefit of persons designated in the will, the trustees were held to be seized of a sufficient estate to enable them to bring ejectment.[7] In Pennsylvania executors, empowered by will to sell real estate, may bring ejectment for it,[8] and it has been held that

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[1] Roe *d.* Bendall *v.* Summerset, 2 W. Blk. 692.
[2] Patten *v.* Patten, T. 3 W. 4.
[3] Tarver *v.* Smith, 38 Ala. 135.
[4] Cornell *v.* Green, 10 S. & R. (Penn.) 14.
[5] Van Rensselaer *v.* Hayes, 5 Denio (N. Y.), 477.
[6] Duchane *v.* Goodtitle, 1 Blackf. (Ind.) 117.
[7] McLean *v.* Macdonald, 2 Barb. (N. Y.) 534.
[8] Chew's Ex'rs *v.* Chew, 28 Penn. St. 17.

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the executors may bring the action when no one is designated in the will to execute the power.[1] In Tennessee it has been held that an executor cannot maintain an action for mesne profits of the land, even though clothed with a power of sale.[2] An executor appointed under a will in Virginia, to whom lands in Kentucky have been devised, need not take out letters testamentary in the latter State to enable him to maintain ejectment for the lands.[3] In Michigan an administrator has been held entitled to maintain ejectment for lands which he acquired by foreclosure of a mortgage left by his intestate.[4] In New York, when the purchaser of real estate at execution sale dies previous to the execution of the sheriff's deed, the conveyance must be made to his personal representatives, who may bring ejectment for the land on a title so acquired, without joining the heirs.[5]

§ 211. *Statutory changes.*—In California, during administration of an estate, and until distribution, the executor or administrator is entitled to the possession of the real property, and may recover it from the heir or devisee.[6] In Michigan the statutory right of the administrator, before final settlement, to the possession and to the rents and profits of the real property, may be enforced by ejectment.[7] A similar statutory policy prevails in Minnesota.[8] In Alabama an executor or administrator has such a right to the possession of land of his testator or intestate, that he may bring ejectment without reference to the solvency of the estate,[9] and it has been held in that State, that where the

[1] Kirk *v.* Carr, 54 Penn. St. 285.

[2] Brown *v.* McCloud, 3 Head (Tenn.), 280.

[3] Doe *d.* Lewis *v.* McFarland, 9 Cranch, 151.

[4] Kunzie *v.* Wixom, 39 Mich. 384.

[5] Reynold's Adm'r *v.* Darling, 42 Barb. (N. Y.) 418.

[6] Page, Adm'r, &c. *v.* Tucker, 54 Cal. 121; see McCrea *v.* Haraszthy, 51 Cal. 146.

[7] Kline *v.* Moulton, 11 Mich. 370. But see Warren *v.* Tobey, 32 Mich. 45.

[8] Miller *v.* Hoberg, 22 Minn. 249; see Menifee *v.* Menifee, 8 Ark. 9.

[9] McRae's Adm'r *v.* McDonald, 57 Ala. 423; Russell *v.* Erwin's Adm'r, 41 Ala. 292; Golding *v.* Golding's Adm'r, 24 Ala. 122.

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plaintiff brings the action as an individual the complaint may be so amended as to show that he sues as administrator.[1] In Missouri, however, an executor suing in his representative capacity was not allowed to recover by virtue of his individual interest.[2]

§ 212. *Reversioners—conditions subsequent.*—A grantor may maintain ejectment after a breach of a condition subsequent to recover the premises conveyed subject to such condition;[3] usually all the original grantors or their heirs must join in the action.[4] The grantors are reversioners, and such an interest in real estate is not and does not become a title till after entry,[5] or the recovery of possession; until then the title of the defendant is not divested.[6] "Such interest," says the New York Supreme Court, "being joint, no less than the whole number could declare the forfeiture, nor could an action to recover possession for condition broken be sustained without the consent and joinder of all."[7] In England, by 32 Hen. VIII, c. 34, the assignee of the reversion is given a right of re-entry for condition broken and may bring the action.[8] Breach of the condition can only be taken advantage of by the grantors, and the right to claim and enforce it does not usually pass by a conveyance of the land,[9] and is not assignable,[10] and a stranger cannot take advantage of it.[11] If a grantor re-enters for breach

[1] Agee *v.* Williams, 30 Ala. 636.

[2] Burdyne *v.* Mackey, 7 Mo. 374.

[3] Horner *v.* Chicago, M. & St. P. Ry. 38 Wis. 165; Bogie *v.* Bogie, 41 Wis. 209; Bear *v.* Whisler, 7 Watts (Pa.), 144; Ruch *v.* Rock Island, 97 U. S. 693.

[4] Cook *v.* St. Paul's Church, 5 Hun (N. Y.), 293; affi'd 67 N. Y. 594.

[5] Osgood *v.* Abbott, 58 Me. 73; Guild *v.* Richards, 82 Mass. (16 Gray), 309.

[6] Ruch *v.* Rock Island, 97 U. S. 693: Kenner *v.* American Contract Co. 9 Bush (Ky.), 202.

[7] Cook *v.* St. Paul's Church, 5 Hun (N. Y.), 293; Nicoll *v.* N. Y. & Erie Railway, 12 N. Y. 121. See Doe *d.* Patrick *v* Beaufort, 4 Eng. L. & Eq. 496.

[8] Adams on Ejectment, 4th ed. p. *72 (120).

[9] Towle *v.* Remsen, 70 N. Y. 303–312.

[10] Underhill *v.* S. & W. R. R. Co. 20 Barb. (N. Y.) 455; Ruch *v.* Rock Island, 97 U. S. 693.

[11] Schulenberg *v.* Harriman, 21 Wall. 44–63; Dewey *v.* Williams, 40 N. H. 222;

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of a condition subsequent, the dower of the grantee's wife of course falls with the estate of her husband,[1] and a recovery against a life tenant, for breach of a condition subsequent, destroys the lien of a judgment on the life tenant's estate.[2] The right to enforce the forfeiture may be lost by waiver.[3]

§ 213. A condition in a deed that the grantee shall not at any time manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done on the premises conveyed, was held by the New York Court of Appeals to be valid, and not repugnant to the grant. The right of entry upon breach of the condition being reserved in the deed, the grantor, upon proof of the breach may recover the premises in ejectment, without previous entry, demand or notice. The court, in the opinion, cites with approval various cases in which conditions against the use of the premises for a school house, distillery, blast furnace, livery stable, machine shop, powder magazine, hospital, or cemetery, have been upheld as valid.[4] But where the plaintiff sold land to a railroad corporation, which paid for the same, and agreed in the contract of sale that when the road was finished it would keep the land fenced, it was held that ejectment would not lie for the failure of the corporation to maintain fences, the agreement being merely an interproprietary regulation.[5]

Hooper *v.* Cummings, 45 Me. 359; Nicoll *v.* N. Y. & Erie R. R. Co. 12 N. Y. 121; Fonda *v.* Sage, 46 Barb. (N. Y.) 109; Underhill *v.* S. & W. R. R. Co. 20 Barb. (N. Y.) 455; Ruch *v.* Rock Island, 97 U. S. 693.

[1] Beardslee *v.* Beardslee, 5 Barb. (N. Y.) 324.

[2] Moore *v.* Pitts, 53 N. Y. 85. But see Allen *v.* Brown, 5 Lansing (N. Y.), 280.

[3] Cook *v.* St. Paul's Church, &c. 67 N. Y. 594; Andrews *v.* Senter, 32 Me. 394; Hooper *v.* Cummings, 45 Me. 359.

[4] Plumb *v.* Tubbs, 41 N. Y. 442; see Collins Mfg. Co. *v.* Marcy, 25 Conn. 242; Gray *v.* Blanchard, 8 Pick. (Mass.) 284; Sperry's Lessee *v.* Pond, 5 Ohio, 388; Nicoll *v.* N. Y. & Erie Railway, 12 N. Y. 121; Warner *v.* Bennett, 31 Conn. 468; Gillis *v.* Bailey, 17 N. H. 18; Gibert *v.* Peteler, 38 N. Y. 165; Cowell *v.* Colorado Springs Co. 3 Col. 82; 100 U. S. 55; Bogie *v.* Bogie, 41 Wis. 209; Horner *v.* Chicago, M. & St. P. Ry. Co. 38 Wis. 165.

[5] Hornback *v.* Cincinnati & Z. R. R. Co. 20 Ohio St. 81.

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§ 214. *Forfeiture of life estate.*—In this country a reversioner cannot maintain ejectment on the ground that the owner of the life estate has forfeited his estate by the commission of waste,[1] nor does the life tenant forfeit his estate by claiming the fee against the reversioner,[2] nor by consenting to a sale of it,[3] nor by executing a deed purporting to convey the fee.[4] The early English doctrine that estates for life were liable to forfeiture for waste, or for alienation in fee, has been uniformly renounced in this country.[5] Commission of waste can be restrained by injunction, or the property preserved by the appointment of a receiver, while a conveyance of a greater estate than the life tenant possesses conveys only the title or estate which he could lawfully grant.

§ 215. *Life tenant.*—It has been held in North Carolina in a case where B. erected a saw mill, house and fixtures on A.'s land, under an agreement that the same might remain as long as B. wished, that B. had a life interest in the land, so far as the use of the same might be necessary for his business, and that ejectment could be maintained to recover that interest.[6] A married woman in New York may recover, in ejectment against her husband, a life estate.[7]

§ 216. *Tenant for years.*—A tenant of a term for years, or leasehold interest, may maintain ejectment. It was contended by counsel, in an action in the Supreme Court of

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[1] Patrick *v.* Sherwood, 4 Blatch. C. C. 112; see Quimby *v.* Dill, 40 Me. 528.

[2] Robinson *v.* Miller, 2 B. Mon. (Ky.) 284; see, especially, De Lancey *v.* Ganong, 9 N. Y. 9.

[3] Bazemore *v.* Davis, 48 Ga. 341.

[4] Carpenter *v.* Denoon, 29 Ohio St. 379; Quimby *v.* Dill, 40 Me. 528; Rogers *v.* Moore, 11 Conn. 553; Williams *v.* Robinson, 16 Conn. 522; McKee's Lessee *v.* Pfout, 3 Dall. 486; Robinson *v.* Miller, 1 B. Mon. (Ky.) 88.

[5] 4 Kent's Com. 83, 84; Quimby *v.* Dill, 40 Me. 528; Patrick *v.* Sherwood, 4 Blatch. C. C. 112.

[6] Stancel *v.* Calvert, Wins. (N. C.) Law, 104.

[7] Wood *v.* Wood, 18 Hun (N. Y.), 350; affi'd 83 N. Y. 575; see Batterton *v.* Yoakum, 17 Ill. 288; Gregg *v.* Tesson, 1 Black (U. S.), 150; Beal *v.* Harmon, 38 Mo. 435.

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New York, that as a term for years was a chattel interest, and constituted personal estate, the owner of the term could not maintain ejectment. But the court decided that ejectment at common law lay to recover possession of land held under a lease for years, whatever the duration of the term might be. While it is true that the subject-matter in controversy must be in its nature corporeal and capable of seizin, yet the right of possession being shown, the nature or quality of the estate itself does not control.[1] This doctrine has been repeatedly recognized in the New York Court of Appeals in actions in which leasehold interests constituted the subject-matter of contention,[2] and in Pennsylvania, even where the right conferred under the lease was incorporeal.[3] Ejectment may be maintained by a lessee, before entry, against a stranger wrongfully withholding the possession.[4]

§ 217. *Tenant at will.*—It has been said by the Supreme Court of Indiana that a tenant at will may maintain ejectment.[5] The opinion is based upon the case of Stone *v.* Grubbam [6] referred to by Runnington,[7] which sustains the tenant's right to the action against an intruder, on the theory that ejectment is in its nature an action of trespass supposed to have been committed *vi et armis*, and the ouster and wrong committed must be personal to the party in actual possession, hence "the tenant at will may make a lease to punish the trespass and ejectment, otherwise there would be an injury done, and no one competent to redress it." But this authority can hardly be considered of much weight. The Supreme Court of North Carolina held that

[1] Olendorf *v.* Cook, 1 Lansing (N. Y.), 37.

[2] Mason *v.* Lord, 40 N. Y. 476; Darby *v.* Callaghan, 16 N. Y. 71; Trull *v.* Granger, 8 N. Y. 115.

[3] Karns *v.* Tanner, 66 Penn. St. 297.

[4] See Trull *v.* Granger, 8 N. Y. 115; Gardner *v.* Keteltas, 3 Hill (N. Y.), 330.

[5] Buntin *v.* Doe *d.* Duchane, 1 Blackf. (Ind.) 26.

[6] 1 Rolle's Rep. 3.

[7] Runnington on Ejectment, pp. 23, 24.

where the obligee of a bond to make titles went into possession, under a parol agreement, to the effect that he might occupy the premises until the bond matured, he was a mere tenant at will of the obligor, and not entitled to maintain ejectment against the latter, or one taking title from him.[1] The definition of an estate at will excludes the idea of the tenant sustaining ejectment *against his lessor*,[2] for any acts of the lessor sufficient to warrant an ejectment against him would indicate a withdrawal of his assent, and constitute a termination of the tenancy. It is clear that the tenant has no certain and indefeasible estate; nothing that can be granted to a third person,[3] and hence his grantee cannot maintain or defend ejectment.

§ 218. *Tenant at sufferance.*—A tenant at sufferance who is evicted by his landlord, without a demand of possession, cannot maintain ejectment, for he has no interest in the land; but it has been said that he may bring trespass.[4] Like a tenant at will, he has no estate which can be granted to a third person. "A tenancy by sufferance," says the New York Court of Appeals, "existing only by the laches of the owner, cannot give the occupant an estate or interest capable of transmission to another."[5]

§ 219. *Tenant by the curtesy.*—A tenant by the curtesy initiate may sue alone for the possession of his wife's land, and for damages for withholding it.[6] It has been held in Pennsylvania, however, that the wife must join.[7] At com-

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[1] Richardson *v.* Thornton, 7 Jones (N. C.) Law, 458: see Love *v.* Edmonston, 1 Ire. (N. C.) Law, 152.

[2] Jemot *v.* Cooly, Sir T. Raym. 137.

[3] Reckhow *v.* Schanck, 43 N. Y. 448; see Haythorn *v.* Margerem, 3 Hals. Ch. (N. J.) 324.

[4] Doe *d.* Harrison *v.* Murrell, 8 C. & P. 134.

[5] Reckhow *v.* Schanck, 43 N. Y. 448.

[6] Wilson *v.* Arentz, 70 N. C. 670; Tucker *v.* Vance, 2 A. K. Mar. (Ky.) 458; Chambers *v.* Handley, 3 J. J. Mar. (Ky.) 98; see Gregg *v.* Tesson, 1 Black (U. S.), 150; Jackson *v.* Leek, 19 Wend. (N. Y.) 339; Prescott *v.* Jones, 29 Ga. 58; Thompson's Lessee *v.* Green, 4 Ohio St. 216.

[7] Bratton *v.* Mitchell, 7 Watts (Pa.), 113.

mon law the husband's interest in the estates of which the wife was possessed, at the time of the marriage, was a freehold, he alone having the right of entry, and the present right of exclusive enjoyment. The wife could not recover the lands from a stranger, even though her husband was joined as defendant, and disclaimed title, and admitted the wife's right to possession.[1]

§ 220. *Married Women.*—In most of our States the right to hold and enjoy real property, free from the interference or control of their husbands, has been conferred by statute on married women. A wife may now, in some States, maintain ejectment for her lands, even against her husband,[2] and may recover a term for years without joining her husband,[3] and in Illinois may sue for homestead.[4]

§ 221. *Partners.*—Ejectment for real property belonging to a firm should be brought in the name of all the persons in whom the legal estate is vested.[5] If one partner alone has the legal estate, he should bring the action in his own name,[6] and a surviving partner may recover the partnership lands against one having no title.[7] The real property held by a commercial firm, as partnership assets, upon the dissolution of the partnership, as between the partners, vests in the individual members thereof as tenants in common,[8] and where the interest of a partner is sold on execution it creates a dissolution of the firm, and the purchaser becomes a tenant in common as to the realty with the remaining partner.[9] This rule has been recognized in Georgia, where it has been held that one partner cannot mortgage

[1] Clark *v.* Clark, 20 Ohio St. 128.
[2] Wood *v.* Wood, 83 N. Y. 575; s. c. below, 18 Hun (N. Y.), 350.
[3] Darby *v.* Callaghan, 16 N. Y. 71.
[4] Allen *v.* Hawley, 66 Ill. 164, 169.
[5] 1 Lindley on Part. *482.
[6] Doe *d.* Green *v.* Baker, 2 Moore, 189.
[7] Robinson *v.* Roberts, 31 Conn. 145.
[8] McGrath *v.* Sinclair, 55 Miss. 89.
[9] Carter *v.* Roland, 53 Texas, 540.

the interest of his copartner.[1] In equity, partnership real estate is treated and governed by the same rules as personalty,[2] but after the claims of partnership creditors are satisfied, and the rights and equities of the partners adjusted, it is then considered as real estate,[3] and descends to heirs.[4] It has been held in Pennsylvania, where the partnership real property is purchased with partnership funds, and the deeds are made to the partners as tenants in common, that as to creditors the deeds establish the status of the property, and that this cannot be altered by parol. This is because partners have the power of directing the application of partnership moneys to suit their own purposes, and can always secure the identity of its character in the kind of title they take for it. If they take title as tenants in common, instead of as partners, they by their own election stamp the character of the title as to those who may subsequently deal with them.[5]

§ 222. *Trustees.*—A trustee may recover in ejectment the lands affected by the trust even against his *cestui que trust*,[6] and may defend the legal title against the *cestui que trust* unless the trust has terminated, or the trustee is enjoined, by a court of equity, from setting up the title.[7] The title of the *cestui que trust* being merely equitable, and the

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[1] Sutlive *v.* Jones, 61 Ga. 676.

[2] Andrews' Heirs *v.* Brown, 21 Ala. 437; Black *v.* Black, 15 Ga. 445; Divine *v.* Mitchum, 4 B. Mon. (Ky.) 488; Coles *v.* Coles, 15 Johns. (N. Y.) 159; Piatt *v.* Oliver, 3 McLean, 27; Whitney *v.* Cotten, 53 Miss. 689; Davis *v.* Christian, 15 Gratt. (Va.) 11; Mauck *v.* Mauck, 54 Ill. 281.

[3] Buckley *v.* Buckley, 11 Barb. (N. Y.) 43; *In re* Codding, 9 Fed. Rep. 849, especially the learned note of Mr. Ewell at pages 851–853; Scruggs *v.* Blair, 44 Miss. 406.

[4] Foster's Appeal, 74 Penn. St. 391; Williamson *v.* Fontain, 7 J. Bax. (Tenn.) 212; McGrath *v.* Sinclair, 55 Miss. 89; Wilcox *v.* Wilcox, 13 Allen (Mass.), 252.

[5] Second National Bank of Titusville's Appeal, 83 Penn. St. 203; Ebbert's Appeal, 70 Penn. St. 79.

[6] Beach *v.* Beach, 14 Vt. 28; Reade *v.* Reade, 8 T. R. 118; Matthews *v.* Ward, 10 G. & J. (Md.) 443; Starke's Lessee *v.* Smith, 5 Ohio, 455–458.

[7] Stearns *v.* Palmer, 10 Met. (Mass.) 35; Den *d.* Obert *v.* Bordine, 1 Spencer (N. J.), 394; Nicoll *v.* Walworth, 4 Denio (N. Y.), 385.

trustee being vested with the legal title or estate, real actions or remedies in the nature of ejectment must, of course, be brought in the name of the trustee.[1] Where the defendant deeded to the plaintiff as trustee "to seize, sell, and dispose of" the real estate in controversy, and apply the proceeds to the payment of certain debts, it was held that sufficient title passed to the trustee to support ejectment to recover the lands, to enable him to carry into effect the objects of the trust.[2] In a case which arose in Georgia, it appeared that the plaintiff in an ejectment was appointed trustee under a marriage settlement, and vested with the title for the use of a wife, with power of disposition in her by will, and in the event of her intestacy then the property was to go to her children. Pending the ejectment the wife died. The court held that the trustee could continue the action so as to enable him to execute the trust, by recovering and turning over the possession to those entitled to it, and to accomplish this end he was allowed to add such demises as might be necessary to bring in the children as formal parties.[3] A wrong-doer cannot set up the title of the *cestui que trust* against the trustee.[4] It has been held in New York, where lands were devised to trustees with directions to convert the same into money, invest the proceeds, and collect the rents and income, and apply it during two specified lives, to the use of certain persons named, that the trustees

[1] Moore *v.* Burnet's Lessee, 11 Ohio, 334; Beach *v.* Beach, 14 Vt. 28; Cox *v.* Walker, 26 Me. 504; Hopkins *v.* Stephens, 2 Rand. (Va.) 422; First Baptist Soc. *v.* Hazen, 100 Mass. 322; Matthews *v.* Ward, 10 G. & J. (Md.) 443; Fitzpatrick *v.* Fitzgerald, 13 Gray (Mass.), 400; Chapin *v.* First Universalist Soc. 8 Gray (Mass.), 581; Reece *v.* Allen, 5 Gilm. (Ill.) 236; Doggett *v.* Hart, 5 Fla. 215; Stearns *v.* Palmer, 10 Met. (Mass.) 35; Wake *v.* Tinkler, 16 East, 36; Goodtitle *v.* Jones, 7 T. R. 47; Methodist Soc. *v.* Bennett, 39 Conn. 293; McClurg *v.* Wilson, 43 Penn. St. 439; Baker *v.* Nall, 59 Mo. 265; Adams on Ejectment (4th Am. ed.), 127 [82]; Kirkland *v.* Cox, 94 Ill. 400; Trustees M. E. Church *v.* Stewart, 27 Barb. (N. Y.) 553; see Western R. R. Co. *v.* Nolan, 48 N. Y. 517; see Smith's Lessee *v.* McCann, 24 How. 398.

[2] Cameron *v.* Phillips, 60 Ga. 434; see Findlay *v.* Artope, 48 Ga. 537.

[3] Findlay *v.* Artope, 48 Ga. 537.

[4] Hunt *v.* Crawford, 3 P. & W. (Penn.) 426.

were seized of such an estate in the lands as entitled them to maintain ejectment.[1]

§ 223. *Cestuis que trustent.*—It has been held that the *cestui que trust* may maintain a real action upon his equitable title against a stranger who has no title and does not claim under the trustee,[2] or possibly after the purposes of the trust have been fully accomplished though the true legal title is still in the trustee.[3] But the remedy of the *cestui que trust* is usually in equity.[4]

§ 224. *Insolvent.*—It has been decided, in a case which arose in Pennsylvania, that notwithstanding the assignment of an insolvent debtor passed the legal estate in his lands, yet a trust resulted by operation of law, which, as soon as the debts were satisfied, entitled the insolvent to the possession of the lands, even against his assignee, *et a multo fortiori* as to a stranger, against whom he might maintain ejectment in his own name. It was further held that after a lapse of fourteen years the court would, in the absence of proof to the contrary, make all necessary intendments that the debts had been paid.[5] In another case in the same State it was held that an insolvent, upon proof of payment of all the debts owing by him at the time of his discharge, could maintain ejectment, in his own name, for lands assigned by him without a formal re-assignment.[6] But one discharged as an insolvent debtor, whose debts remain unpaid, cannot support an ejectment for lands of which he was divested by the assignment, though his trustees have not

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[1] McLean *v.* Macdonald, 2 Barb. (N. Y.) 534; see Heermanns *v.* Robertson, 64 N. Y. 332–352. See *contra*, Doe *d.* Elle *v.* Young, 3 Zab. (N. J.) 478. Reversed 4 Zab. (N. J.) 775. See Chew's Ex'rs *v.* Chew, 28 Penn. St. 17.

[2] Stearns *v.* Palmer, 10 Met. (Mass.) 35; Roper *v.* Holland, 3 Ad. & El. 99; Sloper *v.* Cottrell, 2 Jur. N. S. 1046; see Kennedy *v.* Fury, 1 Dall. 72.

[3] Hopkins *v.* Ward, 6 Munf. (Va.) 38; Goodtitle *d.* Hart *v.* Knott, Cowp. 46.

[4] See Gillett *v.* Treganza, 13 Wis. 472.

[5] Ross *v.* M'Junkin, 14 S. & R. (Penn.) 364; see Hoag *v.* Hoag, 35 N. Y. 469; Colie *v.* Jamison, 4 Hun (N. Y.), 284; R. S. N. Y. (7th ed.) p. 2183, § 67.

[6] Power *v.* Hollman, 2 Watts (Penn.), 218.

given the bonds required by law.[1] The Supreme Court of California have decided that an insolvent might maintain ejectment for a right of homestead, during the pendency of an application on his part to be discharged from his debts, under the insolvency laws of that State.[2]

§ 225. *Assignee of bankrupt or insolvent debtor.*—An early case in Massachusetts held that an assignee in bankruptcy was not entitled to come in under the statute,[3] and prosecute a real action instituted by the bankrupt. The report of the case does not contain the reasons upon which the decision is based.[4] A conclusion more in harmony with the spirit of the bankrupt act was reached in Connecticut, where the right of the assignee of a bankrupt, under the act of 1800, to maintain ejectment was upheld.[5] Similar decisions have been rendered relative to the English bankruptcy laws,[6] under which it is held that the assignees can eject the bankrupt himself from lands conveyed to a friendly third party in trust for him, and transferred by such third party, by order of the court, to the assignees.[7] In England, both the assignee[8] and provisional assignee[9] of an insolvent debtor may bring ejectment for the lands of the insolvent.

§ 226. *Aliens.*—The general rule under the former practice in England was that an alien could not maintain a real or mixed action,[10] and this principle was recognized in an early case in North Carolina, in which the court held that an alien could not maintain ejectment, or any action for the

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[1] Willis' Lessee *v.* Row, 3 Yeates (Penn.), 520.
[2] Moore *v.* Morrow, 28 Cal. 551.
[3] Bankrupt Act of 1800, ch. 19, § 3.
[4] Fales, Jr. *v.* Thompson, 1 Mass. 134.
[5] Barstow *v.* Adams, 2 Day (Conn.), 70.
[6] Smith *v.* Coffin, 2 H. Black. 444.
[7] Cooper *v.* Lands, 14 Weekly R. 610; S. C. 14 L. T. (N. S.) 287.
[8] Doe *d.* Ibbetson *v.* Land, 3 D. & R. 509.
[9] Doe *d.* Clark *v.* Spencer, 2 C. & P. 79.
[10] Co. Litt. p. 129; Shep. Touchstone, p. 204; see White *v.* Sabariego, 23 Tex. 243; Hardy *v.* De Leon, 5 Tex. 240.

recovery of a freehold.[1] But in many of our States an alien may acquire land by purchase, and hold it against all the world but the State, and may convey a good title thereto, at least until after office found.[2] Having this right, it of course follows that an alien may maintain an action in the nature of ejectment, to recover and protect the possession of his lands.[3] Thus in California a non-resident alien can acquire title to real property by purchase, or other act of the party, though not by descent or operation of law, and until office found no individual can question the rights or title of the plaintiff on the ground of alienage, or non-residence.[4] The same principle has been recognized in Maryland, where the court say that the title of an alien friend could not be divested but by office found, or some act done by the State to acquire the possession, and a judgment for the possession of the land in the right of the alien was upheld.[5]

§ 227. *Receivers.*—In England it was held that a receiver appointed in Chancery, with general authority to let lands from year to year, had also authority to determine such tenancies, and, therefore, might sustain ejectment.[6] But the receiver, as a rule, cannot institute an action to recover the possession of land without first obtaining leave of the court so to do.[7] In New York, a receiver in supplementary proceedings obtains title to the real property of the judgment

[1] Barges, by Guardian, &c. *v.* Hogg, 1 Hayw. (N. C.) 485 (559).

[2] Craig *v.* Leslie, 3 Wheat. 563, 589; Territory *v.* Lee, 2 Mont. R. 124–129; Fox *v.* Southack, 12 Mass. 143; Montgomery *v.* Dorion, 7 N. H. 475; 1 Washb. on Real Prop. p. 74 [*49]; Blount *v.* Horniblea, 2 Hayw. (N. C.) 36 (197); People *ex rel. v.* Folsom, 5 Cal. 373.

[3] Jinkins *v.* Noel, 3 Stew. (Ala.) 60; Bradstreet *v.* Supervisors, &c. 13 Wend. (N. Y.) 546; Ford *v.* Harrington, 16 N. Y. 285, 294; Overing *v.* Russell, 32 Barb. (N. Y.) 263, and cases cited.

[4] Norris *v.* Hoyt, 18 Cal. 217.

[5] McCreery *v.* Allender, 4 H. & McH. (Md.) 409; see People *ex rel. v.* Folsom, 5 Cal. 372.

[6] Doe *d.* Marsack *v.* Read, 12 East, 57.

[7] Wynne *v.* Lord Newborough, 1 Vesey, Jr. 165; S. C. 3 Bro. C. C. 88; Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60; Sturgeon *v.* Douglas, 1 Hogan, 400; Conyers *v.* Crosbie, 6 Irish Eq. R. 657; Ward *v.* Swift, 6 Hare, 312.

debtor, within that State, by force of his appointment when perfected, without an execution of an assignment by the debtor, and may impeach transfers of real property made by the latter in fraud of creditors.[1] The title of receivers to the property of which they are the custodians is generally statutory, and their right to maintain actions in the nature of ejectment often depends upon the wording and construction of statutes.[2]

§ 228. *Indians.*—An Indian may recover in ejectment lands reserved to him by treaty, and of which he has been dispossessed.[3]

§ 229. *Felons.*—In England a person attainted of felony may, before office found in favor of the king, convey a title to land which will sustain ejectment.[4]

§ 230. *Additional illustrations.*—We cannot, perhaps, further classify, to advantage, the parties who may maintain actions for the trial of title to land. Any additional discussion of exceptional cases, in a particular State, might confuse the general subject. In conclusion it may be stated that, in Mississippi, trustees of school lands may maintain ejectment, in the name of their president, for school lands wrongfully withheld from them.[5] So may school commissioners in Tennessee.[6] In Vermont a plaintiff vested with a proprietor's right in a town may recover in ejectment, against one in possession without title.[7] In Pennsylvania, overseers of the poor have legal capacity to maintain ejectment, and if the plaintiff in ejectment dies a pauper the overseer may be sub-

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[1] Porter *v.* Williams, 9 N. Y. 142; see, however, Scott *v.* Elmore, 10 Hun (N. Y.), 68; see Wing *v.* Disse, 15 Hun (N. Y.), 190; Chautauqua County Bank *v.* Risley, 19 N. Y. 374.

[2] See Davis *v.* Gray, 16 Wall. 203, as to the general nature of a receiver's title.

[3] Coleman *v.* Doe *d.* Tish-ho-mah, 12 Miss. 40.

[4] Doe *d.* Griffith *v.* Pritchard, 5 Barn. & Ad. 765.

[5] Windham *v.* Chisholm, 35 Miss. 531.

[6] Bowers *v.* School Com'rs, 7 Yer. (Tenn.) 117.

[7] Pomeroy *v.* Mills, 3 Vt. 410.

stituted in his stead.[1] In Wisconsin a pre-emptor of swamp lands may maintain ejectment therefor.[2] In Ohio a religious society may maintain ejectment by its trustees.[3] The owner of a conditional fee may, until a breach of the condition, maintain ejectment,[4] and the assignee of a rent charge may take advantage of a clause of re-entry and bring the action.[5] The grantee of a deed containing covenants of warranty may bring ejectment against his grantor who remains in possession,[6] and the grantee of an ordinary quit-claim deed may, of course, maintain ejectment if his grantor could have done so.[7] Where it appeared that the plaintiff purchased from the mortgagor, but his name had been omitted, as a party defendant, in proceedings subsequently instituted to foreclose the mortgage, it was held in Illinois that he could not maintain ejectment against the purchaser at foreclosure sale, though he was unaffected by the decree, and had the right to redeem.[8] The nature of the titles which will support actions for the trial of title, and recovery of possession of land, will be more fully discussed in subsequent portions of this treatise.

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[1] Jester *v.* Overseers, &c., 11 Penn. St. 540.

[2] Manny *v.* Smith, 10 Wis. 509.

[3] First Presbyterian Society *v.* Smithers, 12 Ohio St. 248.

[4] Candee *v.* Burke, 1 Hun (N. Y.), 546; Olmsted *v.* Harvey, 1 Barb. (N. Y.) 102.

[5] Farley *v.* Craig, 6 Halst. (N. J.) Law, 262.

[6] Dodge *v.* Walley, 22 Cal. 225.

[7] Sullivan *v.* Davis, 4 Cal. 291.

[8] Kelgour *v.* Wood, 64 Ill. 345; see Howard *v.* Railway Company, 101 U. S. 837.

CHAPTER VII.

PARTIES DEFENDANT.

§ 231. Party in possession.
232. Abandonment of possession.
233. Defendants in writs of entry.
234. Unoccupied lands.
235. Claim of adverse title.
236. Proof of possession.
237. Possession of a part of the land.
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243. Clergymen and trustees of religious corporations.
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245. } States.
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§ 250. Ejectment against corporations.
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259. Who may come in and defend—Joint owners.
260. Parties claiming by title paramount to both litigants.
261. Parties claiming in opposition to defendant's title.
262. Mortgagee.
263. Purchaser *pendente lite.*
264. Landlord as defendant.
265. Party claiming as landlord.
266. Marvin *v.* Dennison discussed.

§ 231. *Party in possession.*—Ejectment, as we have seen, is a possessory action which must be instituted by a party who has been disseized, or from whom the possession of the land is wrongfully withheld. Black, J., in delivering the opinion of the Supreme Court of Pennsylvania said: "Ejectment is a possessory action. It is designed to redress no other wrong than that of holding the true owner out of possession, and it cannot be maintained for land of which the plaintiff is himself in possession,"[1] The action must usually be brought against the tenant or person in the actual occupation or enjoyment of the lands. He is a necessary party defendant, for the reason that he is the party who withholds the possession.[2] Usually all the par-

[1] Kribbs *v.* Downing, 25 Penn. St. 399-404; Reed *v.* Tyler, 56 Ill. 288.

[2] Rodgers *v.* Bell, 53 Ga. 94; Hawkins *v.* Reichert, 28 Cal. 534; Simms *v.* Richardson, 32 Ark. 304; Garner *v.* Marshall, 9 Cal. 270; Betz *v.* Mullin, 62 Ala. 365; Dutton *v.* Warschauer, 21 Cal. 609; Owen *v.* Fowler, 24 Cal. 192; Lucas *v.* Johnson, 8 Barb. (N. Y.) 244; Lyle *v.* Rollins, 25 Cal. 440; Thompson *v.*

ties in possession should be summoned.[1] By the party in possession is meant the actual occupant "as against the plaintiff;" *i. e.*, holding in hostility to, and not in privity with him.[2] And, as a general rule, the defendants in ejectment cannot, on motion, require the plaintiff to bring in other parties as defendants, who are not alleged to have been in possession of the land at the commencement of the action.[3]

§ 232. *Abandonment of possession.*—A party in possession of lands may, of course, abandon the premises at any time, and whether the owner accepts such abandonment or not, if the party is out of possession, by his own act, at the time the ejectment is instituted against him, the plaintiff cannot recover. Thus, when a mechanic, having possession of a school-house for the purpose of making repairs, offered to deliver the key, which was the only symbol of possession he had, to one of the trustees of the district school, it was held by the New York Supreme Court that his act constituted an abandonment of the possession, and that a subsequent action of ejectment could not be maintained against him, whether one or all of the trustees were present at the time the key was offered, or whether the offer was accepted or not.[4]

§ 233. *Defendants in writs of entry.*—As a general rule a writ of entry will only lie against one claiming an estate not less than a freehold, but in Maine it has been held that if

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Schuyler, 2 Gilm. (Ill.) 271; Bonner *v.* Greenlee's Heirs, 6 Ala. 411; Taylor *v.* Crane, 15 How. Pr. (N. Y.) 358; Jackson *v.* Allen, 30 Ark. 110; Schuyler *v.* Marsh, 37 Barb. (N. Y.) 350; Albertson *v.* Reding, 2 Murphey (N. C.), 283; Allen *v.* Dunlap, 42 Barb. (N. Y.) 585; Banyer *v.* Empie, 5 Hill (N. Y.), 48; Lockwood *v.* Drake, 1 Mich. 14; Kilgour *v.* Gockley, 83 Ill. 109; Finnegan *v.* Carraher, 47 N. Y. 493; People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97; Goodright *v.* Rich, 7 T. R. 327. See § 161.

[1] Irish *v.* Scovil, 6 Binn (Penn.), 55.

[2] Strong *v.* City of Brooklyn, 68 N. Y. 1; see Childs *v.* Chappell, 9 N. Y. 246.

[3] Simms *v.* Richardson, 32 Ark. 304.

[4] Allen *v.* Dunlap, 42 Barb. (N. Y.) 585.

the person in possession has actually ousted the demandant, or withheld the possession, the demandant may, at his election, consider him a disseizor for the purpose of trying the right, though claiming an estate less than a freehold.[1] Formerly, in Massachusetts, a writ of entry could not be brought against a tenant at will, who refused to surrender the premises on demand, as the writ would only lie against a tenant of the freehold, but the right has since been conferred by statute.[2]

§ 234. *Unoccupied lands.*—Under the modern practice, if the premises are not occupied, the action can usually be instituted against any one exercising acts of ownership over the lands,[3] and under such circumstances acts of trespass by one claiming title may be considered as acts of possession.[4] Any subjection of the property to the will and dominion of the party is sufficient.[5]

§ 235. *Claim of adverse title.*—It has been held in Wisconsin, that a grantee in a tax deed, who had never occupied the premises, by placing the tax deed upon record might be considered as asserting and claiming title to the land, and could properly be made a party defendant in ejectment.[6] So it was decided under the practice in Virginia, that any person who had made entries and surveys of any part of the land in controversy, and set up claims to it, though not in the actual possession at the time the action was instituted, could be made a party defendant.[7] Any person claiming title to the lands adversely to the plaintiff, though not in actual occupation, may be made a party defendant.[8] An

[1] Wyman *v.* Brown, 50 Me. 139; Gregory *v.* Tozier, 24 Me. 308.

[2] See Dolby *v.* Miller, 2 Gray (Mass.), 135; Gregory *v.* Tozier, 24 Me. 308.

[3] Hanson *v.* Armstrong, 22 Ill. 442; Langford *v.* Love, 3 Sneed. (Tenn.) 308; Hill *v.* Kricke, 11 Wis. 442.

[4] Chilson *v.* Buttolph, 12 Vt. 231; Doolittle *v.* Linsley, 2 Aik. (Vt.) 155; Sawyer *v.* Newland, 9 Vt. 383.

[5] Quicksilver Mining Co. *v.* Hicks, 4 Sawyer, 688.

[6] Hill *v.* Kricke, 11 Wis. 442.

[7] See Harvey *v.* Tyler, 2 Wall. 328.

[8] Carter *v.* Hunt, 40 Barb. (N. Y.) 89; Abeel *v.* Van Gelder, 36 N. Y. 513;

idle declaration, however, made by the defendant, that he owns the land, will not be sufficient to justify the action; but if the defendant seriously and deliberately lays claim to the title he does so at the peril of making good the claim, for he should not set up title to lands unless he is prepared to defend it.[1]

§ 236. *Proof of possession.*—It is usually an indispensible part of the plaintiff's case in ejectment to show that, at the commencement of the action, the defendant was in possession of at least some portion of the lands to which the plaintiff seeks to establish title,[2] and, as already shown, if the defendant proves that he abandoned the premises before the action was commenced, the plaintiff's case cannot be sustained.[3] It has, however, been decided to be sufficient for the plaintiff to prove that a third person is in actual possession under the defendant, especially if such possession is held under a lease or written contract,[4] and in California it has been expressly held that the possession need not be actual as distinguished from constructive in its character.[5] In Pennsylvania proof of service of the writ is *prima facie* evidence of the possession of the defendant.[6] There are substantial objections to the practice of requiring the plaintiff in actions to try title to prove that the defendant is in possession and exercising acts of ownership over the land. It is often very difficult, and sometimes practically impossible, to distinguish between acts which constitute

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Mordecai *v.* Oliver, 3 Hawks (N. C.), 479; see Langford *v.* Love, 3 Sneed (Tenn.), 308.

[1] Banyer *v.* Empie, 5 Hill (N. Y.), 48; see Abeel *v.* Van Gelder, 2 Trans. App. (N. Y.) 99; s. c. 36 N. Y. 513.

[2] Brown *v.* Brackett, 45 Cal. 167; Garner *v.* Marshall, 9 Cal. 268; Flanniken *v.* Lee, 1 Ired. (N. C.) Law, 293; Doe *v.* Roe, 30 Ga. 553; Ward *v.* Parks, 72 N. C. 452; Williamson *v.* Doe *d.* Crawford, 7 Blackf. (Ind.) 12.

[3] Allen *v.* Dunlap, 42 Barb. (N. Y.) 585.

[4] Hurd *v.* Tuttle, 2 D. Chip. (Vt.) 43; see Smith *v.* Walker, 18 Miss. 584.

[5] Crane *v.* Ghirardelli, 45 Cal. 235; Noe *v.* Card, 14 Cal. 609; Garner *v.* Marshall, 9 Cal. 268.

[6] Kirkland *v.* Thompson, 51 Penn. St. 216.

merely trespasses on the land and acts amounting to a claim of title, or an exercise of ownership over it, and though trespass and ejectment are distinct remedies, which must not be confounded, it is not an easy task to find the dividing line. The practice of encumbering actions for the trial of title with this issue of the possession of the defendant often results in the miscarriage of the action, and places the claimant in an extremely awkward position. Thus, questions of fact involving the title are sometimes submitted to the jury, together with disputed facts as to the possession or occupancy of the lands by the defendant, and the jury under the practice in some States is allowed to render a general verdict. If the verdict is rendered and a judgment entered for the defendant, on the ground that he has not withheld the possession, then the object of the action is not accomplished, and though the plaintiff may have a perfect title to the land, yet there is a judgment record showing that he was defeated in an action of ejectment, in which that title was involved. The questions involved in the trial of the title to land are so important that neither the courts, the litigants, nor the juries ought to be called upon to consider the secondary and collateral question as to the possession of the defendant. The title alone should be brought in issue, and not complicated and embarrassed by disputed questions of possession. A still further embarrassment must be noticed. The defendant may be vested with an easement or *profit a prendre* upon or over the land, the enjoyment of which carries with it many of the elements which constitute the proofs of ordinary possession. It is sometimes practically impossible to discover whether or not the acts amount to a disseizin, a trespass or a legal exercise of the rights conferred by the servitude. If the owner brings trespass he may fail because the jury find the possession in the defendant as proprietor of the easement. If ejectment is resorted to this carries with it the dangerous admission as to the possession of the defendant, for if the de-

fendant relies upon adverse possession, the plaintiff is practically called upon to prove what may constitute an important or vital part of his adversary's case.

§ 237. *Possession of a part of the land.*—Upon proof that the plaintiff is in possession of a portion of the demanded premises, he must fail to recover judgment for that portion. The Supreme Court of California, in Mahoney *v.* Middleton,[1] says that the error of rendering a judgment against a defendant for land not in his possession, might be immaterial were it not for the rule rendering the judgment evidence against the defendant, in a suit for the recovery of damages and mesne profits.

§ 238. *Joinder of defendants.*—Under the practice in some States, the landlord may be joined as a party defendant with his tenants.[2] So, as shown elsewhere, husband and wife may be joined in certain cases,[3] and the mortgagee with the party in possession,[4] and parties occupying by a joint possession should all be made defendants.[5] In an action of ejectment in New York against four defendants, the complaint charged that one of them unjustly claimed title to the premises, that the others were in possession under him, and that all the defendants unjustly withheld the possession. The answer merely denied the allegation as to withholding possession, and alleged that one of the defendants was the owner, and entitled to the premises. The defendants were allowed to prove, under objection, that they occupied, severally, distinct parcels of the premises. The court decided that under the pleadings the plaintiff was entitled to recover against all the defendants, and that if there was an improper joinder of parties the objection should have

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[1] 41 Cal. 41.

[2] Harkey *v.* Houston, 65 N. C. 137; Fosgate *v.* The Herkimer Co. 12 N. Y. 580; Abeel *v.* Van Gelder, 36 N. Y. 513; Wilson *v.* Guthrie, 2 Grant (Penn.), 111; Pearce *v.* Ferris, 10 N. Y. 280.

[3] Stewart *v.* Patrick, 68 N. Y. 450.

[4] Marvin *v.* Dennison, 1 Blatchf. C. C. 159.

[5] See Fosgate *v.* Herkimer Co. 12 N. Y. 580; Harkey *v.* Houston, 65 N. C. 137.

been raised by demurrer or answer.[1] It is clear that if the defendants unite in a joint denial, they are liable to a joint verdict.[2]

§ 239. *Defendants claiming distinct parcels.*—In Fisher *v.* Hepburn,[3] in the New York Court of Appeals, it was held that where different plaintiffs claimed distinct parcels of the real property in question, but all denied plaintiff's rights upon the same ground, and claimed title from the same source, it was proper to join them all as defendants in the same action or proceeding. And in Minnesota it was decided that where the possession of the land was wrongfully withheld by two persons, both were liable to a suit, and the fact that one was acting as an agent for the other afforded no protection.[4] On the other hand, it has been held, in Michigan, that where ejectment was instituted against two defendants, it was error to direct a verdict for the plaintiff unless a joint occupancy was shown.[5] In Pearce *v.* Ferris,[6] it appeared that the defendants occupied, separately, different parts of a house which had been wrongfully continued on the land after the expiration of a lease. The owner brought ejectment against them jointly, and it was held that as they all used the land in common, to sustain and support the house, they were all joint trespassers as against the plaintiff, who only claimed the land, and that plaintiff was not bound to elect against which defendant he desired to take a verdict. And in Michigan it was held that if a distinct portion of a house is occupied by any person, it is proper to join him as defendant, but the suit would not

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[1] Fosgate *v.* Herkimer Co. 12 N. Y. 580; see Dillaye *v.* Wilson, 43 Barb. (N. Y.) 261; Ames *v.* Harper, 48 Barb. (N. Y.) 56; Camden *v.* Haskill, 3 Rand. (Va.) 462; Cunningham *v.* Bradley, 26 Ga. 238.

[2] Patterson *v.* Ely, 19 Cal. 28; Jones *v.* Hartley, 3 Whart. (Penn.) 191.

[3] 48 N. Y. 41. See § 128.

[4] Wells *v.* Atkinson, 24 Minn. 161.

[5] Murphy *v.* Campau, 33 Mich. 71.

[6] 10 N. Y. 280. See Winton *v.* Cornish, 5 Ohio, 477; Kerr *v.* Merchants Ex. Co. 3 Ed. Ch. (N. Y.) 315; Stockwell *v.* Hunter, 11 Metc. (Mass.) 448.

fail by reason of the non-joinder, as the only effect would be to limit the recovery by excluding that portion of the premises which he occupied.[1] In ejectment against a number of persons, who are severally in possession of different parcels of the demanded premises, where no damages or mesne profits are claimed, the recovery against each defendant should be confined to the parcel in his possession.[2] At common law in ejectment for lands, distinct parcels of which were in the several occupation of different persons, no direct objection to the misjoinder could be made, as by plea in abatement, but the parties might apply to the court to be allowed to enter into the consent rule and plead separately. But even if they pleaded jointly, evidence might be given on the trial to show that the defendants occupied distinct parcels, and in such cases, if the plaintiff was entitled to recover, there was verdict and judgment severally for the parcels respectively occupied by the defendants.[3]

§ 240. *Claiming under distinct titles.*—In Helfenstein *v.* Leonard,[4] in the Supreme Court of Pennsylvania, which was ejectment for several distinct properties against several defendants, it was held that they could defend separately on separate titles, but if the titles were identical, as where the parties occupied the position of a landlord and tenant of the same premises, and the defendants had the same interest to defend, it was error to permit a severance at the trial. It was held, however, in Georgia, that where the defendants claimed under distinct titles, a joint recovery could not be had;[5] but in the event of a misjoinder of defendants, the plaintiff may usually, under the modern practice, move to

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[1] Hendricks *v.* Rasson, 42 Mich. 104.

[2] Mahoney *v.* Middleton, 41 Cal. 41.

[3] See Gibbons *v.* Martin, 4 Sawyer (U. S.), 206; Bayard *v.* Colefax, 4 Wash. C. C. 38; Jackson *v.* Woods, 5 Johns. (N. Y.) 278; but see Camden *v.* Haskill, 3 Rand. (Va.) 462; White *v.* Pickering, 12 S. & R. (Penn.) 435; Greer *v.* Mezes, 24 How. 268.

[4] 50 Penn. St. 461. See § 128.

[5] Wood *v.* McGuire, 17 Ga. 303; see Cunningham *v.* Bradley, 26 Ga. 238.

strike out the unnecessary parties, and proceed against those properly joined.[1]

§ 241. *Squatters.*—The owner of the fee can maintain ejectment against a mere squatter, who neither makes claim to nor has color of title.[2] And it was held in the Circuit Court of the United States for the district of Oregon, that if several defendants were mere trespassers or squatters on land, without color of right, or definite claims to distinct parcels, or established and visible boundaries, they might be joined as defendants in a single action, for the reason that the plaintiff could not be expected to know how they claimed, or to what extent.[3] In Greer *v.* Mezes,[4] in the Supreme Court of the United States, the rule is stated as follows: "In the action of ejectment a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if on the trial he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs un-

[1] See Cunningham *v.* Bradley, 26 Ga. 238.
[2] Sykes *v.* Hayes, 5 Bissell, 529.
[3] Gibbons *v.* Martin, 4 Sawyer, 206.
[4] 24 How. 277.

connected with his separate litigation." It may be here observed that possession of public land, by a mere squatter, will afford no basis for the presumption of a grant,[1] and that a squatter who entered as a tenant at will, disclaiming title, cannot change the character of his possession so as to make it adverse by secretly attorning to another.[2]

§ 242. *Servants or employees.*—A servant or employee claiming no title or interest in himself, or any right to the possession, is not usually liable to an action of ejectment. Such an employee is not an occupant within the meaning of the rules of law governing ejectment. He is acting under the control of another, and it is only in another's right that he occupies the premises.[3]

§ 243. *Clergymen and trustees of religious corporations.* —On this principle it has been held in the Supreme Court of Illinois, that a clergyman who preached in a church edifice, under the direction and employment of a religious corporation, was not liable to an action of ejectment. As well, say the court, might the claimant of a farm bring his action against the men employed to cultivate the farm.[4] Even in England, a parson claiming a right to enter and perform divine service has been held not to have a sufficient title to be admitted as a defendant.[5] It has been decided in New York, that where the property in controversy was a church edifice, occupied and used by a society for the purpose of religious worship, it was to be deemed to be in the posses-

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[1] Miller *v.* Brownson, 50 Tex. 583.

[2] Gay *v.* Mitchell, 35 Ga. 139.

[3] Hawkins *v.* Reichert, 28 Cal. 534; Polack *v.* Mansfield, 44 Cal. 36; Doe *v.* Staunton, 1 Chit. 119. It has been held, however, in New York, in an ejectment in which it appeared that the premises were not actually occupied but work was being done thereon by a servant of a person making claim thereto, that the servant was the person exercising acts of ownership over the land, and was the proper party defendant. Shaver *v.* McGraw, 12 Wend. (N. Y.) 558; but see People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97.

[4] Chiniquy *v.* Catholic Bishop, 41 Ill. 148.

[5] Martin *v.* Davis, Stran. 914; but see Hillingsworth *v.* Brewster, 1 Salk. 256.

sion of the corporation, and ejectment would not lie against the trustees or other officers of the church.[1]

§ 244. *Ejectment against the United States.*—An interesting question is presented as to who shall be made defendant, and how a claimant shall proceed to recover the possession of, or try the title to, lands of which the United States government are in possession, by its officers, employees, tenants, or agents. It has been held in England, that ejectment will not lie for lands belonging to the crown, or of which the crown is in possession by its officers; the proper remedy is by petition of right,[2] which may be brought in all cases where the crown has, through misinformation or inadvertence, wrongfully possessed itself of the lands or chattel property of a subject. It is a fundamental principle that the government cannot be summoned into its own courts against its will. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind."[3] A bill cannot be sustained that calls for an interference with the operations of the executive departments of the government;[4] and money in the hands of an officer of the government, as purser, cannot be attached by creditors of seamen to whom it may be due.[5] It may be regarded as established by the cases, that the officers and executive agents of the United States cannot be divested or

[1] Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

[2] Adams on Ejectment (4th Am. ed.), p. 18 [*21]; Doe *d.* Leigh *v.* Roe, 8 M. & W. 579; see Atty. Gen'l *v.* Hallett, 15 M. & W. 106; Broom's Constitutional Law, p. 241; 3 Bla. Com. p. 255.

[3] Federalist, No. 81; Cohens *v.* Virginia, 6 Wheat. 264–380; United States *v.* Clarke, 8 Peters, 436, 444; United States *v.* Eckford, 6 Wall. 484; Hill *v.* United States, 9 How. 386–389; Reeside *v.* Walker, 11 How. 272–290; Briggs *v.* Light Boats, 11 Allen (Mass.), 157, 176, 177; People *v.* Dennison, 84 N. Y. 272; The Davis, 10 Wall. 15. See The Fidelity (16 Blatch. C. C. 569), in which case it was held that this exemption applied to a municipal corporation in so far as it was locally intrusted with a share in the government.

[4] Dobbins *v.* The Commissioners, 16 Peters, 435; The Collector *v.* Day, 11 Wall. 113; Harris *v.* Dennie, 3 Peters, 292.

[5] Buchanan *v.* Alexander, 4 How. 20.

dispossessed of property to which the government has an *undisputed* title, for the purpose of enforcing a lien upon such property.[1]

§ 245. In Carr *v.* The United States,[2] the question of the right of an individual to sue the government indirectly was considered by the Supreme Court of the United States. The court held in this case that a judgment in ejectment against a government agent did not constitute an estoppel against the government. Mr. Justice Bradley, in delivering the opinion of the court, said: "We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the government suable in its courts. It is conceded in The Siren,[3] and in The Davis,[4] that, without an act of Congress, no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed, that, 'the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession.' If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office, or a custom house, a prison, or a fortification. In some cases (perhaps it was so in the present case), it might not be apparent until after suit brought, that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings or the proofs, the jurisdiction of the court ought to cease. Otherwise the government could always be compelled to come into court and litigate with private parties in defense of its property." The later case of Camp-

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[1] See The Davis, 10 Wall. 15; The Siren, 7 Wall. 154; The Fidelity, 16 Blatch. C. C. 569; Klein *v.* New Orleans, 99 U. S. 149.

[2] 98 U. S. 433. See People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97.

[3] 7 Wall. 152. [4] 10 Wall. 15.

bell *v.* James,[1] was an action brought against a United States postmaster by a patentee who claimed that the former had, while acting in the government service, infringed a patent covering a stamp for printing post marks, and cancelling postage stamps. Mr. Justice Bradley, in delivering the opinion of the court, said: "We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, and cannot be maintained under the guise of a suit against its officers and agents, except in the manner provided by law. We have heretofore expressed our views on this subject in the case of Carr *v.* The United States,[2] where a judgment in ejectment against a government agent was held to be no estoppel against the government itself. But as the conclusion which we have reached in this case does not render it necessary to decide this question, we reserve our judgment upon it for a more fitting occasion."

§ 246. Notwithstanding the remarks of the Supreme Court of the United States in the cases of Carr *v.* The United States,[3] and Campbell *v.* James,[4] already quoted, the right of an individual claimant of lands, which are in the possession of officers, employees, or agents of the government, to assert his title and recover the possession in the courts, has been upheld by the same court in a number of cases[5] which are not even referred to in Carr *v.* United States or Campbell *v.* James, and which it is difficult to believe that the court intended to overrule. Indeed, in Campbell *v.* James the court, as we have seen, expressly reserves its judgment upon the point for a more fitting occasion.

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[1] Vol. 21 Patent Office Gazette, p. 337.

[2] 98 U. S. 433.

[3] 98 U. S. 433.

[4] Vol. 21 Patent Office Gazette, p. 337.

[5] See Meigs *v.* M'Clung's Lessee, 9 Cranch, 11; Wilcox *v.* Jackson, 13 Peters, 498; Brown *v.* Huger, 21 How. 305; Grisar *v.* McDowell, 6 Wall. 363; Cooley *v.* O'Connor, 12 Wall. 391; see *contra*, in New York, People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97; Dibble *v.* Clapp, 31 How. Pr. (N. Y.) 420.

Meigs *v.* M'Clung's Lessee,[1] one of the most prominent of these cases, was an action of ejectment—the plaintiff claiming the land under a grant from the State of North Carolina, and the United States asserting title to it under an Indian treaty. The defendants were officers of the government, and were maintaining a garrison upon the land under its authority. The objection was urged against a recovery that "the land was occupied by the United States troops, and the defendants, as officers of the United States, for the benefit of the United States, and by their direction." Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: "The fact that the agents of the United States took possession of this land * * * erected expensive buildings thereon, and placed a garrison there, cannot be permitted to give an explanation to the treaty which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it by violence, and without compensation. This court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action."

§ 247. In the later case of Grisar *v.* McDowell,[2] Mr. Justice Field states the position of the parties, and the ground of the controversy, as follows: "The premises, for the possession of which this action is brought, are situated within the city of San Francisco, in the State of California. The plaintiff claims to be seized in fee of them, and derives his title from the city of San Francisco, under an ordinance of the Common Council for the settlement of land titles in the city, passed on the 20th of June, 1855, commonly known as the Van Ness Ordinance, and the act of the Legislature of the State ratifying and confirming the same. The defendant is an officer in the army of the United

[1] 9 Cranch, 11. [2] 6 Wall. 363.

States, commanding the Military Department of California, and as such officer entered upon the possession of the premises previous to the commencement of this action, and has ever since held them, under the order of the Secretary of War, as part of the public property of the United States reserved for military purposes." In four of these cases the actions were brought against officers of the United States, in possession of the land by the alleged authority of the government, and for its use and benefit, as public property. The question of the exemption of the government from suit, and of the jurisdiction of the court to proceed, was presented in some form in each of these causes. In Meigs *v.* McClung,[1] the point was distinctly taken and insisted upon by counsel. In Wilcox *v.* Jackson,[2] it was sharply presented by the agreed state of facts. In Grisar *v.* McDowell,[3] it was raised by the pleadings, and in Brown *v.* Huger,[4] it was a prominent feature in the case. In Cooley *v.* O'Connor,[5] the defendants were tenants of the United States, and the title of the latter was directly assailed, and though the judgment was reversed in the Supreme Court of the United States it was by reason of error which had been committed in the trial, and a *venire de novo* was awarded but not a judgment dismissing the action for want of jurisdiction. The right of an individual to bring actions in the nature of ejectment against officers or employees of the government is recognized in some of our State tribunals. Thus, the Supreme Court of California, in Polack *v.* Mansfield,[6] said: "But this rule which * * exempts the mere servant or employee of another from an action, presupposes that the employer may be sued, and that the wrongs of which

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[1] 9 Cranch, 11. [2] 13 Peters, 498. [3] 6 Wall. 363.
[4] 21 How. 305. [5] 12 Wall. 393.
[6] 44 Cal. 36. McConnell *v.* Wilcox, 1 Scam. (Ill.) 344; Swasey *v.* North Carolina R. R. Co. 1 Hughes, 17–20; S. C. 71 N. C. 571; Dreux *v* Kennedy, 12 Rob. (La.) 489; see Osborn *v.* Bank of the United States, 9 Wheat. 738; Hancock *v.* Walsh, 3 Woods C. C. 351; Davis *v.* Gray, 16 Wall. 203, Chase, C. J., and Davis, J., dissenting; Preston *v.* Walsh, 10 Fed. Rep. 315.

the plaintiff complains may be redressed by resort to an action against the employer, as being the real party committing the ouster. In a case, therefore, where the employer is for any reason not amenable to an action, the rule referred to has no application, and the employee, or servant, becomes *ex necessitate* the proper party defendant, since he is the only party who can be subjected to suit at all. Were this otherwise, it would result that open and admitted violation of private rights would find no redress in the courts of the country. The government of the United States, as such, cannot be sued as a party defendant in the courts of the State; and unless its servants and employees may be properly held responsible for the lawless invasion of private property, committed by them under the direction or command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of the municipal law to afford."

§ 248. *The Arlington case.*—This subject derives fresh interest from the Arlington case,[1] recently argued in the Supreme Court of the United States, and in which a re-argument has been ordered at the next term. The facts of the case are briefly as follows: The plaintiff, Lee, asserted ownership of the premises in controversy. The government claimed title to them under a tax sale, being one of a series of such sales which had been adjudged void by the courts.[2] The lands were occupied by officers, agents, tenants, or wards of the federal government, and were used as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known as the "Arlington Cemetery." Lee brought ejectment and made the officers and occupants of the land, some two hundred in number, defendants. The Attorney-General of the United States intervened upon the record, and, by way of sugges-

[1] The Arlington Case, Lee *v.* Kaufman, 3 Hughes, 36.

[2] See Bennett *v.* Hunter, 9 Wall. 326; Tacey *v.* Irwin, 18 Wall. 549; Atwood *v.* Weems, 99 U. S. 183.

tion, informed the court that the lands in controversy were held and possessed by the United States, through its officers and agents, for the purposes above specified, and, without submitting the rights of the government of the United States to the jurisdiction of the court, insisted that the court had no jurisdiction of the subject-matter in controversy, and moved that the declaration in ejectment be set aside, and the proceedings dismissed. The motion made on behalf of the government to dismiss the cause was denied, and the plaintiff had judgment in the ejectment, from which a writ of error was prosecuted to the Supreme Court. If the principles laid down in Carr *v.* United States,[1] Campbell *v.* James,[2] and People *v.* Ambrecht,[3] are sound, and entitled to universal application, then the motion to dismiss for want of jurisdiction should have prevailed, for clearly Lee was indirectly attacking the title of the United States, or rather asserting that it had no title, and the action was in effect against the government. If, on the other hand, Grisar *v.* McDowell,[4] Meigs *v.* McClung,[5] Polack *v.* Mansfield,[6] Dreux *v.* Kennedy,[7] and similar cases, embody the correct principle, the judgment should stand. The solution of this question is of vital importance. The proposition that a person vested with the title to land who is deforced of the possession, by military or executive agents of the government, is thereby divested of all legal redress, and can only procure relief by the uncertain method of petition to Congress, asking to be restored to the possession, or to be paid the value of the lands, if decided to be law, seems to justify the inference drawn by learned counsel, in the course of argument in the Arlington case, that "the citizen holds his property no longer under the protection of law, but at

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[1] 98 U. S. 433.
[2] Vol. 21 Patent Office Gazette, p. 337.
[3] 11 Abb. Pr. (N. Y.) 97.
[4] 6 Wall. 363.
[5] 9 Cranch, 11.
[6] 44 Cal. 36.
[7] 12 Rob. (La.) 489.

the will of the executive agents of the government."[1] It is difficult to see how the exercise of such arbitrary power can be reconciled with the principle of the Constitution, that no man should "be deprived of life, liberty, or *property*, without due process of *law*." In Swasey *v.* North Carolina Railroad Company,[2] which was a suit by a bondholder to procure a sale of certain certificates of stock held by the State of North Carolina in pledge for the security of bonds owned by complainant and others, Chief Justice Waite, sitting at circuit, said: "It is first insisted by the defendant that the State of North Carolina is in fact a party defendant, and consequently that this court cannot entertain jurisdiction of the cause. The State, although directly interested in the subject-matter of the litigation, is not a party to the record. The eleventh amendment to the Constitution of the United States provides that no suit can be prosecuted in this court against a State, by the citizens of another State, or by citizens or subjects of a foreign State. It has long been held, however, that this amendment applies only to suits in which a State is a party to the record, and not to those in which it has an interest merely. It is next urged, that if the State is not actually a party to the suit it is a necessary party in whose absence the cause cannot proceed, and that as a State cannot be brought into court no relief should be granted upon the case made. If the State could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of Osborn *v.* The Bank of the United States,[3] it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party, when the property or the agent is within the

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[1] Argument of Hon. Wm. D. Shipman in the United States Supreme Court, in the Arlington case.

[2] 1 Hughes, 17, 20; S. C. 71 N. C. 571; see Davis *v.* Gray, 16 Wall. 203.

[3] 9 Wheat. 738.

jurisdiction. In such cases the courts act through the instrumentality of the property or the agent."

§ 249.—Ejectment, as we shall presently see, is a remedy in the nature of a proceeding *in rem*,[1] and the action must be instituted in the State and county in which the lands are situated. There would seem to be no practical objection growing out of the nature of the subject-matter of contention, to the exercise of jurisdiction in such cases by the courts "through the instrumentality of the property or the agent."[2] The plaintiff can only recover upon the strength of his own title, and upon proof of a wrongful withholding of the possession by the defendant. In so far as the possession of the agent is wrongful, and constitutes an encroachment upon private property, to which the government has no title, it cannot be regarded as the authorized act of the sovereign power, but should be treated as the independent tort of the agent. The fact that a party is employed in the federal service will not exempt him from responsibility for the commission of felonies or misdemeanors, and he may be arrested and punished even under State process,[3] and certainly this principle ought to include injuries and wrongs to property. If the wrongful act of the agent is to be construed as the act of the executive department of the government, it would seem to be the proper function of the judiciary, as an independent and co-ordinate department of the body politic, to adjudge and declare the rights of the parties, enlighten the executive as to its powers and duties, and extend the appropriate relief. Surely it cannot be intended by the courts that the executive agents of the government should have an unlimited license to seize and appropriate private property to governmental uses, and then to invoke the sovereign prerogative as a

[1] Mostyn *v.* Fabrigas, Cowp. 161–176, per Lord Mansfield; Casey *v.* Adams, 102 U. S. 66.

[2] Swasey *v.* N. C. R. R. Co. 1 Hughes, 17, 20.

[3] See United States *v.* Kirby, 7 Wall. 482; United States *v.* Hart, Peters C. C. 390; Penny *v.* Walker, 64 Me. 430; Opinions Att'y Genl. vol. 5, p. 554.

shield against judicial inquiry, and a bar to all efforts of the owner to repossess himself of that to which he has a clear title. How can the use to which the property is appropriated, whether public or private, affect the rights of the parties? Is it possible that any one of the vast number of our state or federal executive agents is able to deprive a citizen of his personal property, and place it beyond the reach of a replevin writ, by applying it to the uses of the government? Can the appropriation of private property to governmental uses be treated as the equivalent of a sale in market overt? And can the executive agents of the government place themselves above the law, and disseize the rightful owner of his lands, in a country in which private rights are so carefully guarded that the government is not allowed to occupy private property, even temporarily, with its military forces, except in time of actual war, and then only in the manner prescribed by law?[1]

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[1] U. S. Constitution, III Amendment. In Dibble *v.* Clapp, 31 How. Pr. (N. Y.) 420, it appeared that the lands in question were purchased from the husband of the claimant, and also ceded by the State of New York to the United States, and were appropriated to public governmental uses. The plaintiff brought ejectment to recover dower in the lands making the government officers defendants. The complaint was dismissed upon the ground that the State courts had no jurisdiction over the lands. People *v.* Ambrecht, 11 Abb. Pr. (N. Y.) 97, is a special term decision. The case holds that a soldier occupying real property under the direction of his superior officers, is not an actual occupant within the meaning of the statute of that State, and that an ejectment cannot be maintained against him. The court said "ejectment could not therefore be brought against the United States any more than an action of assumpsit, and it seems to follow that they cannot be indirectly sued in the person of their agents or officers, and the title and claim thus subjected by indirection to the jurisdiction of the State courts." But upon what theory are the acts of the officers and agents of the government to be excepted from judicial inquiry, and why are not such acts, when shown to be in defiance of the plainest provisions of organic laws, the proper subject of judicial redress? The grant of judicial power, which extends to all cases in law and equity arising under the Constitution, must certainly have been intended to cover cases of this character, for it seems incredible that the framers of our Constitution should have embodied provisions in that instrument guarding the rights of the citizen against executive encroachment, and furnished no means by which the exercise of arbitrary power could be checked, and these salutary provisions made effectual. New York stands in the front rank of the States

§ 250. *Ejectment against corporations.*—The old doctrine that ejectment would not lie against a corporation aggregate has long been exploded.[1] It has been held in New York, that if the premises are actually occupied by the tenant of a corporation, the action must be against the tenant and not against the corporation,[2] and that a railroad corporation which had laid its track in a street, but had not occupied the whole street, was not an actual occupant, and could not be sued in ejectment as such.[3] A church edifice will be deemed to be in the actual occupation of the religious society using it, and ejectment therefor should be brought against such corporation, and not against its trustees.[4] It has been held in Illinois, that ejectment could be maintained against a railroad corporation in the same way as against any individual who had entered upon plaintiff's lands, without taking condemnation proceedings, or acquiring the title by deed, and was using the land for a public purpose;[5] and where the plaintiff purchased at judicial sale, land over which a railroad company had constructed its road, without right or condemnation, it was held that he could eject the company, and that he need take no notice of their possession, as they were mere intruders.[6]

§ 251. *County.*—Ejectment may be brought against a county to recover land claimed by the county to have been dedicated to public use.[7]

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which have placed the judiciary above the executive, and in which executive action is constantly supervised and annulled by the courts, and it seems curious that, even in an inferior tribunal of that State, an authority should be found tending to support the startling proposition contended for by the attorney general in the Arlington case.

[1] See Dater *v.* Troy Turnpike, &c. Co. 2 Hill (N. Y.), 629.

[2] People *v.* Mayor, &c. of N. Y. 28 Barb. (N. Y.) 240.

[3] Redfield *v.* Utica, &c. R. R. Co. 25 Barb. (N. Y.) 54.

[4] Lucas *v.* Johnson, 8 Barb. (N. Y.) 244.

[5] Smith *v.* Chicago, A. & St. L. R. R. 67 Ill. 191; see Chicago, B. & Q. R. R. Co. *v.* President, &c. 34 Ill. 195. But see Edwardsville R. R. Co. *v.* Sawyer, 92 Ill. 377.

[6] Chicago & I. R. R. Co. *v.* Hopkins, 90 Ill. 316.

[7] Barry *v.* Sonoma Co. 43 Cal. 217.

§ 252. *City.*—Ejectment will lie against a city by the owner of land wrongfully taken by the city and converted into a public street.[1]

§ 253. *Insolvents.*—In a case which arose in New York, it was held, that where a person had been discharged under an insolvent act, he had no further right in the premises, and, therefore, could not be let in to defend as landlord.[2] In Canada, ejectment is maintainable against an insolvent and his assignee.[3] In Massachusetts, the assignee of an insolvent may maintain a real action against the wife of the insolvent, and need not aver that she holds the land to her sole and separate use.[4]

§ 254. *Infants.*—Ejectment, being an action of tort, may be maintained against an infant[5] who must, however, appear and be represented by a guardian, otherwise any judgment rendered against him in the action will be reversed;[6] but if the infant attain his majority pending the suit he may be admitted to plead,[7] and, having pleaded, he waives any doubt attending the service of the writ during his minority.[8] An infant vested with the title to land, for which an action of ejectment has been instituted, has a right to be admitted as a party defendant on the usual terms, and it is the duty of the court to appoint a guardian *ad litem*, so as to enable him to defend the action;[9] and an infant is entitled to defend by guardian as landlord of the

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[1] Armstrong *v.* St. Louis, 69 Mo. 309; Strong *v.* City of Brooklyn, 68 N. Y. 1. But see Cowenhoven *v.* City of Brooklyn, 38 Barb. (N. Y.) 9; Smith *v.* Wiggin, 48 N. H. 105. See § 161.

[2] Jackson *v.* Stiles, 10 Johns. (N. Y.) 67–69.

[3] Fraser Institute *v.* Moore, 19 L. C. J. (Canada), 133.

[4] Blake *v.* Sawin, 10 Allen (Mass.), 340; see Cooper *v.* Lands, 14 Weekly R. 610; S. C. 14 L. T. (N. S.) 287.

[5] Marshall *v.* Wing, 50 Me. 62; McCoon *v.* Smith, 3 Hill (N. Y.), 147; Beckley *v.* Newcomb, 24 N. H. 360. See § 196.

[6] Beckley *v.* Newcomb, 24 N. H. 360; Crockett *v.* Drew, 5 Gray (Mass.), 399.

[7] Marshall *v.* Wing, 50 Me. 52; Tessier *v.* Wyse, 3 Bland's Ch. (Md.) 28.

[8] Hillegass *v.* Hillegass, 5 Barr (Pa.), 97.

[9] Glass *v.* Doe, 2 Blackf. (Ind.) 293.

premises.[1] It has been held in Missouri, however, that an action of ejectment will not lie against an infant upon the possession of his guardian.[2] In New York a statutory action for the determination of conflicting claims to real property cannot be brought against an infant defendant.[3]

§ 255. *Husband and wife.*—At common law, where husband and wife occupied the land, the possession was in law the possession of the husband, and in no respect that of the wife. And where the husband claimed the lands in his own right, it was held to be improper to join the wife in the action, and, if joined, she was entitled to a nonsuit, or a verdict in her favor.[4] To authorize a judgment against the wife, there must be evidence tending to show that the ouster, dispossession or holding over was the act of the wife.[5] In Massachusetts, however, as we have just seen, an assignee of an insolvent debtor was held entitled to maintain a writ of entry against the insolvent's wife, without averring that she held the land to her sole and separate use.[6] It has been held in the New York Court of Appeals,[7] that where a husband and wife were seized in joint tenancy, the entry upon the premises by the husband, under a claim of title under the grant to himself and wife, enured to the benefit of both. It appeared in this case that when the possession was demanded of the wife she did not disclaim title to the land, or repudiate the action of her husband, but refused to yield the possession. The court held that the wife was properly joined as a party defendant with her husband, not as being answerable for his tortious acts, but as one claiming

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[1] Stiles *v.* Jackson, 1 Wend. (N. Y.) 316.

[2] Spitts *v.* Wells, 18 Mo. 468.

[3] Bailey *v.* Briggs, 56 N. Y. 407.

[4] See Rose *v.* Bell, 38 Barb. (N. Y.) 25; Von Schrader *v.* Taylor, 7 Mo. App. 361; Meegan *v* Gunsollis, 19 Mo. 417; Hunt *v.* Thompson, 61 Mo. 154.

[5] Von Schrader *v.* Taylor, 7 Mo. App. 361.

[6] Blake *v.* Sawin, 10 Allen (Mass.), 340; see Von Schrader *v.* Taylor, 7 Mo. App. 361.

[7] Stewart *v.* Patrick, 68 N. Y. 450–455.

title and right of possession to the lands in controversy. The action would have been defective had she been omitted as a party, because the judgment would not have concluded her, and it would have been necessary to litigate the same questions over again with her, should she subsequently have asserted the right which she had already asserted by refusing to yield the possession. So it was decided in the Supreme Court of Michigan,[1] that where a husband and wife occupied lands claimed by the wife, an ejectment against the husband alone would be a fruitless proceeding, as no judgment could be rendered affecting her title to which she was not a party, and her possession could not be disturbed by a judgment against her husband. And in Pennsylvania, in an ejectment against a husband for the wife's lands, if the husband has confessed judgment, the wife has a right to ask that the judgment be opened and to come in and defend.[2] So, in Fenwick *v.* Gravenor,[3] an early English case, a wife was admitted to defend when the title of the plaintiff's lessor was based on a pretended marriage with her, which, however, she disputed. On a writ of entry, in New Hampshire, where the title to the land sued for is in the wife, the husband need not be joined.[4] The legal relations existing between husband and wife have been so much altered by legislation that it is almost impossible to formulate any general rule applicable to them. It is clear that if the wife claims title to the land independent of the rights incident to the relationship, or if she is the person who has ousted or withheld the possession from the plaintiff, then she is a necessary and proper party defendant. If, however, she is upon the land merely as a member of her husband's family, she can, as we shall presently show, be evicted under the writ issued against him.

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[1] Hodson *v.* Van Fossen, 26 Mich. 68.

[2] Lewis *v.* Brewster, 57 Penn. St. 410; see, however, Johnson *v.* Fullerton, 44 Penn. St. 466.

[3] 7 Mod. *71. See Den *v.* Steward, 2 Pen. (N. J.) [*929] 676.

[4] Cahoon *v.* Coe, 57 N. H. 556.

§ 256. *Widow.*—In Pennsylvania, ejectment will not lie by an heir against a widow in possession of real estate, of which her husband died seized. The heir, it was held, must proceed under the partition acts of that State to have her share ascertained and set off to her.[1] It has been held in Kentucky, that the possession of the mansion house of a deceased person by his widow, before allotment of dower, is consistent with that of the heirs, and the latter may therefore be admitted to defend an ejectment brought against her.[2]

§ 257. *Defendant claiming under tax title.*—According to some of the authorities, ejectment cannot be supported against the purchaser of a tax title until he has taken possession,[3] but in some of the States the statute of limitations begins to run from the date of the deed,[4] or from the date of its record, the act of recording the instrument being regarded as equivalent to taking possession under it.[5] It has been decided in Nebraska, that parties holding tax deeds are not proper parties to a foreclosure, that if made defendants they are entitled to defend their title, and that the plaintiff should be compelled to rely upon the strength of his own title and not on the invalidity of the tax title.[6]

§ 258. *Tenant at will.*—A writ of entry will lie against a tenant at will who refuses to surrender the premises on demand.[7]

§ 259. *Who may come in and defend—Joint owners.*—In an action to recover land in North Carolina, it was held that a third party claiming to be a joint owner with the de-

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[1] Gourley *v.* Kinley, 66 Penn. St. 270.

[2] Porter *v.* Robinson, 3 A. K. Marsh (Ky.), 253.

[3] Waln *v.* Shearman, 8 S. & R. (Pa.) 356; see McEntire *v.* Brown, 28 Ind. 347, 352; Pixley *v.* Rockwell, 1 Sheldon (N. Y.), 267.

[4] Degraw *v.* Taylor, 37 Mo. 310.

[5] Knox *v.* Cleveland, 13 Wis. 245; Whitney *v.* Marshall, 17 Wis. 174.

[6] Hurley *v.* Cox, 9 Neb. 230.

[7] Wheelwright *v.* Freeman, 12 Metc. (Mass.) 154; Dolby *v.* Miller, 2 Gray (Mass.), 135; Gregory *v.* Tozier, 24 Me. 308.

fendant, had a right to be let in as a party defendant.[1] This is, of course, the general rule as to joint ownership.

§ 260. *Parties claiming by title paramount to both litigants.*—It was decided in the Supreme Court of California, that a party did not gain the right to intervene, in an action of ejectment, who merely alleged that he had title paramount to both litigants, for a person so situated could not be said to possess any interest in the matter in litigation, and certainly could not be disturbed in his possession under any process which might be issued on a judgment in the action.[2] So in Files *v.* Watt,[3] in the Supreme Court of Arkansas, the application of a party to come in and defend was denied where he alleged an independent ownership, and showed no interest in common or privity of right between himself and either of the litigants. Under the practice in Texas, however, in an action of trespass to try title, brought by an insolvent vendor against the vendee, to enforce payment of purchase money for the land, the vendee has, as against his vendor, the right in equity to have the claimants of an outstanding grant, who assert title, brought in so that the title may be settled before the vendee is either evicted or forced to pay the balance of the purchase money to an insolvent vendor.[4]

§ 261. *Parties claiming in opposition to defendant's title.*—So it is quite clear that one claiming in hostility to the title of the defendant, cannot be admitted as a party defendant in the action.[5]

§ 262. *Mortgagee.*—A mortgagee may be let in to de-

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[1] Lytle *v.* Burgin, 82 N. C. 301; see Colgrove *v.* Koonce, 76 N. C. 363; Rollins *v.* Rollins, 76 N. C. 264; McCown *v.* Hannah, 3 Oregon, 302.

[2] Porter *v.* Garrissino, 51 Cal. 559; Colgrove *v.* Koonce, 76 N. C. 363.

[3] 28 Ark. 151.

[4] Estell *v.* Cole, 52 Texas, 170; see Cooper *v.* Singleton, 19 Texas, 267; Simpson *v.* Hawkins, 1 Dana (Ky.), *303; Harris *v.* Smith, 2 Dana (Ky.), *11.

[5] Jackson *v.* Flint, 2 Cowen (N. Y.), 594.

fend,[1] and so may the assignee of a mortgage,[2] unless the plaintiff in ejectment will satisfy the mortgage;[3] and a mortgagee claiming title for his mortgagor, to land as being within the description of the mortgage deed, is jointly liable in ejectment with the mortgagor.[4]

§ 263. *Purchaser pendente lite.*—It may be stated as a general principle, that a party who purchases or intermeddles with property *pendente lite*, does so at his peril, and is as conclusively bound and affected by the judgment as though he had been made a party, and has no right to demand that the proceedings be suspended or delayed until he is brought in as a defendant. If the rule were otherwise, by successive alienations, litigations could be protracted, and the administration of justice delayed indefinitely;[5] and persons entering upon land pending ejectment, are bound by the judgment subsequently rendered, and are subject to removal by the final process.[6] And in Georgia, where a defendant was added who took possession after the action was instituted, it was held that the only result thereby accomplished was to hold him for mesne profits, as he would have been bound by the judgment as to the title, even though not made a party.[7]

§ 264. *Landlord as defendant.*—In Finnegan *v.* Carraher,[8] in the New York Court of Appeals, which was an

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[1] Doe *v.* Cooper, 8 T. R. 645; *vide* Barnes, 194; Doe *v.* Roe, 6 Bing. 613; Den *v.* Fen, 1 Halst. (N. J.) 478; Doe *v.* Roe, 4 M. & P. 437; Fairclaim *v.* Shamtitle, 3 Burr. 1293.

[2] Jackson *v.* Babcock, 17 Johns. (N. Y.) 112.

[3] Den *v.* Fen, 1 Halst. (N. J.) 478; see Jackson *v.* Babcock, 17 Johns. (N. Y.) 112.

[4] Patch *v.* Keeler, 28 Vt. 332; see Marvin *v.* Dennison, 1 Bla. C. C. 159.

[5] Malone *v.* Marriott, 64 Ala. 486–490; Tilton *v.* Cofield, 93 U. S. 163; Inloe's Lessee *v.* Harvey, 11 Md. 524; Salisbury *v.* Morss, 7 Lans. (N. Y.) 359; Harrington *v.* Slade, 22 Barb. (N. Y.) 162; Canal Co. *v.* Iron Works, 7 Phila. (Penn.) 662.

[6] Oetgen *v.* Ross, 47 Ill. 142; Wallen *v.* Huff, 3 Sneed (Tenn.), 82.

[7] Willingham *v.* Long, 47 Ga. 540; Bradley *v.* McDaniel, 3 Jones Law (N. C.), 128.

[8] 47 N. Y. 493. See Abeel *v.* Van Gelder, 36 N. Y. 513; Pierce *v.* Ferris, 10

action for the possession of real estate occupied by a tenant of the defendant, it was held, that, under the practice in that State, the presence of the tenant was not essential to enable the claimant to litigate the title, and that the defendant had waived the defect of the non-joinder of the tenant because such objection had not been taken by demurrer or answer. It further appeared that the defendant (the landlord) said that he was in possession of the premises in question, and that service of the papers in the action was made upon him on the faith of this statement. The court decided that the defendant was estopped by such declaration from subsequently denying that he was in the actual possession of the lands, at the time of the commencement of the action. It has been held in South Carolina, that trespass to try title will lie against a landlord, even though he was never in possession except by his tenant.[1]

§ 265. *Party claiming as landlord.*—A third party claiming as landlord will ordinarily be let in to defend an action of ejectment.[2] But, according to some of the authorities, he cannot be substituted in the tenant's place without the plaintiff's consent.[3] If the tenant dies pending suit, the landlord may prosecute a writ of error in the name of the tenant's heirs, and against their will, upon his engagement to bear all the costs and expenses of the action.[4] And it may be stated as a general rule, that if the landlord is once allowed to appear and defend in the tenant's name, his right to conduct the proceedings is not limited to the lower courts,[5] and the tenant cannot interfere with the

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N. Y. 280; Fosgate *v.* Herkimer Co. 12 N. Y. 580; Presbyterian Congregation *v.* Williams, 9 Wend. (N. Y.) 147; Hall *v.* White, 3 C. & P. 136.

[1] Binda *v.* Benbow, 11 Rich. Law (S. C.), 24.

[2] Rollins *v.* Bishop, 76 N. C. 268; Mitchell *v.* Baratta, 17 Gratt. (Va.) 455; Wise *v.* Wheeler, 6 Ired. Law (N. C.), 196; Marvin *v.* Dennison, 1 Blatch. C. C. 159.

[3] Merritt *v.* Thompson, 13 Ill. 716; Emlen *v.* Hoops, 3 S. & R. (Penn.) 130; Jackson *v.* Stiles, 1 Cow. (N. Y.) 134.

[4] Kellogg *v.* Forsyth, 24 How. 186.

[5] Dutton *v.* Warschauer, 21 Cal. 609; Kellogg *v.* Forsyth, 24 How. 186.

cause to the prejudice of the landlord.[1] It was held in Virginia, that by the common law, and under the statute of that State, the policy prevailed to extend the word landlord to every person whose right or title was consistent with or connected to the possession of the occupying tenant,[2] and where the tenant occupied under a mere license, no lease or contract being shown, the party from whom he received the possession was let in to defend.[3] The technical relationship need not always be shown, provided the title of the applicant is consistent with that of the occupier.[4]

§ 266. *Marvin v. Dennison discussed.*—In Marvin *v.* Dennison,[5] in the United States Circuit Court, the proper construction of the statute of Vermont, which provides that "the action shall be brought as well against the landlord as the tenant in possession of the premises," is considered. The court says that it would seem to be more consistent with the general reason and policy of the law that all the parties to the title, under and subsidiary to which the possession is held, should be liable to be joined in the first instance, and the title finally settled as to all in one suit. The court further suggests that the fitness and propriety of this rule would appear none the less obvious when it was considered that otherwise, especially where different courts, acting under different and independent jurisdictions, existed and could be resorted to, conflicting decisions might possibly be rendered upon the same title. "To the joinder of mortgagee with mortgagor we are not able to perceive any well-founded objection; nor any, we may add, to the joinder of vendor with vendee, where the latter holds under a bond or contract for a deed, or of trustee with *cestui que trust*, where the latter is in possession under the trust title. In these

[1] Doe *v.* Franklin, 7 Taunt. 9.

[2] See Stribling *v.* Prettyman, 57 Ill. 371; Fairclaim *v.* Shamtitle, 3 Burr. 1290; Falkner *v.* Jones, 12 Ala. 165.

[3] Hanks *v.* Price, 32 Gratt. (Va.) 108.

[4] Falkner *v.* Jones, 12 Ala. 165.

[5] 1 Blatch. C. C. 159.

and other cases of a like nature, but especially in that of mortgagee and mortgagor, there is such a relation or connection existing between the respective parties as constitutes a tenancy, though it may not amount to that of landlord and tenant within the meaning of the statute. A mortgagee, if he claims title under the mortgage, cannot be allowed in contradiction to the tenancy to set himself up, or claim to be treated, as a stranger to the possession. If he claims nothing under the mortgage and would, on that ground, not only discharge himself from but recover costs, there can be no injustice or hardship in compelling him to disclaim, so that he may be forever estopped by matter of record from setting up any title under the mortgage. If the mortgagee cannot be made a party, the suit would be, in a good measure, ineffectual, since a judgment against the mortgagor, though conclusive upon his rights, would have no effect upon the rights of the mortgagee, who would be at liberty to bring an action in his own behalf, and have the title tried over again, or leave it unsettled and open to litigation during his pleasure, or until the statute of limitations should run." Much as the purpose sought to be accomplished in this case is to be commended, we cannot but regard the decision as carrying the interpretation of the word landlord to an extreme, not to say unwarrantable limit. The decision, in effect, practically converts ejectment into a modern statutory action for the determination of conflicting claims to real property, at least so far as the title under which the actual possession is held is concerned.

CHAPTER VIII.

EJECTMENT BY MUNICIPAL CORPORATIONS FOR STREETS AND PUBLIC PLACES.

§ 267. Ejectment by municipal corporations vested with the fee.
268. Vested with public easement.
269. Theory of the decisions.
270. Founded on public necessity.
271. Ejectment for streets and public places.
§ 272. Right to bring ejectment not uniformly recognized.
273. Rule in Michigan.
274. When ejectment cannot be maintained.
275. Trespass to try title.

§ 267. *Ejectment by municipal corporations vested with the fee.*—The right of a municipal corporation to recover possession of streets or public places, under its direction and control, by ejectment, has been a subject of frequent contention in the courts. Where the legal title to the soil itself is vested in the corporation, though in trust for public use, it is clearly established that the action may be brought, for the right of entry, and of possession, accompany the legal title, and the sheriff delivers possession of the ground itself to be held and appropriated to the purposes of the public trusts.[1]

§ 268. *Vested with public easement.*—Where, however, the adjoining owner retains the freehold in the soil, and only a naked easement or servitude, or the power to regulate and control the enjoyment by the public, of the right of way or passage, is granted or acquired by the corporation, a more serious question is presented. How can the rights thus conferred, which are in their nature clearly incorporeal, be protected or enforced by the action of ejectment?[2] In City of Savannah *v.* Steamboat Company,[3] the

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[1] City of Savannah *v.* Steamboat Co. 1 R. M. Charlton (Ga.), 342; see Com'rs of Bath *v.* Boyd, 1 Ired. (N. C.) Law, 194; see Chicago *v.* Wright, 69 Ill. 318.

[2] See §§ 95, 130, 132, 139, 140, 146, 161.

[3] 1 R. M. Charlton (Ga.), 342.

recovery in ejectment was limited to cases of corporations holding the fee, and, as we have seen, the right to recover in that case was founded upon the ownership of the fee by the city. On the other hand, the case of Cincinnati *v.* White[1] established the doctrine that a municipal corporation could defend ejectment at the suit of the owner of the fee, by setting up the right of possession, in a street or common, under rights acquired by dedication to a public use; and, as has been said by the New Jersey Court of Errors and Appeals, "if the right of possession under a public easement may be made a defense in ejectment, no reason can be advanced why it should not be also available to support an action to recover the possession."[2]

§ 269. *Theory of the decisions.*—In Dummer *v.* Jersey City,[3] which was ejectment for a market ground, dedicated to public use, the New Jersey Supreme Court used this language: "Ejectment is a possessory action, and if the lessors of the plaintiff (a municipal corporation) are entitled to the possession, and they must be if they are entitled to the use, for they are inseparable, it is a legal and not a mere equitable right, and they may recover it against the legal owner of the fee." The principles of this case, however, involve a plain departure from the common law rules governing the action of ejectment. Are the rights, which the parties are seeking to redress, incident to or connected with some corporeal interest or estate in the land, is the common law test in determining whether or not ejectment is the appropriate remedy. Any easement, whether public or private, carries with it, to the extent essential for its proper enjoyment, the right of possession of the land over which the easement extends. Remedies for the protection and enforcement of such incorporeal rights, exist both at law and in equity. It is going too far to say that the right of pos-

[1] 6 Peters, 431.

[2] Hoboken Land and Imp. Co. *v.* Mayor, &c. 7 Vroom (N. J.), 540.

[3] 1 Spencer (N. J.), 86.

session is the test as to when the remedy can be invoked, unconnected with the character of the possession claimed, or the nature of the interest or estate from which the right springs. This principle is not affected by calling the right to enjoy the easement a legal rather than an equitable right. There is no inherent distinction between public and private easements.[1] Neither constitute an estate in lands, and they differ only in degree.

§ 270. *Founded on public necessity.*—In the case of Hoboken Land Company *v.* Mayor, &c., of Hoboken,[2] the right of a municipal corporation, not vested with the fee, to maintain ejectment, is placed upon the ground of convenience and paramount public necessity. The public easement in a street or public place, is considered to be of so important a character that possession, exclusive of any interference by the owner of the fee, is essential for its improvement, regulation, and enjoyment. In a large city the owner of the fee is practically divested of dominion over the land, and his rights differ little from those which are common to the public. Hence, for the protection of so important a public use, and in furtherance of what is vaguely termed police power, the convenient and effectual remedy of ejectment is given, instead of remitting the municipal authorities to test and protect the rights of the public by criminal prosecutions. The early decisions limited the public right in a street or highway to that of passage and repassage, but the interests of the public in the easement have been greatly extended by the modern decisions, especially with reference to streets in crowded cities, and now include not only the right of passage, and of flagging, curbing, and paving the street, but also the privilege of constructing sewers, and laying water and gas pipes under it, and the exclusive right to regulate the public use and enjoyment even as against the owner of the soil, so that the latter has only a

[1] See §§ 140, 161.

[2] Hoboken Land Co. *v.* Mayor, &c., of Hoboken, 7 Vroom (N. J.), 540; Trustees M. E. Church *v.* Council of Hoboken, 4 Vroom (N. J.), 13.

naked fee of but nominal value. The public easement has grown to such proportions as to draw to it the remedies incident to an estate in lands.

§ 271. *Ejectment for streets and public places.*—The right of municipal corporations or public authorities vested with no higher estate than a public easement, or right by dedication, to invoke the remedy of ejectment, for the possession of streets,[1] public squares,[2] town commons,[3] church,[4] and market grounds,[5] is upheld in many cases.[6]

§ 272. *Right to bring ejectment not uniformly recognized.*—The correctness of this doctrine, however, is not uniformly conceded. Where ejectment had been brought by a town having an easement in a street against the owner of the fee, for obstructing it, the Kentucky Court of Appeals denied the right of a party entitled to an easement to recover in ejectment, for the reason that the judgment would divest the owner of her absolute property in the soil. The court say that the public have a remedy by injunction or indictment.[7]

§ 273. *Rule in Michigan.*—By statute in Michigan, the plaintiff in ejectment is required to show "a valid subsisting interest in the premises claimed." Under this statute the right of a city vested by charter with the supervision and control of its streets to maintain ejectment therefor was denied.[8] The same doctrine was applied in a case in which a county representing the public brought ejectment against a party

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[1] San Francisco *v.* Sullivan, 50 Cal. 603.

[2] Trustees M. E. Church *v.* Council of Hoboken, 4 Vroom (N. J.), 13; City of Winona *v.* Huff, 11 Minn. 119.

[3] Com'rs of Bath *v.* Boyd, 1 Ired. (N. C.) Law, 194.

[4] City of Hannibal *v.* Draper, 15 Mo. 634.

[5] Dummer *v.* Jersey City, 1 Spencer (N. J.), 86.

[6] Chicago *v.* Wright, 69 Ill. 318; Klinkener *v.* School Directors, 11 Penn. St. 444; City of Apalachicola *v.* Land Co. 9 Fla. 340; see Greenwich *v.* Railroad Co. 9 C. E. Green (N. J. Eq.), 217; see Barney *v.* Keokuk, 94 U. S. 324; see Perry *v.* New Orleans, &c., R. R. 55 Ala. 413.

[7] West Covington *v.* Freking, 8 Bush (Ky.), 121.

[8] Grand Rapids *v.* Whittlesey, 33 Mich. 109.

who had occupied and obstructed land dedicated to the public use as a street. The easement, the court said, was not a beneficial ownership in land, and in Michigan ejectment has never been considered as a proper remedy to put the public in possession of land appropriated for streets, or to keep it clear of unauthorized impediments.[1]

§ 274. *When ejectment cannot be maintained.*—In the case of The Borough of Chambersburg *v.* Manko,[2] in the New Jersey Court of Errors and Appeals, the general rule that local municipal authorities having charge of a public highway may maintain ejectment therefor, against any persons encroaching thereon, is recognized; but the rule was held not to be applicable so as to support ejectment by the municipal authorities for an encroachment upon a turnpike, under the control of a private corporation, upon which the burden of protecting the highway had been expressly imposed, even though the municipal authorities were vested with certain prescribed powers which, in the case of an ordinary highway, would have justified the use of this possessory action.

§ 275. *Trespass to try title.*—In South Carolina it has been held, that the commissioners of streets cannot maintain trespass to try title for lands alleged to have been dedicated to public use as streets, and which had been closed up by those claiming under the donor. Indictment for nuisance was declared to be the appropriate relief.[3] In Texas, however, a municipal corporation may maintain trespass to try title for its lands.[4]

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[1] Bay County *v.* Bradley, 39 Mich. 163.

[2] 10 Vroom (N. J.), 496.

[3] Com'rs of Georgetown *v.* Taylor, 1 Brev. (S. C.) 100, *130; S. C. 2 Bay (S. C.), 282; second trial, Ib. 288.

[4] Lewis *v.* San Antonio, 7 Texas, 288.

CHAPTER IX.

EJECTMENT BETWEEN CO-TENANTS, AND BY CO-TENANTS AGAINST THIRD PARTIES.

§ 276. Between tenants in common.
277. Actual ouster must be shown.
278. How distinguished from ouster in other cases.
279. Newell *v.* Woodruff.
280. Zeller's Lessee *v.* Eckert.
281. Ouster a question of fact.
282. Burden of proof.
283. What constitutes ouster.
284. Examples.
285. Wild lands.
286. Ouster to sustain trespass.
287. Conveyance of the entire estate.
288. Exceptions.
289. Presumption of ouster from lapse of time.
290. When ouster need not be proved.
§ 291. Title of co-tenants.
292. Outstanding title.
293, 294. Title acquired under same instrument.
295. Ejectment between joint tenants and co-parceners.
296. Tenancy in common of naked possession.
297–299. *Tenants in common against third parties.*—Joinder of tenants in common.
300, 301. What interest recovered.
302. Joinder of joint tenants against third parties.
303. Ejectment by co-parceners.

§ 276. *Between tenants in common.*—Ejectment is an appropriate remedy in cases where one tenant in common has been dispossessed or ousted by his co-tenant, from the whole or any portion of the lands of the co-tenancy.[1] The principal question to be determined, in ejectments between co-tenants, is whether or not the unity of possession has been destroyed, or whether the defendant has excluded the plaintiff from the possession and enjoyment of the estate, or has ousted him therefrom. The general rule is that the possession of one tenant in common is the possession of his companions,[2] for a fellowship exists between

[1] See Culver *v.* Rhodes, MSS. opinion, probably reported in 87 N.Y.

[2] Covington *v.* Stewart, 77 N. C. 148; Bowen *v.* Preston, 48 Ind. 367; Foulke *v.* Bond, 12 Vroom (N. J.), 527; Doe *d.* Barnett *v.* Keen, 7 T. R. 386; Smales *v.* Dale, Hob. [120] 265; Miller *v.* Myers, 46 Cal. 535; Ford *v.* Grey, Salk. 285; Phillips *v.* Gregg, 10 Watts (Penn.), 158; Doe *v.* Prosser, Cowp. 217; Challefoux *v.* Ducharme, 8 Wis. 287; Fairclaim *v.* Shackleton, 5 Burr. 2604; Mining Co. *v.* Taylor, 100 U. S. 37; Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587; Vaughan *v.* Bacon, 15 Me. 455; Young *v.* De Bruhl, 11 Rich. (S. C.) Law, 638; Clymer's

tenants in common, and the law assumes that each will be true to the other.[1] "The seizin and possession of one tenant in common of real estate," says the Supreme Court of Iowa, "is seizin and possession for the use of the others."[2]

In a recent case, in the New York Court of Appeals, it was said that where one tenant in common acted for all the tenants, in reference to the common property, his knowledge would be attributed to his co-tenants, with the same effect as the knowledge of any other agent affects his principal.[3] But this must be regarded as an extreme statement of the legal effects of this relation, for the co-tenant's admissions have been held not to be evidence against his companions, there being no community of interest,[4] and the judgment in an unsuccessful action for the lands of the cotenancy, brought by one co-tenant, does not bind or estop his companions.[5] The relations of tenants in common are presumed to be amicable rather than hostile, and the acts of one co-tenant affecting the common property are presumed to be for the common benefit;[6] and one co-tenant will not be presumed to intend a wrong to his companion if his acts will admit of any other construction.[7] Thus, in Wood *v.* Phillips, the New York Court of Appeals held that one tenant in common was justified in taking peaceable possession of the common property, and even though such possession was acquired by stealth it was legal, as against a cotenant claiming the sole possession, if accomplished without tumult or breach of the peace.[8]

Lessee *v.* Dawkins, 3 How. (U. S.) 674–689; Campau *v.* Campau, 44 Mich. 31; Allen *v.* Hall, 1 McCord (S. C.), 131; Lillianskyoldt *v.* Goss, 2 Utah, 292.

[1] Day *v.* Howard, 73 N. C. 1.

[2] Kinney *v.* Slattery, 51 Iowa, 353; Burns *v.* Byrne, 45 Iowa, 285; Campbell *v.* Campbell, 13 N. H. 483.

[3] Ward *v.* Warren, 82 N. Y. 265; see Munson *v.* Munson, 30 Conn. 425.

[4] Young *v.* Griffith, 79 N. C. 201.

[5] Stovall *v.* Carmichael, 52 Texas, 383; see Williams *v.* Sutton, 43 Cal. 71.

[6] Foulke *v.* Bond, 12 Vroom (N. J.), 527; Baker *v.* Whiting, 3 Sumn. 475, per Story, J.; Wood *v.* Phillips, 43 N. Y. 152.

[7] Stearns on Real Actions (2d ed.), p. 41; Berthold *v.* Fox, 13 Minn. 507.

[8] Wood *v.* Phillips, 43 N. Y. 152.

Tenants in common sustain to each other a relation of trust,[1] and the possession of one tenant in common *eo nomine*, as tenant in common can never bar his companion, such possession being not adverse to, but in support of, the common title.[2] In an early case, in the New York Supreme Court, Spencer, J., is reported as having said that in ejectment between tenants in common actual ouster need not be proved. This cannot, however, be regarded as a correct statement of the law, unless the term be confined to actual physical ouster, "a turning out by the shoulders," or forcible expulsion.[3]

§ 277. *Actual ouster must be shown.*—The rule of law is clearly established, that one co-tenant cannot maintain ejectment against his fellow tenant without proof of an actual ouster, which may be effected either forcibly or by a denial of the plaintiff's rights, and the assertion of an adverse title. Story adopts this doctrine in Barnitz *v.* Casey,[4] and cases sustaining the rule are numerous, in both State and Federal tribunals, under both common law and code systems of practice.[5] The ouster may be committed by a principal through an agent.[6]

The rule, requiring proof of actual ouster, existed in ear-

[1] Harrison *v.* Harrison, 56 Miss. 174.

[2] Doe *d.* Fisher *v.* Prosser, Cowper, 217; Kathan *v.* Rockwell, 16 Hun (N.Y.), 90; Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241.

[3] Shepard *v.* Ryers, 15 Johns. (N. Y.) 497, 501; see Gale *v.* Hines, 17 Fla. 773.

[4] 7 Cranch, 456.

[5] Norris *v.* Sullivan, 47 Conn. 474; Bethell *v.* McCool, 46 Ind. 303; Sharp *v.* Ingraham, 4 Hill (N.Y.), 116; Jones *v.* Perkins, 1 Stew. (Ala.) 512; Day *v.* Howard, 73 N. C. 1; Story *v.* Saunders, 8 Humph. (Tenn.) 663; Gale *v.* Hines, 17 Fla. 773; Cutts *v.* King, 5 Greenl. (Me.) *482; Doe *d.* Taylor *v.* Hill, 10 Leigh (Va.), 457; Harvin *v.* Hodge, Dudley (S. C.) Law, 23; Cross *v.* Robinson, 21 Conn. 379; Higbee *v.* Rice, 5 Mass. *351; Noble *v.* McFarland, 51 Ill. 226; Ewald *v.* Corbett, 32 Cal. 493; Young *v.* De Bruhl, 11 Rich. (S. C.) Law, 638; Siglar *v.* Van Riper, 10 Wend. (N. Y.) 414; Doe *d.* Halford *v.* Tetherow, 2 Jones (N. C.) Law, 393; Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500; Trapnall *v.* Hill, 31 Ark. 345; Edwards *v.* Bishop, 4 N. Y. 61; Halford *v.* Tetherow, 2 Jones (N. C.) Law, 393; Jones *v.* Weathersbee, 4 Strob. (S. C.) Law, 50.

[6] Munson *v.* Munson, 30 Conn. 425.

ly times in all cases where ejectment was brought by a tenant in common, joint tenant, or parcener, against his companion, and the peculiar practice introduced to meet this emergency further illustrates the flexible nature of the remedy. When the defendant desired to admit the title and co-tenancy, and to deny the commission of any acts amounting to an ouster, or total denial of the plaintiff's rights, the court permitted him, upon presenting proper proof of the facts by affidavit, to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster, unless actual ouster should be proved.[1]

This favor was usually granted as a matter of course,[2] for if the defendant entered into the usual consent rule he could not subsequently object that no actual ouster was proved at the trial.[3] This special rule was, of course, available only when the defendant did not dispute or assail the title of his companion.

§ 278. *How distinguished from ouster in other cases.*— An ouster by a tenant in common does not differ in its nature from any other ouster in any respect; the amount of evidence required to prove it, however, is greater. In other cases the assumption of ownership is more clearly adverse, but the acts of a tenant in common which indicate assumption of ownership may be consistent with an acknowledgment of the title, and rights of the co-tenant; hence, acts which are decisive in the one case may be equivocal and insufficient in the other,[4] and may be susceptible of explanation consistent with a common title. "Acts of ownership," says Story, "are not, in tenancies in common, necessarily acts of dis-

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[1] Doe *d.* Gigner *v.* Roe, 2 Taunt. 397; Anon. 7 Mod. 39; Oates *v.* Brydon, 3 Burr. 1895; Langendyck *v.* Burhans, 11 Johns. (N. Y.) 461; Jackson *v.* Lyons, 18 Johns. (N. Y.) 398; Jackson *d.* Hopkins *v.* Leek, 12 Wend. (N. Y.) 105; Taylor *v.* Hill, 10 Leigh (Va.), 457.

[2] Doe *d.* Gigner *v.* Roe, 2 Taunt. 397.

[3] Jackson *v.* Denniston, 4 Johns. (N. Y.) 311.

[4] Foulke *v.* Bond, 12 Vroom (N. J.), 527; Newell *v.* Woodruff, 30 Conn. 492; see Warfield *v.* Lindell, 30 Mo. 272.

seizin."[1] The difference, as explained by the Supreme Court of Connecticut in a leading case, is only in the kind of evidence by which the ouster may be proved in the two cases. As against a co-tenant it cannot be proved merely by acts which are consistent with an honest intent to acknowledge and conform to the rights of his companion, although such acts might be sufficient evidence of an ouster, between the parties, if there was no tenancy in common, and each claimed the whole estate.[2]

§ 279. *Newell* v. *Woodruff.*—In this case the evidence showed that the defendant let the property, ordinarily spoke of it as her own, and paid the taxes regularly; that no one had, to her knowledge, set up a title or claimed any right to it, except the plaintiff, who had never distinctly stated the nature of the claim put forward by him, and had not demanded to be let into possession of a specific interest as co-tenant. The court below on this evidence granted a nonsuit, and this was held on appeal to be correct. Mr. Freeman, in his valuable work on Co-tenancy and Partition,[3] says of this decision, that if it be accepted as sound, "it follows that acts sufficient to establish an ouster when proved as a defense, are insufficient when proved as a cause of action." As an illustration he takes the case of an exclusive occupancy (similar to that shown in Newell *v.* Woodruff) under a claim of ownership in severalty, accompanied by the occupant's belief that his claim is unquestioned and unquestionable. "If he be sued in ejectment by a co-tenant, the latter cannot recover, in the absence of a demand for possession, because there is no ouster," *i. e.*, the facts proved are insufficient as a cause of action. "But if the possession has continued for a length of time sufficient to

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[1] Prescott *v.* Nevers, per Story, J., 4 Mason, 326; and see Gower *v.* Quinlan, 40 Mich. 572.

[2] Newell *v.* Woodruff, 30 Conn. 492; and see Barret *v.* Coburn, 3 Met. (Ky.) 510; 13 Am. Dec. 140, note.

[3] Co-tenancy and Partition, by A. C. Freeman, Esq.; § 231.

create a title by disseizin, then the plaintiff would not be able to recover, because, from such possession, the jury would be justified in finding an ouster," *i. e.*, the facts proved are sufficient as a defense. If the decision were rested by the court wholly on the absence of a distinct demand by the plaintiff, it might be open to this criticism; but the judges seem to have been quite as much affected by the lack of any positive evidence that the defendant's occupancy was actually adverse to the plaintiff's asserted title. Her speaking of the property as her own must be considered as of little importance. As was said by the Supreme Court of Missouri, in a leading case in that State, "To constitute an adverse possession of one tenant in common against his co-tenant, there must be some notorious act asserting an entire ownership. It is further said in some cases that this act must be brought home to the knowledge of the co-tenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not with any propriety be regarded as an act of adverse possession of which the co-tenant was bound to take notice, unless made to him or communicated to him."[1]

§ 280. *Zeller's Lessee* v. *Eckert.*—In Zeller's Lessee *v.* Eckert,[2] Mr. Justice Nelson, in delivering the opinion of the Supreme Court of the United States, said: "The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after the expiration of his lease; the vendee, the title of his vendor after breach of the contract; and the tenant in common, the title of his co-tenant; and drive the respective owners and claimants to their action within the period of the statute of limitations. The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced, is in the degree of proof required to establish the adverse character of the possession. As that was originally taken

[1] Warfield *v.* Lindell, 30 Mo. 272–282.

[2] 4 How. (U. S.) 289.

and held in subserviency to the title of the real owner, a clear, positive, and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practiced; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations." The principles on which this opinion is founded apply to every case where a party comes into possession of land while occupying a fiduciary relation to another, and include, as has often been decided, the case of a tenant in common in possession of land,[1] for the proof of ouster must be sufficient to establish an adverse possession on the part of the wrong-doer.[2]

§ 281. *Ouster a question of fact.*—The ouster is a question of fact which it is the province of the jury to determine, and must be expressly found by them,[3] and is not a question of law for the decision of the court.[4] The evidence must be of a most positive and satisfactory nature.[5]

§ 282. *Burden of proof.*—The burden of proving the ouster rests upon the party alleging it;[6] the law, as we have seen, never assumes that a co-tenant is disloyal to the interests of the co-tenancy, or that he intends to do an unlawful act. But before the plaintiff can be called upon to establish an eviction, or denial of his rights, the defendant must prove himself a tenant in common with plaintiff, for it is only

[1] Boggess *v.* Meredith, 16 W. Va. 1–25.

[2] See Edwards *v.* Bishop, 4 N. Y. 61.

[3] Taylor *v.* Hill, 10 Leigh (Va.), 457.

[4] Cummings *v.* Wyman, 10 Mass. 465; Purcell *v.* Wilson, 4 Gratt. (Va.) 16; Harmon *v.* James, 7 Smedes & M. (Miss.) 111; Blackmore *v.* Gregg, 2 W. & S. (Penn.) 182; Carpentier *v.* Mendenhall, 28 Cal. 484; Clark *v.* Crego, 47 Barb. (N. Y.) 599.

[5] Adam *v.* Ames Iron Co. 24 Conn. 230; Allen *v.* Hall, 1 McC. (S. C.) 131.

[6] Newell *v.* Woodruff, 30 Conn. 492; Van Bibber *v.* Frazier, 17 Md. 436.

when that relation is shown to exist, that proof of the ouster becomes necessary.[1] The objection that a tenant in common must show an ouster, can only be taken by the co-tenant, or one claiming under him.[2]

§ 283. *What constitutes ouster.*—The determination of the question as to what constitutes an ouster, between tenants in common, is often perplexing and difficult, and the cases, though numerous, are not entirely in harmony. As we have seen, no proof of actual physical force,[3] or "turning out by the shoulders,"[4] or "the heels,"[5] is necessary. The intent to oust must be established to the satisfaction of the jury, and the highest and most complete evidence of an ouster is a specific demand, by the plaintiff, to be let into the possession of the premises, followed by a specific refusal on the part of the defendant to comply with the demand.[6] The demand and refusal do not, however, constitute an ouster, but, like any other facts, are evidence of it just as in trover a demand and refusal do not constitute, but are only evidence of, a conversion. Hence, in California, a special verdict in ejectment between co-tenants, finding not an ouster, but merely a demand of possession, and a refusal by defendant to comply therewith, has been held not sufficient to authorize a judgment in plaintiff's favor,[7] the court saying, however, that in the absence of all explanation, the court might direct the jury to infer an ouster from the fact of demand and refusal.

It seems quite clear that a denial of plaintiff's title, and right of entry, by answer in the ejectment suit, is equivalent

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[1] Gillett *v.* Stanley, 1 Hill (N. Y.), 121; Sharp *v.* Ingraham, 4 Hill (N. Y.), 116.

[2] Arnot *v.* Beadle, Hill & Denio, Supp. (N. Y.) 181.

[3] Gale *v.* Hines, 17 Fla. 773.

[4] Doe *v.* Prosser, Cowper, 217.

[5] Warfield *v.* Lindell, 30 Mo. 272.

[6] Miller *v.* Myers, 46 Cal. 535; Doe *d.* Hellings *v.* Bird, 11 East, 49; Greer *v.* Tripp, 56 Cal. 209.

[7] Carpentier *v.* Mendenhall, 28 Cal. 484; see Roberts *v.* Moore, 3 Wall., Jr. 297.

to an ouster.[1] According to the Supreme Court of Missouri, there must be outward acts of exclusive ownership, of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the co-tenants that an adverse possession, and an actual disseizin, are intended to be asserted against them.[2]

In the recent case of Culver *v.* Rhodes,[3] the New York Court of Appeals said, "We are thus led to consider the reason and justice of the rule which should measure the adverse possession necessary to effect the ouster of a co-tenant. Assuredly it should be one which requires notice in fact to the co-tenant, or unequivocal acts, so open and public, that notice may be presumed, of the assault upon his title, and the invasion of his rights. The adverse possession sets running a limitation which in the end may operate as a bar. It does so only upon the theory that the party disseized has slept upon his rights, and by silence and inaction has waived them. The rule is just if the ouster or adverse possession is brought home to the knowledge of the owner, or is of such definite and hostile and public character that such knowledge may be fairly presumed: but it is unjust and unreasonable if enforced without such limitation. * * Originally an actual disseizin, a palpable turning out of the co-tenant, or hindering him from entry, seems to have been requisite.[4] The modern rule is content with less, but is well stated in Hawk *v.* Senseman,[5] that to effect an ouster of the co-tenant there must be 'an actual, continued, visible, notorious, distinct, and hostile possession.' It must be such

[1] Siglar *v.* Van Riper, 10 Wend. (N. Y.) 414; Miller *v.* Myers, 46 Cal. 535; Greer *v.* Tripp, 56 Cal. 209.

[2] Warfield *v.* Lindell, 38 Mo. 561–581; Zeller *v.* Eckert, 4 How. (U. S.) 289; Boggess *v.* Meredith, 16 W. Va. 1; Hudson *v.* Putney, 14 W. Va. 561; Rust *v.* Rust, 17 W. Va. 901.

[3] New York Court of Appeals, MSS., opinion per Finch, J., probably reported in 87 N. Y.

[4] Citing Reading's Case, 1 Salk. 392.

[5] 6 S. & R. (Penn.) 21.

that knowledge of its existence is brought home to the co-tenant.[1] It must make the intention to hold adversely manifest, and palpably display such intention.[2] * * Wherever the acts needful to create an ouster have been stated, they have been an actual and exclusive possession of the whole premises claiming the whole;[3] taking title from a hostile source, and refusing to let in the co-tenant;[4] an exclusive possession, exclusive receipt of rents and profits, and exclusive claim of title;[5] a public claim of the entire title, a notorious act, an open claim of exclusive right,[6] or where, upon demand of the co-tenant, his title is denied and possession is refused."[7]

§ 284. *Examples.*—The refusal must be unequivocal. Thus, it has been held that where the plaintiff, before suit brought, demanded to be let into possession, and defendant, who occupied the whole premises, answered that she desired to pay the judgment on which plaintiff had acquired title, and did not wish to give up the premises, this was held not to be an ouster or denial of plaintiff's rights.[8]

Where the defendant admitted that he was in possession, and in answer to a demand for possession, answered that "it would be hard to pay for the land twice," this was held not to amount to "an unequivocal denial of the defendant's title," and not to be evidence of an ouster.[9]

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[1] Citing Zeller's Lessee *v.* Eckert, 4 How. 295; Barr *v.* Gratz, 4 Wheat. 213; McClung *v.* Ross, 5 Wheat. 124; Challefoux *v.* Ducharme, 8 Wis. 287; Long *v.* Mast, 11 Penn. St. 189; Bennet *v.* Bullock, 35 Penn. St. 364; Hall *v.* Stevens, 9 Met. (Mass.) 418.

[2] Citing Marcy *v.* Marcy, 6 Met. (Mass.) 360; Prescott *v.* Nevers, 4 Mason, 330; Hart *v.* Gregg, 10 Watts (Penn.), 185.

[3] Citing Florence *v.* Hopkins, 46 N. Y. 182.

[4] Citing Clapp *v.* Bromagham, 9 Cowen (N. Y.), 530; Clark *v.* Crego, 47 Barb. (N. Y.) 617; Phelan *v.* Kelly, 25 Wend. (N. Y.) 395.

[5] Citing Grim *v.* Dyar, 3 Duer (N. Y.), 354.

[6] Citing Smith *v.* Burtis, 9 Johns. (N. Y.) 174; Jackson *v.* Brink, 5 Cow. (N. Y.) 483; Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241; Miller *v.* Platt, 5 Duer (N. Y.), 272.

[7] Citing Siglar *v.* Van Riper, 10 Wend. (N. Y.) 419.

[8] Avery *v.* Hall, 50 Vt. 11.

[9] Colburn *v.* Mason, 25 Me. 434.

So where defendant "claimed the land as owner in fee," such claim was adjudged not to be evidence of an ouster, or total denial of plaintiff's rights, but was considered to be consistent therewith, for each tenant in common is an owner in fee with the others.[1] It is an ouster if the tenant in possession refuses to suffer his companion to occupy with him.[2] The ouster cannot be presumed from the fact of sole and exclusive possession,[3] nor from a mere refusal to account for or pay a share or proportion of the rents,[4] nor from an occasional going upon the land and cutting and removing trees from the woods or swamps,[5] nor from the exclusive receipt of the profits.[6] "The taking of the whole profits," says Coke, "is no ejectment." There must be something more than mere perception of profits and payment of taxes.[7] There must be a disturbance of the possession.[8] But proof of a denial of the plaintiff's title, accompanied by an exclusive claim of possession, and receipt of the whole profits, is sufficient to establish an ouster.[9] So where defendant, in response to a demand for possession, said the demandant "could obtain it by law," this was held to justify a finding of an ouster.[10] Where one of several co-tenants entered, claiming as exclusive owner, and locked the doors of the buildings upon the premises, thereby excluding the other tenants in common, the latter were allowed to maintain ejectment.[11]

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[1] Edwards *v.* Bishop, 4 N. Y. 61.

[2] Norris *v.* Sullivan, 47 Conn. 474.

[3] Blakeney *v.* Ferguson, 20 Ark. 547.

[4] Doe *d.* Fisher *v.* Prosser, Cowper, 217; Phillips *v.* Gregg, 10 Watts (Penn.), 158–164.

[5] Peck *v.* Ward, 18 Penn. St. 506; Ewer *v.* Lovell, 9 Gray (Mass.), 276.

[6] Silloway *v.* Brown, 12 Allen (Mass.), 30; Keyser *v.* Evans, 30 Penn. St. 507; Allen *v.* Hall, 1 McC. (S. C.) 131; Catlin *v.* Kidder, 7 Vt. 12; Linker *v.* Benson, 67 N. C. 150.

[7] Tulloch *v.* Worrall, 49 Penn. St. 133.

[8] Harvin *v.* Hodge, Dudley (S. C.) Law, 23; Doe *d.* Hellings *v.* Bird, 11 East, 49; Gale *v.* Hines, 17 Fla. 773.

[9] Alexander *v.* Kennedy, 19 Texas, 488, per Savage, Ch. J.; Siglar *v.* Van Riper, 10 Wend. (N. Y.) 414; Humbert *v.* Trinity Church, 24 Wend. 587.

[10] Gordon *v.* Pearson, 1 Mass. 323.

[11] Trustees, &c, of North Greig *v.* Johnson, 66 Barb. (N. Y.) 119.

It has been held in Vermont that acts of possession constituting the ouster must be not only inconsistent with, but exclusive of the continuing rights of the plaintiff, and such as would amount to an ouster between landlord and tenant.[1] In North Carolina an ouster by one tenant in common will not be presumed merely upon evidence of an exclusive use of the common property, and appropriation to himself of its profits, unless such use and appropriation have continued for a period of twenty years.[2]

The ouster must at least be such as would establish an adverse possession on the part of the wrong-doer.[3]

A silent possession accompanied by no act which can amount to an ouster, or give notice to the co-tenant of the intention to exclude him, will not make the possession adverse.[4]

§ 285. *Wild lands.*—The occupation of an extensive tract of wild mountain land, covered, except as to a patch of five acres, with forest, by occasionally cutting a small number of trees for shingle or lumber, and peeling and carrying away a few loads of bark, at a nominal profit, does not of itself afford conclusive evidence of an ouster of a co-tenant, or of an adverse possession.[5]

§ 286. *Ouster to sustain trespass.*—A tenant in common can only maintain trespass *quare clausum fregit* against his companion for an actual ouster, such as would entitle him to maintain an ejectment,[6] and in an action between tenants in common, recently decided in the House of Lords,[7] it was held that where one co-tenant put a lock

[1] Chandler *v.* Ricker, 49 Vt. 128; see Squires *v.* Clark, 17 Kan. 84; Ball *v.* Palmer, 81 Ill. 370.

[2] Caldwell *v.* Neely, 81 N. C. 114; Covington *v.* Stewart, 77 N. C. 148; Neely *v.* Neely, 79 N. C. 478; see Frederick *v.* Gray, 10 S. & R. (Penn.) 182.

[3] Edwards *v.* Bishop, 4 N. Y. 61; see § 278.

[4] Abercrombie *v.* Baldwin, 15 Ala. 363; McClung *v.* Ross, 5 Wheat. (U. S.) 116–124; Challefoux *v.* Ducharme, 8 Wis. 288–307.

[5] Chandler *v.* Ricker, 49 Vt. 128.

[6] Stedman *v.* Smith, 8 El. & Bl. 1; McCourt *v.* Eckstein, 22 Wis. 153, 159.

[7] Jacobs *v.* Seward, L. R. 5 H. L. 464–472.

upon a gate, which was not shown, however, to have been kept locked, it did not constitute an ouster which would enable the co-tenant to maintain trespass.

In the case of Filbert *v.* Hoff,[1] which was trespass between tenants in common, the court decided that where both were in actual possession, a mere denial of the plaintiff's title, unaccompanied by acts, did not of itself amount to an ouster. The denial is available only as showing intent in connection with evidence that plaintiff had been excluded or expelled from the property.

§ 287. *Conveyance of the entire estate.*—Where the grantee has obtained a conveyance of the whole estate from one of the co-tenants, entry made under such a title is a disseizin of the other co-tenants.[2] This doctrine is just and reasonable, for the grantee does not intend to enter or hold as a co-tenant. His entry is adverse. The same principle applies to joint tenants.[3]

§ 288. *Exceptions.*—In Seaton *v.* Son,[4] the Supreme Court of California, however, held that nothing short of an actual ouster severs the unity of possession, and that entry under a deed which purported to convey the entire title, followed by exclusive possession, and a belief that the deed conveyed the whole estate, when in fact the grantor had but an undi-

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[1] 42 Penn. St. 97.

[2] Foulke *v.* Bond, 12 Vroom (N. J.), 527 ; Horne *v.* Howell, 46 Ga. 9; Kinney *v.* Slattery, 51 Iowa, 353; Kittredge *v.* Locks & Canals, &c., 17 Pick. (Mass.) 246; Cain *v.* Furlow, 47 Ga. 674 ; Townsend & Pastor's Case, 4 Leon. 52; Doe *d.* Reed *v.* Taylor, 5 Barn & Ad. 575 ; Parker *v.* Prop'rs, &c. M. R. 3 Met. (Mass.) 101 ; Clark *v.* Vaughan, 3 Conn. 191 ; Long *v.* Stapp, 49 Mo. 506 ; Gill *v.* Fauntleroy, 8 B. Mon. (Ky.) 186 ; Gray *v.* Bates, 3 Strob. (S. C.) Law, 498–500 ; Clapp *v.* Bromagham, 9 Cowen (N. Y.), 530; Hinkley *v.* Greene, 52 Ill. 230; Bradstreet *v.* Huntington, 5 Peters, 401–445 ; Clymer's Lessee *v.* Dawkins, 3 How. (U. S.) 674–689; Prescott *v.* Nevers, 4 Mason, 326; Gerry *v.* Holford, Cro. Eliz. 615. But see Seaton *v.* Son, 32 Cal. 481 ; Roberts *v.* Morgan, 30 Vt. 319, 324; Day *v.* Howard, 73 N. C. 1 ; Caldwell *v.* Neely, 81 N. C. 114 ; Culver *v.* Rhodes, 87 N. Y.

[3] Larman *v.* Huey's Heirs, 13 B. Mon. (Ky.) 436; Caldwell *v.* Neely, 81 N. C. 114; Day *v.* Howard, 73 N. C. 1.

[4] 32 Cal. 481. See, also, Day *v.* Howard, 73 N. C. 1 ; Roberts *v.* Morgan, 30 Vt. 324.

vided interest, did not amount to an ouster of the co-tenant. This case cannot be reconciled with the authorities above cited, and seems to ignore the fact that the grantee has rights which should be considered. It is doubtful, however, if the taking of a deed by one co-tenant from a third party[1] or a life tenant[2] is of itself the equivalent of an ouster, unless accompanied and followed by a hostile claim, of which the co-tenant had knowledge, or by acts of possession not only inconsistent with, but exclusive of, the rights of the co-tenant.

The execution by one co-tenant of a mortgage upon the whole property was held in Pennsylvania not to be *per se* an ouster, for the mortgagor was left in possession, and the instrument created only a lien, and had not the force or legal effect of an absolute sale.[3]

§ 289. *Presumption of ouster from lapse of time.*—When there is no evidence of actual ouster, it is frequently said that the jury may presume an ouster from long continued adverse possession. No fixed principle, or well defined rule of law, as to this seems to have governed the decisions. The exclusive possession, and receipt of profits, for more than seven years in North Carolina,[4] for seventeen years in Iowa,[5] for twenty-six years in Missouri,[6] and for twenty-seven years in New York,[7] appear to have been regarded as insufficient, without other evidence, to justify an inference of an ouster. But thirty-six years sole and uninterrupted possession, by one tenant in common, was held by Lord Mansfield to be sufficient to justify the jury in finding an actual ouster.[8] So in New York, periods of forty and forty-two years,[9] in Ala-

[1] Holley *v.* Hawley, 39 Vt. 532.
[2] Culver *v.* Rhodes, New York Court of Appeals, MSS. opinion.
[3] Wilson *v.* Collishaw, 73 Penn. St. 276.
[4] Linker *v.* Benson, 67 N. C. 150.
[5] Flock *v.* Wyatt, 49 Iowa, 466.
[6] Warfield *v.* Lindell, 30 Mo. 272.
[7] Northrop *v.* Wright, 24 Wend. (N. Y.) 221.
[8] Doe *v.* Prosser, 1 Cowper, 217.
[9] Van Dyck *v.* Van Beuren, 1 Caines (N. Y.), 84; Jackson *d.* Bradt *v.* Whitbeck, 6 Cow. (N. Y.) 632; see Woolsey *v.* Morss, 19 Hun (N. Y.), 273.

bama thirty years,[1] and in Pennsylvania twenty-one years[2] were, in each case, regarded as sufficient to justify the inference of an ouster without other proof. In one of the cases cited[3] it was said, by the Supreme Court of New York, that the jury should have been directed to presume an ouster, *i. e.*, that the presumption was one of law, or that, as a matter of law, exclusive possession and receipt of profits, for forty-two years, is conclusive evidence of an ouster. The only authority cited in support of this principle is Doe *v.* Prosser, but in that case Lord Mansfield simply left the question to the jury upon all the facts. It is hard to see on what ground the view advanced in Van Dyck *v.* Van Beuren can be supported, and the authorities are very generally opposed to it.[4] Michigan has no statute that disposes of controversies which may arise between tenants in common, from an exclusive possession by one co-tenant, but where such exclusive possession is continued for more than twenty-five years, it is there held that the right of the excluded parties is gone.[5] These cases cannot be reconciled, but the confusion seems to have arisen partly from the misuse of the word presumption, and partly from the analogies suggested by the existence of a statutory limit with regard to most cases of adverse possession. Thus, in Pennsylvania and Alabama the courts appear, from the cases above cited, to regard the statutory period of twenty-one years as governing absolutely, but whether by actual force of law, or by analogy, is not made clear. The resort to analogy, for such a purpose, is open to many objections, and, indeed, when the legislature has omitted to provide a statutory limit to govern in cases where ouster is claimed from lapse of time, such action by the courts is merely a loose kind of judicial legislation. On principle the following rules seem

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[1] Johnson *v.* Toulmin, 18 Ala. 50.

[2] Frederick *v.* Gray, 10 S. & R. (Penn.) 182; McCall *v.* Webb, 88 Penn. St. 150.

[3] Van Dyck *v.* Van Beuren, 1 Caines (N. Y.), 84.

[4] See Bolton *v.* Hamilton, 2 W. & S. (Penn.) 294.

[5] Campau *v.* Dubois, 39 Mich. 274.

to be those which ought generally to govern, though they have never been distinctly formulated by the courts.

First. There is, in ordinary cases, no *presumption of law* as to ouster arising from long continued exclusive possession by one co-tenant.

Second. Where the exclusive possession, however, has been of such long duration as to be manifestly inconsistent with the claim of a co-tenancy, the jury should be directed to find an ouster based on the presumption of fact arising from such long continued hostile possession.

Third. Where the possession has been of such short duration as to be manifestly insufficient to support a title in the occupant, based upon an ouster, without other evidence, the question of ouster should not be submitted to the jury at all.

Fourth. Where a period is fixed by statute, it of course governs absolutely.

Fifth. When no such period is fixed, the limit of twenty years, from its general adoption by legislation, in ordinary cases of adverse possession, may possibly be regarded as a general guide in considering the evidence in the case; but, otherwise, has no bearing on the question, because the possession must be more distinctly adverse than between strangers.[1]

Sixth. As a general rule, the evidence of exclusive possession is to be submitted to the jury, if its duration warrants a submission at all, with the direction that they may infer ouster from it.

§ 290. *When ouster need not be proved.*—If the defendant controverts the plaintiff's title, that must be taken as an admission of the ouster. If he does not dispute the plaintiff's title he should admit it by answer or disclaimer, and deny the ouster.[2] He cannot, in one breath, deny the co-tenancy and claim the benefit of the relation.[3] Hence it was held that no ouster need be shown where the answer

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[1] See § 278.

[2] Withrow *v.* Biggerstaff, 82 N. C. 82; see Halford *v.* Tetherow, 2 Jones (N. C.) Law, 395.

[3] Peterson *v.* Laik, 24 Mo. 541.

alleged that the defendant held the premises "adversely against all persons,"[1] or where the defendant claiming the exclusive possession pleaded "not guilty,"[2] or denied the plaintiff's title, or right of entry, by answer.[3] In the New York Superior Court, Chief Justice Oakley said: "that a denial in the defendant's answer of all right, title and interest in the plaintiff, is an admission that his own possession is adverse, and may therefore well be treated as equivalent to a confession of ouster superseding the necessity of proof upon the trial."[4]

§ 291. *Title of co-tenants.*—Tenants in common, entering into and holding possession as such, cannot, as against their co-tenants, dispute or assail the common title,[5] or set up a tax title as paramount and in opposition to the title of the co-tenants. But where the co-tenant relies upon the defense of adverse possession, any title may be proved in support of that plea.[6] The purchase of a tax title by one co-tenant is esteemed to be for the benefit of all the tenants in common.[7] The same principle applies to the grantee of a co-tenant, if he purchases with knowledge of the co-tenancy.[8] The tenant who relieves the estate of the incumbrance of

[1] Harrison *v.* Taylor, 33 Mo. 211.

[2] Noble *v.* McFarland, 51 Ill. 226. But see Halford *v.* Tetherow, 2 Jones (N. C.) Law, 393.

[3] Miller *v.* Myers, 46 Cal. 535; Greer *v.* Tripp, 56 Cal. 209.

[4] Clason *v.* Rankin, 1 Duer (N. Y.), 337; see McCallum *v.* Boswell, 15 U. C. Q. B. 343; Scott *v.* McLeod, 14 U. C. Q. B. 574.

[5] Olney *v.* Sawyer, 54 Cal. 379; Bornheimer *v.* Baldwin, 42 Cal. 27; Phelan *v.* Kelly, 25 Wend. (N. Y.) 389; Knolls *v.* Barnhart, 71 N. Y. 474; Funk *v.* Newcomer, 10 Md. 301; Buchanan *v.* King, 22 Gratt. (Va.) 414; Keller *v.* Auble, 58 Penn. St. 410; Weaver *v.* Wible, 25 Penn. St. 270; Brown *v.* Homan, 1 Neb. 448; Frentz *v.* Kiotsch, 28 Wis. 312 But see Lawrence *v.* Webster, 44 Cal. 385; reviewed in Olney *v.* Sawyer, 54 Cal. 379; Burhans *v.* Van Zandt, 7 Barb. (N.Y.) 91.

[6] Phelan *v.* Kelly, 25 Wend. (N. Y.) 389; see Larman *v.* Huey's Heirs, 13 B. Mon. (Ky.) 436.

[7] Allen *v.* Poole, 54 Miss. 323–334; Davis *v.* King, 87 Penn. St. 261; Page *v.* Webster, 8 Mich. 263; Morgan *v.* Herrick, 21 Ill. 481; Flinn *v.* McKinley, 44 Iowa, 68; Lloyd *v.* Lynch, 28 Penn. St. 419; Sheean *v.* Shaw, 47 Iowa, 411; Dubois *v.* Campau, 24 Mich. 360.

[8] Austin *v.* Barrett, 44 Iowa, 488.

taxes, has a charge upon the land against his co-tenant for reimbursement,[1] but not as against a purchaser from the co-tenant without notice.[2]

In Gillett *v.* Gaffney[3] a curious exception was admitted to the rule that one tenant in common, who acquires an outstanding title, will be considered as holding it in trust for his co-tenant. The fee of the lands of the co-tenancy, which was subject to entry, was in the United States. One co-tenant died, leaving heirs. The survivor deeded an undivided half interest in the lands to a third party, who, with the survivor, thereafter acquired the title to the entire tract from the government, the heirs of the deceased co-tenant having taken no steps to do so. The survivor afterwards died, leaving heirs. The court held that the heirs of the co-tenant who died first, having neglected to perfect their title, should not be allowed to participate in the fruits of the greater diligence of the third party, and that the latter did not come within the rule making co-tenants trustees for their companions, as to the acquisition of an outstanding title, but that the heirs of the survivor took his interest in the premises charged with all the equities, and must be held to hold it in trust for the heirs of his co-tenant.

§ 292. *Outstanding title.*—It is a familiar rule that one tenant in common, who purchases an outstanding title or incumbrance, cannot set it up against his co-tenant without affording the latter an opportunity to contribute his proportion of the expense of acquiring the title or incumbrance, and thus enabling him to participate in the benefits of the purchase.[4] The same principle applies to joint tenants and

[1] Davidson *v.* Wallace, 53 Miss. 475; see Harrison *v.* Harrison, 56 Miss. 174.

[2] Stover *v.* Cory, 53 Iowa, 708.

[3] 3 Col. 351.

[4] Smith *v.* Osborne, 86 Ill. 606; Titsworth *v.* Stout, 49 Ill. 78–80; Wilton *v.* Tazwell, 86 Ill. 29; Venable *v.* Beauchamp, 3 Dana (Ky.), 321; Lee *v.* Fox, 6 Ib. 172; Boskowitz *v.* Davis, 12 Nev. 446; Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 389, 407; Tisdale *v.* Tisdale, 2 Sneed (Tenn.), 596; Picot *v.* Page, 26 Mo. 421; Rothwell *v.* Dewees, 2 Black (U. S.), 613; Bracken *v.* Cooper, 80 Ill. 221;

co-parceners.[1] A defendant in possession under a deed which makes him tenant in common with the plaintiff, cannot set up an outstanding title, in a stranger, to defeat the action.[2] The possession of a widow as dowress, and as guardian in socage of the minor children, is as tenant in common with the heirs, and she will not be permitted to buy in a title for her individual benefit.[3] The same principle holds though the co-tenant takes the title in the name of a third party.[4]

Chancellor Kent said in Van Horne *v.* Fonda, the leading case on the subject, "It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseize and expel his co-tenant."[5]

This doctrine is not, however, of universal application, but is limited and qualified by some of the authorities.

Thus, after one tenant denies the title of his co-tenants, and claims the entire property, such denial being known to his companions, the latter cannot be justified thereafter in

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Brown *v.* Homan, 1 Neb. 448; Gossom *v.* Donaldson, 18 B. Mon. (Ky.) 230; Flagg *v.* Mann, 2 Sumner, 486; Brittin *v.* Handy, 20 Ark. 381.

[1] Lee *v.* Fox, 6 Dana (Ky.), 172, 176.

[2] Braintree *v.* Battles, 6 Vt. 395.

[3] Knolls *v.* Barnhart, 71 N. Y. 474.

[4] Duff *v.* Wilson, 72 Penn. St. 442.

[5] Van Horne *v.* Fonda, 5 Johns. Ch. (N. Y.) 389; Tisdale *v.* Tisdale, 2 Sneed (Tenn.), 596.

assuming that the acts of his hostile companion, respecting the land, are for the common benefit. It is then no longer a breach of trust, or fraud upon their rights, for him to purchase an outstanding title, and hold it exclusively for his own benefit.[1]

If the lands have been actually lost by an adverse title, and the co-tenants are evicted, the co-tenancy is destroyed, and one tenant may then buy the lost land, and hold it free from any claim of his companion.[2]

§ 293. *Title acquired under same instrument.*—It has been laid down in several cases[3] that tenants in common are subject to this mutual obligation only when their interests accrue under the same instrument, or acts of the party, or of the law, or where they enter into some obligation or understanding with one another, and that persons acquiring unconnected interests in the same subject, by distinct purchases, though it may be under the same title, are not bound to any greater protection of one another than would be required among strangers.

In most of these cases the principle was not necessary to a decision of the case. Thus in Roberts *v.* Thorn it appeared that the outstanding title acquired was of no value, and the decision is in great measure based on the distinction, drawn in the case of Smiley *v.* Dixon,[4] between a defective title and an absolute want of title. The plaintiff and defendant in that case had purchased from a party having neither claim nor color of title, and the defendant had subsequently acquired the title from the State by actual settlement. The court held that there existed no obligation of law, or of conscience, which prevented him from acquir-

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[1] Wright *v.* Sperry, 21 Wis. 331, 338; see Frentz *v.* Klotsch, 28 Ib. 312, 317.

[2] Coleman *v.* Coleman 3 Dana (Ky.), 398.

[3] Roberts *v.* Thorn, 25 Texas, 728, 737; King *v.* Rowan, 10 Heisk. (Tenn.) 675; Rippetoe *v.* Dwyer, 49 Texas, 498; Brittin *v.* Handy, 20 Ark. 381, 419; Frentz *v.* Klotsch, 28 Wis. 312, 318.

[4] Smiley *v.* Dixon, 1 P. & W. (Pa.) 439.

ing the absolute title, or that made him a trustee for the plaintiff.

None of the cases, in which the principle is cited with approval, suggest any reason in the nature of the relation between co-tenants why, if it is a relation of trust, it should be destroyed by the mere fact that the interests of the co-tenants are of different origin. The distinction seems to have been derived from a misconception of the principle underlying the decision of the Massachusetts Supreme Court, in Matthews *v.* Bliss.[1] In that case it was held that one tenant in common of a vessel, who had contracted with his co-tenant for the purchase of his share, was under no legal obligation to disclose the fact that a third party had previously agreed with him to purchase the entire vessel at a higher rate. Chief Justice Shaw, in delivering the opinion of the court, says, that "the tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence towards each other, in respect of the sale of such vessel, that each is bound, in his dealings with the other, to communicate all the information of facts within his knowledge, which may affect the price or value. A different rule may prevail, in respect to any contract for the use or employment of the common property, in which relation perhaps they may be deemed to place confidence mutually in each other."

The rule here stated with regard to tenants in common of a ship would undoubtedly apply to tenants in common of land; that is to say, there is nothing in the mere relation, established by such a co-tenancy, to prevent one co-tenant dealing with another, as to the purchase or sale of his share, as an entire stranger. But the Massachusetts Supreme Court suggested no distinction between co-tenancies having a common and diverse origin. The learned court did indeed suggest, that if the tenants in common of a ship were en-

[1] 22 Pick. (Mass.) 48.

gaged jointly in the employment of purchasing or building ships for sale, they might be bound to communicate to each other all facts affecting the price or value; such a rule would, however, be founded not on considerations growing out of the origin of the co-tenancy, but out of its object and purpose. It is hard to see on what principle any distinction as to the nature of the co-tenancy, growing out of its origin, can be satisfactorily supported.

§ 294. The distinction is absurd if the doctrine of this trust relation is founded upon elementary considerations of fair dealing between parties having a community of interest in a subject. Each tenant in common is entitled to the entire management and control of the property; for one to use this right for his own individual profit, and not the common benefit, would be simple fraud; and to permit him to buy in outstanding titles, without giving his co-tenant the option of joining in the purchase, would be to permit a fraud no less distinct. All this remains true no matter how the tenancy in common originated, and, therefore the cases in which the general principle of the trust relation is departed from, must be rested upon the consideration that the facts showed, as in Matthews *v.* Bliss, *ubi supra*, that no trust and confidence was called for between the co-tenants. Thus, in Brittin *v.* Handy[1] it was decided by the Supreme Court of Arkansas, in a well-considered opinion, that there was no reason why one tenant in common should not purchase the interest of his co-tenant in the land under execution. He having a claim against his co-tenant, enforcible by such means, was regarded as to the enforcement of it, as standing in a hostile relation to him, though no doubt as to the use of the land accounting for profits, &c., he would have been held by the same court to occupy a relation of trust. In the course of the opinion, the learned court refers to the supposed distinction between tenancies in common under

[1] 20 Ark. 381, 401, 404.

the same instrument, and such tenancies arising through purchases at different times, and held by different titles, but what was said on this head was in no way necessary to the decision of the case.

§ 295. *Ejectment between joint tenants and co-parceners.*—The principles governing ejectment between tenants in common are applicable to joint tenants and co-parceners. The possession of one joint tenant or co-parcener is in legal contemplation the possession of all; the acts of each affecting the joint property, are considered to be for the common benefit, and proof of actual ouster, and denial of the claimant's rights and title, is necessary to sustain the action.[1]

One joint tenant or owner may, as we shall presently see, sustain ejectment upon a title acquired by adverse possession against another.[2] The Court of Errors and Appeals of South Carolina, recognized the rule that one joint tenant could not sue his co-tenant except he be ousted of the joint possession, and held that it was an ouster where the defendant had overflowed the land by water from a mill pond, thus appropriating it to his exclusive use.[3]

§ 296. *Tenancy in common of naked possession.*—The Supreme Court of Utah, in a recent case, expressed doubts as to whether there could be any tenancy in common in a mere naked possession of land, strongly intimating the opinion that there must be some right or title to the possession to create a co-tenancy; that in any case a mere possessory tenancy in common can exist only when all the tenants are actually occupying the land,[4] and, consequently, that where one of two joint possessors of land ousted the other, the latter could not maintain ejectment. If, however, any possessory co-tenancy at all can exist, the

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[1] 2 Cruise's Dig. *497, *518; Adams on Ejectment (4th ed. 1854), p. 136; Doe *d.* Barnett *v.* Keen, 7 T. R. 386; Jones *v.* Weathersbee, 4 Strob. (S. C.) Law, 50.

[2] Russell *v.* Marks, 3 Met. (Ky.) 37.

[3] Jones *v.* Weathersbee, 4 Strob. (S. C.) Law, 50.

[4] Lillianskyoldt *v.* Goss, 2 Utah, 292 (Boreman, J. diss.).

termination of the relation by force is inconsistent with the most elementary principles of justice. The recognition of such a right would lead to the most absurd results. In all cases of co-tenancy, for instance, the tenants are entitled to partition, but the right would hardly have any value if the more powerful of the co-tenants could end the relationship by driving his companion off the property. But clearly, naked possession or occupancy of land is a degree of title, although the lowest and most imperfect,[1] and constitutes, in itself, *prima facie* evidence of title,[2] which, in ejectment, is effectual against every person except the true owner.

A mere naked possession can be sold at sheriff's sale, and the purchaser acquires the right to recover it;[3] so a debtor may have homestead in a mere possessory interest,[4] and such an interest descends to heirs.[5] Actual possession of land is *prima facie* evidence of title in fee, and will support ejectment against a trespasser,[6] though to raise a presumption as to the quality or degree of the interest claimed, if not an absolute fee, proof of possession must be accompanied by evidence of some claim of title.[7] In Gillett *v.* Gaffney,[8] the nature of title by occupancy of land, and whether or not it possesses the legal character of real estate, was considered at length by the Supreme Court of Colorado. The common law doctrine, that a mere naked possession, without shadow or pretence of right, or apparent right, to continue such possession, constitutes an estate in land, is recognized, though the decision is based largely upon the construction of statutes. The court reach the conclusion that title by occupancy of land which is the subject of entry,

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[1] 2 Bla. Com. 195.
[2] Hill *v.* Draper, 10 Barb. (N. Y.) 458.
[3] Knox *v.* Herod, 2 Penn. St. 26; Hughes *v.* Devlin, 23 Cal. 501.
[4] McGrath *v.* Sinclair, 55 Miss. 89.
[5] Gillett *v.* Gaffney, 3 Col. 351; Teabout *v.* Daniels, 38 Iowa, 158.
[6] Burt *v.* Panjaud, 99 U. S. 180.
[7] Ricard *v.* Williams, 7 Wheaton (U. S.), 59.
[8] 3 Colorado, 351.

descends to heirs. There seems, therefore, no reason why a possessory co-tenancy should not be recognized as involving, as far as applicable, all the legal consequences incident to an ownership of the fee by tenants in common.

§ 297. *Tenants in common against third parties.—Joinder of Tenants in common.*—Many cases hold that, at common law, tenants in common cannot join in an action of ejectment. This was certainly the rule in real actions.[1] The reason upon which this rule rests is that their freeholds are several; there is no joint property, or union and entirety of interests, but the estate is held by distinct titles, or by one title and several rights.[2] The co-tenants have separate interests in the land, each has only an undivided part; there is no privity, and consequently neither has the right to demise the whole.[3] Their interests are considered as different estates, depending upon different titles.[4] This rule has been disregarded in some of our States, and actions of ejectment, founded upon a joint demise, by tenants in common, have been sustained by courts of the highest authority, upon the theory that the possession of tenants in common is joint, and that they may join in disposing of that interest.[5] This is contrary to the former rule in England, and opposed to the doctrine of Littleton and

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[1] Stearns on Real Actions, p. 198; Roscoe on Actions Relating to Real Property, p. *8.

[2] Doe *d.* Poole *v.* Errington, 1 Ad. & El. 750; Heatherley *v.* Weston, 2 Wils. 232; Gaines *v.* Buford, 1 Dana (Ky.), 483; Wathen *v.* English, 1 Mo. 746; Moore *v.* Fursden, 1 Show. 342; Mantle *v.* Wollington, Cro. Jac. 166; Rogers *v.* Turley, 4 Bibb (Ky.), 355; White *v.* Pickering, 12 S. & R. (Penn.) 435; Throckmorton *v.* Burr, 5 Cal. 400; Cole *v.* Irvine, 6 Hill (N. Y.), 634; Malcom *v.* Rogers, 5 Cowen (N. Y.), 188; Dube *v.* Smith, 1 Mo. 313.

[3] White *v.* Pickering, 12 S. & R. (Penn.) 435.

[4] Doe *d.* Harrison *v.* Botts, 4 Bibb (Ky.), 420.

[5] Cole *v.* Irvine, 6 Hill (N. Y.), 634; Malcom *v.* Rogers, 5 Cowen (N. Y.), 188; Lessee of Massie *v.* Long, 2 Ohio, 287; Doe *d.* Nixon *v.* Potts, 1 Hawks (N. C.), 469; Jackson *v.* Bradt, 2 Caines (N. Y.), 170 (note a); Alford *v.* Dewin, 1 Nev. 211; Hoyle *v.* Stowe, 2 Dev. (N. C.) Law, 321; Barrow *v.* Nave, 2 Yerg. (Tenn.) 228.

Coke.[1] Chancellor Kent said (1804), that it had "long been the established practice to permit tenants in common to join in the mixed action of *ejectione firmæ*, and when that action has become in form only a mixed action, and in substance a real action, for trying the title of the fee, having carried the fiction thus far, we ought not now to suffer ourselves to be entangled in this very fiction. If two tenants in common are competent to join in the lease or transfer of their joint possession, it is sufficient; and for these reasons we must hold, even in opposition to several authorities, that it has now become immaterial whether tenants in common declare on joint or separate demises."[2]

§ 298. It was held, however, in a later case in New York, that though this doctrine may be sound as to the mere rights of possession of tenants in common, it has no application to their right of property which is not joint.[3] Judge Story said in the case of Poole *v.* Fleeger,[4] in error from the Circuit Court of Western Tennessee, that it had been the uniform practice in Tennessee for tenants in common to declare on a joint demise in ejectment. In several of our States this vexed question has been disposed of by statutory enactment conferring upon tenants in common the right to join in ejectment at their option,[5] and that method of procedure is now very common.

§ 299. In New York it was held, in an action in which the title was in several tenants in common, that a joint ejectment could not be sustained by two or more less than the whole number. All must join in one action to recover the whole premises and estate, or a separate action must be

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[1] See Jackson *v.* Bradt, 2 Caines (N. Y.), 170.

[2] Ibid.

[3] Cole *v.* Irvine, 6 Hill (N. Y.), 634.

[4] Poole *v.* Fleeger, 11 Peters (U. S.), 185.

[5] Gray *v.* Givens, 26 Mo. 291–303; Poole *v.* Fleeger, 11 Peters (U. S.), 185–212; affirming S. C. 1 McL. 185; Hicks *v.* Rogers, 4 Cranch, 165; Swett *v.* Patrick, 11 Me. 179.

brought by each to recover his share. The case turns upon the construction of the statutes of that State.[1]

§ 300. *What interest recovered.*—A tenant in common is seized *per mi et per tout*, and, as we have seen, has such an interest in the lands of the co-tenancy as entitles him to the enjoyment of the entire estate as against every one except his co-tenants.[2] Each tenant can pursue his remedies independent of the others, and may maintain ejectment or trespass to try title alone,[3] and in many States may recover the entire premises and estate from trespassers, strangers, wrong-doers, and all persons, other than his co-tenants, and those claiming under them.[4] Where this right is recognized he recovers for the benefit of all.[5] Thus, in Vermont, it was held that one tenant in common had the right to oust an intruder and stranger to the title, and recover and hold the lands for the benefit of all the tenants in common.[6] This principle is expressly recognized in Oregon,[7] Nevada,[8] and California.[9] But the rule has been repudiated in Massachusetts,[10] Pennsylvania,[11] and Missouri.[12] In Gray *v.*

[1] Hasbrouck *v.* Bunce, 62 N. Y. 475.

[2] Williams *v.* Sutton, 43 Cal. 65; Hart *v.* Robertson, 21 Cal. 346; Touchard *v.* Crow, 20 Cal. 150–162.

[3] Robinson *v.* Roberts, 31 Conn. 145; Alexander *v.* Gilliam, 39 Texas, 227; Cruger *v.* McClaughry, 51 Barb. (N. Y.) 642; Tarver *v.* Smith, 38 Ala. 135; Mobley *v.* Bruner, 59 Penn. St. 481; Carson *v.* Smart, 12 Ired. (N. C.) L. 369; Hooper *v.* Hall, 30 Texas, 154; Hines *v.* Trantham, 27 Ala. 359; Presley *v.* Holmes, 33 Texas, 476.

[4] Hardy *v.* Johnson, 1 Wall. (U. S.) 371; Stark *v.* Barrett, 15 Cal. 361–371; Winthrop's Lessee *v.* Grimes, Wright (Ohio), 330; Hibbard *v.* Foster, 24 Vt. 542; Allen *v.* Gibson, 4 Rand. (Va.) 468; Truehart *v.* McMichael, 46 Texas, 222; Alexander *v.* Gilliam, 39 Ib. 227; Presley *v.* Holmes, 33 Texas, 476; Chipman *v.* Hastings, 50 Cal. 310; Logan *v.* Goodall, 42 Ga. 95; Davant *v.* Cubbage, 2 Hill. (S. C.) Law, *311; French *v.* Edwards, 5 Sawyer C. C. 266.

[5] Barrett *v.* French, 1 Conn. 354.

[6] Johnson *v.* Tilden, 5 Vt. 426.

[7] Dolph *v.* Barney, 5 Oregon, 191.

[8] Sharon *v.* Davidson, 4 Nev. 416.

[9] Chipman *v.* Hastings, 50 Cal. 310; Hart *v.* Robertson, 21 Cal. 346.

[10] Dewey *v.* Brown, 2 Pick. (Mass.) 387.

[11] Dawson *v.* Mills, 32 Penn. St. 302.

[12] Gray *v.* Givens, 26 Mo. 291–303.

Givens,[1] the Supreme Court of Missouri say, that "as the right of possession, which depends on title, is several, a recovery by one will restore him only a moiety of the possession against the disseizor, who will hold the other moiety with him in common."

The court remark further, that the statute permitting tenants in common to join is rendered useless if one co-tenant can recover for his companions. Moreover, the disseizor may have a complete defense against the co-tenants who are not parties, and their rights cannot, certainly, be a proper subject of adjudication in a proceeding in which they are not represented; and the other co-tenants may prefer that the disseizor should occupy the lands.[2] It seems to be clearly settled in Pennsylvania, that, as there is no privity of estate between tenants in common, and they are separately seized, one cannot maintain ejectment, or sue and recover, in any form of action, for the interest and benefit of the others.[3]

§ 301. It was held by Judge Story, in the case of Stevens *v.* Ruggles, which arose in the Circuit Court in Rhode Island, that a tenant in common could recover no more than his moiety or portion of the estate. The co-tenant in that case had never been ousted or disseized, and dying without heirs in the colony, the town council took possession and charge of the land under the statute, and the defendants claimed as its tenants. The plaintiff, it was said, could not recover the whole estate upon his prior possession, for that possession was consistent with the title of the other tenant.[4]

In Texas, since the enactment of the Revised Statutes of that State, the claimant of an undivided interest is required to state its nature,[5] and in Georgia, when tenants in

[1] Gray *v.* Givens, 26 Mo. 291-303.
[2] Dewey *v.* Brown, 2 Pick. (Mass.) 387.
[3] Mobley *v.* Bruner, 59 Penn. St. 481.
[4] Stevens *v.* Ruggles, 5 Mason, 221.
[5] Stovall *v.* Carmichael, 52 Texas, 383.

common sever, each recovers only his own interest, or their respective shares.[1] The rule allowing one tenant in common to maintain, in his own name, but for the benefit of his co-tenants as well as himself, an action of trespass to try title, will not be allowed to prevail when it is evident that the action is speculative in its character, and is brought by the plaintiff for his own exclusive benefit.[2]

§ 302. *Joinder of joint tenants against third parties.*— At common law, in all actions relating to the joint estate, one joint tenant could not sue or be sued without joining the other.[3] Having but one joint title, and one freehold, they must join in an action for the possession of land.[4] Hence, in an early case in Pennsylvania, it was held that one of three joint tenants could not recover his one-third of the estate from a stranger.[5] All must join in that State. Less than the whole number cannot recover for the benefit of the others.[6]

"It is not, however," says Mr. Adams, "compulsory upon joint tenants, or parceners, to allege a joint demise; for if a joint tenant, or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land."[7] Cases sustaining this doctrine are numerous.[8] It was suggested to Lord Ellenborough, by counsel, that if joint tenants might sever it was difficult to see why tenants in common might not join. Where joint tenants demise jointly each may recover his

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[1] Sanford *v.* Sanford, 58 Ga. 259; Wilson *v.* Chandler, 60 Ga. 129; see Logan *v.* Goodall, 42 Ga. 95.

[2] Cromwell *v.* Holliday, 34 Texas, 463.

[3] 3 Bla. Com. 182; Bac. Abr. Joint Tenants, K.; see §§ 187, 188, 189.

[4] Dewey *v.* Lambier, 7 Cal. 347.

[5] Milne *v.* Cummings, 4 Yeates (Penn.), 577.

[6] Mobley *v.* Bruner, 59 Penn. St. 481.

[7] Adams on Ejectment (4th ed. 1854), p. (*210) 232.

[8] See Roe *d.* Raper *v.* Lonsdale, 12 East, 39; Doe *d.* Marsack *v.* Read, 12 East, 57–61; Doe *v.* Fenn, 3 Camp. 190.

share in ejectment on their several demises.[1] Where several persons have a joint title to an estate, any one or more of them may sue, without joining the others, and recover against him who has no title.[2]

§ 303. *Ejectment by co-parceners.*—Parceners may declare on a joint demise,[3] or they may sever and each recover his moiety.[4]

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[1] Doe *v.* Chaplin, 3 Taunt. 120; see Craig *v.* Taylor, 6 B. Mon. (Ky.) 457.

[2] Clark *v.* Vaughan, 3 Conn. 191.

[3] Boner *v.* Juner, 1 Lord Raymond, 726, per Holt, J., overruling Milliner *v.* Robinson, Moore, 682; see Decharms *v.* Horwood, 10 Bing. 526.

[4] Jackson *d.* Fitzroy *v.* Sample, 1 Johns. Cases (N. Y.), 231; Doe *v.* Pearson, 6 East, 179; Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; Roe *v.* Lonsdale, 12 East, 39.

CHAPTER X.

EJECTMENT BETWEEN VENDOR AND VENDEE.

§ 304. Against vendee in possession under executory contract.
305. Vendee holds as a licensee.
306. Ejectment maintainable when covenant or specific performance cannot be brought.
307. Election of remedies.
308. Vendor—Bond for titles.
309. Nature of vendor's interest.
310. Demand of possession and notice to quit.
311. Rescission of contract.
312. When notice of rescission is necessary.
313. Tender of deed by vendor.
314. When tender not necessary.
§ 315. Nature of the relationship.
316. Rules governing relationship of landlord and tenant not applicable.
317. Vendee in default cannot dispute vendor's title.
318. Estoppel.
319. Vendee against vendor.
320. Vendor or vendee against trespassers.
321. Part performance.
322. Vendee may assert equitable rights.
323. Defective title—Surrender of possession—Improvements.
324. Defenses—Defective title.
325. Parties.
326. Waiver of forfeiture.

§ 304. *Against vendee in possession under executory contract.*—Remedies in the nature of ejectment are often invoked by a vendor to regain possession of lands from a vendee in possession, under an executory contract of sale, after the latter has repudiated or failed to perform the contract on his part. When the contract for the sale and purchase of land is silent as to the possession, there is no implied license for the purchaser to enter; the facts oppose the idea that the vendee is to have the consideration for which he bargained, before he has complied with the terms of the contract on his part, and by omitting any stipulation in the contract, as to the possession of the land, the right to it is left with the vendor.[1]

§ 305. *Vendee holds as a licensee.*—If the vendee acquires the possession he holds as a licensee,[2] and his possession is

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[1] Burnett *v.* Caldwell, 9 Wall. 290; Gaven *v.* Hagen, 15 Cal. 208; Spencer *v.* Tobey, 22 Barb. (N. Y.) 260; Suffern *v.* Townsend, 9 Johns. (N. Y.) 35; Erwin *v.* Olmsted, 7 Cowen (N. Y.), 229.

[2] Burnett *v.* Caldwell, 9 Wall. 290; see Doolittle *v.* Eddy, 7 Barb. (N. Y.) 74, 78; Mumford *v.* Whitney, 15 Wend. (N. Y.) 380.

in no sense adverse to the vendor,[1] at least until his agreement has been fully performed, so that he has become entitled to a conveyance,[2] or the purchase money has been fully paid.[3]

§ 306. *Ejectment maintainable when covenant or specific performance cannot be brought.*—Though the vendor, having failed to tender a deed, cannot recover the purchase money in covenant against the vendee, yet he may, after default in the payment of any installment, and without tendering a deed, maintain an action of ejectment; the redress of the vendee in such a case, if any, is in equity.[4] And when a vendor sues for a specific performance of a contract to convey, it is necessary to show a strict tender of performance on his part, but in ejectment by a vendor, to recover the land, the vendee can only defend or protect his possession by showing a performance on his part, or that he is not in default.[5]

Hill *v.* Winn,[6] in the Supreme Court of Georgia, was ejectment by the obligor of a bond for titles against an obligee in possession and in default as to part of the purchase money. The defense was insolvency of the vendor, and the fact that he had no title, but only a bond for title, and had not paid his vendor. It was held that these facts might have constituted sufficient ground for a rescission of the contract, but afforded no defense in ejectment, and no reason why the obligee should keep both the purchase money and the possession of the land.

§ 307. *Election of remedies.*—After demand of payment

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[1] Young *v.* Irwin, 2 Hay (N. C.), *9; Seabury *v.* Stewart, 22 Ala. 207.

[2] Matter of Department of Parks, 73 N. Y. 560–566; Devyr *v.* Schaefer, 55 N. Y. 446; Briggs *v.* Prosser, 14 Wend. (N. Y.) 227; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74. But see Stansbury *v.* Taggart, 3 McL. 457.

[3] Benson *v.* Stewart, 30 Miss. 49.

[4] Wright *v.* Moore, 21 Wend. (N. Y.) 230; Burnett *v.* Caldwell, 9 Wall. 290–293.

[5] Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155–169.

[6] 60 Ga. 337.

of the purchase money, and a refusal or default, the vendor has an election either to maintain a suit for the specific performance of the contract, or an action for the purchase money; or, if the contract is executory, to treat it as rescinded, and bring an action of ejectment against the vendee in possession.[1]

§ 308. *Vendor—Bond for titles.*—In Georgia the general principle prevails that, in cases of an executory sale of land, where the purchase money is not paid, and no deed is executed, but only a bond for title given, conditioned to be void if the vendor conveys a perfect title on the payment of the notes, the title, and therefore the right to sue and recover in ejectment, remains in the vendor until the purchase money is fully paid.[2] In Texas the rule is stated in a recent case to be that the superior title remains in the vendor until the purchase money is fully paid in three classes of cases.[3] First. When the conveyance is executory, as where a bond for title has been given.[4] Second. When a mortgage for unpaid purchase money is given simultaneously with the deed.[5] Third. When an express lien is retained in the deed for the payment of the purchase money.[6]

§ 309. *Nature of vendor's interest.*—In Mississippi the vendor is regarded by the courts as a mortgagee, his retention of the title operating as an equitable mortgage; and his interest and the interest of a mortgagee are held to be alike in this essential, that both are security for the debt;[7] while

[1] Home Manuf. Co. *v.* Gough, 2 Brad. (Ill.) 477; see Crary *v.* Smith, 2 N. Y. 60.

[2] Alston *v.* Wingfield, 53 Ga. 18; Day *v.* Solomon, 40 Ga. 32; Tompkins *v.* Williams, 19 Ga. 569; Miller *v.* Swift, 39 Ga. 91; Ware *v.* Jackson, 19 Ga. 452; McHan *v.* Stansell, 39 Ga. 197.

[3] Webster *v.* Mann, 52 Texas, 416.

[4] Citing Walker *v.* Emerson, 20 Texas, 706; Baumgarten *v.* Smith, 37 Texas, 439.

[5] Citing The Howards *v.* Davis, 6 Texas, 174; Dunlap *v.* Wright, 11 Texas, 597.

[6] Citing Baker *v.* Ramey, 27 Texas, 52; Peters *v.* Clements, 46 Texas, 114.

[7] Strickland *v.* Kirk, 51 Miss. 795; Tanner *v.* Hicks, 12 Miss. 294, 300.

in Alabama the vendor is said to be a trustee for the vendee of the legal title pending an executory contract.[1]

§ 310. *Demand of possession and notice to quit.*—We shall presently show that after default, or failure by the vendee to comply with the conditions of the contract, the vendor may, in most of our States, recover the possession of the lands from the vendee by ejectment, without proving previous demand of possession, or notice to quit.[2] The same rule applies where the vendee repudiates the contract.[3] The subsequent possession of the vendee is held to be tortious, and there is an immediate right of action against him.[4]

§ 311. *Rescission of contract.*—A rescission of a contract in order to be effectual must be a rescission *in toto*.[5] And if on a bill to rescind a contract, on the ground that the vendor is unable to convey good title, it appear that, at the time of the hearing, or decree, he is able to do so, the plaintiff will be compelled to accept.[6]

§ 312. *When notice of rescission is necessary.*—It has been held in the Supreme Court of Kansas,[7] that where a vendee had been for a long time in possession of land, under a bond

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[1] Sellers *v.* Hayes, 17 Ala. 749; see Muldrow *v.* Muldrow, 2 Dana (Ky.), 387.

[2] Baker *v.* Gittings, 16 Ohio, 485; Jackson *v.* Miller, 7 Cowen (N. Y.), 747; Jackson *v.* Moncrief, 5 Wend. (N. Y.) 26; Wright *v.* Moore, 21 Wend. (N. Y.) 233; Maynard *v.* Cable, Wright (Ohio), 18; Gregg *v.* Von Phul, 1 Wall. 274, 280.

[3] Moak *v.* Bryant, 51 Miss. 560; see Chap. XIII.

[4] Gregg *v.* Von Phul, 1 Wall. 274; Prentice *v.* Wilson, 14 Ill. 92; Baker *v.* Gittings, 16 Ohio, 489; Burnett *v.* Caldwell, 9 Wall. 290. But see, *contra*, Costigan *v.* Wood, 5 Cr. C. C. 507; Right *v.* Beard, 13 East, 210; Twyman *v.* Hawley, 24 Gratt. (Va.) 512; Williamson *v.* Paxton, 18 Gratt. (Va.) 475, 505; Newby *v.* Jackson, 1 B. & C. 448.

[5] Bohall *v.* Diller, 41 Cal. 532.

[6] Diggle *v.* Boulden, 48 Wis. 477; Akerly *v.* Vilas, 15 Wis. 401; Fletcher *v.* Wilson, 1 S. & M. Ch. (Miss.) 376; Pierce *v.* Nichols, 1 Paige Ch. (N. Y.) 244. The same principle applies to a suit for specific performance, especially where time is not of the essence of the contract. Dresel *v.* Jordan, 104 Mass 407; Christian *v.* Cabell, 22 Gratt. (Va.) 82; Jenkins *v.* Fahey, 73 N. Y. 355; Moss *v.* Hanson, 17 Penn. St. 379; Luckett *v.* Williamson, 37 Mo. 388; Coffin *v.* Cooper, 14 Ves 205; Hepburn *v.* Dunlop, 1 Wheat. 179.

[7] Courtney *v.* Woodworth, 9 Kan. 443; see Kirby *v.* Harrison, 2 Ohio St. 326; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186.

for title, and had neglected to pay the balance of the purchase money when due, and the contract was silent as to any rescission, and no time of performance was mentioned, the vendor could not maintain an action of ejectment against the vendee in possession, without at least giving an explicit notice, reasonable in its terms, that unless the vendee performed, within a certain time, he would rescind the contract. The vendor, it was said, had the right to proceed in equity for a rescission of the contract, or could treat the bond as an equitable mortgage and foreclose the equities of the vendee.

§ 313. *Tender of deed by vendor.*—In the case of Gregg *v.* Von Phul[1] it appeared that the vendor had tendered a deed which did not contain all the covenants called for by the contract. The vendee, however, made no objection to the form of the deed, but handed it back, answering that he was not ready to pay the money. The Supreme Court of the United States held that if the deed was defective, or objectionable, the defects should have been pointed out by the vendee at the time of the tender, for, possibly, they might have been obviated. The very silence of the vendee was well calculated to influence the conduct of the vendor, and to convince him that inability to raise the money was the only reason which the vendee had for declining to perform the contract. The vendee is estopped, upon the most obvious principles of justice, from subsequently interposing objections which he did not even name when the deed was tendered, and the money due on the contract demanded.

§ 314. *When tender not necessary.*—No necessity exists for proving tender of the deed, in ejectment by a vendor against a vendee who has failed to pay the purchase-money, where the vendee had previously declared his inability to perform,[2] or had practically abandoned the possession, and

[1] 1 Wall. 274. See Bigler *v.* Morgan, 77 N. Y. 312; Carman *v.* Pultz, 21 N. Y. 547; Congregation S. H. M. *v.* Halladay, 50 N. Y. 664.

[2] Dixon *v.* Oliver, 5 Watts (Penn.), 509.

given notice to the vendor of his refusal to perform the contract.[1]

§ 315. *Nature of the relationship.*—In the case of Blight's Lessee *v.* Rochester,[2] in the United States Supreme Court, it appeared that James Dunlap, an alien, died seized of the premises in dispute, in 1794. The plaintiffs were the heirs of John Dunlap, who was a citizen, and had claimed as the heir to his alien brother James Dunlap. Subsequent to his death, one Hunter, professing to have purchased from John Dunlap, entered into possession and conveyed to the defendant. The plaintiffs brought ejectment, and sought to estop the defendant from impeaching or controverting the title of John Dunlap, by parol evidence that James Dunlap was an alien. The court, however, doubted the propriety of extending the doctrine of estoppel, as applied to lessor and lessee, to vendor and vendee. Chief Justice Marshall, who delivered the opinion, said: "The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy which ought

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[1] See Crary *v.* Smith, 2 N. Y. 60; see Morange *v.* Morris, 3 Keyes (N. Y.), 48. So the vendee is excused from a tender of payment, or of performance on his part, where the vendor is unable to perform the agreement, or has broken it by failing to remove incumbrances. Morange *v.* Morris, 3 Keyes (N. Y.), 48; see Holmes *v.* Holmes, 12 Barb. (N. Y.) 137; S. C. affi'd, 9 N. Y. 525; Karker *v.* Haverly, 50 Barb. (N. Y.) 79.

[2] 7 Wheaton, 535.

to arise between him and the vendor, respects the payment of the purchase-money. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and in deciding it, all those circumstances are examinable. If the vendor has actually made a conveyance, his title is extinguished in law as well as equity, and it will not be pretended that he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional. If, after such a contract, he brings an ejectment for the land, he violates his own contract, unless the condition be broken by the vendee; and if it be, the vendor ought to show it."

§ 316. *Rules governing relationship of landlord and tenant not applicable.*—It may be regarded as a settled principle that the relation of landlord and tenant does not exist between vendor and vendee.[1] An essential quality of a lease is wanting, *i. e.*, stipulation for compensation to the owner.

§ 317. *Vendee in default cannot dispute vendor's title.*—But where the vendee enters into possession, under an executory contract to purchase land, and fails to comply with the terms of the contract, by neglecting to pay the purchase-money, the vendor may bring ejectment, and the vendee cannot dispute his title, nor set up an outstanding title, to defeat a recovery,[2] any more than a lessee could question

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[1] Watkins *v.* Holman, 16 Peters, 25–54; The Society, &c. *v.* Town of Pawlet, 4 Peters, 480–506; Jackson *d.* Bradstreet *v.* Huntington, 5 Peters, 402; Willison *v.* Watkins, 3 Peters, 43; Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74; Burnett *v.* Caldwell, 9 Wall, 290.

[2] Pershing *v.* Canfield, 70 Mo. 140; Lesher *v.* Sherwin, 86 Ill. 420; Seabury *v.* Stewart, 22 Ala. 207; Harvey *v.* Morris, 63 Mo. 475; Fitzgerald *v.* Spain, 30 Ark. 95; Jackson *v.* Bard, 4 Johns. (N. Y.) 230; Jackson *v.* Stewart, 6 Johns. (N. Y.) 34; Hill *v.* Winn, 60 Ga. 337; Jackson *v.* Ayers, 14 Johns. (N. Y.) 224; Sanford *v.* Cloud, 17 Fla. 557; Jackson *v.* Hotchkiss, 6 Cowen (N. Y.), 401; Galloway *v.* Finley, 12 Peters, 264–295; Jackson *v.* Walker, 7 Cow. (N. Y.) 637;

the title of his lessor,[1] and for the same reason. The estoppel in one case, as in the other, is founded upon the fact that the defendant has been clothed with the possession by the plaintiff.

The estoppel, of course, extends to those claiming in the vendee's right,[2] and a purchaser cannot set up want of title, or an outstanding title, against a grantor who brings ejectment to enforce a forfeiture arising from a breach of a condition subsequent.[3] When a person in possession of land covenants with another to pay him for the land, he thereby acknowledges the title of the vendor, and is estopped from setting up an outstanding title, or title in himself, unless he can show that he was deceived, or imposed upon, in making the agreement.[4]

§ 318. *Estoppel.*—So in Pennsylvania, in ejectment by a vendor against a purchaser from the vendee, where it appeared that the defendant had not paid any part of the purchase-money, or made any valuable improvements, it was held that the defendant could not set up the weakness of the vendor's title in defense of his possession. Unless fraud had been practiced on him he must pay the purchase-money or relinquish possession. He cannot set up an outstanding title in another, or adverse title in himself.[5]

§ 319. *Vendee against vendor.*—It has been held in the Supreme Court of Georgia, that a vendor is not liable to an

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Bush *v.* Marshall, 6 How. 284–291; Love *v.* Edmonston, 1 Ired. (N. C.) Law, 152; Strong *v.* Waddell, 56 Ala. 471; Jackson *v.* McGinness, 14 Penn. St. 331.

[1] Burnett *v.* Caldwell, 9 Wall. 290; Whiteside *v.* Jackson, 1 Wend. (N. Y.) 418; Bowers *v.* Keesecker, 14 Iowa, 301–305; but see *contra*, Gudger *v.* Barnes, 4 Heisk. (Tenn.) 570; Corder *v.* Dolin, 4 Baxter (Tenn.), 238; see Waggener *v.* Lyles, 29 Ark. 47.

[2] Raley *v.* Ross, 59 Ga. 862.

[3] O'Brien *v.* Wetherell, 14 Kan. 616.

[4] Jackson *v.* Ayers, 14 Johns. (N. Y.) 224; Jackson *v.* Thompson, 6 Cow. (N. Y.) 178; Jackson *v.* Walker, 7 Cow. (N. Y.) 637.

[5] Jackson *v.* McGinness, 14 Penn. St. 331; see Smith *v.* Webster, 2 Watts (Penn.), 478; Treaster *v.* Fleisher, 7 W. & S. (Penn.) 138.

action for the recovery of the possession of the land, at the instance of his vendee, claiming under a bond for titles, until the purchase-money has been fully paid, or unconditionally tendered.[1]

But it has been decided, in the Supreme Court of Pennsylvania, that where no time for the delivery of possession was stipulated for in the contract of sale, and, before the day for the payment of the purchase-money, the vendee obtained possession with the consent of the vendor, and the purchase-money remained partially unpaid, the vendee might, without tender of the balance of the purchase-money, recover the possession from the vendor who had unlawfully obtained possession through the unauthorized act of a third party.[2] The general rule, however, is that an obligee of a title bond cannot maintain ejectment against the obligor, or one taking title under him,[3] for he has only a promise of the title, and not a title sufficient to support the action.

§ 320. *Vendor or vendee against trespassers.*—In Texas it has been decided that either the vendor or vendee may eject a trespasser or stranger to the title. And against a trespasser the vendee need not prove a compliance with the conditions of the contract which would entitle him to a specific performance. The trespasser has no interest in, and cannot bring into controversy, any disputed matters, or unadjusted equities, between them. A recovery of the land, by either the vendor or vendee, will enure to the benefit of the one who may be entitled thereto upon an adjustment between them of their respective rights.[4]

§ 321. *Part performance.*—Although a vendor cannot insist upon the vendee's accepting a part performance of

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[1] Miller *v.* Swift, 39 Ga. 91; see Allen *v.* Holding, 29 Ga. 485–490; Peterson *v.* Orr, 12 Ga. 464.

[2] Harris *v.* Bell, 10 S. & R. (Penn) 39.

[3] Richardson *v.* Thornton, 7 Jones (N. C.) Law, 458; Love *v.* Edmonston, 1 Ired. (N. C.) Law, 152; Trammell *v.* Simmons, 17 Ala. 411.

[4] Hooper *v.* Hall, 30 Texas, 154; Wright *v.* Thompson, 14 Texas, 558.

the contract,[1] yet the vendee may require a specific performance as to part, and claim damages as to the residue, where the vendor is unable to perform *in toto*.[2]

§ 322. *Vendee may assert equitable rights.*—In a case decided by the New York Court of Appeals,[3] it was held that a vendee in possession of land, under a contract of sale, in an action of ejectment brought by the vendor, could assert equitable rights the same as though he was a party to an action for a specific performance of the contract. And if the vendor is indebted to him on an independent liquidated claim, he can set it up and have it applied in payment, and procure a specific performance of the contract. The same rule was held to apply in favor of a sub-vendee. So in Minnesota the vendee may set up in ejectment any equities relating to the right of possession, but the facts must be such as, under the former practice, would have sustained a bill in chancery for an injunction against the action at law, and so have kept the party in possession.[4]

§ 323. *Defective title—Surrender of possession.*—It has been decided by the New York Court of Appeals, that if the vendee is not content with the title offered he should specify the objection, and surrender up the possession of the land.[5] The application of this principle, however, often works injustice to a vendee who has paid a part of the purchase-money, or made valuable improvements, and then discovers that the vendor is unable to give him the title for which he bargained. Hence the same court has decided

[1] Gibert *v.* Peteler, 38 N. Y. 165.

[2] Jones *v.* Shackleford, 2 Bibb (Ky.), 410.

[3] Cavalli *v.* Allen, 57 N. Y. 508; see Traphagen *v.* Traphagen, 40 Barb. (N. Y.) 537; Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; Tibeau *v.* Tibeau, 19 Mo. 78; Carpenter *v.* Ottley, 2 Lans. (N. Y.) 451; Love *v.* Watkins, 40 Cal. 547; Richards *v.* Elwell, 48 Penn. St. 361; Young *v.* Montgomery, 28 Mo. 604.

[4] Williams *v.* Murphy, 21 Minn. 534; Gates *v.* Smith, 2 Minn. 30; Barker *v.* Walbridge, 14 Minn. 469–475.

[5] Viele *v.* Troy & B. R. R. Co. 20 N. Y. 184; see Jackson *v.* McGinness, 14 Penn. St. 331; McIndoe *v.* Morman, 26 Wis. 588; Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155; Diggle *v.* Boulden, 48 Wis. 477–484; Hill *v.* Winn, 60 Ga. 337.

that where a vendee was in possession, under a contract from a vendor to convey, and had made improvements in conformity with the provisions of the contract, which required certain expenditures as a necessary condition to entitle him to a deed, and the vendor's title proved defective, the vendee had an equitable lien upon the premises for the money so expended for improvements, which entitled him to hold the possession, and the payment of which was a condition precedent to the recovery of the premises, by the vendor, in ejectment.[1]

§ 324. *Defenses—Defective title.*—It has been decided in Texas, that where the purchaser held under an executed contract, as a deed with warranty, he could not resist the payment of the purchase-money upon proof that the title might be doubtful. He must go further and show with reasonable certainty that the title had failed, in whole or in part, and that he had been evicted by a superior outstanding title, of which he had no notice at the time of the purchase.[2] The fact that the vendor has proved his claim for the purchase-money in bankruptcy against the estate of the vendee constitutes no ground of defense to an ejectment, brought by the vendor against the vendee, for default in the payment of it.[3]

§ 325. *Parties.*—It has been held in Pennsylvania, that a vendor could not enforce his contract in ejectment by bringing suit against a tenant of a single field or tract, or of a single room of a house,[4] nor could a vendee who was not summoned, or made a party to the ejectment, be turned out of possession upon a judgment rendered against a tenant of a small portion of the premises.

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[1] Gibert *v.* Peteler, 38 N. Y. 165.

[2] Price *v.* Blount, 41 Texas, 472; Cooper *v.* Singleton, 19 Texas, 266; Woodward *v.* Rodgers, 20 Texas, 178; Johnson *v.* Long, 27 Texas, 21; Demaret *v.* Bennett, 29 Texas, 263; see Estell *v.* Cole, 52 Texas, 170.

[3] McAlpin *v.* Lee, 57 Ga. 281.

[4] Davidson *v.* Barclay, 63 Penn. St. 406; see § 239.

§ 326. *Waiver of forfeiture.*—In a recent case, in the Supreme Court of Iowa, it was held that the vendor's statement to the purchaser that he would not insist upon the forfeiture stipulated in the contract, in case of default in prompt payments, constituted a waiver of the right to declare a forfeiture, where upon the strength of such statements the payments were allowed to become in arrears, and valuable improvements were made upon the property.[1] And in a case which arose in New York, where it appeared that the time of payment under the contract had been extended with the vendor's assent, and no certain time fixed when payment would be required, it was held that the vendor could not afterwards claim a forfeiture of the contract, by requiring immediate payment, but the vendee was entitled to a reasonable time, after notice, to complete his payment.[2]

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[1] Blair *v.* Blair, 48 Iowa, 393.

[2] Cythe *v.* La Fontain, 51 Barb. (N. Y.) 186; see Durand *v.* Sage, 11 Wis. 151; Edgerton *v.* Peckham, 11 Paige Ch. (N. Y.) 352.

CHAPTER XI.

EJECTMENT BETWEEN MORTGAGEE AND MORTGAGOR.

§ 327. Early practice.
328. Disadvantages of ejectment between mortgagee and mortgagor.
329. Foreclosure a more effectual remedy.
330. Mortgagee's rights at common law.
331. } Modern practice.
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333. In what States mortgagee may bring ejectment.
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340. Ejectment by mortgagor against mortgagee in possession.
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342. Rule in Michigan.
343. Mortgagee may purchase equity at execution sale.
344. A conveyance by mortgagor to mortgagee of entire estate—How regarded.
345. Mortgagor's remedy against mortgagee after condition broken.

§ 327. *Early practice.*—The remedy of ejectment was formerly much resorted to by mortgagees, to recover possession of the premises from the mortgagor, after default in the payment of the mortgage. The ancient principle, governing this relationship, was that the mortgagee became immediately vested with the entire estate, upon the execution of the mortgage, and the mortgagor, by continuing in possession, was considered to be like a tenant at will of the mortgagee.

§ 328. *Disadvantages of ejectment between mortgagee and mortgagor.*—The remedy, while in general use by mortgagees, was not, ordinarily, a final remedy, and frequently led to litigious accountings concerning the rents and profits received by the mortgagee, during the period of his occupancy, so that the practical abolition of ejectment, as applied to this peculiar relationship, may be regarded as a desirable innovation.

§ 329. *Foreclosure a more effectual remedy.*—The mortgagee's most common and effectual remedy is to proceed

by bill in equity, or statutory proceeding, to foreclose the mortgage, sell the property, and thus, in a single action, bar the mortgagor's right of redemption, and secure the possession of the premises to the purchaser. "The case of mortgages," says Kent, "is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."[1] The commentator refers in this passage to the adoption by courts of law, by a gradual and almost insensible progress, of the equity doctrine that a mortgage is a mere security for the debt, and only a chattel interest, and that, until a decree of foreclosure, the mortgagor continues the owner of the fee.[2] Lord Mansfield, in King *v.* St. Michael,[3] decided in 1781, used this language: "The mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner."

§ 330. *Mortgagee's rights at common law.*—But, as we have said, at common law the mortgagee, even before and *a fortiori* after forfeiture, by reason of non-payment of the mortgage, could maintain an action of ejectment, a writ of entry, or an action of trespass to try title, to recover the possession of the lands, against the mortgagor, or any person in occupation of the premises claiming under him.[4]

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[1] 4 Kent's Com. p. *158.

[2] 4 Kent's Com. p. *160; see Wilkins *v.* French, 20 Me. 111; Kinna *v.* Smith, 2 Green Ch. (N. J.) 14.

[3] 2 Doug. 632. See Casborne *v.* Scarfe, 1 Atkyns, 603, per Lord Hardwicke.

[4] Thunder *v.* Belcher, 3 East, 449; Wakeman *v.* Banks, 2 Conn. 445; Rockwell *v.* Bradley, 2 Conn. 1; Keech *v.* Hall, Doug. 21; Birch *v.* Wright, 1 T. R. 378; Tripp *v.* Ide, 3 R. I. 51; Colman *v.* Packard, 16 Mass. 39; Pierce *v.* Brown, 24 Vt. 165; Wilson *v.* Hooper, 13 Vt. 653; Den *d.* Hart *v.* Stockton, 7 Halst. (N. J.) Law, 322; Jackson *v.* Warren, 32 Ill. 331; Jackson *v.* Colden, 4 Cowen (N. Y.), 266; Carpenter *v.* Carpenter, 6 R. I. 542; Oldham *v.* Pfleger, 84 Ill. 102; Carroll *v.* Ballance, 26 Ill. 9–17; Fuller *v.* Wadsworth, 2 Ired. (N. C.) Law, 263; Ahern *v.* White, 39 Md. 409; Mitchell *v.* Bogan, 11 Rich. (S. C.) Law, 686.

Whether the mortgage was legal or equitable in its nature, the mortgagee might pursue his legal remedy of ejectment, and, at the same time, file a bill to foreclose the equity of redemption.[1]

§ 331. *Modern practice.*—The law, as at present settled, in most of our States, by judicial decision, or by statute, is that the mortgagee does not possess a sufficient title to support the action of ejectment, even after default. The exceptions to this general rule in certain States, however, must not be overlooked. In New York the rule is settled that a mortgage is but a lien upon the land. The mortgagor, both at law and in equity, is regarded as the owner of the fee, and the mortgage is considered to be a mere chose in action, or security of a personal nature.[2]

Prior to the enactment of the Revised Statutes, a mortgagee could maintain ejectment in New York, to recover possession of the mortgaged lands, but, under the present system of practice in that State, the mortgagor, both before and after default, is entitled to the possession of the mortgaged premises, of which he cannot be deprived, without his consent, except by a decree of foreclosure and sale, or the appointment of a receiver. Ejectment by mortgagees, in that State, is expressly prohibited by statute.[3] And a mortgagor, in default, may have ejectment against an intruder, or one claiming under a void deed, since he has the right of possession, until foreclosed, against all the world, except the mortgagee lawfully in possession.[4] Indeed, it is

[1] Hughes *v.* Edwards, 9 Wheat. 489–494; Very *v.* Watkins, 18 Ark. 546. But see Ould *v.* Stoddard, 54 Cal. 613; Livingston *v.* Hayes, 43 Mich. 129.

[2] Trustees of Union College *v.* Wheeler, 61 N. Y. 88–118; Trimm *v.* Marsh, 54 N. Y. 599–604; Packer *v.* Rochester & Syracuse R. R. Co. 17 N. Y. 283–295; Kortright *v.* Cady, 21 N. Y. 343; Astor *v.* Hoyt, 5 Wend. (N. Y.) 603; Power *v.* Lester, 23 N. Y. 527; see 4 Kent's Com. 194, and notes; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534; Waters *v.* Stewart, 1 Cai. C. E. (N. Y.) 47.

[3] Trimm *v.* Marsh, 54 N. Y. 599–604; Madison Ave. Bap. Ch. *v.* Oliver St. Bap. Ch. 73 N. Y. 82–94; Dunning *v.* Fisher, 20 Hun (N. Y.), 178; see Russell *v.* Ely, 2 Black (U. S.), 575; Souter *v.* La Crosse R. R. 1 Woolw. 80.

[4] Olmsted *v.* Elder, 5 N. Y. 144; see Pell *v.* Ulmar, 18 N. Y. 139.

the prevailing principle, in most of the States, that a mortgage is only a chattel interest, and a lien upon the lands as a security for the debt, the legal title remaining in the mortgagor during the life of the mortgage,[1] and the interest of the mortgagor is an estate which may be sold on execution,[2] and is subject to dower and curtesy, and may be mortgaged or conveyed as any other estate in lands. The mortgagor's estate is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate vested in the mortgagee, and the right to redeem existed only in equity.[3]

§ 332. It has been held in Texas, that the mortgagor of real estate remains the real owner of the land, and entitled to the possession thereof, both before and after the breach of the condition of defeasance, and that the mortgagee cannot maintain an action of trespass to try title to dispossess him.[4] In Florida, under the present practice, the mortgagee cannot acquire the possession until after a decree of foreclosure.[5] So a mortgagee cannot maintain ejectment for the possession of the mortgaged premises in Kentucky;[6] and it has been held in Wisconsin, that where the plaintiff's only title is a mortgage the action fails, even though the defense is imperfectly pleaded,[7] and in Georgia a mortgagee has only a lien, and no right of entry, and cannot maintain

[1] Fletcher *v.* Holmes, 32 Ind. 497; Grable *v.* McCulloh, 27 Ind. 472; Turrell *v.* Warren, 25 Minn. 9; Carpenter *v.* Bowen, 42 Miss. 28; Taliaferro *v.* Gay, 78 Ky. 496; United States *v.* Athens Armory, 35 Ga. 344; Jackson *v.* Carswell, 34 Ga. 279; Souter *v.* La Crosse R. R. 1 Woolw. 80; Bartlett *v.* Borden, 13 Bush (Ky.), 45; McMillan *v.* Richards, 9 Cal. 365; see Brobst *v.* Brock, 10 Wall. 519–529; Dayton *v.* Dayton, 7 Brad. (Ill) 136.

[2] Gorham *v.* Arnold, 22 Mich. 247; Huntington *v.* Cotton, 31 Miss. 253; Trimm *v.* Marsh, 54 N. Y. 599.

[3] Odell *v.* Montross, 68 N. Y. 499.

[4] Mann *v.* Falcon, 25 Texas, 271; Duty *v.* Graham, 12 Texas, 427.

[5] See McMahon *v.* Russell, 17 Fla. 698; see Casborne *v.* Scarfe, 1 Atkyns, 606.

[6] Newport Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673; see Caufman *v.* Sayre, 2 B. Mon. (Ky.) 202–205.

[7] Brinkman *v.* Jones, 44 Wis. 498.

ejectment,[1] and a mortgagee, as such, is not entitled to bring ejectment in Michigan.[2]

§ 333. *In what States mortgagee may bring ejectment.* —In Illinois the mortgagee owns the fee, and has the *jus in re* as well as *ad rem*, and after condition broken may maintain ejectment against the mortgagor,[3] and in that State, where the mortgage provides for the payment of interest annually or in installments, and for a forfeiture in case of non-payment, the mortgagee can maintain ejectment whenever an installment of interest or principal is overdue and unpaid.[4]

In North Carolina a mortgagee may bring an action to recover the lands.[5] So in Vermont, the mortgagee, under the statute of that State, has the right, after condition broken, to bring ejectment against the mortgagor or his grantees without giving notice to quit,[6] and upon condition broken becomes absolutely vested with the interest of the mortgagor, and has a right to the immediate possession.[7]

So in Arkansas, the mortgagee can obtain possession of the mortgaged premises by ejectment, and apply the rents and profits in satisfaction of the debt, and it is unnecessary to make the legal representatives of a deceased mortgagor defendants in the action, for the judgment would not bar their right of redemption.[8]

§ 334. *Statute prohibiting ejectment by mortgagee—When unconstitutional.*—In Todd *v.* Davis[9] the Supreme

[1] Fry *v.* Shehee, 55 Ga. 208–212.

[2] Livingston *v.* Hayes, 43 Mich. 129.

[3] Oldham *v.* Pfleger, 84 Ill. 102; Jackson *v.* Warren, 32 Ill. 331; Carroll *v.* Ballance, 26 Ill. 17.

[4] Carroll *v.* Ballance, 26 Ill. 9; see Carpenter *v.* Carpenter, 6 R. I. 542; Reddick *v.* Gressman, 49 Mo. 389.

[5] Wittkowski *v.* Watkins, 84 N. C. 458.

[6] Pierce *v.* Brown, 24 Vt. 165; Wilson *v.* Hooper, 13 Vt. 653; Pratt *v.* Bank of Bennington, 10 Vt. 293; Burton *v.* Austin, 4 Vt. 105; see Marvin *v.* Dennison, 20 Vt. 662; see Chapter XIII.

[7] Hagar *v.* Brainerd, 44 Vt. 294.

[8] Simms *v.* Richardson, 32 Ark. 304.

[9] 32 Mich. 160. And see Mundy *v.* Monroe, 1 Mich. 68.

Court of Michigan decided that the act of the legislature preventing actions of ejectment by mortgagees, before their title had become absolute by foreclosure, was unconstitutional and void as to mortgages existing and in force at the time of the passage of the act, and it was held that mortgagees so situated still had the right to bring ejectment.

§ 335. *Ejectment by execution purchaser.*—In Rhode Island the mortgagor is regarded as the tenant at sufferance of the mortgagee, and in a case decided by the Supreme Court of that State, it was held that a mortgagor in possession, whose interest had been sold on execution, might, in ejectment brought against him by the purchaser, protect his possession by setting up a lease for years from his mortgagee, the mortgage having been given prior to the levy.[1] The sale of the mortgagor's interest upon execution, it was held, imposed no obligation upon him to redeem the mortgage for the benefit of the purchaser at the sheriff's sale, nor did it create any such relation between them as disentitled him to acknowledge the superior title of his mortgagee, and to accept a lease from him to protect the possession from the adverse claim of the purchaser.

In Alabama the mortgagor's interest, unless the right to possession is reserved, is regarded as a mere equity of redemption, and, consequently, except in case of such a reservation, a purchaser of the mortgagor's equity of redemption in land, after the maturity of the mortgage, does not become vested with a sufficient title to maintain a possessory action in the nature of ejectment.[2]

§ 336. *Title after default.*—Some of the authorities decide that the title of the land passes and becomes absolute in the mortgagee after condition broken;[3] but the prevail-

[1] Simmons *v.* Brown, 7 R. I. 427. But see Doe *d.* Ogle *v.* Vickers, 4 Ad. & El. 782.

[2] Atcheson *v.* Broadhead, 56 Ala. 414; Childress *v.* Monette, 54 Ala. 317; Bernstein *v.* Humes, 60 Ala. 582.

[3] Frische *v.* Kramer, 16 Ohio, 125–138; Stewart *v.* Crosby, 50 Me. 130; Johnson *v.* Houston, 47 Mo. 227.

ing modern principle is that even after default the title revests in the mortgagor upon payment of the debt, without a formal reconveyance.[1] And after the condition of the mortgage has once been performed the mortgage becomes void, and no agreement of the parties to continue it in force can affect the legal title.[2]

§ 337. *Deed absolute on its face may be shown to be a mortgage.*—A deed absolute on its face may be shown by parol or other extrinsic evidence to be a mortgage, and the relation of mortgagor and mortgagee being thus established, all the rights, remedies, and obligations incident to that relation attach to the parties,[3] and in New York such a mortgagee cannot recover the possession of the mortgaged premises in ejectment.[4] But a deed will be declared a mortgage only on purely equitable grounds, and in the absence of such equitable considerations the relief will be refused; as where the conveyance was made to defraud creditors.[5] The evidence must be so clear and conclusive as to leave no doubt as to the real intention of the parties, otherwise the intention, as expressed on the face of the deed, will prevail.[6] The burden rests upon the grantor to establish that the deed

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[1] 4 Kent's Com. p. 194, Lecture LVIII and notes; Pease *v.* Pilot Knob Iron Co. 49 Mo. 124; Tryon *v.* Munson, 77 Penn. St. 250–262; McMillan *v.* Richards, 9 Cal. 365; White *v.* Rittenmyer, 30 Iowa, 268; Wells *v.* Rice, 34 Ark. 346; McMahon *v.* Russell, 17 Fla. 698.

[2] York Co. Savings Bank *v.* Roberts, 70 Me, 384; see Griffin *v.* Lovell, 42 Miss. 402; Donnelly *v.* Simonton, 13 Minn. 301.

[3] Horn *v.* Keteltas, 46 N. Y. 605; Carr *v.* Carr, 52 N. Y. 251; Murray *v.* Walker, 31 N. Y. 399; McBurney *v.* Wellman, 42 Barb. (N. Y.) 390; S. C. *sub nomine* Dodge *v.* Wellman, 43 How. Pr. (N. Y.) 427; Odell *v.* Montross, 68 N. Y. 499; see Chase *v.* Peck, 21 N. Y. 581; Villa *v.* Rodriguez, 12 Wall. 323; Littlewort *v.* Davis, 50 Miss. 403; O'Neill *v.* Capelle, 62 Mo. 202; French *v.* Burns, 35 Conn. 359; Weide *v.* Gehl, 21 Minn. 449; Steinruck's Appeal, 70 Penn. St. 289; Hills *v.* Loomis, 42 Vt. 562; Kent *v.* Agard, 24 Wis. 378.

[4] Carr *v.* Carr, 52 N. Y. 251; Murray *v.* Walker, 31 N. Y. 399.

[5] Hassam *v.* Barrett, 115 Mass. 256.

[6] Henley *v.* Hotaling, 41 Cal. 22; Phillips *v.* Croft, 42 Ala. 477; Kent *v.* Lasley, 24 Wis. 654; Price *v.* Karnes, 59 Ill. 276; see Fullerton *v.* McCurdy, 55 N. Y. 637.

was intended as a mortgage,[1] and the question of whether or not a deed absolute in form was a mortgage is a mixed question of law and fact.[2] But if the lands are conveyed by a deed absolute on its face, but intended as security for money loaned, a purchaser from the grantee without notice that the grant was intended as a mortgage, acquires a title free from the equity of the grantor.[3]

§ 338. *Ejectment maintainable in certain States upon a deed intended as a mortgage.*—In Michigan, a deed absolute on its face, though intended as a mortgage, confers upon the grantee a right of possession that will support ejectment. It was decided that the statute of that State, which forbids ejectment by mortgagees before foreclosure, was not intended to reach a case of this description.[4] So in Georgia, in which State ejectment cannot ordinarily be maintained by a mortgagee, an absolute deed, conveying land in fee simple, has been held to pass the legal title, though made and delivered as security for a debt, and a recovery may be had thereon in ejectment by the grantee against the grantor.[5]

It has been held in California, that where the plaintiff claims under a conveyance, absolute in form, but intended as a mortgage to secure a loan of money, he is entitled to recover in ejectment, unless the defendant sets up his equities by answer, accompanied with an offer to pay the amount of the mortgage lien, and prays that the conveyance be declared a mortgage.[6] On the other hand it has been held in Texas, that the defendant, under a plea of "not guilty" in an action of trespass to try title, may give in evidence special matters of defense to the action, whether legal

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[1] Haines *v.* Thomson, 70 Penn. St. 434.

[2] Brown *v.* Clifford, 7 Lansing (N. Y.), 46; see Montgomery *v.* Spect, 55 Cal. 352.

[3] Pico *v.* Gallardo, 52 Cal. 206.

[4] Jeffery *v.* Hursh, 42 Mich. 563; Wetherbee *v.* Green, 22 Mich. 311; Bennett *v.* Robinson, 27 Mich. 26-30.

[5] Biggers *v.* Bird, 55 Ga. 650.

[6] Pico *v.* Gallardo, 52 Cal. 206; see Sutton *v.* Mason, 38 Mo. 120.

or equitable, and may defeat the plaintiff's recovery by proving that the deed under which plaintiff claims, is, in fact, a mortgage.[1]

§ 339. *Mortgage—Outstanding title.*—The rule that the plaintiff in ejectment cannot recover premises, the title to which is in a third person, does not apply to a case where the outstanding title is a mortgage with which defendant is unconnected.[2] The principle was declared in the United States Supreme Court to be settled, that an outstanding satisfied mortgage could not be set up against the mortgagor by a stranger for the purpose of defeating the mortgagor's title.[3]

§ 340. *Ejectment by mortgagor against mortgagee in possession.*—The general rule, as we have seen, is, that upon payment of the mortgage debt, the title or interest of the mortgagee revests in the mortgagor, or those claiming under him, without reconveyance or release.[4] The mortgagor cannot ordinarily maintain an action of ejectment, or writ of entry, or an action of trespass to try title, against the mortgagee lawfully in possession,[5] nor his tenant,[6] nor any one claiming in his right.[7] He, of course, cannot do so until the mortgage is fully paid and satisfied ;[8] for the lawful

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[1] Mann *v.* Falcon, 25 Texas, 271 ; see Hannay *v.* Thompson, 14 Texas, 142.

[2] Hardwick *v.* Jones, 65 Mo. 54–60; Woods *v.* Hilderbrand, 46 Mo. 284; Bartlett *v.* Borden, 13 Bush (Ky.), 45; Johnson *v.* Houston, 47 Mo. 227; Den *d.* Dimon *v.* Dimon, 5 Halst. (N. J.) Law, 157; Emory *v.* Keighan, 88 Ill. 482; Oldham *v.* Pfleger, 84 Ill. 102. But see Meyer *v.* Campbell, 12 Mo. 603.

[3] Peltz *v.* Clarke, 5 Peters, 480; see Collins *v.* Robinson, 33 Ala. 91; 2 Greenl. Ev. § 330.

[4] Odell *v.* Montross, 68 N. Y. 499.

[5] Conner *v.* Whitmore, 52 Me. 185; Hennesy *v.* Farrell, 20 Wis. 42; Gillett *v.* Eaton, 6 Wis. 30; Phyfe *v.* Riley, 15 Wend. (N. Y.) 248; Sherman *v.* Abbot, 18 Pick. (Mass.) 448; Pace *v.* Chadderdon, 4 Minn. 499.

[6] Hennesy *v.* Farrell, 20 Wis. 42.

[7] Stark *v.* Brown, 12 Wis. 572.

[8] Madison Ave. Bap. Church *v.* Oliver St. Bap. Church, 73 N. Y. 82; Sahler *v.* Signer, 44 Barb. (N. Y.) 606; Holt *v.* Rees, 44 Ill. 30; Martin *v.* Fridley, 23 Minn. 13; Roberts *v.* Sutherlin, 4 Oreg. 219; Wells *v.* Rice, 34 Ark. 346; Tryon *v.* Munson, 77 Penn. St. 250, 262; Den *d.* Wright *v.* Wright, 2 Halst. (N. J.) Law, 175; Hannay *v.* Thompson, 14 Tex. 142.

possession of the mortgagee carries with it the right to liquidate the mortgage debt from the rents and profits of the land, and to retain the possession until that purpose is accomplished. But if the mortgagee's possession is obtained unlawfully, as where the mortgagee, without the mortgagor's consent, secured the possession by an arrangement with the tenant of the mortgagor, whose term had expired, the rule that he cannot be evicted after condition broken until the debt is paid does not apply.[1] To authorize such retention of the possession, however, it is not necessary that it should have been given under the mortgage, or with a view to the liquidation of it out of the rents and profits. The true test of the right to retain the possession is—was it acquired rightfully and by the mortgagor's consent.[2]

§ 341. *Ejectment by mortgagor not maintainable until after accounting and application of rents.*—Even though the mortgagee has received sufficient rents and profits to satisfy the mortgage, an action in the nature of ejectment cannot be sustained against him until an accounting has been had, and such rents and profits applied to the mortgage debt, for the mortgagee takes the rents and profits in the *quasi* character of trustee or bailiff of the mortgagor, and to be applied in equity as an equitable set-off to the amount due on the mortgage debt.[3] The law does not make the application.[4]

§ 342. *Rule in Michigan.*—In Michigan, however, a mortgagor, at any time before his rights have been foreclosed, can recover possession by ejectment from a mortgagee, who, without consent of the mortgagor, peaceably takes possession of the land.[5]

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[1] Russell *v.* Ely, 2 Black (U. S.), 575.

[2] See Madison Ave. Bap. Ch. *v.* Oliver St. Bap. Ch. 73 N. Y. 82.

[3] See Ruckman *v.* Astor, 9 Paige Ch. (N. Y.) 517.

[4] Hubbell *v.* Moulson, 53 N. Y. 225; New England Jewelry Co. *v.* Merriam, 2 Allen (Mass.), 390.

[5] Newton *v.* McKay, 30 Mich. 380; see Humphrey *v.* Hurd, 29 Mich. 44; see

§ 343. *Mortgagee may purchase equity at execution sale.*—A mortgagee in possession may purchase, for his own benefit, the title of the mortgagor on an execution sale against him in favor of a third party, and he may set up the title so acquired as a defense to an action by the mortgagor or his grantee to redeem, for the relationship is not one of trust or confidence;[1] and he may purchase the equity of redemption, and thereby acquire an absolute title.[2]

§ 344. *Conveyance by mortgagor to mortgagee of entire estate—How regarded.*—The mortgagor and mortgagee may, at any time after the creation of the mortgage, and before foreclosure, make any agreement that they please concerning the estate, and the mortgagee may become the purchaser of the right of redemption. Such a transaction is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining the title. It will be sustained only when it is *bona fide*, and in all respects fair and for an adequate consideration.[3] In Odell *v.* Montross,[4] in the New York Court of Appeals, it appeared that the plaintiff executed to the defendant a deed of the premises, absolute on its face, but simply as security for the payment of money. Subsequently defendant paid plaintiff at his request the sum of fifty dollars and plaintiff signed and delivered to defendant the following paper:

Russell *v.* Ely, 2 Black (U. S.), 575. But see Mad. Ave. Bap. Ch. *v.* Oliver St. Bap. Ch. 73 N. Y. 82.

[1] Ten Eyck *v.* Craig, 62 N. Y. 406.

[2] Green *v.* Butler, 26 Cal. 595; Gwinn *v.* Smith, 55 Ga. 145; Hinkley *v.* Wheelwright, 29 Md. 341.

[3] Odell *v.* Montross, 68 N. Y. 499; Trull *v.* Skinner, 17 Pick. (Mass.) 213; Hyndman *v.* Hyndman, 19 Vt. 9; Patterson *v.* Yeaton, 47 Me. 308; Ford *v.* Olden, L. R. 3 Eq. Cases, 461; Russell *v.* Southard, 12 How. 139; Holdridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 30.

[4] 68 N. Y. 499.

"NEW YORK, Sept. 17, 1866.

"Received from William Montross fifty dollars, in full satisfaction for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date.

"THOMAS B. ODELL."

It was held that the deed was a mortgage, with all the incidents of such an instrument, and that the rights and obligations of the parties were the same as though the deed had been subject to a defeasance expressed in the body of the paper, or executed simultaneously with it. Furthermore, that the mortgagor's legal estate in fee could only be divested (otherwise than by way of estoppel) by some instrument valid under the statute of frauds, and which complied with the statute prescribing the mode and manner of conveying lands. That this paper, *ex proprio vigore*, did not have that effect, for it did not profess to release the right of redemption, nor to convey any title, interest, or estate in lands, and was not under seal. No agreement could be spelled out of the instrument which could be specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. Though the contract was intended as a full settlement of the mortgagor's claim upon the property, yet the mere payment of money did not entitle the purchaser to a specific performance of a parol contract for the purchase of an interest in lands. Had the mortgagee incurred expense and changed his situation so that he could not be restored to the same position, it might have estopped the mortgagor from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument.

§ 345. *Mortgagor's remedy against mortgagee after condition broken.*—The remedy of the mortgagor against the mortgagee in possession after breach of condition, according to some of the authorities, is in equity;[1] and in

[1] Brobst *v.* Brock, 10 Wall. 519-536; Hill *v.* Payson, 3 Mass. 559; Parsons *v.* Welles, 17 Mass. 419.

Maine, New Hampshire, and Massachusetts, he cannot recover the possession from the mortgagee by a writ of entry, although he has tendered the whole amount due after default. The tender, under such circumstances, merely affords a foundation for a bill in equity.[1]

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[1] Parsons *v.* Welles, 17 Mass. 419; Rowell *v.* Mitchell, 68 Me. 21; Jewett *v.* Hamlin, 68 Me. 172; Wilson *v.* Ring, 40 Me. 116; Woods *v.* Woods, 66 Me. 206; Dyer *v.* Toothaker, 51 Me. 380; see Johnson *v.* Elliot, 26 N. H. 67; Brown *v.* Smith, 116 Mass. 108.

CHAPTER XII.

EJECTMENT BETWEEN LANDLORD AND TENANT.

§ 346. Ejectment prior to the introduction of summary proceeding statutes.
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348. Summary proceeding statutes.
349. Title not involved in summary proceedings.
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367. Construction of conditions.
368. Liberal construction by Lord Tenterden.
369. Verbal disclaimer.
370. Ejectment for non-payment of rent.
371. Right to enforce forfeiture—How waived.

§ 346. *Ejectment prior to the introduction of summary proceeding statutes.*—Early in the present century ejectment, in the States in which that form of remedy prevailed, constituted the only proceeding by which a landlord, entitled to re-enter upon his lands, by reason of forfeiture, or expiration of the demised term, could recover the possession from a tenant.

§ 347. *The remedy inadequate.*—This intricate and dilatory remedy was productive of the grossest abuse and injustice to the landlord,[1] and in the case of refractory and irresponsible tenants, often proved an expensive and inadequate method of compelling a surrender of the possession. The judgment for mesne profits constituted the landlord's only redress for the delay and loss of possession, and this remedy was often rendered worthless by reason of the tenant's insolvency.

[1] See Adams on Ejectment, 4th Am. ed. p. 187 [*161].

§ 348. *Summary proceeding statutes.*—The unsatisfactory character of the remedy, in this class of cases, led to the enactment of the summary proceeding statutes, now so common, which furnished the landlord a convenient, prompt, and effectual substitute for ejectment, in many cases where the tenant, after forfeiture or expiration of the term, refused to yield up the possession.

§ 349. *Title not involved in summary proceedings.*—It is foreign to the scope of this treatise to discuss remedies or proceedings in which the title to land is not the principal subject of contention, and as questions of title cannot be tried in summary proceedings, the principles governing that class of remedies will not be considered. Furthermore, the provisions of these statutes, and the principles and rules governing their interpretation, vary in the different States, and any attempt to treat of the general practice under them would be of doubtful utility.

The subject of ejectment between landlord and tenant, which assumes so great a prominence in the early text-books, will be but briefly noticed, partly because, as already stated, summary proceedings have been generally substituted in its stead, and for the additional reason that when this remedy is invoked, by a landlord, practically all the proof offered or required is such as will establish this conventional relationship, and when once established the tenant, as we shall presently see, is estopped from denying the landlord's title, so that in either case the controversy over the title is excluded.

§ 350. *What the landlord must prove in ejectment.*—The landlord, in order to maintain ejectment against his tenant, must show either that the term has expired, according to the provisions of the lease, or that the tenancy has been actually terminated by forfeiture, and that the landlord has a present right to the immediate possession. The landlord ordinarily has no right of re-entry during the term, and his only practical redress for breach of the contract, or injuries

to the property, is compensation in damages, unless there is an express clause in the agreement reserving the right of re-entry before the expiration of the term for condition broken.[1]

§ 351. *Estoppel against the tenant.*—It is a fundamental principle, governing the relation of landlord and tenant, that in controversies between them, concerning the possession of the demised lands, the tenant is estopped from disputing or assailing the landlord's title,[2] or from setting up an outstanding title against the landlord hostile to that under which he entered, or a title acquired during the existence of the tenancy.[3]

This principle is a rule of pleading as well as of evi-

[1] Johnson *v.* Gurley, 52 Texas, 222; Dennison *v.* Read, 3 Dana (Ky.), 586; Brown *v.* Bragg, 22 Ind. 122; Smith *v.* Blaisdell, 17 Vt. 199; Fox *v.* Brissac, 15 Cal. 223; Vanatta *v.* Brewer, 32 N. J. Eq. 268; see Van Rensselaer *v.* Jewett, 2 N. Y. 141. As to the early feudal and common law doctrine concerning forfeiture of inferior estates, see DeLancey *v.* Ganong, 9 N. Y. 9–16, and the extract from Coke therein discussed; see, also, Wigg *v.* Wigg, 1 Atk. 382; Doe *v.* Watt, 1 Man & R. 694; Fox *v.* Brissac, 15 Cal. 223. A forfeiture will not be favored or implied. Kentucky River Nav. Co. *v.* Commonwealth, 13 Bush (Ky.), 435.

[2] 6 Am. Law. Rev. 1; Doe *d.* Knight *v.* Smythe, 4 M. & S. 347; Coppinger *v.* Armstrong, 8 Brad. (Ill.) 210; Hostetter *v.* Hykas, 3 Brewst. (Penn.) 162; Tompkins *v.* Snow, 63 Barb. (N. Y.) 525; Hawes *v.* Shaw, 100 Mass. 187; Barwick *v.* Thompson, 7 T. R. 488; Silvey *v.* Summer, 61 Mo. 253; Townsend *v.* Davis, Forrest, 120; Lucas *v.* Brooks, 18 Wall. 436; Stott *v.* Rutherford, 92 U. S. 107; Vernam *v.* Smith, 15 N. Y. 327; O'Halloran *v.* Fitzgerald, 71 Ill. 53; James *v.* Belding, 33 Ark. 536; Donald *v.* McKinnon, 17 Fla. 746; Cook *v.* Creswell, 44 Md. 581; Morrison *v.* Bassett, 26 Minn. 235; Love *v.* Law, 57 Miss. 596; Nolen *v.* Royston, 36 Ark. 561; Territt *v.* Cowenhoven, 79 N. Y. 400; Prevot *v.* Lawrence, 51 N. Y. 219; Davis *v.* Davis, 83 N. C. 71; Wilson *v.* James, 79 N. C. 349; Jones *v.* Dove, 7 Oregon, 467; Lyles *v.* Murphy, 38 Texas, 75; Hatch *v.* Bullock, 57 N. H. 15; Bowdish *v.* Dubuque, 38 Iowa, 341; Walden *v.* Bodley, 14 Peters, 156; Lamson *v.* Clarkson, 113 Mass. 348; Tewksbury *v.* Magraff, 33 Cal. 237; Pope *v.* Harkins, 16 Ala. 321; Clarke *v.* Clarke, 51 Ala. 498; Cody *v.* Quarterman, 12 Ga. 386; Alwood *v.* Mansfield, 33 Ill. 452; Grant *v.* White, 42 Mo. 285; Richardson *v.* Harvey, 37 Ga. 224; Cooper *v.* Smith, 8 Watts (Penn.), 536; Blakeney *v.* Ferguson, 20 Ark. 547; Hawes *v.* Shaw, 100 Mass. 187; Longfellow *v.* Longfellow, 61 Me. 590; Jackson *v.* McLeod, 12 Johns. (N. Y.) 182; Jackson *v.* Harder, 4 Ib. 202.

[3] Pope *v.* Harkins, 16 Ala. 321; Jackson *d.* Colton *v.* Harper, 5 Wend. (N.Y.) 246; O'Halloran *v.* Fitzgerald, 71 Ill. 53; Galloway *v.* Ogle, 2 Binn. (Penn.) 468; Bertram *v.* Cook, 32 Mich. 518.

dence,[1] and when the relationship is shown, applies to actions of assumpsit, covenant, debt, summary proceeding, and actions of forcible entry and unlawful detainer, as well as to ejectment, trespass to try title, and writs of entry.[2] A party admitted to defend, in the tenant's place, is subject to the same rule,[3] and the estoppel applies to the heirs of the tenant, retaining the possession and claiming solely in the tenant's right[4]; nor can the tenant, after the landlord's death, hold adversely to his infant heir, by taking a grant to himself, or attorning to another.[5]

The estoppel extends to all persons claiming under, or succeeding to the lessee,[6] and being founded on the delivery of possession,[7] ceases only when the possession is surrendered.

In a very recent case decided in the Supreme Court of California, it was held that a party who accepted a lease could not lawfully refuse to surrender possession of the demised premises, at the expiration of the term, upon the ground that a prior agreement existed, under which the lessee might have retained the possession, if he had not taken the lease. The prior agreements are presumed to be merged in the lease.[8]

The tenant, however, is not precluded from denying his landlord's title, and setting up title in himself adversely to

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[1] Palmer *v.* Bowker, 106 Mass. 317.

[2] Townsend *v.* Davis, Forrest, 120; Tompkins *v.* Snow, 63 Barb. (N. Y.) 525; Barwick *v.* Thompson, 7 T. R. 488; Hawes *v.* Shaw, 100 Mass. 187; Towne *v.* Butterfield, 97 Mass. 105; Silvey *v.* Summer, 61 Mo. 253; Jackson *v.* Hinman, 10 Johns. (N. Y.) 292; Allen *v.* Chatfield, 8 Minn. 435. For a history of the origin of the estoppel, see 6 Am. Law Rev. p. 1.

[3] Belfour *v.* Davis, 4 Dev. & Bat. (N. C.) Law, 300; Whissenhunt *v.* Jones, 80 N. C. 348; see Isler *v.* Foy, 66 N. C. 547.

[4] Lewis *v.* Adams, 61 Ga. 559.

[5] Williams *v.* McAliley, Cheves (S. C.) Law, 200.

[6] Graham *v.* Moore, 4 S. & R. (Penn.) 467; Stagg *v.* Eureka Tanning Co. 56 Mo. 317; Blakeney *v.* Ferguson, 20 Ark. 547; Rose *v.* Davis, 11 Cal. 133; McCravey *v* Remson, 19 Ala. 430; Earle *v.* Hale, 31 Ark. 470; Jones *v.* Dove, 7 Oregon, 467; Cooper *v.* Smith, 8 Watts (Pa.), 536.

[7] Lamson *v.* Clarkson, 113 Mass. 348.

[8] McCreary *v.* Marston, 56 Cal. 403.

his landlord, as against a stranger. The reason upon which the estoppel depends is manifestly wanting, when a stranger, not in privity with the landlord, seeks to set it up, for estoppels must be mutual, and can only operate between parties and privies.[1]

§ 352. *Reasons upon which the estoppel rests—Public policy.*—The estoppel rests upon considerations of public policy, the purpose of which, for obvious reasons, would be defeated if one who had been clothed with possession of land by another was allowed to controvert the title of the latter, without first restoring him to as good a position as he occupied before parting with the possession.[2] The landlord can only be required to litigate title with his tenant upon the vantage ground of possession. If the tenant acquires a title, he must ordinarily surrender the possession and regain it by action.[3]

If the rule were otherwise no person would be safe in parting with the possession of lands, as he might be driven to the necessity of making out a complete chain of title before he could regain the possession, or evict the tenant.[4] If any defects existed in the chain of his title, or the muniments of title had been lost or destroyed, or the witnesses who were conversant with the facts affecting it had died, or were absent from the country, the owner would be practically precluded from letting the property. It results from the application of this principle that, generally speaking, as we have said, proof of the relationship and expiration of the term only, and not proof of title, is required in ejectment between landlord and tenant.

§ 353. *Estoppel ceases upon redelivery of the possession.*—

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[1] Cole *v.* Maxfield, 13 Minn. 235.

[2] Tewksbury *v.* Magraff, 33 Cal. 237–244; Glen *v.* Gibson, 9 Barb. (N. Y.) 638; Richardson *v.* Harvey, 37 Ga. 224; Rogers *v.* Boynton, 57 Ala. 501; Wilson *v.* James, 79 N. C. 349.

[3] Lowe *v.* Emerson, 48 Ill. 160.

[4] Anderson *ads.* Darby, 1 N. & McC. (S. C.) Law, *368.

The tenant, however, is estopped to deny only the title under which he entered, and therefore the rule does not prevent the tenant from buying up a title to be asserted after the termination of the tenancy and the redelivery of possession of the land.[1] The tenant of one holding under a tax deed cannot purchase the interest of a minor, having a right of redemption, and set it up against his lessor.[2]

§ 354. *Tenant cannot, by his own act, destroy the estoppel.* —The tenant, by ceasing to pay rent to his landlord, and attorning to another, cannot so change his tenancy, or affect the relationship, as to enable him to dispute the landlord's title,[3] nor can the tenant ordinarily, without defending the possession or giving notice to his landlord, treat himself as evicted, and attorn to another.[4] Where one claiming as landlord to be entitled to the rents, acknowledges the right of another thereto, and the tenant, relying upon such acknowledgment, made payment to the latter, the party claiming the rent was held to be estopped from enforcing his claim against the tenant.[5] And an attornment to a stranger may be operative as to the tenant, though void as against his lessor.[6] The attornment does not *create* a new tenancy, but is a continuation of the old tenancy under a new landlord.[7]

§ 355. *Fraud of the landlord.*—The estoppel has been held not to apply in cases where the tenant was induced by force, fraud, or misrepresentation, to enter into the lease.[8]

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[1] Williams *v.* Garrison, 29 Ga. 503; Nims *v.* Sherman, 43 Mich. 45.

[2] Stout *v.* Merrill, 35 Iowa, 47.

[3] Belfour *v.* Davis, 4 Dev. & Bat. (N. C.) Law, 300; Bertram *v.* Cook, 32 Mich. 518; Turner *v.* Thomas, 13 Bush (Ky.), 518, and cases cited; Leach *v.* Koenig, 55 Mo. 451; Simmons *v.* Robertson, 27 Ark. 50; Rogers *v.* Boynton, 57 Ala. 501; see Mills *v.* Hamilton, 49 Iowa, 105.

[4] Williams *v.* McMichael, 64 Ga. 445; Lowe *v.* Emerson, 48 Ill. 160; see Tucker *v.* Whitehead, 58 Miss. 762; but see Merryman *v.* Bourne, 9 Wall, 592.

[5] Winterink *v.* Maynard, 47 Iowa, 366.

[6] Kenada *v.* Gardner, 3 Barb. (N. Y.) 589.

[7] Austin *v.* Ahearne, 61 N. Y. 6.

[8] Schultz *v.* Arnot, 33 Mo. 172; Johnson *v.* Chely, 43 Cal. 300; Miller *v.* Bonsadon, 9 Ala. 317; Mountnoy *v.* Collier, 1 El. & Bl. 630; Franklin *v.* Merida, 35

The same rule applies where an attornment of the tenant is superinduced by the misrepresentations of the landlord,[1] or the plaintiff has received rent from the defendant by mistake, or under a false claim of title.[2] Hence, where, by the exhibition of a title founded in forgery, the party in possession was induced to accept the lease, it was held that the facts might be shown;[3] and the landlord's title may be disputed where it was acknowledged under a misapprehension by a party already in possession as the tenant of another.[4] It may be here observed that an agreement by a party in possession to abandon the premises at a certain day is not a lease, and does not estop him from controverting the title.[5]

But the tenant, in refusing to surrender possession of the demised premises, on the ground that his landlord falsely represented himself to be the owner of the property, must prove not only the false representation, but that he was induced, by the fraud, to accept the lease,[6] and must show some right under a superior title. And it is error to permit the defendant to prove that his signature to the lease was obtained by fraud or mistake, when no such facts are set up in the answer.[7]

§ 356. *When tenant may purchase superior title*.—In Gallagher *v.* Bennett, the Supreme Court of Texas[8] carried the exception as to the fraud of the landlord to the extent of holding that if he practiced misrepresentation or fraud as to his title, and his estate, by reason of insolvency, was unable to indemnify the tenant for rents wrongfully exacted, the tenant acting in good faith, under the advice of counsel,

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Cal. 558; Higgins *v.* Turner, 61 Mo. 249; Turpin *v.* Saunders, 32 Gratt. (Va.) 27-33; Alderson *v.* Miller, 15 Gratt. (Va.) 279.

[1] Tison *v.* Yawn, 15 Ga. 491; Gallagher *v.* Bennett, 38 Texas, 291; Evans *v.* Bidwell, 76 Penn. St. 497; Jenckes *v.* Cook, 9 R. I. 520.

[2] Anderson *v.* Smith, 63 Ill. 126; Schultz *v.* Arnot, 33 Mo. 172.

[3] Miller *v.* McBrier, 14 S. & R. (Penn.) 382.

[4] Swift *v.* Dean, 11 Vt. 323; see Borland *v.* Box, 62 Ala. 87.

[5] Miller *v.* McBrier, 14 S. & R. (Penn.) 382.

[6] Camarillo *v.* Fenlon, 49 Cal. 202.

[7] McCreary *v.* Marston, 56 Cal. 403.

[8] 38 Texas, 291.

and from a well-founded fear of eviction, during the term, might purchase the superior title, and resist the landlord's action to recover the possession.

§ 357. *Acknowledgment of another's title—Attornment.* —A party in possession, who has acknowledged the title of another, is not, as a general rule, estopped from subsequently disclaiming holding under such title, if the original entry was not under the person whose title is acknowledged.[1] And after judgment of eviction by title paramount the tenant may attorn to the successful party, and defeat the former landlord's claim for rent, by setting up the paramount title;[2] but the tenant assumes the burden of showing the superiority of the title in question.[3]

§ 358. *Exceptions as to the estoppel.*—The tenant may also show that his landlord's pretended title was acquired in violation of law.[4] So no estoppel exists if the contract on which the so-called tenancy rests is void for usury.[5] And if the tenant is compelled to purchase in an outstanding mortgage upon, or title to, the property, for his own safety, equity will protect his equitable title and his possession, until he has been reimbursed.[6] The tenant, it is clear, may show an outstanding title against the landlord where the latter's title has expired, or been extinguished since the re-

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[1] Jackson *v.* Leek, 12 Wend. (N. Y.) 105; Franklin *v.* Merida, 35 Cal. 558; Alderson *v.* Miller, 15 Gratt. (Va.) 279; Washington *v.* Conrad, 2 Humph. (Tenn.) 562; but see, *contra*, Saunders *v.* Moore, 14 Bush (Ky.), 98; Prevot *v.* Lawrence, 51 N. Y. 219; Hall *v.* Butler, 10 Ad. & El. 204; Marlow *v.* Wiggins, 4 Ad. & El. (N. S.) 367.

[2] Moffat *v.* Strong, 9 Bos. (N. Y.) 57; Lunsford *v.* Turner, 5 J. J. Mar. (Ky.) 104; Foster *v.* Morris, 3 A. K. Mar. (Ky.) 609; Supervisors *v.* Herrington, 50 Ill. 232.

[3] Merryman *v.* Bourne, 9 Wall. 592; see Douglas *v.* Fulda, 45 Cal. 592.

[4] Satterlee *v.* Mathewson, 13 S. & R. (Penn.) 133; see Milton *v.* Haden, 32 Ala. 30.

[5] Tribble *v.* Anderson, 63 Ga. 31.

[6] Bates *v.* Conrow, 11 N. J. Eq. 137; see Gallagher *v.* Bennett, 38 Texas, 291; Thrall *v.* Omaha Hotel Co. 5 Neb. 295.

lation of landlord and tenant was created,[1] for he does not thereby deny that the landlord had title at the time the lease was executed.[2] So the tenant may show that he himself has acquired the title by voluntary alienation or purchase under execution sale; for it is no more prejudicial to the landlord that the tenant should purchase or acquire the title than that it should pass into the hands of a stranger.[3]

The tenant may also show that the landlord's only title was an estate for the life of another which expired during the term.[4] So it has been held that a tenant who is under no obligation to pay taxes may purchase the property at a tax sale, and resist the recovery of his former landlord for rent by virtue of an adverse title so acquired.[5] And a tenant entitled to homestead in certain lands, which have been sold under an execution against him, is not estopped from claiming the homestead by accepting a lease for the same lands from the purchaser at execution sale.[6]

The cases holding that the tenant may show the failure of the landlord's title subsequent to the entry are numerous.[7]

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[1] Jackson *v.* Rowland, 6 Wend. (N. Y.) 666; Randolph *v.* Carlton, 8 Ala. 606; McDevitt *v.* Sullivan, 8 Cal. 592; Wheelock *v.* Warschauer, 21 Cal. 309; Gregory *v.* Crab, 2 B. Mon. (Ky.) 234; Giles *v.* Ebsworth, 10 Md. 333; Wolf *v.* Johnson, 30 Miss. 513; Camp *v.* Camp, 5 Conn. 291; Wells *v.* Mason, 5 Ill. 84; Tilghman *v.* Little, 13 Ill. 239; Kinney *v.* Doe, 8 Blackf. (Ind.) 350; Pentz *v.* Kuester, 41 Mo. 447; Russell *v.* Allard, 18 N. H. 222; Horner *v.* Leeds, 25 N. J. L. 106; Hoag *v.* Hoag, 35 N.Y. 469; Devacht *v.* Newsam, 3 Ohio, 57; Clarke *v.* Clarke, 51 Ala. 498.

[2] Lamson *v.* Clarkson, 113 Mass. 348.

[3] Casey *v.* Gregory, 13 B. Mon. (Ky.) 505; Texas Land Co. *v.* Tieman, 53 Texas, 619; Camley *v.* Stanfield, 10 Texas, 546; see Silvey *v.* Summer, 61 Mo. 253; Higgins *v.* Turner, 61 Mo. 249; Ryder *v.* Mansell, 66 Me. 167; Hetzel *v.* Barber, 69 N. Y. 1–15; Despard *v.* Walbridge, 15 N. Y. 374.

[4] Lamson *v.* Clarkson, 113 Mass. 348; Blake *v.* Foster, 8 T. R. 487.

[5] Weichselbaum *v.* Curlett, 20 Kansas, 709.

[6] Abbott *v.* Cromartie, 72 N. C. 292.

[7] Lancashire *v.* Mason, 75 N. C. 455; Grundin *v.* Carter, 99 Mass. 15; Den *v.* Ashmore, 22 N. J. L. 261; Dobson *v.* Culpepper, 23 Gratt. (Va.) 352; Jackson *v.* Davis, 5 Cow. (N. Y.) 123–135; Supervisors *v.* Herrington, 50 Ill. 232; Duff *v.* Wilson, 69 Penn. St. 316; England *v.* Slade, 4 T. R. 682; St. John *v.* Quitzow, 72 Ill. 334; Franklin *v.* Palmer, 50 Ill. 202; Armstrong *v.* Wheeler, 9 Cow. (N. Y.) 88; Burden *v.* Thayer, 3 Met. (Mass.) 76.

So the tenant may show that the landlord's title has expired by effluxion of time,[1] or that the plaintiff has parted with his title, and is no longer entitled to possession.[2]

§ 359. *In Massachusetts tenant cannot set up his wife's title.*—It seems that in Massachusetts a tenant cannot hold over, after the expiration of his term, under a claim of title to the premises in his wife,[3] for he can derive no title from her by contract or grant.[4]

§ 360. *Tenancy under mortgagor extinguished by foreclosure.*—The interest of a tenant under a demise from a mortgagor is extinguished by a foreclosure sale, and though the tenant be not evicted, yet if he attorn to the purchaser, the right of the lessor to the future rents is extinguished. If the tenant voluntarily does that which the law would compel him to perform—yields up the possession to the party entitled to it—this cannot be regarded as an act of disloyalty, or as being in any sense injurious to the rights of the landlord. The proceedings are tantamount to an actual eviction, and the tenant is not estopped to show that he has attorned to the holder of the paramount title.[5] But a disclaimer by the tenant of his landlord's title will never be implied.[6]

§ 361. *Tenant in common may deny co-tenant's title.*—The relation of landlord and tenant stands on grounds entirely different from that of tenants in common ; and it has been held in Tennessee, that each tenant in common enters as owner, and holds possession for himself, and is not

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[1] Presstman *v.* Silljacks, 52 Md. 647; see Claridge *v.* Mackenzie, 4 Man. & Gr. 143, per Tindal, Ch. J.

[2] McGuffie *v.* Carter, 42 Mich. 497.

[3] Miller *v.* Lang, 99 Mass. 13.

[4] Ibid. See Thomson *v.* O'Sullivan, 6 Allen (Mass.), 303; Gay *v.* Kingsley, 11 Ibid. 345; see Love *v.* Law, 57 Miss. 596.

[5] Simers *v.* Saltus, 3 Denio (N. Y.), 214; Lancashire *v.* Mason, 75 N. C. 455; but see Belfour *v.* Davis, 4 Dev. & Bat. (N. C.) Law, 300.

[6] Leport *v.* Todd, 3 Vroom (N. J.), 124.

estopped, by the admission of the co-tenancy, from setting up a better title in himself or others.[1]

§ 362. *Forfeiture and waste.*—Ejectment may be brought for breach of a covenant against waste, where the lease contains a provision for re-entry. In the case of the United States *v.* Bostwick,[2] the Supreme Court of the United States held that, unless excluded by the operation of some express covenant or agreement, an implied obligation existed on the part of the lessee so to use the property as not unnecessarily to injure it, or to treat the premises demised in such manner that no injury be done to the inheritance, so that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. This implied obligation was declared to be a part of the contract itself; as much so as if incorporated into it by express language. It results from the relation of landlord and tenant which the contract creates,[3] and is not a covenant to repair generally, but so to use the property in a proper and tenant-like manner,[4] as to avoid the necessity for repair as far as possible.[5] The tenant is not bound to rebuild, if the buildings are burned down or otherwise destroyed by accident. But it is voluntary waste, and within the prohibition of the implied agreement, if, during the occupancy under the lease, ornamental trees are destroyed, fences and walls torn down, and the materials used for sidewalks, and the erection of buildings, or removed from the property; or where stones are quarried, and gravel dug, from a stone quarry and gravel-pit on the premises, and taken away.[6]

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[1] Washington *v.* Conrad, 2 Humph. (Tenn.) 562. See §§ 291, 292.

[2] 94 U. S. 53–65. See McGregor *v.* Brown, 10 N. Y. 114; Winship *v.* Pitts, 3 Paige Ch. (N. Y.) 259; Cole *v.* Greene, 1 Levinz, *309; see London *v.* Greyme, Cro. Jac. 181.

[3] See Holford *v.* Dunnett, 7 M. & W. 347.

[4] Nave *v.* Berry, 22 Ala. 382; see Cheetham *v.* Hampson, 4 T. R. 318.

[5] Miller *v.* Shields, 55 Ind. 71; Horsefall *v.* Mather, Holt, 7–9; Brown *v.* Crump, 1 Marsh. 567.

[6] United States *v.* Bostwick, 94 U. S. 53–69; Jackson *d.* Church *v.* Brownson, 7 Johns. (N. Y.) 227; see People *v.* Alberty, 11 Wend. (N. Y.) 162.

§ 363. *Test of waste.*—Injury is not the test of waste, but disherison of him in remainder or reversion.[1] The tenant is not liable for the mere wear and tear of the premises,[2] and is under no obligation to make repairs of a substantial and general nature.[3] Waste, it may be added, can only be committed of the thing demised; and where trees are excepted out of the demise no waste could be committed of them, and consequently no forfeiture could be incurred by cutting them down.[4]

§ 364. *Waste by tenant at will.*—A tenant at will who commits voluntary waste, such as cutting timber, forfeits the term, for it is said that the injury amounts to a determination of the will, and of his possession.[5] A condition in the lease not to sell or dispose of any wood or timber from the demised premises, is valid, and a breach of it works a forfeiture of the estate which may be enforced in ejectment.[6]

§ 365. *Construction of covenant against waste.*—Ejectment has been upheld, in the following cases:—by a lessor for breach of a covenant in the lease, against exercising the trade of a butcher on the premises, upon proof that the lessee sold raw meat thereon, although no beasts were slaughtered upon the demised lands;[7] on a proviso for

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[1] Livingston *v.* Reynolds, 26 Wend. (N. Y.) 115; Doe *d.* Darlington *v.* Bond, 5 B. & C. 855; see, especially, McGregor *v.* Brown, 10 N. Y. 114.

[2] Torriano *v.* Young, 6 C. & P. 8; Wise *v.* Metcalfe, 10 B. & C. 299; see Harder *v.* Harder, 26 Barb. (N. Y.) 409.

[3] Horsefall *v.* Mather, Holt, 7; Johnson *v.* Dixon, 1 Daly (N. Y.), 178; Leach *v.* Thomas, 7 C. & P. 327.

[4] Goodright *v.* Vivian, 8 East, 190; see Schermerhorn *v.* Buell, 4 Denio (N. Y.), 422.

[5] Phillips *v.* Covert, 7 Johns. (N. Y.) 1; see, further, as to forfeiture for waste, Suffern *v.* Townsend, 9 Johns. (N. Y.) 35; Cooper *v.* Stower, Ib. 331; Erwin *v.* Olmsted, 7 Cowen (N. Y.), 229; Livingston *v.* Reynolds, 26 Wend. (N. Y.) 115.

[6] Verplanck *v.* Wright, 23 Wend. (N. Y.) 506.

[7] Doe *d.* Gaskell *v.* Spry, 1 Barn. & Ald. 617; see Doe *d.* Davis *v.* Elsam, 1 Mood. & M. 189.

re-entry for breach of a covenant not to use the demised premises for any trade or business whatever—the breach consisting in carrying on a school by an assignee of the lease;[1] and for breach of a covenant to insure,[2] and where the tenant broke a doorway in the demised premises into an adjoining house, this was held, by Lord Ellenborough, to be a breach of a covenant to repair.[3]

§ 366. *Severance of conditions in a lease.*—The conditions of a lease do not become severed by a severance of the occupation of the demised premises, and the payment of rent to the lessor by the respective occupants for the portion occupied by each, and if either the lessee, or an assignee of the lease, as to a portion of the demised premises, commits any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole of the premises embraced in the lease.[4]

§ 367. *Construction of conditions.*—It has been held by the New York Court of Appeals, that in all cases where an estate for years is granted on condition, and the lease declares that the estate shall cease and determine on the breach of the condition, without any clause of re-entry or other qualification, the estate will *ipso facto* cease as soon as the condition is broken[5], but, if the lease contain a clause that, in case of non-performance, the landlord may re-enter, the lease is not void, but voidable only at the election of the landlord.[6] It is often said that the extent and meaning of a covenant or condition, and the fact of a breach, are mat-

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[1] Doe *d.* Bish *v.* Keeling, 1 M. & S. 95.

[2] Doe *d.* Flower *v.* Peck, 1 Barn.& Adol. 428; Doe *d.* Pitt *v.* Shewin, 3 Camp. 134; Reynolds *v.* Pitt, 2 Price, 212, note.

[3] Doe *d.* Vickery *v.* Jackson, 2 Stark. 293. But see Doe *v.* Jones, 4 B. & Adol. 126.

[4] Clarke *v.* Cummings, 5 Barb. (N. Y.) 339; see Eyton *v.* Jones, 21 L. T. N. S. 789.

[5] Parmelee *v.* O. & S. R. R. Co. 6 N. Y. 74; see Morton *v.* Weir, 70 N.Y. 247.

[6] Stuyvesant *v.* Davis, 9 Paige Ch. (N.Y.) 427; Collins *v.* Hasbrouck, 56 N. Y. 157.

ters *strictissimi juris*, and the plaintiff to defeat an estate of his own creation, by means of such a condition, must bring the defendant clearly within its letter.[1] A forfeiture is never favored or implied.[2] Thus, it has been held in ejectment for breach of a condition, that the words "let and underlet," in the lease, cover a demise or underletting, and not an assignment of the whole interest, and the landlord having proved only an assignment, was defeated by this strict and literal interpretation of the covenant.[3]

§ 368. *Liberal construction of Lord Tenterden.*—It was held by Lord Tenterden, however, that provisoes of this sort should not be construed with the strictness of conditions at common law, as they constituted matters of contract between the parties, and should be construed like any other contracts.[4] This rule of construction commends itself as sound and reasonable. The covenants and conditions should receive the construction which the ordinary and natural meaning of the words employed justify, for such an interpretation obviously more clearly reflects the intention of the parties. The words strict or liberal, as applied to these interpretations, are often mere epithets; and a departure from Lord Tenterden's rule has, in considering many cases of forfeiture, led to palpable absurdities.

§ 369. *Verbal disclaimer.*—The mere verbal disclaimer, or parol denial, by a tenant for life, or years, of his landlord's title, and a claim and assertion of ownership in fee, does not work a forfeiture of the term, nor will it authorize the landlord to maintain ejectment for the demised lands. This subject has been learnedly considered in the New

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[1] Lynde *v.* Hough, 27 Barb. (N. Y.) 415, 423; Livingston *v.* Stickles, 8 Paige Ch. (N. Y.) 398; S. C. in error, 7 Hill (N. Y.), 253, per Nelson, Ch. J.; Jackson *v.* Harrison, 17 Johns. (N. Y.) 66; see Dermott *v.* Wallach, 1 Wall. 61.

[2] Kentucky River Nav. Co. *v.* Commonwealth, 13 Bush (Ky.), 435.

[3] Lynde *v.* Hough, 27 Barb. (N. Y.) 415, 423.

[4] Doe *d.* Davis *v.* Elsam, 1 M. & M. 189.

York Court of Appeals,[1] and the conclusion reached that, even under the feudal system, the many causes for which an inferior estate could be forfeited did not include a parol denial of the landlord's title, except in cases of a tenancy at will, or sufferance, or from year to year, in which a disclaimer is evidence only of a cessation of the will, and supersedes the necessity of service of notice to quit. The court expressed inability to find any case in which judgment had proceeded upon the distinct ground that a parol denial of the landlord's title worked a forfeiture of a term for years. If the doctrine was established that an estate for years could be forfeited by mere words, such interests in real estate, which are often of great value, would be dependent upon the uncertain memory of witnesses, and the title to valuable landed estates gained or lost, according to the preponderance of oral testimony, or the result of a nicely balanced case. This would be contrary to the policy of our law, in regard to interests in real estate, which has been to leave as little as possible to depend upon verbal testimony.

§ 370. *Ejectment for non-payment of rent.*—The remedy by ejectment to enforce the payment of rent is never allowed except where a right of re-entry for non-payment of rent is expressly stipulated for between the parties.[2] It was formerly held that, at common law, only the grantor of a lease in fee, and his heirs, could avail themselves of the right of re-entry,[3] but the condition of re-entry is now generally made by statute, or held by the courts to be assignable, and the right of re-entry may be enforced in

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[1] De Lancey *v.* Ganong, 9 N. Y. 9, and cases cited; see Graves *v.* Walls, 10 Ad. & El. 427.

[2] De Lancey *v.* Ganong, 9 N. Y. 25; Van Rensselaer *v.* Jewett, 2 Ib. 141; 5 Denio (N. Y.), 121; Kenege *v.* Elliott, 9 Watts (Penn.), 258; Tyler *v.* Heidorn, 46 Barb. (N. Y.) 439–454; Campbell *v.* Shipley, 41 Md. 81; Hosford *v.* Ballard, 39 N. Y. 147.

[3] Tyler *v.* Heidorn, 46 Barb. N. Y. 439–454; Nicoll *v.* N. Y. & E. R. R. Co. 12 N. Y. 121; Van Rensselaer *v.* Ball, 19 Ib. 100–103.

ejectment by the assignee of the rent,[1] or by an heir for an undivided interest in the demised premises.[2] The right to re-enter for breach of the conditions of a lease in fee may, as a general rule, be enforced by the legal representatives, grantee, or assignee of the lessor.[3]

§ 371. *Right to enforce forfeiture—How waived.*—The right to maintain ejectment for forfeiture, arising upon breach of a covenant on the part of the lessee, may be waived, or lost, by acceptance of rent which accrued after knowledge on the part of the lessor of the act of forfeiture,[4] or by acceptance of an annuity non-payment of which constituted the claim of forfeiture,[5] or by any act constituting an acknowledgment of a subsisting tenancy.[6] This principle applies, whether the breach be for non-payment of taxes;[7] failure to erect buildings;[8] underletting;[9] cutting timber,[10] or insolvency,[11] and it has been said that an unqualified demand for rent after forfeiture,[12] or dilatoriness on the part of the landlord, from which the tenant is justified in assuming that strict performance of the cove-

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[1] Van Rensselaer *v.* Slingerland, 26 N. Y. 580; Farley *v.* Craig, 6 Halst. (N. J.) Law, 262.

[2] Cruger *v.* McLaury, 41 N. Y. 219.

[3] Van Rensselaer *v.* Hays, 19 N. Y. 68; Nicoll *v.* N. Y. & Erie Railway, 12 Barb. (N. Y.) 460.

[4] Collins *v.* Hasbrouck, 56 N. Y. 157; Roe *d.* Gregson *v.* Harrison, 2 T. R. 425; Conger *v.* Duryee, 12 Weekly Dig. (N. Y.) 225; s. c. 24 Hun (N. Y.), 617; see Jackson *v.* Sheldon, 5 Cow. (N. Y.) 448; Chalker *v.* Chalker, 1 Conn. 79; Ireland *v.* Nichols, 46 N. Y. 413; Arnsby *v.* Woodward, 6 B. & C. 519; McGlynn *v.* Moore, 25 Cal. 384; Gomber *v.* Hackett, 6 Wis. 323; Watson *v.* Fletcher, 49 Ill. 498.

[5] Chalker *v.* Chalker, 1 Conn. 79.

[6] Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78.

[7] Watson *v.* Fletcher, 49 Ill. 498.

[8] McGlynn *v.* Moore, 25 Cal. 384.

[9] Ireland *v.* Nichols, 46 N. Y. 413.

[10] Gomber *v.* Hackett, 6 Wis. 323.

[11] Doe *v* .Rees, 4 Bing. N. C. 384.

[12] Doe *d.* Nash *v.* Birch, 1 M. & W. 402.

nant will not be exacted,[1] amounts to a waiver of the forfeiture, or may constitute a ground of relief in equity.

The principles governing the relationship of landlord and tenant will be further discussed in the next chapter.

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[1] Thropp *v.* Field, 26 N. J. Eq. 82. As to necessity of demand of rent, see Hosford *v.* Ballard, 39 N. Y. 147; Van Rensselaer *v.* Jewett, 2 N.Y. 141; People *ex rel. v.* Dudley, 58 N. Y. 323; Prout *v.* Roby, 15 Wall. 471; Gage *v.* Bates, 40 Cal. 384. The right of re-entry for non-payment of rent must be enforced during the term, otherwise the forfeiture will be considered waived. Cheatham *v.* Plinke, 1 Tenn. Ch. 577; see Johns *v.* Whitley, 3 Wils. 127, and a covenant not to assign without the landlord's consent, if waived once, is waived forever. Murray *v.* Harway, 56 N. Y. 337; Chalker *v.* Chalker, 1 Conn. 79; see Dumper *v.* Syms, Cro. Eliz. 815. See further, as to waiver, Prindle *v.* Anderson, 19 Wend. (N. Y.) 391. Rent must have accrued, and been received after forfeiture, to constitute waiver. Jackson *v.* Allen, 3 Cow. (N. Y.) 220; Hunter *v.* Osterhoudt, 11 Barb. (N. Y.) 33. Mere receipt of rent without knowledge of the forfeiture, is not a waiver. Keeler *v.* Davis, 5 Duer (N. Y.), 507.

CHAPTER XIII.

NOTICE TO QUIT AND DEMAND OF POSSESSION.

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§ 372. *Notice to quit.*—The subject of notice to quit and demand of possession, assumes much prominence in controversies over the possession of land, where the relationship of landlord and tenant is proved, or some express or implied contract or agreement as to the possession is shown between the parties. The importance of determining, in a given case, whether or not a demand of possession, or notice to quit, is requisite, should not be overlooked, for the failure to observe one of these prerequisites may defeat the plaintiff's action, and preclude inquiry into the merits of the title. Attention to this subject is the more important, because parties sometimes enter into a contest with the intention of trying the title, and the defendant, when actually confronted

with a suit, having no substantial claim, or desiring to embarrass the litigation, finds it convenient to retreat behind a claim of tenancy, or of occupation by the express or implied consent of the owner, and a failure to demand possession or to serve notice to quit. Every presumption will, of course, be indulged by the courts, that the defendant acquired the possession by right or consent of the owner, for the law will never presume that a man is a trespasser, or wrongdoer, and as a result subject him to costs and damages in an action at law.

§ 373. *When necessary.*—Generally speaking, notice to quit is necessary in cases where the occupant acquired the possession with the owner's assent, but for no definite term.[1] The right is founded upon the theory that it would be unreasonable that a man, who had expended time and money in cultivating lands, and making preparation for crops, while his estate was uncertain, should be turned off at a moment's warning.[2] There is, however, no distinction between houses and lands, as regards the time of giving notice to quit, it being considered necessary that both should be governed by one rule.[3]

§ 374. *Privity of estate.*—A party in possession, it is clear, is not entitled to notice to quit, unless there is some privity of contract or of estate between the parties.[4] And where the relation of landlord and tenant is not shown between the parties,[5] and the issue is one of title only, no demand or notice is requisite.[6] This subject has been recently considered in the Supreme Court of New Jersey, in the

[1] See Jackson *v.* Miller, 7 Cowen (N. Y.), 747; Gregg *v.* Von Phul, 1 Wall. 274; Stedman *v.* McIntosh, 4 Ired. (N. C.) Law, 291.

[2] Bedford *v.* McElherron, 2 S. & R. (Penn.) 49; Witt *v.* Mayor, &c. 6 Robt. (N. Y.) 441.

[3] Right *v.* Darby, 1 T. R. 159.

[4] See Livingston *v.* Tanner, 14 N. Y. 64-66; Gregg *v.* Von Phul, 1 Wall. 274; Jackson *v.* Fuller, 4 Johns. (N. Y.) 215; Eberwine *v.* Cook, 74 Ind. 377.

[5] Waters *v.* Butler, 4 Cr. C. C. 371.

[6] Eysaman *v.* Eysaman, 24 Hun (N. Y.), 430; Wood *v.* Wood, 18 Hun (N. Y.), 351; Herrell *v.* Sizeland, 81 Ill. 457.

case of Steffens *v.* Earl,[1] and the court state the rule relative to notices to quit, as follows: "Where there is a lease for a certain period, the term determines without notice.[2] In uncertain tenancies, reasonable notice was necessary, which reasonable notice had, from the time of Henry VIII, according to Lord Ellenborough, been six months.[3] This rule was applied to all uncertain tenancies in New Jersey, whether rent was or was not reserved.[4] * * * In cases of tenancies for periods running less than a year, the rule enunciated by the text-writers is, that the notice must be regulated by the letting, and must be equivalent to a period. How the rule arose is uncertain."[5]

§ 375. *Notice to quit necessary only in cases of tenancies.* —In order to render service of notice to quit necessary, the party claiming it must show that he entered as a tenant of some kind of the lessor of the plaintiff. If he is not a tenant for years, or from year to year, or at will, or even by sufferance, there can be no pretense that a notice to quit, or demand of possession, is necessary before the action is brought.[6] A person in possession is not, as already shown, entitled to notice to quit, unless there existed privity either of contract, or of estate, between him and the plaintiff.[7] It has been held in New York, that a tenant for the life of another, who continues in possession after the death of the *cestui que vie*, without the consent of the owner, is not a tenant at sufferance, but a trespasser, and hence not entitled to notice to quit.[8]

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[1] 11 Vroom (N. J.), 128.

[2] Citing Cobb *v.* Stokes, 8 East, 358; Right *v.* Darby, 1 T. R. 159; Decker *v.* Adams, 7 Halsted (N. J.) Law, 99.

[3] Citing Doe *d.* Strickland *v.* Spence, 6 East, 120.

[4] Citing Den *v.* Drake, 2 Green (N. J.) Law, 523. Changed by statute in New Jersey to three months. See Rev. page 575.

[5] See Steffens *v.* Earl, *supra;* Huffell *v.* Armitstead, 7 C. & P. 56; Towne *v.* Campbell, 3 C. B. 921.

[6] Eaton *v.* George, 3 Jones (N. C.) Law, 385.

[7] Livingston *v.* Tanner, 14 N. Y. 64; Jackson *v.* Fuller, 4 Johns. (N. Y.) 215. See § 373.

[8] Livingston *v.* Tanner, 14 N. Y. 64; see Horsey *v.* Horsey, 4 Harr. (Del.) 517.

§ 376. *Intruders.*—Where the plaintiff had purchased the property under decree of foreclosure of a mortgage made by T., who had executed an unrecorded lease for life to R., it was held, R. having died, and his daughter, the defendant, having entered on the property, that she was to be considered as a mere intruder, and therefore not entitled to notice to quit.[1] Wood *v.* Wood[2] was ejectment by a wife against her husband, for the possession of lands, the title to which was vested in the wife. The parties had taken possession of the lands under a deed to the wife, and had resided together thereon, until, by reason of the husband's improper conduct, the wife went off of the premises, the husband remaining. It was held that the possession taken under the deed was by virtue of the wife's title, the defendant being upon the premises merely because he was her husband, and the head of the family; that he was not in any way a tenant at will or at sufferance, because he never had any interest in the lands, nor any possession growing out of an interest,[3] nor acquired the possession by the consent of the plaintiff. The court compares the case to that of one who had, by a trespass, come into the *pedis possessio* of the lands, and was therefore not entitled to notice to quit. This analogy seems forced and unnecessary to the decision of the case.

§ 377. *Trespassers.*—It seems to be clearly established, that no proof of service of notice to quit is necessary in ejectment against a party who sets up no right to the possession.[4] The Supreme Court of California have held that it would be absurd to require either a demand of possession or notice to quit, in a case where the defendant was a mere naked trespasser or intruder.[5] These cases proceed upon

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[1] Worthington's Lessee *v.* Etcheson, 5 Cr. C. C. 302.

[2] 83 N. Y. 575.

[3] Citing Knowles *v.* Hull, 99 Mass. 562.

[4] Meeker *v.* Place, 7 Blackf. (Ind.) 169.

[5] Godwin *v.* Stebbins, 2 Cal. 103; see Eaton *v.* George, 3 Jones (N. C.) Law, 385; Murphy *v.* Williamson, 85 Ill. 149; Chicago, B. & Q. R.R. Co. *v.* Knox College, 34 Ill. 195.

the theory that as there is an entire want of privity and absence of contract relationship, express or implied, between the parties, the reasons upon which the practice of giving the notice rests do not apply.

§ 378. *Expiration of term by provisions of lease.*—Where the term of a lease is to end on a day certain, there is no occasion for a notice to quit previous to bringing an action, because both of the parties are apprised that unless they come to some fresh agreement, there is an end of the lease.[1] The contract itself gives sufficient notice.[2]

§ 379. *Lease void by statute of frauds.*—The receipt of rent, and occupancy under a lease void by the statute of frauds, does not validate the lease, but the relationship enures as a tenancy from year to year,[3] which must be terminated by a notice to quit, though resort may be had to the void lease to determine the rights and duties of the parties in all things consistent with a yearly tenancy. Where the occupancy is under a lease, void by the statute of frauds, and the rent is paid monthly, the relationship constitutes a tenancy from month to month, which is determinable only by a month's notice to quit.[4]

§ 380. *Tenant holding over.*—In Schuyler *v.* Smith,[5]

[1] Cobb *v.* Stokes, 8 East, 358; Messenger *v.* Armstrong, 1 T. R. 54, per Lord Mansfield; Right *v.* Darby, 1 T. R. 162; McCanna *v.* Johnston, 19 Penn. St. 434; Roe *v.* Ward, 1 H. Blackst. 97; McClure *v.* McClure, 74 Ind. 108.

[2] Doe *v.* Stratton, 4 Bing. 446; Bedford *v.* McElherron, 2 S. & R. (Penn.) 49; see, especially, Den *v.* Adams, 7 Halsted (N. J.) Law, 99; Ellis *v.* Paige, 2 Pick. (Mass.) 71, and note reviewing cases; Hendrick *v.* Cannon, 5 Texas, 248; Young *v.* Smith, 28 Mo. 65; Dorrell *v.* Johnson, 17 Pick. (Mass.) 263; Stockwell *v.* Marks, 17 Me. 455; Gregg *v.* Von Phul, 1 Wall. 274; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628; Rich *v.* Keyser, 54 Penn. St. 86.

[3] Reeder *v.* Sayre, 70 N. Y. 180; Clayton *v.* Blakey, 8 T. R. 3; Doe *v.* Bell, 5 T. R. 471; Doe *v.* Terry, 4 Ad. & El. 274; see Doe *v.* Cockell, Ib. 478; see Doe *v.* Amey, 12 Ad. & El. 476; Schuyler *v.* Leggett, 2 Cow. (N. Y.) 660; Lounsbery *v.* Snyder, 31 N. Y. 514; Edwards *v.* Clemons, 24 Wend. (N. Y.) 480.

[4] Geiger *v.* Braun, 6 Daly (N. Y.), 506; People *v.* Darling, 47 (N. Y.) 666.

[5] 51 N. Y. 309. Conway *v.* Starkweather, 1 Denio (N. Y.), 113; see Rowan *v.* Lytle, 11 Wend. (N. Y.) 616; Allen *v.* Jaquish, 21 Wend. (N. Y.) 628; Garner *v.* Hannah, 6 Duer (N. Y.), 262–270; Livingston *v.* Tanner, 12 Barb. (N. Y.) 484.

the New York Court of Appeals held that where a tenant, for one or more years, holds over after the expiration of his term, the landlord may at his option treat him as a trespasser, or as a tenant for another year, upon the terms of the prior lease, so far as applicable, and that the right of the landlord to continue the tenancy is not affected by the fact that the tenant refused to renew the lease, and had notified the landlord that he had hired other premises. It is not in the power of the tenant to throw off his character as such, or deny his tenancy; nor has he the right to convert himself, at his option, into a wrong-doer, any more than he could deny the landlord's title. To entitle a tenant who holds over a definite term to notice, the holding over must be continued for such a length of time, after the expiration of the term, and under such circumstances, as to authorize the implication of assent, on the part of the landlord, to such continuance.

§ 381. *Uncertain tenancies*—It has been held in the Supreme Court of New Jersey, that half a year's notice to quit is necessary in all cases of uncertain tenancy, whether under the name of tenancies from year to year, or tenancies at will. This rule, it was said, applies to all general and undefined tenancies, whether they originated simply by permission of the owner, or when the tenant has entered under a void lease, or has been let in pending a treaty for a purchase, or wherever no express agreement has been made between the parties as to the terms of the occupancy; provided the entry was a lawful one, or with the privity and consent of the owner. All such tenancies, whether created by grant, or contract, or arising by implication, are, so far at least as to entitle the tenant to half a year's notice to quit, constructively held to be tenancies from year to year.[1]

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[1] Den *v.* Drake, 2 Green (N.J.) Law, 523, and cases cited; see Ellis *v.* Paige, 2 Pick. (Mass.) 72, note. Changed by statute, in New Jersey, to three months. See Rev. p. 575.

§ 382. *Tenancy from year to year.*—In Hall *v.* Myers,[1] the Maryland Court of Appeals held, that in order to terminate a tenancy from year to year, notice should be given six months prior to the expiration of the tenancy. So, where the defendant has been allowed to occupy lands for several years, without any definite lease or specific contract as to the termination of the tenancy, he is a tenant from year to year, and entitled to notice to quit before the end of the year.[2] Either party may determine a tenancy from year to year, at the end of any current year, by giving notice to quit half a year before the end of the year,[3] and if the premises are taken "twelve months certain, and six months notice to quit afterwards," the tenancy may be determined by a six month's notice to quit, expiring at the end of the first year.[4] If the owner does any act, from which the jury may infer that he intended to acknowledge the party in possession as his tenant, a tenancy from year to year is created, and can be terminated only by a regular notice to quit. So, where the lessor has allowed the tenant to remain in possession seventeen years after the expiration of the lease, notice to quit is necessary before a recovery can be had in ejectment.[5] The same rule prevails where the tenant holds over by the permission of the landlord.[6] And where a contract provided that the defendant was to occupy a house, and put it in repair, and in consideration thereof should enjoy the property, at a certain rent, until the repairs were reimbursed, this has been held to create a

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[1] 43 Md. 446. See Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957; Thomas *v.* Wright, 9 S. & R. (Penn.) 87; Stedman *v.* McIntosh, 4 Ired. (N. C.) Law, 291.

[2] Den *d.* Snowhill *v.* Snowhill, 3 Zab. (N. J.) 447; Jackson *d.* Livingston *v.* Bryan, 1 Johns. (N. Y.) 322; see Hemphill *v.* Giles, 66 N. C. 512.

[3] Doe *d.* Clarke *v.* Smaridge, 7 Q. B. 957.

[4] Thompson *v.* Maberly, 2 Camp. 573.

[5] Bedford *v.* McElherron, 2 S. & R. (Penn.) 49.

[6] Doe *v.* Morse, 1 B. & Ad. 365; Doe *d.* Miller *v.* Noden, 2 Esp. 530; but see Williams *v.* Deriar, 31 Mo. 13.

tenancy from year to year, determinable only by a notice to quit.[1]

§ 383. *Reasonable notice—Tenancy from year to year.*—In Boudette *v.* Pierce,[2] it appeared that the defendant obtained permission of the plaintiff, who owned the *locus in quo*, to build a hovel and stable a colt upon the premises, the plaintiff, by way of compensation, to have the manure. Subsequently defendant enlarged the hovel, and moved his family into it with the plaintiff's knowledge. The Court held that the defendant, by occupying the hovel as a dwelling, undoubtedly put an end to the contract, if the plaintiff had so elected, but that by acquiescence, and thereafter receiving the stipulated compensation, plaintiff confirmed the act. In April, plaintiff, without stating any time, requested defendant to remove the building, and vacate the premises; and on July 10, notified him to quit at once; and on July 14 brought ejectment. It was held upon this state of facts, that the occupancy had become a tenancy from year to year, and that the notice was not reasonable. Where, however, a parol agreement provided for a lease for one month, and for each successive month, until the landlord should want the premises, whereupon the tenancy should expire, it was held by the New York Supreme Court that thirty days' notice was not necessary to terminate the tenancy.[3]

§ 384. *Tenant at will.*—In a case which arose in Michigan, it was held, that a woman who had obtained a divorce from her husband, and with his consent kept possession of lands to which he held the legal title, was at least a tenant at will, and entitled to notice to quit, before she could be disturbed.[4] In a recent ejectment case in the New York Court of Appeals, it was decided that where a party entered

[1] Thomas *v.* Wright, 9 S. & R. (Penn.) 87.
[2] 50 Vt. 212. See Hemphill *v.* Giles, 66 N. C. 512.
[3] People *v.* Schackno, 48 Barb. (N. Y.) 551.
[4] Wilson *v.* Merrill, 38 Mich. 707.

upon land for an indefinite period by the permission of the owner, even without the reservation of any rent, he was, by implication of law, a tenant at will, and, under the statutes of that State, entitled to one month's notice to quit.[1] In a very recent case, decided in the Supreme Court of Maine, it appeared that the defendant, for several years prior to April 1, 1877, had been occupying a wharf at an annual rent, payable quarterly, and on April 1, 1877, the agreement was renewed for another year, on the same terms, under which the defendant occupied, and paid rent up to January 1, 1878. The court decided that, under the statutes of that State, this agreement created a tenancy at will, which could be terminated only by thirty days' notice in writing, to be given by one party to the other, or by mutual consent.[2]

Chief Justice Kent said, in the case of Phillips *v.* Covert,[3] decided in 1810, that though a tenancy at will might be considered to be a tenancy from year to year, for the purpose of notice to quit, yet the tenant had no right to such notice, after he had determined the will by an act of voluntary waste. The rule in England seems to be that, without a previous demand of possession, a tenant at will cannot be ousted in ejectment.[4] It was said by Kent, however, in 1804, in the case of Jackson *v.* Bradt,[5] that if the defendant was strictly a tenant at will, no notice to quit was necessary. Where it appeared that the defendants moved into the house of another, and resided with and took care of him, until he died, but never agreed to pay rent, nor was any definite term agreed upon, they were held, by the Supreme Court of Illinois, not to be tenants from year to year, or

[1] Larned *v.* Hudson, 60 N. Y. 102; Post *v.* Post, 14 Barb. (N. Y.) 253; Burns *v.* Bryant, 31 N. Y. 453.

[2] Thomas *v.* Sanford Steamship Co. 71 Me. 548; see Rollins *v.* Moody, 72 Me. 135.

[3] 7 Johns. (N. Y.) 4. See Jackson *v.* Wilsey, 9 Johns. (N. Y.) 267; see Jackson *v.* Miller, 7 Cowen (N. Y.), 747; and especially Harris *v.* Frink, 49 N. Y. 24, 32, 33.

[4] Right *v.* Beard, 13 East, 210.

[5] 2 Caine's Rep. (N. Y.) 169, 174. See Larned *v.* Hudson, 60 N. Y. 102.

entitled to notice to quit, but mere tenants at will of the owner, and a demand of possession was considered sufficient to terminate the tenancy.[1]

§ 385. *Tenant at sufferance.*—In a case recently reported in Massachusetts, it was decided that the owner of land, who forcibly entered thereon and ejected, without unnecessary force, a tenant at sufferance who had received reasonable notice to quit, was not liable to an action for an assault.[2] At common law a tenant at sufferance was not entitled to notice to quit,[3] and where a tenant for years held over he became a tenant at sufferance, and was not entitled to notice to quit, for he stood in no privity to his landlord, and had no estate which he could transfer. But there is a distinction in the case of tenants holding over, between one entering by act of the parties and one entering by act of the law. The former is a tenant at sufferance, the latter becomes merely an abator, intruder or trespasser.[4] In Michigan, however, a tenant at sufferance is entitled to notice to quit.[5] But a tenant who wrongfully holds over his term does not acquire any equities from a brief delay on the part of the landlord in proceeding against him, and is not entitled to notice to quit.[6]

§ 386. *Possession under a void homestead claim.*—A party who gets possession of a homestead by foreclosure of a void mortgage is not entitled to notice to quit, as tenant at will, before being sued in ejectment, for the reason that the possession is not acquired by the consent of the person entitled to it.[7]

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[1] Herrell *v.* Sizeland, 81 Ill. 457.

[2] Low *v.* Elwell, 121 Mass. 309.

[3] Reckhow *v.* Schanck, 43 N. Y. 448; Hauxhurst *v.* Lobree, 38 Cal. 563.

[4] Livingston *v.* Tanner, 14 N. Y. 64; 4 Kent's Com. pp. 116, 117; Jackson *d.* Van Cortlandt *v.* Parkhurst, 5 Johns. (N. Y.) 128; Jackson *d.* Anderson *v.* McLeod, 12 Johns. (N. Y.) 182; see Co. Litt. 57 *b*; Moore *v.* Lawder, 1 Stark. 308.

[5] Kunzie *v.* Wixom, 39 Mich. 384.

[6] Benfey *v.* Congdon, 40 Mich. 283.

[7] Sherrid *v.* Southwick, 43 Mich. 515.

§ 387. *Disclaimer by tenant.*—Notice to quit is not necessary in cases where the tenant commits any act which amounts to a disavowal, or disclaimer of the title of his lessor, or sets the landlord's title at defiance.[1] The tenant by so doing becomes a trespasser; his possession is adverse, and the landlord may bring ejectment with the same effect as though the possession had originally been acquired by wrong.[2] And a disclaimer, made subsequent to the demise, may be considered in evidence to disprove the tenancy;[3] and where the tenant conveys the land in fee simple it is a disclaimer of the tenancy which dispenses with the necessity of notice to quit.[4] These cases follow the doctrine of Lord Mansfield in Doe *v.* Williams,[5] to the effect that where the tenant's possession is adverse from the very nature of things no notice to quit is necessary.

§ 388. *Disclaimer a question of fact.*—The question as to whether or not particular expressions constitute a disclaimer or repudiation of the tenancy, is ordinarily a question of fact for the jury.[6] But the mere payment of rent by a tenant to a third person, does not amount to a disclaimer of the title of the landlord so as to operate as a forfeiture of the lease,[7] nor will the refusal to pay rent to a devisee claiming under a contested will, accompanied with a declaration that the tenant was ready to pay rent to any person entitled to receive it,

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[1] Grubb *v.* Grubb, 10 B. & C. 816; Doe *d.* Williams *v.* Pasquali, Peake, [*196], 259; Van Winkle *v.* Hinckle, 21 Cal. 342; Doe *d.* Jefferies *v.* Whittick, Gow, 195; Doe *d.* Clun *v.* Clarke, Peake's Add. Cases, 239; Vincent *v.* Corbin, 85 N. C. 108; Kunzie *v.* Wixom, 39 Mich. 384; Eberwine *v.* Cook, 74 Ind. 377; Herrell *v.* Sizeland, 81 Ill. 457; Murphy *v.* Williamson, 85 Ill. 149.

[2] Willison *v.* Watkins, 3 Peters, 43–48; see Harrison *v.* Middleton, 11 Gratt. (Va.) 527.

[3] Horsey *v.* Horsey, 4 Harr. (Del.) 517.

[4] Trustees *v.* Meetze, 4 Rich. (S. C.) Law, 50.

[5] Cowp. 621.

[6] Doe *d.* Bennett *v.* Long, 9 C. & P. 773.

[7] Doe *d.* Dillon *v.* Parker, Gow, 180.

amount to a disavowal sufficient to dispense with the necessity of a regular notice[1], nor a mere naked claim to hold adversely to the landlord. Attornment to another, or some act of disclaimer, must appear in order to work a forfeiture.[2]

"I have no rent for you, because A. B. has ordered me to pay none," is evidence of a disclaimer of a tenancy;[3] so it is a disclaimer where a tenant attorned to another, and answered the demand for rent by saying that his connection as tenant with the plaintiff had ceased.[4]

§ 389. *Defense of adverse possession forfeits right to notice.*—If the tenant, after entering under the lessor, sets up a defense of adverse possession against him, in an action for the recovery of the land, and hostile to the title under which he entered, he cannot claim to be a tenant at will and entitled to notice to quit. Such a defense is inconsistent with the existence of a tenancy at will.[5] The rule has been stated by the Supreme Court of Illinois to be that a tenant's right to notice to quit may be superseded, and the tenancy terminated by the denial by the tenant, by word or act, of the title of the landlord.[6] This is, perhaps, too broad and general a statement, for, as we have already shown, a parol disclaimer of the landlord's title does not work a forfeiture of the lease.[7]

§ 390. *When refusal to deliver possession not a disclaimer.*—A refusal to deliver possession, or a declaration that the party will continue to hold the property, at a time when the landlord had no right to claim or demand the possession, does not constitute a disclaimer.[8] There must be a direct

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[1] Doe *d.* Williams *v.* Pasquali, Peake's N. P. C. [*196] 259, per Lord Kenyon; see Den *d.* Snowhill *v.* Snowhill, 3 Zab. (N. J.) 447; but see Phillips *v.* Rollings, 4 C. B. 188; Doe *v.* Frowd, 4 Bing. 557.

[2] Montgomery *v.* Craig, 3 Dana (Ky.), 102.

[3] Doe *d.* Whitehead *v.* Pittman, 2 N. & M. 673.

[4] Grubb *v.* Grubb, 10 B. & C. 816.

[5] Williams *v.* Cash, 27 Ga. 507; see Kunzie *v.* Wixom, 39 Mich. 384.

[6] Wood *v.* Morton, 11 Ill. 547.

[7] See § 369.

[8] Doe *v.* Stanion, 1 M. & W. 695–703.

repudiation of the relation of landlord and tenant, or a claim to hold possession, which by necessary implication is a repudiation of it.[1] Where a lease for a specified time contained an express covenant that the tenant would "deliver up possession at the expiration of the term, *without further notice*," and with a reservation of the right of the landlord to "enter and repossess the premises at the end of the period, *or at any time thereafter*," it was held that the landlord could maintain ejectment after the expiration of the term without previous notice to quit, and that a new lease from year to year, with right to three months' notice to quit, could not be implied from the neglect of the landlord to dispossess the tenant.[2]

§ 391. *Tenants in common—Demand of possession.*—We have already seen that in ejectment between tenants in common, proof of actual ouster and denial of the plaintiff's rights is essential to support the action. It is generally safer, and often necessary, as already shown in discussing this special subject, for the plaintiff to make demand of his companion to be let into possession, before bringing ejectment, where this relationship exists between the parties,[3] for a specific demand by the plaintiff to be let into possession, followed by a specific refusal on the part of the defendant to comply with the demand, constitutes the highest and best evidence of an ouster; but the demand is not necessary where the defendant relies on adverse title,[4] or sets it up by answer.[5]

§ 392. *Tenant of tenants in common.*—Where the defendant in ejectment has been put in possession, or allowed to

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[1] Bates *v.* Austin, 2 A. K. Mar. (Ky.) 270; Tuttle *v.* Reynolds, 1 Vt. 80; Willison *v.* Watkins, 3 Peters, 43; Tillotson *v.* Doe, 5 Ala. 407; Brown *v.* Keller, 32 Ill. 151; Bolton *v.* Landers, 27 Cal. 104.

[2] McCanna *v.* Johnston, 19 Penn. St. 434.

[3] See Newell *v.* Woodruff, 30 Conn. 492; Greer *v.* Tripp, 56 Cal. 209; see § 283.

[4] Harrison *v.* Taylor, 33 Mo. 211.

[5] Greer *v.* Tripp, 56 Cal. 209; see § 290.

occupy a portion of the premises, by one of several tenants in common, it has been held, in California, that he cannot be sued as a trespasser by another tenant in common, without notice to quit or other act showing a termination of the license or tenancy. Being in possession by lawful right he cannot, so long as his relations to the owners are unchanged, be turned into a trespasser, and held liable for costs and damages.[1]

§ 393. *Landlord defending in tenant's place.*—One who comes in to defend as landlord, in place of the tenant, cannot object that no notice to quit has been given to the original defendant.[2] The application of the landlord to defend in place of the tenant, presupposes that the defendant is the applicant's tenant; so that although the defendant entered at first as the tenant of the plaintiff, he must have subsequently attorned to the applicant, and thereby disclaimed or disavowed the tenancy to plaintiff, and thus put himself in the wrong, which dispensed with the necessity of notice.

§ 394. *Vendor and vendee.*—Under an executory contract to purchase land, the possession of the vendee is originally rightful, and until the party in possession has made default, or is called upon to restore the possession, he cannot be ejected without a demand of possession or notice to quit.[3] An executory contract of purchase and sale of land, which gives the vendee the right to occupy, until default in the payment of the purchase money, is a license, and not a lease. The license operates as an excuse for the vendee's possession, and he cannot be treated as a wrongdoer until after default.[4]

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[1] Ord *v.* Chester, 18 Cal. 77.

[2] Foust *v.* Trice, 8 Jones (N. C.) Law, 490; Whissenhunt *v.* Jones, 78 N. C. 361; see Doe *d.* Davies *v.* Creed, 5 Bing. 327.

[3] Right *v.* Beard, 13 East, 210; Moak *v.* Bryant, 51 Miss. 560; Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155; Carson *v.* Baker, 4 Dev. (N. C.) Law, 220; Prentice *v.* Wilson, 14 Ill. 91; see Costigan *v.* Wood, 5 Cr. C. C. 507.

[4] Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74; Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155.

The vendee, however, may forfeit his right of possession, and if he fails to comply with the terms of sale, his possession afterwards is tortious, and there is an immediate right of action against him.[1] And if the vendor, after default, finds the premises vacant and peaceably enters, he is not an intruder.[2] It would be an idle ceremony to demand possession when the vendee refused to respond to a previous demand for the money due on the contract of purchase. The refusal, unaccompanied by any promise to pay the money at a future day, is equivalent to a direct notice to the vendor, that the vendee declines to execute the contract,[3] and he has no right to notice that the vendor intends to assert his rights.[4] The same exemption as to demand or notice applies in case of the non-performance by the vendee of any of the conditions or covenants contained in the contract of sale.[5] This doctrine constitutes an exception to the general rule that demand of possession, or notice to quit, are necessary in cases of occupancy by the consent of the owner for no definite term.[6]

A different rule prevails in England.[7] It is that the vendor having put the vendee in possession cannot, without a proof of a demand of possession and a refusal by the vendee, or some wrongful act to determine the possession, treat the latter as a wrong-doer or trespasser, as he must assume him to be in instituting an action of ejectment. This

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[1] Gregg *v.* Von Phul, 1 Wall. 274; Baker *v.* Gittings, 16 Ohio, 489; Burnett *v.* Caldwell, 9 Wall. 290; Prentice *v.* Wilson, 14 Ill. 91; Hotaling *v.* Hotaling, 47 Barb. (N. Y.) 163; Wright *v.* Moore, 21 Wend. (N. Y.) 230; Candee *v.* Haywood, 34 Barb. (N. Y.) 349; Jackson *v.* Moncrief, 5 Wend. (N. Y.) 26; Dean *v.* Comstock, 32 Ill. 173; Moak *v.* Bryant, 51 Miss. 560; Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155; McClanahan *v.* Barrow, 27 Miss. 664; but see Stackhouse *v.* Reynolds, 5 Blackf. (Ind.) 570; Twyman *v.* Hawley, 24 Gratt. (Va.) 512.

[2] McHan *v.* Stansell, 39 Ga. 197.

[3] Gregg *v.* Von Phul, 1 Wall. 274.

[4] McHan *v.* Stansell, 39 Ga. 197.

[5] Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155.

[6] McClane *v.* White, 5 Minn. 178.

[7] Right *v.* Beard, 13 East, 210; Newby *v.* Jackson, 1 B. & C. 448.

has been followed in Virginia,[1] the reason assigned being that the vendor would rarely be subjected to any inconvenience by making the demand, while it is an act of simple justice to the vendee, who, having failed to pay the money, may desire to surrender the premises without incurring the costs of an action, or whose default may have been the result of inadvertence or misapprehension, and the demand would enable him to comply with the contract.

§ 395. *Obligee in bond for titles.*—If the obligee in a bond for titles fails to pay the purchase money, within the time specified, no demand of possession, or notice to quit is necessary to enable the obligor to maintain ejectment.[2] Of course these formalities are unnecessary where the defendant's contract is with a stranger, between whom and the plaintiff no connection is shown in respect to the title.[3] In the case of Ross *v.* Van Aulen,[4] recently decided in the Supreme Court of New Jersey, it was held, that where the defendant was let into possession, under a contract to purchase, which he failed to carry out, he was not to be regarded as a tenant to the vendor in such a sense as to entitle him to three months' notice to quit, but that he might be ejected after a demand of possession, unless the contract contained some provision to the contrary.

§ 396. *Vendee in possession under void contract.*—Where the defendant was in possession under a parol contract to purchase the lands, which was void by the statute of frauds, and refused to pay the purchase money, or to deliver up possession, it was held that he was in no sense a tenant so as to entitle him to demand notice to quit.[5] In McClung

[1] Twyman *v.* Hawley, 24 Gratt. (Va.) 512; Williamson *v.* Paxton, 18 Gratt. (Va.) 475–505.

[2] Day *v.* Solomon, 40 Ga. 32; McHan *v.* Stansell, 39 Ga. 197.

[3] Petty *v.* Graham, 13 Ala. 568.

[4] 13 Vroom (N. J.), 49. See Den *v.* Westbrook, 3 Green (N. J.) Law, 371; Van Valkenbergh *v.* Den, 3 Zab. (N. J.) 583; Freeman *v.* Headley, 4 Vroom (N. J.), 523.

[5] Chilton *v.* Niblett, 3 Humph. (Tenn.) 404; see Den *v.* Webster, 10 Yer. (Tenn.) 513.

v. Echols,[1] it appeared that the defendant had acquired the possession under a contract to purchase, but subsequently procured a decree declaring the contract null and void, as being founded on a promise to pay confederate treasury notes. It was held that his subsequent possession was wrongful, and that he was not entitled to notice to quit prior to the institution of an action of ejectment.

§ 397. *Mortgagee against mortgagor.*—It has been said that before bringing ejectment, by a mortgagee against a mortgagor, notice to quit must be given, for the mortgagor occupies with the mortgagee's consent, and with the perfect understanding that he may use the premises as his own. His interest is much greater than that of the mortgagee, and in practice no tenant at will, for years, or even for life, exercises such unlimited dominion over the land as the mortgagor. No person who holds by another's consent, for an indefinite period, ought ever to be evicted by ejectment at the suit of such party without a previous notice to quit. This should especially be required in all cases of mortgages, because the mortgagor may not only surrender the possession of the land, but may protect himself against an action by payment of the money due.[2] But the general rule in such States as permit a mortgagee to invoke the remedy of ejectment is, that he may recover the possession of the lands, from the mortgagor, after default, or the day of payment has passed, without notice to quit, the mortgagor being considered as a tenant at sufferance only.[3]

The same rule applies in ejectment against the assignee of the mortgagor.[4] A purchaser of public lands who has

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[1] 5 W. Va. 204.

[2] Jackson *v.* Laughhead, 2 Johns. (N. Y.) 75.

[3] Wilson *v.* Hooper, 13 Vt. 653; Stedman *v.* Gassett, 18 Vt. 346; Fuller *v.* Wadsworth, 2 Ired. (N. C.) Law, 263; Jackson *v.* Warren, 32 Ill. 331; Thunder *v.* Belcher, 3 East, 449; Rockwell *v.* Bradley, 2 Conn. 1; Carroll *v.* Ballance, 26 Ill. 9, and cases cited; but see Keech *v.* Hall, Douglas, 21; see § 333.

[4] Lyman *v.* Mower, 6 Vt. 345; Wilson *v.* Hooper, 13 Vt. 653; see Walcop *v.* McKinney, 10 Mo. 229; Pierce *v.* Brown, 24 Vt. 165.

made default in the payment of the purchase money, and has failed to redeem after a resale, may be evicted by the second purchaser without notice to quit.[1]

§ 398. *Infant plaintiff.*—Where an infant becomes entitled to the reversion of an estate, leased from year to year, he cannot maintain ejectment against the tenant without giving the same notice to quit that would have been required had the original lessor been the plaintiff; and he cannot avoid a lease which is for his own benefit.[2]

§ 399. *Personal representatives.*—If a tenant from year to year dies, his personal representatives are entitled to notice to quit,[3] unless by the terms of the letting no interest is to vest in the personal representatives, in which case, of course, no notice is necessary.[4] The lessee of a tenant for life is entitled to regular notice from the remainderman.[5]

§ 400. *Notice by tenant to landlord.*—As the relation of landlord and tenant is mutual, the rules for the regulation of notices to quit, when given by tenants, are of course similar *mutatis mutandis* to those by which notices from landlords are governed. They must be the same in form and substance, expire at the like periods of the year, are dependent upon like rules as to the time and mode of service, and may be waived by similar acts.[6]

§ 401. *Form of the notice.*—"Care should be taken," says Mr. Adams,[7] "that the words of the notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for, although the courts will reluctantly listen to objections of this nature, yet, if the notice be really ambiguous, or optional, it will be sufficient to render it inef-

[1] Candee *v.* Haywood, 34 Barb. (N. Y.) 349; affi'd, 37 N. Y. 653.

[2] Maddon *v.* White, 2 T. R. 159; see Miller *v.* Noden, 2 Esp. 530; see §§ 196, 198, 451.

[3] Gulliver *v.* Burr, 1 W. Bla. 596; Doe *v.* Porter, 3 T. R. 13; Parker *v.* Constable, 3 Wils. 25.

[4] Doe *v.* Smith, 6 East, 530.

[5] Jordan *v.* Ward, 1 H. Bla. 97.

[6] Adams on Eject. (4th Am. ed. 1854), 182, *156; see Boynton *v.* Bodwell, 113 Mass. 531.

[7] Adams on Eject. (4th Am. ed. 1854), 164, *133.

fectual, as far at least as the action of ejectment is concerned." But a notice directing the tenant to quit, "or I shall insist on double rent," was held, by Lord Mansfield, sufficient to support ejectment, the additional words only proving the landlord's anxiety to get into possession, and being an emphatic way of showing to the tenant that he is in earnest, by informing him of the consequences if he holds over. His Lordship said, that had the notice contained the words, "*or else that you agree to pay double rent*," the ejectment could not have been supported.[1] A notice to quit will be held good if, upon the whole, it is intelligible, and so certain that the tenant cannot reasonably misunderstand it. An obvious mistake, in some part, will not invalidate it if it is otherwise so explicit that the party receiving it cannot be misled.[2] A misdescription of the premises, or a mis-statement of dates which cannot mislead, will not vitiate the notice; nor need it be directed to the person. Even if directed by a wrong name, yet if the tenant keeps it without objection the error is waived.[3]

§ 402. *What notices held good.*—Thus, a notice describing the lands as lying in an adjoining parish, has been held sufficient.[4] In Massachusetts a tenancy at will may be terminated by either party by a thirty days notice to quit.[5] A notice served by a tenant was held to be defective and informal, in that it did not state the time when he would vacate and deliver up the premises;[6] but it was held that the landlord might waive the informality, and evidence tending to show that after service of the notice the landlord en-

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[1] Doe *d.* Matthews *v.* Jackson, Doug. 175; see, further, Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 142; Doe *d.* Matthewson *v.* Wrightman, 4 Esp. 5; Doe *v.* Archer, 14 East, 245.

[2] Cook *v.* Creswell, 44 Md. 581.

[3] Doe *d.* Cox *v.* Roe, 4 Esp. 185; Doe *d.* Matthewson *v.* Wrightman, Ib. 5; Doe *v.* Spiller, 6 Esp. 70; Doe *d.* Bedford *v.* Kightley, 7 T. R. 63.

[4] Armstrong *v.* Wilkinson, 12 Ad. & El. 743; S. C. 40 Eng. C. L. 368.

[5] Genl. Stat. Mass. 1860, c. 90, § 31.

[6] Boynton *v.* Bodwell, 113 Mass. 531; Currier *v.* Barker, 2 Gray (Mass.), 224.

deavored to induce the tenant to remain, and offered to reduce the rents and make improvements, and that upon the tenant's departure he received the keys, and at no time objected to the sufficiency of the notice, was held sufficient to warrant a jury in finding a waiver.

§ 403. *Mistakes in notice.*—In Clark *v.* Keliher,[1] the notice was addressed to John Clark, but his true name was Thomas B. Clark. The court held that the notice was sufficient and lawful, both in substance and in mode of service. There was no uncertainty as to the party for whom it was intended, or the tenement to which it applied, and there could have been no doubt but that it was meant for the family who occupied that tenement. The mistake in the christian name of the tenant was, therefore, of no importance. And where a tenant died and a notice to quit was served upon his widow, and there was no proof of the existence of personal representatives, the notice was held sufficient.[2]

§ 404. *Parol notice.*—Where a demise is by parol, notice to quit need not be in writing.[3] And it is not necessary to state to whom possession is to be delivered up.[4] Though a parol notice to quit may suffice, the general practice of serving a written notice is much safer, the notice being more easily susceptible of proof.

§ 405. *By whom notice should be given.*—The notice to quit must be given either by the landlord or his authorized agent,[5] or by any person legally entitled to the reversion, as assignee, devisee, heir, or executor, or receiver with power to let. If it be doubtful in whom the legal estate is vested, all should join in the notice.[6] The notice to quit given by

[1] 107 Mass. 406; Doe *v.* Spiller, 6 Esp. 70.

[2] Rees *v.* Perrot, 4 C. & P. 230.

[3] Doe *d.* Macartney *v.* Crick, 5 Esp. 196; Bird *v.* Defonvielle, 2 C. & K. 415; Roe *v.* Pierce, 2 Camp. 96; Timmins *v.* Rowlinson, 3 Burr. 1603.

[4] Doe *d.* Bailey *v.* Foster, 3 C. B. 215.

[5] Reeder *v.* Sayre, 70 N. Y. 180–188; Doe *v.* Browne, 8 East, 165.

[6] Reeder *v.* Sayre, 70 N. Y. 180–188; see Doe *d.* Whayman *v.* Chaplin, 3 Taunt. 120; Doe *d.* Green *v.* Baker, 8 Taunt. 241.

an agent should purport to be given in the name of and on behalf of the principal,[1] and must be such that the tenant may safely act on it at the time of receiving it; hence, a notice by an unauthorized agent cannot be made good by an adoption or ratification of it, by the principal, after the proper time for giving notice has elapsed.[2] Bringing an action of ejectment is not a sufficient recognition of such authority to entitle the plaintiff to recover, because the recognition should at all events be before the day of the demise laid in the declaration.[3] And a notice to quit given by an agent of an agent, is not sufficient without evidence of recognition by the plaintiff;[4] but an agent to receive rent has power to determine a tenancy.[5]

§ 406. *Receiver in chancery.*—A receiver in chancery, with power to let, is considered as the agent of the landlord sufficiently authorized to give a valid notice to quit,[6] though a mere receiver of rents, as such, has no authority to determine a tenancy.[7]

§ 407. *Agent of a corporation.*—The authority of the agent of a corporation to give notice to quit, to its tenants, need not be under seal,[8] and it has been held that a notice given by a person acting as steward of a corporation is sufficient without evidence that he had authority under seal from the corporation for such purposes.[9]

§ 408. *By joint tenants.*—Notice to quit by one of several joint tenants, who have demised jointly from year to year, has been held to be good for his share only, and he

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[1] Cole on Ejectment, p. 44.

[2] Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143; Adams on Eject. (4th Am. ed. 1854), [*127] 158.

[3] Doe *v.* Walters, 10 B. & C. 626; see Right *v.* Cuthell, 5 East, 491.

[4] Doe *d.* Rhodes *v.* Robinson, 3 Bing. N. C. 677.

[5] Doe *d.* Manvers *v.* Mizem, 2 Moo. & R. 56.

[6] Wilkinson *v.* Colley, 5 Burr. 2694; Doe *d.* Marsack *v.* Read, 14 East, 57–61.

[7] Doe *v.* Walters, 10 B. & C. 633.

[8] Wolf *v.* Goddard, 9 Watts (Penn.), 544.

[9] Roe *v.* Pierce, 2 Camp. 96.

was allowed to recover on his separate demise;[1] but the contrary doctrine was held in the King's Bench,[2] and a notice signed by one of several joint tenants, on behalf of his companions, was adjudged sufficient; and a notice to quit, signed by three of four trustees, who were joint landlords of a house under a deed of trust, puts an end to the relation of landlord and tenant between all the parties.[3]

§ 409. *By tenants in common.*—A notice which required the defendant to quit the entire estate, has been held fatally defective where it appeared that the plaintiff's title was an undivided interest; and the defendant was in possession as a lessee of the other tenant in common. The defendant could not comply with the notice without giving up his legal right to the enjoyment of an undivided portion of the estate which did not belong to the plaintiff. The notice was, therefore, one which the plaintiff had no legal right to give, and which the defendant was not bound to regard. It was not even effectual to terminate the right of the defendant to occupy the estate as lessee or tenant of the plaintiff.[4]

§ 410. *Who cannot give notice.*—A vendee, who has entered into a contract with the landlord for a purchase of the premises, but who has not obtained the legal title, cannot give a valid notice to quit;[5] and notice to quit is not necessary where the person holding the possession is a mere bailiff or servant to the owner.[6]

§ 411. *Waiver of right to notice.*—The objection that notice to quit was necessary comes too late, if made for the first time in the appellate court; it should be urged upon the trial at *nisi prius*.[7] Acceptance of subsequently accru-

[1] Doe *v.* Chaplin, 3 Taunt. 120; see Goodtitle *v.* Woodward, 3 B. & Ald. 689.

[2] Doe *v.* Summersett, 1 B. & Adol. 135, 137; see Doe & Hughes, 7 M. & W. 139.

[3] Alford *v.* Vickery, Car. & Marsh. 280.

[4] King *v.* Dickerman, 11 Gray (Mass.), 480; see § 300.

[5] Reeder *v.* Sayre, 70 N. Y. 180.

[6] Jackson *v.* Sample, 1 Johns. Cases (N. Y.), 231.

[7] Castro *v.* Gill, 5 Cal. 40.

ing rent is a waiver of the notice to quit.[1] Where ejectment is brought by a landlord against a tenant, relying upon a disclaimer, any subsequent act of the landlord acknowledging the party as his tenant, such as distraining for rent, is a waiver of the disclaimer.[2] Serving a second notice has been construed to be a waiver.[3] The right to demand and notice may, of course, be waived by express stipulation in the lease.[4] And the tenant may, by agreement, waive the notice;[5] and where the service of the notice has been admitted in the pleadings, it need not be proved on the trial.[6]

§ 412. *Service of notice.*—It has been held in Walker *v.* Sharpe,[7] upon an examination of the English cases, to be well settled in England, that delivery of a notice on the premises to the wife or agent of the tenant, or any other person occupying the same jointly with or under him, is a sufficient service. Notice to a corporation tenant should be addressed to it by name, and served upon its officers;[8] and where a tenant dies, the notice may be served on the administrator, who pays the rent.[9] Where there are two tenants of premises held in common, notice to one is sufficient;[10] and where the defendant and his wife are absent from the commonwealth, service on the tenant's partner, at his place of business, is valid.[11]

§ 413. *How served.*—It has been held in New York,

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[1] Prindle *v.* Anderson, 19 Wend. (N. Y.) 391; S. C. 23 Ib. 616; Goodright *v.* Cordwent, 6 T. R. 219; see Collins *v.* Hasbrouck, 56 N. Y. 157.

[2] Doe *d.* David *v.* Williams, 7 C. & P. 322.

[3] See Doe *v.* Palmer, 16 East, 53–56.

[4] McCanna *v.* Johnston, 19 Penn. St. 434; Hosford *v.* Ballard, 39 N. Y. 147; Byrane *v.* Rogers, 8 Minn. 281; Eichart *v.* Bargas, 12 B. Mon. (Ky.) 464; Doe *d.* Harris *v.* Masters, 2 B. & C. 490.

[5] Banks *v.* Carter, 7 Daly (N. Y.), 417.

[6] Chandler *v.* Kent, 8 Minn. 536.

[7] 103 Mass. 154. See Cook *v.* Creswell, 44 Md. 581.

[8] Doe *v.* Woodman, 8 East, 228.

[9] Prior *v.* Ongley, 10 C. B. 25.

[10] Doe *d.* Macartney *v.* Crick, 5 Esp. 196.

[11] Walker *v.* Sharpe, 103 Mass. 154.

that the notice in writing given under the statute,[1] to terminate a tenancy at will or by sufferance, cannot be served by leaving it at the tenant's place of business (not being his residence) while he is absent therefrom, and that a tenancy from month to month, which, by special agreement can be terminated on a notice of thirty days, is in the nature of a tenancy at will, and the notice must be given in the manner prescribed by the statute.[2] Where the tenant of an estate holden by the year, had a dwelling house at another place, a delivery of the notice to quit to his servant, at the dwelling house, is strong presumptive evidence that the master received the notice.[3]

§ 414. *Service of notice—How proved.*—A copy of a notice to quit is competent evidence,[4] and may be proved by the person who served it, and in case of neglect to take a copy, or preserve a counterpart, the contents of the notice may be proved by a witness, without notice to produce the original.[5] And where the tenant being personally served with a notice to quit on a specified day, made no objection to the time, this was held to afford *prima facie* proof that the tenancy ended at the date specified in the notice.[6]

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[1] 1 R. S. N. Y. 745, §§ 7 and 8.

[2] Banks *v.* Carter, 7 Daly (N. Y.), 417.

[3] Jones *d.* Griffiths *v.* Marsh, 4 T. R. 464.

[4] Eisenhart *v.* Slaymaker, 14 S. & R. (Penn.) 153.

[5] See 1 Greenleaf's Ev. vol. 1, § 561; Jory *v.* Orchard, 2 B. &. P. 39–41; Doe *v.* Somerton, 7 Ad. & El. N. S. 58; Doe *v.* Durnford, 2 M. & S. 62; Doe *v.* Turford, 3 B. & Ad. 890; Falkner *v.* Beers, 2 Doug. (Mich.) 117.

[6] Doe *v.* Biggs, 2 Taunt. 109; Doe *v.* Forster, 13 East, 405.

CHAPTER XIV.

ATTORNEY'S AUTHORITY TO PROCEED.

§ 415. Attorney not generally required to produce authority.
416. Rule more strict in action to recover land.
417. Proof of authority after issue joined.
418. Authority of general agent to bring ejectment.
419. Authority by one or more of several co-tenants.
420. Outstanding title.
421. Hamilton *v.* Wright.

§ 415. *Attorney not generally required to produce authority.*—That an appearance of an attorney at law for a party in an action, if no collusion is shown, may be recognized by the adverse party as authentic and valid, is a rule of practice almost universal in the administration of justice.[1] And while the courts clearly possess the power[2] in the exercise of a sound discretion,[3] to compel an attorney to exhibit or prove his authority, yet, in the absence of circumstances indicative of fraud, the court will not ordinarily exercise this prerogative, as against a reputable and responsible attorney, in the preliminary stages of the action.[4] The presumption will ordinarily be indulged that the attorney, who is an officer of the court, has full authority to prosecute.[5]

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[1] Hamilton *v.* Wright, 37 N. Y. 502; S. C. 5 Trans. App. (N. Y.) 1; see Hallett *v.* Hastie, 35 Ala. 164.

[2] Ninety-nine Plaintiffs *v.* Vanderbilt, 4 Duer (N. Y.), 632; S. C. 1 Abb. Pr. (N. Y.) 193; Allen *v.* Green, 1 Bailey (S. C.) Law, 448; see Allen *v.* Bone, 4 Beav. 493.

[3] Commissioners of Excise, &c. *v.* Purdy, 22 How. Pr. (N. Y.) 506; S C. 36 Barb. (N. Y.) 266; S. C. 13 Abb. Pr. (N. Y.) 434; M'Alexander *v.* Wright, 3 Monroe (Ky.), 189; Gillespie, *ex parte*, 3 Yerg. (Tenn.) 325.

[4] Republic of Mexico *v.* Arrangois, 1 Abb Pr. (N. Y.) 437; S. C. 5 Duer (N. Y.), 643; Denton *v.* Noyes, 6 Johns. (N. Y.) 296, per Chief Justice Kent; Jackson *v.* Stewart, 6 Johns. (N. Y.) 34; Anon. 1 Salk. 86–88; Anon. 6 Mod. *16; Cartwell *v.* Menifee, 2 Ark. 356; Hamilton *v.* Wright, 37 N. Y. 502; American Ins. Co. *v.* Oakley, 9 Paige Ch. (N. Y.) 496.

[5] Esley *v.* People, 23 Kan. 510; Rogers *v.* Park, 4 Humph. (Tenn.) 480.

§ 416. *Rule more strict in action to recover land.*—But when the title or right of possession of land is in dispute a stricter rule has been applied, so cherished are the rights of the actual occupant of land in the eye of the law. In New York it is provided by statute that the defendant in an action to recover real property, or the possession of it, may demand at any time before answer, and, in a proper case, obtain, an order requiring the plaintiff's attorney to produce written evidence of his authority from the plaintiff, or his agent, to commence the action, or written recognition of his authority to do so.[1] The court has no discretion, upon such an application being made to it, but is compelled to grant the order with a stay of proceedings in the action until the authority has been produced.[2] The practice requiring the attorney to produce his authority to prosecute actions in the nature of ejectment, prevails in several States.

§ 417. *Proof of authority after issue joined.*—It was held in Virginia, while the system of real actions prevailed, that where a writ of right was sued out, and the issue regularly joined upon the mere right, and the tenant subsequently produced affidavits tending to show that the demandant died before the institution of the suit (the tenant having been ignorant of this fact until after the issue was joined), all proceedings should be stayed until the person who instituted the suit for his own benefit proved that the demandant was living when the writ issued.[3] In ejectment in Pennsylvania the rule was recognized that a defendant could require the plaintiff's attorney to file his warrant of attorney, in order that the defendant might learn by whose authority the suit had been instituted; but it was decided that the application came too late if not made until after

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[1] N. Y. Code of Civil Procedure, §§ 1513, 1514; see Harris *v.* Mason, 10 Wend. (N. Y.) 568; see Turner *v.* Davis, 2 Denio (N. Y.), 187.

[2] McDermott *v.* Davison, 1 How. Pr. (N. Y.) 194; Howard *v.* Howard, 11 Ib. 80; see Carpenter *v.* Allen, 13 Jones & S. (N. Y.) 322.

[3] Howard *v.* Rawson, 2 Leigh. (Va.) 733; see Gynn *v.* Kirby, 1 Stra. 402.

pleading and putting the cause at issue.[1] It may be here observed, that the rule permitting the defendant to demand proof that the prosecuting attorney was authorized by the plaintiff to bring the action, does not allow the defendant to compel the attorney for the plaintiff to testify as to whether or not, in bringing the ejectment for plaintiff, in his capacity as administrator, he was employed to maintain plaintiff's individual claim to the land. Such evidence is privileged under the rule governing confidential communications between attorney and client.[2]

§ 418. *Authority of general agent to bring ejectment.*— It has been held in New York, that the general agent of a principal absent from the State, having power to manage the property and business of his principal, and to take and hold possession of and manage the *locus in quo*, is not authorized to employ an attorney to bring ejectment.[3]

§ 419. *Authority by one or more of several co-tenants.*— An instrument executed by one of two joint or common owners of land, in the name of himself and his co-tenant, with the verbal consent of the latter, who is absent, requesting the attorney to continue the ejectment, is sufficient.[4] So a power of attorney from four out of five of the owners of the land, authorizing the commencement of the ejectment, the fifth owner, a married woman, having signed the power without procuring her husband to join, has been held sufficient in Illinois.[5] In an action of ejectment which arose in Tennessee, in which the name of R. was used as a lessor, without his authority, by co-plaintiffs claiming a joint interest in the land, on proof by defendants that R. was dead at the time the action was commenced, and that his name was

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[1] Campbell *v.* Galbreath, 5 Watts (Penn.), 423; Mercier *v.* Mercier, 2 Dall. 142.

[2] Stephens *v.* Mattox, 37 Ga. 289.

[3] See Howard *v.* Howard, 11 How. Pr. (N. Y.) 80.

[4] Howard *v.* Howard, 11 How. Pr. (N. Y.) 80. But see § 1514 N. Y. Code of Civil Procedure.

[5] Lockwood *v.* Mills, 39 Ill. 602.

used without authority, the court refused to dismiss the action, but struck out his name and allowed the survivors to continue the cause.[1]

§ 420. *Outstanding title.*—To authorize a claimant of the title in ejectment to use the name of a third party, some connection must be shown between his title and that of the person in whose name he sues; and it must appear that the paramount outstanding title is not invoked to rob or molest others, but for the protection of the claimant himself. Though the claimant's attorney may have no authority to use the name of a party as lessor of the plaintiff in ejectment, yet the court will not, for that reason, dismiss the action, unless it also clearly appear that the claimant himself is without such authority.[2] And where it is apparent to the court that such use is important for the vindication of the rights of the claimant, the name of a party may be used as lessor by the plaintiff, or the action may be brought in his name, not only without his consent, but against his will, provided the party so using it furnishes sufficient indemnity against loss or damages.[3]

§ 421. *Hamilton* v. *Wright.*—In the case of Hamilton *v.* Wright, in the New York Court of Appeals, it appeared that the plaintiffs Hamilton and Livingston had conveyed the premises in dispute to the plaintiff Gleason, while the defendant was in possession, holding adversely. Gleason was, of course, compelled to institute an ejectment in the name of his grantors, which he did without their knowledge or consent. Defendant prevailed in the action and obtained a judgment for costs against all the plaintiffs. The court held that the grantors were bound by the attorney's appearance, and were liable to defendant for the costs, notwithstanding the ejectment was prosecuted without their knowl-

[1] Greer *v.* Smith, 7 Yerg. (Tenn.) 487.

[2] Shanks *v.* White, 36 Ga. 432; Kinsey *v.* Sensbough, 17 Ib. 540; Adams *v.* McDonald, 29 Ib. 571; see § 190.

[3] Shanks *v.* White, 36 Ga. 432; Fain *v.* Garthright, 5 Ga. 6.

edge or sanction, and at the sole instance, and for the exclusive benefit of the grantee. The court further held that the defendant was not guilty of laches in failing to avail himself of the statutory right of demanding evidence of the attorney's authority to institute the action.[1] The grantors, by delivering a deed of the land, might be fairly presumed to consent that the grantee should avail himself of every legal means by which he could obtain possession of it. It has been said that a deed of lands held adversely operates as a power of attorney authorizing the grantee to employ the grantor's name as plaintiff in ejectment.[2]

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[1] Hamilton *v.* Wright, 37 N. Y. 502; S. C. 5 Trans. App. (N. Y.) 1; Couch *v.* Turner, 17 Ga. 489. As to the effect of an attorney's appearance, see, further, Denton *v.* Noyes, 6 Johns. (N. Y.) 296; Taylor *v.* Trask, 7 Cow. (N. Y.) 249; Gaillard *v.* Smart, 6 Cow. (N. Y.) 385; Meacham *v.* Dudley, 6 Wend. (N. Y.) 514; Anon. 1 Keble, 89; Anon. 1 Salk. 86–88; McCullough *v.* Guetner, 1 Binney (Penn.), 214; Reinholdt *v.* Alberti, 1 Binney (Penn.), 469; Lorymer *v.* Hollister, 2 Stra. 693; Alleley *v.* Colley, Cro. Jac. 695. See, also, Shepherd *v.* Orchard, 6 Mod. 40, and cases cited; Gibson *v.* Bishop of Bath, Barnes, 239.

[2] See § 190.

CHAPTER XV.

OF THE COMPLAINT.

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§ 422. *The fictitious lease.*—In tracing the history of ejectment, it has been shown that the parties were formerly imaginary or fictitious, and that the action was instituted by serving the declaration upon the tenant in possession, accompanied by a notice, signed by Richard Roe, the casual ejector, advising the tenant in possession to appear and procure himself to be made a party and defend the action.[1] The declaration constituted the writ or process of the Court,[2] and the service of the declaration and notice was considered to be the commencement of the action of ejectment.[3]

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[1] See §§ 37, 38, 39.

[2] Rex *v.* Unitt, Strange, 567.

[3] Pindell *v.* Maydwell, 7 B. Mon. (Ky.) 314; Atwell *v.* McLure, 4 Jones (N. C.) Law, 371; Barron *v.* Abeel, 3 Johns. (N. Y.) 481.

§ 423. *How set forth in the declaration.*—In the declaration John Doe declared, on a fictitious lease or demise of the premises in controversy, from A to himself for a term of years, and alleged that, during the existence or continuance of the term, he was ousted from possession by the casual ejector Richard Roe.[1] When the tenant entered into the consent rule, and was substituted as defendant in the place of the casual ejector, it was necessary to file a new declaration against him, and if the court proceeded to trial and judgment without a new declaration, it was error which was not cured by the tenant pleading to the original declaration against Richard Roe, the casual ejector.[2]

§ 424. *Demise, though a fiction, must be consistent.*—Though the demise, under the early practice, was fictitious, yet the plaintiff was required to count on a demise which, if real, would have supported the action;[3] for the fictitious lease and ouster were tested by the same rules as if actually made and proved at the trial, and were required to be consistent with the plaintiff's legal rights, and within the scope of his legal powers.[4] But as the lease was entirely a fiction, invented for the purpose of obtaining a fair and expeditious trial of the title, the courts very properly exercised full discretion, and evinced much liberality in granting amendments, in matters of form, such as enlarging the term and changing the date of the demise.[5]

§ 425. *Modern pleading.*—The use of fictitious or imaginary parties, and the practice of declaring on a fictitious lease, is so nearly obsolete, that further discussion[6] of this

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[1] See §§ 37, 38, 39.

[2] Ayres *v.* McConnel, 2 Scam. (Ill.) 307; Harney *v.* Lamborn, 2 Scam. (Ill.) 480; see Jackson *v.* Wood, 6 Cow. (N. Y.) 586.

[3] Binney *v.* Chesapeake & Ohio Canal Co. 8 Peters, 214; Marston *v.* Butler, 3 Wend. (N. Y.) 154; see § 28.

[4] Den *v.* McShane, 1 Green (N. J.) Law, 35.

[5] Blackwell *v.* Patton, 7 Cranch, 471; McDaniel *v.* Wailes, 4 Cranch C. C. 201; Shattuck *v.* Tucker, N. Chip. (Vt.) 69; Walden *v.* Craig, 9 Wheat. 576; see § 53.

[6] See §§ 27, 34, 37.

novel method of judicial procedure would prove of little practical importance, though the modern practice is still governed, to some extent, by the principles of pleading and practice established by courts of common law.[1] The real parties in interest[2] now appear, by their proper names, as the nominal parties in the action, usually the claimant or party deforced being the plaintiff, and the party in possession the defendant.

§ 426. *Names of the parties.*—By a name in law must be understood the full Christian name, as received in baptism, prefixed to the surname received from the parties' ancestors. Initials, or middle names, are not ordinarily recognized in law, and the addition of senior or junior to a name is a mere matter of description, and forms no part of the name.[3] And where parties whose names are unknown, are sued by fictitious names, the record should so state.[4]

§ 427. *Written pleadings required.*—As controversies over titles to lands are, in most cases, restricted to courts of record, the universal practice is to require written pleadings. Oral pleadings were not tolerated in the system of real actions, as practiced in Virginia, and ought not to be countenanced.[5] The subject-matter of contention in actions to try title being practically indestructible and unchangeable, the highest considerations of public policy and convenience require that all statements or proofs affecting the title in such controversies be preserved upon the court records for

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[1] Greer *v.* Mezes, 24 How. 268; Kitchen *v.* Wilson, 80 N. C. 191.

[2] Hubbell *v.* Lerch, 62 Barb. (N. Y.) 295; affirmed, 58 N. Y. 237; Hogan *v.* Kurtz, 94 U. S. 773.

[3] People *v.* Cook, 14 Barb. (N. Y.) 259; S. C. affi'd, 8 N. Y. 67; Van Voorhis *v.* Budd, 39 Barb. (N. Y.) 479; Blake *v.* Tucker, 12 Vt. 45; Petition of John Snook, 2 Hilt. (N. Y.) 566; Fleet *v.* Youngs, 11 Wend. (N. Y.) 524; see Chapman *v.* Phœnix Nat. Bank, 12 Weekly Dig. (N. Y.) 525; Franklin *v.* Talmadge, 5 Johns. (N. Y.) 84; Rex *v.* Newman, 1 Ld. Raym. 562; McKay *v.* Speak, 8 Texas, 376; State *v.* Martin, 10 Mo. 391; Edmundston *v.* The State, 17 Ala 179.

[4] Ford *v.* Doyle, 37 Cal. 346.

[5] Taylors *v.* Huston, 2 H. & M. (Va.) 161.

future inspection, instead of being left to the uncertain memories of witnesses.

§ 428. *Pleadings, how construed.*—The general rule is, that doubtful phraseology in pleadings is to be taken most strongly against the pleader; and any ambiguity, uncertainty, or omission in the pleadings must, therefore, be at the peril of the party in whose allegations it occurs.[1] In Evans *v.* Womack,[2] on the other hand, the Supreme Court of Texas has held that the petition in trespass to try title is not that sort of pleading which is required to be "certain to a certain intent in every particular," as the rule was understood at common law; while under the practice in Iowa, the rule of the common law, that the allegations of the pleading are to be construed most strongly against the pleader does not obtain, the allegations being liberally construed with a view to substantial justice between the parties.[3] Uncertainty in the pleadings must generally be reached by motion and not by demurrer.[4]

§ 429. *Pleadings in real actions.*—In real actions the demandant was required to allege, and if traversed to prove, a seizin either in himself, or his ancestors through whom he claimed, and in general it was also necessary to aver that he was seized by taking the esplees or profits.[5] Seizin of some kind must be shown in the declaration in a writ of right, either by the constructive seizin in deed, or by the posses-

[1] Hill *v.* Allison, 51 Texas, 390; Howard *v.* Gosset, 10 Q. B. 383; Ferriss *v.* North Am. Fire Ins. Co. 1 Hill (N. Y.), 71; Slocum *v.* Clark, 2 Hill (N. Y.), 475; see Stephen on Pleadings (8th Am. ed.), 378, Rule 11; Bac. Max. Reg. III; Goldham *v.* Edwards, 18 C. B. 389–399; Triscony *v.* Orr, 49 Cal. 612; Herrington *v.* Santa Clara Co. 44 Cal. 496; Requa *v.* Guggenheim, 3 Lans. (N. Y.) 51; Winter *v.* Quarles, 43 Ala. 692; Stephens & C. T. Co. *v.* Central R. R. Co. 4 Vroom (N. J.), 229.

[2] 48 Texas, 230.

[3] Foster *v.* Elliott, 33 Iowa, 216.

[4] Hampson *v.* Fall, 64 Ind. 382; see Cairo & F. R. R. Co. *v.* Parks 32 Ark. 131; Lorillard *v.* Clyde, 86 N. Y. 384.

[5] See Payne *v.* Treadwell, 5 Cal. 310; Roscoe on Actions relating to Real Property. 174; Dally *v.* King, 1 H. Bla. 1; Stearns on Real Actions (ed. 1824), 153; see Plummer *v.* Walker, 24 Me. 14.

sion of the land, and the perception of the profits, or taking the esplees.[1]

§ 430. *Declaration in a writ of entry in Maine.*— Under the practice in Maine four things are necessary in a declaration in a writ of entry. *First.* The premises must be clearly described. *Secondly.* The estate which the demandant claims in the premises must be stated, whether it be a fee simple, a fee tail, for life or for years; and, if for life, then whether for the demandant's own life or that of another. *Thirdly.* An allegation that the demandant was seized of the estate claimed within twenty years. *Fourthly.* A disseizin by the tenant.[2]

§ 431. *Modern declaration or complaint.*—The requisites of the modern declaration, petition, or complaint in actions for the trial of title to lands, are almost uniformly a matter of statutory regulation. Though the requirements in some cases are essentially different in the several States, yet it is important to notice the essential allegations, which are of general and almost universal application.

§ 432. *Must allege possession by defendant.*—Actions in the nature of ejectment must, as we have seen,[3] be instituted against the occupant or party in possession of the lands,[4] and the declaration must generally allege that the defendant is in possession of the disputed property, for, if the plaintiff is clothed with the possession, he cannot support ejectment which is a possessory action.[5] It has been held in Illinois, that the allegations of the declaration should be

[1] Dawson *v.* Watkins, 2 Rob. (Va.) 259; Dally *v.* King, 1 H. Bla. 1; see Plummer *v.* Walker, 24 Me. 14.

[2] Wyman *v.* Brown, 50 Me. 139.

[3] See §§ 231–236.

[4] Hawkins *v.* Reichert, 28 Cal. 534; Wheelock *v.* Warschauer, 21 Cal. 309; Garner *v.* Marshall, 9 Cal. 268; Rodgers *v.* Bell, 53 Ga. 94; Lockwood *v.* Drake, 1 Mich. 14; Schuyler *v.* Marsh, 37 Barb. (N. Y.) 350; Child *v* Chappell, 9 N. Y. 246; Redfield *v.* Utica & S. R. R. Co. 25 Barb. (N. Y.) 54; Morris *v.* Beebe, 54 Ala. 300; Banyer *v.* Empie, 5 Hill (N. Y.), 48; Ward *v.* Parks, 72 N. C. 452.

[5] Corley *v.* Pentz, 76 Penn. St. 57; Buchanan *v.* Streper, 12 Phila. (Penn.) 529; Cooper *v.* Smith, 9 S. & R. (Penn.) 26.

the same, whether the defendant is in the actual occupation or possession of the premises, or, the premises being unoccupied, is exercising acts of ownership thereon, or claiming title thereto, or an interest therein.[1] In North Carolina, however, it has been decided to be sufficient to plead that the defendant is in possession of a part of the premises, without specifying the particular portion.[2] The objection that the complaint was defective in that it did not positively allege that the defendants were in possession, but merely stated that they withheld the land, has been held, in that State, to be cured by verdict.[3] A declaration alleging that the plaintiff was in possession, and was ousted on the —— day of September, 1862, was held sufficient under the practice in Illinois, the objection not having been raised until after judgment, though the defect, it was said, might, undoubtedly, have constituted good ground of special demurrer.[4]

§ 433. *Must allege wrongful or unlawful withholding of possession.*—The complaint or declaration should also contain an averment that the defendant *wrongfully* or *unlawfully* withholds the possession of the premises claimed. Ejectment, as already stated, was originally an action of trespass,[5] and the defendant or disseizor, under the modern practice, is regarded as a wrong-doer, and must be put in the wrong by the pleadings. Under the practice in New York a complaint, which does not set out affirmatively that the possession of the premises is unlawfully withheld from the claimant, is fatally defective.[6] The Supreme Court of Wisconsin has decided that, under the statute of that State, it is necessary in an action to recover real estate to allege, in the complaint, that the defendant "unlawfully withholds the possession" of the premises claimed, although the premises

[1] Dickerson *v.* Hendryx, 88 Ill. 66; see Platto *v.* Jante, 35 Wis. 629.
[2] Johnson *v.* Nevill, 65 N. C. 677.
[3] Wiseman *v.* Penland, 79 N. C. 197.
[4] Parr *v.* Van Horn, 38 Ill. 226.
[5] See § 1.
[6] Taylor *v.* Crane, 15 How. Pr. (N. Y.) 358.

may not be actually occupied at the commencement of the action.[1] In the same State the statute requires that the complaint should specifically allege that the plaintiff is entitled to the possession of the premises.[2]

§ 434. *Plaintiff's seizin.*—In New York the plaintiff must allege, in the complaint in ejectment, that he is lawfully seized or possessed of a certain estate in the premises, describing them, or of some tangible interest therein; that he is entitled to the immediate possession of the lands, and that the defendant unlawfully withholds the possession thereof from him.[3] If the complaint fails to state the nature or quality of the estate claimed by the plaintiff, it has been held in that State that this defect should be taken advantage of by demurrer. It does not follow, because the pleading is defective in some particulars, that no cause of action is made out by the facts stated, and, after a trial upon the merits, this objection cannot be taken by motion to dismiss the complaint.[4]

§ 435. *Allegations as to plaintiff's title.*—The claimant must allege title in himself at the time of the commencement of the action, or at the time of the wrongful entry by defendant,[5] and must, ordinarily, prove on the trial that he had title to the premises in dispute on the day named in the complaint or declaration.[6] An allegation that the plaintiff "claims" the premises "in fee simple absolute," is, under the practice in California, equivalent to a direct aver-

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[1] Platto *v.* Jante, 35 Wis. 629; see Barclay *v.* Yeomans, 27 Wis. 682; Lee *v.* Simpson, 29 Wis. 338.

[2] Barclay *v.* Yeomans, 27 Wis. 682.

[3] People *v.* Mayor, &c. 28 Barb. (N. Y.) 240; s. c. 17 How. Pr. (N. Y.) 56; Walter *v.* Lockwood, 23 Barb. (N. Y.) 228; see Sears *v.* Taylor, 4 Col. 38. As to the sufficiency of a complaint in ejectment for dower, see Ellicott *v.* Mosier, 7 N. Y. 201.

[4] Clark *v.* Crego, 47 Barb. (N. Y.) 599.

[5] Armstrong *v.* Hinds, 8 Minn. 254.

[6] Pitkin *v.* Yaw, 13 Ill. 251; Wood *v.* Morton, 11 Ill. 547; Holt *v.* Rees, 44 Ill. 30; Joy *v.* Berdell, 25 Ill. 542.

ment of such title in the plaintiff.[1] In Steinback *v.* Fitzpatrick,[2] in the Supreme Court of California, it was held that the plaintiff must either aver title or possession, and that the mere taking from the land of a portion of the herbage growing thereon was not sufficient to give a right of possession that would support the action.

§ 436. *Under claim of fee simple, life estate cannot be recovered.*—The statutes, in many of our States, require the plaintiff to state the nature of the estate claimed. Under a count claiming an estate in fee simple, the plaintiff cannot recover a life estate;[3] and a real action in which the writ claims an estate in fee simple, cannot be maintained by proof of an estate in fee tail only.[4]

§ 437. *Declaration on legal title will not support equitable recovery.*—It has been repeatedly decided that where the plaintiff declared upon a legal title he was not entitled to recover upon showing an equitable title. The equitable title if relied upon should be set forth in the pleadings; and if the evidence shows that the plaintiff, who has declared upon a legal title, has only the equitable title, it is not regarded as a variance, but as a failure of proof.[5] The rule requiring the plaintiff to plead an equitable title is obviously just and reasonable, because such titles are usually founded upon a complex state of facts often peculiarly within the claimant's knowledge, and which the opposing party is entitled to have spread upon the records, for his information. As opposed to the cases just cited, however, it has been

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[1] Marshall *v.* Shafter, 32 Cal. 176.

[2] 12 Cal. 295.

[3] Forsyth *v.* Rowell, 59 Me. 131; Rawson *v.* Taylor, 57 Me. 343; Almond *v.* Bonnell, 76 Ill. 536; Lyon *v.* Kain, 36 Ill. 362; Breed *v.* Osborne, 113 Mass. 318; see Rupert *v.* Mark, 15 Ill. 540; but see Harrison *v.* Stevens, 12 Wend. (N. Y.) 170; Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

[4] Hamilton *v.* Wentworth, 58 Me. 101.

[5] Sutton *v.* Aiken, 57 Ga. 416; Groves *v.* Marks, 32 Ind. 319; Jones *v.* Parker, 55 Ga. 12; Rowe *v.* Beckett, 30 Ind. 154; Seaton *v.* Son, 32 Cal. 481; Peck *v.* Newton, 46 Barb. (N. Y.) 173.

held in New York, that a plaintiff who had claimed in his complaint the ownership of the lands in fee simple, might prove title as mortgagee in possession by agreement with the mortgagor.[1]

§ 438. *Nature of the interest claimed.*—In Harrison *v.* Stevens,[2] Chief Justice Savage, in delivering the opinion of the New York Supreme Court, held that the plaintiff in ejectment was not bound to set forth in the complaint the nature of the estate, or the quantity of the interest claimed by him, unless required to do so by statute. But under the modern practice the statutes, which require the claimant to state the nature and extent of the interest sought to be recovered in the lands in controversy in effect preclude a recovery upon proof of a different interest, for evidence of a different interest or estate is inadmissible, as it would not tend to establish the issues raised by the pleadings. Thus it has been held in Wisconsin, that a complaint for an undivided interest in lands was properly dismissed when it appeared that the plaintiff's share was less than that claimed.[3] So it has been decided, that, upon a claim for an undivided share of lands, the plaintiff could not recover an undivided interest greater or less than the share claimed, nor could he recover the entire property. Neither could he, upon a claim of the whole property, have a judgment for an undivided part.[4] In Illinois it is clear that under a declaration claiming the whole estate, an undivided interest cannot be recovered.[5] While the courts generally possess power to grant amendments to remedy difficulties of this nature, yet the exercise

[1] Chapman *v.* Del., L. & W. R. R. 3 Lansing (N.Y.), 261.

[2] 12 Wend. (N. Y.) 170. Baker *v.* Heirs of Chastang, 18 Ala. 417; Van Alstyne *v.* Spraker, 13 Wend. (N. Y.) 578; but see Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

[3] Riehl *v.* Bingenheimer, 28 Wis. 84–89.

[4] Allie *v.* Schmitz, 17 Wis. 169; Bresee *v.* Stiles, 22 Wis. 120; Eagan *v.* Delaney, 16 Cal. 85; see Holmes *v.* Seely, 17 Wend. (N. Y.) 75; Cole *v.* Irvine, 6 Hill (N. Y.), 634; Cook *v.* St. Paul's Church, 5 Hun (N. Y.), 293.

[5] Murphy *v.* Orr, 32 Ill. 489; Clark *v.* Thompson, 47 Ill. 25; Hardin *v.* Kirk, 49 Ill. 153.

of this power is usually discretionary, and, even though the amendment is granted, terms are often imposed, and the cause delayed, so that the necessity of correctly stating the interest and estate of the claimant ought never to be overlooked. If the plaintiff declares on a particular estate or interest, the defendant is justified in preparing to disprove, at the trial, only the allegations of the complaint, and it would be unfair to the latter to grant amendments, at the trial, by which the plaintiff was permitted to introduce evidence of a different title or interest, unless it is clearly shown that the defendant could not possibly have been misled by the erroneous pleading. The plaintiff may recover a part of the premises for which he declared,[1] and the complaint in such a case may be amended so as to conform to the proofs.[2]

§ 439. *Nature of estate—How set forth.*—As we have said, in many of our States the plaintiff must set forth the nature of his estate in the property claimed, and specify whether it is in fee, for life, or for years.[3] In a case in the Supreme Court of New York, the general rule is stated to be that the plaintiff must allege the nature of his claim. But it is not necessary to state it in detail, nor need the facts constituting the estate or interest claimed in the land be set forth, but the general form or character of the interest must be averred.[4] In other words, the plaintiff must allege that he is seized of some certain estate.[5] In a case which arose in Alabama, it was said that the complaint should allege that the plaintiff was possessed of the lands in controversy, and that, after his right had accrued, the defendant entered thereon and unlawfully withheld and detained the premises. Otherwise the

[1] McArthur *v.* Porter, 6 Peters, 205.

[2] Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116–131.

[3] Thompson *v.* Wolf, 6 Oregon, 308; Walter *v.* Lockwood, 23 Barb. (N. Y.) 228; Bridges *v.* Cundiff, 45 Texas, 440.

[4] Austin *v.* Schluyter, 7 Hun (N. Y.), 275; Ensign *v.* Sherman, 13 How. Pr. (N. Y.) 39; Walter *v.* Lockwood, 23 Barb. (N. Y.) 228; see Bridges *v.* Cundiff, 45 Texas, 440.

[5] People *v.* The Mayor, &c. 28 Barb. (N.Y.) 248; Rawlings *v.* Bailey, 15 Ill. 178; see Rogers *v.* Sinsheimer, 50 N. Y. 646.

complaint would be defective both under the statute of that State and at common law.[1]

§ 440. *Pleading an estate in fee simple.*— It has been held in Tennessee, where the declaration averred an estate in fee in the plaintiff, that the estate claimed was sufficiently set forth, and that the pleader need not specify the claim or title under which defendant entered.[2] And in Maine, under a statute which required the demandant to "set forth the estate he claims in the premises, whether in fee simple, fee tail, for life, or for years," it has been held sufficient to aver in a real action that he is seized in "fee," for the owner of a fee simple is frequently called the tenant in fee.[3] An estate in fee simple may be pleaded in general terms without showing when or how the estate arose or was created.[4]

§ 441. *Particular estates.*—A general rule of pleading is that the commencement of particular estates must be shown. If a party sets up in his own favor an estate tail, an estate for life, a term for years, or a tenancy at will, he must show the derivation of that title, from its commencement; that is, from the last seizin in fee simple.[5] The distinction between pleading estates in fee simple and particular estates, originates in the nature of the estates. A fee simple may be acquired by wrong, as by disseizin, or by causes involving matters of fact, as to which a jury are competent to judge, and which need not therefore be spread upon the records for the information of the court. Hence a general allegation of a seizin in fee simple is traversable. Particular estates, on the other hand, are carved out of a fee simple, and can be created only by contract, conveyance, or operation

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[1] Bush *v.* Glover, 47 Ala. 167.

[2] Smith *v.* Cox, 6 Heisk. (Tenn.) 462.

[3] Jordan *v.* Record, 70 Me. 529; see 2 Bla. Com. 104–106; Stephens on Pleadings, pp. 304, 305.

[4] Silly *v.* Dally, 12 Mod. 191; Parr *v.* Van Horn 38 Ill. 226; Marshall *v.* Shafter, 32 Cal. 176.

[5] See Stephen on Pleading, p. 307; Hendy *v.* Stephenson, 10 East, 60; Johns *v.* Whitley, 3 Wils. 72; Silly *v.* Dally, 12 Mod. 191.

of law; hence, it is said, that a general allegation of seizin of a particular estate is defective, as it combines law and fact, and is not traversable.[1] The strictness of this rule of pleading, however, has been much softened by the provisions of modern codes of procedure, which, in some States at least, permit a recovery in ejectment by a claimant vested with a particular estate, who has merely asserted ownership of such an estate, in the complaint, without tracing its origin.[2]

§ 442. *General allegation of ownership, seizin and possession.—What may be proved under.*—In Bridges *v.* Cundiff,[3] in the Supreme Court of Texas, the plaintiffs, in their pleadings, made no effort to set out the commencement or derivation of the title, but only averred, in general terms, their ownership, and the legal seizin and possession. Under these averments, it was held to be competent for them to prove a grant of the premises to their ancestor, and that they were his heirs. It was not necessary to aver, in the petition, that they claimed by inheritance. A different rule might apply if the plaintiff had undertaken to specifically set forth the title, and had failed to aver heirship.

§ 443. *Effect of setting forth specific chain of title.*—If the plaintiff sets out a specific chain of title, his evidence will be confined to the title as alleged,[4] and while it is not necessary to aver the evidences of the plaintiff's title, yet if these be alleged, the substantial elements of the title must be stated.[5] In Hill *v.* Allison,[6] the plaintiff, in anticipation of defendant's answer, and in avoidance of his title, set forth a sheriff's deed under which he alleged the defendant claimed, and then sought to avoid the deed by averments

[1] Scilly *v.* Dalby, Comb. 476; S. C. 12 Mod. 191; S. C. 2 Salk. 562; especially Johns *v.* Whitley, 3 Wils. 65–72.

[2] See §§ 439, 445.

[3] 45 Texas, 440. See Ufford *v.* Wells, 52 Texas, 612.

[4] Turner *v.* Ferguson, 39 Texas, 505; see Custard *v.* Musgrove, 47 Texas, 217; Eagan *v.* Delaney, 16 Cal. 85; Rivers *v.* Foote, 11 Texas, 670.

[5] Hughes *v.* Lane, 6 Texas, 289.

[6] 51 Texas, 390. See Harlan *v.* Haynie, 9 Texas, 462.

that the property was, at the time of the levy and sale homestead. The answer was a plea of not guilty. It was held that the plaintiff assumed the entire burden of the issue thus made and tendered by him.

§ 444. *Muniments and chain of title not to be set forth.*— In an action for the recovery of the possession of real property, it is not necessary for the plaintiff to set out his muniments, these being merely part of his evidence. In the case of Pease *v.* Hannah,[1] in Oregon, a motion was granted striking out that portion of the complaint which set forth the plaintiff's chain of title. And where a deed, under which the plaintiff claimed title, was set out at length in the complaint, in an action for the recovery of real property in Indiana, the court held that the claimant was not thereby relieved from the necessity of proving its delivery, and that it was improper practice, in pleading, to set out, *in extenso*, the deeds upon which the parties rely, on either side, to make out their titles.[2] As a general rule, the absence of material allegations in a complaint cannot be supplied by reference to exhibits.[3] In Fitch *v.* Cornell,[4] it was held, that an exhibit was no part of a pleading in an action at law, and that a record or instrument should be stated in a pleading, either according to its tenor or legal effect.

§ 445. *Evidence of title not to be pleaded.*—In Colman *v.* Clements,[5] it was held by the Supreme Court of California, that the complainant who had averred ownership in general terms, was not required to set forth, in the pleadings, the rules and customs of mining, upon which his title partly depended. The plaintiff is not bound to plead or

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[1] 3 Oregon, 301.

[2] Burkholder *v.* Casad, 47 Ind. 418; see Cairo & F. R. R. Co. *v.* Parks, 32 Ark. 131; see Hann. & St. J. R. R. Co. *v.* Knudson, 62 Mo. 569; Buck *v.* Fischer, 2 Col. 182.

[3] Watkins *v.* Brunt, 53 Ind. 208; City of Los Angeles *v.* Signoret, 50 Cal. 298.

[4] 1 Sawyer, 160. But see Montgomery *v.* Gorrell, 51 Ind. 309.

[5] 23 Cal. 245.

disclose the evidence of his title; facts,[1] and not the evidence of facts,[2] must be stated;[3] nor should he set forth the mesne conveyances through which the title is deraigned.[4] It is not proper, in any form of action, to plead the evidence by which a cause of action is to be established.[5]

§ 446. *In California seizin must be averred.*—It has been held, in California, that none of the allegations peculiar to the old action of ejectment are necessary in an action to recover the possession of real property. The seizin is the fact to be alleged, and it is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. The right of possession follows the seizin, and need not be alleged.[6]

§ 447. *Precision in pleading.*—In McCarthy *v.* Yale,[7] the Supreme Court of that State advert to the prevalent opinion, that a style of pleading in the action of ejectment should be adopted which would show with precision the right or title under which the plaintiff claims the possession, and the true position of the defendant, both with respect to the title and the possession. Conceding that the change might be preferable to the existing general system of pleading, as by adopting such a method of procedure the judgment roll would exhibit the issues, which were tried and determined, with more distinctness and certainty, the court held that the change, if desirable, must be effected by statute. The same objection, it may be observed, was urged against the action of ejectment in the early stages of its history, and one of the redeeming features of the intricate system of real actions was the fact that the nature of the writ and the judgment record revealed the precise issue involved.[8]

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[1] Hughes *v.* Lane, 6 Texas, 289.
[2] Depuy *v.* Williams, 26 Cal. 309.
[3] Coryell *v.* Cain, 16 Cal. 567; Bruck *v.* Tucker, 42 Cal. 346.
[4] Coryell *v.* Cain, 16 Cal. 567.
[5] Badeau *v.* Niles, 9 Abb. N. C. (N. Y.) 48.
[6] Payne *v.* Treadwell, 16 Cal. 220; see McCarthy *v.* Yale, 39 Cal. 585.
[7] 39 Cal. 585.
[8] See § 42.

§ 448. *Mortgagor against mortgagee.*—Holt *v.* Rees[1] was ejectment instituted by a mortgagor against a mortgagee. The title, entry and ouster were laid in the declaration, May 3, 1865, while it appeared that the mortgage was not extinguished until August 22, 1865. The court held that on the day laid, the right of possession was not in the plaintiff, and that therefore the action could not be supported.

§ 449. *Joint title.*—The title must be truly stated in the declaration. A joint demise can only be supported by showing a title in each to demise the whole. If one of the plaintiffs has no title,[2] or the title is several,[3] the action must fail; and a joint demise by husband and wife, when the title was in the husband alone, cannot be maintained.[4]

§ 450. *Joinder of hostile claimants.*—In Hubbell *v.* Lerch,[5] in the New York Court of Appeals, the principles regulating the joinder of plaintiffs in ejectment, claiming under titles hostile to each other, are discussed. The complaint was so framed that both plaintiffs united in stating that the plaintiff A. H. was seized in his own right of an estate in fee in the premises as grantee of the heirs at law of one H., deceased, who it was alleged had died seized of the lands. In a subsequent portion of the complaint, the same plaintiffs united in declaring that H., in his lifetime, conveyed the premises upon a valid trust to M. and S., of whom the other plaintiff, A. S. H., was the successor. The court decided that if the complaint was to be regarded as containing only one count it showed no right of action in either plaintiff. Each plaintiff, in the same breath,

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[1] 44 Ill. 30.

[2] Hoyle *v.* Stowe, 2 Dev. (N. C.) Law, 318; see Bryan *v.* Manning, 6 Jones (N. C.) Law, 334; Teal *v.* Terrell, 48 Texas, 491; Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 19; Taylor *v.* Whiting, 4 Mon. (Ky.) 365; see contra, Miller *v.* Bledsoe, 61 Mo. 96; Tormey *v.* Pierce, 42 Cal. 335; see §§ 187–189.

[3] Teal *v.* Terrell, 48 Texas, 491; see §§ 187–189.

[4] Tucker *v.* Vance, 2 A. K. Marsh. (Ky.) 458.

[5] 58 N. Y. 239. See 62 Barb. (N. Y.) 295; see § 188.

stated facts showing that he was and that he was not entitled to recover. If no answer had been interposed, the court would have been unable to determine which plaintiff was entitled to judgment. On the other hand, if the complaint was to be regarded as containing two counts, or statements of causes of action, it was equally defective. The practice in New York does not permit two persons, each of whom claims the whole of a piece of land by a title hostile to that of the other, to unite as plaintiffs in an action of ejectment against a third party in possession, and to set forth the title of each plaintiff in a separate count.[1]

§ 451. *Ejectment by infant.*—In Voorhies *v.* Voorhies[2] it was held, in ejectment brought to recover possession of lands conveyed by plaintiff during his infancy, that he must disaffirm the deed prior to the action, and give notice of his intention not to be bound by it, and this act of disaffirmance must be averred in the complaint.

§ 452. *Declaration against several defendants holding different portions of same premises.*—One declaration in ejectment will lie against several defendants holding different portions of the same tract.[3] And where the defendants occupied separately the different stories of a building, it was held, in New York, that the action would lie against all the defendants, as being joint trespassers on the land, in using it to sustain and uphold the house, and for other uses necessary for the enjoyment of the house.[4]

§ 453. *Co-tenants.*—In ejectment between co-tenants, as already shown, the complaint should aver an actual ouster,

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[1] See St. John *v.* Pierce, 22 Barb. (N. Y.) 362; affi'd, 26 How. Pr. (N. Y.) 599; Hubbell *v.* Lerch, 62 Barb. (N. Y.) 295.

[2] 24 Barb. (N. Y.) 150–153. See §§ 196–198.

[3] Needham *v.* Branson, 5 Ired. (N. C.) Law, 426; Marshall *v.* Wood, 5 Vt. 250; Stuart *v.* Coalter, 4 Rand. (Va.) 74; Camden *v.* Haskill, 3 Rand. (Va.) 462; White *v.* Pickering, 12 S & R. (Penn.) 435; see §§ 238, 239, 240.

[4] Pearce *v.* Ferris, 10 N. Y. 280; Pearce *v.* Colden, 8 Barb. (N. Y.) 522; see Davidson *v.* Barclay, 63 Penn. St. 406; Beard *v.* Federy, 3 Wall. 478; see §§ 238 239, 240.

or some act amounting to a total denial of the plaintiff's right of possession, for ouster must be shown to sustain ejectment between co-tenants.[1]

§ 454. *Damages for withholding possession.*—The claims for mesne profits and damages for the withholding of the premises may properly be joined with the demand for possession, and the jury, upon finding for the plaintiff, on the main issue, should give a verdict for damages up to the day of the trial.[2] The claims for damages, and for mesne profits, as we shall presently see, are separate and distinct causes of action, which must be pleaded, and it is error to allow evidence of the value of the use and occupation where only damages are claimed in the complaint.[3]

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[1] Edwards *v.* Bishop, 4 N. Y. 61; see Nicholson *v.* Caress, 76 Ind. 24; see § 276 and succeeding sections.

[2] Vandevoort *v.* Gould, 36 N. Y. 639; see Livingston *v.* Tanner, 12 Barb. (N.Y.) 481; Holmes *v.* Davis, 21 Ib. 265; S. C. on appeal, 19 N. Y. 488; Bell *v.* Medford, 57 Miss. 31; Lord *v.* Dearing, 24 Minn. 110; Emrich *v.* Ireland, 55 Miss. 390; Bottorff *v.* Wise, 53 Ind. 32; Woodhull *v.* Rosenthal, 61 N. Y. 382; Beard *v.* Federy, 3 Wall. 478.

[3] Larned *v.* Hudson, 57 N. Y. 151.

CHAPTER XVI.

HOW THE LANDS ARE TO BE DESCRIBED.

§ 455. Descriptions under the early practice.
456. Examples.
457. Modern practice.
458. General and particular descriptions.
459. Johnson *v.* Nevill.
§ 460. Property described by street numbers.
461. Description by reputed name.
462. Sections of townships.
463. Defective description.
464. Amendment of description.

§ 455. *Descriptions under the early practice.*—Under the practice, as established in the early action of ejectment, a general and imperfect description in the declaration of the lands sued for was sufficient. It is true that when the action was originally adapted to its new uses the same certainty of description was, according to some of the cases, held to be requisite, as in a *præcipe quod reddat*.[1] But the strict rules prevailing in real actions, regulating the pleading and the manner of describing the lands, if ever fully enforced, were soon relaxed in ejectment, and no greater certainty of statement was required than in an ordinary action of trespass. In this respect the peculiarities of a personal action clung to ejectment after it had been transformed and adopted as a remedy for trying titles. The practice prevailed, however, for a considerable time of requiring a description sufficiently specific and definite to enable the sheriff to find the premises recovered, and deliver the possession by consulting the writ solely, and without any suggestion or information from the lessor of the plaintiff, as to the situation or boundaries of the lands.[2] This strict method of procedure, however, was soon relaxed.[3] In Connor *v.*

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[1] Macduncoh *v.* Stafford, 2 Rolle, 166; see Adams on Ejectment (4th Am. ed.), p. *26.

[2] See Bindover *v.* Sindercombe, 2 Ld. Raym. 1470, and cases.

[3] See Connor *v.* West, 5 Burr. 2672; Cottingham *v.* King, 1 Burr. 623–630; St. John *v.* Commyn, Yelv. 117.

West,[1] Lord Mansfield explains the reason of the change as follows: "A *præcipe* in a real action requires exactness and precision; but an ejectment is a fictitious action, contrived for ease, dispatch, and saving expense; and has, of later times, been taken with more latitude than formerly. And though it has been often said, 'that the descriptions ought to be so certain that the sheriff may be able to know, without any information from the plaintiff, what he is to give possession of;' yet, in truth and fact, the sheriff delivers possession at the shewing of the plaintiff, and at the peril of the plaintiff; who is, at his peril, to take possession of no more than he is entitled to."

§ 456. *Examples.*—Some of the descriptions inserted in the declaration, under the early practice, were vague and imperfect in the extreme, and are curiosities in procedure. Mr. Adams[2] has made a collection of these descriptions in his treatise. Thus ejectment has been maintained for "five acres of alder carr" in Norfolk; alder carr, in that county, signifying land covered with alders. So, also, in Suffolk for a beast gate; and in Yorkshire for cattle gates; and for so many acres of bog, or of mountain;[3] for a messuage or tenement called the Black Swan;[4] for corn mills, without stating whether wind or water mills,[5] and for a stable or cottage.[6] So, a declaration in ejectment for a place called a passage room, has been held sufficient,[7] and for a room and a chamber in the second story;[8] and for "part of a house in A;"[9] and for a certain place called a vestry;[10]

[1] 5 Burr. 2672. See Johnson *v.* Nevill, 65 N. C. 677.

[2] Adams on Ejectment (4th Am. ed.), p. 27.

[3] Barnes *v.* Peterson, 2 Stran. 1063; Bennington *v.* Goodtitle, 2 Stran. 1084.

[4] Burbury *v.* Yeomans, 1 Sid. 295.

[5] Fitzgerald *v.* Marshall, 1 Mod. 90.

[6] Hill *v.* Giles, Cro. Eliz. 818; Lady Dacres' Case, 1 Lev. 58; Royston *v.* Eccleston, Cro. Jac. 654; S. C. Palm. 337.

[7] Bindover *v.* Sindercombe, 2 Ld. Raym. 1470.

[8] 3 Leon, 210.

[9] Sullivane *v.* Seagrave, 2 Stran. 695; Rawson *v.* Maynard, Cro. Eliz. 286.

[10] Hutchinson *v.* Puller, 3 Lev. 95.

and for ten acres of underwood;[1] and for "one hundred acres of gorse and furze;"[2] and for "fifty acres of moore and marsh;"[3] and for "ten acres of pease;"[4] and for a manor or moiety of a manor generally, without any mention of the number of acres.[5]

§ 457. *Modern practice.*—The method of describing the lands in the pleadings and process in modern actions in the nature of ejectment, is regulated, in some of our States, by statute, which of course controls. The general requisites of a sufficient description of lands are so obviously apparent that most of the numerous mistakes and miscarriages of actions, to be found in the reports, resulting from imperfect descriptions of the *locus in quo* in the pleadings, must be attributed to the carelessness of pleaders. The requirements as to correctly pleading the geographical position of the lands will be noticed in discussing the subject of venue.[6] The general rule is that the country or State and the county in which the lands are situated, should be stated in the pleadings, and in most cases the town or city, or section or subdivision of the county, should be added. These allegations are often held to be jurisdictional, actions for the trial of title to land being local in their nature, and should not be overlooked by the pleader.[7]

§ 458. *General and particular descriptions.*—In Inge *v.* Garrett,[8] in the Supreme Court of Indiana, it appeared that the complaint contained a general, followed by a specific, description of the lands. The particular description did not, as it professed to, contain a more definite description of the same lands mentioned in the general description.

[1] Warren *v.* Wakeley, 2 Rolle, 482.

[2] Fitzgerald *v.* Marshall, 1 Mod. 90.

[3] Connor *v.* West, 5 Burr. 2672.

[4] Odingsal *v.* Jackson, 1 Brown C. & G. 149.

[5] Warden's Case, Hetley, 146; Cole *v.* Aylott, Litt. 299–301; Hems *v.* Stroud, Latch. 61.

[6] See Chapter XVII.

[7] See Leary *v.* Langsdale, 35 Ind. 74.

[8] 38 Ind. 96.

The court held that if these descriptions were intended to apply to the same land, and were contained in a deed, the rule that words of particular description will control more general terms of description, when both cannot stand together, would require the court to adopt the more particular and reject the general description.[1] The same rule, it was held, should be applied to a pleading. Hence a deed which did not contain the particular description set forth in complaint, was held to be properly rejected on the trial. And where the declaration contains a general description, the court will on motion order the plaintiff to furnish a more particular and detailed description of the lands.[2]

§ 459. *Johnson* v. *Nevill.*—The Supreme Court of North Carolina remarked, in Johnson *v.* Nevill,[3] that particularity of description admitted of many degrees, and its sufficiency depended upon the objects to be answered by it. That in ejectment there can be but two objects: *First.* To enlighten the defendant as to what land is claimed. *Secondly.* To enable the sheriff to determine from the execution itself of what premises he is to put the plaintiff in possession. The court further remark that though these reasons seem plausible, yet "their weight is much diminished by the reflection, that however particular and definite (short of a photograph) a description of an object may be, it always requires some evidence outside of the written description to enable a stranger to apply it to the parcel intended; so that even in such a case, the sheriff is obliged either to satisfy himself of the identity of the land, by witnesses, or to act on the representations of the plaintiff. It has, therefore, been the modern practice for the plaintiff, at his peril, to point out the land recovered, to the sheriff, who puts him in pos-

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[1] See Gano *v.* Aldridge, 27 Ind. 294; Moore *v.* Griffin, 9 Shep. (Me.) 350.

[2] Phillips *v.* Phillips, 1 Zab. (N. J.) 436; Goodright *v.* Rich, 7 T. R. 332, and note; Doe *d.* Roberts *v.* Roe, 13 M. & W. 691; Doe *d.* Winnall *v.* Broad, 2 Man. & G. 523; Johnson *v.* Nevill, 65 N. C. 677.

[3] 65 N. C. 677.

session accordingly. Such a practice sometimes produces inconvenience, as when the plaintiff seeks to obtain possession of more or other land than he has recovered. But, in such a case, the court will always interfere and restrict the action of the sheriff under the writ, to the land to which the plaintiff proved title on the trial. It was found by experience that the contrary course of requiring a precise and minute description of the land, in the declaration, was attended with inconveniences vastly greater. If a description be minute, it must be proved with exactness, or else the minuteness only misleads. Under such a rule, there is constant danger that a plaintiff may lose his cause from a variance in minute particulars, not entering into the merits, and the delay and expense of trials is greatly aggravated. To avoid these evils, the constant tendency of modern opinion has been to reduce the certainty required in pleading within the more moderate limits which experience has shown to be reasonable and convenient."[1]

§ 460. *Property described by street numbers.*—A declaration in ejectment "for the premises situated No. 136 South Third street, in the city of Philadelphia," is sufficient in a city having a known system of street numbers regulated by municipal laws, recognized in the transaction of general business, and acted upon by every one.[2] A description by metes and bounds is required in ejectment only so far as is necessary to identify the property with certainty.[3] And a declaration in ejectment for property "lying between Water street and the river Monongahela, with the appurtenances, situate and being in the city of Pittsburgh," has been sustained, as being sufficiently specific, by the Supreme Court of the United States.[4]

§ 461. *Description by reputed name.*—A description in a

[1] See Seward *v.* Jackson, 8 Cow. (N. Y.) 427; Clark *v.* Clark, 7 Vt. 190.

[2] Flanigen *v.* City of Philadelphia, 51 Penn. St. 491.

[3] Doll *v.* Feller, 16 Cal. 432.

[4] Barclay *v.* Howell, 6 Peters, 498.

will of "all my lands on both sides of Haw river in Chatham County, and all the mills and appurtenances and improvements thereto, said property being known as the McClenahan Mills," has been held sufficiently definite to constitute color of title, provided the jury found that the tract of land was well known throughout the county by the name used in the will.[1] So designating land as "The Home Place," "The Lynn Place," and "The Leonard Greeson Place," have been held sufficient descriptions if the property was well known by that name.[2] The name of a place may serve to identify it to the apprehension of more persons than a description by coterminous lands and watercourses, and with equal certainty. For example "Mount Vernon, the late residence of General Washington," is better known by that name than by a description of it as situate on the Potomac river, and adjoining the lands of A., B. and C. Indeed the name of a place frequently overrules a mistaken description.[3] A count in a writ of right demanding "a certain tenement, consisting of the one stone house with the appurtenances," was held to be a demand for the land on which the house stands, and sufficiently certain.[4] And in a declaration in trespass to try title, although advantageous, it is not necessary to describe a close by its abuttals; "a certain plantation, close and tract of land" has been held to be a sufficient description.[5]

§ 462. *Sections of townships.*—Proof of the number of the section, and the township, range, and meridian, is sufficient to sustain a verdict, where the declaration counts for lands by the number of the government surveys.[6] A com-

[1] Henley *v.* Wilson, 81 N. C. 405.

[2] Smith *v.* Low, 2 Ired. (N. C.) Law, 457.

[3] See Proctor *v.* Pool, 4 Dev. (N. C.) Law, 370; see, further, Ritter *v.* Barrett, 4 Dev. & Bat. (N. C.) Law, 133; Kitchen *v.* Herring, 7 Ired. Eq. (N. C.) 190; Fouke *v.* Kemp's Lessee, 5 Harr. & Johns. (Md.) 135; Lahiffe *v.* Hunter, Harper (S. C.) Law, 184.

[4] Snapp *v.* Spengler, 2 Leigh (Va.), 1; see Beverley *v.* Fogg, 1 Call (Va.), 484.

[5] Broughton *v.* Broughton, 4 Rich. (S. C.) Law, 491.

[6] Dart *v.* Hercules, 34 Ill. 395; see, further, Sims *v.* Thompson, 30 Ala. 158;

plaint in ejectment for a "part of the southwest quarter of section —, township nineteen, range four west, containing one hundred and fourteen and sixty-five hundredths acres," has been held, by the Supreme Court of Indiana, to be bad. The court remarks, "A judgment, founded on such a complaint, would hardly authorize the issuing of a writ which would justify the officer in putting the plaintiff in possession of any particular property."[1]

§ 463. *Defective description.*—In Budd *v.* Bingham,[2] in the Supreme Court of New York, the following description: "Northwardly, by lands of said plaintiff; eastwardly, by lands of said plaintiff; southwardly, by lands of said defendant; and westwardly, by lands of said plaintiff," was held to embrace nothing whatever, or rather to describe only a straight line; because, assuming that which the complaint asserts to be true, the lands of the plaintiff and the defendant join upon a line running east and west; hence, there can be no intermediate territory as the lines unite, and are blended into one line. It was further held that, as the complaint omitted to describe any premises whatever, there was nothing which could be made definite and certain by amendment, or by a bill of particulars.

§ 464. *Amendment of description.*—A misdescription in the writ may be amended,[3] and a new description filed, but the amendment, where it includes new lands, will not relate back to the commencement of the action, so as to affect rights the defendant might have acquired under the statute of limitations. The rights of the defendant are the same as though the writ had issued at the date of the amendment.[4] It seems to have been held in Maine, on a writ of entry, that an amendment embracing a different piece of

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Rayburn *v.* Elrod, 43 Ala. 700; Heifner *v.* Porter, 12 Ala. 470; Pickett *v.* Doe, 13 Miss. 470.

[1] Jolly *v.* Ghering, 40 Ind. 139.

[2] 18 Barb. (N. Y.) 494.

[3] Leeds *v.* Lockwood, 84 Penn. St. 70; Sample *v.* Robb, 16 Penn. St. 305.

[4] Kaul *v.* Lawrence, 73 Penn. St. 410; Trego *v.* Lewis, 58 Penn. St. 463; Kille *v.* Ege, 82 Penn. St. 102.

land from that described in the declaration, was inadmissible as setting forth a new cause of action. If, however, the amendment merely furnished a more particular and certain description of the land originally sued for, the court said that it would be unobjectionable.[1] But in trespass to try title in Texas, the plaintiff may, by an amended petition, describe land of different location, and by a chain of title other than that set forth and relied upon in the original petition.[2] A complaint in ejectment in New York described the premises as "situate in the village of Forrestville, etc., viz., the store-room of the said defendants, which at and previous to said time had been occupied by said defendants as a billiard saloon, and situate in said village and adjoining the Morrison House in said Forrestville, together with the cellar under said store, being the cellar and first floor of the building of the defendants, adjoining the Morrison House in the village of Forrestville in said county, together with the right to use the back yard of the lot upon which said building stands, in common with the defendants." At the trial the defendants moved, after a jury had been impaneled, to dismiss the complaint, on the ground that it contained no description of any land. The motion was denied, and an exception taken; later in the trial, and after an accurate description of the premises claimed had been given in evidence, the court allowed the plaintiff to amend the complaint by inserting the correct description in it. It was held on appeal that, conceding the description was originally uncertain and defective, the court was at liberty to proceed with the trial, and to allow the amendment, in the exercise of its judicial discretion, and that this discretion was not the subject of review.[3] The complaint in ejectment, or in a real action, may be amended, even after the evidence is closed, to correct a misdescription of the land in controversy.[4]

[1] Wyman *v.* Kilgore, 47 Maine, 184.

[2] Hunter *v.* Morse, 49 Texas, 219; see Beard *v.* Federy, 3 Wall. 478.

[3] Olendorf *v.* Cook, 1 Lansing (N. Y.), 37.

[4] Russell *v.* Erwin's Adm'r, 38 Ala. 44; Bird *v.* Decker, 64 Maine, 550.

CHAPTER XVII.

VENUE.—LOCAL AND TRANSITORY ACTIONS.

§ 465. Actions affecting realty are local.
466. Residence of the parties immaterial.
467. Local actions not maintainable in foreign jurisdictions.
468. Ejectment for lands lying in several counties.
469. Questions as to venue.—How raised.
470. Distinctions between actions local by nature and actions local by statute.
§ 471. Change of venue.
472. Practice in New York.
473. Changes in territorial limits of counties.
474. Changes in channel of a stream dividing counties.
475. Venue in federal courts.

§ 465. *Actions affecting realty are local.*—Actions for the recovery of real property, or for the determination of an interest therein, are local, and must be instituted in the county in which the premises are situated ;[1] and conflicting titles and rights to the possession of lands must be determined by the courts of the State wherein the lands lie.[2] The distinction between transitory and local actions, in no way depends upon the difference between equitable and common law jurisdiction ; and whether the relief is sought at common law or in chancery, the question of jurisdiction equally applies.[3] Lord Mansfield stated, in 1774, that eject-

[1] Draper *v.* Kirkland, 1 Head (Tenn.), 2; Blake *v.* Freeman, 13 Me. 130; Bellas *v.* Houtz, 8 Watts (Penn.), 373; Doulson *v.* Matthews, 4 T. R. 503; Mayor, &c. *v.* Ewart, 2 W. Bla. 1070; Mayor of London *v.* Cole, 7 T. R. 587, 588; Mersey, &c. Nav. Co. *v.* Douglas, 2 East, 498, 499; Livingston *v.* Jefferson, 1 Brock C. C. 203; Roach *v.* Damron, 2 Humph. (Tenn.) 425; Graves *v.* McKeon, 2 Denio (N. Y.), 639; Warren *v.* Webb, 1 Taunt. 379; Northern Ind. R. R. Co. *v.* Mich. Cent. R. R. Co. 15 How. 233; see Putnam *v.* Bond, 102 Mass. 370; Loeb *v.* Mathis, 37 Ind. 306; Hamer *v.* Raymond, 5 Taunt. 789; Watts *v.* Kinney, 6 Hill (N. Y.), 82; Atlantic, &c. Tel. Co. *v.* Baltimore, &c. R. R. Co. 14 J. & S. (N. Y.) 377.

[2] Clopton *v.* Booker, 27 Ark. 482; see McGoon *v.* Scales, 9 Wall. 23; Story on Conflict of Laws, § 543; Burbank *v.* Payne, 17 La. Ann. 15; American Union Telegraph Co. *v.* Middleton, 80 N. Y. 408; Watts' Adm'r *v.* Kinney, 23 Wend. (N. Y.) 484.

[3] Atlantic, &c. Tel. Co. *v.* Baltimore, &c. R. R. Co. 14 J. & S. (N. Y.) 377;

ment was a local action, and in its nature a proceeding *in rem*, in which possession was to be delivered by the sheriff of the county, and that, therefore, the judgment could have no effect if the action was not laid in the county in which the lands were situated.[1] The same rule prevailed in the system of real actions,[2] and is still generally applicable to mixed actions, waste, *quare impedit*,[3] trespass,[4] case for nuisances,[5] and all actions for injuries to real property.[6] In Casey *v.* Adams,[7] Chief Justice Waite, in delivering the opinion of the United States Supreme Court, said: "Local

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People *v.* Central R. R. Co. 42 N. Y. 283; Northern Ind. R. R. Co. *v.* Michigan Cent. R. R. Co. 15 How. 233.

[1] Mostyn *v.* Fabrigas, Cowp. 161–176; see Goodtitle *v.* Lammiman, 2 Campb. 274; Mayor of London *v.* Cole, 7 T. R. 588; Casey *v.* Adams, 102 U. S. 66.

[2] Booth on Real Actions, p. 1.

[3] Gould's Pleadings, p. 105.

[4] American Union Tel. Co. *v.* Middleton, 80 N. Y. 408.

[5] Warren *v.* Webb, 1 Taunt. 379; see Miss. & Mo. R. R. Co. *v.* Ward, 2 Black. 485.

[6] Jacks *v.* Moore, 33 Ark. 371. As to the distinction between local and transitory actions, see Webb *v.* Goddard, 46 Me. 505; Mason *v.* Warner, 31 Mo. 508; Henwood *v.* Cheeseman, 3 S. & R. (Penn.) 500–503; Livingston *v.* Jefferson, 1 Brock C. C. 203, per Chief Justice Marshall; Casey *v.* Adams, 102 U. S. 66; Vermont & Mass. R. R. Co. *v.* Orcutt, 16 Gray (Mass.), 116. An action to procure a decree declaring a deed a mortgage, and for an accounting, has been held, in New York, to be a local action triable exclusively in the county where the property was situated. Bush *v.* Treadwell, 11 Abb. Pr. N. S. (N. Y.) 27; see Leland *v.* Hathorne, 9 Abb. Pr. N. S. 97; S. C. on appeal, 42 N. Y. 547; but see Ely *v.* Lowenstein, No. 2, 9 Abb. Pr. N. S. (N. Y.) 42. And an action brought to compel the conveyance of a farm to the plaintiff, on the ground that the title to it was held in trust for him by the defendant, has been held, under the New York Code, to be an action for the recovery of real property, and for the determination of an estate, right, or interest therein, which must be tried in the county where the land was situated. Ring *v.* McCoun, 3 Sandford (N. Y.), 524; affi'd, 10 N. Y. 268; see Newton *v.* Bronson, 13 N. Y. 587. So an action to restrain the erection of a bridge over a highway, to connect buildings of the defendant standing on opposite sides of the highway, the plaintiff claiming that the erection would injure his property by cutting off the view and light and air, is local and not transitory, under the practice in New York, and must be tried in the county where the real property is situated. Leland *v.* Hathorne, 42 N. Y. 547. But in West Virginia, a suit by a grantor of a deed, absolute on its face, to have it declared a mortgage, may be brought in the county where the grantee resides, though the lands lie in another county. Lawrence *v.* Du Bois, 16 W. Va. 443.

[7] 102 U. S. 66.

actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." The court further said, that the distinction between local and transitory actions was as old as the actions themselves, and that no one had ever supposed that laws which prescribed generally the place where a party could be sued, included actions which were local in their character, either by statute or at common law, unless the statute so declared.

§ 466. *Residence of the parties immaterial.*—In Mississippi, ejectment and trespass *quare clausum fregit*, have been declared to be the only actions which could be brought in a county in which the defendant did not reside, and was not found.[1] It is unnecessary, in an action of ejectment, to state the residences of the parties, as the situation of the premises, and not the residences of the litigants, determines the county in which the action must be brought.[2]

§ 467. *Local actions not maintainable in foreign jurisdictions.*—No action will lie in one State or country, to try the title or recover possession of lands lying in another country. Courts ordinarily have no jurisdiction of local actions arising within the borders of a foreign State. Judgments rendered in such cases would be nugatory, for the process of the courts could not be enforced beyond the territorial limits of the State.[3] In Leary *v.* Langsdale,[4] decided by the Supreme Court of Indiana, it was held, that a complaint in ejectment was fatally defective which did not disclose the county or State in which the lands were situated, and that the defect was not cured by answer.

§ 468. *Ejectment for lands lying in several counties.*—The rule at common law was that only lands lying within

[1] Elder *v.* Hilzheim, 35 Miss. 231.

[2] Doll *v.* Feller, 16 Cal. 432.

[3] Mostyn *v.* Fabrigas, Cowp. 176; Bac. Abr. Actions Local, &c. A (a); see Clopton *v.* Booker, 27 Ark. 482; Burbank *v.* Payne, 17 La. Ann. 15; American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; Howe *v.* Willson, 1 Denio (N. Y.), 181; Watts' Adm'rs *v.* Kinney, 23 Wend. (N. Y.) 484.

[4] 35 Ind. 74.

the county in which the ejectment was instituted could be recovered by the judgment;[1] and when the lands were situated within the borders of several counties it was necessary to make several entries, and bring as many ejectments,[2] for the recovery in one county did not extend to another.[3] This inconvenient practice has been practically abrogated by statute in this country. Thus, in Tennessee, when the lands are situated within the limits of more than one county, an ejectment for the entire tract may be brought in either county.[4]

§ 469. *Questions as to venue.—How raised.*—In a case which arose in New York, it was held that when the action was local in its nature, and the venue was untrue on the face of the complaint, the defendant could demur.[5] But the absence of an allegation that the land is located within the limits of the county in which the action is brought, is not a ground of demurrer if the property is described as being in a town which is within the borders of the county, as the court will take judicial notice of towns created by law.[6] It has been held in Maine, that when an action, local in its nature, is commenced in the wrong county, the defendant is not obliged to plead that fact in abatement. If the objection appear on the record, it may be raised by demurrer. Otherwise the defendant may avail himself of it at the trial under

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[1] Hord *v.* Walker, 5 Litt. (Ky.) 23; see Bellas *v.* Houtz, 8 Watts (Penn.), 373.

[2] Co. Litt. 252 b., and see 35 Hen. VI, 30.

[3] Sowder *v.* McMillan's Heirs, 4 Dana (Ky,), 456.

[4] Session Acts of Tennessee, 1847–48, p. 280. In King *v.* Portis, 81 N.C. 382, in the Supreme Court of North Carolina, it was held that a foreclosure sale of lands lying in two counties, under a mortgage recorded in only one, passed title to the land in both counties, as against a purchaser under a judgment docketed, subsequent to the foreclosure proceedings, in the county in which the mortgage was not registered. See Barrett *v.* Watts, 13 S. C. 441.

[5] Vermilya *v.* Beatty, 6 Barb. (N. Y.) 429.

[6] Martin *v.* Martin, 51 Me. 366; Goodwin *v.* Appleton, 22 Me. 453; Ham *v.* Ham, 39 Me. 263; State *v.* Jackson, 39 Me. 291; Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; see St. Louis, J. & C. R. R. Co. *v.* Thomas, 47 Ill. 116.

the general issue.[1] In an action of ejectment, which arose in Tennessee, the court decided that the venue must be proved ; but it was held that if the title papers covering the land in controversy showed that the premises lay in the county in which the action was brought, oral examination of witnesses, or direct proof as to that fact, was unnecessary.[2] Nor is it competent for the defendant, merely with a view to defeat jurisdiction, on the principle that the action is local, to show that *de jure* the line of the county ought to be located in a different place from that in which it is actually established and known.[3]

§ 470. *Distinction between actions local by nature and actions local by statute.*—Actions necessarily local differ from actions naturally transitory, but required by statute to be brought in a particular county, in respect to questions of jurisdiction, for when the objection raised is that the court had no jurisdiction over the subject matter, or the parties, to issue the process, the proceeding is void.[4] But matters merely of form in practice, which do not affect the substantial merits of the controversy, nor the regular and fair administration of justice, are held to be waived if not excepted to at an early stage of the cause.[5] The Supreme Court of Texas decided, in an action of trespass to try title, that a plea to the jurisdiction of the court, based on the ground that the lands in controversy lay without the limits of the county, came too late after a plea to the merits.[6]

§ 471. *Change of Venue.*—It has been decided in the

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[1] Hathorne *v.* Haines, 1 Greenl. (Me.) *239; 1 Tidd. Pr. 369; see Thrale *v.* Cornwall, 1 Wils. 165 ; Bruckshaw *v.* Hopkins, Cowp. 409, 410 ; Santler *v.* Heard, 2 W. Bla. 1033.

[2] Gorham *v.* Jones, 11 Humph. (Tenn.) 353.

[3] Hathorne *v.* Haines, 1 Greenl. (Me.) *239.

[4] Elder *v.* Dwight Mfg. Co. 4 Gray (Mass.), 201.

[5] Webb *v.* Goddard, 46 Me. 505; Richardson *v.* Welcome, 6 Cush. (Mass.) 331; Demuth *v.* Cutler, 50 Me. 298.

[6] Ryan *v.* Jackson, 11 Texas, 391 ; see Heath *v.* Whidden, 29 Me. 108.

same State, that great prejudice in the community against the title furnished no ground for a change of venue in an action of forcible entry and detainer, for the title could not be litigated in a proceeding of that character;[1] and, in an action of trespass to try title, it was held that the fact that the judge had given an opinion in regard to the validity of the title in controversy was not a sufficient reason to sustain an order changing the venue;[2] nor is the fact that parties to the suit are influential citizens of the county a sufficient ground for ordering a change of venue in ejectment.[3] In Illinois, if a party in his application for a change of venue conforms strictly with the requirements of the statute,[4] the granting of the change of venue is not considered discretionary, but a matter of absolute right.[5] This doctrine was extended to an action of ejectment.[6] The statute, however, allows the court to impose terms and conditions upon the granting of the order, and where the plaintiffs proved that some of the defendants were non-residents, and the others had no property within the jurisdiction of the court, and plaintiffs were being subjected to a large annual loss, by being deprived of the possession, it was held to be a proper exercise of discretion to require the defendant, as a condition of granting the change of venue, to furnish a bond as security for the rents in the event of the plaintiff's success.[7]

§ 472. *Practice in New York.*—It has been held by the New York Court of Appeals, that, under the practice in that State, a judge has no power to adjourn the trial of a local action to another county.[8] But the statute of that

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[1] Warren *v.* Kelly, 17 Texas, 544.

[2] Houston & T. Rwy. Co. *v.* Ryan, 44 Texas, 426.

[3] Phipps *v.* Mansfield, 62 Ga. 209.

[4] R. S. Illinois, p. 1094, § 11.

[5] Knickerbocker Ins. Co. *v.* Tolman, 80 Ill. 106.

[6] Mapes *v.* Scott, 94 Ill. 379.

[7] Mapes *v.* Scott, 94 Ill. 379.

[8] Birmingham Iron Foundry *v.* Hatfield, 43 N. Y. 224; Gould *v.* Bennett, 59 N. Y. 124.

State, requiring that actions for the recovery of any interest in realty must be tried in the county where the land lies, was held not to apply to a suit brought to compel the specific performance of a contract to convey land without the jurisdiction of the State.[1] In Meldrum *v.* Sarvis,[2] decided in 1793, in the New Jersey Supreme Court, the power of the court to change the venue in ejectment for proper cause is asserted, but in the later case of Deacon *v.* Shreve,[3] it was held that, under the statutes of that State, the court could not change the venue in a local action from the county where the land was situated. This latter case conforms to the current of modern authority, and accords with the general legislative policy of this country. It may be here remarked, that the Supreme Court of the United States decided, in Cook *v.* Burnley,[4] that an exception to a refusal to grant a change of venue was not available for review on a writ of error to that court.

§ 473. *Changes in territorial limits of counties.*—If, in consequence of a legislative change of boundaries, the land in dispute is transferred from one county to another, pending an action of ejectment, the venue should be altered, and the record transmitted to the new county, in order that the plaintiff, if successful, may have a writ of *habere facias possessionem* issued to the sheriff of the county in which the land lies. Otherwise a new action would be necessary.[5] And where, after ejectment brought and before trial, the land in controversy was by legislative act transferred to a different county, the court held that it was thereby deprived of all jurisdiction over the subject matter of the litigation. The cause having meanwhile gone to trial, and resulted in a verdict for plaintiff, an injunction was granted against

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[1] Newton *v.* Bronson, 13 N. Y. 587.

[2] Coxe Rep. (N. J.) 203.

[3] 23 N. J. L. 204.

[4] 11 Wall. 659.

[5] Murdock *v.* Little, 18 Ga. 719; see, *contra*, Blake *v.* Freeman, 13 Maine, 130.

the sheriff to restrain eviction thereunder.[1] On the other hand, where the land in dispute had been included in another county, after a decree had been rendered in chancery, it was held in Indiana that a bill to revive the decree should be brought in the county which contained the records. The jurisdiction of the Court of Chancery having once attached, it was retained until the court fully and finally acted upon the subject matter before it.[2] In Maine, where, during the pendency of a real action, the town in which the land lay was set off to another county, it was held that the action must proceed and be tried in the county in which it was commenced.[3] And in Wisconsin it has been decided that where the action was commenced in the proper county, but, while it was pending, the lands were set off into another county, the court did not thereby lose jurisdiction. In that State the venue in ejectment may be changed by consent, or for cause shown, to a county other than that in which the lands are situated, so that the jurisdiction of the court is not entirely dependent upon the *locus* of the real estate.[4] It is competent for a legislature, in order to avoid the confusion which would arise from the shifting of causes from one county to another, to provide, in establishing a new county, that pending actions of ejectment shall not be disturbed, even as to lands falling within the limits of the new county.[5]

§ 474. *Change of channel of a stream dividing counties.* —Where a stream, which is the boundary of a county or State, alters its channel by a gradual wearing of its banks, the division line shifts with the channel; but if its course is changed by violent or visible alterations, as by making a

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[1] Kelly *v.* Tate, 43 Ga. 535.
[2] Arnold *v.* Styles, 2 Blackf. (Ind.) 391.
[3] Blake *v.* Freeman, 13 Maine, 130.
[4] Cornell University *v.* Wisconsin Central R. R. Co. 49 Wis. 158.
[5] Jackson *v.* Dains, 2 Cowen (N. Y.), 526.

"cut off," the abandoned channel continues to be the boundary.[1]

§ 475. *Venue in federal courts.*—In the federal courts, whenever the subject matter is local, and lies beyond the limits of the district, no jurisdiction attaches to the Circuit Court sitting within that district. An action of ejectment cannot be maintained in a district other than that in which the land is located; nor can an action of trespass *quare clausum fregit* be prosecuted where the act complained of was not committed in the district. These actions being local in their character, must be prosecuted where the process of the court can reach the *locus in quo.*[2]

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[1] Collins *v.* The State, 3 Texas Ct. of App. 323; see Holbrook *v.* Moore, 4 Neb. 437; Missouri *v.* Kentucky, 11 Wall. 395.

[2] Northern Ind. R. R. Co. *v.* Michigan Cent. R. R. Co. 15 How. 233; S. C. 5 McL. 444; Livingston *v.* Jefferson, 1 Brock, 203; see Foot *v.* Edwards, 3 Blatch. C. C. 310. So a bill to abate a nuisance is local, and can only be brought in the district where the nuisance is located. Mississippi & Mo. R. R. Co. *v.* Ward, 2 Black, 485.

CHAPTER XVIII.

OF THE PLEA OR ANSWER.

§ 476. The general issue.
477. Evidence admissible under general issue.
478. Denial of plaintiff's title under modern practice.
479. Effect of plea of general issue on question of possession.
480. Disclaimer and denial inconsistent.
481. Special plea and general denial.
482. Pleading statute of limitations.
483. Practice in Texas.
484. General issue in trespass to real property.
485. Equitable defenses and affirmative relief.
486. Equitable defenses must be pleaded.
487. Elements of an equitable defense.
488. Defendant need not become an actor.
489. Counter-claim or set-off.
490. Title admitted by answer.
491. Tax title.
492. Pleading a special title.
493. Reply to affirmative defense.
494. Demurrer to answer.
495. Supplemental answer or plea *puis darrein continuance.*

§ 476. *The general issue.*—Under the early practice the general issue in ejectment was "not guilty;"[1] and after the entry of the plea no objection could be taken to the declaration, or to the indorsement on the writ.[2] This plea afforded the defendant a substantial advantage, and was a dangerous one to the claimant, who, though vested with a meritorious title, was liable to be surprised and defeated by a defense that could not reasonably have been anticipated, for which he was wholly unprepared at the trial, and which might have been avoided or disproved had the real issue been disclosed by the pleadings, or brought to the claimant's notice. Some of the authorities held that "not guilty" was the only proper plea in the action.[3] It is certain that a most liberal tendency existed, and still prevails in the courts and in modern legislation, to favor this plea,

[1] Kirkland *v.* Thompson, 51 Penn. St. 216; Gallagher *v.* McNutt, 3 S. & R. (Penn.) 409; Zeigler *v.* Fisher's Heirs, 3 Penn. St. 365; see Lea *v.* Slatterly, 7 Baxter (Tenn.), 235; Dorsey on Ejectment, p. 25; Gosser *v.* Hickenlooper, 81* Penn. St. 281.

[2] See James *v.* Tait, 8 Porter (Ala.), 476.

[3] See Bernard *v.* Elder, 50 Miss. 336; Adams on Ejectment (4th Am. ed.), 302; Tegarden *v.* Carpenter, 36 Miss. 404; Gallagher *v.* McNutt, 3 S. & R. (Penn.) 409; Bratton *v.* Mitchell, 5 Watts (Penn.), 69.

and to admit evidence of available legal defenses of almost every class or nature under it.

§ 477. *Evidence admissible under general issue.*—Thus, in actions to recover real property in Indiana, all defenses may be given in evidence without special plea;[1] and in California, after pleading the general issue, the defendant need not set up title in himself.[2] In Pennsylvania, coverture, or any other available defense, may be given in evidence under it;[3] so in Illinois, may a defense of homestead right, for a special plea of homestead right has no proper place in ejectment as practiced in that State.[4] Under the general issue, or a general denial, the defendant, if not a mere trespasser or intruder, may show title out of the plaintiff, at the commencement of the action, without even connecting himself with such outstanding title in any way.[5] This principle is founded upon the fundamental rule that in ejectment the plaintiff must recover solely upon the strength of his own title, and that he fails in proving his case if the title is shown to be outstanding in another.

§ 478. *Denial of plaintiff's title under modern practice.*—It is ordinarily sufficient, under the modern practice, to deny generally the title set forth in the declaration or petition, and under such a denial the defendant may prove any facts tending to establish that the plaintiff is not vested with the title or right of possession;[6] but a mere denial of possession, and of unlawful withholding of the premises claimed, accompanied by an allegation that there has been no demand of possession, does not put the plaintiff's title in

[1] Poffenberger *v.* Blackstone, 57 Ind. 288; Dale *v.* Frisbie, 59 Ind. 530; Woodruff *v.* Garnor, 20 Ind. 174; Tracy *v.* Kelley, 52 Ind. 535.

[2] Bruck *v.* Tucker, 42 Cal. 346.

[3] Black *v.* Tricker, 52 Penn. St. 436.

[4] Johnson *v.* Adleman, 35 Ill. 265; see Patterson *v.* Kreig, 29 Ill. 514.

[5] Raynor *v.* Timerson, 46 Barb. (N. Y.)518–526; Gillett *v.* Stanley, 1 Hill (N. Y.), 121; Schauber *v.* Jackson, 2 Wend. (N. Y.) 13–48; Styles *v.* Gray, 10 Tex. 503; Kinney *v.* Vinson, 32 Tex. 125.

[6] Wicks *v.* Smith, 18 Kan. 508.

issue, nor raise the question of adverse possession. To question the plaintiff's title, in such a case, the defendant must set up title in himself or out of the plaintiff.[1]

§ 479. *Effect of plea of general issue on question of possession.*—The authorities are not entirely uniform as to whether the plea of the general issue in ejectment admits or puts in issue the question of the defendant's possession. The general rule, according to many of the cases, is, that the defendant, by interposing this plea, admits himself to be in possession of the whole of the lands claimed in the writ or declaration;[2] and that if he desires to dispute or controvert the question of possession, the proper method to accomplish that result is by special plea, in order to avoid this admission of possession.[3] So, under the practice in Massachusetts, on a writ of entry, the tenant who pleads the general issue only is estopped to deny that he was in possession of the premises, and claiming a freehold therein;[4] and in a real action in Maine the defendant admits himself to be in possession of the entire premises unless he files a disclaimer as to the whole or some part thereof.[5] In North Carolina, if the defendant in ejectment intends to disavow possession, it has been held that he should not enter any defense.[6]

§ 480. *Disclaimer and denial inconsistent.*—Under the practice in Alabama, the plea of "not guilty," and a denial of the possession of the premises sued for, were held to be incompatible defenses, for the former plea was regarded as equivalent to the consent rule, which required the defendant

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[1] Ford *v.* Sampson, 30 Barb. (N. Y.) 183; s. c. 17 How. Pr. (N. Y.) 447; see Wade *v.* Doyle, 17 Fla. 522; Sharp *v.* Daugney, 33 Cal. 505.

[2] Ulsh *v.* Strode, 13 Penn. St. 433; Hill *v.* Hill, 43 Penn. St. 521.

[3] Bernard *v.* Elder, 50 Miss. 336; Cumming *v.* Butler, 6 Ga. 88; Stevens *v.* Griffith, 3 Vt. 448; Mooberry *v.* Marye, 2 Munf. (Va.) 453. *Contra*, Stroud *v.* Springfield, 28 Tex. 649.

[4] Swan *v.* Stephens, 99 Mass. 7; Higbee *v.* Rice, 5 Mass. 344; Washington Bank *v.* Brown, 2 Metc. (Mass.) 293; Devens *v.* Bower, 6 Gray (Mass.), 126.

[5] Blake *v.* Dennett, 49 Me. 102.

[6] McClennan *v.* McCleod, 75 N. C. 64; see Thomas *v.* Orrell, 5 Ired. (N. C.) Law, 569; Judge *v.* Houston, 12 Ired. (N. C.) Law, 108.

to admit the fictitious averments as to lease, entry and ouster.[1] In that State, in an action in the nature of ejectment, an answer, "disclaiming all right, interest or possession in the premises sued for, at or since the commencement of the action," has been held tantamount to a plea denying possession, and which the court could not disregard by rendering judgment *nil dicit* for the plaintiff.[2]

§ 481. *Special plea and general denial.*—Under the practice in Texas, a general denial is not abandoned, defeated or qualified by subsequent special pleas of confession and avoidance, and it has been held by the Supreme Court of that State, to be error to sustain exceptions to the entire answer if a general denial had been filed and not expressly withdrawn.[3]

§ 482. *Pleading statute of limitations.*—The question as to whether or not it is necessary to plead the statute of limitations in actions in the nature of ejectment, to entitle the defendant to introduce evidence in support of a title so acquired, or to protect the possession, is regulated by statute in many of the States. In the famous case of Taylor *v.* Horde,[4] Lord Mansfield said: "Ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff, only; but takes away his right of possession. Every plaintiff in ejectment must shew a right of possession, as well as of

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[1] Bernstein *v.* Humes, 60 Ala. 582; King *v.* Kent, 29 Ala. 542; Clarke *v.* Clarke, 51 Ala. 498; Sledge *v.* Swift, 51 Ala. 386.

[2] Morris *v.* Beebe, 54 Ala. 300

[3] Hurt *v.* Blackburn, 20 Texas, 601; but see Custard *v.* Musgrove, 47 Texas, 217.

[4] 1 Burr. 119.

property; and therefore the defendant need not plead the statute." In Wisconsin, the statute of limitations, if relied upon as a defense in ejectment, must be pleaded;[1] and it has been held not to be error, but matter resting entirely in the sound discretion of the court, to allow a defendant to amend his pleadings so as to set up the statute of limitations.[2] In Mississippi, it has been decided, under the Pleading Act of 1850, that the defendant could set up the statute of limitations by special plea, although at common law a special plea was not allowed, as the defense could be made under the plea of not guilty. The court held further that it was error to sustain a demurrer to a special plea, merely because the defendant could prove the same defense under the general issue, which had been originally pleaded.[3] It is difficult, however, to see how the defendant could have been prejudiced or affected by sustaining the demurrer,[4] or what good purpose could be subserved by encumbering the record with useless pleas. In an action, in the nature of a writ of right, in Mississippi, the defendant is not required to plead the statute of limitations, and where the seizin is denied, the demandant is bound to prove it within the time prescribed. The defense is allowable under the general denial of seizin in the answer.[5] In Alabama, adverse possession may be given in evidence, under the plea of the general issue;[6] so in Illinois evidence to establish title by the statute of limitations is admissible under this plea.[7] It has been held, in the Supreme Court of North Carolina, that it is not necessary to plead the statute in order to authorize the introduction of proof that title to the land was out of the plaintiff by adverse possession, and vested in some third

[1] Lawrence *v.* Kenney, 32 Wis. 281; Orton *v.* Noonan, 25 Wis. 672.

[2] Meade *v.* Lawe, 32 Wis. 261; Fogarty *v.* Horrigan, 28 Wis. 142; Eldred *v.* The Oconto Co. 30 Wis. 206; see Ferguson *v.* Miles, 3 Gilm. (Ill.) 358.

[3] Tegarden *v.* Carpenter, 36 Miss. 404.

[4] Poffenberger *v.* Blackstone, 57 Ind. 288; Johnson *v.* Adleman, 35 Ill. 265.

[5] Ellis *v.* Murray, 28 Miss. 129.

[6] Lay's Ex'r *v.* Lawson's Adm'r, 23 Ala. 377.

[7] Stubblefield *v.* Borders, 92 Ill. 279; see Wicks *v.* Smith, 18 Kan. 508.

party. The reason given is that the inquiry in ejectment is intended to ascertain whether or not the plaintiff has title to the land claimed; not whether the defendant has no title.[1] So in Hogan *v.* Kurtz,[2] in the Supreme Court of the United States, the rule is recognized that proof of title by adverse possession is admissible under the general issue. It has been held in Florida that a plea in ejectment, which averred that neither the plaintiffs nor those under whom they claimed title were seized or possessed of the premises within seven years prior to the commencement of the action, or before the accruing of the right of action, was bad, because it did not set forth facts showing that during the same period the defendant had been in adverse possession.[3] A mere squatter claiming no title, or a person in possession in subordination to the legal title, cannot acquire the title by adverse possession simply because there has been no actual entry or actual possession by the owner during the statutory period.[4] On the other hand, title by adverse possession cannot be shown under a general denial, under the practice in California,[5] and in that State an answer in ejectment, setting forth that the defendant was, at the commencement of the action, and had been for more than five years prior thereto, the owner of, and seized in fee, and entitled to the possession of the demanded premises, has been held not to constitute a plea of the statute of limitations.[6] In New York, adverse possession must be pleaded, and evidence of a title so acquired cannot be given under the general issue.[7] In partition, where the

[1] Freeman *v.* Sprague, 82 N. C. 366; Davis *v.* McArthur, 78 N. C. 357.

[2] 94 U. S. 773. Stearns on Real Actions, 241; see McConnel *v.* Reed, 4 Scam. (Ill.) 124; Wade *v.* Doyle, 17 Fla. 522; Zeigler *v.* Fisher, 3 Penn. St. 367.

[3] Wade *v.* Doyle, 17 Fla. 522.

[4] Sharp *v.* Daugney, 33 Cal. 505; Neddy *v.* The State, 8 Yerg. (Tenn.) 249; see Stevens *v.* Hauser, 39 N. Y. 302.

[5] McCreery *v.* Duane, 52 Cal. 262.

[6] McCreery *v.* Sawyer, 52 Cal. 257.

[7] Dezengreuel *v.* Dezengreuel, 12 Weekly Dig. (N. Y.) 286; Butler *v.* Mason, 16 How. Pr. (N. Y.) 546; see Sands *v.* St. John, 36 Barb. (N. Y.) 628.

complaint showed a tenancy in common between the parties, a paragraph in the answer not denying the tenancy in common, but averring fifteen years sole, exclusive and undisputed possession, "under claim and color of title, openly, notoriously, continuously, and adversely to any other claim or title whatsoever," was held not to constitute a good defense to the cause of action set forth in the complaint. The averments of the answer were construed to mean that the defendant, as tenant in common, was holding for the benefit of the co-tenancy adversely to all other persons. An allegation of actual ouster, or its equivalent, was held to be necessary to show an adverse holding to the co-tenant.[1]

§ 483. *Practice in Texas.*—Under the practice in Texas, a plea of "not guilty" in trespass to try title, lets in all defenses except the statute of limitations;[2] and by interposing this plea the defendant is not regarded as admitting anything. The plea puts in issue not only the title of the plaintiff, but also, contrary to the usual practice, the question of the possession of the defendant, and imposes upon the plaintiff the necessity of proving the defendant's possession and everything requisite to sustain the plaintiff's right of action.[3] The defendant may even show, under a plea of "not guilty," that his deed to the plaintiff, upon which the latter relies to support the action, although absolute on its face, was, in fact, a mortgage; a special plea is not necessary.[4] In Johnson *v.* Byler,[5] in the Supreme Court of Texas, it was held to be settled doctrine that under the plea of the general issue in trespass to try title, either a legal or

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[1] Nicholson *v.* Caress, 76 Ind. 24; see Sanford *v.* Tucker, 54 Ind. 219; Bowen *v.* Preston, 48 Ind. 367; Nelson *v.* Davis, 35 Ind. 478; Jenkins *v.* Dalton, 27 Ind. 78. See Chapter IX.

[2] Dalby *v.* Booth, 16 Texas, 563.

[3] Stroud *v.* Springfield, 28 Texas, 649.

[4] Mann *v.* Falcon, 25 Texas, 271.

[5] 38 Texas, 606, 610; Herrington *v.* Williams, 31 Texas, 448; Ragsdale *v.* Gohlke, 36 Texas, 286.

equitable defense, which amounted to an estoppel, could be introduced without being specially pleaded. But issues which involve affirmative equitable relief, must be specially pleaded, and the facts set forth in accordance with equitable principles and accompanied by an appropriate prayer for relief.[1]

§ 484. *General issue in trespass to real property.*—In trespass to real property, a freehold or mere possessory right in the defendant may be given in evidence under the general issue, though it is often advisable to plead *liberum tenementum.*[2]

§ 485. *Equitable defenses and affirmative relief.*—As ejectment is an action at law, a recovery under the former practice could only be had upon the legal title to the land. The holder of an equitable title could neither support the action nor set up his equitable title, as a basis of affirmative relief, or to defeat a recovery based upon the legal title.[3] The rights of the holder of the equitable title could only be asserted and established in equity. Injunctions were frequently granted to restrain ejectment by the holder of the legal title during the pendency of the proceedings in equity upon the equitable title. The modern innovations in systems and forms of judicial procedure, especially the blending of legal and equitable jurisdictions, have wrought radical and highly important change in the nature and uses of the statutory action of ejectment for the trial of controverted titles. The defendant may in many of our States interpose equitable as well as legal titles or defenses;[4] and when

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[1] Williams *v.* Barnett, 52 Texas, 130; Catlin *v.* Bennatt, 47 Texas, 165; Ayres *v.* Duprey, 27 Texas, 604; Rippetoe *v.* Dwyer, 49 Texas, 498; Powers *v.* Armstrong, 36 O. S. 357.

[2] Cooley *v.* O'Connor, 12 Wall. 391–399; Monumoi Beach *v.* Rogers, 1 Mass. 160.

[3] See Neave *v.* Avery, 16 C. B. 328.

[4] Newsome *v.* Williams, 27 Ark. 632; Pope *v.* Cole, 64 Barb. (N. Y.) 406; Smith *v.* Tome, 68 Penn. St. 158; Dewey *v.* Hoag, 15 Barb. (N. Y.) 365; Phillips *v.* Gorham, 17 N. Y. 270; Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 103; McCau-

equitable defenses are set up against legal titles, the same rule and measure of justice is to be applied as if the proceeding was in equity.[1]

§ 486. *Equitable defenses must be pleaded.*—As a general rule equitable defenses must be distinctly pleaded and proved.[2] In New York, when the action is based upon the alleged legal title of the plaintiff to the premises in controversy, it is competent for the defendant to show that he is the equitable owner, and entitled in equity to a conveyance of the premises, or to other appropriate relief. The same facts which would formerly have entitled a defendant to be relieved in equity, may be set up in his answer as a full defense.[3]

§ 487. *Elements of an equitable defense.*—It has been held, however, in that State,[4] that if a recovery in ejectment is resisted by an equitable counter-claim in the nature of a cross bill, the answer must contain all the elements of a complaint, or bill in chancery, and must ask affirmative relief;[5] that the defendant must become an actor in respect to his claim, and that the judgment must be for the plaintiff that he recover the land, or for the defendant that the

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ley *v.* Fulton, 44 Cal. 355; Neill *v.* Keese, 5 Texas, 22; Allison *v.* Elder, 45 Ga. 17; Elder *v.* Allison, 45 Ga. 13; Herrington *v.* Williams, 31 Texas, 448; Bartlett *v.* Judd, 21 N. Y. 200; Pearsall *v.* Mayers, 64 N. C. 549; Webster *v.* Bond, 9 Hun (N. Y.), 437; Jones *v.* Manly, 58 Mo. 559.

[1] Sower *v.* Weaver, 78 Penn. St. 443.

[2] McCauley *v.* Fulton, 44 Cal. 355; Cadiz *v.* Majors, 33 Cal. 288; Millhollin *v.* Jones, 7 Ind. 715; Powers *v.* Armstrong, 36 O. S. 357; Kentfield *v.* Hayes, 57 Cal. 409.

[3] Crary *v.* Goodman, 12 N. Y. 266; Phillips *v.* Gorham, 17 N. Y. 270; Stone *v.* Sprague, 20 Barb. (N. Y.) 509; Hoppough *v.* Struble, 60 N. Y. 430; Lamont *v.* Cheshire, 65 N. Y. 42; Cavalli *v.* Allen, 57 N. Y. 508; Traphagen *v.* Traphagen, 40 Barb. (N. Y.) 537; Thurman *v.* Anderson, 30 Barb. (N. Y.) 621.

[4] Dewey *v.* Hoag, 15 Barb. (N. Y.) 365; Lombard *v.* Cowham, 34 Wis. 486; Follett *v.* Heath, 15 Wis. 601; Conger *v.* Parker, 29 Ind. 380; Hicks *v.* Sheppard, 4 Lans. (N. Y.) 335; but see Webster *v.* Bond, 9 Hun (N. Y.), 437; Cramer *v.* Benton, 60 Barb. (N. Y.) 216; Stone *v.* Sprague, 20 Barb. (N. Y.) 509; Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 98–103.

[5] See Conger *v.* Parker, 29 Ind. 380; Lombard *v.* Cowham, 34 Wis. 486, 492; Duont *v.* Davis, 35 Wis. 634.

plaintiff convey to him on such terms as the court shall adjudge. The court held that if an equitable defense were allowed simply as a defense in an action of ejectment, the effect might be to keep the legal title and possession forever separate. So in California, where the answer presents an equitable defense, it must contain all the essential averments of a bill in equity.[1] The defendant becomes an actor with respect to the matters alleged by him, and his defense must be of such a character as may be ripened by a decree of the court into a legal right to the premises, or as will estop the prosecution of the ejectment by the plaintiff. Under the practice of that State, the equitable defense is first passed upon by the court, and, until it is disposed of, the assertion of the legal remedy is in effect stayed. It will not be available unless specially pleaded.[2] Upon the adjudication by the court as to the right to the relief sought by the answer, the necessity of proceeding further with the action at law depends.[3]

§ 488. *Defendant need not become an actor.*—On the other hand, in Hoppough *v.* Struble,[4] in the New York Court of Appeals, it was decided that in an ejectment the defendant could set up as a defense the fact that the land in question was intended to be conveyed to him by a deed from plaintiff, but, by a mistake in the description, was not included. No reformation of the deed was considered necessary, because the same facts which would entitle the defendant to a reformation, would establish his equitable

[1] Kentfield *v.* Hayes, 57 Cal. 409.

[2] Cadiz *v.* Majors, 33 Cal. 288; Hartley *v.* Brown, 51 Cal. 465; see Carman *v.* Johnson, 20 Mo. 108; Murray *v.* Walker, 31 N. Y. 399; Safford *v.* Hynds, 39 Barb. (N. Y.) 625.

[3] Estrada *v.* Murphy, 19 Cal. 248–272; Lestrade *v.* Barth, 19 Cal. 660; Blum *v.* Robertson, 24 Cal. 127; Downer *v.* Smith, 24 Cal. 114; Bruck *v.* Tucker, 42 Cal. 346–352.

[4] 60 N. Y. 430. See Crary *v* Goodman, 12 N. Y. 266; Bates *v.* Rosekrans, 23 How. Pr. (N. Y.) 98, 105; affi'd 37 N. Y. 409; see Ferguson *v.* Crawford, 70 N. Y. 253; Mandeville *v.* Reynolds, 68 N. Y. 528; but see Haire *v.* Baker, 5 N. Y. 357; Harris *v.* Vinyard, 42 Mo. 568; State *v.* Meagher, 44 Mo. 356.

right to the possession, and constitute a defense as effectual as the legal title. In Cramer *v.* Benton,[1] affirmed in the New York Court of Appeals, on the opinion of the court below,[2] in which the defense to an action of ejectment proceeded upon the ground that the language and legal effect of the deed differed essentially from the intention of the parties, it was held that a case must be presented which would induce a court of equity to interpose, and reform the defective instrument, but that it was not absolutely necessary in such a case that a judgment reforming the instrument should be pronounced if the defendant was content to waive, or did not demand, such full relief.

The cases in which defendants setting up equitable defenses in ejectment, rely upon the possession which their equitable rights confer, and do not become actors, or claim a formal judgment in their favor, are rare, for a litigant will be prompted by self interest to strengthen and perfect his title, and, if expedient or necessary, to acquire the legal title, and will eagerly avail himself of a formal adjudication or finding of the court in his favor. But an important obstacle to a complete adjudication of an equitable defense in an action at law must not be overlooked. A person bringing an action at law cannot generally be compelled to sue any person, except such as he may elect to prosecute. Equitable defenses frequently require the presence of additional parties in the action, without whose presence an affirmative judgment, which would be *res adjudicata* upon the parties in interest, could not be rendered,[3] and the plaintiff may refuse to bring them before the court. By interposing an equitable defense, the defendant does not convert the legal action into an equitable one, nor change the plaintiff's right to have his legal rights determined in a legal forum, nor can he ordinarily be forced

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[1] 60 Barb. (N. Y.) 216.

[2] 56 N. Y. 638. See Webster *v.* Bond, 9 Hun (N. Y.), 437.

[3] Cramer *v.* Benton. 4 Lans. (N. Y.) 291; S. C. 60 Barb. (N. Y.) 216; Call *v.* Chase, 21 Wis. 511.

to bring in the additional parties.[1] A vendee in possession, under a contract to purchase the land, may, as we have seen, defend ejectment by his vendor, by pleading that he has fully performed the contract, or can compel a specific performance.[2] In Harris *v.* Vinyard, in the Supreme Court of Missouri, the defendant set up as a defense his purchase of the land under a contract with the plaintiff's deceased father. It was held that, if the answer was true, it was sufficient to defeat the action, but that the defendant would not, by reason of a decision of the issues in his favor, be entitled to a decree, vesting the title in himself, as against the heirs, and that portion of the answer, praying for a decree of title in himself, was stricken out.[3]

In Minnesota, the defendant may, by answer, set up his equities, so far, at least, as they relate to the right of possession, and the ejectment is the proper action in which to litigate them. To prevail against the plaintiff's legal right to the possession in ejectment, the equities pleaded as a defense must be such that, under the former practice, a court of equity would, upon a bill filed, setting up the facts, have enjoined the legal owner from proceeding at law.[4]

§ 489. *Counter-claim, or set-off.*—A widow's claim for dower of real estate is not subject to a set-off for damages, nor for money due, nor for the receipt of rents and profits of the whole of the land in which she claims dower, nor can such set-off be interposed as a counter-claim under the practice in New York when she claims no damages.[5]

§ 490. *Title admitted by answer.*—In Pryor *v.* Madigan,[6]

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[1] Webster *v.* Bond, 9 Hun (N. Y.), 437.

[2] Pierce *v.* Tuttle, 53 Barb. (N. Y.) 155; Richards *v.* Elwell, 48 Penn. St. 361; Young *v.* Montgomery, 28 Mo. 604; Cavalli *v.* Allen, 57 N. Y. 508; Love *v.* Watkins, 40 Cal. 547; Tibeau *v.* Tibeau, 19 Mo. 78; 6 Am. Rep. 624; see § 322.

[3] Harris *v.* Vinyard, 42 Mo. 568.

[4] Williams *v.* Murphy, 21 Minn. 534.

[5] Bogardus *v.* Parker, 7 How. Pr. (N. Y.) 303; see Elliott *v.* Gibbons, 31 N. Y. 67.

[6] 51 Cal. 178.

in the Supreme Court of California, it appeared that the complaint in ejectment contained the usual averments that at a specified time prior to the commencement of the action, the claimant owned the premises in fee, and whilst so the owner, and in possession, was ousted by the defendants, who had ever since withheld the possession. The answer admitted the defendants' possession, and averred that the defendants "claim the fee," and then proceeded to deraign title under an administrator's sale. The administrator's sale was adjudged void. It was held that the averment that the defendants "claim the fee," merely meant that they had acquired the title at the administrator's sale, and that it was not a denial of the plaintiff's title, except as predicated upon that fact; and the administrator's sale having been held void, the plaintiff's title was adjudged to be admitted by the answer.

§ 491. *Tax title.*—When the defendant, in an action of ejectment for dower under the practice in New York, sets up a tax deed, the answer should contain averments of the various matters necessary to be proved, in order to establish the validity of the conveyance. If the facts are not pleaded the defendant cannot give evidence to support them, and the answer is bad on demurrer.[1]

§ 492. *Pleading a special title.*—It has been held in Texas, that where the defendant in trespass to try title, filed a special plea claiming title in himself, and setting it out specially, he should be confined in his defense to the title so pleaded, and the plea of not guilty, if also interposed, was held to be thereby waived.[2] By pleading specially, the defendant gives notice of his defenses, and the plaintiff has the right to assume that the defendant will rely on none other, and ought not to be required to come prepared with evidence to meet other defenses than those which the

[1] Nicoll *v.* Fash, 59 Barb. (N. Y.) 275; Blackwell on Tax Titles, [*501] 579.

[2] Custard *v.* Musgrove, 47 Texas, 217; Shields *v.* Hunt, 45 Texas, 424; Rivers *v.* Foote, 11 Texas, 670.

pleadings disclose;[1] and he may plead specially though his defenses were equally available under the plea of not guilty.[2] So in Kansas, the defendant may state his defenses specifically, and his answer is then governed by the ordinary rules of pleading. The pleadings must determine the relevancy of the evidence offered; for, even though unverified, they are professional statements, by counsel, of the claims of their clients, and the matters which they intend to prove.[3] In Oregon, if the defendant desires to claim title, or to avail himself of title in another, he must plead it specifically, and disclose its nature,[4] and when the defendant sets up title to an undivided interest, he must specify what share or interest he owns.[5] It has been held in California, that an answer setting up title to only a portion of the demanded premises, must particularly describe the part to which title is claimed, and failing to do so, no evidence will be admitted under such a pleading.[6] In New York, it has been held that a defendant is concluded by his answer setting up a certain chain of title from disputing the validity of the same title when asserted by the plaintiff.[7]

§ 493. *Reply to affirmative defense.*—Under the practice in Minnesota the allegations in an answer in ejectment that defendant entered under an official deed, had no notice of any defects invalidating the deed, and had made improvements and paid taxes, are not admitted by failure to reply.[8] In Texas a plaintiff, relying upon an exception in his favor to the running of the statute of limitations, pleaded by the defendant, must specially plead the exception by way of repli-

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[1] Shields *v.* Hunt, 45 Texas, 424.

[2] Hollingsworth *v.* Holshousen, 17 Texas, 41; Hunt *v.* Turner, 9 Texas, 385.

[3] Wicks *v.* Smith, 18 Kan. 508.

[4] Stark *v.* Starr, 1 Sawyer, 15; Fitch *v.* Cornell, 1 Sawyer, 156; Phillippi *v.* Thompson, 8 Oregon, 428; Hall *v.* Austin, 1 Deady, 104.

[5] Pease *v.* Hannah, 3 Oregon, 301.

[6] Anderson *v.* Fisk, 36 Cal. 625.

[7] Henderson *v.* Scott, 12 Week. Dig. (N. Y.) 363.

[8] Reed *v.* Newton, 22 Minn. 541.

cation. This scientific and very exacting rule of pleading is not, however, of universal application.[1]

§ 494. *Demurrer to answer.*—In ejectment, in Kansas, an answer, which averred a contract of sale by plaintiff and a surrender of possession thereunder to defendant, but did not recite the contract, nor disclose the terms of sale, nor allege performance, was held to be defective, but the defects were held to be of such character that they should have been reached by motion, and not by demurrer, and a demurrer to the answer was overruled.[2]

§ 495. *Supplemental answer or plea puis darrein continuance.*—The rights of litigants are usually determined with reference to the state of facts existing at the commencement of the litigation, and, ordinarily, evidence of matters which transpired during the pendency of the action cannot be introduced upon the trial.[3] As transfers of the title to the land in controversy, or changes in the relation of the parties, frequently occur *pendente lite*, the question of how such matters may be made available becomes important. This object is accomplished by applying to the court for leave to file amended or supplemental pleadings setting forth the new facts, and presenting the additional issues, or by the common law plea *puis darrein continuance.* If the practice were otherwise, the utmost confusion and uncertainty would result, for evidence could be introduced not tending to support the issues raised, and relating to matters not in the contemplation of the parties when the pleadings were framed. It seems to be a clearly settled practice not to allow a defendant to put in evidence a title acquired pending the action, unless his pleadings have been amended by averments showing that the title was ac-

[1] Hughes *v.* Lane, 25 Texas, 356.

[2] Stringfellow *v.* Alderson, 12 Kan. 112; see Lorillard *v.* Clyde, 86 N. Y. 384.

[3] Mills *v.* Graves, 44 Ill. 50; Jackson *v.* Leggett, 7 Wend. (N. Y.) 377; Wood *v.* McGuire, 21 Ga. 576.

quired since the commencement of the action;[1] or by supplemental answer in the nature of a plea *puis darrein continuance*.[2] Thus, it has been held in Michigan, that a deed from the plaintiff to the defendant's wife, conveying the disputed premises, after the commencement of the ejectment, is not admissible in evidence as a defense, without a special notice in the nature of a plea *puis darrein continuance*.[3] But a mere agreement entered into by the plaintiff to sell the land in dispute, but which provided that no conveyance should be made until after the suit was determined, is not a divesting of the plaintiff's title, and constitutes no defense to his recovery.[4] In a real action judgment must be rendered upon the title as it existed at the date of the writ. The tenant cannot set up a title acquired by a deed made to him, without the demandant's concurrence, since the commencement of the action.[5] In a number of cases it has been held, however, that a plea *puis darrein continuance* in ejectment setting up that the plaintiff had entered upon the lands described in the declaration, and still retained the possession, was bad, and constituted no bar to the further maintenance of the action.[6] If the defendant had offered to fully surrender the possession, pay the costs, and enter into a stipulation as to mesne profits, the court might direct a stay of proceedings, or a discontinuance.[7]

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[1] Reily *v.* Lancaster, 39 Cal. 354; McMinn *v.* O'Connor, 27 Cal. 238; McLane *v.* Bovee, 35 Wis. 27; Moss *v.* Shear, 30 Cal. 472; Anon. Salk. 260; Doe *v.* Brewer, 4 M. & S. 300; Jackson *v.* Demont, 9 Johns. (N. Y.) 55; Jackson *v.* Ramsay, 3 Cow. (N. Y.) 75; Moore *v.* Hawkins, Yelv. 181; Simmons *v.* Brown, 7 R. I. 427.

[2] Hardy *v.* Johnson, 1 Wall. 371–374; see Thompson *v.* Red, 2 Jones (N. C.) Law, 412.

[3] Jenney *v.* Potts, 41 Mich. 52; see Buell *v.* Irwin, 24 Mich. 149.

[4] Maus *v.* Montgomery, 11 S. & R. (Penn.) 329.

[5] Hooper *v.* Bridgewater, 102 Mass. 512; Andrews *v.* Hooper, 13 Mass. 472; Hall *v.* Bell, 6 Met. (Mass.) 431; Curtis *v.* Francis, 9 Cush. (Mass.) 427.

[6] Tyler *v.* Canaday, 2 Barb. (N. Y.) 160; Price *v.* Sanderson, 3 Harr. (N. J.) 426; McChesney *v.* Wainwright, 5 Ham. (Ohio), 452; Venner *v.* Underwood, 1 Root (Conn.), 73. But see Thompson *v.* Red, 2 Jones (N. C.) Law, 412.

[7] Tyler *v.* Canaday, 2 Barb. (N. Y.) 160; Jackson *v.* Stiles, 3 Wend. (N. Y.) 429.

CHAPTER XIX.

OF THE VERDICT.

§ 496. Questions of fact to be tried by jury.
497. Requirements of the verdict.
498. Verdicts liberally construed.
499. References in verdict.
500. Verdict must specify the nature of the estate.
501. Verdicts held sufficient
502. Verdicts held insufficient.
503. Roberti *v.* Atwater.
504. Verdict between tenants in common.
505. Misjoinder cured by verdict.

§ 496. *Questions of fact to be tried by jury.*—When questions of fact are involved, in ejectment, the issues are almost uniformly submitted to a jury, under proper instructions from the court, for the reason that litigants ordinarily have a constitutional right to a trial by jury of questions of fact. The disinclination of the courts to adjudicate upon conflicting facts, and their purpose to give full effect to the right of trial by jury, is evidenced by the common practice of framing issues of fact in equity cases, to be sent out to a jury for determination. This practice is very common in suits in equity which draw the title to land in question.

§ 497. *Requirements of the verdict.*—The general form of the verdict or finding in ejectment, is usually prescribed by statute, or by the rules or established practice of the courts. The requirements as to the verdict vary in the several States, and no uniform test can be furnished. One general rule applicable to the subject is that the courts will more readily set aside a verdict in ejectment upon a question of location than upon an ordinary question of fact.[1] It becomes important to keep this principle in view, for uncertainty as to the lands intended to be affected, and the insufficiency of the description, constitute favorite grounds for attacking verdicts in ejectment. While the early prac-

[1] Mathews *v.* Horlbeck, 1 Rich (S. C.) Law, 382; Bank *v.* Bobo, 14 Rich. (S. C.) Law, 51.

tice prevailed, it was commonly held that the verdict could relate only to the lands described in the consent rule.[1] Under the modern practice, the verdict must be limited to the lands claimed in the declaration, and must correspond with the evidence,[2] and be limited to the lands to which the plaintiff proved title.[3] The verdict must comprehend the whole issue, otherwise the judgment founded upon it will be reversed.[4] Thus, where the jury found for all the plaintiffs but one, whom they failed to mention, the verdict was held to be defective, because it was impossible to tell whether they intended to find for or against him.[5] The rule, as stated by Professor Stearns, is, that if the substance of the issue is found for the demandant, he will be entitled to judgment, though all the circumstances are not found.[6]

§ 498. *Verdicts liberally construed.*—It was held in Turberville *v.* Long,[7] an early case in Virginia, that the statute of *jeofails* extended to writs of right, and therefore, if the verdict and judgment were substantially right, though not in the words of the law, they should not be disturbed. The verdict found "that the demandant hath more right to demand the land in the count and plea mentioned than the tenant hath to hold." Tucker, J., said: "Verdicts are held to be subject to the power of the court, so as to mould them according to the true intent and meaning of the jury, where that can be found responsive to the issue joined. The jury have found the plaintiff had more right to *demand* than the tenant to hold the lands. The court have said he had more right to *have* them as he demandeth them. One seems to be an irresistible consequence

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[1] See White *v.* Den *d.* Woodruff, 4 Zab. (N. J.) 753.

[2] Hughes *v.* Holliday, 3 G. Gr. (Ia.) 30.

[3] City of East St. Louis *v.* Hackett, 85 Ill. 382.

[4] Patterson *v.* United States, 2 Wheat. 222; Miller *v.* Trets, 1 Ld. Raym. 324.

[5] Wood *v.* McGuire, 17 Ga. 361.

[6] Stearns on Real Actions, p. 243.

[7] 3 H. & M. (Va.) 309.

of the other." In M'Murray *v.* Oneal,[1] decided in 1798, a verdict in ejectment, "for the plaintiff one cent damage" was extended by the court, and made to read, "We of the jury find for the plaintiff the lands in the declaration mentioned, and one cent damage." It must be conceded, however, that this latter case carries the principle regulating the extension of verdicts to an extreme, if not a dangerous limit. Where the verdict rendered is so utterly lacking in essential facts, as in this case, the safer and more prudent practice would be to set it aside. In a case before the Maryland Court of Appeals, it appeared that the jury found a verdict "for the plaintiff, and assessed the damages at one cent." The court held that the plain meaning and import of this verdict was that the defendants were guilty of the trespass and ejectment complained of in the declaration, and that the jury assessed the damages resulting therefrom to the plaintiff to be one cent.[2]

§ 499. *References in verdict.*—It seems clearly established, where no statute controls, that the certainty of the verdict may be established by a reference in it to monuments on the ground, or to recorded deeds, or diagrams filed of record, or to warrants of survey, or to identified agreements. This practice, the Supreme Court of Pennsylvania said, had been too often recognized to be any longer called in question. Strong, J., said: "Perhaps it would have been better had it never been so held. A record should be complete in itself, and as a court may mould a verdict, not changing its substance, there is no difficulty in having the record complete, by assisting the jury to incorporate formally into their verdict that which practically becomes a part of it by being made the object of a reference."[3] So it has been held that a verdict in trespass to try title may be aided by a reference embodied in it to the description in the plat

[1] 1 Call. (Va.) 246. See Kershner *v.* Kershner, 36 Md. 309–336.
[2] Kershner *v.* Kershner, 36 Md. 309–336.
[3] Miller *v.* Casselberry, 47 Penn. St. 376.

or declaration. Hence, where the jury found for "the land on which the defendant lives," it was held sufficiently definite to enable the plaintiff to take possession.[1]

§ 500. *Verdict must specify the nature of the estate.*— In some of our States the verdict must specify the nature of the estate found,[2] and if the verdict fails so to do, it may be treated as a nullity and a new trial ordered.[3] Under the practice in Illinois, if the jury omit to specify the estate found they are sent back to further consider the verdict. The courts of that State have no power to supply the want of such a finding. Such action, if attempted by the courts, would be regarded as constituting an encroachment upon the province of the jury, for the defect is considered not as a matter of form, but an omission of an essential fact. Hence a verdict "for plaintiff" was held, in that State, not to be a verdict upon which a judgment could be based, the nature of the estate found not being specified.[4] On the other hand, in Hawley *v.* Twyman,[5] an ejectment case on appeal before the Court of Appeals of Virginia, it appeared that the declaration set forth that the plaintiff had title, in fee simple, to the land which was described as to quantity, and boundaries, and coterminous owners. The issue was "not guilty." The verdict was as follows: "We, the jury, upon the issue joined, find that the defendant is guilty in manner and form as the plaintiff in his declaration hath complained." The court held that though the verdict did not expressly find an estate in fee in the plaintiff, as required by statute, yet the verdict was sufficient, though informal.

§ 501. *Verdicts held sufficient.*—Where the jury found that "the old hedge row, &c.," was the dividing line be-

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[1] Manning *v.* Dove, 10 Rich. (S. C.) Law, 395.

[2] Van Fossen *v.* Pearson, 4 Sneed (Tenn.), 362.

[3] Rivier *v.* Pugh, 7 Heisk. (Tenn.) 715; Rogers *v.* Sinsheimer, 50 N.Y. 646; see Goodtitle *v.* Alker, 1 Burr. 133.

[4] Long *v.* Linn, 71 Ill. 152; see Rawlings *v.* Bailey, 15 Ill. 178.

[5] 24 Gratt. (Va.) 516.

tween the parties, the verdict was held sufficiently certain;[1] and low water-mark is a boundary sufficiently certain in a judgment in a real action to enable the sheriff to execute the judgment by an *habere facias*.[2] And a verdict for the use and benefit of a house and store-room has been held to be a verdict for them, as they are capable of delivery of possession under an *habere facias*.[3] Under the practice in California, a finding that "the defendant has a good and perfect title to the demanded premises," will support a judgment in his favor, whether it is to be regarded as a finding of fact or conclusion of law.[4] In ejectment in Alabama, where the premises are described with particularity in the complaint, and defendant pleads not guilty without any disclaimer as to a part of the premises, a verdict of a jury finding the issues for the plaintiff is a verdict for the entire premises, and is sufficient. Under the practice of that State it is only necessary, when the jury find for the plaintiff less than the quantity of land sued for, to describe in the verdict the part of the premises recovered.[5] The fact that a small piece of ground is included in the verdict, of which defendant is not in possession, cannot prejudice the defendant if he makes no claim to it, and a motion in arrest of judgment, based on that ground, will be overruled. It could only be important as to the question of damages and mesne profits, and in this case the damages assessed by the jury were only nominal.[6] In trespass to try title, in Alabama, a verdict not finding, as required by statute, that "the land belonged to the plaintiff at the commencement of the action," but only that "the land belongs to the plaintiff," was held sufficient, under the prevailing liberal rules of intendment, to support a judg-

[1] Hopkins *v.* Myers, Harper (S. C.), 37, *57.

[2] Adams *v.* Frothingham, 3 Mass. 352.

[3] Miller *v.* Casselberry, 47 Penn. St. 376.

[4] Frazier *v.* Crowell, 52 Cal. 399.

[5] Chapman *v.* Holding, 60 Ala. 522.

[6] Adm'rs of Russell *v.* Maloney, 39 Vt. 579; see Coleman *v.* Doe *d.* Henderson, 2 Scam. (Ill.) 251.

ment in favor of plaintiff for damages and costs, and to authorize the court to award a writ *habere facias possessionem.*[1] A finding by the jury "for the defendant ten acres, forty-eight perches, the meadow on the west side of the creek, and find for the plaintiff the balance," has been held sufficiently certain.[2] Where the writ described the premises as "a tract of land in Jackson township, containing 185 acres or thereabouts, bounded by lands of M. J. and V.," a verdict "for the farm as it stands in the writ," was held good.[3] Where the description in the writ of ejectment was for a certain limestone quarry, containing about three acres, and bounded on two sides by adjoining owners, a verdict for the quarry, describing the two boundaries, was said to be sufficient.[4] An award in ejectment, showing a plain mistake in fact in misdescribing the premises, should be sent back to the referees for correction, so as to make the award certain and consistent.[5]

§ 502. *Verdicts held insufficient.*—A verdict in ejectment for a certain number of acres, "part of the premises in the declaration mentioned," is too uncertain to warrant a judgment upon it,[6] and a verdict "for the plaintiff for one hundred and fifty acres, part of the land claimed in the writ, and not guilty as to the residue," is bad for uncertainty.[7] A verdict "for one half of the survey, according to draft filed in the case, the land to be laid off according to quantity and quality, reserving to defendant as much of the improvement as practicable," &c., has been held void for uncertainty, in Pennsylvania.[8] So a verdict "for 2 acres, $28\frac{35}{100}$ perches, with 6 cents damages," is incurably bad, it being a

[1] Stephens *v.* Westwood, 25 Ala. 716.

[2] Tryon *v.* Carlin, 5 Watts (Penn), 371.

[3] Emig *v.* Deihl, 76 Penn. St 359.

[4] Clement *v.* Youngman, 40 Penn. St. 341.

[5] Kidd *v.* Emmett, 72 Penn. St. 150.

[6] Gregory *v.* Jacksons, 6 Mun. (Va.) 25.

[7] Stewart *v.* Speer, 5 Watts (Penn.), 79; see White *v.* Hapeman, 43 Mich. 267.

[8] Martin *v.* Martin, 17 S. & R. (Penn.) 431.

part of the lot for which the action was brought.[1] So "the middle of a stone wall" is too indefinite a starting point for the boundary of a town lot, as fixed by a verdict. It was said that while the courts favored verdicts, such essential uncertainty could not be tolerated.[2] A verdict in ejectment, finding "that the defendant should have the third part of the 41 acres and 32 perches, and, if any overplus, it goes to the plaintiff," has been held to be too uncertain, and that the court could not cure it by appointing a surveyor to ascertain and designate the rights of the parties, and rendering judgment thereon.[3] And where an ejectment was brought for the whole tract, and verdict was given for 20 acres on the lower or south end of the tract, it was held to be void for uncertainty. The verdict in this case was also rendered for the land in severalty, though it was owned in common. It was held that the verdict should have been for an undivided interest.[4]

§ 503. *Roberti v. Atwater.*—In a case which arose in Connecticut, the verdict was as follows: "In this case the jury find the issue for the plaintiffs, and therefore find for them to recover of the defendant the seizin and peaceable possession of the premises described in the declaration, and one dollar damages; and that the defendant have until June 1, 1875, to remove the barn." The court held that the whole verdict was vitiated by the last clause, and said, "It is clear that the jury believed that they were authorized to name a day in the future, prior to which the defendant might enter upon the plaintiffs' land, without their consent, and remove the barn. It is to be presumed that this belief entered into and produced the verdict, and that the jury would not have agreed to any portion of it as actually rendered unless this condition had been embodied in it.

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[1] Borough of Harrisburg *v.* Crangle, 3 W. & S. (Penn.) 460.
[2] Hagey *v.* Detweiler, 35 Penn. St. 409.
[3] Smith *v.* Jenks, 10 S. & R. (Penn.) 153.
[4] Nolan *v.* Sweeny, 80 Penn. St. 77.

To strike off the condition, and allow the remnant to stand, is for this court to make and record a verdict which the jurors refused to render. They practically declared themselves unable to agree upon one within legal limits, and we cannot perfect that which they left thus imperfect."[1]

§ 504. *Verdict between tenants in common.*—And in ejectment between tenants in common, if the jury return a special verdict, actual ouster must be found therein to entitle the plaintiff to judgment.[2] As we have already shown, the ouster is a question of fact which must be found by the jury. Even a special verdict, finding a specific demand by the plaintiff to be let into possession, followed by a refusal on the part of the occupying co-tenant to comply with the demand, will not warrant a judgment in ejectment between co-tenants. Actual ouster must be found by the jury.[3]

§ 505. *Misjoinder cured by verdict.*—In an early case in England, it was held that where an action of ejectment and an action of assault and battery were joined in the same writ, and, after verdict, it was moved, in arrest of judgment, that the practice was without precedent, the misjoinder was cured by verdict.[4] The cases cited in discussing the subject of the description in the pleadings, are applicable to the verdict, though it is usually sufficient to insert a much shorter description in the latter. The courts frequently assist the jury in putting the verdict in proper form, by interrogating them as to their real intention, and suggesting the appropriate method of giving expression to it; or by calling their attention to informalities or elements of uncertainty in the verdict as tendered, and sending them back to further consider it. For this reason, errors in the form of verdicts are of infrequent occurrence.

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[1] Roberti *v.* Atwater, 42 Conn. 266.

[2] Taylor *v.* Hill, 10 Leigh (Va.), 457; see Pierce *v.* Wanett, 10 Ired. (N. C.) Law, 446; Barnitz *v.* Casey, 7 Cranch, 456.

[3] See §§ 277–283; Carpentier *v.* Mendenhall, 28 Cal. 484.

[4] Bird *v.* Snell, Hob. 249; see Dalston *v.* Janson, 5 Mod. 90.

CHAPTER XX.

OF THE JUDGMENT.

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§ 506. *Judgments in personal actions conclusive.*—The legal effect of the judgment in ejectment has been briefly adverted to in the opening chapter of this treatise.[1] The importance of this branch of our subject however, and the absence of harmony in the authorities, and in the legislative policy in the several States, regulating its effect, render necessary a more extended and detailed statement and discussion of the rights which are established and secured by the adjudication. The general and familiar rule in personal actions is that a litigant shall not be twice vexed for the same cause, and that allegations of record, upon which issue has been taken and found, are conclusive upon the parties

[1] See §§ 41, 42, 43, 44, 47.

and their privies, according to the tenor of the findings, so as to estop the parties from again litigating the facts and issues once so tried and determined.[1] Stated in another form the rule is, that the judgment of a court of competent jurisdiction, directly upon the point in issue considered as a plea, is a bar and as evidence is conclusive, between the same parties upon the same matter directly in question, in another action or court.[2]

§ 507. *Test as to the conclusiveness of a judgment.*—If the evidence which will sustain the second action would have authorized a recovery in the first action, under the allegations of the complaint, the first judgment is an absolute bar to a recovery in the second action.[3] This is the usual and most simple test. It is not sufficient that the transactions involved in and giving rise to the two actions are the same; the causes of action must be identical to the extent that the same evidence will support both actions. The forms of the actions may be different and the causes of action still the same; that is, the same evidence may be available to support either action.[4] The judgment is equally conclusive upon the parties in a second action depending

[1] Ferrer's Case, 6 Rep. (3 Coke), 7; see Stowell *v.* Chamberlain, 60 N. Y. 272; Sturdy *v.* Jackaway, 4 Wall. 174; Cromwell *v.* County of Sac, 94 U. S. 351; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; Arnold *v.* Arnold, 17 Pick. (Mass.) 4; Steinbach *v.* Relief Fire Ins. Co. 77 N. Y. 498; South Ala. R. Co. *v.* Henlein, 56 Ala. 368; Perry *v.* Dickerson, 85 N. Y. 345; see Castrique *v.* Imrie, 7 Jurist (N. S.), 1076.

[2] Stowell *v.* Chamberlain, 60 N. Y. 272; Barrs *v.* Jackson, 1 Y. & C. N. R. 585; Bigelow *v.* Winsor, 1 Gray (Mass.), 299; Bagot *v.* Williams, 3 B. & C. 235; Nelson *v.* Couch, 15 C. B. (N. S.) 99; Smith *v.* Hemstreet, 54 N. Y. 644; Blair *v.* Bartlett, 75 N. Y. 150; Gates *v.* Preston, 41 N. Y. 113; White *v.* Coatsworth, 6 N. Y. 137; Duchess of Kingston's Case, 20 Howell's St. Tr. 538; Toles *v.* Gardner, 11 Week. Dig. (N. Y.) 395; Masten *v.* Olcott, 24 Hun (N. Y.), 587; East N. Y. & J. R. Co. *v.* Elmore, 53 N. Y. 624.

[3] Steinbach *v.* Relief Fire Ins. Co. 77 N. Y. 498; Stowell *v.* Chamberlain, 60 N. Y. 272.

[4] Rice *v.* King, 7 Johns. (N. Y.) 20; Miller *v.* Manice, 6 Hill (N. Y.), 114; Martin *v.* Kennedy, 2 B. & P. 69; especially Stowell *v.* Chamberlain, 60 N. Y. 272; Dawley *v.* Brown, 79 N. Y. 390; see Kelsey *v.* Ward, 16 Abb. Pr. (N. Y.) 98–103; affi'd, 38 N. Y. 83; Cannon *v.* Brame, 45 Ala. 262; Taylor *v.* Castle, 42 Cal. 367.

upon the same questions involved in the first action, although the subject-matter of the second action may be different.[1] A judgment for the defendant, in an action of trover, may bar an action of *indebitatus assumpsit* for the value of the same goods, but to constitute a bar it must appear that the question of property was passed upon in the first action.[2] A difference in the form of the action will not prevent the application of the estoppel;[3] nor is the estoppel avoided by the fact that the first judgment was rendered upon erroneous grounds.[4]

§ 508. The courts have even gone so far, in giving full effect to the binding force of a judgment, as to hold that the judgment is an estoppel, not only as to the matters which were actually determined, but as to every other matter which the parties might, with reasonable diligence, have litigated and had decided in the former action, either as matter of claim or of defense.[5] The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps, or the ground-work, upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, "upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."[6] In Doak *v.*

[1] Castle *v.* Noyes, 14 N. Y. 329; Doty *v.* Brown, 4 N. Y. 71.

[2] Hitchin *v.* Campbell, 2 W. Bla. 779; S. C. 3 Wils. 240; Id. 304; Union R. R. & T. Co. *v.* Traube, 59 Mo. 355–362; Agnew *v.* McElroy, 10 S. & M. (Miss.) 555.

[3] See Stowell *v.* Chamberlain, 60 N. Y. 272; Ware *v.* Percival, 61 Me. 391; Steinbach *v.* Relief Fire Ins. Co. 77 N. Y. 498; Washburn *v.* Great Western Ins. Co. 114 Mass. 175.

[4] Morgan *v.* Plumb, 9 Wend. (N. Y.) 287; Steinbach *v.* Relief Fire Ins. Co. 77 N. Y. 498.

[5] Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Le Guen *v.* Governeur, 3 Johns. Cas. (N. Y.) 605; Jordan *v.* Van Epps, 85 N. Y. 427; Chamberlain *v.* Gaillard, 26 Ala. 504; Stafford *v.* Clark, 2 Bing. 382; Miller *v.* Covert, 1 Wend. (N. Y.) 487; Roberts *v.* Heim, 27 Ala. 678; Bloomer *v.* Sturges, 58 N.Y. 176; Clemens *v.* Clemens, 37 N. Y. 74; Marriot *v.* Hampton, 7 T. R. 269; see Foster *v.* Evans, 51 Mo. 39.

[6] Burlen *v.* Shannon, 99 Mass. 200–203; Reg. *v.* Hartington, 4 El. & Bl. 794; Gilbert *v.* Thompson, 9 Cush. (Mass.) 349; Dickinson *v.* Hayes, 31 Conn. 417; see Packet Co. *v.* Sickles, 5 Wall. 580.

Wiswell,[1] in the Supreme Court of Maine, it appeared that after a demandant had recovered a judgment in a real action, and had taken possession under it, the tenant brought assumpsit for the value of buildings erected by him upon the premises, claiming that they constituted personal property, and that the demandant having taken possession of them was bound to repay their value. The court decided, however, that, as the action for the land was brought directly against the tenant, it was his duty to have defended and protected, *in that action*, all his rights connected with the land. Whether or not he had set up, in the real action, by betterment claim or otherwise, his right to the buildings, did not appear, but the court held it was of no importance, because the judgment in the real action, with the possession taken under it, constituted a bar to the action of assumpsit. The rule as to finality applies not only to judgments rendered after an actual litigation upon the merits of the matter in controversy, but also to judgments rendered upon default, or by confession.[2] It is to be observed, however, that only a final judgment, one which has definitely and conclusively decided the issues, and fixed the rights involved, can be used in another action as a bar, or as conclusive evidence,[3] and an interlocutory order has been held, in New York, not to be such a judgment.[4]

§ 509. *Judgment in real actions.*—We have already shown[5] that in the system of real actions writs of different degree prevailed. A judgment rendered upon an inferior writ was not an estoppel upon a writ of a higher degree or nature, because the superior writ established rights additional

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[1] 33 Me. 355.

[2] Brown *v.* Mayor, &c. 66 N. Y. 390; Gates *v.* Preston, 41 N. Y. 113; Newton *v.* Hook, 48 N. Y. 676; Bradford *v.* Bradford, 5 Conn. 127.

[3] Webb *v.* Buckelew, 82 N. Y. 555; Brinkley *v.* Brinkley, 50 N. Y. 202; Whitaker *v.* Bramson, 2 Paine's C. C. 209; Holt *v.* Miers, 9 C. & P. 191; Baugh *v.* Baugh, 4 Bibb. (Ky.) 556; McLane *v.* Spence, 11 Ala. 172; Thompson *v.* Mylne, 4 La. Ann. 206.

[4] Webb *v.* Buckelew, 82 N. Y. 555.

[5] See Chapter II.

to those acquired under or conferred by an inferior writ.[1] A judgment upon a writ of right,[2] the highest and most important of the real writs, was final and conclusive, because no other writ could confer any additional or greater rights.[3] By selecting a writ of a lower rank, the demandant under this system was enabled to secure more than one trial of his title. Lord Ellenborough, in the leading case of Outram *v.* Morewood,[4] after discussing the different species of actions affecting lands and chattels real, uses this significant language: "A judgment, therefore, in each species of action, is final only for its own purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject matter, by way of bar to future litigation, for the thing thereby decided. Only the matter of the one judgment is in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land than the other. What, therefore, Lord Coke says, that in personal actions concerning debts, goods, and effects (by way of distinction from other actions), a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever, *quoad* their subject matter."[5]

§ 510. *Review of the origin of ejectment.*—Before considering the effect of the judgment in ejectment, a brief review of the origin of the action will facilitate the discussion. Ejectment, as we have seen, was originally a writ of

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[1] See §§ 66, 67. [2] See § 69.

[3] See Outram *v.* Morewood, 3 East, 358; S. C. 5 T. R. 121; Stearns on Real Actions; Booth on Real Actions; Jackson on Real Actions.

[4] 3 East, 346. See Stevens *v.* Hughes, 31 Penn. St. 381. [5] See § 67.

trespass brought by a tenant for years to recover compensation for damages resulting from eviction from the demised premises during the continuance of his term.[1] The money judgment for damages, proved, in many cases, an inadequate redress, so the practice of awarding the lessee a writ of possession sprung up.[2] This was followed by the introduction of imaginary parties,[3] declaring on a fictitious lease, and the consent rule,[4] by which the party desiring to protect the possession was forced to admit a lease in order to facilitate the trial of the title in cases where no tenancy or lease in fact existed. When the claimant recovered judgment in the action, and was placed in possession by the sheriff, he was said to be seized "according to his right."[5] "This," says Mr. Adams,[6] "is effected by another fiction. It is a rule of law, that when a man having a title to an estate comes into possession of it by lawful means, he shall be in possession according to his title; and, therefore, when possession is once given by the sheriff, the possession and title are said to unite, and the plaintiff's lessor holds the lands according to the nature of his interest in them." The party thus clothed with the possession, if he had a fee simple, became thereby seized in fee simple; if he had a chattel interest, he was in as a termor; and if he had no title, his possession was that of a trespasser,[7] except that he was not liable in trespass for the entry. The judgment did not award, and the claimant did not recover the seizin of the land, as in a real action. The only relief given as regards the land itself was the writ of possession.

§ 511. *Judgment in ejectment not conclusive.*—The record or judgment in the action did not disclose the title claimed by the parties; and unlike a real action, an inspec-

[1] See §§ 1, 23, 24, 25, 27. [2] See § 23. [3] See § 37. [4] See § 36.

[5] See Minke *v.* McNamee, 30 Md. 294; see § 41.

[6] Adams on Ejectment (4th Am. ed.), p. 391.

[7] Taylor *v.* Horde, 1 Burr. 114; see Long *v.* Neville, 29 Cal. 131; Man *v.* Drexel, 2 Penn. St. 202; Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 270; see §§ 41, 42, 43, 44.

tion of it would not reveal the character of the estate or interest adjudicated; for no particular estate or interest was claimed in the writ or awarded by matter of record by the court. Indeed the declaration negatived the ownership of the freehold by the plaintiffs.[1] The judgment, it is true, clothed the successful claimant with the possession of the land, which was an important acquisition, but it went no further. It did not, in form, declare or establish the title, or protect or continue the possession so awarded. The record afforded no evidence of the claimant's right to the possession as established upon the trial, and was not a bar or a matter of estoppel as to the same title or between the same parties.[2]

§ 512. When we consider the solid reasons upon which the practice of holding the judgment in personal actions or on a writ of right, the highest real writ conclusive upon parties and privies, is based, it becomes important to consider more fully the causes which rendered the judgment in ejectment inconclusive as a muniment of title, or evidence of the right of posssession, and of no avail as a protection against further vexatious litigation over the same title. The inconclusiveness of the judgment, as we have seen, constituted the basis of Lord Coke's lament over the disuse of real actions.[3] In New England, too, this imperfection in the remedy was appreciated, and it was largely instrumental in inducing the

[1] Stevens *v.* Hughes, 31 Penn. St. 381.

[2] Strother *v.* Lucas, 12 Peters, 410; Jones *v.* De Graffenreid, 60 Ala. 145; Shaw *v.* Lindsey, 60 Ala. 344; Camp *v.* Forrest, 13 Ala. 114; White *v.* Kyle, 1 S. & R. (Penn.) 515; Doe *v.* Harlow, 12 Ad. & E. 40; Bailey *v.* Fairplay, 6 Binn. (Penn.) 450; Eldridge *v.* Hill, 2 Johns. Ch. (N. Y.) 281; Kimmel *v.* Benna, 70 Mo. 52; Taylor *v.* Horde, 1 Burr. 114; Jackson *v.* Dieffendorf, 3 Johns. (N. Y.) 270; Botts *v.* Shields, 3 Litt. (Ky.) 36; Holmes *v.* City of Carondelet, 38 Mo. 552; Smith *v.* Sherwood, 4 Conn. 276; Bradford *v.* Bradford, 5 Conn. 132; Chapman *v.* Armistead, 4 Munf. (Va.) 382; Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667; Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233; Pollard *v.* Baylors, 6 Munf. (Va.) 433; Hawkin's Lessee *v.* Hayes, 3 Harr. (Del.) 489; Rice *v.* Auditor General, 30 Mich. 12; Moran *v.* Jessup, 15 U. C. Q. B. 612; see Sherman *v.* Dilley, 3 Nev. 21; Cagger *v.* Lansing, 64 N. Y. 417.

[3] See § 45.

colonists to attempt the experiment of reforming and restoring the worn out system of real writs.[1]

§ 513. *Reasons for the inconclusiveness of the judgment.* —One reason, as we have seen, why the judgment was not conclusive, was that nothing remained of record to reveal the title that had been adjudicated. The changes in the rules of evidence which enable a party to show, by parol testimony, what matters were actually litigated in an action without regard to the judgment record, or the issues disclosed by the pleadings, are of comparatively modern origin.[2] Besides this, there was no privity between the successive fictitious plaintiffs, and each successive ejectment was based upon a new lease and a fresh trespass. The right of property, too, might be in one person, the right of possession in a second, and the actual possession in a third; hence a judgment for the possession did not of necessity conclude the title. In Smith *v.* Sherwood,[3] in the Supreme Court of Errors of Connecticut, it was held that a former judgment for the defendant, in an action of disseizin on the issue of no wrong or disseizin, was not an estoppel as to the plaintiff's title, as the judgment might have been rendered upon the ground that the defendant was not in possession, or had occupied by the consent or license of the plaintiff, or on other grounds not involving the question of title.

§ 514. *Kimmel* v. *Benna and Camp* v. *Forrest discussed.* —The action is now divested of fictitious parties, and the practice of declaring on a fictitious lease is practically obsolete;[4] but it is not clearly settled that these important changes in the practice and form of the action, render the judgment conclusive upon the parties or the title. In Kimmel *v.* Benna,[5] the Supreme Court of Missouri say: "It is a mistaken assumption that the sole reason for the ancient rule in regard to the want of finality of judgments

[1] See § 74.
[2] See § 523.
[3] 4 Conn. 276. See Oetgen *v.* Ross, 54 Ill. 79.
[4] See § 55.
[5] 70 Mo. 52.

in ejectment was the employment of fictitious parties in the proceeding. A judgment in ejectment confers no title upon the party in whose favor it is given." The court then quotes from Mr. Adams,[1] who says: "That the judgment can never be final, and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action;" and continue. "This reason is just as applicable since the abolishment of lease, entry and ouster as before."[2] In Camp *v.* Forrest,[3] in the Supreme Court of Alabama, the question of the conclusiveness of a judgment, in an action of trespass to try title, where the issue was made in the name of the real parties in interest, was considered. The court observes that a judgment in ejectment confers no title upon the party in whose favor it is given, and is not evidence in a subsequent action between the same parties, and adverts to the fact that the peculiar character of the record renders it impossible to plead a former recovery in bar of a second ejectment, because it can never be made to appear that the second ejectment is on the same title as the first. The court says, further: "Although such may be the condition of the record, yet the inconclusiveness of the judgment does not rest on the *form* of the declaration and consequent proceedings, but upon the effect of the verdict and judgment. These entitle the lessor of the plaintiff to the possession of the lands, but do not give him any title thereto, except such as he previously had." The decision, however, was not rested upon these grounds, but upon the peculiar wording of the statute of Alabama, abrogating the fictions which provided, among other things, that, "the laws now in force in relation to the action of ejectment, except in so far as relates to fictitious proceedings therein, shall be applied to the action of trespass to try titles." The court held

[1] Adams on Ejectment (4th Am. ed.), p. 420.

[2] See Carter *v.* Scaggs, 38 Mo. 302; Holmes *v.* City of Carondelet, 38 Mo. 551; Slevin *v.* Brown, 32 Mo. 176; Foster *v.* Evans, 51 Mo. 39; Gibson *v.* Chouteau, 50 Mo. 85.

[3] 13 Alabama, 114.

that, under the wording of this statute, no greater effect could be given to the judgment in the new action than in the action which was superseded, and that the language was too general and unlimited to restrict it to what might transpire up to the rendition of the judgment, and to hold that the judgment itself was decisive of the question of title.

§ 515. *Abolition of fictions ordinarily renders judgment conclusive.*—The effect of the judgment in ejectment in cases where the real parties in interest appeared as the nominal parties in the action as rival claimants of the title, has been before the Supreme Court of the United States several times, and the conclusions of that court cannot be reconciled with the cases in the Supreme Court of Missouri, and the case of Camp *v.* Forrest, in Alabama, which we have just noticed. In Miles *v.* Caldwell,[1] Mr. Justice Miller, delivering the opinion of the Supreme Court, refers to the common law rule, that the verdict and judgment in actions of ejectment have not that conclusive effect between the parties which judgments have in other actions, either in courts of law or equity, and continues: "It must be conceded that such is the general doctrine on the subject, as applicable to cases tried under the common law form of the action of ejectment. One reason why the verdict cannot be made conclusive in those cases is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A. B., who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A. B. cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor, for there is no privity between John Doe and John Den. Hence, technically, an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used. It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in

[1] 2 Wall. 35.

ejectment, that induced courts of equity (which, unrestrained by the technicality, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place, to determine fairly the validity of the title, and by injunction, directed to the unsuccessful litigant, compel him to cease from harassing his opponent by useless litigation. There was, perhaps, another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors, that they were not willing that the claim to it should, like all other claims, be settled forever by one trial in an ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title. They, however, did concede to those solemn actions the writ of right and the writ of assize, the same force as estoppels, which they did to personal actions in other cases." The principles of this case were followed in the same court in the later case of Sturdy *v.* Jackaway,[1] in which Mr. Justice Grier, delivering the opinion of the court, said: "As the title of the freehold was never formally and directly in issue by the pleadings, but only a trespass committed by John Doe or Richard Roe, in forcibly expelling him from a term of years, no verdict between these parties for the supposed trespass could be pleaded in bar to another action of trespass by Thomas Troublesome or Timothy Peaceable. It was in this way that the doctrine crept in that a verdict and judgment were conclusive only as regards personalty. Afterwards, when this fictitious scaffolding was demolished in many States, and the parties made their issue in their own names—where there could be no difficulty as to the estoppel—the idea of a difference between rights to real property and personalty

[1] 4 Wall. 174–176.

still continued in many States to linger, and a single verdict and judgment in ejectment was not considered conclusive. In such States provision was usually made by statute for a second trial."

§ 516. In Blanchard *v.* Brown,[1] Mr. Justice Davis, delivering the opinion of the same court in an ejectment case on review from the State of Illinois, said: "The common law form of the action of ejectment does not prevail in Illinois. There the action is without fictions, and is between the real parties in interest, and for the possession of a specific estate, and damages for its detention. On account of the fictitious character of the common law action of ejectment, a judgment was not a complete bar, as in other actions."[2] In Marshall *v.* Shafter,[3] the Supreme Court of California use this language: "No sufficient reason, in our opinion, is given why the matters that have once been judicially determined in the action of ejectment, may be again drawn in question between the same parties, when they could not in an action of another character. In ejectment, as in other actions, the parties rely strictly upon their rights in the matter in litigation. No argument can be drawn from the fact that the judgment is not that the plaintiff recover the title, but only the possession, for a similar result accrues in the action of replevin, though the title to the personal property is confessedly in issue. In trespass to lands, whatever may be the form of the issues, the recovery is only of damages, and yet, as in Outram *v.* Morewood,[4] the losing party is estopped in another action from averring contrary to the title as found in the former suit."[5] So in Doyle *v.* Hallam,[6] the Supreme Court of

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[1] 3 Wall. 245. See Hogan *v.* Kurtz, 94 U. S. 775.

[2] See Spence *v.* McGowan, 53 Texas, 30–35.

[3] 32 Cal. 176–198. See Amesti *v.* Castro, 49 Cal. 325.

[4] 3 East, 346.

[5] See cases cited in note, Duchess of Kingston's Case, 2 Smith's Leading Cases, 784.

[6] 21 Minn. 515. See Sherman *v.* Dilley, 3 Nev. 21–25.

Minnesota, after citing some of the authorities which we have been discussing, declare that as the fictions accompanying the common law action of ejectment have no existence in the practice of that State, the inconclusiveness which attached to judgments in ejectment, on account of those fictions, is no longer admitted. In Stevens *v.* Hughes,[1] the Supreme Court of Pennsylvania declared that: "The inconclusiveness of a verdict and judgment in ejectment, is due to the form of the action, not to the character of the subject matter of the controversy. The apparent exception nowhere else exists. That there is no charm about land, as land, which relieves it from the operation of the general rule that a judgment between the same parties, or their privies, directly upon the same matter, is the end of controversy; that it is an estoppel against future litigation of the same question, is evident from the fact, that a fine, a common recovery, a simple judgment in a writ of right, and indeed judgments in any real action, have always been held to be conclusive."

§ 517. *Conflict of the cases.*—The conflict in the authorities as to the effect of a judgment in ejectment, as an estoppel upon new actions, which bring in question the same title, is perhaps not deserving of as extended notice as the subject would call for if the statutes in most of our States did not specifically establish and define the rights of the parties, and the effect to be given to the adjudication. But changes and repeals of the statute law in several States, removing the statutory estoppel upon the judgments, have brought the subject into some prominence. It is probably now an open question in South Carolina as to whether or not a judgment in an action for the possession of land and trial of the title is conclusive. Even where the statutes defining the effect of the judgment prevail the language employed is sometimes ambiguous, and capable of a double construction, so that frequently it becomes important, and often necessary, to fully comprehend the effect of the judg-

[1] 31 Penn. St. 381–385.

ment, without regard to the provisions of the statute, in cases where the issue is made between the real parties in interest. Little need be said in support of the considerations upon which the principle of law making judgments conclusive rests. The highest reasons of public policy require that contentions, whether over the title to realty or personalty, should be promptly and irrevocably settled, otherwise the uncertainty as to ownership will be attended with waste, disuse or destruction of the subject matter of contention, whether it be realty or personalty.

§ 518. *Kimmel v. Benna criticised.*—Even in Kimmel *v.* Benna,[1] the most recent of the cases holding that the judgment in ejectment was not conclusive in cases where no fictions were employed, it is practically conceded that the inconclusiveness of the judgment was in part due to the peculiarities of the fictions. The court remark (p. 65): "It is a mistaken assumption that the *sole* reason for the ancient rule in regard to the want of finality of judgments in ejectments was the employment of fictitious parties in the proceeding." We have seen already, especially in the cases of Sturdy *v.* Jackaway,[2] Blanchard *v.* Brown,[3] and Miles *v.* Caldwell,[4] in the Supreme Court of the United States, and Stevens *v.* Hughes,[5] in the Supreme Court of Pennsylvania, that the want of finality is rested in some of the authorities very largely, and in others wholly, upon the fictitious and peculiar form of the action. It must be conceded that legislative acts, abolishing the fictions in actions of ejectment, do not abolish the action as such, nor convert it into a writ of right, and though changes of this character are usually held to place the final judgment in ejectment on the same footing as judgments in other actions, yet it still remains an action of ejectment, and falls under the rule of limitation applicable to that action.[6] But what are the reasons for

[1] 70 Mo. 52–65.
[2] 4 Wall. 174.
[3] 3 Wall. 245.
[4] 2 Wall. 35.
[5] 31 Penn. St. 381–385. See Cromwell *v.* County of Sac, 94 U. S. 351–354.
[6] Hogan *v.* Kurtz, 94 U. S. 773–775.

holding that the judgment is inconclusive other than the fictitious form of the action, and the use of imaginary parties, which technically prevented the application of the estoppel?

§ 519. The Supreme Court of Missouri, in Kimmel *v.* Benna,[1] remark further: "A judgment in ejectment confers no title upon the party in whose favor it is given. 'It is, therefore, manifest,' observes Mr. Adams,[2] 'that the judgment can never be final, and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action.' This reason is just as applicable since the abolishment of lease, entry and ouster as before." The latter remark is a mere assertion of the opinion of the court, without fact or argument to support it. It begs the question and states the conclusion without explaining the reason or assigning any cause why the rule should be as applicable since as before the change. The quotation from Mr. Adams' excellent work is given without reference to what precedes and follows the sentence quoted; and it must not be forgotten that his treatise was written while the fictions were in full force, and before the practice of making the issue in the name of the real parties in interest had been introduced or its effect considered. It is true that he says, "a judgment in ejectment confers no title upon the party in whose favor it is given," and then adds, "it is not evidence in a subsequent action even between the same parties," because the structure of the record "renders it impossible to plead a former recovery in bar of a second ejectment, for the plaintiff in the suit is only a fictitious person, and as the demise, term, &c., may be laid many different ways, it cannot be made to appear that the second ejectment is brought upon the same title as the first."[3]

§ 520. *Judgment not a source of title.*—But a judgment

[1] 70 Mo. p. 65.

[2] Adams on Ejectment (4th Am. ed.), p. 420.

[3] Adams on Ejectment (4th Am. ed.), p. 420.

in an action of ejectment, or any action, does not possess the force of a patent, or statutory or other grant. The court is not a source of title, and is possessed of no title that it can confer or bestow. Its function is merely to investigate and declare the legal status and effect of the titles which the rival claimants exhibit, and with which they are invested. The judgment record does not create the title, but merely shows that it had been proved, and its sufficiency judicially determined.[1] True, the judgment in ejectment does not award the seizin of the land, but only the possession, to the successful party. The possession being thus lawfully acquired however, the party clothed with it, as we have seen,[2] becomes lawfully seized according to his estate or interest in the land, so that the result of a judgment in a real action is attained, except that no available record, muniment, or evidence of the title, or estate, upon which the recovery was had, is made or preserved. In Mahoney *v.* Middleton,[3] the Supreme Court of California says: "A judgment in ejectment does not transfer to the successful party, the title of the adverse party, but if presented in the proper mode, whenever such adverse title is drawn in issue, it shuts out all proof of such adverse title. Its effect bears a closer resemblance to an extinguishment than a transfer of the adverse title. The judgment awards the possession to the prevailing party, because he had title at the commencement of the action, and because the losing party had no title, or not such title as would authorize him to withhold the possession; but it neither directly nor indirectly transfers the title."

§ 521. *Judgment operates as an estoppel.*—It is not a question as to what title has been conferred upon the successful litigant by the judgment, but whether or not the

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[1] See, especially, Cagger *v.* Lansing, 64 N.Y. 417–424; Mahoney *v.* Middleton, 41 Cal. 41; Long *v.* Neville, 29 Cal. 131; Currier *v.* Esty, 116 Mass. 577.

[2] See §§ 510, 513.

[3] 41 Cal. 41–53.

judgment is an estoppel upon the parties who have thus made the issue in their own names, exhibited their titles, and had their day in court. It would, as we have seen, be an estoppel in contentions over the title to personalty, and the judgment in the latter class of actions does not usually, in terms or in form, confer the title upon the prevailing party. Is there any inherent difference between realty and personalty which ought to prevent the application of the estoppel, or any consideration of public policy calling for the promulgation of a different rule?

§ 522. *Distinction between realty and personalty.*—The Supreme Court of Pennsylvania, as already shown, has declared that there is no charm about land, as land, which relieves it from the operation of the general and salutary rule that a judgment between the same parties, or their privies, directly upon the same matter, is an end of the controversy, and an estoppel against future litigation of the same question.[1] This sweeping declaration, we concede, must be accepted with some caution, for, at least in England, many vast estates are held for which no title can be shown other than that conferred by long continued possession. A peculiar sanctity derived from the old feudal system attached to this right of possession,[2] and the courts evinced a strong disinclination to hold that so important a right should be lost or maintained upon the result of a single conflict. But in our modern practice the facilities for correcting errors or omissions occurring at the trial, by motion for a new trial, or by appeal, are so ample that any scheme for increasing the number of methods by which the binding force of an adjudication is avoided ought properly to be discouraged. It must be remembered that the plaintiff's lessor in the early action of ejectment was compelled to prove a superior title in himself, or a right of immediate possession, and entry, against the defendant. The

[1] Stevens *v.* Hughes, 31 Penn. St. 381, 385; see § 516.

[2] Miles *v.* Caldwell, 2 Wall. 35.

writ of possession was awarded upon the strength of the right to the possession of the land.

§ 523. *Parol evidence admissible to show the exact title adjudicated.*—The record itself contained no recital of the title, or rights established, but a fundamental rule of evidence has grown up under which the nature of the title in dispute, decided in the action, may be shown by parol, and thus brought within the estoppel of the judgment. This principle has been expressly applied to judgments in ejectment,[1] as well as other actions,[2] and is distinctly recognized by the Supreme Court of Missouri in Kimmel *v.* Benna.[3] Not only is the doctrine of Kimmel *v.* Benna repugnant to the authorities in the Federal courts and in the other States, but the prior decisions of the same court cannot be reconciled with it, for in Foster *v.* Evans[4] the court remarks: "In regard to the effect of a judgment in ejectment, it may be remembered that it is not a bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses are precisely the same as they were in the first suit." The case of Foster *v.* Evans embodies the general and true rule.

§ 524. *Result of the cases.*—The correct principles deducible from the authorities seem to be as follows: *First.* The inconclusiveness of the judgment in ejectment under the early practice is attributable to the fictitious form of the action. *Second.* There is no inherent difference between rights to realty and to personalty which renders nec-

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[1] Briggs *v.* Wells, 12 Barb. (N.Y.) 567; Treftz *v.* Pitts, 74 Penn. St. 343; Dawley *v.* Brown, 79 N. Y. 398; Barger *v.* Hobbs, 67 Ill. 592; Sherman *v.* Dilley, 3 Nev. 21; Masten *v.* Olcott, 24 Hun (N. Y.), 587.

[2] Johnson *v.* Albany and Susquehanna R. R. Co. 5 Lansing (N. Y.), 222–226; Lawrence *v.* Hunt, 10 Wend. (N. Y.) 80; Young *v.* Rummell, 2 Hill (N.Y.), 478; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Beebe *v.* Elliott, 4 Barb. (N. Y.) 457; Wood *v.* Jackson, 8 Wend. (N.Y.) 9; Packet Co. *v.* Sickles, 5 Wall. 580; Strauss *v.* Meertief, 64 Ala. 299.

[3] 70 Mo. 65.

[4] 51 Mo. 39, 40 (decided in 1872).

essary the application of a different rule exempting the former from the effect of the usual estoppel incident to a judgment. *Third.* The overwhelming weight of authority is in favor of holding the judgment conclusive in ejectment, as in other actions where the issue is made in the names of the real parties in interest. *Fourth.* The cases holding the judgment inconclusive, where the issue is so made, are not supported by precedent, or by considerations of public policy, or the application of any sound technical rules or general principles of law.

§ 525. *Judgment must conform to complaint and verdict.*—The judgment in ejectment should of course follow and conform to the verdict in designating the extent of the interest recovered,[1] and must be rendered for the premises described in the complaint,[2] and must follow the complaint in respect to the description of the lands, and as to the plaintiff's estate or interest in the premises.[3] Where the verdict was for more land than the plaintiff proved title to, a judgment in ejectment was reversed by the Supreme Court of Illinois, and the court refused to correct or reform the verdict, or to render judgment for the portion of the property to which the plaintiff proved title.[4] This somewhat harsh ruling, however, must not be taken as establishing the uniform practice, for appellate tribunals, under the modern practice, frequently reform, reduce, or correct verdicts or judgments so as to render substantial justice between the parties.

§ 526. *Judgment for land subject to easement, servitude or public use.*—Where land is subject to an easement, servitude or public use, it has been shown that the owner of the fee or dominant estate may recover it in ejectment subject

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[1] Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32–35; see § 497.

[2] Bentley *v.* Brownson, 1 Scam. (Ill.) 240.

[3] Allie *v.* Schmitz, 17 Wis. 169; Orton *v.* Noonan, 18 Wis. 447; see Holmes *v.* Seely, 17 Wend. (N. Y.) 75.

[4] City of East St. Louis *v.* Hackett, 85 Ill. 382.

to such servitude or use.[1] And where the plaintiff's title is subject to an easement, such as the support of a party wall, the judgment will give him possession subject to the easement, and, under the practice in New York, should define the nature and extent of the claimant's interest.[2] So a judgment may be rendered for land subject to a homestead right.[3]

§ 527. *Recital of incorporeal hereditaments.*—It has been shown that ejectment is not a proper remedy to recover or test the right to incorporeal hereditaments. The recitals concerning incorporeal hereditaments in a judgment in ejectment have been held by the Supreme Court of Michigan, however, to be merely nugatory, and not to affect the validity of the judgment for the land ;[4] but the rule must not be overlooked that when the ejectment is successfully prosecuted for lands, the rights, liberties and privileges appurtenant to the land are recovered therewith.[5]

§ 528. *Relief incident to interference with property in possession.*—It is clear that a complaint alleging seizin, and right of possession in the plaintiff, followed by averments of a wrongful entry and possession by the defendant, and concluding with a demand for possession and damages, is a simple action of ejectment, and a plaintiff in a complaint of this nature, under the practice in New York, is not entitled to a judgment restraining an unlawful interference with a right incident to property in possession, such as projecting a cornice over the plaintiff's premises.[6] The title to land may, however, in certain cases, be established in equity, and

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[1] Tillmes *v.* Marsh, 67 Penn. St. 507; Goodtitle *v.* Alker, 1 Burr. 133; Reformed Church *v.* Schoolcraft, 65 N.Y. 134; Ayer *v.* Phillips, 69 Me. 50; Doe *d.* The Queen *v.* Archbishop of York, 14 Ad. & El. N. S. 81; see §§ 130–132.

[2] Rogers *v.* Sinsheimer, 50 N. Y. 646; see Goodtitle *v.* Alker, 1 Burr. 133.

[3] Castle *v.* Palmer, 6 Allen (Mass.), 401; Stebbins *v.* Miller, 12 Allen (Mass.), 591; Swan *v.* Stephens, 99 Mass. 7; Letchford *v.* Cary, 52 Miss. 791; see § 141.

[4] Taylor *v.* Gladwin, 40 Mich. 232; see § 102 and note; see Provident Institution *v.* Burnham, 128 Mass. 458.

[5] Crocker *v.* Fothergill, 2 B. & Ald. 652–661.

[6] Vrooman *v.* Jackson, 6 Hun (N. Y.), 326; see Aiken *v.* Benedict, 39 Barb. (N. Y.) 400; see §§ 156, 157.

the defendant restrained from interfering with the possession.[1]

§ 529. *Judgment in ejectment in New York.*—In New York the action of ejectment tests and settles not only the right to the possession, but the title under which the right exists, whether in fee, for life, or for years.[2]

§ 530. *Judgment by default.*—In that State it has been provided by statute,[3] that a judgment by default in ejectment shall not be considered conclusive upon the title against persons claiming under the defendant, unless the judgment has been for three years docketed in the office of the clerk of the court in which it was rendered. The Court of Appeals of that State,[4] in construing these provisions, held that the "judgment book" required to be kept by the statute,[5] was a separate and distinct book from the "docket book," which the statute also provided should be kept,[6] and that an entry or record in the judgment book was not sufficient to render the judgment an estoppel, unless it was also entered in the docket book.[7]

§ 531. *Judgment by consent binding.*—In the Supreme Court of Nevada, it has been decided, where an action of ejectment for a mining interest was dismissed upon the written stipulation of the respective attorneys, conditioned that each party should pay his own costs and that the plaintiff should be released from liability on an undertaking furnished to procure a restraining order, and a judgment

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[1] Broiestedt *v.* South Side R. R. Co. 55 N. Y. 220; Corning *v.* Troy Iron and Nail Factory, 40 N. Y. 191.

[2] Cagger *v.* Lansing, 64 N. Y. 417; (below) 4 Hun (N. Y.), 812; Dawley *v.* Brown, 79 N. Y. 390; Sheridan *v.* Andrews, 49 N. Y. 478; Sheridan *v.* Linden, 81 N. Y. 182; Beebe *v.* Elliott, 4 Barb. (N. Y.) 457; Sheridan *v.* Andrews, 3 Lans. (N. Y.) 129.

[3] 2 R. S. (N. Y.) 309, § 38.

[4] Sheridan *v.* Andrews, 49 N. Y. 478.

[5] N. Y. Code Civ. Proc. § 1236.

[6] N. Y. Code Civ. Proc. § 1245.

[7] Sheridan *v.* Linden, 81 N. Y. 182; see Ryerss *v.* Rippey, 25 Wend. (N. Y.) 432.

was entered accordingly, that such judgment of dismissal was a bar as to the identical title or cause of action involved in the former action.[1]

§ 532. *Judgment by confession.*—The authorities are not uniform as to the effect of a judgment by confession in ejectment; and in Botts *v.* Shields,[2] in Kentucky, it was held that it was no more conclusive than a judgment based on a verdict of a jury. On the other hand, it has been held in Pennsylvania that a judgment by confession in ejectment is to be treated as a solemn judicial confession of want of title; a total and unconditional surrender of the field in controversy, and as such conclusive forever on the defendant and all his privies.[3]

§ 533. *Judgment in California.*—In California the rule and practice is firmly established of holding the judgment conclusive, upon parties and their privies, as to the same title. But in Amesti *v.* Castro,[4] it was held that the claimant of an inchoate Mexican grant, who had instituted proceedings to secure a confirmation of the grant by the United States courts, had not the same title, within the meaning of this rule, that he acquired after the grant had been confirmed, surveyed and patented, and hence was not estopped, after the issuance of the patent, by a judgment in ejectment, rendered against him before the confirmation of the grant, and the issuance of the patent.

§ 534. *Judgment in Vermont.*—Under the practice in Vermont, ejectment partakes of the nature of a real action, and a judgment upon the merits is conclusive of the title between the parties; and greater certainty of description is

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[1] Phillpotts *v.* Blasdel, 10 Nev. 19; citing Merritt *v.* Campbell, 47 Cal. 542; Bank of the Commonwealth *v.* Hopkins, 2 Dana (Ky.), 395; Jarboe *v.* Smith, 10 B. Mon. (Ky.) 257.

[2] 3 Litt. (Ky.) 32.

[3] Secrist *v.* Zimmerman, 55 Penn. St. 446.

[4] 49 Cal. 325; citing Waterman *v.* Smith, 13 Cal. 417, 418; Merryman *v.* Bourne, 9 Wall. 592.

therefore necessary than would be required in ejectment at common law, where the action was possessory merely, and the judgment not conclusive of the title.[1]

§ 535. *Judgment in Illinois must specify particular estate*—Under the practice in Illinois, the finding and judgment must specify the particular estate in the premises to which the plaintiff is entitled;[2] and it is provided by statute in many of our States, that the verdict or finding should specify the nature of the estate or interest recovered.[3]

§ 536. *Vendor and Vendee.*—The Supreme Court of Illinois has decided that a judgment in ejectment by default, against a vendee in possession under an executory contract of sale, is not conclusive upon the rights of the vendor, even though he had notice of the pendency of the action, and that the court will not allow it to be set up in an action of ejectment subsequently brought by the vendor for the same property.[4]

§ 537. *Landlord and tenant.*—The customary practice is to make the tenant, or party in possession, defendant in ejectment.[5] As to him, a judgment rendered in the action is, of course, binding and conclusive under the modern practice; but a different question is presented as to the effect of the judgment upon the landlord of the defendant. The general rule is that a judgment against a tenant[6] is not conclusive against his landlord, who was not made a party to the action, and is not named in the record or judgment; for judgments are ordinarily conclusive only upon the parties named therein, and those claiming under them; but the

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[1] Davis *v.* Judge, 44 Vt. 500–506; see Marvin *v.* Dennison, 1 Blatch. C.C. 159; Edwards *v.* Roys, 18 Vt. 473.

[2] Koon *v.* Nichols, 63 Ill. 163; see Lillianskyoldt *v.* Goss, 2 Utah, 292; see § 500.

[3] See Rogers *v.* Sinsheimer, 50 N. Y. 646–649.

[4] Cadwallader *v.* Harris, 76 Ill. 370; see Ryerss *v.* Rippey, 25 Wend. (N. Y.) 432; see Chap. X.

[5] See Finnegan *v.* Carraher, 47 N. Y. 493; see §§ 231, 432.

[6] See Oetgen *v.* Ross, 47 Ill. 142; Lowe *v.* Emerson, 48 Ill. 160.

landlord cannot properly be said to claim under his tenant, the converse of this proposition being the fact. In a recent case in the Supreme Court of New York,[1] it was held that a judgment in ejectment recovered against a tenant in possession of the lands, was not binding upon his landlord, although the tenant notified the landlord of the pendency of the action, and the latter refused to defend the action. Under the practice in New York the landlord may be joined as a party defendant with the tenant,[2] and, of course, the judgment would then constitute an estoppel against him; but if the claimant omits to join the landlord, and the latter refuses to appear or to defend the action, the judgment under the practice in New York only concludes the tenant, and those claiming under him, since the commencement of the action, and is not evidence against the landlord.[3] A judgment against the tenant is, of course, not binding upon his landlord, if the tenant failed to notify him of the pendency of the action, and allowed judgment to be entered by default, and attorned to the defendants, and let them into possession.[4] In Alabama, on the other hand, if, pending an action of ejectment, the landlord, who is not made a party defendant, receives the possession from the tenant, who alone is made defendant, the landlord may be turned out under the writ of possession.[5] If, however, the landlord undertakes the defense of the action in the tenant's name, and is unsuccessful, the court will ordinarily require him to pay the plaintiff's costs upon a return of an execution unsatisfied against the defendant of record.[6]

[1] Bennett *v.* Leach, 25 Hun (N. Y.), 178.

[2] See Fosgate *v.* Herkimer Mfg. Co. 12 N. Y. 580.

[3] Bennett *v.* Leach, 25 Hun (N. Y.), 178; S. C. 13 Weekly Dig. (N. Y.) 96; Ainslie *v.* Mayor, &c. 1 Barb. (N. Y.) 168; Thompson *v.* Clark, 4 Hun (N. Y.), 164; Leland *v.* Tousey, 6 Hill (N. Y.), 328; Sheridan *v.* Andrews, 49 N. Y. 484; see Finnegan *v.* Carraher, 47 N. Y. 493; Ryerss *v.* Rippey, 25 Wend. (N. Y.) 432; Boles *v.* Smith, 5 Sneed (Tenn.), 105; Brush *v.* Cook, Brayton (Vt.), 89; Kent *v.* Lasley, 48 Wis. 257.

[4] Lum *v.* Reed, 53 Miss. 73.

[5] Smith *v.* Gayle, 58 Ala. 600.

[6] Finnegan *v.* Carraher, 47 N.Y. 493; Farmers' L. & T. Co. *v.* Kursch, 5 N. Y.

§ 538. In California, a landlord is not concluded by a judgment in ejectment against the tenant, unless he had notice of the pendency of the action, and an opportunity to defend in the name of the tenant;[1] nor does a judgment in that State, in favor of the plaintiff in an action of ejectment, against his tenant, determine the question of title, or the right of possession, as between the plaintiff and a third person, whom the tenant collusively placed in possession of the premises after the action was instituted.[2] In that State, however, if the landlord, in an action of ejectment against a tenant, assumes charge of the defense, and puts his title in issue, the judgment rendered binds him, by way of estoppel, with the same effect as though he had been made a party defendant;[3] and after the tenant has permitted the landlord to appear and defend in the tenant's name, the tenant cannot interfere with any of the subsequent proceedings to the prejudice of the landlord;[4] and in Texas, where a judgment is recovered against a tenant without notice to the landlord, the latter may procure the judgment to be set aside, and be admitted to defend the suit.[5]

§ 539. *Avoidance of the estoppel.*—The estoppel may, of course, be avoided by proof that the defendant, by reason of some lease or license which temporarily defeated the right of possession, could not assert his title in the former suit. In such case the right of possession may be said to have accrued since the former action.[6]

§ 540. *Government officials.*—A judgment in ejectment against an agent of the government negatives all presump-

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558; Jackson *v.* Van Antwerp, 1 Wend. (N. Y.) 295; see Miller *v.* Adsit, 18 Wend. (N. Y.) 674.

[1] Chant *v.* Reynolds, 49 Cal. 213.

[2] Calderwood *v.* Brooks, 45 Cal. 519.

[3] Valentine *v.* Mahoney, 37 Cal. 389; Russell *v.* Mallon, 38 Cal. 259.

[4] Valentine *v.* Mahoney, 37 Cal. 389; Kellogg *v.* Forsyth, 24 How. 186. See §§ 264–266.

[5] Hough *v.* Hammond, 36 Texas, 657.

[6] Sherman *v.* Dilley, 3 Nev. 21; Chase *v.* Irvin, 87 Penn. St. 286.

tion of privity of contract in the nature of an implied lease between the owners of the premises and the government, and will defeat an action for the implied rent during the government's prior occupancy.[1] The judgment against a government agent is not conclusive against the government.[2]

§ 541. *After-acquired title.*—The judgment in ejectment is conclusive only upon the title established in the action,[3] and only between the parties or their privies, and for the same land;[4] or where the title and defenses are precisely alike.[5] It seems to be clearly settled that a defeated plaintiff or litigant may bring a new action, upon an after-acquired title, with the same effect as a stranger in whom such title might have been vested, and the former judgment will be no bar to the second action,[6] for the judgment has no binding effect as to a subsequently acquired title, because the merits of the new title were not in issue.[7]

542. *Foreign judgment.*—It has been held in the Supreme Court of Texas, that the records, judgments, and proceedings in one State can, in no particular, affect or pass the title to land situated in another State. When courts of equity have jurisdiction of the person they may compel a party to convey lands beyond their jurisdiction, but in all such cases it is the act of the party and not the judgment or decree of the court which affects the title.[8] As we have

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[1] Langford *v.* United States, 12 Ct. of Cl. 338.

[2] See § 245.

[3] Dawley *v.* Brown, 79 N. Y. 398; Bank *v.* Bridges, 11 Rich. (S. C.) Law, 87; Sherman *v.* Dilley, 3 Nev. 21.

[4] Chase *v.* Irvin, 87 Penn. St. 286.

[5] Foster *v.* Evans, 51 Mo. 39.

[6] Merryman *v.* Bourne, 9 Wall. 592; Barrows *v.* Kindred, 4 Wall. 399; Sherman *v.* Dilley, 3 Nev. 21.

[7] McLane *v.* Bovee, 35 Wis. 27; Whitney *v.* Nelson, 33 Wis. 365; Montgomery *v.* Whiting, 40 Cal. 294; Mann *v.* Rogers, 35 Cal. 316; Reed *v.* Calderwood, 32 Cal. 109; Mahoney *v.* Van Winkle, 33 Cal. 448; Emerson *v.* Sansome, 41 Cal. 552; Burt *v.* Sternburgh, 4 Cow. (N. Y.) 559; Doe *v.* Bather, 12 Ad. & El. N. S. 941; Haigh *v.* Paris, 16 M. & W. 145.

[8] Paschal *v.* Acklin, 27 Texas, 173. As to the conclusiveness of foreign judg-

seen, actions for the trial of title to land are local, and cannot be maintained in foreign jurisdictions.[1] Ejectment is in the nature of a proceeding *in rem*.[2] Thus, in Cragin *v.* Lovell,[3] in the New York Court of Appeals, it appeared that the action was brought in New York for damages for breach of a contract to convey land outside the limits of the State. The defendant set up as a counter-claim waste committed by the plaintiff while in possession of the plantation in question, which was located in Louisiana. Plaintiff demurred to the counter-claim, and the court held that the demurrer was well taken, as actions for injuries to real estate must be brought in the forum *rei sitæ*,[4] and this rule prohibited the defendant from alleging as a counter-claim damages sustained by waste committed upon land outside of the State.

§ 543. *Form of judgment in Texas.*—Under the practice in Texas, where the defendant pleads not guilty and asserts title in himself, a general verdict for the defendant only authorizes a general judgment for the defendant, and a judgment decreeing title to defendant and cancelling plaintiff's claim as a cloud, was held to be erroneous.[5]

§ 544. *In California.*—In California the plain tiffcannot ask that he be adjudged the owner, and put in possession, and that the defendant be enjoined from claiming title to the land recovered. He must rely upon his judgment as a bar.[6] The principles governing the practice by which

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ments, see Pennoyer *v.* Neff, 95 U. S. 714; Boswell *v.* Otis, 9 How. 336; Harkness *v.* Hyde, 98 U. S. 476.

[1] See Chap. XVII, especially §§ 465-467. See Newton *v.* Bronson, 13 N. Y. 587.

[2] Casey *v.* Adams, 102 U. S. 66.

[3] 14 Weekly Dig. (N. Y.) 204.

[4] See Story on Conflict of Laws, § 554; Watts *v.* Kinney, 23 Wend. (N. Y.) 485; Watts *v.* Kinney, 6 Hill (N. Y.), 82; American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; De Courcy *v.* Stewart, 20 Hun (N. Y.), 561.

[5] Johnson *v.* Newman, 35 Texas, 166; see Pixley *v.* Rockwell, 1 Sheldon (N. Y.), 267. See § 154.

[6] Doyle *v.* Franklin, 40 Cal. 106.

affirmative relief may be sought by answer have already been considered.[1]

545. *Judgment for possession and damages.*—Where the jury rendered a general verdict for the plaintiff in an action of ejectment without assessing damages, it was held that, under the practice in Arkansas, the court had no power to render a judgment for possession and damages.[2]

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[1] See §§ 485, 487, 488.

[2] Cannon *v.* Davies, 33 Ark. 56; see Larned *v.* Hudson, 57 N. Y. 151; Camarillo *v.* Fenlon, 49 Cal. 202. See § 454.

CHAPTER XXI.

WRIT OF POSSESSION.

§ 546. Origin of the writ.
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549. Peaceable possession without a writ.
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567. Officer cannot file counter affidavit of party in possession to excuse execution of writ.
568. Injunction improper in order for restitution.
569. Landlord and tenant.
570. Co-tenant.
571. Land subject to easement.
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574. Separate judgments.
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§ 546. *Origin of the writ.*—Precisely how the practice originated of awarding a writ of *habere facias possessionem* in *ejectione firmæ* is involved in obscurity. The plaintiff in *ejectione firmæ*, as already shown,[1] at first recovered compensation in damages only, as in any other action of trespass, but this limited relief often afforded inadequate redress by reason of the defendant's insolvency. The courts therefore following, it is said, in the footsteps of courts of equity, by a species of judicial legislation, engrafted upon the remedy a judgment for the recovery of the term of which the claimant had been ousted, and issued a writ of *habere facias possessionem*, directing the sheriff to place the claimant in the quiet and peaceable possession of the lands.

§ 547. *Its purpose.*—The writ of *habere facias possessionem*,

[1] *Ante*, § 23.

or its statutory substitutes, under the modern practice commonly called writs of possession, constitute the basis and evidence of the sheriff's or marshal's authority for performing a task which, in many instances, involves delicate questions of official liability to the interested parties. It is the ultimate process by which the successful litigant secures the fruits of his victory, and through which the judgment is made practically effectual by the actual personal expulsion of the defeated party, and the removal of his goods and personal property from the lands. It is, therefore, obvious that a clear understanding of the nature and provisions of this writ, and of the rights and liabilities of the parties in connection with it, and especially a statement or specification of the duties and responsibilities of the sheriff or marshal governing the method of executing or enforcing it, is of paramount importance, both to the litigants and the officer.

§ 548. *Habere facias seisinam.*—Before further considering this writ, we will briefly notice the nature of the final writ in the system of real actions. Upon the rendition of a judgment upon a real writ, process of execution issued, which was denominated a writ *habere facias seisinam*, from the command to the sheriff, embodied in the writ, that he cause the demandant to have a seizin of the tenements recovered.[1] "This writ," says Professor Stearns,[2] "being executed by the sheriff's delivering seizin of the tenements recovered to the demandant, and the writ being returned, and filed with the clerk of the court from whence it issued, the title of the defendant is now fully established by the highest sanction which the law can give." It will be noticed that this writ revested the lost seizin in the demandant while the writ *habere facias possessionem*, the nature and

[1] Stearns on Real Actions, pp. 15, 245, 388; Pilford's Case, 10 Rep. 116 (5 Coke, 460); Jackson on Real Actions, p. 193.

[2] Stearns on Real Actions, p. 388.

uses of which we are about to discuss, merely conferred the possession upon the plaintiff.

§ 549. *Peaceable possession without a writ.*—The successful plaintiff in ejectment may, of course at his election if opportunity presents itself, take peaceable possession of the lands in controversy without the aid of the sheriff, and without procuring a writ of possession to be issued.[1] The defeated party, in some cases, surrenders the possession voluntarily, and in others the lands are unoccupied, or the defendant may have only had technical possession.[2] In such cases the necessity of entering by virtue of the writ, or any court process, is obviated. The judgment is a complete protection to the plaintiff against an action of trespass for entering and taking possession of the land under such circumstances.[3] It has been held in New York, that if the plaintiff could himself take possession, he might authorize the sheriff as his agent to do so, which would seem to indicate that the sheriff is not entirely restricted to the writ as a justification for removing a party from the lands.[4] There would seem to be no greater propriety in suing out a writ of possession in cases where a peaceful entry on the land in controversy could be effected, and complete possession gained without the assistance of a writ or a sheriff, than in instituting the action of ejectment for land the possession of which was not withheld. So in an early case in Massachusetts,[5] on a writ of right, the court said: "That a man, who has a judgment for possession, may enter without a writ, is common learning." It is hardly pru-

[1] Taylor *v.* Horde, 1 Burr. 60–88; Caldwell *v.* Walters, 22 Penn. St. 378; Anon. 2 Sid. 155, 156; Witbeck *v.* Van Rensselaer, 64 N. Y. 27–31; Hinton *v.* McNeil, 5 Ohio, 509.

[2] Craft *v.* Yeaney, 66 Penn. St. 210; Roe *v.* Dawson, 3 Wils. 49.

[3] People *v.* Cooper, 20 Hun (N. Y.), 486; Jackson *v.* Haviland, 13 Johns. (N. Y.) 229–234; Witbeck *v.* Van Rensselaer, 64 N. Y. 27–31; Doe *v.* Bluck, 3 Campb. 447; Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 392; Hinton *v.* McNeil, 5 Ohio, 509; Craft *v.* Yeaney, 66 Penn. St. 210; Caldwell *v.* Walters, 22 Penn. St. 380; Creighton *v.* Proctor, 12 Cush. (Mass.) 433, 436.

[4] People *v.* Cooper, 20 Hun (N. Y.), 486–491.

[5] McNeil *v.* Bright, 4 Mass. 282–300; see Farwell *v.* Rogers, 99 Mass. 33–35.

dent to adopt the practice of taking possession without process, after judgment, where a probability of opposition on the part of the defendant exists. The presence of the sheriff may be necessary to preserve the peace. Thus, in Doe *d.* Stephens *v.* Lord,[1] the court said: "It ought not to go forth that a party having obtained judgment in ejectment may enter without a writ of possession, unless by consent of the person holding." In that case, it appeared that a successful plaintiff in ejectment had sued out a writ of possession in 1834, which was never executed. In 1837 a second writ of possession was issued, and the possession obtained under it. The second writ was subsequently set aside for irregularity. The court held that the plaintiff could not be allowed to retain the possession, because it had been acquired with an appearance and color of authority from the court, to which he was not entitled. The possession had been gained under a void writ. The case is scarcely an authority upon the question of the plaintiff's right to take peaceable possession without process, though it is sometimes cited as holding adversely to the exercise of that right.

§ 550. *Form and contents of the writ.*—The writ must follow the terms of the verdict[2] and judgment,[3] and is usually addressed to the sheriff of the county in which the premises in controversy are located,[4] and commands him to deliver the possession of the land, describing it, to the party entitled to it. It is no objection to the validity of the writ that the names of the officers to whom it was directed were inserted by interlineation after the writ had been sealed and placed in the officer's hand.[5]

§ 551. *Return-day of the writ.*—Usually there is no necessity for making the writ returnable except where a

[1] 7 Ad. & El. 610–614; see Wood *v.* Coghill, 7 Mon. (Ky.) 601.

[2] Martin *v.* Martin, 17 S. & R. (Penn.) 431; see §§ 497–525.

[3] Roscoe on Real Actions, 609; Orton *v.* Noonan, 18 Wis. 447; see § 497.

[4] Roscoe on Real Actions, 608.

[5] The King *v.* Harris, 2 Leach C. C. 929.

rule of the court, or statutory regulation on the subject exists, and therefore the sheriff, while he has the writ, may remove the defendant, or his privies, from the land as often as he, or they, intrude upon it.[1] In some States the writ merely directs the officer to deliver possession, "without delay,"[2] and it is not always essential that any return-day should be named in it,[3] and the writ cannot be avoided for mere irregularities and erroneous recitals in its form.[4] It has been held in Kentucky, that a joint writ, issued upon separate judgments, is irregular, and the writ was quashed, and a restitution awarded.[5] A command to return the writ within a given time has been considered, in New York, to be directory merely, and it was held in the Court of Appeals of that State, that a writ of possession could be lawfully executed after the return-day specified in the writ. The judgment, it was said, bound the land of which the writ directed possession to be delivered, and the office of the writ was simply to carry the judgment into effect with reference to that particular piece of land.[6] The court below, in the same case, decided that, in the absence of any evidence on the subject, the presumption would be indulged that the sheriff began the execution of the writ or process within the sixty days prescribed by the writ.[7] In United States *v.* Slaymaker,[8] however, it was held that a writ of possession could not be legally executed after the day on which it was made returnable, as it then became *functus officio*. In Dent *v.* Simmons,[9] the Court of Appeals of Kentucky decided, that where a judgment in ejectment had

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[1] See Witbeck *v.* Van Rensselaer, 64 N. Y. 27-31; Crocker on Sheriffs, § 575.

[2] See People *v.* Cooper, 20 Hun (N. Y.), 486–489.

[3] Jackson *v.* Hawley, 11 Wend. (N. Y.) 182.

[4] Franklin *v.* Merida, 50 Cal. 289.

[5] Lowry *v.* Jenkins, 3 Bibb. (Ky.) 315.

[6] Witbeck *v.* Van Rensselaer, 64 N. Y. 27–31.

[7] Witbeck *v.* Van Rensselaer, below, 2 Hun (N. Y.), 55.

[8] 4 Wash. C.C. 169. See Gardiner *v.* Schuylkill Bridge Co. 2 Binn. (Penn.) 450.

[9] 7 J. J. Marsh. (Ky.) 42. See Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 392.

been fully executed on a *habere facias*, by the eviction of the tenant in possession and giving actual possession to the plaintiff, and the writ returned executed, and the defendant in ejectment afterwards re-entered, the proper remedy for restitution was by a warrant for forcible entry, and that an alias writ of possession was erroneous. Both of these cases are referred to by the New York Court of Appeals in Witbeck *v.* Van Rensselaer,[1] and in so far as they conflict with the rule established by that case, to the effect that the writ can be executed after the return-day, are not followed. Dent *v.* Simmons, usually cited in connection with United States *v.* Slaymaker, was distinguished from Witbeck *v.* Van Rensselaer on the point as to the execution of the writ after the return-day, on the ground that it appeared, in Dent *v.* Simmons, that the writ had been returned and filed as a court record, and was, of course, no longer in the hands of the sheriff for execution. The theory upon which Dent *v.* Simmons, and similar cases, are decided is, that the execution of the writ is tantamount to a satisfaction of the judgment, and that two satisfactions cannot be had of the same judgment.[2] It must be conceded, however, that this principle cannot, from the very nature of things, be applied to actions for the recovery of the possession of land. If the writ can be issued and executed but once it is idle to hold that the judgment is binding and conclusive, for, if the defendant again entered upon the lands there would be no method at the disposal of the plaintiff, by which the judgment could be made practically effectual and the defendant again dispossessed.

§ 552. *Alias writs.*—Under the practice in New York, when, in ejectment, a writ *habere facias possessionem* has been executed by putting the defendant out of possession and the plaintiff, after maintaining the possession four or five days, is dispossessed by a person claiming under defendant's title,

[1] 64 N. Y. 27–31.

[2] Dent *v.* Simmons, 7 J. J. Marsh. (Ky.) 42; see Romero *v.* Munos, 1 New Mex. 314.

an alias writ is awarded, although the return-day of the first writ has not arrived,[1] and if the sheriff deliver possession to the plaintiff on an alias writ, and before its actual return the defendant regains possession, the plaintiff may have a *pluries* writ.[2]

§ 553. *Witbeck v. Van Rensselaer discussed.* — The practice intended to be established by the New York Court of Appeals, in Witbeck *v.* Van Rensselaer, is certainly a more simple and effectual form of redress than that suggested by the cases holding that after the writ has been once executed and returned, or the return-day has passed, the power of the court to further enforce its mandate, or to protect and secure to the successful litigant the fruits of the judgment is exhausted. The latter doctrine renders the entire redress afforded by the judgment in ejectment transitory and unsatisfactory. The court is bound in good conscience to maintain and continue the party in the possession of the lands to which it has adjudged him to be entitled. Otherwise, the defeated party might constantly undo the action of the court, and practically nullify its mandate. It is not a sufficient answer to say that the plaintiff in the ejectment action can procure a warrant of forcible entry if the defendant re-enters. Invoking this further remedy entails additional inconvenience and expense, and, furthermore, the possession may have been regained by the defendant, under such circumstances as not to render him amenable to the provisions of the statutes regulating forcible entries.[3] If the plaintiff was unable to proceed under these statutes, his only redress would be to institute another ejectment. The judgment in ejectment, as we have seen, is now generally declared by statute, or held by the courts, to be conclusive upon the parties. Under these cir-

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[1] Jackson *v.* Hawley, 11 Wend. (N. Y.) 182; see Batchelder *v.* Moore, 42 Cal. 412; People *v.* Dwinelle, 29 Cal. 632.

[2] Van Rensselaer *v.* Witbeck, 2 Lans. (N. Y.) 498.

[3] See Romero *v.* Munos, 1 New Mexico, 314.

cumstances it seems unreasonable to refuse to issue process to render its binding force practically effectual.[1]

§ 554. *Plaintiff taking possession at his peril.*—At common law, in ejectment, when the declaration, verdict, and judgment described the property in general terms, the plaintiff might take possession of the lands at his peril, subject to be put right by the court if he took more or other lands than those which constituted the subject-matter of the controversy.[2] The propriety, however, of arming a claimant with court process, and furnishing him an officer empowered to take possession of any lands which the claimant's caprice or cupidity might prompt him to point out, was open to the most serious objections. This practice was not universal, and was not followed in Alabama, at least while trespass to try title prevailed in that State. The practice there required that the verdict and writ should describe with reasonable certainty the lands intended to be covered thereby.[3]

§ 555. *Manner of executing the writ.*—In executing the writ of possession, where an adverse possession is held, it is the duty of the officer, first, to turn out the occupants;[4] then to take possession in the name of the law, and afterwards to deliver the vacant possession to the plaintiff in the ejectment.[5] When the writ is issued to the sheriff, he is held to possess all the power necessary to accomplish its complete enforcement; and where admission to a house is denied, he may break open the doors or windows, and use all the

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[1] See §§ 43, 44, 524, and Chapter XX.

[2] Jackson *v.* Rathbone, 3 Cowen (N. Y.), 291; Doe *v.* Wilson, 2 Starkie, 477; Cottingham *v.* King, 1 Burr. 629; Shaw *v.* Bayard, 4 Penn. St. 257; Johnson *v.* Nevill, 65 N. C. 677; *Ex-parte* Reynolds, 1 Cai. (N.Y.) 499; Bayard *v.* Colfax, 4 Wash. C. C. 38–43; Camden *v.* Haskill, 3 Rand. (Va.) 462–465; Den *v.* Johnson, 7 Halst. (N. J.) Law, 275; Fassit *v.* Richard, 2 Harr. (Del.) 289. See §§ 455–459.

[3] Bennet *v.* Morris, 9 Porter (Ala.), 171; see, also, Hildreth *v.* Thompson, 16 Mass. 191.

[4] Johnson *v.* McIlwain, Rice (S. C.) Law, 368.

[5] United States *v.* Lowry, 2 Wash. C. C. 169; *Ex-parte* Black, 2 Bailey (S. C.) Law, 8.

force that may be needed to overcome any resistance to the enforcement of the process.[1] If there is a house on the premises, the writ must be executed by putting the tenant out of the house and the plaintiff into it.[2] And in contemplation of law, a delivery of the possession to the plaintiff's agent is equivalent to a delivery to the plaintiff in person.[3]

§ 556. *When execution considered complete.*—The case of Kingsdale *v.* Mann[4] is usually cited as an authority for the proposition that the execution of the writ of possession is not completed until the sheriff or his bailiffs have delivered full possession to the plaintiff, and have left the premises. No such proposition, however, was actually or necessarily involved in the case, for it appeared that possession was actually delivered by the officers at nine o'clock in the morning, and toward six o'clock at night of the same day the plaintiff was forcibly dispossessed. The court expressed doubt as to whether, after so many hours had elapsed, the act of the defendant in dispossessing the plaintiff could be regarded as an interference with or disturbance of the execution, and merely granted a rule to show cause why an attachment should not issue. This leads us to the discussion of the question as to what may be considered a delivery of possession or complete execution of the writ. It is undoubtedly the duty of the sheriff, if required so to do, to remove from the premises all the personal property belonging to the defendant found thereon. But, in a recent case before the New York Court of Appeals, that tribunal declared that no authorities had been cited to the court tending to show that the omission so to do vitiated the execu-

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[1] Adams on Ejectment (4th Am. ed.), p. [*342] 412; Crocker on Sheriffs, § 573; Howe *v.* Butterfield, 4 Cush. (Mass.) 302; Semayne's Case, 5 Rep. 91, (b) (3 Coke, 188); Keith *v.* Johnson, 1 Dana (Ky.), 605.

[2] Den *d.* Smallwood *v.* Bilderback, 1 Harr. (N. J.) 497.

[3] People *v.* Cooper, 20 Hun (N. Y.), 486–491; Kercheval *v.* Ambler, 4 Dana (Ky.), 166; Higginbotham *v.* Higginbotham, 10 B. Mon. (Ky.) 370; Smith *v.* White, 5 Dana (Ky.), 376; Witbeck *v.* Van Rensselaer, 64 N. Y. 27.

[4] 1 Salk. 321; S. C. 6 Mod. 27; see Farnsworth *v.* Fowler, 1 Swan (Tenn.), 1.

tion of the writ when possession of the land had been actually and in fact delivered.[1]

§ 557. *Removal of personal property.*—People *v.* Cooper,[2] in the New York Supreme Court, is an important and interesting case concerning the rights and duties of the sheriff as to the removal of goods and personal property found upon the premises. It appeared that on May 18, 1874, at 10 A. M., a writ of possession was issued to the sheriff on a judgment in ejectment, in which one Fountain was plaintiff and one Scudder was defendant. The sheriff thereupon went to the house with one Arnot, the assignee of the plaintiff's rights under the judgment, and demanded the immediate possession from Scudder, refused his request for delay, and proceeded at once to carry out the furniture and took the door keys and put them in his pocket. At 1 P. M. of the same day the sheriff was served with an order staying all proceedings upon the judgment and the writ. He thereupon stopped the further removal of the goods from the house, told a person in the house that she had better go out, as he was about to lock up the house, and having locked the doors went away, leaving a deputy sheriff in possession. Upon an appeal from an order adjudging the sheriff guilty of contempt for violating the stay of proceedings, it was held that the sheriff could take possession as Arnot's agent; that when served with the order staying all further proceedings Arnot was already, by virtue of what had transpired, in possession of the premises; that the sheriff was not required to turn out Arnot and reinstate Scudder in possession, and that his failure so to do did not render him guilty of a contempt.

§ 558. *Parties who may be evicted.*—It is the duty of the sheriff to remove not only the defendant named in the writ and his family, employees, and servants, but also all

[1] Witbeck *v.* Van Rensselaer, 64 N. Y. 27–32; People *v.* Cooper, 20 Hun (N. Y.), 486–491.

[2] 20 Hun (N. Y.), 486.

persons who may have entered upon the land pending the action, whether as trespassers or claiming to hold the possession in the right of the defendant, or under the title which was adjudicated in the action.[1]

§ 559. *Removal of wife under writ against her husband.*—It has been even held in Pennsylvania, that this rule justifies the sheriff, while executing the writ, in removing the wife of the defendant from the lands, though she put forth a claim of independent title in herself. The court decided that a judgment against the head of the family was a judgment against his family and servants, and against all tenants under him, who had entered since the action was instituted, otherwise it was considered that the judgment would be valueless, for if one member of the family could retain the possession, he or she might cover the possession of all the others. The court say further that it was the husband's duty to defend the possession of the family, and failing so to do the family must go out with him, "just as a tenant with his family must go out who fails to give his landlord notice, or to defend under his title, though this title may be perfect."[2] The court concede that the title of the wife cannot be affected by the judgment against her husband alone, but only her possession. The opinion seems to be rested largely upon considerations of public policy, and the dangers and uncertainty likely to result to a plaintiff from permitting a member of a family to evade the effect of the writ of possession issued against the head of the family.

§ 560. *Johnson v. Fullerton criticised.*—This case, however, cannot be supported on principle nor reconciled with established precedents. Title to land is but another name

[1] Hickman *v.* Dale, 7 Yerg. (Tenn.) 149; Wallen *v.* Huff, 3 Sneed (Tenn.), 82; McCreery *v.* Everding, 54 Cal. 166; Higginbotham *v.* Higginbotham, 10 B. Mon. (Ky.) 372; Johnson *v.* Fullerton, 44 Penn. St. 466; Wattson *v.* Dowling, 26 Cal. 124; Satterlee *v.* Bliss, 36 Cal. 489; Long *v.* Morton, 2 A. K. Marsh. (Ky.) 39; Hanson *v.* Armstrong, 22 Ill. 442; Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233; Howard *v.* Kennedy, 4 Ala. 592; Mayne *v.* Jones, 34 Cal. 483.

[2] Johnson *v.* Fullerton, 44 Penn. St. 466.

for the right by which the possession of land is protected and maintained. The possession is its most essential and important attribute. The party vested with the title and possession, can only be deprived of it against his will by a judgment duly rendered, by a court of competent jurisdiction, to which he is a party, and which is binding and conclusive upon him. The proposition that a party vested with the title to land, and enjoying the possession which such ownership confers, must forfeit that possession solely because he or she is so unfortunate as to be related to, or a member of, the family of another person, who has been adjudged to be without title, can hardly be regarded as sound. The court said, in the case above cited, that it was the duty of the head of the family to defend the family's possession by setting up the title of the wife. But is the wife to be prejudiced by the breach of duty of the husband in failing so to do, and is she to forfeit her possession in obedience to a judgment rendered without notice to her, and upon a title under which she does not claim or hold? The court said: "The title of the wife cannot be affected by a judgment against her husband alone, but only her possession." This statement is clearly erroneous. If the wife is deforced of the possession, she will be compelled to become a plaintiff in ejectment, and thereby lose the vantage ground which the possession conferred. She will be forced to recover upon the strength of her own title, which it may be difficult or impossible to prove, and to become an actor, and assume the burden of a litigation, which, but for the loss of the possession, would have been cast upon her opponent. Her title is clearly affected, abridged and impaired by her expulsion under the writ to this extent at least; she can no longer hold the land as against all the world except the true owner. Her adversary has, by virtue of a judgment, to which she was not a party, and rendered upon a different title, usurped her position, and, by gaining the possession, acquired the important and substantial rights and advantages which the possession confers, and which belonged to her.

The conclusion sought to be established in this case by the analogy as to evicting a tenant, under a judgment, where his landlord, who had no notice of the suit, may have a perfect title, is most unsatisfactory. No such relationship exists between husband and wife, or the head of a family and its members. Furthermore, the tenant in the case stated is made a party to the ejectment, and was bound by the judgment, which is, of course, an entirely different state of facts. In the case which we have been considering, the analogy applies to the husband, and not to the wife. The broad distinction between being plaintiff and defendant in ejectment has been noticed in different portions of this treatise, and the advantages which the latter possesses over the former have been so frequently discussed that further reference to the subject is unnecessary. These principles have been recognized in the Supreme Court of California, in Tevis *v.* Hicks,[1] where it was held that a wife who claimed in her own right, and as her separate property, an interest in the lands in controversy, could not be ejected or removed under a writ against her husband.

§ 561. *Burden upon the officer to excuse non-execution of the writ.*—There being ordinarily no exception on the face of the writ, as to the parties to be removed under it, if the sheriff fails to obey its command, his excuse is affirmative matter, and the burden rests upon him to show that the parties whose possession he has refused to disturb, are not bound or affected by the judgment.[2]

§ 562. *Parties concluded by the judgment must be evicted.* —The doctrine seems to be generally established that persons who were not made parties to the ejectment, and were in possession before it was instituted, or who claim under titles distinct and independent from or paramount to the title litigated in the ejectment, cannot be evicted under the writ. The safest test is, are the parties whom it is proposed to

[1] 38 Cal. 234.

[2] Leese *v.* Clark, 29 Cal. 664.

remove bound or concluded by the judgment, or do they claim under parties concluded by it, or in subordination to the title adjudicated in the action?[1] If so they must be evicted. Of course, *prima facie*, all parties entering after suit brought acquire the possession in subordination to the defendant.[2] But the facts may be shown, and the rule will exempt the party from eviction if he comes into possession after the action is commenced, provided he does not come in under a party to the suit, but by virtue of an adverse and paramount title. His most effective remedy, if evicted, is not to apply to open the judgment, but to get a writ of restitution,[3] or to apply to the court to be excepted from the operation of the writ of possession.

§ 563. *Possession to be given of fixtures and improvements.*—The sheriff should also place the plaintiff in possession of all the fixtures[4] and improvements upon the premises; that is to say, the disseizor, when obliged by law to yield the possession, must surrender the land in its improved state;[5] and, as between the successful plaintiff in an action of ejectment and the evicted defendant, the crops growing upon the land are a part of the realty, and belong to the plaintiff.[6]

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[1] Powell *v.* Lawson, 49 Ga. 290; Calderwood *v.* Pyser, 31 Cal. 333; Garrison *v.* Savignac, 25 Mo. 47–53; Goerges *v.* Hufschmidt, 44 Mo. 179; Tevis *v.* Ellis, 25 Cal. 515; South Beach Land Ass'n *v.* Christy, 41 Cal. 501; Rogers *v.* Parish, 35 Cal. 127; Ford *v.* Doyle, 37 Cal. 346; Clark *v.* Parkinson, 10 Allen (Mass.), 133; Howard *v.* Kennedy, 4 Ala. 592; Smith's Lessee *v.* Trabue's Heirs, 1 McL. 87; Jones *v.* Burget, 38 Tex. 396; Kelly *v.* Fritz, 11 Heisk. (Tenn.) 7; Fogarty *v.* Sparks, 22 Cal. 143; see Terrell *v.* Allison, 21 Wall. 289; Howard *v.* Railway Co. 101 U. S. 837–849.

[2] Hall *v.* Dexter, 3 Sawyer, 434; Leese *v.* Clark, 29 Cal. 664.

[3] Smith *v.* Pretty, 22 Wis. 655; Hall *v.* Dexter, 3 Sawyer, 434; Gelpeke *v.* M. & H. R. R. Co. 11 Wis. 462; McChord's Heirs *v.* McClintock, 5 Litt. (Ky.) 304; Raw *v.* Stevenson, 24 Pitts. L. J. (Pa.) 145.

[4] McMinn *v.* Mayes, 4 Cal. 209.

[5] Russell *v.* Blake, 2 Pick. (Mass.) 507.

[6] Altes *v.* Hinckler, 36 Ill. 275; Lane *v.* King, 8 Wend. (N. Y.) 584; Gillett *v.* Balcom, 6 Barb. (N. Y.) 370; McLean *v.* Bovee, 24 Wis. 295; Hodgson *v.* Gascoigne, 5 B. & Ald. 88; Doe *d.* Upton *v.* Witherwick, 3 Bing. 11; Crotty *v.* Collins, 13 Ill. 567; Brothers *v.* Hurdle, 10 Ired. (N. C.) Law, 490; Strode *v.* Swim, 1 A. K. Marsh. (Ky.) 271; Adams on Ejectment (4th Am. ed.), [*347] 416.

§ 564. *Interference by the court before execution.*—The court will also, when necessary, interfere in a proper case before the execution of the writ, and restrain the claimant from taking possession of more land than he is entitled to recover.[1] Thus where the lessor had declared for lands held under two separate titles, and by a mistake of the judge upon the law of the case the verdict was given for the plaintiff upon both titles, when it should have been entered for the defendant as to the lands comprised in one of them, the court confined the execution to the lands to which the lessor had proved a valid title.

§ 565. *Mandamus or order to officer to execute writ—Indemnity.*—If the sheriff refuses to execute the writ, the plaintiff may procure an order in the action requiring him to do so,[2] or he may procure a peremptory mandamus against the sheriff.[3] The sheriff may, of course, demand a bond of indemnity before removing a party who claims that he is not bound by the judgment, if a reasonable doubt exists on the subject.[4]

§ 566. *Officer's duties defined.*—The duties of the officer with regard to the execution of the writ have been carefully considered and defined by Mr. Justice Field, of the United States Supreme Court, sitting at circuit, in a comparatively recent case. After stating the general rule that a judgment in ejectment binds, as to the title, only parties to the action and those claiming under them, the court said: "Persons entering after suit by title existing previously adverse to

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[1] Doe *d.* Forster *v.* Wandlass, 7 T. R. 118, *in notis;* see Brookes *d.* Mence *v.* Baldwyn, Barnes, 468; Wallen *v.* Huff, 3 Sneed (Tenn.), 82; Blair *v.* Pathkiller, 5 Yerg. (Tenn.) 230; see Jackson *v.* Rathbone, 3 Cow. (N. Y.) 291; Leese *v.* Clark, 29 Cal. 664; Roe *d.* Blair *v.* Street, 2 Ad. & El. 329; Adams on Ejectment (4th ed.), p. 412 [*342].

[2] Jackson *v.* Rathbone, 3 Cow. (N. Y.) 291; Leese *v.* Clark, 29 Cal. 664.

[3] Fremont *v.* Crippen, 10 Cal. 211; Moses on Mandamus, p. 59; Fogarty *v.* Sparks, 22 Cal. 143.

[4] Adams on Ejectment (4th Am. ed.), [*342] 412; Gilbert on Ejectment, 110; Crocker on Sheriffs, § 572; Long *v.* Neville, 36 Cal. 455; Dupont *v.* Ervin, 2 Brev. (S. C.) Law, [*400] 79; Hall *v.* Dexter, 3 Sawyer, 434.

that of the parties, stand in a different position. Their title is in no respect affected by the judgment. But the determination of the question, whether parties thus entering into possession have such antedating title, is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant. The most that he can do, when such a party claims to have a title anterior to the suit, is to require from the plaintiff a bond of indemnity, or give a reasonable time for the party to apply to the court for a modification of the writ, so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ, or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal will only be discharged by placing the plaintiff in possession, as directed, and this implies a removal of all occupants."[1]

§ 567. *Officer cannot file counter-affidavit of party in possession to excuse execution of writ.*—A curious state of facts growing out of the execution of a writ of possession was presented in a case in Georgia. The defendant in ejectment after judgment abandoned the possession of the premises, and a day or two after he left, one L. went into possession. A writ of possession having issued on the judgment, the sheriff went upon the land to execute the writ, and found L. in possession, who furnished him an affidavit setting forth that she did not hold under any of the parties to the action. The sheriff received and filed the affidavit with his return, and did not execute the writ. The court held that there was no provision of law authorizing the sheriff to receive the counter-affidavit of L. to the writ of possession, as she was not a party to the action, and no issue could be created

[1] Hall *v.* Dexter, 3 Sawyer, 434.

to be tried by returning the papers to the court in the manner indicated.[1]

§ 568. *Injunction improper in order for restitution.*— In Dawley *v.* Brown,[2] in the New York Supreme Court, it appeared that the plaintiff had been put into possession of certain lands by virtue of a writ issued on a judgment in ejectment. The judgment was subsequently set aside and an order for the restoration of the possession granted to the defendant. This order contained an injunction clause restraining the plaintiff from entering upon or interfering with the possession of the lands, and restraining him from cultivating or otherwise using or occupying them. The court decided that the portions of the order which attempted to restrain the plaintiff were not only irregular, but utterly void; that the only appropriate redress was the order for the restoration of the possession, and that when the possession was regained the defendant could maintain an appropriate action against the plaintiff for any illegal entry or interference with the possession.

§ 569. *Landlord and tenant.*—According to some of the cases, the landlord who receives the possession from his tenant pending the ejectment, will be bound by a recovery against the tenant, at least so far as to entitle the plaintiff to evict him under the writ,[3] and this rule has been extended to include the landlord's widow and heirs who entered subsequent to the commencement of the suit.[4] But in Oetgen *v.* Ross,[5] however, in which judgment had been rendered against a tenant, and the landlord had reassumed possession, the Supreme Court of Illinois, in the exercise of a species of equitable jurisdiction, stayed the enforcement of the writ and permitted the landlord to come in and try the case

[1] Powell *v.* Lawson, 49 Ga. 290.

[2] 43 How. Pr. (N. Y.) 22. See People *v.* Cooper, 20 Hun (N. Y.), 486–489.

[3] Hanson *v.* Armstrong, 22 Ill. 442; Sampson *v.* Ohleyer, 22 Cal. 200; Smith *v.* Gayle, 58 Ala. 600; Rodgers *v.* Bell, 53 Ga. 94.

[4] Wallen *v.* Huff, 3 Sneed (Tenn.), 82.

[5] 47 Ill. 142.

upon its merits, the landlord representing that the tenant had not informed him of the pendency of the action.

§ 570. *Co-tenant.*—Where an ejectment is brought by a stranger against one of two persons in joint possession of the land, it not appearing that either claimed under the other, the judgment will bind only the defendant, and the other party cannot be expelled by the writ of possession.[1] And where the plaintiff recovers in ejectment an undivided part of a house and lot it is the duty of the sheriff to put the plaintiff in actual possession with the defendant.[2] Thus, where the defendants were two out of eight of the lessors heirs, it was held that the writ of possession should not issue to put the defendants out, but to put the other heirs in possession with them, as in the case of tenants in common.[3] This subject has been considered at length in discussing the special subject of ejectment between tenants in common.

§ 571. *Land subject to easement.*—The owner of the fee of a public highway over which the public have an easement or right to travel, who has recovered in ejectment the lands within the limits of the highway against a person who has appropriated the same to a purpose not authorized by the easement, is entitled to have the possession delivered to him by the sheriff, subject to the use or easement.[4] The writ should follow the judgment in this respect, and this subject has already been incidentally considered in discussing the interests which will support ejectment and the judgment.[5]

§ 572. *Inaccessible lands.*—As shown in a former chapter, it is no obstacle to a recovery in ejectment that the land in controversy is inaccessible at the time of trial, so that the

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[1] Stokes *v.* Morrow, 54 Ga. 597.

[2] Ash *v.* McGill, 6 Whart. (Penn.) 391; Withrow *v.* Biggerstaff, 82 N. C. 82; Ewald *v.* Corbett, 32 Cal. 499; Tevis *v.* Hicks, 38 Cal. 234; Dupont *v.* Ervin, 2 Brev. (S. C.) [*400], 79.

[3] Wilson *v.* Hall, 13 Ired. (N. C.) Law, 489.

[4] Reformed Church *v.* Schoolcraft, 65 N. Y. 134.

[5] See §§ 130–132, 526.

sheriff cannot deliver possession.[1] Nor does the fact that the land is covered with water necessarily prevent the sheriff from delivering possession.[2]

§ 573. *Writ issued on behalf of heirs.*—In Pennsylvania it has been held that where a plaintiff dies after recovering a judgment in an ejectment, his heirs can have execution thereon without a re-trial of the original controversy. Only a release of the judgment or a conveyance to the defendant would be pleadable to a *scire facias*.[3] In New York it has been held, under the former practice, that if one of two plaintiffs dies after judgment, execution may issue in their joint names without a *scire facias*.[4]

§ 574. *Separate judgments.*—Where two plaintiffs obtained separate judgments in ejectment at the same term of the court, against the same defendant, and one plaintiff evicted the defendant by *habere facias*, and immediately leased to him the land recovered, and he entered under the lease, it was held that he might be afterward lawfully evicted by *habere facias* upon the other judgment. Had the first plaintiff retained the possession, or leased to a stranger, neither he nor his tenant could have been turned out by a judgment to which neither was a party.[5]

§ 575. *Restitution.*—A writ, or an order for restitution, will be granted in cases where the sheriff has delivered possession of lands not embraced in the writ, or has evicted parties who were not legally subject to the operation of the writ or bound by the judgment,[6] or where the judgment in

[1] Woodhull *v.* Rosenthal, 61 N. Y. 382; see § 127.

[2] Perrine *v.* Bergen, 14 N. J. L. 355.

[3] Weaver *v.* Wible, 72 Penn. St. 469; see Howell *v.* Eldridge, 21 Wend. (N. Y.) 678; Penn *v.* Klyne, Pet. C. C. 446.

[4] Howell *v.* Eldridge, 21 Wend. (N. Y.) 678.

[5] Kercheval *v.* Ambler, 4 Dana (Ky.), 169.

[6] City of Natchez *v.* Vandervelde, 31 Miss. 706; Smith *v.* Pretty, 22 Wis. 655; South B. L. A. *v.* Christy, 41 Cal. 501; Shaw *v.* Bayard, 4 Penn. St. 257; Blair *v.* Pathkiller, 5 Yerg. (Tenn.) 230; Jackson *v.* Stiles, 5 Cow. (N. Y.) 418; Roscoe on Real Actions, p. 610.

ejectment has been reversed on appeal,[1] or vacated for irregularity,[2] or a party has been turned out by mistake.[3] The party moving for a writ, or order of restitution, must make out a clear case, free from ambiguity,[4] and restitution will be denied to a party who has been removed from possession, if he is without color of right to the possession.[5] In New York, since the adoption of the Code, when a regular judgment is entered awarding the plaintiff the possession of real property, and execution has issued putting him in actual possession, on setting aside the judgment and execution the proper remedy of the defendant, to compel restoration of the property, is to apply to the special term of the court for an order to show cause why possession should not be restored to him, and an order granted on the hearing of the order to show cause is sufficient authority to restore the possession to the defendant. Disobedience of such an order may be punished as for a contempt. But, as we have seen, the order cannot properly contain an injunction clause restraining the plaintiff from using the premises.[6] In Pennsylvania it has been held that where a *habere facias* is set aside, in consequence of an agreement of the parties after judgment, an award of restitution is a matter of course, and this may be enforced either by attachment or writ of restitution,[7] and in New York where the plaintiff takes possession of more land than he has recovered, or is entitled to, the court will grant a writ of restitution, or, in a doubtful case, award a feigned issue.[8]

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[1] Breading *v.* Blocher, 29 Penn. St. 347; Polack *v.* Shafer, 46 Cal. 270.

[2] Dawley *v.* Brown, 43 How. Pr. (N. Y.) 17; Lowry *v.* Jenkins, 3 Bibb (Ky.), 314.

[3] *Ex-parte* Reynolds, 1 Cai. (N. Y.) 500.

[4] California, &c., Min. Co. *v.* Redington, 50 Cal. 160; see Franklin *v.* Merida, 50 Cal. 289.

[5] McQuade *v.* Emmons, 38 N. J. L. 397.

[6] Dawley *v.* Brown, 43 How. Pr. (N. Y.) 22.

[7] Greer *v.* McClelland, 1 Phila. (Penn.) 128.

[8] Ostrander *v.* Hasbrouck, 5 Johns. (N. Y.) 366; Jackson *v.* Stiles, 5 Cow. (N. Y.) 418.

CHAPTER XXII.

STATUTORY NEW TRIALS, OR SECOND ACTIONS TO TRY TITLE.

§ 576. Early practice as to new trials in ejectment.
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609. } mended.

§ 576. *Early practice as to new trials in ejectment.*— The principle was asserted in some of the early cases, that the court would not award a new trial in an action of ejectment, for the reason that the judgment was not conclusive;[1] but Lord Mansfield decided in the case of Goodtitle *v.* Clayton, in 1768, that the fact that the action was an ejectment constituted no reason against granting a new trial, for, though the judgment was not an estoppel, and a second ejectment might be instituted, yet a change of possession would be effected under the first judgment, by which the defeated party would suffer.[2]

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[1] Argent *v.* Darrell, 2 Salk. 648; S. C. 1 Ld. Raymd. 514; Fenwick *v.* Grosvenor, 2 Salk. 650.

[2] Goodtitle *v.* Clayton, 4 Burr. 2224, 2225.

§ 577. *New trials at common law.*—It is clearly settled that the defeated party in ejectment, as in other civil actions, is entitled to any number of new trials for sufficient legal cause, such as erroneous rulings of the court in the admission or exclusion of evidence, a misdirection in the charge, a finding of the jury contrary to or against the weight of the evidence, or other similar errors.[1] Indeed, the rules governing applications for new trials in other civil cases, are not so rigidly enforced in actions to try title to land, and a new trial is frequently ordered in the latter class of cases for reasons which would ordinarily be considered manifestly insufficient.[2] A new trial will not, however, be granted in these actions to enable a defeated party to set up an outstanding title with which he has no connection, for such a defense is *stricti juris*, and will not be favored;[3] and a third trial will rarely be allowed on an application at common law after the moving party has availed himself of the privilege of a second new trial under the statutes which we are about to consider,[4] and will be denied if the purpose is to enable the party to introduce cumulative evidence.[5]

§ 578. *Origin of statutory new trials.*—In many of our States a more certain and effective method of procuring a rehearing than the common law application for a new or second trial, peculiar to actions for the trial of title to land, is given by statute to the plaintiff, or the defeated party. The policy of the law in allowing new or second trials, as a matter of right, in actions to try titles to land, owes its origin to the peculiar sanctity which, in feudal

[1] Emmons *v.* Bishop, 14 Ill. 152; Taylor *v.* Sutton, 15 Ga. 103; Baze *v.* Arper, 6 Minn. 220; Clayton *v.* School District, 20 Kansas, 256.

[2] Jackson *v.* Dickenson, 15 Johns. (N. Y.) 309; Jackson *v.* Laird, 8 Ib. 489; Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144; Newell *v.* Sanford, 10 Iowa, 396; White *v.* Poorman, 24 Ib. 108.

[3] Peck *v.* Carmichael, 9 Yerg. (Tenn.) 325.

[4] Frost *ads.* Brown, 2 Bay. (S. C.) 133; Phyfe *v.* Masterson, 45 Superior Ct. (N. Y.) 338; Wright *v.* Milbank, 9 Bosw. (N. Y.) 672.

[5] Laflin *v.* Herrington, 17 Ill. 399.

times, attached to the tenure of real property. Our ancestors were unwilling that claims of title to land should, like other claims, be settled forever by one trial, in an ordinary personal action, but, as is shown elsewhere, inclined to afford the unsuccessful party another opportunity of establishing his title.[1]

§ 579. *Reason for granting statutory new trial to plaintiff.*—The statutory right to a second trial is given in some States only to a defeated plaintiff upon the theory that the burden of proving a superior title rests with him, and he should be afforded an opportunity to supply any defects in his claim of title as first exhibited, and especially to avoid or overcome the defendant's title of the evidence in support of which he may have been ignorant in the first instance.[2] The wisdom of a system of practice which enables a plaintiff to employ the process of the court to obtain knowledge of his adversary's title, as a means of preparing for a second trial, may certainly be questioned.

§ 580. *Statutes in effect restrictive of common law rights.*—The judgment in ejectment, for reasons already discussed,[3] was not conclusive, and fresh ejectments could be instituted until a court of equity intervened by injunction. These statutes, generally speaking, are, therefore, in effect restrictive of the common law rights of the defeated party in ejectment; usually, by their provisions, a given number of trials is made conclusive upon the parties and the title, and the necessity for a perpetual injunction against new ejectments is superseded. The statutes, though necessarily somewhat varied in details as to matters of practice, are substantially alike in the several States in which they prevail.

§ 581. *Statutory and common law new trials independent.*—It is clear that these statutes furnish a remedy additional

[1] See Miles *v.* Caldwell, 2 Wallace (U. S.), 35–41; Spence *v.* McGowan, 53 Texas, 30–35; see § 42.

[2] Spence *v.* McGowan, 53 Texas, 30–35.

[3] See Chapter XX.

to and independent of the ordinary new trials at common law,[1] though in some cases in which the defeated party was pursuing the ordinary rights of a litigant, the application for a new trial at common law has been treated by the courts as superfluous, the statutory right to a new trial being available.[2]

§ 582. *Abuses under the statutes.*—Despite the wise purpose intended to be subserved by the law-making power, statutory new trials are frequently resorted to by unscrupulous claimants as instruments of vexatious delay and oppression. An honest litigant, after a tedious and expensive trial, and a careful examination and adjudication of the title upon the merits, suddenly finds his judgment vacated, and the fruits of a hard fought contest apparently sacrificed, for no error, omission, or mistake contained in the record, or occurring at the trial. Hence the books are prolific of expedients for thwarting the operation of these statutes. Judge Foster, in delivering the opinion of the New York Court of Appeals in the case of Shumway *v.* Shumway,[3] says: "It was not very uncommon for a party, claiming the title to land and the right of possession, and who desired to avoid the delays consequent upon the statutory right to new trials in an action of ejectment, to bring his action in trespass, and so establish his right upon a single trial, and recover his damages for the trespass; and when judgment was perfected, if the defendant did not yield the possession, to bring his action of ejectment, on the trial of which, the record of judgment in the action of trespass would be conclusive evidence of his right, and render hopeless any attempt to obtain a new trial."

§ 583. *Successful plaintiff not allowed to discontinue ejectment to avoid second trial.*—In Carleton *v.* Darcy,[4] a

[1] Laflin *v.* Herrington, 17 Ill. 399.

[2] Walker *v.* Armour, 22 Ill. 658; see Frost *ads.* Brown, 2 Bay (S. C.), 133.

[3] 42 N. Y. 143. See Masten *v.* Olcott, 24 Hun (N. Y.), 587.

[4] 75 N. Y. 375; S. C., below, 11 J. & S. (N. Y.) 373.

plaintiff who had succeeded in an ejectment was put into possession under the judgment. The defendant paid the costs, and took a new trial. The plaintiff, still retaining possession of the lands, applied to the court for permission to discontinue the action. The application was denied, the court holding that the plaintiff could not retain the substantial fruits of the action, and force upon the defendant the burden of showing a valid title, but rather that it would require the plaintiff to pursue the action until a definite and final result was reached, settling positively the rights of possession of the lands in dispute, so long as the defendant desired to avail himself of the further litigation which the law afforded him.

§ 584. *How the statutes are interpreted.*—In Illinois it has been held that the statutes should receive a liberal construction,[1] and the courts of that State have decided that the important rights granted thereby, were not lost by reason of the failure of the moving party to pay an award of one cent damages, given on the first trial, as the law would not regard such trifles.[2] In Texas, the statute permitting a second suit, was declared to be an exception to an almost universal rule founded on the wisest public policy, and the court said that it should be strictly construed, and confined to actions for the trial of title proper, which came within the mischief intended to be obviated.[3] We shall presently show that these statutes have practically outlived their usefulness, and the wisdom of applying a rule of construction to them which tends to favor new trials is very questionable. They should at most receive only an ordinary and natural construction, neither strict nor liberal. Any attempt to restrict the operation of the statutes by applying to them the rules of interpretation governing penal statutes would be of doubtful utility.

[1] Chamberlin *v.* McCarty, 63 Ill. 262.

[2] Myers *v.* Phillips, 68 Ill. 269.

[3] Spence *v.* McGowan, 53 Texas, 30-36; but see Magee *v.* Chadoin, 44 Texas, 488-496.

§ 585. *Actions to which the statutes apply.*—Where the complaint, in addition to the usual averments, stated facts in relation to the assessment of damages, and also contained averments sufficient to warrant an application for a receiver, and supplemented the ordinary prayer by asking for an injunction, accounting, and receiver, the suit was held to be ejectment, and the defeated plaintiff was allowed a new trial under the statute.[1] In a very recent case which arose in Kansas, it was decided that the right to a second trial was not taken away by the addition to the petition of a claim for mesne profits, and that this important privilege was not affected by the fact that an equitable defense was set forth in the answer. The court held that, as the plaintiff had commenced an action in form for the recovery of real property, the statutory rights incident to actions of that class were in no way prejudiced by the character of the defense interposed.[2] So the plaintiff was held to be entitled to bring the second action, though the judgment in the first contained a superfluous provision that the defendant be quieted in the possession of the lands.[3] Where the judgment for defendant in terms attempted to remove a cloud from defendant's title, his pleadings being purely defensive, the form, though inappropriate, was held not to operate so as to prevent the plaintiff from maintaining his second suit.[4] The plaintiff has been held to be entitled to a second action, though the judgment in the first was rendered on demurrer and not on a verdict, the court holding that a judgment on demurrer was *res adjudicata* as much as a judgment on a verdict. In the one case the judgment is given for lack of sufficient facts alleged, and in the other case for lack of sufficient facts proved.[5] But in Michigan the statutes were

[1] Bucher *v.* Carroll, 19 Hun (N. Y.), 618.

[2] Cheesebrough *v.* Parker, 25 Kan. 566.

[3] Houston & T. C. R. R. Co. *v.* McGehee, 49 Texas, 481.

[4] Blessing *v.* Edmonson, 49 Texas, 333; see Cheesebrough *v.* Parker, 25 Kan. 566.

[5] Edgar *v.* Galveston City Co. 46 Texas, 421.

interpreted to cover the case of an actual trial, and not simply of a nonsuit.[1] The second suit may be brought as well where the defense interposed in the first suit was the statute of limitations as in other cases.[2]

§ 586. *Suits to quiet title.*—In Indiana, a new trial may be demanded and obtained as a matter of right in suits for quieting title to land, with the same effect as in actions for the recovery of the possession.[3]

§ 587. *Defeated defendant cannot become plaintiff in second action.*—In a case which arose in South Carolina, it was held that the defendant in an action of trespass to try title could not, after a recovery against him, in turn become plaintiff and maintain a second action to try the title to the same lands.[4]

§ 588. *Effect of entry of erroneous judgment.*—A judgment in ejectment, entered by defendant's attorney, erroneously recited that the verdict was for defendant, instead of stating that plaintiff's complaint was dismissed. Nearly three years subsequently plaintiff moved to vacate the judgment, and for a new trial, as a matter of right under the statute. Defendant opposed the motion, and produced the minutes of the trial, showing that the complaint was dismissed. A new trial was granted, the court holding that the judgment could not be impugned, or changed from a final judgment upon the merits, for the temporary purpose of defeating the motion. The court left undecided the question as to whether or not a judgment entered upon an order dismissing a complaint was to be regarded as one rendered "upon the decision of a single judge upon the facts" within

[1] People *v.* St. Clair Circuit Judge, 37 Mich. 131.

[2] Ward *v.* Drouthett, 44 Texas, 365.

[3] Shuman *v.* Gavin, 15 Ind. 93; Galletley *v.* Williams, 15 Ind. 468; Wills *v.* Dillinger, 17 Ind 253; Shucraft *v.* Davidson, 19 Ind. 98; Zimmerman *v.* Marchland, 23 Ind. 474; Truitt *v.* Truitt, 37 Ind. 514. But see Russell *v.* Nelson, 32 Iowa, 215; Blackford *v.* Loveridge, 10 Kan. 101.

[4] Thomas *v.* Geiger, 2 N. & McC. J. (S. C.) Law, 528; see Brownsville *v.* Cavazos, 100 U. S. 138.

the meaning of the statute allowing second trials as a matter of right in such cases.[1] It has been held in Texas, that an omission to indorse on the petition a recital that the action was brought to try the title, could not control the nature of the suit when it necessarily involved the plaintiff's title, and if the second suit was not brought within a year, the judgment rendered in the former suit would be *res adjudicata*.[2]

§ 589. *Statutes not applicable to equitable actions.*—In an action which arose in New York, it appeared that the plaintiffs, as executors, had successfully prosecuted an action to set aside a deed made by the testator, on the ground that it was procured by fraud and undue influence. The judgment contained a finding that the plaintiffs were entitled to the possession of the lands. Defendant moved for a new trial under the statute, claiming that the action determined the title to real property within the meaning of the statute, and urging that the course of the plaintiffs, in bringing a suit in equity instead of an action at law, should not be allowed to deprive the defendant of the statutory new trial. The court held, however, that the statute granting new trials as a matter of right, had never been extended so as to include equitable actions, though such actions frequently determined not only the right of possession, but the whole title to the premises, and denied the motion for a new trial.[3]

§ 590. *Granting new trials in equity in analogy to the statutes.*—But in analogy with these statutes a tendency exists to grant new trials in equitable actions, which in effect determine the title to land, upon grounds which ordinarily would be deemed wholly insufficient,[4] and this principle has been extended even to cases in which the verdict

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[1] Towle *v.* Dewitt, 7 Hun (N. Y.), 93.

[2] Dangerfield *v.* Paschal, 20 Texas, 536.

[3] Shumway *v.* Shumway, 42 N. Y. 143; see Somerville *v.* Donaldson, 26 Minn. 75.

[4] Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144.

was satisfactory to the court.[1] Daniels[2] says, that in order that titles may not be divested or defeated by a single verdict, the court will frequently direct new trials of issues, even in cases in which the issue has been properly tried and the verdict is satisfactory upon the evidence, the practice of the court being adverse to bind the inheritance where there has been but one trial at law. But the rule granting a new trial in equity actions in analogy to the statutory right of the defeated party in ejectment, has been held not to apply to an action brought by an heir-at-law against the widow of his deceased father, to have the marriage declared void by reason of the lunacy of the father at the time of the marriage, as the judgment therein sustaining the marriage would not defeat the plaintiff's right as heir, but at most merely suspended his possession of a portion of the estate for the life of the widow.[3]

§ 591. *Disputed boundaries.*—In Texas it has been held that a second action of trespass to try title cannot be brought if the issue is one of boundary simply, though nominally in form an action to try title, and the defense of *res adjudicata* was declared to be available as a plea to the second action in like manner as though the action had been in form, as well as in fact, an equitable proceeding for the settlement of the disputed boundary.[4]

§ 592. *Actions to determine conflicting claims to real property.*—It has been held in Kansas, that the statutes did not apply to an action brought by a party in possession to determine conflicting claims to real property,[5] and this doctrine was maintained in New York[6] until a second trial was conferred by statute.[7] In a proceeding of this character, in

[1] Stevens *v.* Church, 8 Phila. (Penn.) 642; see White *v.* Wilson, 13 Ves. 88.
[2] 2 Daniels' Ch. Pr. 1124.
[3] Banker *v.* Banker, 4 Hun (N. Y.), 259.
[4] Bird *v.* Montgomery, 34 Texas, 713; see Spence *v.* McGowan, 53 Ib. 30–33.
[5] Northup *v.* Romary, 6 Kan. 240; see Swartzel *v.* Rogers, 3 Kan. 374.
[6] Malin *v.* Rose, 12 Wend. (N. Y.) 258.
[7] New York Code of Civil Procedure, § 1646.

Minnesota, in which the defendant answered, denying the lawfulness of plaintiff's possession and demanding judgment for possession and mesne profits, the proceeding was held to be a cross action in the nature of ejectment, and a new trial was demanded as a matter of right under the statutes allowing a second trial to the defeated party in an action to recover real property.[1] Practically the same doctrine has been maintained in Texas.[2]

§ 593. *Actions between landlord and tenant.* — The statutes have been held, in Michigan, not to be applicable to ejectments between landlord and tenant for non-payment of rent, for the reason that in such actions the title could not be disputed.[3] A similar interpretation was placed upon the statute in New York, in Christie *v.* Bloomingdale,[4] but the doctrine of this case was disapproved in the later case of Reed *v.* Loucks,[5] at special term. The new Code of that State has exempted actions of ejectment founded upon an allegation of rent in arrear, from the operation of the statutes.[6] In New York these statutes do not embrace controversies submitted without *action* by the agreement of the parties to a general term of the court;[7] and they are not applicable to ejectments commenced prior to the enactment of the statutes.[8]

§ 594. *Forcible entry statutes.*—In Minnesota a novel practice (chiefly statutory) has grown up of making use of the statutory proceedings of forcible entry and unlawful detainer for the trial of the title to the land in controversy. As in such cases the proceeding is, in effect, an action for the recovery of real property in the nature of ejectment, a

[1] Eastman *v.* Linn, 20 Minn. 433; see Laws of Minnesota, 1867, ch. 72, § 2.
[2] Magee *v.* Chadoin, 44 Tex. 488–496.
[3] Whitaker *v.* McClung, 14 Minn. 170.
[4] 18 How. Pr. (N. Y.) 12.
[5] 61 How. Pr. (N. Y.) 434.
[6] § 1528 N. Y. Code Civ. Proc.
[7] Lang *v.* Ropke, 1 Duer (N. Y.), 701; s. c. 10 N. Y. Leg. Obs. 70.
[8] Jackson *d.* Palmer *v.* Coe, 5 Wend. (N. Y.) 101.

second trial is allowed as a matter of right under the statute providing for new trials in actions for the recovery of real property.[1]

§ 595. *Actions of trespass, specific performance, and to set aside conveyances not within the statutes.*—The statutes in New York have no application to trespass *quare clausum fregit*, though it is strictly a legal action, and involves the title and right of possession;[2] nor in Kansas to actions of partition.[3] The statutes are not applicable to actions to compel a specific performance of a contract to convey real estate,[4] or to actions to set aside conveyances as fraudulent.[5] In New York, an application for a second trial, as a matter of right, was denied in a proceeding brought under the laws of 1853, ch. 238, § 2, to test the validity of an apparent devise of real estate.[6] A new trial, it is clear, cannot be given by legislative enactment where the right has once lapsed and the judgment has become final between the parties.[7]

§ 596. *Common law new trials not counted.*—It has been held in Michigan, in the case of Gilman *v.* Judge of Wayne Circuit,[8] that it was the intention of the statute to grant a new trial as a matter of right only in cases in which a judgment had been regularly and properly obtained. Hence, if the judgment had been procured wrongfully or illegally, by error of law or of fact, it was not a valid judgment, but was subject to reversal by the appellate court, and when so reversed, the case stood in the same position as though no

[1] Ferguson *v.* Kumler, 25 Minn. 183.

[2] Shumway *v.* Shumway, 42 N. Y. 143.

[3] Swartzel *v.* Rogers, 3 Kan. 374.

[4] Blackford *v.* Loveridge, 10 Kan. 101; see Main *v.* Payne, 17 Kan. 608; Benner *v.* Benner, 10 Ind. 256; Allen *v.* Davison, 16 Ind. 416; Walker *v.* Cox, 25 Ind. 271; Truitt *v.* Truitt, 37 Ind. 514.

[5] Somerville *v.* Donaldson, 26 Minn. 75; Shumway *v.* Shumway, 1 Lansing (N. Y.), 474; affi'd, 42 N. Y. 143; Perry *v.* Ensley, 10 Ind. 378.

[6] Marvin *v.* Marvin, 11 Abb. Pr. N. S. (N. Y.) 102.

[7] Sydnor *v.* Palmer, 32 Wis. 406; see Jackson *d.* Palmer *v.* Coe, 5 Wend. (N. Y.) 101.

[8] 21 Mich. 372.

such judgment had ever been rendered. The statute was not needed to get rid of a judgment of this character. Hence it was held that a new trial granted by the court, reversing the judgment for error, was not to be counted as one of the new trials provided by the statute.

§ 597. *What title investigated on second trial.*—It appeared in an action of trespass to try title, which arose in Texas, that the plaintiffs were defeated in the first action, and acquired a new title before bringing the second action. The defendant objected to the introduction of evidence tending to establish the new title upon the theory that the second action was a continuation of the first, and consequently a recovery could not be had upon a title acquired after the institution of the action.[1] The court did not, however, accept this view, but followed the case of Barrows *v.* Kindred,[2] in the Supreme Court of the United States, which maintains the doctrine that a defeated plaintiff in ejectment may subsequently purchase a new and distinct title, and acquire the same right to assert it without prejudice from the former action as would have accompanied the title into the hands of a stranger. It was held, however, in the case of Menifee *v.* Hamilton,[3] in which the judgment rendered on the first trial was reversed on appeal, and a new trial ordered, that it was error to permit an amendment of the defendant's pleading so as to count upon a new and different title from that set up on the former trial, otherwise it was urged there would be no end to the litigation; for as often as the judgment was reversed in the appellate court, the parties could go on acquiring new muniments of title, and presenting new issues of law and fact, thus effectually abrogating the rule giving but two actions of trespass to try title to the same party, and for the same subject matter. In Pennsylvania it is held, however, that the defendant may on the second trial repudiate the defense interposed at

[1] Connolly *v.* Hammond, 51 Texas, 635.

[2] 4 Wall. (U. S.) 399.

[3] 32 Texas, 495.

the first trial, and defeat the plaintiff's recovery on other grounds.[1]

§ 598. *Conditions of procuring the order.*—Payment of costs is generally made a condition precedent to granting a new trial,[2] and the entry of the order is absolutely without effect, unless the costs, and in some States the damages, awarded by the first trial are paid,[3] though, as we have seen, it has been held in Illinois that the statutory remedy is not lost by failure to pay an award of one cent damages, it being the policy of the law not to regard such trifles.[4] Where the costs were paid and the motion for a new trial granted within the year, but no formal order entered, the moving party's right to the new trial was nevertheless declared complete;[5] and the order is effectual, even though a judgment has not been entered upon the verdict.[6] Payment of the costs and damages in national bank notes to the clerk of the court has been held to be a good payment in Michigan.[7] In Brownsville *v.* Cavazos,[8] in the Supreme Court of the United States, on appeal from the United States Circuit Court for the Eastern District of Texas, it appeared that the defendant in that suit had been defeated as plaintiff in an action of trespass to try title, and that under the statute of that State (since abrogated) a judgment against a plaintiff in an action for the possession of real property was made conclusive, unless he commenced a second action for the property within a year, which in this case he had neglected to do. In answer to this objection, however, it was urged that before the year elapsed, and within ten days after the suit was

[1] Rice *v.* Bixler, 1 W. & S. (Penn.) 445.

[2] Oetgen *v.* Ross, 36 Ill. 335; see Davidson & Lamprey, 16 Minn. 445; Shaw *v.* McMaren, 2 Hill (N. Y.), 417.

[3] Golden *v.* Snellen, 54 Ind. 282; Oetgen *v.* Ross, 36 Ill. 335; Dennison *v.* Genesee Circuit Judge, 37 Mich. 281.

[4] Myers *v.* Phillips, 68 Ill. 269.

[5] Rountree *v.* Talbot, 89 Ill. 246.

[6] Delano *v.* Bennett, 61 Ill. 83.

[7] Dennison *v.* Genesee Circuit Judge, 37 Mich. 281.

[8] 100 U. S. 138.

dismissed, the defendant in the first action brought suit against the plaintiff in that action, in which all their rights were again brought into litigation. The court held that the statute allowing the defeated plaintiff one year within which to re-litigate the title, did not preclude him or his grantees from setting up his or their chain of title, if within the required period a similar suit respecting the same land was commenced against the plaintiff or his grantees by the former defendant. The object of allowing a second litigation of the same title, and of requiring such litigation to be speedily instituted, was equally accomplished.

§ 599. *Practice in New York.*—In New York, one new trial is granted to the defeated party as a matter of right upon the payment of the costs and all damages awarded upon the first trial, other than for rents and profits, or for use and occupation,[1] and a second new trial may be had in the discretion of the court, in cases where justice will be promoted, and the rights of the parties more satisfactorily ascertained and established, but only two new trials can be granted under the statute. The courts of that State do not ordinarily exercise this discretion to award a second new trial under the statute, but incline to remit the applicant to the ordinary rights of a defeated suitor by appeal.[2] It has been decided that the Code of Procedure of that State has not abrogated the former practice of making an order before judgment, directing that when the judgment is perfected it be thereupon vacated upon payment of costs, and a new trial granted without further order of the court.[3] Under the former statute of that State, the courts held that it was essential to this form of relief that there should have

[1] Burrows *v.* Miller, 5 How. Pr. (N. Y.) 51; New York Code of Civil Procedure, § 1525.

[2] Brown *v.* Crim, 1 Denio (N. Y.), 665; Bellinger *v.* Martindale, 8 How. Pr. (N. Y.) 113; Harris *v.* Waite, 54 Ib. 113; Wright *v.* Milbank, 9 Bos. (N. Y.) 672–677; Phyfe *v.* Masterson, 13 J. & S. (N. Y.) 338.

[3] Post *v.* Moran, 61 How. Pr. (N. Y.) 122; see Cooke *v.* Passage, 4 How. Pr. (N. Y.) 360; s. c. 3 Code R. 88.

been a trial by jury, and a verdict rendered, upon which judgment was entered,[1] though a verdict subject to the opinion of the court at general term, was regarded as bringing the application within the statute.[2] The statute is now extended to judgments in actions for the trial of title rendered upon the decision of a single judge, or the report of a referee.[3] The application for the first new trial must be made within three years from the entry of the first judgment,[4] and not three years from the affirmance of the judgment in the court of last resort,[5] and an order, allowing a new trial under the statute, was held, under the former practice of that State, not to be appealable to the Court of Appeals.[6]

§ 600. *Sacia v. O'Connor.*—In Sacia *v.* O'Connor,[7] an application was made on behalf of the defendant, and a party claiming to be his landlord, for a new trial as a matter of right. It was shown that when the action was ready for trial the defendant, who was the tenant in possession, withdrew his answer, and the judgment was rendered by consent. The application in question was made by an attorney other than the attorney of record, and who had not been substituted in the action, and the interest of the landlord was strongly controverted in plaintiff's affidavits. The application was denied in the court below with leave to renew. The Court of Appeals held, that as the motion was on behalf of a party whose interest in the premises was doubtful, and by an attorney who was not shown to have had any authority, and the judgment had been rendered by consent, it was very doubtful whether a case within the

[1] Chautauqua Co. Bk. *v.* White, 23 N. Y. 347; Holmes *v.* Davis, 21 Barb. (N. Y.) 265; Lang *v.* Ropke, 1 Duer (N. Y.), 701.

[2] Phyfe *v.* Masterson, 13 J. & S. (N. Y.) 338.

[3] Bucher *v.* Carroll, 19 Hun (N. Y.), 618; N. Y. Code of Civil Procedure, chapter XIV, art. 1.

[4] N. Y. Code of Civil Procedure, § 1525.

[5] Chautauqua Co. Bk. *v.* White, 23 N. Y. 347.

[6] Evans *v.* Millard, 16 N. Y. 619.

[7] 79 N. Y. 260.

statute had been made out, and the moving party not having availed himself of the leave given to renew, the order should be affirmed. A subsequent application was made in this action for a statutory new trial in the court below. It appeared that issue had been joined in the action, and the cause regularly called for trial, and the defendant failing to appear, an inquest had been taken, and judgment entered for the plaintiff. A statutory new trial was granted, the court holding that this was not a judgment rendered by default within the meaning of the statute, an answer having been interposed, and the plaintiff thereby compelled to proceed regularly to verdict and judgment, which he did by taking an inquest in open court. A judgment by default was defined to be a judgment rendered for want of a plea or answer.[1]

§ 601. *Strangers to the record not entitled to new trial.*—In Forsyth *v.* Van Winkle,[2] in the United States Circuit Court for the District of Indiana, it has been held that only a party concluded by the judgment, or his heirs, assignees or representatives, was entitled, under the statute of Indiana, to have the judgment vacated and a new trial granted as a matter of right. The statutes will not be interpreted to include strangers to the record.

§ 602. *Practice in various States.*—In Minnesota the defeated party may have a second trial as of course, by demanding the same in writing within six months after notice of the entry of the judgment.[3] In Texas, before the abolition of the statute, it was necessary to bring the second action within one year from the entry of the judgment in the first action, and not one year from the dismissal of an appeal,[4] and the right was given to the plaintiff only,[5] and

[1] Sacia *v.* O'Connor, 11 Weekly Dig. (N. Y.) 440; see 2 N. Y. R. S. p. 309, §§ 36–38.

[2] 9 Fed. Rep. 247.

[3] Davidson *v.* Lamprey, 16 Minn. 445.

[4] Martin *v.* Wayman, 38 Texas, 649.

[5] Fisk *v.* Miller, 20 Texas, 572; Lewis *v.* San Antonio, 26 Ib. 316.

not to the defendant, though he set up and relied upon title.[1] The party first invoking the action of the court upon the controversy was alone authorized to bring the second action, and this right it was said did not depend upon the mere designation of the parties to the action as plaintiffs or defendants, but upon the relations which they bore to the case.[2] Under the practice in Ohio, it has been held that after two judgments in favor of defendant, the second trial having been granted as a matter of right under the statute, the plaintiff had no right of appeal.[3] And in the same State, in estimating the number of new trials to which a party is entitled on appeal in the District Court, it was decided that no notice would be taken of the number or result of the trials in the court below.[4] In Wisconsin the statute is interpreted so as to grant but one new trial as a matter of right, and not one new trial to each party.[5] In Illinois a conditional order vacating the judgment, and granting a new trial upon payment of costs, followed by payment of the costs within one year, is sufficient.[6] In that State each party is entitled to a new trial, as a matter of right,[7] but as the right is itself a matter of grace and favor, it must be insisted upon within the time specified.[8] In Pennsylvania, a second ejectment may be brought by the *successful party* before he has attempted to take possession under the first verdict.[9] It seems difficult to conceive of any greater legal absurdity.

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[1] Fisk *v.* Miller, 20 Texas, 572; Lewis *v.* San Antonio, 26 Ib. 316; see, also, Magee *v.* Chadoin, 44 Texas, 488.

[2] Magee *v.* Chadoin, 44 Texas, 488–496.

[3] Smith *v.* Anderson, 20 Ohio St. 76; S. & C. Stat. (Ohio), 1157, sec. 294.

[4] City of Marietta *v.* Emerson, 5 Ohio St. 288.

[5] Boland *v.* Gillett, 44 Wis. 329; see Gilman *v.* Judge Wayne Circuit, 21 Mich. 372; Wright *v.* Milbank, 9 Bosw. (N. Y.) 677; Bellinger *v.* Martindale, 8 How. Pr. (N. Y.) 113; Brown *v.* Crim, 1 Denio (N. Y.), 665.

[6] Rountree *v.* Talbot, 89 Ill. 246; see Myers *v.* Phillips, 68 Ill. 269; Becker *v.* Sauter, 89 Ill. 596; but see Delano *v.* Bennett, 61 Ill. 83.

[7] Chamberlin *v.* McCarty, 63 Ill. 263.

[8] Emmons *v.* Bishop, 14 Ill. 152.

[9] Ross *v.* Pleasants, 19 Penn. St. 157.

It has been held in Pennsylvania, under a statute which provided that where two verdicts were given in succession for the plaintiff or defendant no new ejectment could be brought, that one verdict and one award of arbitrators in favor of the same party was not a bar to another ejectment.[1] And in a case which arose in Tennessee, the court held, that when the complainant's title was both legal and equitable, a trial in ejectment, which could be renewed, was no bar to the assertion of complainant's claim in equity any more than it would be a bar to the prosecution of a new ejectment.[2] But one verdict for the plaintiff in ejectment and a disclaimer, filed by the defendant in a second action, are equivalent, under the statute in Pennsylvania, to two verdicts for plaintiff, and end the controversy.[3]

§ 603. Under the practice in Kansas, if the defeated party applies for a new trial at common law, for errors occurring at the trial, and has made no demand for a second trial as of course under the statute, it is too late for him to insist, for the first time in the appellate court, that he was entitled to a new trial as a matter of right.[4] In Michigan the time for taking a new trial, under the statute, only dates from the day when the first judgment is perfected.[5] In a case which arose in South Carolina, while the statute allowing the plaintiff to bring a second action within two years after the termination of the first action was in force, it appeared that shortly after the termination of the first action, in defendant's favor, he abandoned the possession of the land. The defeated plaintiff, finding the land unoccupied, took possession, and the question subsequently presented was, whether or not she was barred of her title to the land by reason of her failure to bring a second action within two years from the termination of the first action. The court

[1] Ives *v.* Leet, 14 S. & R. (Penn.) 301.
[2] Winchester *v.* Gleaves, 3 Hayw. (Tenn.) 213.
[3] Crea *v.* Hertzler, 8 Phila. (Penn.) 644.
[4] Anderson *v.* Kent, 14 Kan. 207.
[5] O'Blinskie *v.* Judge Kent Co. 34 Mich. 62.

held that the obvious intent of the statute was to quiet possession, and to take away the right of one out of possession, claiming to be the owner of land against a party in possession, after one trial or one decision, unless the second action was brought within two years. The plaintiff in the first action could not maintain ejectment or trespass to try title, the substitute for it, because she was in possession herself, nor could she bring trespass *quare clausum fregit*, for her possession was not disturbed.[1]

§ 604. *New trial waived by stipulation.*—In the case of Ladd *v.* Hildebrant,[2] it appeared that the defendant, as a condition of procuring a continuance of the cause, had stipulated to waive his right to a new trial if a verdict was rendered against him. Having been defeated, he applied for a new trial, urging that the stipulation was invalid, having been entered into prior to the trial, and before it was known whether the defendant would need or had a right to apply for it. The application was denied, the court holding that full effect should be given to the stipulation, and that a party might waive the statutory remedy as a future contingent right.

§ 605. *Pendency of writ of error or appeal.*—The pendency of a writ of error does not preclude the court below from granting a statutory new trial, and if the year within which to make the application under the statute expires pending an appeal from the judgment rendered on the first trial, the right to a new trial, as a matter of course, is lost.[3] Nor does the granting of the new trial operate to discontinue the writ of error pending at the time, brought by the party thus taking a new trial. The appellate court retains jurisdiction to decide the case on the record.[4]

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[1] Henderson *v.* Kenner, 1 Rich. (S. C.) Law, 474.

[2] 27 Wis. 135.

[3] Gibson *v.* Manly, 15 Ill. 140; see Chautauqua Co. Bank *v.* White, 23 N. Y. 347; Martin *v.* Wayman, 38 Texas, 649; see O'Blinskie *v.* Judge Kent Co. 34 Mich. 62.

[4] Rees *v.* City of Chicago, 40 Ill. 107.

§ 606. *Second action must be instituted in same court.*—A defeated plaintiff in ejectment, in Michigan, vacated the judgment and took a new trial under the statute and brought the second action in the United States courts. The court held that plaintiff's course was a fraud upon the law; having set aside the bar to another action he did so under an obligation to pursue the remedy under the statute, and was not at liberty to resort to the United States court.[1]

§ 607. *Statutes controlling in Federal courts.*—In Hiller *v.* Shattuck,[2] a question arose involving the construction of the acts of Congress,[3] and the rules of the Federal courts adopting the practice of the State courts in Federal tribunals, and the determination of the effect to be given in an ejectment pending in the United States Circuit Court to a State statute granting a new trial as a matter of right. It was urged against the motion for a new trial, that it was a statutory right and not a matter of practice, and, therefore, not covered by the acts of Congress or the rules of the Federal courts, but the court said that because it was a matter of right it was binding upon the Federal tribunal, and, except as to the mode of enforcement, was independent of the Federal statutes and rules; that local laws, constituting rules of property and especially respecting titles to land, are binding rules of decision in the Federal courts,[4] and that State statutes, defining the effect of a judgment in ejectment upon the title in controversy and permitting new trials, are "laws

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[1] Fraser *v.* Weller, 6 McL. 11; see, also, Cunningham *v.* City of Milwaukee, 13 Wis. 120.

[2] 5 Chicago Legal News, 289; S. C. 1 Flippin, 272; see Sturdy *v.* Jackaway, 4 Wall. 174; Cady *v.* Phenix Fire Ins. Co. 18 Int. Rev. Rec. 30; see Forsyth *v.* Van Winkle, 9 Fed. Rep. 247.

[3] 17 Stat. at Large, Ch. 179, Act of June 1, 1872.

[4] Polk *v.* Wendal, 9 Cranch, 87; Shipp *v.* Miller, 2 Wheat. 316–325; Gardner *v.* Collins, 2 Peters, 58; Green *v.* Neal, 6 Ib. 291; Thatcher *v.* Powell, 6 Wheaton, 119; Shelby *v.* Guy, 11 Ib. 361–367; Jackson *v.* Chew, 12 Ib. 153.

respecting titles to land," conclusive alike in State and Federal courts and constituting a rule of property.[1]

§ 608. *Repeal of the statutes recommended.*—The strong disinclination of the courts to interfere with or deprive the defendant of the possession of real property, pending the trial of the title, will be presently noticed.[2] Irresponsible and unscrupulous defendants eagerly avail themselves of this regard for possessory rights, and not satisfied with pilfering the rents and profits accruing during the pendency of the first action, hasten to pay the costs, vacate the judgment, and continue their depredations pending the second trial. The unfortunate owner of the title, who has been deprived of the possession, is, in many cases, under the existing practice, virtually deprived of redress, for the delays and embarrassments by which the proceedings are hampered are so numerous, the advantages of the possessor so important, and the expense of the litigation so great, that unless the *locus in quo* is of considerable value, the plaintiff, though ultimately successful, may be ruined by an action decided in his favor. Under the early practice, as has been shown, judgments in ejectment were not conclusive, and fresh ejectments could be brought upon new fictitious leases. After a sufficient number of trials a perpetual injunction was obtained against further ejectments. The statutes, making the judgment in ejectment conclusive after a given number of trials, were regarded as an important legal reform; but when we consider that in several States the defeated party is afforded three and in others five years, within which to elect to take a second trial, and being defeated upon the second trial is, in some States, given two additional years within which to invoke the discretion of the court to grant a third

[1] See Blanchard *v.* Brown, 3 Wall. 245–249; Sturdy *v.* Jackaway, 4 Wall. 174; Barrows *v.* Kindred, Ib. 399; Miles *v.* Caldwell, 2 Ib. 35–44. See further, as to practice in Federal courts under the act of 1872, Butler *v.* Young, 5 Chicago Legal News, 146; Republic Ins. Co. *v.* Williams, Ib. 97.

[2] See Chapter XXIII.

trial, the question cannot but suggest itself whether a further curtailment of the remedy might not be beneficial. Indeed, a sufficient number of trials might have been had within a shorter space of time to warrant a perpetual injunction under the early practice. It must be remembered that these statutes were not enacted to furnish relief against judgments erroneously rendered, as such judgments can be avoided by appeal, or application at common law for a new trial.[1]

§ 609. It has been stated that it is not to be inferred that every action relating to real property is within the provisions of these statutes. The almost uniform tendency of the decisions is to confine the operation of the statutes to actions at law for the recovery of the possession and trial of the title, either technically in the form of ejectment, or the statutory substitutes for that remedy. Equitable actions, or proceedings, are held not to be within their provisions. Keeping in view the fact that transfers of real property cannot usually be effected by parol, and that titles are, in most cases, spread upon the public records, it is not easy to discover any controlling or sufficient cause for this result. It is certainly more difficult to prepare and try equitable actions than actions at law, and there exists no well-founded reason for extending the statute to actions at law and excluding suits in equity, for the latter frequently settle the whole title, and the result in equitable actions is manifestly more uncertain. In any case, if the defeated party, having suffered no wrong by reason of errors occurring at the first trial, is afforded the great privilege of a new presentation of his case, he should be compelled to make the election so to do forthwith. Otherwise, the title remains unsettled; is clouded for purposes of sale, and the possessor does not dare to permanently improve the property, lest he may ultimately lose it. The statute in Texas, which granted

[1] Gilman *v.* Judge of Wayne Co. 21 Mich. 372.

a second trial as a matter of right to the plaintiff, has recently been repealed,[1] and the Supreme Court of that State, commenting upon the change, remarks, that as real estate is now the subject of transfer with almost the same facility as personal property, the reasons for the practice of granting statutory new trials in such actions no longer exist.

A careful study of the operation of these statutes as evidenced in the reports of many recent ejectment cases, some of which will be presently noticed, cannot fail to confirm the growing conviction that the right to statutory new trials should be either very greatly curtailed or entirely abolished.[2]

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[1] Spence *v.* M'Gowan, 53 Tex. 30–36.

[2] See § 632.

CHAPTER XXIII.

PROVISIONAL REMEDIES AND ANCILLARY RELIEF IN ACTIONS TO TRY TITLE.

§ 610. Provisional remedies.
611. Provisional relief at common law.
612. Forms of provisional relief.
613. Appointment of receiver.
614. Policy of the courts in New York.
615. In New York receiver not appointed before judgment.
616. When receiver will be appointed.
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618. In Illinois—Mapes *v.* Scott criticised.
619. Receiver after judgment.
620. Defendant's right to move for receiver.
621. Receiver to prevent waste.
622. Injunctions against trespass or waste pending ejectment.
623. Practice in North Carolina.
624. Injunction to restrain trespass in the nature of waste.
625. Failure to prosecute ejectment forfeits right to injunction.
626. Jurisdiction to grant injunction.
627. Storm *v.* Mann.
628. Practice in Pennsylvania.
629. Injunction by mortgagee against mortgagor.
630. Executions against the person, and orders of arrest.
631. Tendency of the modern cases.
632. Hardships incident to withholding provisional relief.

§ 610. *Provisional remedies.* — Occasions often arise, pending actions for the trial of title to land, where more speedy redress becomes necessary than is afforded by final judgment and writ of possession. The party in possession may be unscrupulous, improvident, or insolvent, and desirous of profiting by his occupancy of the land at the expense of the inheritance. Cases of this character, in which prompt relief is of vital importance to the party out of possession, occur so frequently, that the propriety of considering the principles and cases affecting provisional remedies, and applications for ancillary relief pending the delays incident to the trial of the title, is apparent,

§ 611. *Provisional relief at common law.*—In ejectment at common law, the law courts, not having equitable or chancery jurisdiction, were powerless to afford provisional relief, which could be obtained only by bill in chancery. This necessitated two actions—one to establish the title, the other to preserve and protect the property from waste

or destruction pending the litigation. In States in which legal and equitable jurisdictions are blended, this cumbersome method of procedure is now practically abrogated, and provisional relief may, in certain cases, be had in the action to try the title.

§ 612. *Forms of provisional relief.*—The usual and most effectual provisional relief is either by the appointment of a receiver to take possession of the property and preserve the rents, or by granting an injunction to restrain waste, or kindred injury, to the property in dispute. The principles which govern courts of equity in passing upon applications by bill in equity for provisional relief pending the ejectment, control the policy of the courts when the relief is sought in the action itself.

§ 613. *Appointment of receiver.*—The general rule is, that the appointment of a receiver *pendente lite*, rests in the sound discretion of the court,[1] and is usually granted only at the instance of a party having an acknowledged interest or strong presumption of title.[2] There must be reasonable probability of the plaintiff's success, and the subject-matter of the suit must be in danger.[3]

§ 614. *Policy of the courts in New York.*—The courts of New York have shown great reluctance to interfere with the use and enjoyment of lands by the possessor before judgment in ejectment. In Ireland *v.* Nichols,[4] a much criticised case which arose in the New York Superior Court, a receiver was appointed, but in Thompson *v.* Sherrard,[5] in the Supreme Court, it was held that the action of ejectment and for mesne profits was brought against the

[1] Verplank *v.* Caines, 1 Johns. Ch. (N. Y.) 57; Owen *v.* Homan, 4 H. L. Cas. 997–1032; Frisbee *v.* Timanus, 12 Fla. 300; Collier *v.* Sapp, 49 Ga. 93; Lenox *v.* Notrebe, Hempstead's C. C. 225.

[2] Chase's Case, 1 Bland's Ch. (Md.) 206–213; Vause *v.* Woods, 46 Miss. 120; Mays *v.* Rose, Freem. (Miss.) Ch. 718; Stitwell *v.* Williams, 6 Madd. 49.

[3] Bainbrigge *v.* Baddeley, 3 Macn. & G. 413–419.

[4] 37 How. Pr. (N. Y.) 222; S. C. 1 Sweeny (N. Y.), 208.

[5] 35 Barb. (N. Y.) 593. See Guernsey *v.* Powers, 9 Hun (N. Y.), 78.

defendants as trespassers, for the wrongful withholding of the possession, and that it was irregular and improper to appoint a receiver to receive damages to be recovered in an action of trespass. In the case of People *v.* The Mayor,[1] the New York Supreme Court said, that when the landlord alone was sued in ejectment, having let the property to tenants and was himself irresponsible, there could be no objection to the appointment of a receiver of the rents. The absurdity of seeking to remove the occupant because his possession was unlawful, and, at the same time, accepting rent as for a lawful occupation, is thus avoided. The appointment of a receiver of the rents and profits amounts to a complete ouster of the defendant, wresting from him the subject-matter of the litigation without trial or judgment. Though the appointment does not operate as an immediate transfer, yet, if the plaintiff succeeds, it is a transfer by relation from the time of the entry of the receiver. Proof of an apparently good title in plaintiff to the premises in question, is not sufficient unless some equitable ground is made to appear, entitling the plaintiff to the rents and profits as such, or it is shown that their sequestration is essential to his protection.

§ 615. *In New York receiver not appointed before judgment.*—In the later cases of Burdell *v.* Burdell[2] and Guernsey *v.* Powers,[3] however, it has been expressly held by the Supreme Court of New York, that a receiver will not be appointed in ejectment before judgment. The cases follow Thompson *v.* Sherrard and overrule Ireland *v.* Nichols, while no reference is made to People *v.* The Mayor. In New York, a receiver will not be appointed *pendente lite* in ejectment against one in possession under a contract of sale.[4]

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[1] People *v.* The Mayor, &c. 10 Abb. Pr. (N. Y.) 111.

[2] 54 How. Pr. (N. Y.) 91 (decided in 1877).

[3] See Guernsey *v.* Powers, 9 Hun (N. Y.), 78; see Mitchell *v.* Barnes, 22 Hun (N. Y.), 194, and dissenting opinion of Larned, P. J.

[4] Guernsey *v.* Powers, 9 Hun (N. Y.), 78.

§ 616. *When receiver will be appointed.*—As against the legal title, the uniform rule is that the court will interpose with reluctance, and only in cases of fraud clearly proved and danger to the property.[1] A receiver will be appointed only in cases of such destructive and malicious waste by the defendant as would indicate his total want of confidence in his own claim, such as stripping the land of timber or pulling down the buildings;[2] or when there is actual danger of a total loss of the rents, and the defendant is irresponsible.[3] Unless some equitable principle is shown by which the Court of Chancery can "affect the conscience of the defendant," it will not interfere to deprive one occupying the lands of his possession at the instance of a person claiming a mere legal title.[4]

§ 617. *When receiver will not be appointed in Georgia.*—During the pendency of an action of ejectment, in Georgia, the plaintiff filed a bill in equity alleging that the defendant was insolvent, and asking that a quantity of corn and some bags of cotton, raised upon the land, and then in defendant's custody, be impounded; that the defendant be enjoined from interfering therewith, and that a receiver thereof be appointed to hold the same to await the result of the ejectment. The application was denied, the court holding that the claimant of the title had no lien upon the crops above other creditors.[5] It has been held, however, in the same State, that a count for mesne profits in an action of ejectment, was a claim for money which entitled the plaintiff to process of garnishment.[6]

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[1] Vause *v.* Woods, 46 Miss. 120; Lloyd *v.* Passingham, 16 Ves. Jr. 59.

[2] Talbot *v.* Scott, 4 Kay & John. 96–126; Haigh *v.* Jaggar, 2 Collyer, 231.

[3] Payne *v.* Atterbury, Harr. Ch. (Mich.) 414; Ireland *v.* Nichols, 1 Sweeny (N. Y.), 208; S. C. 37 How. Pr. (N. Y.) 222; Rogers *v.* Marshall, 6 Abb. Pr. N. S. (N. Y.) 457.

[4] Talbot *v.* Scott, 4 Kay & John. 96; Lenox *v.* Notrebe, Hempst. C. C. 225; Vause *v.* Woods, 46 Miss. 120; Mapes *v.* Scott, 4 Brad. (Ill.) 268; Carrow *v.* Ferrior, L. R. 3 Ch. Ap. 719; Cofer *v.* Echerson, 6 Iowa, 502.

[5] Walker *v.* Zorn, 50 Ga. 370.

[6] Walker *v.* Zorn, 56 Ga. 35.

§ 618. *In Illinois.—Mapes v. Scott criticised.*—The case of Mapes *v.* Scott,[1] in the Appellate court of Illinois, furnishes some excellent illustrations of the glaring imperfections not uncommon in the system of remedies for the protection and recovery of real property. The plaintiff having successfully prosecuted an ejectment, the defendant vacated the judgment and took a statutory new trial. The second trial also resulted in plaintiff's favor, but the judgment was reversed on appeal for error at the trial. The ejectment case was on the calendar awaiting a third trial, the defendant having obtained a continuance, when the bill in question was filed, praying for the appointment of a receiver to care for and rent the property, and retain the profits subject to the order of the court. Defendants had paid no rent or taxes, had failed to keep the premises in repair, or insured against fire, had no legal or equitable title thereto, and were insolvent. The court characterized the plaintiff's claim as being a purely legal one, not connected with any equities which would justify the intervention of a court of equity, and affirmed the principle heretofore stated, that a court of equity will not interfere by the appointment of a receiver to take the property from the party in possession, on the application of a party out of possession claiming a dry legal title only, but will remit him to his remedies at law.

§ 619. *Receiver after judgment.*—In Florida, in the case of Frisbee *v.* Timanus,[2] it appeared that the plaintiff had recovered a verdict and judgment in ejectment. The United States Circuit Court, at the instance of defendant, improvidently issued a writ of *certiorari*, in obedience to which the record in ejectment was certified by the State court to the United States Circuit Court, and the State court, out of comity and to avoid any conflict, suspended the enforcement of its judgment. This bill was filed, alleging that the *certiorari* proceedings were not warranted by law, and were an in-

[1] 4 Brad. (Ill.) 268.
[2] 12 Fla. 300.

vention and contrivance to perpetuate the litigation and deprive the plaintiff of the fruits of his judgment, that the property was becoming dilapidated, no repairs were being made, and defendants had reduced the rent in order to get advance payments from the tenants, and were wholly irresponsible. These circumstances were considered sufficient to justify the appointment of a receiver, pending the proceedings to establish the title. In Georgia,[1] an action was brought for a balance of purchase money, and under the Relief Act of 1868, the jury rendered a verdict returning the land to the plaintiff upon his paying the defendant a sum of money. The defendant carried the case to the Supreme Court and obtained a *supersedeas*, by filing an affidavit of his inability to give security, and then withdrew the writ of error whereby the judgment below was affirmed. Upon these facts, together with proof that plaintiff had paid taxes to prevent a sale, and that defendant had received rents and profits of the land to a large amount, an injunction was granted and a receiver appointed, the object being to offset the rents against the amount which the verdict directed should be paid by the plaintiff to the defendant.

§ 620. *Defendant's right to move for receiver.*—It has been held in a very recent and curious case in North Carolina,[2] where the plaintiff sued *in forma pauperis* to recover land, and during the pendency of the action took possession of a part of it, that it was proper to appoint a receiver on defendant's application to take control of the usurped premises and secure the rents and profits.

§ 621. *Receiver to prevent waste.*—In California, after verdict and judgment in plaintiff's favor, in ejectment for lands which contained valuable mineral springs, the court, on petition of the plaintiff setting forth that the defendant was in possession, and was receiving large sums of money

[1] Collier *v.* Sapp, 49 Ga. 93.

[2] Horton *v.* White, 84 N. C. 297; see More *v.* Massini, 32 Cal. 590.

from the sale of the waters, and was wholly insolvent and threatened waste, appointed a receiver pending an appeal and motion for a new trial.[1] The appointment of a receiver, in that State, is a proceeding in the action to recover the land auxiliary to that action and a part of it.[2]

§ 622. *Injunctions against trespass or waste pending ejectment.*—Provisional or ancillary relief by injunction is regarded with greater favor by the courts than applications for the appointment of a receiver, for this remedy does not change or disturb the possession. The propriety of granting injunctions to restrain trespass, waste, or kindred injuries pending the action to try the title, and recover possession of the land, is quite generally recognized. In some of our States, where legal and equitable jurisdictions are united, this species of relief may be had in the action itself, while in other States a bill in equity is resorted to, the practice being substantially the same as on applications for a receiver. Indeed, both forms of relief are frequently sought on the same application. The principles and practice controlling applications for injunctions against waste, or irreparable injuries to real property, are here discussed, of course, only in so far as that jurisdiction is exercised as ancillary to and in aid of actions at law affecting the title or possession. In Riemer *v.* Johnke, in the Supreme Court of Wisconsin, where it appeared that the greater portion of the value of the land consisted in timber, an injunction was granted pending an ejectment restraining the defendant,

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[1] Whitney *v.* Buckman, 26 Cal. 447.

[2] Ibid. Adams *v.* Woods, 21 Cal. 165. Hlawacek *v.* Bohman, 51 Wis. 92, was an action to obtain specific performance of a contract to convey land. The title was contested, and both litigants were in possession, interfering with each other in harvesting the crops raised by each respectively, and threatening each other with assaults and forcible resistance. The court held that this was a proper case for the appointment of a receiver, as it would save both parties their full rights, and prevent waste and the expense and trouble of threatened and reasonably expected litigation arising from frequent conflicts over the possession pending the suit. See, also, Finch *v.* Houghton, 19 Wis. 150.

who was insolvent, from chopping down, removing or destroying the timber growing upon the land.[1] Where, however, the plaintiff, after obtaining an injunction, proceeded to cut down the timber himself, the injunction was dissolved. It was declared to be the purpose of the injunction to preserve the property in controversy so that the prevailing party might enjoy it unimpaired after the termination of the litigation, but the court would not allow the plaintiff to restrain his adversary and then to seize and appropriate to his own use the most valuable portion of the property in controversy before his right thereto had been adjudicated.[2] An injunction will not be granted at the suit of a mortgagee, to prevent the removal from the mortgaged premises of timber trees cut down in waste of the security before the service of the injunction, unless proof of fraud or insolvency is furnished and there is no redress at law or in equity.[3] In Wisconsin an injunction to prevent waste during the pendency of an action for the recovery of land, may be granted in the action itself.[4]

§ 623. *Practice in North Carolina.*—The general rule in North Carolina is, that the plaintiff may have an injunction or other appropriate order to protect the property from waste and injury by an insolvent defendant during the pendency of the ejectment;[5] but an injunction will not lie restraining the defendant from enjoying the fruits of his possession when it does not appear that the plaintiff, if successful in establishing his title, would lose the fruits of his recovery.[6] The courts of that State have undoubted jurisdiction in the course of the action, where the *locus in quo* is claimed by both parties, to take care of the property until the question of the title can be tried and settled, if the acts

[1] Riemer *v.* Johnke, 37 Wis. 258; see Neale *v.* Cripps, 4 Kay & J. 472.
[2] Haight *v.* Lucia, 36 Wis. 355; see Horton *v.* White, 84 N. C. 297.
[3] Bank of Chenango *v.* Cox, 11 C. E. Green (N. J.), 452.
[4] Gillett *v.* Treganza, 13 Wis. 472; Riemer *v.* Johnke, 37 Wis. 258.
[5] Jones *v.* Boyd, 80 N. C. 258–262.
[6] Baldwin *v.* York, 71 N. C. 463.

threatened are of such a character as to work an irreparable injury, but the defendant in possession will not be enjoined from making that use of the land to which it is best adapted, such as cutting timber and turpentine trees for building and fencing purposes, if the plaintiff fails to show that the defendant is insolvent.[1]

§ 624. *Injunction to restrain trespass in the nature of waste.*—In California, the plaintiff, without any allegation of insolvency, may seek, in addition to the recovery of the premises, an injunction restraining the commission of trespass in the nature of waste, such as cutting, destroying, and removing growing timber pending the action, but the grounds of equitable interposition should be stated in the complaint distinct from the allegations upon which the judgment at law is sought.[2] It has been held in England, that courts of equity have no jurisdiction to interfere in case of permissive waste by a life tenant.[3]

§ 625. *Failure to prosecute ejectment forfeits right to injunction.*—An injunction to prevent waste will not be continued pending an action of ejectment, if the complainant's title is denied, especially if he has been negligent in bringing to trial the action at law.[4] An injunction to prevent injury or waste will usually be granted only when the complainant has established or is seeking to establish his title at law. The remedy is not designed to supersede the jurisdiction of courts of law over the legal title, but rather to aid that jurisdiction so far as it is defective.[5] Nor will the defendant be restrained from using the land in the ordinary course of agriculture, or from clearing timber and erecting buildings for that purpose.[6]

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[1] McCormick *v.* Nixon, 83 N. C. 113.

[2] Natoma Water & Mining Co. *v.* Clarkin, 14 Cal. 544.

[3] Powys *v.* Blagrave, 1 Kay, 495.

[4] Higgins *v.* Woodward, Hopkins' Ch. (N. Y.) 342.

[5] Bogey *v.* Shute, 4 Jones' Eq. (N. C.) 174.

[6] Thompson *v.* Williams, 1 Jones' Eq. (N. C.) 176; see McCormick *v.* Nixon, 83 N. C. 113.

§ 626. *Jurisdiction to grant injunction.*—In Haigh *v.* Jaggar[1] the court said, that even though the defendant was in complete possession of the estate by title adverse to others who claim it against him, and no privity existed between the parties, and the party in possession swears that his title is valid or that the claim of his adversary is unfounded, that state of things did not prevent a court of equity from interfering before judgment at law to restrain the party in possession from committing waste. The later and much quoted case of Talbot *v.* Scott,[2] establishes the doctrine that the court will not interfere by injunction except to restrain malicious and destructive waste. Where the complaint alleged that plaintiff was the owner and entitled to the possession of certain land, that the defendants were insolvent and unable to respond in damages, and had threatened to destroy the improvements on the premises, the allegations were held sufficient to support an order enjoining defendants from removing the improvements or committing waste.[3] It has been said that a court of equity will rarely interpose by injunction to restrain the working of mines until the right is established at law.[4] An injunction to restrain a threatened injury to real property in the nature of waste may be granted in California, although the plaintiff is in possession.[5]

§ 627. *Storm v. Mann.*—An injunction to stay waste pending an ejectment, was denied by Chancellor Kent in Storm *v.* Mann,[6] a case in which the defendant had been in possession a long time, and had joined issue in the eject-

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[1] 2 Collyer's Rep. 231.

[2] 4 Kay & Johns. 96, reviewing the English cases.

[3] Meadow Valley Mining Co. *v.* Dodds, 6 Nevada, 261.

[4] N. J. Zinc Co. *v.* N. J. Franklinite Co. 2 Beas. (N. J.) 322–350; but see Merced Mining Co. *v.* Fremont, 7 Cal. 321; Wade's American Mining Law, p. 234.

[5] More *v.* Massini, 32 Cal. 590.

[6] 4 Johns. Ch. (N. Y.) 21. See Field *v.* Jackson, 2 Dickens, 599; Pillsworth *v.* Hopton, 6 Vesey, 51; see Lansing *v.* North River Steamboat Co., 7 Johns. Ch. (N. Y.) 163.

ment, which had not yet been tried. The decision is based on the general principle that where the right is in doubt equity will not interfere. The rule in Storm *v.* Mann is, perhaps, too broadly stated, but the case as reported does not show that the defendant was insolvent, or that the waste which he was committing constituted an irreparable injury to the premises. This case is followed in Nevitt *v.* Gillespie.[1] The case of Pillsworth *v.* Hopton,[2] is referred to by Kent in Storm *v.* Mann, as authority for the proposition that if the complainant in his bill to restrain waste, states an adverse claim of title in the defendant, he states himself out of court. This extraordinary proposition, however, is not countenanced in the modern cases. The jurisdiction to restrain trespass, or waste which will constitute an irreparable injury to the land, has been greatly enlarged, and now extends to cases in which the title is sharply contested, and the right is in doubt.[3]

§ 628. *Practice in Pennsylvania.*—In Clark's Appeal,[4] the owner of a hotel sought an injunction to restrain the removal of a cooking-range and carving-table fastened to the hotel floor. The injunction was denied on the ground that the table and range were articles of convenience, but not of necessity, and the injury resulting from their removal would not be irreparable, while the redress at law was adequate. Witmer's Appeal,[5] where an injunction was granted, was cited, but the court said that it was a different case, *i. e.*, of dismantling a steam saw-mill by detaching and removing the boilers therefrom. Nor was it like the cases of waste in destroying timber or taking away minerals from land.

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[1] 2 Miss. 108.

[2] 6 Ves. Jr. 51.

[3] Spear *v.* Cutter, 5 Barb. (N. Y.) 486, and cases cited; see United States *v.* Gear, 3 How.(U. S.) 120; Poor *v.* Carleton, 3 Sum. 77; United States *v.* Parrott, 1 McAl. 271.

[4] 62 Penn. St. 447.

[5] 45 Penn. St. 455.

No amount of money could replace the timber and minerals removed.

§ 629. *Injunction by mortgagee against mortgagor.*—A mortgagee may proceed by bill in chancery against a mortgagor, who is impairing the security by committing waste,[1] and a mortgagor, in possession, may be restrained from committing waste after decree of foreclosure, but before it has been executed.[2]

§ 630. *Executions against the person, and orders of arrest.*—It was established under the early code practice in New York that, in an action to recover the possession of real property, and for the rents and profits, the defendant could not be imprisoned,[3] and upon the failure of the plaintiff to recover, in an action of this character, execution would not issue against his body for the costs,[4] and an order of arrest would not be granted upon a complaint for the recovery of real property.[5] But in the later case of Welch *v.* Winterburn,[6] an order of arrest was upheld in a statutory action of trespass, brought to recover damages for a forcible ejectment and detainer. These decisions, however, rest largely upon the construction and interpretation of statutes of that State rather than upon the inherent principles governing the common law action of ejectment. Ejectment was originally based upon the idea of a trespass, an *ejectio firmæ*, which was alleged in the pleading to

[1] Coker *v.* Whitlock, 54 Ala. 180; Burden *v.* Stein, 27 Ala. 104; Nelson *v.* Pinegar, 30 Ill. 481; Capner *v.* Flemington M. Co. 2 Green's Ch. (N. J.) 467; Bunker *v.* Locke, 15 Wis. 635; Cooper *v.* Davis, 15 Conn. 556; Vanderslice *v.* Knapp, 20 Kan. 647; see Van Pelt *v.* McGraw, 4 N. Y. 110; Byrom *v.* Chapin, 113 Mass. 308; Salmon *v.* Clagett, 3 Bland (Md.), 180.

[2] Malone *v.* Marriott, 64 Ala. 486; Harris *v.* Bannon, 78 Ky. 568.

[3] Fullerton *v.* Fitzgerald, 18 Barb. (N. Y.) 441; see Fassett *v.* Tallmadge, 23 How. Pr. (N. Y.) 244.

[4] Merritt *v.* Carpenter, 33 How. Pr. (N. Y.) 428; S. C. 3 Keyes (N. Y.), 142.

[5] Brush *v.* Mullen, 12 Abb. Pr. (N. Y.) 242; Griswold *v.* Sweet, 49 How. Pr. (N. Y.) 171.

[6] 14 Hun (N. Y.), 518. See 2 N. Y. R. S. p. 338; Bruce *v.* Kelly, 5 Hun (N. Y.), 229.

have been committed *vi et armis*. This early characteristic necessarily still clings to the remedy. The defendant must be put in the wrong by the pleadings, and must be shown, at the trial, to have disseized the plaintiff, and to have unlawfully withheld the possession of the lands from him. Upon principle there seems to be no controlling reason why the provisional relief, and final process against the person, usually given in actions for torts, should not be granted in remedies in the nature of ejectment. The policy of modern legislation, however, seems to be otherwise, and the cases reveal a singular absence of any purpose on the part of the courts to extend either provisional or final relief of this character to suitors in ejectment. In Howland *v.* Needham,[1] nevertheless, it was held by the Supreme Court of Wisconsin, that ejectment was an action *ex delicto*, and that the wrongful receipt by the tenant of the mesne profits, or the wrongful withholding of the possession from the lawful owner, had always been regarded as a tort, for which, by the common law, an action of trespass might be maintained. The constitution of that State provides that no person shall be imprisoned for debt arising out of, or founded upon, contract, express or implied. It was held that, as the judgment for damages was unconnected with any contract obligation, and the detention of the possession and the receipt of the profits was a *wrong*, it was entitled to be redressed as such, and an execution might properly issue against the body of the defendant upon a judgment rendered for damages for withholding the possession of the land.

§ 631. *Tendency of the modern cases.*—An examination of the cases and principles governing provisional relief, in actions to recover realty, cannot but confirm the conviction that this branch of relief is, in many of our States, inadequate, imperfect, and susceptible of gross abuse. The right of possession of land is regarded as peculiarly sacred in England, where many vast estates are held without pre-

[1] 10 Wis. 495.

tense of title other than that of possession. Inviolability of possession of realty was a prominent characteristic of the feudal system. This is the source of the strong disinclination, pervading many of the cases, to disturb the possessor of lands before final adverse adjudication of the title. Provisional relief is not encouraged because the subject-matter of contention is immovable, practically indestructible, and, unlike personalty, cannot be spirited away. Objections are also urged against a premature and partial inspection and adjudication of the conflicting titles, based upon *ex parte* statements and affidavits. The defendant, if successful, will, it is true, be restored to the possession, but the improvements, or growing crops, may have needed his attention; any business which he was prosecuting on the property may have been dissipated by the interruption, and kindred losses may have been entailed, for which restoration to the possession furnishes no adequate compensation or redress.

§ 632. *Hardships incident to withholding provisional relief.*—Still, provisional relief has been withheld in many cases entailing the grossest hardships and loss upon parties out of possession. Conceding that the possessor has important advantages, the courts, in passing upon applications for these remedies, should consider more fully the question of the source from which the possession was derived, how long it has been enjoyed, and whether acquired honestly or by indirection, fraud, or force. Trespassers, intruders, and squatters, or parties who have acquired the possession by violence, or deceit, should not be permitted to avail themselves of their own wrong, and to shield their possession by invoking a principle of law devised for the protection of *bona fide* occupants. If the defendant has been clothed with the possession by the plaintiff, that feature should exert an important influence in granting provisional relief. Proof of insolvency of the defendant, which bears so important a part in applications for relief of this kind, is not always a true test; for the injuries inflicted are often *damnum absque injuria.*

In Mapes *v.* Scott,[1] the parties in possession had been twice defeated in the ejectment, were wholly insolvent, and the premises in dispute, to which they had no legal or equitable title, were rapidly going to waste. The record conceded that the defendants were without title, and yet, in the teeth of this strong showing, the application for a receiver was overruled. That the cases in New York are almost uniform in holding that a receiver cannot be appointed in ejectment before judgment, is very remarkable, and scarcely creditable to the jurisprudence of that State. Litigations over titles are necessarily protracted, and a system of procedure which permits unscrupulous and irresponsible possessors of land to enjoy the profits, and waste the subject-matter of contention, in practical defiance of the courts, and the owners, should be corrected.

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[1] 4 Brad. (Ill.) 268.

CHAPTER XXIV.

TWO ACTIONS PENDING FOR THE SAME LAND.—CONSOLIDATION OF EJECTMENTS.—JOINDER OF LEGAL AND EQUITABLE ACTIONS.—MISJOINDER OF ACTIONS.

§ 633. Two actions for same cause.
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§ 633. *Two actions for same cause.*—It may be stated as a general rule, that a suitor will not be permitted to maintain more than one action against the same defendant for the same cause. The pendency of the former action may be pleaded in abatement of the second action, and constitutes a complete answer to it.[1] This rule is, of course, applicable to all actions in the nature of ejectment, in the modern procedure, though the practice as to the correct method of raising the objection is not uniform.

§ 634. *Early practice.*—In the case of Thrustout *v.* Troublesome,[2] decided in 1738, it appeared that, during the pendency of an action of ejectment, the plaintiff brought a second action for the same land on the same title. The court granted a stay of proceedings in the second action until the first action was discontinued and the costs paid, and remarked that the reason for staying proceedings in one ejectment when another was pending, was because the first ejectment could not be pleaded in bar of the second action.

§ 635. *Same title involved in both actions.*—In Dawley

[1] Harrington *v.* Libby, 6 Daly (N. Y.), 259; Wentworth *v.* Barnum, 10 Johns. (N. Y.) 238; Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 207; Dawley *v.* Brown, 65 Barb. (N. Y.) 107.

[2] Andrews Rep. *298. See Doe *v.* Bather, 12 Ad. & El. (N. S.) 941.

v. Brown,[1] an ejectment case, the New York Court of Appeals said: "To sustain a plea of a former action pending, * * * it must appear to the court that the first action is for the same cause as the second. This requirement is strictly enforced. It is not enough that the property in controversy in both actions is the same."[2] The material point of inquiry in such cases is whether or not the same title is involved in both actions.[3] As elsewhere shown, a plaintiff may acquire a new and distinct title, and having done so, may assert it, without prejudice from a former action, with the same effect which would have accompanied such title into the hands of a stranger, because, as the newly acquired title was not investigated in the prior litigation, it cannot be concluded or affected by it.[4] This principle has been fully recognized in California in the case of Vance *v.* Olinger,[5] in which the Supreme Court of that State said that a plaintiff might have two actions pending at the same time, to recover the same land, if the second action was brought upon a different title from the first, or was founded upon a title acquired subsequent to the commencement of the first action.

§ 636. *How the objection is raised.*—In Ritter *v.* Worth,[6] in the New York Court of Appeals, it appeared that the plaintiffs claimed as heirs at law of R., and that the defendant set up in his answer the pendency of a former action, brought by the plaintiffs, together with the widow of R., to recover possession of a portion of the same lands. The court held that proof of the pendency of the former action abated the second action as to the land embraced therein, leaving the second action to proceed as to the balance of the land, and that the fact that the widow was joined as a

[1] 79 N. Y. 390. See s. c. 65 Barb. (N. Y.) 107; s. c. 9 Hun (N. Y.), 461.

[2] Citing Stowell *v.* Chamberlain, 60 N. Y. 272.

[3] See Doe *v.* Bather, 12 Adol. & El. (N. S.) 941; Haigh *v.* Paris, 16 M. & W. 145; Doe *v.* Gustard, 5 Scott N. R. 818.

[4] Barrows *v.* Kindred, 4 Wall. 399; Dawley *v.* Brown, 79 N. Y. 390.

[5] 27 Cal. 358.

[6] 58 N. Y. 627.

co-plaintiff in the former action was no obstacle to the recovery by the other plaintiffs of their interests in the lands. In Williamson *v.* Paxton,[1] it was held in the Court of Appeals of Virginia, that where an action at law and a suit in equity were pending for the same cause of action, at the same time, the proper method of making the objection was by a rule in the chancery suit to put the plaintiff to his election between the two suits. In Singer *v.* Scott,[2] in the Supreme Court of Georgia, it was held that the pendency of the first action might be pleaded in abatement of the second action, and that this plea could not be evaded by dismissing the first suit after the plea had been filed; and in Williams *v.* Rawlins,[3] in the same State, the proper practice was held to be to interpose a plea of *aliter lis pendens*, and a motion to compel the plaintiff to elect which action he would prosecute.

§ 637. *Ejectments and suits in equity.*—In Quinn *v.* Quinn,[4] in the Supreme Court of Wisconsin, it appeared that the defendant had, prior to the commencement of the ejectment, brought a suit in equity against the plaintiff to assert an equitable title to the premises. The court decided that the pendency of the suit in equity was not a bar to the ejectment; that the proper remedy of the defendant was by answer in the ejectment action, setting up the pendency of the suit in equity, followed by an application for a stay of proceedings until the equity suit was heard and tried, or that the defendant might set up and prove the equitable defense, leaving that suit to be discontinued. And in Michigan it was decided that a bill to quiet title would lie, even where an action of ejectment was pending concerning the same land, if the judgment in the latter action would leave the title imperfect, and open to disputes, and the record of complainant would not be *prima facie* better than the op-

[1] 18 Gratt. (Va.) 475. [2] 44 Ga. 659. [3] 33 Ga. 117.
[4] 27 Wis. 168. See Wilson *v.* Jarvis, 19 Wis. 601.

posing title.[1] Relief in equity will not be denied where the decision at law cannot cover the entire controversy. It has been held by the Supreme Court of Pennsylvania, that a plaintiff in partition may, during the pendency of that action, maintain ejectment for a moiety of the same lands, as the action of partition did not affect the title, but operated merely upon the lines of division.[2]

§ 638. *Consolidation of ejectments.*—The practice as to consolidation of ejectments seems to have been unsettled during the early stages of the remedy. In Smith *v.* Crabb[3] it appeared that ten ejectments were instituted on the same demise for as many houses in the occupation of ten persons. Application was made to the court to consolidate the declarations, accompanied by a suggestion that the title was the same in all the actions. The court refused to grant the request, for the reason that the lessor might have sued the defendants at different times, and the consolidation would oblige him "to go on against all, when perhaps he might be ready in some of them only." This objection, however, seems to be answered by the fact that the application was based upon the theory that the title was the same in all the actions. In Grimstone *v.* Burgers,[4] however, a motion to consolidate sixteen ejectments was granted, and in Doe *d.* Pultney *v.* Freeman,[5] where it appeared that thirty-seven ejectments, depending on the same title, had been brought against the occupants of as many houses, Lord Kenyon said it was a scandalous proceeding, and ordered that the actions be stayed to abide the event of a special verdict in one of them. So in Jackson *v.* Schauber,[6] the New

[1] Eaton *v.* Trowbridge, 38 Mich. 454.

[2] Ross *v.* Pleasants, 19 Penn. St. 157.

[3] 2 Strange, 1149. See Medlicot *v.* Bruester, 2 Keb. 524.

[4] Barnes' Notes of Cases, 176. See Roe *d.* Burlton *v.* Roe, 7 T. R. 477.

[5] See 2 Sell. Pr. p. 144; see Den *v.* Kimble, 4 Halst. (N. J.) Law, 335; Adams on Eject. (4th Am. ed.) p. 291 [*262]; Hardin *v.* Kirk, 49 Ill. 153.

[6] 4 Cowen (N. Y.), 78. See Law *v* Jackson, 2 Wend. (N. Y.) 210. In New York actions to foreclose mortgages will not be consolidated. Bech *v.* Ruggles, 6 Abb. N. C. (N. Y.) 69; Kipp *v.* Delamater, 58 How. Pr. (N. Y.) 183.

York Supreme Court, in a *per curiam* opinion, said, that where a number of ejectments were brought, and all depended upon the same title, and the questions to be litigated and the evidence were the same in the several actions, it was competent for either party to make an application to the court for an order that only one of the causes be carried down to trial, the plaintiff not to be prejudiced by his omission to try the others, and directing that in a clear case all the actions abide the event of the cause to be tried. The practice of consolidating ejectments often results in hardships and inconveniences to litigants, which outweigh the reasons upon which the practice is founded. It frequently leads to confusion and injustice in ascertaining and adjusting the damages and mesne profits, and concerning the rights of the parties to costs, and to the control of the litigation, and, unless a plain case of the multiplication of vexatious litigations is presented, the power should not be exercised.

§ 639. *Joinder of legal and equitable actions.*—Under the practice in New York, an equitable cause of action to remove, as a cloud upon plaintiff's title, a deed given by mistake by a third party to the defendant, under which the latter had fraudulently obtained the possession by connivance with the plaintiff's tenant, and a claim to recover the possession of the premises, may be united in the same complaint, and asserted in the same action.[1] So in Phillips *v.* Gorham,[2] it was held that the plaintiff, in an action to recover specific real property, could attack a deed, under which the defendants claimed title, upon grounds cognizable in a court of chancery. In Laub *v.* Buckmiller,[3] the New York Court of Appeals considered it to be settled law that legal and equitable relief might be had in one action, and

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[1] Lattin *v.* McCarty, 41 N. Y. 107; see McTeague *v.* Coulter, 6 J. & S. (N. Y.) 208.

[2] 17 N. Y. 270.

[3] 17 N. Y. 626.

held that a plaintiff claiming under a defective deed, and showing sufficient grounds for its reformation, was entitled to the same relief as if he had brought two actions: one to reform the instrument, the other to enforce it as reformed. And where the defendant claimed under a deed which was void because the grantor was *non compos mentis*, the plaintiff was allowed, in an action to recover possession of the land, to prove the grantor's incapacity, so as to defeat the defendant's claim, and it was held to be unnecessary to resort to a court of equity to set aside the deed.[1] In Broiestedt *v.* South Side Railroad Company,[2] it was expressly held that the legal rights of the owner of land could be established and declared, and the equitable remedy by injunction, restraining any interference therewith, could be obtained in the same action.

§ 640. *Misjoinder of actions.*—In New York the general rules regulating the joinder of causes of action have been expressly declared to be applicable to the action of ejectment; and it seems clearly established, as elsewhere shown, that two hostile claimants of the title of a piece of land cannot unite as plaintiffs in the same action against a third party in possession.[3]

§ 641. *Ejectment and trespass quare clausum fregit.*—Ejectment and trespass *quare clausum fregit* cannot, according to some of the cases, be united in the same complaint, even though the *locus in quo* in both cases is identical. The causes of action are inconsistent. To enable the plaintiff to recover for the trespass, he must show that he was in possession when the tortious acts were committed, and that he had regained the possession at the time of the commencement of the action, while to entitle him to maintain his action for the ouster, and to recover possession,

[1] Van Deusen *v.* Sweet, 51 N. Y. 378; see Mitchell *v.* Barnes, 22 Hun (N.Y.), 194.

[2] 55 N. Y. 220.

[3] Hubbell *v.* Lerch, 58 N. Y. 237; see St. John *v.* Pierce, 22 Barb. (N. Y.) 362.

it is necessary to show that the defendant had the possession when the action was instituted.[1] A disseizee of land cannot, of course, maintain trespass *quare clausum fregit* for an injury done to the land until he has regained the possession.[2]

§ 642. *Ejectment and claim for purchase money.*—A cause of action for the recovery of land alleged to have been improperly sold, under a decree in equity, cannot be united in the same complaint with a demand against the clerk and master for the amount of the purchase money resulting from such sale.[3]

§ 643. *Ejectment and claim for damages.*—In a case which arose in Minnesota, it was decided that a cause of action to recover possession of one piece of real property, with a claim for damages for withholding it, was improperly united with a claim for damages for the detention of another piece of land,[4] or for trespasses committed upon other lands;[5] and the Supreme Court of Florida have held that it is improper to unite a cause of action for specific performance against one party with a cause of action in ejectment against another party in the same action.[6] In Illinois a count in ejectment for dower cannot be joined with counts of a different character.[7] It has been held in New York, that an action against two defendants, to recover possession of real estate, with a claim for damages, was improperly united with a demand against one of the defend-

[1] Budd *v.* Bingham, 18 Barb. (N. Y.) 494; see Hotchkiss *v.* Auburn & R. R. R. Co. 36 Barb. (N. Y.) 600–613; see Pomeroy on Remedies, § 503.

[2] Frost *v.* Duncan, 19 Barb. (N. Y.) 560; see Freer *v.* Stotenbur, 36 Barb. (N. Y.) 641; see §§ 657, 668.

[3] Brown *v.* Coble, 76 N. C. 391.

[4] Holmes *v.* Williams, 16 Minn. 164.

[5] See Hulce *v.* Thompson, 9 How. Pr. (N.Y.) 113; see Wager *v.* Troy Union R. R. Co 25 N. Y. 535.

[6] Fagan *v.* Barnes, 14 Fla. 53. A claim for damages for withholding the land may be joined in an action for specific performance. Worrall *v.* Munn, 38 N. Y. 137.

[7] Ringhouse *v.* Keever, 49 Ill. 470.

ants, for rents and profits of the premises for which it was claimed such defendant was indebted to the plaintiff, no connection being shown between the rents and profits claimed and the alleged withholding of the possession of the premises.[1] And a complaint setting forth a breach of contract to sell and convey real estate, and an assault and battery committed upon plaintiff in forcibly taking the written contract of sale from his possession, was held bad on demurrer.[2] So it seems that a vendor cannot unite, in the same action, a claim against a broker for damages, for having effected a fraudulent sale of land, with a claim against the purchaser for a reconveyance and an accounting.[3] The right to recover mesne profits in the action of ejectment will be presently noticed.

§ 644. *Young v. Young.*—It has been held in North Carolina,[4] that a complaint containing several causes of action, viz.: first, to declare one defendant a trustee of land; second, to recover judgment against other defendants for the purchase money of the land; and third, to recover possession of the land, with damages for withholding it, was not demurrable under the provisions of the code of that State,[5] which allows the plaintiff to unite in the same complaint several causes of action where they arise out of "the same transaction; or transactions connected with the same subject of action."

§ 645. *Lis pendens.*—The question of the propriety of filing, in the office of the clerk or custodian of the public records of the county in which the land in controversy is situated, a notice of the purpose and pendency of an action of ejectment, has never received the consideration which the

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[1] Tompkins *v.* White, 8 How. Pr. (N. Y.) 520; see People *v.* Mayor, &c. 28 Barb. (N. Y.) 240–249.

[2] Ehle *v.* Haller, 6 Bosw. (N. Y.) 663; s. c. 10 Abb. Pr. (N. Y.) 287.

[3] Gardner *v.* Ogden, 22 N. Y. 327.

[4] Young *v.* Young, 81 N. C. 91.

[5] Code of North Carolina, § 126.

importance of the subject deserves. This is possibly due to the fact that the doctrine of *lis pendens* is an equitable doctrine. In foreclosure cases it is the uniform practice to file a *lis pendens*, and so generally of suits in equity involving rights to realty. In Thompson *v.* Clark,[1] it appeared that the plaintiff had instituted an ejectment, filed a *lis pendens*, and recovered a judgment against one B., and had been put into possession of the lands. An action for mesne profits was subsequently brought against a party who had occupied the premises, pending the ejectment, under a lease from a person *not* claiming under B. It was held that the judgment in ejectment was not evidence in the action against the defendant for mesne profits, and that he was not bound by the filing of the notice of *lis pendens* in the ejectment suit, as he did not acquire his title from, or claim under, the defendant in that action.[2] In Sheridan *v.* Andrews,[3] the New York Court of Appeals said: "The point, that the absence of a notice of *lis pendens* deprives the judgment of its effect as against persons claiming from or through the defendants, cannot be sustained. The only office of a notice of *lis pendens* is to give notice of the *pendency* of the action so as to affect persons who may deal with the defendants in respect to the property involved, before final judgment, and thus bind them by the judgment in the same manner as if they had been made parties to the action. Formerly, the commencement of a suit in equity was of itself constructive notice to subsequent purchasers, and they were bound by the decree. This rule was adopted in analogy to the rule in real actions at common law, that if the defendant aliened pending the writ, the judgment would overreach such alienation.[4] * * It is difficult to see how, in an action of

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[1] 4 Hun (N. Y.), 164.

[2] See Aslin *v.* Parkin, 2 Burr. 668; Chirac *v.* Reinicker, 11 Wheat. 296; Leland *v.* Tousey, 6 Hill, 328; Ainslie *v.* Mayor, 1 Barb. (N. Y.) 168.

[3] 49 N. Y. 478. See Long *v.* Neville, 29 Cal. 131; Gregory *v.* Haynes, 13 Cal. 591.

[4] See Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 577.

ejectment, a notice of *lis pendens* can be necessary to bind even purchasers *pendente lite* by the judgment. * * Inasmuch as a recovery in ejectment can only be had upon a legal title, it would seem unnecessary to show notice, actual or constructive, to bind a purchaser. It is only against mere equities that purchasers without notice are protected." While it may be true that the plaintiff or claimant of the land will forfeit none of his rights by failing to file a notice of the pendency of an ejectment action, yet questions of public policy, and the rights of innocent parties, are frequently involved. The defendant in ejectment may have a perfect record title, and may transfer it, pending the action, to an innocent purchaser, who takes without notice, or any means of acquiring knowledge, of the adverse title, or of the actual pendency of the action of ejectment. In New York, it is now provided by statute, that the plaintiff may, in an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of real property, file a notice of the pendency of the action in the clerk's office of each county where the land is situated,[1] which shall be constructive notice from the time of filing it, and a person whose conveyance or incumbrance is subsequently executed or recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action.[2]

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[1] N. Y. Code Civ. Pro. § 1670.

[2] N. Y. Code Civ. Pro. § 1671; see § 649.

CHAPTER XXV.

MESNE PROFITS AND DAMAGES.

§ 646. Damages in real actions.
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§ 646. *Damages in real actions.*—Under the early practice ordinarily no damages could be recovered in a real action.[1] The recovery was limited solely to interests in realty, for "it is of the essence of a real action, that only a real thing can be recovered therein; for wherever damages, which are a pecuniary recompense, and consequently a personal thing, are recoverable in the same action, the action becomes mixed."[2] A discussion of the forms of procedure by which the demandant, while the ancient system of real writs prevailed, recovered the rents and profits of the land,[3] which

[1] Stearns on Real Actions, pp. 94, 244, 389; Jackson on Real Actions, p. 99; Booth on Real Actions, 74, 75; Sedgwick on Damages (7th ed.), vol. I, p. 241 [117].

[2] Sayer on Damages, p. 5.

[3] See Booth on Real Actions, p. 74; Stearns on Real Actions, pp. 245, 389.

had been wrongfully appropriated by the tenant (defendant), would be of little practical value at the present day, as real writs are almost wholly obsolete, and the methods by which damages and mesne profits are recovered, in the modern procedure, are largely regulated by statute. In some of the real writs the demandant was permitted to recover the damages that accrued pending the writ.[1] A writ of *estrepement*, prohibiting the tenant from committing waste upon the land, pending the action, was also granted as a species of provisional relief in aid of certain real writs. By the statutes of Merton, Marlbridge, and Gloucester, damages were given in the principal real actions.[2]

§ 647. *Mesne profits in ejectment.*—"The mesne or intermediate profits of land are those received while the property is withheld from its rightful occupant; and when he recovers possession, the right to the mesne profits follows his recovery."[3] The writ of *ejectione firmæ*, from which the modern action of ejectment is derived, was originally, as has been shown, a simple writ of trespass, brought by a lessee, or tenant for years, to recover damages resulting from eviction and loss of the term and possession. The recovery of compensation in damages at first constituted the sole purpose of the action, and the exclusive relief. Estates for years were scarcely recognized in early times, and the tenant for years was not allowed to make his precarious interest the basis of a real writ. Hence, practically, his only redress against a person who had disseized him during the term was a writ of trespass for damages. The defendant very frequently proved insolvent, and this remedy was, therefore, palpably inadequate; hence, as has been shown, the practice of recovering the unexpired term, and the pos-

[1] See Booth on Real Actions (Am. ed.), pp. 74–76; Stearns on Real Actions, p. 245; also, Chapter VIII.

[2] 20 Hen. III, c. 3; 52 Hen. III, c. 16; and 6 Edw. I, *anno* 1278.

[3] Sedgwick on Damages (7th ed.), vol. I, p. 250 [123]; see Green *v.* Biddle, 8 Wheat. 1–80.

session, was introduced. This innovation changed the whole nature and purpose of the writ, and gave it the character of a real action. The principal recovery under the early practice, became a mere incident. When the fictitious parties were introduced into the action, and the practice of declaring on a fictitious lease, and of extending the action to cases where no lease in fact existed, was established, the judgment for damages and mesne profits necessarily became nominal.[1] Thus in Davis *v.* Delpit,[2] the Court of Errors and Appeals of Mississippi declared, that "ever since the action of ejectment was adopted as a mode of trying title to real estate, it has been well settled as a rule of the common law, that the jury, in the assessment of damages, are confined to a compensation for the injury sustained by the ejectment, which being fictitious, the damage can only be nominal." A judgment for damages against the casual ejector, whether a fictitious or an actual person, was, of course, improper; for a money judgment could not be collected or enforced against a fictitious person, and the casual ejector, if an actual person, had not lived upon the lands, nor received the mesne profits, hence a judgment against him would clearly be erroneous. A *real* tenant, who had actually withheld the possession, occupied the lands, and enjoyed the profits, was needed as a defendant.[3] The tenant in possession signed the consent rule, and defended the action, solely for the purpose of trying the title, not of contesting the right of the plaintiff, or his lessor, to mesne profits or damages, and for that reason, according to many of the cases, a judgment for mesne profits could not be rendered against him, though there is authority to the effect that the plaintiff might recover his real damages by giving

[1] See Reeves' Hist. Eng. Law (ed. 1880), vol. IV, p. 241; Emrich *v.* Ireland, 55 Miss. 390–399; Davis *v.* Delpit, 25 Miss. 446; Adams on Ejectment (4th Am. ed.), p. 444; Stearns on Real Actions, p. 402; Sedgwick on Damages (7th ed.), vol. I, p. 243 [119]; see § 62.

[2] 25 Miss. 446. See Emrich *v.* Ireland, 55 Miss. 390.

[3] See Runnington on Ejectment, p. 438.

notice of his intention to proceed therefor.[1] After the damages in ejectment became nominal, the practice sprung up of bringing a new action of trespass for the mesne profits. Mr. Reeves says, that there is no mention of the action for mesne profits till some time after the reign of Queen Elizabeth.[2]

§ 648. *Nature of the action.*—A right to land essentially implies a right to the profits accruing from it, since without the latter the former can be of no value. "For what," says Lord Coke, "is the land but the profit thereof."[3] The person entitled to the land is of course entitled to the rents and profits; hence the legislature has no power to bestow upon another person who has no title a right to recover from the owner these rents and profits.[4] This leads to a discussion of the nature of the modern remedies or forms of procedure by which claims for compensation in damages for withholding possession of land, and for mesne profits, are asserted. The remarkable changes wrought in the nature and uses of the action of ejectment, by the introduction of fictions to facilitate the trial of the title, have been fitly supplemented by the alterations which, as we shall see, the action for mesne profits has undergone.

Originally, the action for mesne profits was in the nature of *trespass quare clausum fregit*, and the cause of action died with the party.[5] As already shown, one of the strong objections to granting provisional relief in the form of a receiver in this action was, that it was prosecuted

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[1] Battin *v.* Bigelow, 1 Peters' C. C. 452; Osbourn *v.* Osbourn, 11 S. & R. (Penn.) 55; Goodtitle *v.* Tombs, 3 Wils. 118–121; Adams on Ejectment (4th Am. ed.), p. 330; Lion *v.* Burtis, 5 Cow. (N. Y.) 408; Aslin *v.* Parkin, 2 Burr. 665–668.

[2] Reeves' Hist. Eng. Law (ed. 1880), vol. IV, p. 241; see Stearns on Real Actions, p. 402, sec. 3.

[3] Co. Litt. 4 b; see Green *v.* Biddle, 8 Wheat. 1–76.

[4] Rich *v.* Maples, 33 Cal. 102.

[5] Stearns on Real Actions, p. 404; Thompson *v.* Bower, 60 Barb. (N. Y.) 463–478; see Jackson *v.* Wood, 24 Wend. (N. Y.) 443; Evans *v.* Welch, 63 Ala. 253; Brewster *v.* Buckholts, 3 Ala. 20.

against the defendant as a trespasser, for the wrongful withholding of the possession of land, and that it would be a preposterous proceeding to appoint a receiver to receive damages to be recovered in an action of trespass.[1] In Utterson *v.* Vernon,[2] however, Ashhurst, J., said: "The action for mesne profits, though in form it is an action of trespass, yet in effect it is to recover the rent." Again it is held that the action for mesne profits being in its nature an equitable suit,[3] every equitable defense may be set up,[4] and that this feature of the action is borrowed from the chancery practice on bills to account.[5] Chancellor Kent said: "The action for mesne profits is a liberal and equitable action, and will allow of every kind of equitable defense."[6]

Trespass for mesne profits is of course grounded upon the fiction of law, that the disseizee, after re-entry, has been in continuous possession during the period of his disseizin.[7] And the plaintiff must recover possession of the lands in some lawful manner before he is in a position to claim the rents and profits taken by the disseizor,[8] or the damages inflicted by being kept out of possession.

§ 649. In Gill *v.* Patten,[9] this language is used: "The court thinks that the action of trespass for the mesne profits, after a recovery in the fictitious action of ejectment, is strictly analogous to the action of trespass with a *continuendo* after an entry, and to that part of the remedy by assize

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[1] See § 614.

[2] 3 T. R. 539–547.

[3] See Johnson *v.* Futch, 57 Miss. 73; Ege *v.* Kille, 84 Penn. St. 333; Morrison *v.* Robinson, 31 Penn. St. 456; Kille *v.* Ege, 82 Penn. St. 102.

[4] Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438; see Ege *v.* Kille, 84 Penn. St. 333; Zimmerman *v.* Eshbach, 15 Penn. St. 417.

[5] Ewalt *v.* Gray, 6 Watts (Penn.), 427.

[6] Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 442; see Jackson *v.* Loomis, 4 Cow. (N. Y.) 168.

[7] Trubee *v.* Miller, 48 Conn. 347; see Dewey *v.* Osborn, 4 Cow. (N. Y.) 329.

[8] Bockes *v.* Lansing, 74 N. Y. 437–442.

[9] 1 Cr. C. C. 465. See Jackson *v.* Loomis, 4 Cow. (N. Y.) 168; Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 441.

which gave the defendant his damages, and is accompanied by the same equitable defense." In Camp *v.* Homesley,[1] the court said that the action for mesne profits was substantially a continuation of the action of ejectment for the purpose of recovering the actual damages, and therefore whenever a person was allowed to maintain ejectment he could have trespass to complete his remedy. The remedy is regarded by some of the courts as a continuation or extension of the ejectment introduced as a matter of convenience for the purpose of saving time,[2] or as being consequential to a recovery in ejectment.[3] Thus the Supreme Court of Alabama said: "The damages are an incident to the judgment, as in an action of detinue damages for the detention are an incident to the recovery of the chattel detained."[4] And it was said by Hunt, J., in delivering the opinion of the United States Supreme Court,[5] "Speaking strictly, there was not only no cause of action, but no right to the mesne profits until the judgment in the original suit." The right of the true owner to the use and profits of the land is suspended until he regains possession either by entry or under a legal judgment.[6] The Supreme Court of Pennsylvania said that though the action was in form for trespass, it was in reality for use and occupation, and necessarily involved the statement of an account under the evidence.[7] In Carman *v.* Beam,[8] however, the rule is laid down in that State that a claim for mesne profits is governed by the same general rules that are applicable to an ordinary action of trespass.

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[1] 11 Ired. (N. C.) Law, 211.

[2] Bradley *v.* McDaniel, 3 Jones' (N. C.) Law, 128; Miller *v.* Melchor, 13 Ired. (N. C.) Law, 439.

[3] Mitchell *v.* Mitchell, 1 Md. 55; Benson *v.* Matsdorf, 2 Johns. (N. Y.) 369; Trubee *v.* Miller, 48 Conn. 347.

[4] Morris *v.* Beebe, 54 Ala. 300.

[5] New Orleans *v.* Gaines, 15 Wall. 624.

[6] Caldwell *v.* Walters, 22 Penn. St. 378; see Bigelow *v.* Jones, 10 Pick. (Mass.) 161; Avent *v.* Hord, 3 Head (Tenn.), 459; Bockes *v.* Lansing, 74 N. Y. 437–442.

[7] Blight *v.* Ewing, 26 Penn. St. 135.

[8] 88 Penn. St. 319.

In Illinois it is treated as an action of assumpsit,[1] while in New York it is practically converted into an action for use and occupation.[2]

It will be seen from these cases that it is not an easy task to fix the exact status of the modern action for mesne profits. The confusion results from the technical character of the early forms of action. As this remedy embraces some of the elements of an action of trespass for damages, and an action of assumpsit for use and occupation, and a suit for an equitable accounting, it necessarily differs from each of these actions, and must consequently be regarded as a form of relief by itself, to be governed by rules which are not common to the other remedies. It is established, by a preponderance of the authorities, that the action has been divested of many of the peculiarities of an action of trespass; or rather that it has acquired the characteristics of an action *ex contractu*, and the recovery in the modern practice is largely regulated by the principles governing actions upon contract as distinguished from actions of pure tort.[3]

§ 650. *Joinder of ejectment and claim for mesne profits.* —Under the modern practice the general rule is that the plaintiff may bring an action for the recovery of the lands, and unite in the same action the claim to recover the rents

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[1] Ringhouse *v.* Keener, 63 Ill. 230.

[2] See Holmes *v.* Davis, 19 N. Y. 488; Vandevoort *v.* Gould, 36 N. Y. 639; Woodhull *v.* Rosenthal, 61 N. Y. 382.

[3] In Peter *v.* Hargrave, 5 Gratt. (Va.) 12, it appeared that the plaintiffs had recovered their freedom by bringing trespass *vi et armis* for assault and battery and false imprisonment, in which the damages were only nominal. A subsequent action was brought for the mesne profits of the slaves, while wrongfully restrained of their liberty. The court held that the action for mesne profits after a recovery in ejectment, furnished no principle to sustain a demand of this character. The purpose of an ejectment was said to be to remove opposition, quiet the regained possession and establish its enjoyment; but the recovery in a suit for freedom was founded upon nothing in the nature of a disseizin, and re-entry by the disseizee; the suit for freedom is not a possessory, but a *droitural* action, and *droitural* actions do not, by the common law, give mesne profits, either by a recovery therein, or in a subsequent action.

or mesne profits and damages to which he may show himself to be entitled.[1] The legislative policy upon this subject varies in the several States, but generally it is optional with the plaintiff to join the claims for damages and mesne profits in the action of ejectment, or bring an independent action for the mesne profits, after the recovery in the principal action.[2] In Boyd's Lessee *v.* Cowan,[3] Chief Justice M'Kean defends the practice of uniting with the action for the recovery of the possession of the land the claim for mesne profits, and says: "I shall now briefly consider the *argumentum ab inconvenienti*, which refers but to a single instance, to wit: the difficulty the jury may labor under, in deciding on the titles of the parties to the possession, and at the same time, in fixing the value of the mesne profits, if the verdict shall be for the plaintiff. There can be no great hardship in this. In actions of waste, dowry, assize, and all others, where the thing itself, as well as the damages, is recovered, the jury are liable to the same inconvenience; nor can I perceive any great perplexity that can arise in determining the rent, or annual value, of a house or parcel of land, when complete evidence is given of it. It appears to me that the inconvenience or hardship is the other way. After a person has been unlawfully kept out of his house or land, for a series of years, and undergone great trouble and expense in recovering a judgment for them, to give him the

[1] Garner *v.* Jones, 34 Miss. 505; Armstrong *v.* Hinds, 8 Minn. 254; Lord *v.* Dearing, 24 Minn. 110; Field *v.* Columbet, 4 Sawyer, 523; Dawson *v.* McGill, 4 Whart. (Penn.) 230; Harrall *v.* Gray, 12 Neb. 543; Carman *v.* Beam, 88 Penn. St. 319; Bottorff *v.* Wise, 53 Ind. 32; Patterson *v.* Ely, 19 Cal. 28; Walker *v.* Mitchell, 18 B. Mon. (Ky.) 541; Livingston *v.* Tanner, 12 Barb. (N. Y.) 481; Hotchkiss *v.* Auburn, &c., R. R. Co. 36 Barb. (N. Y.) 600; Garner *v.* Jones, 34 Miss. 505; Beard *v.* Federy, 3 Wall. 478; Hecht *v.* Colquhoun, 57 Md. 563; Vandevoort *v.* Gould, 3 Trans. App. (N. Y.) 57.

[2] See Vandevoort *v.* Gould, 36 N. Y. 639-646; Field *v.* Columbet, 4 Sawyer, 523; Emrich *v.* Ireland, 55 Miss. 390. A claim for damages for withholding one parcel of land cannot, however, be united with a claim to recover possession of another piece of land with damages for withholding it. Holmes *v.* Williams, 16 Minn. 164.

[3] 4 Dallas, 138.

possession merely, without any satisfaction for the use and occupation pending the action, does not seem complete justice."

§ 651. *Objections to the practice.*—This presentation of the subject, however, does not entirely dispose of the objections to the joinder of the causes of action, and the trial and submission of both the issues at once. We have already deprecated the existing practice of incumbering the trials of title to land with questions of possession,[1] and the objections urged against that method of procedure are, to a great extent, applicable to the practice of trying the claims for damages, mesne profits, and the right to offset improvements at the same time with the issues relating to the right to recover the possession of the land. Under this practice too many complicated issues are clustered together. The claim for mesne profits embraces some of the elements of an equitable accounting, and is in itself not an easy task for a jury to cope with, while the defendant's set-off for improvements often presents difficult questions as to what shall be considered improvements, and frequently calls for the exercise of much delicate discrimination in separating the income of the unimproved land from the income of the improvements. Then, as we have seen, the right to the possession of land is regarded in the eye of the law as more sacred than rights involved in personal actions, and its consideration should not, therefore, be embarrassed by collateral issues, and a mass of conflicting estimates and statements. Juries must base their verdicts upon their memory of the testimony solely, and ejectment cases in which the presentation of the testimony extends through several days, covering complicated transactions, are quite common. The questions involved in the trial of the title are often very intricate and difficult, and constitute, by themselves, all that the jury are competent to retain in memory and intel-

[1] See § 236.

ligently consider. It is not possible, in the very nature of things, for the jury to creditably discharge their duty where a series of important issues, which might easily be separated, are submitted together in a body for their consideration. While the practice of settling both the disputed title and the questions of mesne profits and improvements in a single action is convenient, yet the issues should be separately considered by the jury, for, aside from the embarrassment incident to submitting a multitude of issues, a verdict for the defendant, of course, renders the testimony, as to mesne profits and improvements, valueless, and the necessity for the production of the testimony on that branch of the cases is entirely uncertain until the main issue is decided. Moreover, if the wisdom of the laws granting statutory new trials of the title is questionable, there certainly can be no reason for a re-trial as of right of the issue as to mesne profits and improvements, and this is an additional consideration in favor of separating the issues.[1]

§ 652. *Distinction between action for mesne profits and action for use and occupation.*—In Thompson *v.* Bower,[2] in the New York Supreme Court, Johnson, J., delivering the opinion of the court, said: "The action for *mesne* profits differs from an action for use and occupation, in this, that the latter is founded upon a promise, express or implied,[3] while the former springs from a trespass, an entry *vi et armis* upon premises, and a tortious holding. The action to recover mesne profits is an action *quare clausum fregit*, and cannot be maintained without proof of the trespass. It is founded on the action of ejectment, generally, and follows a recovery in that action." The plaintiff, to show himself entitled to recover for use and occupation, must prove that the relationship of landlord and tenant, or some ex-

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[1] Morris *v.* Beebe, 54 Ala. 300; see, also, § 658.

[2] 60 Barb. (N. Y.) 463–477.

[3] See Goddard *v.* Hall, 55 Me. 579.

press or implied agreement, existed between the parties.[1] An implied promise to pay rent cannot, from the nature of things, arise out of a trespass or tortious entry upon land, and an adverse holding in the defendant's own right.[2] It is clearly settled that assumpsit will not lie for use and occupation, unless a contract relationship existed between the parties;[3] nor can it be maintained after a recovery in ejectment.[4] Trespass for mesne profits is the proper action.[5] So account rendered will not lie for mesne profits.[6] As already shown, where the relationship of tenants in common exists, and one tenant has evicted his companion, the disseizee cannot maintain assumpsit against the disseizor for rents and profits that accrued during the period of the disseizin, as possession under an adverse title negatives the idea of a promise to pay rent, and the tort cannot be waived for the purpose of trying title to land in an action of assumpsit.[7] It will be apparent, from a consideration of these cases, that the action of trespass for mesne profits is exclusive in its nature, and a disseizor, or person who has tortiously entered upon or occupied lands, either in good faith or *mala fide*, must be prosecuted for the rents

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[1] Sylvester *v.* Ralston, 31 Barb. (N. Y.) 286; Wood *v.* Wilcox, 1 Den. (N.Y.) 38; Pierce *v.* Pierce, 25 Barb. (N. Y.) 243; Bancroft *v.* Wardwell, 13 Johns. (N.Y.) 489; McNair *v.* Schwartz, 16 Ill. 24; Scales *v.* Anderson, 26 Miss. 94; De Young *v.* Buchanan, 10 G. & J. (Md.) 149; see Kiersted *v.* Orange & A. R. R. 1 Hun (N. Y.), 151.

[2] Bard *v.* Nevin, 9 Watts (Penn.), 328; Harker *v.* Whitaker, 5 Watts (Penn.), 474; Irvine *v.* Hanlin, 10 S. & R. (Penn.) 220; Goddard *v.* Hall, 55 Me. 579; see Sinnard *v.* McBride, 3 Ohio, 264.

[3] Watson *v.* Brainard, 33 Vt. 88; Goddard *v.* Hall, 55 Me. 579; Poindexter *v.* Cherry, 4 Yerg. (Tenn.) 305.

[4] Butler *v.* Cowles, 4 Ohio, 205; Larrabee *v.* Lumbert, 34 Me. 79.

[5] Leland *v.* Tousey, 6 Hill (N. Y.), 328; Morgan *v.* Varick, 8 Wend. (N. Y.) 587; Poindexter *v.* Cherry, 4 Yerg. (Tenn.) 305; Dean *v.* Tucker, 58 Miss. 487; Scales *v.* Anderson, 26 Miss. 94; Larrabee *v.* Lumbert, 36 Me. 440.

[6] Harker *v.* Whitaker, 5 Watts (Penn.), 474.

[7] Richardson *v.* Richardson, 72 Me. 403; Van Alstine *v.* McCarty, 51 Barb. (N. Y.) 326; see Bockes *v.* Lansing, 74 N. Y. 437; Sampson *v.* Shaeffer, 3 Cal. 196; see § 176.

taken, and damages sustained by the true owner, in this form of action, and cannot be held accountable in forms of procedure based upon contract, express or implied.

§ 653. *Distinction between claim for damages and for mesne profits.*—In New York, the distinction between the claim for damages for withholding real estate, and the claim for rents and profits of it, during the time the possession is wrongfully withheld, is clearly marked. The Court of Appeals of that State held that, under a complaint which asked for the recovery of the possession of real estate, with damages for withholding it, the reception of evidence as to the value of the use and occupation of the land, and an instruction to the jury that, in estimating the damages, they might consider the evidence as to rental value, was clearly erroneous.[1] The court said that the complaint, in the case cited, failed to set forth how long the defendant had been in possession; it did not allege that he had been in occupation of the premises at all before the day on which the action was commenced, and it contained no statement or allegation whatever to apprise the defendant, or indicate to him, that any claim was made for the rents and profits of the land. The rents and profits, the court said, did not "form any part of the damages for withholding the property, but constitute a separate and distinct cause of action."[2] It was further held that the complaint could not be amended so as to obviate this objection, as that would require the insertion of a new and independent cause of action, and not a mere amendment of that set forth in the complaint, and for which alone the action had been commenced. It must not be understood from this case that damages and mesne profits cannot be recovered in that State in the same ac-

[1] Larned *v.* Hudson, 57 N. Y. 151; Livingston *v.* Tanner, 12 Barb. (N. Y.) 481; see Archbold's Landlord and Tenant, p. 231.

[2] See Candee *v.* Burke, 10 Hun (N. Y.), 350; Cagger *v.* Lansing, 64 N. Y. 417, 431; Holmes *v.* Davis, 19 N. Y. 488.

tion. The disseizee may proceed for both by inserting allegations in his pleading of the value of the use and occupation in addition to the claim for damages, so as to indicate to the defendant the nature and extent of the entire recovery sought.[1] By the damages under the procedure in that State is evidently meant all loss and damage which may be legally awarded to the disseizee, whether for waste, injury to the freehold, or otherwise, "other than for rents and profits or for use and occupation."[2]

§ 654. *Pleading in real actions.*—Under the statute in Massachusetts, the demandant, in a writ of entry, is entitled to recover the rents and profits, although not specifically demanded in the writ.[3] In Maine, on the other hand, the demandant cannot obtain a judgment for damages against the tenant unless he has made claim therefor in his writ.[4] The policy of the latter State certainly embodies the better rule of procedure.

§ 655. *In ejectment.*—Mr. Adams says[5] in relation to pleading the claim for mesne profits, that "the plaintiff complains in it of his ejection and loss of possession, states the time during which the defendant (the real party) held the land, or took the rents and profits, and prays judgment for the damages which he has thereby sustained." This formula is, under the present practice, still generally applicable, though somewhat meagre in its recitals. Under the modern procedure the premises should be described,

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[1] See Cagger *v.* Lansing, 64 N. Y. 419–431.

[2] See N. Y. Code Civ. Pro. § 1525. "The court, at any time within three years after such a judgment is rendered [referring to a judgment in ejectment] and the judgment roll is filed, upon the application of the party against whom it was rendered, his heir, devisee, or assignee, and upon payment of all costs, and all damages, *other than for rents and profits, or for use and occupation*, awarded thereby to the adverse party, must make an order vacating the judgment, and granting a new trial in the action."

[3] Provident Institution *v.* Burnham, 128 Mass. 458; Gen. Stat. of Mass. c. 134, §§ 13, 14; Raymond *v.* Andrews, 6 Cush. (Mass.) 265.

[4] Pierce *v.* Strickland, 25 Me. 440; Larrabee *v.* Lumbert, 36 Me. 440.

[5] Adams on Ejectment (4th Am. ed.), p. 446.

the time stated when the defendant entered thereon and ejected the plaintiff, the length of time during which the possession was wrongfully withheld, and the value of the mesne profits of which the plaintiff has been deprived, and the amount of the damages which he has sustained.[1] The jury cannot, as a rule, take into consideration the mesne profits, unless claimed in the declaration, and notice is given of the plaintiff's intention to proceed for them,[2] and in New York the claim for mesne profits should be stated in a separate count;[3] but it is too late to object, for the first time, on the trial, to the form and want of particularity with which allegations with respect to the damages and mesne profits are made.[4] In that State, as we have seen, under a claim for damages, evidence of the value of the use and occupation cannot be received,[5] as the claims for damages and for rents and profits are regarded as separate causes of action which must be pleaded. A judgment for damages is clearly erroneous where no damages are alleged in the complaint.[6] The damages must, of course, be assessed by the jury, and when a verdict is rendered omitting any assessment of damages, the court has no power to render a judgment for possession *and* damages.[7]

It will thus be seen that there is nothing exceptional about claims against a disseizor for damages and mesne profits, but that such claims must, like other causes of action, be pleaded, to entitle the disseizee to introduce evidence in support of them, and to uphold a recovery.

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[1] See Adams on Ejectment (4th Am. ed.), p. 450 [384]; Higgins *v.* Highfield, 13 East, 407.

[2] Bayard *v.* Inglis, 5 W. & S. (Penn.) 465; Livingston *v.* Tanner, 14 N. Y. 64; Dawson *v.* McGill, 4 Whart. (Penn.) 230; see Carman *v.* Beam, 88 Penn. St. 319; Larned *v.* Hudson, 57 N. Y. 151; Ringhouse *v.* Keener, 63 Ill. 230.

[3] Seaton *v.* Davis, 1 T. & C. (N. Y.) 91.

[4] Candee *v.* Burke, 10 Hun (N. Y.), 350.

[5] Larned *v.* Hudson, 57 N. Y. 151; Livingston *v.* Tanner, 12 Barb. (N.Y.) 481.

[6] McKinlay *v.* Tuttle, 42 Cal. 570.

[7] Cannon *v.* Davies, 33 Ark. 56.

§ 656. *Parties plaintiff.*—The action for mesne profits under the former practice could be brought in the name of the lessor of the plaintiff, or, according to some of the authorities, in the name of the nominal plaintiff;[1] and in either case it was regarded as the lessor's action.[2] A disseizee, who has recovered possession of lands by any lawful means, may maintain trespass for mesne profits against a party who has occupied the premises as a tenant of the disseizor, although the tenant was ignorant of the disseizee's claim of title, and, acting in good faith, had paid the rent to the disseizor.[3] The only advantage which an occupant in good faith secures over a possessor in bad faith, as will presently appear, is that the former may recover for, or set off against mesne profits, the value of improvements left upon the land. Rent paid to a disseizor by a tenant is of no benefit to the true owner, and cannot be used by the tenant to defeat the owner's claim for mesne profits. The right to damages and mesne profits is assignable; and a plaintiff may recover for mesne profits taken by defendant prior to the plaintiff's acquiring title, provided the right of action therefor was transferred to the claimant by his grantor.[4] A plaintiff is entitled to mesne profits which accrued during his minority;[5] so a *cestui que trust* who has recovered lands may have judgment for the rents;[6] and a municipal corporation may maintain an action for *mesne* profits for the use of a street.[7]

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[1] Goodtitle *v.* Tombs, 3 Wils. 118–121; Shadwick *v.* McDonald, 15 Ga. 392; Adams on Ejectment (4th Am. ed.), p. 330; Lion *v.* Burtis, 5 Cow. (N. Y.) 408; see Masterson *v.* Hagan, 17 B. Mon. (Ky.) 325; Van Alen *v.* Rogers, 1 Johns. Cas. (N. Y.) 281, *in notis;* Den *v.* Lunsford, Busb. (N. C.) Law, 401.

[2] Aslin *v.* Parkin, 2 Burr. 665, 668; see Baron *v.* Abeel, 3 Johns. N. Y. 482.

[3] Trubee *v.* Miller, 48 Conn. 347; Alb. Law Jour. vol. 26, p. 39; Storch *v.* Carr, 28 Penn. St. 135; see Doe *v.* Whitcomb, 8 Bing. 46; Johnson *v.* Futch, 57 Miss. 73; Green *v.* Biddle, 8 Wheat. 1; Bradley *v.* McDaniel, 3 Jones' (N. C.) Law, 128; Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

[4] Lord *v.* Dearing, 24 Minn. 110.

[5] McCrubb *v.* Bray, 36 Wis. 333.

[6] Pugh *v.* Bell, 1 J. J. Marsh. (Ky.) 399.

[7] City of Apalachicola *v.* Apalachicola Land Co. 9 Fla. 340.

§ 657. *Plaintiff must actually acquire possession.*—Trespass for mesne profits cannot ordinarily be maintained unless the plaintiff, in the prior ejectment suit, actually goes into possession of the premises after the recovery in the ejectment.[1] In Stancill *v.* Calvert, in the Supreme Court of North Carolina,[2] it appeared that the defendant wrongfully removed and converted a saw-mill, which constituted the subject matter of dispute, and there was nothing of which possession could be taken. The court held that as the removal took place, and the lease expired, before the trial, so that a writ of possession could not be executed, the plaintiff should have urged his right, in the ejectment suit, to have actual instead of nominal damages, as in ordinary cases,[3] and a nonsuit was granted in the action for mesne profits. So in Bockes *v.* Lansing,[4] in the New York Court of Appeals, Rapallo, J., said: "The claim in the complaint to recover rents and profits cannot be sustained, for it appears that the plaintiffs are out of possession. They must recover possession before they are in a position to claim rents and profits." It is not necessary, however, to execute an *habere* to entitle a party to maintain an action for the mesne profits if the plaintiff has been let into possession by the defendant,[5] for, as we have seen, it is common learning that a plaintiff may take peaceable possession without a writ.[6] These cases illustrate the principle heretofore stated, that trespass for mesne profits is grounded upon the fiction of law, that the disseizee having been restored to the pos-

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[1] Stancill *v.* Calvert, 63 N. C. 616; Murphy *v.* Guion, 2 Murphy (N. C.), 238; Poston *v.* Henry, 11 Ired. (N. C.) Law, 301; Carson *v.* Smith, 1 Jones' (N. C.) Law, 106; Miller *v.* Melchor, 13 Ired. (N. C.) Law, 439; Reid *v.* Stanley, 6 W. & S. (Penn.) 369; Zimmerman *v.* Eshbach, 15 Penn. St. 417; Nelson *v.* Allen, 1 Yerg. (Tenn.) 360.

[2] 63 N. C. 616.

[3] See Brown *v.* Galloway, Pet. C. C. 291; Carman *v.* Beam, 88 Penn. St. 319; Dodge *v.* Page, 49 Vt. 137; Woodhull *v.* Rosenthal, 61 N. Y. 385.

[4] 74 N. Y. 437–442.

[5] Calvart *v.* Horsfall, 4 Esp. 167; see Stearns on Real Actions, p. 410.

[6] See § 549.

session, is presumed to have occupied during the period of the disseizin.[1] Where the plaintiff acquired possession of the *locus in quo* before trial, it was held that, having given notice of his intention so to do, he could proceed for *mesne* profits;[2] and the same rule appertains in Vermont, where the plaintiff's title expires pending suit.[3]

§ 658. *Parties defendant.*—The proper and necessary party defendant, in an action for mesne profits, is the disseizor or party who has wrongfully withheld the possession, and appropriated the profits of the land. And one who comes into possession during the pendency of the action of ejectment is bound by the proceedings, and is liable for mesne profits during the period of his occupancy.[4] So where a defendant was added, in ejectment, who took possession after suit brought, it was held that the only necessity for adding the new tenant was to hold him for *mesne* profits, as he would clearly have been concluded by the judgment.[5] The judgment is conclusive of the title into whose hands soever it may subsequently pass by transmutation of the possession from the defendant in ejectment.[6]

Upon the death of a defendant pending an action of ejectment, if his heirs are substituted as defendants, their liability for mesne profits is limited to the rents and profits accruing during the period of their own possession after his death;[7] they cannot be held liable for profits which they never received, nor can the disseizin or tort of the ancestor be predicated of the heir. In a case before the Supreme Court of North Carolina, it was decided that an action for mesne profits would lie against infant defendants even

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[1] See Trubee *v.* Miller, 48 Conn. 347; see § 648.

[2] Carman *v.* Beam, 88 Penn. St. 319.

[3] Dodge *v.* Page, 49 Vt. 137; see Woodhull *v.* Rosenthal, 61 N. Y. 385.

[4] Bradley *v.* McDaniel, 3 Jones' (N. C.) Law, 128.

[5] Willingham *v.* Long, 47 Ga. 540.

[6] Merritt *v.* O'Neil, 13 Johns. (N. Y.) 477; Jackson *v.* Hills, 8 Cowen (N. Y.), 294: Jeffries *v.* Zane, 1 Miles (Penn.), 287; see Chirac *v.* Reinicker, 11 Wheat. 296.

[7] Cavender *v.* Smith, 8 Iowa, 360.

though they had never been in possession except by their guardian.[1] It is clear that the action may be brought against a corporation.[2]

In Eastwick *v.* Saylor,[3] it appeared that a party voluntarily, and with plaintiff's consent, was joined as defendant in ejectment for the purpose of testing his own title, and trying the right of possession of the land. The court decided that the fact that he was thus united with the defendants, as against the title of the plaintiffs, did not render him jointly liable, with the other defendants, for mesne profits when he was powerless to prevent the trespasses of the other defendants, and did not aid, abet or encourage their commission. In Morris *v.* Beebe,[4] in the Supreme Court of Alabama, it was said that because mesne profits and damages could be recovered in the action of ejectment, the rule as to the proper parties defendant was not changed, and, at least in that State, it was never intended to authorize the introduction of defendants against whom no other judgment could be rendered than for mesne profits, while against others a judgment for both the mesne profits and the possession was pronounced. The court said that judgments at law were not capable of being so split up and divided. This question of parties defendant constitutes an impediment, additional to those already considered,[5] to the joinder and trial of the action to recover the possession of the land with the claim for mesne profits.

§ 659. *Possession of defendant.*—While it is the general rule that the plaintiff must furnish proof that the defendant was a disseizor, and withheld the possession, it seems that the objection to the absence of such proof must be taken in the court below. Thus in Hynes *v.* McDermott,[6] it was claimed on appeal that a judgment for the entire mesne profits had

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[1] Molton *v.* Mumford, 3 Hawks (N. C.), 483.
[2] McCready *v.* Guardians, &c., 9 S. & R. (Penn.) 94; see § 250.
[3] 85 Penn. St. 15.
[4] 54 Ala. 300.
[5] See § 651.
[6] 82 N. Y. 41.

been rendered against two of the defendants, no proof having been furnished that they had occupied the entire premises. The court held that as the record did not show that the point was brought to the attention of the trial court, it was not available on appeal.

§ 660. *Co-tenants.*—Trespass for mesne profits may be maintained by one co-tenant against his companion, as a necessary sequence to a judgment in ejectment.[1] The successful co-tenant must, however, take possession of the property within a reasonable time after the recovery in ejectment. In Hare *v.* Fury,[2] a month was considered a reasonable time, and the co-tenant was allowed to recover mesne profits from the date of the demise to one month after judgment. And the tenant cannot recover damages or mesne profits for the period during which the possession or occupancy was not adverse,[3] and when the proof of ouster is insufficient or unavailable, as the basis of a recovery in chief, it is equally unavailable as a ground for the recovery of damages resulting from it.[4] If there is no proof of an ouster, except a denial of the plaintiff's title and right of entry in the answer, the plaintiff in ejectment can recover damages only from the date of the institution of the suit.[5] The principles regulating the recovery and allowance for improvements, between tenants in common, will be presently considered,[6] but it may be here observed, that the co-tenant in possession is not chargeable with rent paid by a tenant in permanent improvements on the land, such as

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[1] Goodtitle *v.* Tombs, 3 Wils. 121; Hare *v.* Fury, 3 Yeates (Penn.), 13; Bennet *v.* Bullock, 35 Penn. St. 367; Lane *v.* Harrold, 72 Penn. St. 267; Carpentier *v.* Mitchell, 29 Cal. 333; Camp *v.* Homesley, 11 Ired. (N. C.) Law, 212; Critchfield *v.* Humbert, 39 Penn. St. 427; Langendyck *v.* Burhans, 11 Johns. (N. Y.) 461; Early *v.* Friend, 16 Gratt. (Va.) 21; see Bryan *v.* Averett, 21 Ga. 401.

[2] 3 Yeates (Penn.), 13.

[3] Carpentier *v.* Mendenhall, 28 Cal. 484.

[4] Carpentier *v.* Mendenhall, 28 Cal. 484; see Chap. IX.

[5] Miller *v.* Myers, 46 Cal. 535.

[6] See § 711.

clearing, fencing, &c.[1] The preponderance of authority seems to be in favor of holding that one co-tenant of real property cannot recover from his companion on account of an appropriation by the latter, to his own use, of the products of the common property, where there is no agreement to account, and the latter has not ousted or excluded the former from the enjoyment of the common property.[2]

§ 661. *Executors.*—In a case which arose in Tennessee, it was said that an executor could not maintain an action for *mesne* profits, even though he was clothed by the will with the power to sell the lands and divide the proceeds; the rents and profits are incident to the ownership of the land, and, consequently, this remedy belongs exclusively to the person having title to the land.[3] Where, however, one from whom the land had been wrongfully taken died without recovering possession, it was held, in New York, that all claim for damage done to the estate, and for the rents and profits, down to the time of his death, went to his executor and belonged to the personal estate;[4] and, in North Carolina, where a party died, the executors were held entitled to the mesne profits and damages for waste, up to the date of her death; while those which accrued subsequently, and up to the time when the premises were vacated by defendant, went to the heirs and devisees.[5] Under the early procedure, as we have seen, the claim for mesne profits, being founded upon a tort, and enforced by an action of trespass, died with the person.[6] This

[1] Walker *v.* Humbert, 55 Penn. St. 407; see Reed *v.* Jones, 8 Wis. 421, 464.

[2] Kean *v.* Connelly, 25 Minn. 222; Ragan *v.* McCoy, 29 Mo. 356; Dresser *v.* Dresser, 40 Barb. (N. Y.) 300; Pico *v.* Columbet, 12 Cal. 414; Wilcox *v.* Wilcox, 48 Barb. (N. Y.) 327; Henderson *v.* Eason, 17 Q. B. 701; Israel *v.* Israel, 30 Md. 120. See *contra*, Early *v.* Friend, 16 Gratt. (Va.) 47; Shiels *v.* Stark, 14 Ga. 435; Hayden *v.* Merrill, 44 Vt. 348.

[3] Brown *v.* McCloud, 3 Head (Tenn.), 280.

[4] Hotchkiss *v.* Auburn, &c. R. R. Co. 36 Barb. (N. Y.) 600.

[5] King *v.* Little, 77 N. C. 138; see Blight *v.* Ewing, 26 Penn. St. 135; Cobb *v.* Biddle, 14 Penn. St. 444.

[6] See § 648.

is now generally changed by statute. Where the disseizee dies his personal representatives are usually entitled to the mesne profits up to the date of his death, and where the disseizor dies, the claim may, in some States, be asserted against his personal representatives.[1]

§ 662. *Recovery of nominal damages not a bar.*—The recovery of nominal damages, in the action of ejectment, is not a bar to an action for the actual damages and mesne profits. Nominal damages are necessary only to entitle the plaintiff to recover costs in the ejectment and to establish title, and are not given in satisfaction of the actual damages and mesne profits which constitute an independent cause of action.[2]

§ 663. *For what periods mesne profits are recoverable.*—The claim for mesne profits being founded upon a tort the plaintiff is required to make specific proof of his case. The defendant will not be held liable for *mesne* profits taken prior to his own entry, by those under whom he claims title,[3] but can be charged only for the rents and profits accruing during the time he was actually in possession of the disputed lands, in the character of a disseizor.[4] And a plaintiff in ejectment recovers mesne profits only from the time his right to the possession accrued. Hence, an execution purchaser can have judgment for mesne profits from the date of the sheriff's deed.[5] In other words, damages and mesne profits can only be computed from the time when the title was cast on the plaintiff.[6]

§ 664. *Damages assessed down to day of trial.*—The damages should be assessed down to the day of trial, upon the same principle that interest is recovered to that time in an action upon a money demand. The profits in one case,

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[1] See Hotchkiss *v.* Auburn, &c. R. R. Co. 36 Barb. (N. Y.) 600; Rhodes *v.* Crutchfield, 7 Lea (Tenn.), 518.

[2] See Van Alen *v.* Rogers, 1 Johns. Cases (N. Y.), 281; Davis *v.* Delpit, 25 Miss. 445.

[3] Gardner *v.* Granniss, 57 Ga. 539.

[4] Jacks *v.* Dyer, 31 Ark. 334.

[5] Clark *v.* Byreau, 14 Cal. 634.

[6] Brewster *v.* Buckholts, 3 Ala. 20.

and the interest in the other, are but the incidents of the cause of action.[1]

§ 665. *Measure of damages.*—In Morrison *v.* Robinson,[2] the Supreme Court of Pennsylvania said: "Trespasses to personal property are usually very easily measured by the value of the property at the time it was taken or destroyed, or by the degree of impairment of its value. But it is not so with real property withheld from the rightful owner; for it is entirely different in its character. Generally, land is not exclusively adapted to any one special use, like most articles of personal property, but may be turned to all imaginable uses, and its condition indefinitely altered at the pleasure of its occupant. Out of these changes of use and condition often arise very complicated questions, in the estimation of damages." The general rule is that the plaintiff recovers the annual value of the land from the time of the accruing of his title.[3] The right to interest will be considered presently. The authorities show that the rule as to damages, in an action of ejectment, was very uncertain at common law.[4] Mr. Adams says:[5] "The jury are not confined, in their verdict, to the mere *rent* of the premises, although the action is said to be brought to recover the *rents and profits* of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand." In Goodtitle *v.* Tombs,[6] Gould, J., said: "The plaintiff in this case is not confined to the very mesne profits only, but he may recover for his trouble, &c. I have known four times the value of the mesne profits given by a

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[1] McCrubb *v.* Bray, 36 Wis. 333; see Bell *v.* Medford, 57 Miss. 31; Whissenhunt *v.* Jones, 78 N. C. 361; Dawson *v.* McGill, 4 Whart. (Penn.) 230; New Orleans *v.* Gaines, 15 Wall. 624; Love *v.* Shartzer, 31 Cal. 487; Dean *v.* Tucker, 58 Miss. 487; Ringhouse *v.* Keener, 63 Ill. 230.

[2] 31 Penn. St. 456.

[3] Sedgwick on Damages (7th ed.), vol. I, p. 251 [124]; see New Orleans *v.* Gaines, 15 Wall. 624, 632; Vandevoort *v.* Gould, 36 N. Y. 639–647.

[4] See Woodhull *v.* Rosenthal, 61 N. Y. 382–394.

[5] Adams on Ejectment (4th Am. ed.), p. 459 [*391].

[6] 3 Wils. 118–121.

jury in this sort of action of trespass; if it were not to be so sometimes, complete justice could not be done to the party injured." In the same case, Chief Justice Wilmot added: "Damages are not confined to the mere rent of the premises; but the jury may give more, if they please." In Goodtitle *v.* North,[1] it was held that bankruptcy was not a plea in bar to an action of trespass for mesne profits, as the damages were unascertained. Buller, J., said: "The damages here are as uncertain as in an action of assault." Lord Mansfield remarked: "The plaintiff goes for the whole damages occasioned by the *tort*, and when damages are uncertain, they cannot be proved under a commission of bankruptcy." Ashhurst, J., added: "The plaintiff goes for a compensation in damages, the amount of which is uncertain, and cannot be sworn to before the commissioners, but must be ascertained by a jury upon all the circumstances." In Dewey *v.* Osborn,[2] the court said: "The damages in that action [mesne profits] are not limited to the rent. Extra damages may be given." "As to the amount of damages," said Washington, J., "the jury are the only proper judges; there is no general rule, and the *quantum* depends on the circumstances of the case."[3] In Hanna *v.* Phillips,[4] on the other hand, where the judge charged the jury that they were not to be limited or confined in estimating a verdict to the mere rent of the premises, but might give such extra damages as they considered the particular circumstances of the case demanded, this was held to be error, on the ground that the jury should have been limited by the annual rent, or by some other definite standard. In Bullock *v.* Wilson,[5] the court charged that the damages were the profits which the defendant had derived from the land. This, also, was held to be error, as the plaintiff was entitled to recover the damages which he had sustained by reason

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[1] 2 Doug. 584.
[2] 4 Cowen (N. Y.), 329, 338.
[3] Brown *v.* Galloway, Peter's C. C. 291.
[4] 1 Grant (Penn.), 253.
[5] 3 Port. (Ala.) 382.

of being kept out of the possession, and these were never increased or diminished by the profits acquired by the defendant from his occupancy. It is clear, as will presently be shown, that the defendant is answerable for all actual damage, waste, and injury to the premises, as well as mesne profits.[1] Mr. Sedgwick says:[2] "It is plain that the measure of compensation, which we are now considering, has been involved in confusion by the technical character of our forms of action. 'The *dicta* on the subject,' says Gibson, C. J., in Pennsylvania, 'seem to have been predicated by judges who had no precise idea of it; for they have not defined it by any landmarks.'[3] The action of trespass being one of *tort*, admits of any evidence in aggravation; and, therefore, in one sense, it is correct to say, that the damages in this proceeding are entirely at large and under the control of the jury. But, on the other hand, there is nothing necessarily in the action of the nature of a trespass. The property may have been withheld, and the rents received, in entire good faith. In this case the allegations of force, etc., are purely fictitious; and it certainly never would be tolerated on such facts, that the jury should give any damages beyond the actual value of the income." The authority of the early cases which laid down the principle that the jury might determine the amount of damages and mesne profits in ejectment, without any practical guide or limitation in considering the evidence, has been very greatly impaired and restricted by modern decisions and legislation. The nature of the subject-matter of contention is such as to practically render specific evidence of the actual loss possible. In this respect, the remedy for mesne profits differs essentially from actions of assault, libel or slander, or actions of pure tort. Hence, in Alexander *v.* Herr,[4] cited by Mr. Sedgwick, where the jury

[1] Huston *v.* Wickersham, 2 W. & S. (Penn.) 308; see Goodtitle *v.* Tombs, 3 Wils. 118–121; Field *v.* Columbet, 4 Sawyer, 523; but see Emrich *v.* Ireland, 55 Miss. 390.

[2] Sedgwick on Damages (7th ed.), vol. I, p. 260.

[3] Alexander *v.* Herr, 11 Penn. St. 537.

[4] 11 Penn. St. 537.

were allowed to assess such other damages as they might think the plaintiff entitled to recover, the verdict was set aside. In Kille *v.* Ege,[1] the rule is stated to be that the plaintiff may recover for the fair rent or yearly value of the premises, and for injury done thereto.[2] In Morrison *v.* Robinson,[3] the rule is laid down that "*compensation* is the purpose of the action." In Campbell *v.* Brown,[4] the damages were said to be not the actual yield or income of the property, but the fair annual value if prudently and judiciously managed. In Cutter *v.* Waddingham,[5] the court say: "The actual annual value of the property detained, with interest thereon, is the measure of damage in ejectment." In Averett *v.* Brady,[6] it was said that the plaintiff must prove "the value of the mesne profits, to be estimated by the amount of the crops taken, or by the fair annual value of the premises." In Bolling *v.* Lersner,[7] the plaintiff was allowed to recover the annual value of the lands "in the hands of a prudent and discreet tenant, upon a judicious system of husbandry."

These cases show clearly that the damages and mesne profits, for which a disseizor can be held accountable, are now limited to strict compensation, and are no longer at large, or in the absolute discretion of the jury. Precise proof of value, injury, etc., must be furnished; the items of the loss and damage must be shown, and the verdict should conform to and reflect the details of the evidence.[8] The action, as we have said, is now largely treated as if it were one of contract. The nature of the injury, and the fact that the disseizor, in the majority of cases, withholds the lands under a belief of title in himself, renders it improper to punish the offender by awarding exemplary damages in this action.[9]

[1] 82 Penn. St. 107, 112.

[2] See Huston *v.* Wickersham, 2 W. & S. (Penn.) 308.

[3] 31 Penn. St. 456. [4] 2 Woods, 349. [5] 33 Mo. 269–286.

[6] 20 Ga. 523–527. See Phillips on Evidence, vol. IV, p. 315.

[7] 26 Gratt. (Va.) 36–58. [8] See § 674.

[9] In cases of a willful withholding of the land for the purpose of oppression, or where circumstances of malicious aggravation are proved, exemplary damages may possibly be given. See Sedgwick on Damages (7th ed.), Vol. I, p. 260.

§ 666. *Rule in New York.*—In Holmes *v.* Davis,[1] the measure of damages, in the action for mesne profits, is held to be that which would obtain in an action of assumpsit for use and occupation; and it was held that under the Revised Statutes of that State, the compensation is to be adjusted as upon contract, and not upon the footing of a tort. In Low *v.* Purdy,[2] it was said that the compensation was to be adjusted as upon a contract for rent. In the later case of Vandevoort *v.* Gould,[3] the rule is recognized that the measure of damages is that which would obtain in assumpsit for use and occupation, and the court say further: "The defendant's possession was wrongful, and the claim for damages for this wrong was in the nature of a claim for a tort. The question was, how much was the plaintiff damaged on the day of the trial by the defendant's wrongful act, which was continuous to that period. And the same considerations of convenience and propriety should here control, as in other cases where a recovery in one action is permitted in order to prevent unnecessary litigation by multiplicity of suits. * * * The allowance of interest or the fair annual value of the use and occupation of the premises during the period they were wrongfully withheld, was a proper subject for the consideration of the jury in determining the amount of damages which the plaintiff was entitled to recover. Such damages are generally designated mesne profits. That is to say, what the premises were reasonably worth annually, with the interest to the time of the trial. Less than this would not give the plaintiff full and complete indemnity for the injury to his rights."[4]

§ 667. *Interest on the value of the fee.*—In Magwire *v.* Labeaume, in the St. Louis Court of Appeals,[5] it appeared that a real estate expert, examined as a witness for the

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[1] 19 N. Y. 488. [2] 2 Lans. (N. Y.) 422. [3] 36 N. Y. 639-647.

[4] See Woodhull *v.* Rosenthal, 61 N. Y. 382; see New Orleans *v.* Gaines, 15 Wall. 624.

[5] 7 Mo. App. 179-185.

plaintiff, had given his opinion as to the rental value of the lot in suit, and upon cross-examination had stated that he computed a rate of interest annually upon what he believed to be the value of the fee. The court said: "The reason was a bad one. The jury are not allowed to arrive at the rental value of unimproved real estate by such a process of calculation. As the witness was an expert, and had, it must be supposed, other means of arriving at the rental value, the court, we think, committed no error in letting the testimony go to the jury for what it was worth."

§ 668. *Damages for waste and trespass.*—Damages for waste may be included in the recovery in an action for mesne profits, if counted for and demanded in the declaration,[1] and damages for actual injuries to the premises;[2] so may damages for trespasses committed upon the land, such as cutting or destroying timber, pulling down fences, and destroying the growing crops.[3] Hence a recovery for mesne profits is a bar to trespass *quare clausum fregit*.[4] In Lippett *v.* Kelley,[5] in the Supreme Court of Vermont, it was held that the plaintiff, in addition to *mesne* profits, might recover damages resulting from building and grading a road across the premises, and depositing stones and dirt thereon, whereby the land was injured and depreciated in value, provided the claims for such damages were properly alleged in the declaration.[6] The practice, however, is not uniform. Thus in Indiana, damages for waste or injury to the freehold are not an incident to the action for mesne profits, and should

[1] Emrich *v.* Ireland, 55 Miss. 390; Morrison *v.* Robinson, 31 Penn. St. 456; Field *v.* Columbet, 4 Sawyer, 523; Alsop *v.* Peck, 2 Root (Conn.), 224; Lee *v.* Bowman, 55 Mo. 400.

[2] Huston *v.* Wickersham, 2 W. & S. (Penn.) 308; Cooch *v.* Geery, 3 Harr. (Del.) 423; Johnson *v.* Futch, 57 Miss. 73.

[3] Hillman *v.* Baumbach, 21 Texas, 203; Bonner *v.* Wiggins, 52 Texas, 125; see Barton Coal Co. *v.* Cox, 39 Md. 1.

[4] Cunningham *v.* Morris, 19 Ga. 583; see Morgan *v.* Varick, 8 Wend. (N. Y.) 587; Kuhns *v.* Bowman, 91 Penn. St. 504.

[5] 46 Vt. 516–523; Whitledge *v.* Wait, Sneed (Ky.), 335.

[6] See Strong *v.* Garfield, 10 Vt. 502; Walker *v.* Hitchcock, 19 Vt. 634.

not be joined with the claim therefor in the action of ejectment.[1] And in Pacquette *v.* Pickness,[2] the court held that where mesne profits were demanded in an ejectment, nothing more could be recovered than the value of the use and occupation of the premises, and that for injuries to the freehold a separate action could be maintained. The damages for waste and injuries ought properly to be recovered in the judgment for rents and profits, and the cases holding otherwise are exceptional, and cannot be regarded as embodying a salutary rule of procedure. It may be here observed, that, in equity, interest should be allowed on damages caused by depreciation from waste, from the time when the plaintiff was let into possession to the date of the assessment or report.[3]

§ 669. *Damages after judgment.*—A lessor in an action of ejectment may bring trespass *quare clausum fregit* against the defendant, or his servants, for an injury done to the freehold intermediate the verdict and *habere facias possessionem* executed.[4]

§ 670. *Interest on mesne profits.*—The rule that interest cannot be allowed upon unliquidated demands has been greatly modified by the modern authorities. In Parrott *v.* The Knickerbocker Ice Company,[5] Rapallo, J., said: "In cases of trover, replevin and trespass, interest on the value of property unlawfully taken, or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same

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[1] Bottorff *v.* Wise, 53 Ind. 32; Woodruff *v.* Garner, 27 Ind. 4–8.

[2] 19 Wis. 219.

[3] Worrall *v.* Munn, 38 N. Y. 137. Under the practice in Virginia, where there is a claim for mesne profits and damages for waste, and also a claim on the part of the defendant for improvements, the various claims must all be passed upon by the same jury. Goodwyn *v.* Myers, 16 Gratt. (Va.) 336; see Malone *v.* Stretch, 69 Mo. 25. See § 670.

[4] Dewey *v.* Osborn, 4 Cow. (N. Y.) 329; see Cummings *v.* M'Gehee, 9 Port. (Ala.) 349.

[5] 46 N. Y. 361.

principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages."[1] As the damages in the action for mesne profits must, under the modern cases, be proved by precise evidence of value, etc., and, as we have seen, are usually limited to strict compensation, the early rule as to the non-allowance of interest on unliquidated demands has ceased to have any practical bearing on the question. Besides this, the rents and profits have usually a fixed value, and come within the rule allowing interest on the recovery in cases where the subject-matter has a market value. In general, in actions *ex delicto*, it is in the discretion of the jury whether to allow interest by way of damages or not,[2] and it is not given by the court as matter of law, but is allowed or withheld by the jury in their discretion.[3] In Rensselaer Glass Factory *v.* Reid,[4] the court lays down the general rule as follows: "Where money has been lent, advanced or expended, by request, and under an agreement to pay at a specific time, or where it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default. * * * But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems that it should be referred to a jury to determine whether damages shall be given by an allowance of interest." As damages for mesne profits are to be assessed

[1] See Whitehall Trans. Co. *v.* N. J. Steamboat Co. 51 N. Y. 369; Brown *v.* Southwestern R. R. Co. 36 Ga. 377; Goddard *v.* Foster, 17 Wall. 124; Lindsey *v.* Danville, 46 Vt. 144. "On principle, we can see no reason for distinguishing between liquidated and unliquidated demands. If interest is given as damages, it should be given to compensate the plaintiff and not to punish the defendant, and the fact that the amount is unliquidated cannot lessen the plaintiff's damages. If anything is due him he has a right to have it paid upon demand, and he loses the interest upon the amount, as much where that amount is unknown as where it is known." Sedgwick on Damages (7th ed.), vol. II, p. 180, note iii.

[2] Walrath *v.* Redfield, 18 N. Y. 457.

[3] Richmond *v.* Bronson, 5 Denio (N. Y.), 55; see Rensselaer Glass Factory *v.* Reid, 5 Cowen (N. Y.), 616.

[4] 5 Cowen (N. Y.), 616.

down to day of trial,[1] so also the interest which is but a portion of the damages, should be allowed down to the same time, in order to give the plaintiff full indemnity for the injury to his rights.[2] In Jackson *v.* Wood,[3] Nelson, J., said: "As rents in the city of New York, where these premises are situate, are payable at the usual quarter days (1 R. S. 736), I think the referees, in ascertaining the value of the mesne profits, were warranted in adding to the annual rent the interest quarterly. So much the plaintiff has lost, and the defendant enjoyed, by means of the wrongful possession."[4] So interest is recoverable on the annual value of the premises from year to year.[5] Where a vendee of land was evicted, it was held that he could recover against his vendor only the value of the land at the time of the purchase, with interest for so much time as he had been compelled to pay mesne profits.[6] So where the evicted vendee had paid no mesne profits to the true owner, it was held that such mesne profits, and the interest on the purchase money, were equivalents to each other, and when one was released the other could not be recovered.[7] The fact that the plaintiffs and defendants are tenants in common makes no exception to the general rule, as to the allowance of damages and interest,[8] and where one tenant in common is in possession, he

[1] McCrubb *v.* Bray, 36 Wis. 333; Whissenhunt *v.* Jones, 78 N. C. 361; New Orleans *v.* Gaines, 15 Wall. 624; Love *v.* Shartzer, 31 Cal. 487; Dean *v.* Tucker, 58 Miss. 487. See § 664.

[2] Vandevoort *v.* Gould, 36 N. Y. 647; New Orleans *v.* Gaines, 15 Wall. 624; Bolling *v.* Lersner, 26 Gratt. (Va.) 36.

[3] 24 Wend. (N. Y.) 443.

[4] See Drexel *v.* Man, 2 Penn. St. 276; Sopp *v.* Winpenny, 68 Penn. St. 78.

[5] Low *v.* Purdy, 2 Lans. (N. Y.) 422; see Worrall *v.* Munn, 38 N. Y. 137.

[6] Fernander *v.* Dunn, 19 Ga. 497; see Staats *v.* Ten Eyck, 3 Caines (N. Y.), 111; Kerley *v.* Richardson, 17 Ga. 602; Caulkins *v.* Harris, 9 Johns. (N. Y.) 324; Bennet *v.* Jenkins, 13 Ib. 50; see, further, Clark *v.* Parr, 14 Ohio, 118; Pitcher *v.* Livingston, 4 Johns. (N. Y.) 1; Guthrie *v.* Pugsley, 12 Ib. 125; Wager *v.* Schuyler, 1 Wend. (N. Y.) 553.

[7] White *v.* Tucker, 52 Miss. 145; see Rawle on Covenant for Title, p. 93 *et seq.*; Patterson *v.* Stewart, 6 Watts & S. (Penn.) 527; Flint *v.* Steadman, 36 Vt. 210; Guthrie *v.* Pugsley, 12 Johns. (N. Y.) 125.

[8] Cutter *v.* Waddingham, 33 Mo. 269.

must pay interest to his co-tenants upon the rents found to be due for each year, from the end of such year until payment.[1]

§ 671. *Judgment conclusive as to mesne profits.*—The recovery in ejectment is conclusive evidence of the title of the plaintiff from the date of the demise laid in the declaration against the defendant, and his servants, who will not be allowed to show title in another in bar of an action of trespass.[2] This rule is salutary; the parties have had their day in court upon the question of title. If the plaintiff claims mesne profits for a period prior to the demise in the declaration, the title is open for investigation.

§ 672. *Judgment not conclusive as to length of defendant's occupation.*—In Miller *v.* Henry,[3] in the Supreme Court of Pennsylvania, it was declared to be well settled that the judgment in ejectment was not conclusive evidence as to the length of time the defendant had been in possession, and such is undoubtedly the general rule. The length of the occupancy is not in issue in the ejectment.

§ 673. *When judgment not conclusive.*—In Thompson *v.* Clark,[4] it appeared that the plaintiff had recovered the lands in ejectment against B., and had been put in possession. Plaintiff then brought this action against C. for rents and profits. It appeared that C. rented from one N., not from B. the defendant in ejectment. Plaintiff proved the judgment in ejectment against B., and the filing of a *lis pendens*, and then rested. The court granted a nonsuit, and it was held on appeal that the nonsuit was properly

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[1] Early *v.* Friend, 16 Gratt. (Va.) 21. As to when interest will not be allowed on rents, see Allen *v.* Smith, 63 Mo. 103.

[2] Dewey *v.* Osborn, 4 Cow. (N. Y.) 329; Chirac *v.* Reinicker, 11 Wheat. 280; Baron *v.* Abeel, 3 Johns. (N. Y.) 482; Kuhns *v.* Bowman, 91 Penn. St. 504; Drexel *v.* Man, 2 Penn. St. 271; Man *v.* Drexel, 2 Penn. St. 202.

[3] 84 Penn. St. 33. See Bailey *v.* Fairplay, 6 Binn. (Penn.) 450; Sopp *v.* Winpenny, 68 Penn. St. 78; Huston *v.* Wickersham, 2 W. & S. (Penn.) 308.

[4] 4 Hun (N. Y.), 164.

granted, as the *lis pendens* only affected the defendant, and those claiming under him, and the judgment was conclusive only upon the parties, and their privies, and as the defendant in this action did not rent from B., the defendant in ejectment, or claim under him, the judgment was not binding upon or evidence against him.[1]

§ 674. *Evidence as to mesne profits.*—A verdict for mesne profits cannot of course be upheld when there is no evidence to sustain the finding.[2] There must be proof of the amount of the mesne profits[3] or of the value.[4] So also, where there was no conflict of evidence as to the rental value of the land, and the jury, having found for the plaintiff for the land, failed to bring in any verdict for the damages, the judgment was reversed on the ground that it did not conform to the uncontradicted testimony.[5] These cases illustrate the principle already stated that the damages are usually limited to compensation, and the recovery is largely based upon contract, and the assessment is not left to the absolute discretion of the jury.

§ 675. *Income from saw-mill and site.*—In ejectment to recover a mill site having a steam saw-mill upon it, the mesne profits may embrace the rent of the mill and of the site as one establishment, and the whole may be treated as realty in estimating the plaintiff's damages. The court said: "Whatever would be rent as between landlord and tenant, is mesne profits as between the parties in ejectment."[6]

§ 676. *From ferry.*—So in an action for the mesne profits of a ferry landing in Georgia, the receipts of the ferry, de-

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[1] See Chirac *v.* Reinicker, 11 Wheat. 280–296.

[2] Brown *v.* Colson, 41 Ga. 42.

[3] Eaton *v.* Freeman, 58 Ga. 129.

[4] Mooring *v.* Campbell, 47 Texas, 37.

[5] Duncan *v.* Jackson, 16 Fla. 338. In Gill *v.* Gill, 37 Penn. St. 312–314, in the Supreme Court of Pennsylvania, it was held that any attempt to settle, in an action of ejectment, the damages due from one party to the other for breach of a contract, which was the foundation of no title, was dangerous and impracticable.

[6] Morris *v.* Tinker, 60 Ga. 466.

ducting the expenses of fitting it up and running it, were held to be the amount properly recoverable.[1] So in the Supreme Court of Texas it was held that the net profits of a ferry were properly assessed, as part of the damages sustained by the detention of the land in connection with which the ferry was operated.[2] It has been shown that though ejectment will not lie for a right or privilege which is a mere incorporeal hereditament, yet when an ejectment is brought for lands, the rights and privileges appurtenant to the lands may be recovered therewith.[3] The cases just considered tend to establish the principle that the income from incorporeal rights, which are appurtenant to the land, may be considered in estimating the damages and mesne profits when the land itself is recovered.

§ 677. *Rules as to ore and mines.*—In Ege *v.* Kille,[4] it appeared that the defendants were *bona fide* occupants under color of title, and had expended large sums of money in developing the mines upon the property and making permanent improvements of great value. It was held that they should be charged only with the value in place of the ore removed.[5] The court said, that "Ore leave, or the right to dig and take ore, can have no general market value." The value of ore in place is to be ascertained by deducting the cost of mining, cleansing, and delivering the ore in market from its market value when delivered—the difference being its value in place.[6]

§ 678. *Income from improvements.*—An important question presents itself in cases where the defendant has occupied the land in good faith, under claim and color of title, as to whether or not, in estimating the mesne profits, he shall be

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[1] Averett *v.* Brady, 20 Ga. 523.

[2] Dunlap *v.* Yoakum, 18 Texas, 582.

[3] See § 102.

[4] 84 Penn. St. 333.

[5] See Hardie *v.* Young, 53 Penn. St. 176; Forsyth *v.* Wells, 41 Penn. St. 291.

[6] See Clowser *v.* Joplin Mining Co. 4 Dillon's C. C. 469, note; Coleman's Appeal, 62 Penn. St. 278; Barton Coal Co. *v.* Cox, 39 Md. 1.

charged with the increase of rents and profits of the land resulting from the improvements which he has placed upon it, or, in other words, with the income from the improvements. Thus in Nixon *v.* Porter,[1] it appeared that the defendant in ejectment had made improvements which had been destroyed by casualty, so that no permanent value was imparted by them to the land, and he was therefore entitled to no compensation for them. The court held that he was not liable for the enhanced rent of the premises during the existence of the improvements. And where the court found that there would have been no rents from the *locus in quo* without the improvements made thereon by the occupants, it was held to be error to charge such occupants with rents which were but the results of their own labor.[2] In Jackson *v.* Loomis,[3] Savage, J., said: "Most clearly the defendant should not be compelled to pay an enhanced rent in consequence of his own improvements." So in Wisconsin, in estimating the value of the use of the premises in controversy, the value of the use of the improvements made by the defendant is to be excluded.[4] Especially should the defendant not be charged with the income from improvements, in estimating mesne profits, where he is so situated as not to be entitled to claim allowance for his expenditures in making the improvements;[5] and if the mesne profits are to include the income from the improvements, then it would seem but fair that the occupant should be allowed interest on his expenditures, instead of being awarded their value at the time of the trial. It has been held in Kentucky that if a *bona fide* occupant is allowed prime cost for his improvements, then he should pay the increase of income from the time of making them.[6]

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[1] 38 Miss. 401.

[2] Adkins *v.* Hudson, 19 Ind. 392; Neale *v.* Hagthrop, 3 Bland (Md.), 551–591; see Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; Ewing *v.* Handley, 4 Litt. (Ky.) 347–371: Hawkins *v.* King, 1 Mon. (Ky.) 162.

[3] 4 Cowen (N. Y), 168.

[4] Davis *v.* Louk, 30 Wis. 308.

[5] Tatum *v.* McLellan, 56 Miss. 352.

[6] Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 517.

In Miller *v.* Ingram,[1] in the Supreme Court of Mississippi, the court decided that, under the code of that State,[2] the plaintiff in ejectment was entitled to the rent of the property as improved by the defendant. The reason for this innovation is not apparent. In Texas, it was said that the established rule had been to allow the successful claimant for rents on the property as it was found at the time the action was commenced, or during the litigation. The court said that it would not be inequitable if the courts and juries, in estimating rents and profits, and value of improvements, were to take into consideration the fact that the occupant had lost his interest on the money expended in making improvements, and they considered that it would be in accordance with correct rules of equity for the legislature to require this to be done.[3] In Dungan *v.* Von Puhl,[4] the Supreme Court of Iowa said: "The owner is entitled to rents and profits according to the value of the land, for the purpose to which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule we think there will nothing be found inequitable. It does not require the occupant to pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor." The estimate should be made upon all the land brought into a state of cultivation by him, and suitable for the raising of crops or for farming purposes; but no rent is to be charged for the use of buildings or farm fixtures erected by the occupant.[5]

The principle of law which prohibits the true owner from recovering, as mesne profits, the increase of income resulting from improvements made by the occupant, is mani-

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[1] 56 Miss. 510.
[2] Code of Miss. 1871, § 1557.
[3] Evetts *v.* Tendick, 44 Tex. 570.
[4] 8 Iowa, 263.
[5] See also Wolcott *v.* Townsend, 49 Iowa, 456.

festly just and equitable. It cannot be said that the additional profits are taken from the owner's land; on the contrary, they spring from practically an independent source. While it is true that the improvements pass to the owner by a recovery in ejectment, yet they are the property of the occupant until set off against mesne profits, or in some States till after their value is ascertained, and the occupant's lien upon the land therefor is satisfied. The strongest consideration to be urged against this policy of the law is the practical difficulty, often experienced, of separating the income of the improvements from the income of the land in its unimproved state.

§ 679. *Costs.*—Usually the taxable costs of the action of ejectment, if not recovered in the action itself, can be proved in the action for mesne profits, and included in the judgment in that action.[1] It was held, in an early case in New Jersey, that all the plaintiff's necessary expenses in the ejectment action, including counsel fees, might be included in the damages.[2] This question came up in Tennessee, in the case of White *v.* Clack,[3] in which it appeared that the court, at the trial, had instructed the jury that, in addition to the mesne profits, the plaintiff was entitled to recover such reasonable counsel fees as had been paid in the prosecution of the action of ejectment. The court said that notwithstanding the discrepancy in the decisions, the established doctrine seemed to be that the plaintiff could recover not only the reasonable value of the rents and profits, but also the *costs* of the ejectment, and held that this meant "the legal and proper costs taxed in the action of ejectment, not including counsel fees, or other expenses incurred by the plaintiff in the prosecution of the suit."[4] This is the

[1] Baron *v.* Abeel, 3 Johns. (N. Y.) 482; White *v.* Clack, 2 Swan (Tenn.), 230.

[2] Denn *v.* Chubb, Coxe (N. J.), 466.

[3] 2 Swan (Tenn.), 230.

[4] See Aslin *v.* Parkin, 2 Burr. 665; Symonds *v.* Page, 1 Cr. & J. 29; Brooke *v.* Bridges, 7 Moore, 471; Doe *v.* Davis, 1 Esp. 358; Doe *v.* Hare, 2 Dowl. P. C. 245; Doe *v.* Filliter, 13 M. & W. 47.

general rule. The costs of the ejectment suit, however, properly constitute no part of the damage recoverable against those who were not parties to that suit.[1]

§ 680. *Defenses.*—In trespass for mesne profits, in Pennsylvania, brought against two defendants, one paid a sum in settlement, and the action was discontinued as to him. It was held that the other was not thereby discharged;[2] nor, as we have seen, is the defendant relieved by the fact he has paid rent to the disseizor as landlord.[3] If the defendant abandons the possession during the pendency of the suit, he is of course not liable for mesne profits which subsequently accrued.[4]

§ 681. *Bankruptcy of defendant.*—The Supreme Court of Georgia has decided that the bankruptcy of the defendant, after verdict, is no ground for staying proceedings, or for a writ of error in ejectment, especially where there was no judgment for mesne profits.[5] In Goodtitle *v.* North,[6] it was held in England that bankruptcy was not a good plea in bar to an action for mesne profits, and in Lloyd *v.* Peell,[7] that an insolvent debtor's discharge was not a defense. These latter cases proceed upon the theory that the claim is founded in tort, and not being provable in bankruptcy is not discharged.

§ 682. *Inadequacy of purchase price does not mitigate damages.*—The damages cannot be mitigated or lessened by evidence that plaintiff paid an inadequate price for the land sought to be recovered. It is no answer to a claim of right that the land cost the owner little or nothing.[8] It is rather the owner's good fortune. Had he paid double value

[1] Leland *v.* Tousey, 6 Hill (N. Y.), 328.

[2] Arundel *v.* Springer, 71 Penn. St. 398.

[3] Keane *v.* Cannovan, 21 Cal. 291; Trubee *v.* Miller, 48 Conn. 347, and cases cited.

[4] Mitchell *v.* Freedley, 10 Penn. St. 198.

[5] Alston *v.* Wingfield, 53 Ga. 18.

[6] 2 Doug. 584. See Banister *v.* Scott, 6 T. R. 489; Charlton *v.* King, 4 T. R. 156; Hamond *v.* Toulman, 7 T. R. 612.

[7] 3 B. & Ald. 407.

[8] Love *v.* Powell, 5 Ala. 58.

for the land he could not have enlarged the claim for damages.

§ 683. *Growing crops.*—The general rule, as we have seen,[1] is, that when a defendant delivers possession of land under a writ of *habere facias possessionem*, he must also deliver possession of the crops growing upon it; and must surrender the land in its improved state.[2] In New York, crops grown upon the disputed land by the tenant, during the pendency of an action of ejectment, belong to the landlord. In that State, the commencement of an ejectment for non-payment of rent, is equivalent to re-entry, and when possession is gained, it relates back to the commencement of the action.[3] In Georgia, the plaintiff in ejectment, if successful, is entitled to the crops growing upon the plantation, unless he puts in issue and recovers, as mesne profits, the rent for that year. If the rents for the year are included in the recovery of mesne profits, then the defendant must be allowed to gather and carry away the crops.[4] In McLean *v.* Bovee,[5] in the Supreme Court of Wisconsin, it appeared that the defendant had, before the suit, recovered possession of certain premises, in an action for the recovery of real property, and that he had been put in possession under the judgment, and had taken possession of a crop of wheat, part of which had been cut, and part of which was uncut, at the time he took the land. The defendant in ejectment brought suit to recover for the taking of the wheat, and it was held that, as the wheat was sowed long after the suit to recover the land was instituted, the crop belonged to the defendant, who had been the successful party in the eject-

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[1] See § 563.

[2] McLean *v.* Bovee, 1 Am. R. 185; S. C. 24 Wis. 295; Adams on Ejectment (4th Am. ed.), p. 416; Altes *v.* Hinckler, 36 Ill. 275; Doe *d.* Upton *v.* Witherwick, 3 Bing. 11; Hodgson *v.* Gascoigne, 5 B. & Ald. 88; Samson *v.* Rose, 65 N. Y. 411; see Lane *v.* King, 8 Wend. (N. Y.) 584; Jackson *v.* Stone, 13 Johns. (N. Y.) 447; Morgan *v.* Varick, 8 Wend. (N. Y.) 587; see § 563.

[3] Samson *v.* Rose, 65 N. Y. 411; see Hodgson *v.* Gascoigne, 5 B. & Ald. 88.

[4] Gardner *v.* Kersey, 39 Ga. 664.

[5] 24 Wis. 295.

ment. The plaintiff, however, has no right to seize upon the products of the land, such as fodder, which had been pulled and stacked, and peas and beans, which had been gathered and stored in a crib, before the writ of possession issued.[1] In Ray *v.* Gardner,[2] it appeared that the plaintiff was in possession of a tract of land, under a claim of ownership, and had raised, gathered, and stacked a crop of oats upon it. Defendant, who also claimed the land, entered, without license, and carried away and converted the oats to his own use, and subsequently recovered the possession of the land. The defendant was held liable for the value of the crops.[3] Stockwell *v.* Phelps,[4] was an action in the nature of replevin *in the cepit* for a quantity of hay. It appeared that the land from which the hay was cut, was, at the time of the cutting, in the possession of one Wild, who claimed the land as his own, and was holding it adversely to the plaintiffs, who had the title in fee. While thus holding the actual possession, adversely to the plaintiffs, Wild sold and delivered the hay to the defendant, and plaintiffs thereupon instituted this action. It was held that an action in the nature of replevin *in the cepit* could only be brought when trespass could be maintained, that such a suit would only lie for an injury to land when the plaintiff was in possession,[5] and that Wild being in the actual possession of the land, claiming it as his own, would be regarded as the owner, as to all the world, until after a judicial decision. The court said: "The remedy of the plaintiffs was a judgment against Wild for mesne profits in an action of ejectment, or by action of trespass after having got possession of the land."

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[1] Brothers *v.* Hurdle, 10 Ired. (N. C.) Law, 490.

[2] 82 N. C. 454.

[3] See Walton *v.* Jordan, 65 N. C. 170.

[4] 34 N. Y. 363.

[5] See Rich *v.* Baker, 3 Denio (N.Y.), 79; De Mott *v.* Hagerman, 8 Cowen (N. Y.), 220.

§ 684. *Fixtures.*—As between hostile claimants to mining lands, all the machinery and implements necessarily used in working the mine become part of the realty, whether fast or loose.[1] By a recovery in ejectment the plaintiff, as a general rule, becomes entitled to the fixtures put upon the land by the defendants or their lessees.

§ 685. *Apportionment of mesne profits.*—In ejectment for a tract of land, only a portion of which the defendant has improved, the jury, in assessing mesne profits, and the value of improvements, may deal with the entire tract together, although the defendant claims the part improved under a separate conveyance. The jury are not bound to deal with the different tracts separately in making their estimates.[2] In Jenkins *v.* Means,[3] it appeared that the plaintiff's wall formed one side of a store room, and a narrow strip along the wall, inside of the room, constituted a part of the premises in dispute. It was held that the yearly rental value of the entire room might be proved, as a fact for the consideration of the jury, in estimating the mesne profits. In Woodhull *v.* Rosenthal,[4] the plaintiff owned a leasehold interest in the rear portion of a city lot, and the defendants a similar interest in the front part. Defendants had taken possession of the entire lot. It was held that the true method of ascertaining the mesne profits, to which plaintiff was entitled, was to ascertain the rental value of the entire lot, and apportion it to the respective owners, according to their interests, giving the plaintiff his proper share.

§ 686. *Statute of limitations.*—The right of the successful party to recover mesne profits and damages is usually limited in this country to six years.[5] Where no statute

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[1] Ege *v.* Kille, 84 Penn. St. 333; McMinn *v.* Mayes, 4 Cal. 209; see McRea *v.* Cent. Nat. Bank, 66 N. Y. 490, as to the general rule applicable to fixtures.

[2] Johnson *v.* Futch, 57 Miss. 73.

[3] 59 Ga. 55.

[4] 61 N. Y. 382.

[5] See Hill *v.* Meyers, 46 Penn. St. 15, and cases cited; Jackson *v.* Wood, 24 Wend. (N. Y.) 443; Ringhouse *v.* Keener, 63 Ill. 230.

exists, the mesne profits may be recovered from the time when the plaintiff's right accrued. Thus in New Orleans *v.* Gaines,[1] which, however, was an accounting supplementary to a decree in equity, the profits for fifteen years, with interest, were awarded. In New York, it has been held to be unnecessary to plead the statute of limitations,[2] for the right to the mesne profits is limited by statute in that State to six years, and for that period only can a recovery be had.[3] The statute in that State failed to specify when the six years, within which the plaintiff's recovery was limited, should commence or terminate. In Budd *v.* Walker,[4] it was held that the six years limitation was next before and up to the filing of the suggestion for mesne profits. The statute, of course, does not begin to run until the title to the property has been judicially determined, for no right to the mesne profits exists, or rather the right is suspended, until judgment is rendered in the original suit.[5] Under the practice in Georgia, it has been held that if a part of the claim for mesne profits is barred by the statute of limitations, the statute to be availed of must be pleaded.[6] In Kansas, such damages only can be recovered as have accrued within three years prior to the commencement of the action.[7] A plaintiff may show that a deficiency of profits in particular years, included in the period of recovery, has been compensated by an excess in years excluded from it by the statute of limitations. But the defendant cannot swell his claim by resorting to an inversion of the principle, which would, in effect, give him a right to recover expenses for a period during which he has elected to be irresponsible for profits.[8]

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[1] 15 Wall. 624.

[2] Grout *v.* Cooper, 9 Hun (N. Y.), 326; Jackson *v.* Wood, 24 Wend. (N. Y.) 443.

[3] Budd *v.* Walker, 9 Barb. (N. Y.) 493.

[4] 9 Barb. (N. Y.) 493. See Avent *v.* Hord, 3 Head (Tenn.), 459.

[5] New Orleans *v.* Gaines, 15 Wall. 624–633; Caldwell *v.* Walters, 22 Penn. St. 378; Avent *v.* Hord, 3 Head (Tenn.), 459; see § 649.

[6] Gardner *v.* Granniss, 57 Ga. 539; see Field *v.* Columbet, 4 Sawyer, 523.

[7] Gatton *v.* Tolley, 22 Kans. 678. [8] Ewalt *v.* Gray, 6 Watts (Penn.), 427.

§ 687. *Mesne profits in equity.*—The right to recover mesne profits is not limited to actions at law, or actions in the nature of trespass for mesne profits, but a recovery may be had, in a proper case, in equity.[1] Thus in Hill *v.* Cooper,[2] in which case a decree was rendered finding that the defendant was a trustee for the plaintiff, and decreeing a conveyance to plaintiff by defendant, it was held that the defendant could be called upon to account for the rents and profits of the land in that same suit in equity. So in South Carolina, a widow is entitled, in equity, when dower is assigned to her, to an account of the rents and profits from the time when her right to dower attached; or if money be assessed in lieu of dower, to interest.[3] So on decreeing a restoration of land, possession of which had been obtained by fraud, the court ordered an account of the rents and profits to be taken, and after allowing for improvements, to be paid to the owners.[4] So an accounting for rents and profits was ordered in the famous case of New Orleans *v.* Gaines,[5] in which judgment had been entered in an equity suit, decreeing possession of the premises in controversy to the defendant in error.[6]

§ 688. *Taxes and assessments.*—In Stark *v.* Starr,[7] it was objected that the amount of money paid by the occupant, as an assessment for the improvement of the street adjoin-

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[1] See Green *v.* Biddle, 8 Wheat. 1; Dormer *v.* Fortescue, 3 Atk. 128; Maddock's Chancery (ed. 1817), vol. I, p. 73; Grimes *v.* Wilson, 4 Blackf. (Ind.) 331; City of Apalachicola *v.* Apalachicola Land Co. 9 Fla. 340; Bains *v.* Perry, 1 Lea (Tenn.), 37; Worrall *v.* Munn, 38 N. Y. 137; Drury *v.* Conner, 1 Harr. & G. (Md.) 220; New Orleans *v.* Gaines, 15 Wall. 624.

[2] 8 Oregon, 254.

[3] Clark *v.* Tompkins, 1 S. C. (N. S.) 119.

[4] Searcy *v.* Reardon, 1 A. K. Marsh. (Ky.) 1.

[5] 15 Wall. 624.

[6] Equity will sometimes regard the special circumstances of the case where there are any peculiarities which render the rigid application of a general rule of law unsatisfactory, and will not always follow the analogy to be found in the rules for the assessment of damages at law. See especially Worrall *v.* Munn, 38 N. Y. 137.

[7] 1 Sawyer, 15.

ing the premises, was not an improvement "made *upon* the property," and hence not allowable as such. The court said that though this distinction was technical, it was nevertheless substantial; the assessment was, in reality, a tax, and payment of taxes upon property is not an improvement made *upon* it, however much such payment may indirectly enhance its value. It was, however, a proper deduction to be made from the gross rents of the property, in estimating the actual damages which the plaintiff had sustained by the defendant's wrongful withholding of the possession. It is the duty of the possessor to pay the taxes imposed by public authority.[1] If the payment of the assessment by the occupant was only allowed by way of set-off as a permanent improvement, it would often happen that no allowance would be made for it whatever, as in this case the pavement put upon the street might be worn out, and have no present value, at the time the possession is surrendered. In Minnesota the claimant may be required to repay to the occupant all taxes paid by the latter upon the land which were a valid charge thereon. This provision was held to be constitutional, and in effect to amount to a transfer of the lien or charge of the State to the person paying such tax.[2] It has been held in Missouri, however, that a plaintiff, after a recovery in ejectment, cannot be compelled to refund to defendant the amount of taxes paid by him while in possession. The decision is rested upon the doctrine that the payments were voluntary, and that no action can be maintained for money paid for another, except upon proof of a previous request, express or implied, or a subsequent assent or sanction.[3] In Marvin *v.* Lewis,[4] in the New York Supreme Court, it appeared that the plaintiff had successfully prosecuted an action to cancel a conveyance made by his ancestor while of unsound mind. The defend-

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[1] See Bright *v.* Boyd, 1 Story, 478; Ringhouse *v.* Keener, 63 Ill. 230.

[2] Madland *v.* Benland, 24 Minn. 372.

[3] Napton *v.* Leaton, 71 Mo. 358.

[4] 61 Barb. (N. Y.) 49.

ants were in possession, claiming under divers mesne conveyances from the grantee in the void deed, and had paid taxes and assessments. It was held that, in declaring the deed void, the court could not impose as a condition that it should be treated as good so far as to require the plaintiff to repay what had been expended by the occupants for taxes and assessments. Even if the payment in good faith of taxes and assessments would seem in conscience to create an equity for reimbursement, there was no principle upon which a court of equity could exact it, any more than such reimbursement could be decreed where a person had committed the mistake of paying taxes on property which did not belong to him. So in Curtis *v.* Gay,[1] it was held that taxes paid by the tenant did not constitute an improvement upon the land, and gave no increase to its value, and therefore did not constitute an item for which the tenant was entitled to be allowed.[2]

These cases reveal the somewhat confused state of the law on the subject of allowing a disseizor the amount paid by him for taxes, imposed upon the land during the period of his occupancy. His claim for reimbursement cannot properly be upheld as an improvement, for the reasons stated in Stark *v.* Starr;[3] the payment is not a betterment or melioration made or placed *upon the land.*[4] The amount of the taxes ought certainly to be deducted from the gross mesne profits of the land when mesne profits are claimed. The cases holding that an occupant who has paid taxes is no more entitled to be reimbursed than a person who has voluntarily paid money for the account of another, without request or sanction, lead to a harsh result, and show the strength of the inclination of the courts to protect the owner against any foreign interference with the management of his property. It may be urged that the disseizor ought in fairness to pay the taxes, as, during his occupancy, he is afforded the public protection and benefit, to maintain

[1] 15 Gray (Mass.), 36. [2] See § 704. [3] 1 Sawyer, 15. [4] See § 700.

which the taxes are levied. The better policy, however, is to treat the tax as an annually accruing lien, and the statute of Minnesota, which, in effect, transfers the public lien to the person paying the tax, certainly accomplishes substantial justice.

§ 689. *Abatement.* — In Pennsylvania, the claim for mesne profits does not abate by the death of the defendant in ejectment, but survives against his personal representatives;[1] and the rule is the same in Alabama,[2] and is a subject of statutory regulation in most of our States.[3]

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[1] Arundel *v.* Springer, 71 Penn. St. 398.

[2] Evans *v.* Welch, 63 Ala. 250.

[3] See §§ 648, 661.

CHAPTER XXVI.

IMPROVEMENTS.

§ 690. Claim for improvements.
691. The civil law.
692. Griswold *v.* Bragg.
693. Improvements allowed in equity.
694. *Bona fide* occupant under claim of title.
695. Exception to the general rule.
696. Constructive notice not sufficient.
697. Claim and color of title.
698. Improvements in excess of mesne profits.
699. What constitutes an improvement.
700. Improvements must be made upon the land.
701. Ornamental improvements.
702. Perishable improvements.
703. Expenditures in experimenting for profits.
704. Payment of incumbrances.
§ 705. Improvements made after suit brought.
706. Improvements made by grantor or warrantor.
707. Basis of valuation—Apportionment.
708. Titles which will not support claim for improvements.
709. Improvements by husband on wife's land.
710. Mortgagee in possession.
711. Co-tenants.
712. Constitutionality of the improvement statutes.
713. In what tribunals improvements are recoverable.
714. Pleading.
715. Verdict.
716. Judgment for improvements.

§ 690. *Claim for improvements.*—The rightful owner of land is entitled to improvements or betterments placed upon it. They become a part of the freehold, and pass by the recovery in ejectment; that is, the plaintiff is placed in possession of the land in its improved condition.[1] The term improvement is a comprehensive one, and includes any melioration, whereby land is converted from its natural state and condition, and rendered suitable for the use and enjoyment of man.[2] The claim of a *bona fide* occupant, or possessor of land, who has made useful, lasting or permanent improvements, or necessary outlays upon it, believing himself to be the owner, to recover the value of such improvements, or expenditures, from the holder of the paramount title, when compelled to surrender up the possession, presents

[1] Bonner *v.* Wiggins, 52 Texas, 125; Lunquest *v.* Ten Eyck, 40 Iowa, 213; Parsons *v.* Moses, 16 Iowa, 440; McMinn *v.* Mayes, 4 Cal. 209; Russell *v.* Blake, 2 Pick. (Mass.) 507; see § 563.

[2] Johnson *v.* Gresham, 5 Dana (Ky.), 547.

many difficult and perplexing questions. The character of the occupant's possession, and the nature of the expenditures, or meliorations, for which allowance can properly be made, if at all, has been a subject of sharp contention, both in actions at law, and suits in equity, in England and this country. The policy of the common law, as we shall presently see, is averse to making any allowance to a person adjudged to have held the possession of land, without right or title, for his labors and expenditures in improving the property, during the period of his wrongful occupancy. This principle of the common law is founded upon the theory that the rightful owner of land is under no equitable or moral obligation to pay for improvements which he never authorized, and which originated in tort. In the case of a tortious confusion of goods, the law gives the entire property to the innocent party. So where an occupant expends his labor and money in making improvements upon lands of another, when the rightful owner desires to use his own property, and can only do so by availing himself of the improvements thus wrongfully placed upon it by the occupant, it would seem strange to hold that this wrong should prevail against a lawful exercise of a right incident to the ownership of property.[1] In Townsend *v.* Shipp's Heirs,[2] the court said: "If owners could not have the exclusive use and control of real estate, it would be in the power of others, by taking possession without permission and making larger improvements, to acquire a property in the soil. It would be manifestly repugnant to the first principle of property, of society and of free government, that any person should pay for work and labor done without his consent." The practice of compensating the occupant for improvements, or of making deductions therefor, is also discountenanced as tending to encourage depredations upon private property.[3] Mr. Sedg-

[1] See Billings *v.* Hall, 7 Cal. 1, and the authorities discussed.

[2] Cooke (Tenn.), 293.

[3] See Frear *v.* Hardenbergh, 5 Johns. (N. Y.) 271–277.

wick says:[1] "In regard to improvements made on the land while out of the possession of the rightful owner, the general principle of the English law, as well as our own, is, that the owner recovers his land in ejectment without being subjected to the condition of paying for improvements which may have been made upon it by any intruder, or occupant without title. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril, and whether acting on an honest belief in his title or without color of right, the party who is ousted loses all benefit of his expenditures."

Mr. Mayne,[2] after remarking that the doctrine as to the allowance for improvements does not seem well founded as a mere matter of natural justice, says: "The improvements may be very valuable, but they may be quite unsuited to the use which the plaintiff intends to make of his land. Even if they are such as he would have wished to make, they may also be such as he could not have afforded to make. To compel him to pay for them, or to allow for them in damages, which is all the same, is quite as unjust as it would be to lay out money in any other investment for a man, and then compel him to adopt it *nolens volens*."

§ 691. *The civil law.*—The civil law, however, drew a clear distinction between the possessor *bonæ fidei* and *malæ fidei*: the latter was not allowed to recover for improvements or meliorations, but the former was permitted to mitigate the damages in an action brought by the rightful owner, by offsetting the value of permanent and useful improvements, made upon the land in good faith, to the extent of the rents and profits claimed.[3] This distinction in the

[1] Sedgwick on Damages (7th ed.), vol. I, p. 246; see 2 Kent's Comm. p. 335; Lord Stair's Institutions, vol. I, p. 137; Frear *v.* Hardenbergh, 5 Johns. (N. Y.) 272.

[2] Wood's Mayne on Damages, p. 554 [* 394], § 586; see Oberich *v.* Gilman, 31 Wis. 495; Ford *v.* Holton, 5 Cal. 319.

[3] Sedgwick on Damages (7th ed.), vol. I, pp. 247–257; see Pilling *v.* Armit-

civil law has obtained in our courts, and, as we shall presently see, it is an established principle, in the various States, to allow a *bona fide* occupant, under color of title, to mitigate the claim for damages and mesne profits by introducing proof of the value of permanent and useful improvements.[1] In some States a *bona fide* occupant may recover the value of the improvements in excess of the mesne profits, and his claim for the excess is made a lien upon the land, payment of which may be exacted as a condition precedent to a recovery of the possession by the owner.[2]

§ 692. *Griswold v. Bragg.*—In Griswold *v.* Bragg,[3] one of the most recent and well considered cases upon the subject of improvements, Shipman, J., said: "The statute practically impresses upon the land of a successful plaintiff in ejectment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid. There is a natural equity which rebels at the idea that a *bona fide* occupant

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age, 12 Ves. 84; Bright *v.* Boyd, 1 Story, 479, and authorities cited; Just. Inst. lib. 2, tit. 1, §§ 30–32; 1 Story's Eq. Jurisprudence, §§ 388–799a, note; Putnam *v.* Ritchie, 6 Paige (N. Y.), 390, and cases cited; Green *v.* Biddle, 8 Wheat. 1; Bell's Comm. on Law of Scotland, p. 139, § 538. "The disseizor shall recoup all in damages which he hath expended in amending of the houses." Coulter's Case, 5 Coke, 30 (vol. III, p. 60). "It is a maxim suggested by nature, that reparations and meliorations bestowed upon a house, or upon land, ought to be defrayed out of the rents. Governed by this maxim we sustain no claim against the proprietor for meliorations if the expense exceed not the rents levied by the *bona fide* possessor." Kame's Equity, p. 421.

[1] Woodhull *v.* Rosenthal, 61 N. Y. 382; Davis *v.* Louk, 30 Wis. 308; Yount *v.* Howell, 14 Cal. 465; Marlow *v.* Adams, 24 Ark. 109; Wood *v.* Wood, 83 N. Y. 575; Walker *v.* Humbert, 55 Penn. St. 407; Ewalt *v.* Gray, 6 Watts (Penn.), 427; Morrison *v.* Robinson, 31 Penn. St. 456; McKinly *v.* Holliday, 10 Yerg. (Tenn.) 477.

[2] See Abbey *v.* Merrick, 27 Miss. 320; Hatcher *v.* Briggs, 6 Oregon, 31; Griswold *v.* Bragg, 18 Bla. C. C. 202.

[3] 18 Bla. C. C. 202.

and reputed owner of land in a newly settled country, where unimproved land is of small value, or where skill in conveyancing has not been attained, or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet, in a comparatively newly organized State, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon this subject, '*Nemo debet locupletari ex alterius incommodo*,' tersely expresses the antagonism against the enrichment of one out of the honest mistake and to the ruin of another. It is obvious that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital; but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner." The occupant, as we have seen, is liable for rents and profits, but he cannot be said to have received the mesne profits which were expended upon or returned to the land in the form of betterments, and should not therefore, in equity and justice, be compelled to account for them.

§ 693. *Improvements allowed in equity.*—The principle of allowing *bona fide* occupants the value of improvements made upon lands, under a mistaken belief as to ownership, has a prominent place in equity jurisprudence. Indeed, the principles of the civil law from which, as we have said, the doctrine of allowing *bona fide* occupants for improvements is derived, has been introduced into the modern procedure, regulating mesne profits and improvements, largely through the instrumentality of and by analogy with equity pro-

cedure, and is based upon equitable grounds.[1] The improvement acts have been construed merely to change the form of relief without altering its extent.[2] If the plaintiff seeks the aid of a court of equity to enforce his title against an innocent person, who has expended money and labor upon lands, supposing himself to be the absolute owner, aid will be extended to him, in equity, only upon the terms that he shall make due compensation to such innocent person, to the extent of the benefits which will be received from the improvements.[3] Questions of this character arise in equity where the plaintiff's claims are purely of an equitable character, and the occupant seeking compensation for improvement was vested with the legal title.[4] If the plaintiff owns the legal estate, he is not entitled, as we have seen, to maintain ejectment in the form of a bill in chancery,[5] or by a proceeding commonly denominated an ejectment bill,[6] but must resort to an action at law, in the nature of ejectment, and determine the questions relating to damages and improvements either in that action, or in the consequential action for mesne profits. Hence questions of the right of an occupant to defalk improvements, against the owner of the legal title, cannot generally arise in equity.

§ 694. *Bona fide occupant under claim of title.*—It is uniformly established, in the modern procedure, as we have said, that only a *bona fide* occupant of land will be permit-

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[1] See Woodhull *v.* Rosenthal, 61 N. Y. 382–397; Green *v.* Biddle, 8 Wheat. 1.

[2] Townsend *v.* Shipp's Heirs, Cooke (Tenn.), 293.

[3] See Bomberger *v.* Turner, 13 O. S. 263; Sale *v.* Crutchfield, 8 Bush (Ky.), 636; McLaughlin *v.* Barnum, 31 Md. 425; Bright *v.* Boyd, 1 Story, 494; Troost *v.* Davis, 31 Ind. 34; Mickles *v.* Dillaye, 17 N. Y. 80; Benedict *v.* Gilman, 4 Paige Ch. (N. Y.) 58; Green *v.* Biddle, 8 Wheat. 1; 2 Story's Eq. Jur. §§ 799a.–1237; Putnam *v.* Ritchie, 6 Paige Ch. (N. Y.) 390–405; Robinson *v.* Ridley, 6 Madd. 2; Attorney-General *v.* Baliol College, 9 Mod. 411; New Orleans *v.* Gaines, 15 Wall. 624.

[4] See Putnam *v.* Ritchie, 6 Paige Ch. (N. Y.) 390–403.

[5] Lewis *v.* Cocks, 23 Wall. 466; see § 170.

[6] Young *v.* Porter, 3 Woods' C. C. 342; Loker *v.* Rolle, 3 Ves. Jr. 4, and note; Cavedo *v.* Billings, 16 Fla. 261; see §§ 168, 169.

ted to mitigate the plaintiff's claim for damages, and mesne profits, by offsetting the value of his improvements; and the same principle prevails in States which give the occupant a lien upon the land, for the surplus of the meliorations above the damages and mesne profits. The claim for betterments is founded upon equitable grounds, and it would be manifestly inequitable to the owner, and, indeed, a highly dangerous policy, to make allowances for improvements to one who made the expenditures with full knowledge of the adverse claim.[1] The question of the occupant's good faith is for the jury. Hence, a charge which takes from the jury the question of good faith, and contains a direction to allow the defendant for his improvements, is erroneous.[2] This leads to the discussion of the question as to who may be considered a *bona fide* occupant.

A *bona fide* possessor of land is one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it.[3] And an occupant of land, under color of title, is presumed to be acting in good faith until the contrary appears. The court will not presume that the possessor is a trespasser or wrongdoer.[4] "Possession," says Kent,[5] "is always presumption of right, and it stands good until other and stronger evidence destroys that

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[1] Woodhull *v.* Rosenthal, 61 N. Y. 382; Wood *v.* Wood, 83 N. Y. 575; Thompson *v.* Thompson, 16 Wis. 91; Morrison *v.* Robinson, 31 Penn. St. 456; Tatum *v.* McLellan, 56 Miss. 352; Bellows *v.* Copp, 20 N. H. 492; Ragsdale *v.* Gohlke, 36 Tex. 286; Burkle *v.* Ingham, Circuit Judge, 42 Mich. 513; Wales *v.* Coffin, 100 Mass. 177; Bristoe *v.* Evans, 2 Over. (Tenn.) 341; Kille *v.* Ege, 82 Penn. St. 102; Bedell *v* Shaw, 59 N. Y. 46; Townsend *v.* Shipp's Heirs, Cooke (Tenn.), 293. The right to set off the value of the improvements is not affected by the fact that the plaintiff is an infant or a *feme covert*. Potts *v.* Cullum, 68 Ill. 217; see Wilie *v.* Brooks, 45 Miss. 542.

[2] Powell *v.* Davis, 19 Tex. 380.

[3] Green *v.* Biddle, 8 Wheat. 1; Cole *v.* Johnson, 53 Miss. 94; Morrison *v.* Robinson, 31 Penn. St. 456; Whitney *v.* Richardson, 31 Vt. 300; Bright *v.* Boyd, 1 Story, 478; Putnam *v.* Ritchie, 6 Paige Ch. (N. Y.) 390; Henderson *v.* McPike, 35 Mo. 255; Dorn *v.* Dunham, 24 Texas, 366.

[4] Stark *v.* Starr, 1 Sawyer, 15. [5] Smith *v.* Lorillard, 10 John. (N. Y.) 356.

presumption." Knowledge of the adverse title, as we have said, is fatal to the occupant's claim for expenditures.[1] Thus, a person who takes a title, knowing it to be defective, is not entitled to compensation for improvements, as against the true owner, even though the latter saw the improvements in progress and did not object.[2] So, where the defendant entered as a trespasser, or with full knowledge of the inferiority of his title, having acquired the possession as well as the pretended title by fraudulent representations, the court held that it would not extend to him the relief to which a *bona fide* occupant is entitled.[3] So, where a party wrongfully retains a title which he knows he ought to convey to another, he is not in a condition to claim payment for improvements.[4] This principle is further illustrated in the case of Tatum *v.* McLellan,[5] in the Supreme Court of Mississippi, where it was held that a trustee of land wrongfully retaining possession of it, in opposition to the provisions of the trust instrument which directed him to sell it, was not entitled to an allowance for expenditures in making improvements. So, one who forcibly disseizes another, and makes improvements, cannot be allowed for them.[6] And improvements made by a guardian upon lands of his ward, fraudulently purchased by the guardian, will not be reimbursed.[7] The rule running through these cases needs only to be stated to commend it as sound, but an exception of doubtful utility remains to be considered.

§ 695. *Exception to the general rule.*—In Texas the rule laid down in Green *v.* Biddle,[8] that a *bona fide* possessor

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[1] Woodhull *v.* Rosenthal, 61 N. Y. 382.

[2] Walker *v.* Quigg, 6 Watts (Penn.), 87.

[3] Mosely *v.* Miller, 13 Bush (Ky.), 408.

[4] Thompson *v.* Thompson, 16 Wis. 91.

[5] 56 Miss. 352.

[6] Morrison *v.* Robinson, 31 Penn. St. 456.

[7] Eberts *v.* Eberts, 55 Penn. St. 110; see Barrett *v.* Cocke, 12 Heisk. (Tenn.) 566.

[8] 8 Wheat. 1.

must be one who is ignorant that his title is contested, by any person claiming a better right, is limited. The court concede that the principle stated is the general rule, but say there are cases where, though aware of the adverse claim, the possessor may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be a possessor in good faith. In other words, the principal test is declared to be, has the occupant reasonable grounds to believe himself the true owner of the land. The notice of the adverse claim would not, necessarily, destroy the good faith of the possessor, if his confidence in his title was unshaken.[1] In Hill *v.* Spear,[2] it was held that the fact that the defendant purchased land, knowing that his vendor held it under a deed from a married woman defectively acknowledged, was not inconsistent with his good faith in making such purchase, and the court decided that it was error, in such a case, to exclude from the jury evidence of the value of improvements.[3] It will be apparent, at a glance, that the principle embodied in these Texas cases, is highly important in its bearing upon the rights of occupants to recover for improvements. If actual notice of the adverse title is not a conclusive test, in determining the question of good faith, then the occupant might be allowed for improvements down to the day of trial, merely upon proof that his counsel had advised him, and he honestly believed, that the adverse title was absolutely without merit, or upon showing that he fully expected, and had reasonable grounds to believe, that he would be able to defeat the hostile claim. The litigants on either side, as a general rule, expect to succeed, and can, usually, furnish a multitude of plausible reasons to justify that belief, and if the test of actual notice is departed from, it would result that almost every possessor could prove himself to be an occupant in

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[1] See Sartain *v.* Hamilton, 12 Tex. 222; Dorn *v.* Dunham, 24 Tex. 366; Hutchins *v.* Bacon, 46 Tex. 408.

[2] 48 Tex. 583.

[3] See Berry *v.* Donley, 26 Tex. 737.

good faith, and thus entitled to recover for improvements. If the occupant learns of an adverse title, it is but just and reasonable that the law should regard subsequent improvements as having been made at his peril. We have seen that one of the great objections to allowing for improvements, in any case, is, that the character of the improvements may not be suitable to the property, or such as the owner needed, or could afford, or desired to have made upon the land. Under the rule in Texas, the occupant, learning of the adverse claim, might "improve the owner out of his property." The principle embodied in these cases, constitutes a dangerous innovation upon a settled rule of law, and if adopted would render the determination of the character of the possession one of great difficulty and uncertainty, and, in many cases, a recovery, or allowance for improvements, by an occupant really holding in bad faith, would be a possibility.

§ 696. *Constructive notice not sufficient.*—The constructive notice of an adverse title, which the law implies from the record of a deed, is not sufficient to preclude an occupant from recovering for improvements or betterments, if he, in fact, purchased in good faith, and with the supposition that he was obtaining a perfect title in fee.[1] The mere fact that a fatal defect in the occupant's title is discoverable, by an examination of the records of the county, is not enough to deprive him of the right to the value of his improvements in the ejectment suit. There must be brought home to him either knowledge of an outstanding paramount title, or some circumstance from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title. Thus, in Cole *v.* Johnson,[2] it appeared that certain defects in probate court proceedings vitiated the title under which the occupant purchased, and these were patent upon the record, and could have been ascertained by inspec-

[1] Whitney *v.* Richardson, 31 Vt. 300; Green *v.* Dixon, 9 Wis. 532; Hatcher *v.* Briggs, 6 Oregon, 31.

[2] 53 Miss. 94.

tion. Under these circumstances it was contended that the possessor could not claim to have become a purchaser, or to have paid his money, in good faith. But the court held that what was meant by the requirement of good faith was, that the money should have been genuinely paid, and without knowledge or suspicion, on the part of the purchaser, of fraud or imperfection. "The term," says the court, "is used in contradistinction to bad faith, and not in the technical sense in which it is applied to conveyances of title, in which latter sense, a party wholly free from moral *mala fides*, is still frequently held not to be a *bona fide* purchaser."[1] Notice in this connection does not mean direct and positive information, but anything calculated to put a man of ordinary prudence on the alert. Hence, where the statute adopts the word "notice" and "good faith," the terms are to be interpreted with the full force and meaning which attached to them as inseparable incidents in the system of jurisprudence, from whence they were derived.[2]

§ 697. *Claim and color of title.*—An occupant, to successfully claim for improvements, must ordinarily show not only that he occupied and claimed the land in good faith, but also under color of title; *i. e.*, under some instrument or paper writing presenting the appearance or semblance of title.[3] By statute, in some States, the possessor asserting a betterment claim is required to prove occupancy under color of title. Where no such enactment exists, color of title is a highly important and practically indispensable element of proof, in showing adverse occupancy and good faith. It does not necessarily follow that the claim and color of title

[1] See Learned *v.* Corley, 43 Miss. 687; Lee *v.* Bowman, 55 Mo. 400; Dothage *v.* Stuart, 35 Mo. 251; Morrison *v.* Robinson, 31 Penn. St. 456.

[2] Lee *v.* Bowman, 55 Mo. 400; see Cole *v.* Johnson, 53 Miss. 94.

[3] See Field *v.* Columbet, 4 Sawyer, 523; Lunquest *v.* Ten Eyck, 40 Iowa, 213; Hatcher *v.* Briggs, 6 Oregon, 31; Krause *v.* Means, 12 Kan. 335; Thomas *v.* Thomas, 16 B. Mon. (Ky.) 420; Barlow *v.* Bell, 1 A. K. Marsh. (Ky.) 246; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Vallé *v.* Fleming, 29 Mo. 152; Bright *v.* Boyd, 1 Story, 478; Cole *v.* Johnson, 53 Miss. 94; Love *v.* Shartzer, 31 Cal. 487.

which will sustain a recovery for improvements must be such as will ripen into an adverse possession. Thus, in Bedell *v.* Shaw,[1] it was held that possession, to be adverse, must be under a claim of title in fee. An occupant under an assessment lease was decreed not to hold in hostility to the true title, but it was, nevertheless, decided that one who entered under such a lease, in good faith, or those who held under him, were entitled to be allowed for valuable and permanent improvements placed upon the land.[2] So the fact that the tenant had a good estate for life, will not defeat the claim for betterments, if he had reason to believe that he had a title in fee.[3] The general subject of color of title will be presently discussed.

§ 698. *Improvements in excess of mesne profits.*—The general policy of the law, where no express statute intervenes, is to allow the value of improvement only by way of set-off against or in mitigation of damages for the detention of the land, and the value of the betterments cannot usually exceed the amount of the plaintiff's damages and mesne profits.[4] This rule is followed in a recent ejectment case in New York,[5] in which the Court of Appeals in that State say that, at best, one who puts improvements upon the lands of another, is only allowed to mitigate the damages by offsetting the improvements to the extent of the rents and profits claimed.[6] So, in some States, evidence of improvements cannot be given where no claim is made for mesne profits,[7] while in others, as already stated, the excess of the

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[1] 59 N. Y. 46.

[2] Bedell *v.* Shaw, 59 N. Y. 46.

[3] Plimpton *v.* Plimpton, 12 Cush. (Mass.) 458; see Wales *v.* Coffin, 100 Mass. 177.

[4] Yount *v.* Howell, 14 Cal. 465; McKinly *v.* Holliday, 10 Yerg. (Tenn.) 477; Woodhull *v.* Rosenthal, 61 N. Y. 382; Davis *v.* Louk, 30 Wis. 308.

[5] Wood *v.* Wood, 83 N. Y. 575.

[6] See Bedell *v.* Shaw, 59 N. Y. 46; Jackson *v.* Loomis, 4 Cow. (N. Y.) 168; Merritt *v.* Scott, 81 N. C. 385; Dowd *v.* Faucett, 4 Dev. (N. C.) Law, 92; Scott *v.* Mather, 14 Tex. 235.

[7] Ford *v.* Holton, 5 Cal. 319; Learned *v.* Corley, 43 Miss. 687.

value of the improvements is impressed as a lien upon the land.[1] Texas furnishes an example of the latter policy. In that State the right to recover for improvements is not dependent upon the claim for rents and profits, nor is it limited to cases where rent is claimed, or compensation for use and occupation allowed. It is independent of such claim on the part of the plaintiff.[2]

§ 699. *What constitutes an improvement.*—An improvement, or melioration, is something done or put upon the land which the occupant cannot remove, or carry away with him, either because it has become physically impossible to separate it from the land, or, in contemplation of law, it has been annexed to the soil, and is therefore to be considered as a fixture or part of the freehold. The character of the improvement must be such as to make the land more valuable in the future for the ordinary purposes for which such property is owned and used. Hence it is said that a structure or labor may be as permanent in every sense of the word as the pyramid of Cheops, and yet add nothing to the usefulness or value of the land, for the ordinary purposes to which it is devoted. The test is, does the melioration make the land more valuable to the owner.[3] It is clear that if the plaintiff will receive no benefit from the expenditures or improvements, the defendant cannot be allowed for them. Thus, in Woodhull *v.* Rosenthal,[4] in the New York Commission of Appeals, it appeared that the plaintiff claimed a leasehold interest, and that his term expired pending the action. He recovered judgment for mesne profits, and the court refused to allow to the defendant, as an improvement, the value of a building erected by him upon the land, be-

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[1] Abbey *v.* Merrick, 27 Miss. 320; Griswold *v.* Bragg, 18 Bla. C. C. 202; Hatcher *v.* Briggs, 6 Oregon, 31; see § 691.

[2] Dorn *v.* Dunham, 24 Tex. 366; see Scott *v.* Mather, 14 Tex. 235; Saunders *v.* Wilson, 19 Tex. 194.

[3] See Stark *v.* Starr, 1 Sawyer, 15; Bright *v.* Boyd, 1 Story, 494; Johnson *v.* Gresham, 5 Dana (Ky.), 547.

[4] 61 N. Y. 382, per Dwight, C.

cause it did not increase the value of the plaintiff's interest, and was of no benefit to him as lessee, the term having expired. The defendant is entitled to give evidence of such improvements only as are of a lasting and permanent character, and which give a permanently increased value to the land.[1] By the term value, as applied to improvements, is meant the value to the real owner.[2]

§ 700. *Improvements must be made upon the land.*—The expenditures must be incurred in making improvements *upon the land*, and not beyond the limits of the demanded premises. Thus a claim for the construction of a sidewalk which was located outside the limits of the premises recovered, was excluded.[3] So in Coburn *v.* Ames,[4] in the Supreme Court of California, it appeared that a lease had been given of lands bounded by low-water mark, on the shore of the ocean, and that the lessee had constructed a wharf extending from the shore into the water beyond low-water mark. The court decided that the portion of the wharf beyond low-water mark was not an improvement upon the demised premises, nor appurtenant thereto, nor was it affixed to the land within the meaning of the statute, even though attached to a wharf on the demised premises by nails, bolts and screws.

§ 701. *Ornamental improvements.*—In Mississippi, any allowance for ornamental improvements is expressly excepted from the statutes,[5] and this policy of the law is of general application.[6] In Whitledge *v.* Wait,[7] the Court of

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[1] Ege *v.* Kille, 84 Penn. St. 334.

[2] Bristoe *v.* Evans, 2 Over. (Tenn.) 341. If the only interest which a possessor has in land consists in the right to recover the value of improvements made by him upon it, such claim is not subject to sale on execution. Hendricks *v.* Snediker, 30 Texas, 296.

[3] Curtis *v.* Gay, 15 Gray (Mass.), 36.

[4] 52 Cal. 385.

[5] See Gaines *v.* Kennedy, 53 Miss. 103.

[6] See Reed *v.* Reed, 10 Pick. (Mass.) 398; Woodward *v.* Phillips, 14 Gray (Mass.), 132.

[7] Sneed (Ky.), 335.

Appeals of Kentucky, after laying down the general rule that a *bona fide* possessor is entitled to an allowance for lasting and valuable improvements, made on the premises, remark: "Cases may arise which may be exceptions to this general rule without impeaching it, as where unnecessary, expensive, useless, fanciful, or ornamental improvements should be made or done with a design to render it out of the power of the proprietor to pay for them, and, therefore, to abandon his claim to the land." In cases where the improvements are made without the motive instanced in Whitledge *v.* Wait, it is not always an easy task to determine the question of what constitute useful and permanent as distinguished from ornamental meliorations. Thus, expenditures upon property suitable for a country residence might be allowed which would be manifestly out of place upon lands useful only for agricultural purposes. The adaptability of the improvements is the test, and this question must, of course, be determined with reference to the peculiar facts of each particular case.

§ 702. *Perishable improvements.*—Improvements which are temporary and perishable in their nature cannot be allowed to the occupant. In Morris *v.* Tinker,[1] the improvements consisted of a basin and wharf; the former had to be dug out and cleaned two or three times a year, and the latter repaired annually. The court held that, as the improvements, owing to their character and the destructive influences to which they were exposed, had to be renewed periodically, they could not be said to add any permanent value to the lands, and were properly disallowed. Such improvements do not come within the rule already stated, that they must be permanent, and add to the future value of the property for the ordinary purposes for which it is to be devoted.[2]

§ 703. *Expenditures in experimenting for profits.*—In

[1] 60 Ga. 466.

[2] See Stark *v.* Starr, 1 Sawyer, 15; see § 699.

Noble *v.* Biddle,[1] it was held that an occupant, who received profits from one part of the land, could not set off his losses, occasioned by experimenting for profits, on other parts of the land. The doctrine of equitable defense, in an action for mesne profits, goes no further than to allow the defendant to defalk the value of improvements that are advantageous and useful, and give the land additional value. A trespasser or wrongdoer cannot be allowed to improve the owner out of his property, by making expenditures merely to suit his whim or caprice, or by experimenting in the hope of gain. The equity which will sustain his claim for the improvement is founded upon the fact that his labor and money have gone to the actual benefit of the owner by really enhancing the worth of his property.

§ 704. *Payment of incumbrances.*—The subject of allowance for taxes and assessments, paid by the occupant, has already been noticed, and the unsatisfactory state of the law discussed.[2] The question of the right of a *bona fide* possessor of real estate, who has paid out money in discharging valid existing incumbrances, or charges upon the estate, having no notice of any infirmity in his title, has been before the courts in different forms, and it may be regarded as a settled rule, in equity, that he is entitled to be repaid the amount of such payments by the true owner seeking to recover the estate from him.[3] This rule was probably derived from the Roman law, and was applied by Mr. Justice Story to a case where the money was appropriated, not to the discharge of a judgment or mortgage lien, but to the payment of the debts of a testator, which were a general charge upon the estate.[4]

§ 705. *Improvements made after suit brought.*—It has been shown that constructive notice, such as the record of a deed, is not such notice of an adverse title as will deprive

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[1] 81* Penn. St. 430. [2] See § 688. [3] Wilie *v.* Brooks, 45 Miss. 542.
[4] See Bright *v.* Boyd, 1 Story, 498; Cook *v.* Toumbs, 36 Miss. 685.

a party of the character of an occupant in good faith. The question of the propriety of allowing for improvements made by an occupant after the institution of an ejectment, or other legal proceeding, concerning the title, has frequently been before the courts, and it may be regarded as a settled principle of law that the occupant cannot recover for or offset improvements made by him after suit brought.[1] It is impossible to instance any form of notice of an adverse claim which could be more explicit and actual than the issuance and service of process in an action based upon the hostile title. Jackson *v.* Loomis,[2] if the reporter's statement of facts is correct, countenances the principle that the value of improvements made pending the ejectment may be given in evidence in mitigation of damages. The distinction between improvements placed upon the land before and after suit brought seems to have been overlooked. Chief Justice Savage, who wrote the opinion, said: "If the plaintiff is not content with acquiring possession of his property in an improved condition, after he has neglected to assert his title for a number of years, it is certainly equitable that the defendant should be allowed the value of his improvements, made in good faith, to the extent of the rents and profits claimed." This is all true, but is not applicable to improvements made after suit brought. The learned court overlooks the fact that the owner, who is invoking the aid of the court to be let into possession, is no longer guilty of laches, which is the basis of the equitable claim for improvements, while the possessor, by actual notice of the suit, has lost the character of a *bona fide* occupant. In Pennsylvania, evidence as to valuable improvements, made between the first and second actions of ejectment, was excluded, the court declaring that there was no

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[1] Haslett *v.* Crain, 85 Ill. 129; Morrison *v.* Robinson, 31 Penn. St. 456; Gaines *v.* Kennedy, 53 Miss. 103; see Woodhull *v.* Rosenthal, 61 N. Y. 382; Taylor *v.* Whiting, 9 Dana (Ky.), 399.

[2] 4 Cowen (N. Y.), 168.

principle of law which required the defeated party to bring his second action forthwith, at the risk of being improved out of his estate.[1] So, evidence that the defendant in possession under a parol gift made improvements, at a date subsequent to a dispute about the gift, has been rejected in that State.[2] So, in Indiana, a defendant in ejectment was not allowed to prove that he had made permanent and lasting improvements, subsequent to a sheriff's sale of the land to the plaintiff, and before action brought.[3] In was even held in Haslett *v.* Crain,[4] in the Supreme Court of Illinois, that improvements placed upon the land after notice of title in another, were not to be regarded as made before notice merely from the fact of having been completed in pursuance of a contract with reference thereto entered into prior to the notice.

§ 706. *Improvements made by grantor or warrantor.*— In Winslow *v.* Newell,[5] it was held that a party who purchased with the belief that he acquired a good title, could not recover for improvements made by his grantor who was not an occupant in good faith, and knew he was without title, although the last purchaser may have paid for the full value of the improvements.[6] The principles governing the law merchant do not of course apply to a purchaser of this character, and the grantee could acquire no right of action or of set-off, which his grantor did not possess. If, however, the defendant is *bona fide* in possession, under a claim of right, with a warranty from a previous possessor in good faith, who has made improvements, it is only just that he should have the benefit of such improvements, so far as they are in excess of the rents due from the first possessor. The plaintiff gets the improvements by his judgment, and as the defendant succeeds under his deed to all the rights of

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[1] Wilkinson *v.* Pearson, 23 Penn. St. 117.
[2] Aurand *v.* Wilt, 9 Penn. St. 54.
[3] Osborn *v.* Storms, 65 Ind. 321.
[4] 85 Ill. 129.
[5] 19 Vt. 164.
[6] See Griswold *v.* Bragg, 18 Bla. C. C. 202.

his warrantor, there is great equity in allowing him to set up whatever defense his warrantor might have interposed.[1] The defendant is, of course, not liable for mesne profits taken prior to his own entry, if he makes no claim for improvements. If, however, he takes credit for prior improvements, all profits chargeable to former occupants must first be deducted.

§ 707. *Basis of valuation—Apportionment.*—In a case which arose in Mississippi, it was held that the value of the improvements should be assessed on a basis co-extensive in time with the estimate of rents and profits which they contribute to produce, so as to allow the defendant for all improvements made by him of which the plaintiff recovers the benefit.[2] It has been held in Georgia, that the defendant in ejectment is entitled to the value which the improvements give to the land, and that he is not limited to their actual cost.[3] The value of the betterments, at the time of trial, is the correct basis of the award.[4] The jury in assessing mesne profits and the value of improvements, may deal with the entire tract together, although the defendant claims the improved part under a separate conveyance.[5]

§ 708. *Titles which will not support claim for improvements.*—Improvements of any kind, put upon land by a life-tenant during his occupancy, constitute no charge upon the land when it passes to the remainderman.[6] So a vendee of land under a parol agreement, who has failed to comply with his contract, and abandoned the possession without fault of the vendor, cannot recover for improvements put by him upon the land.[7] So, in Massachusetts, a town

[1] Willingham *v.* Long, 47 Ga. 540; see Morrison *v.* Robinson, 31 Penn. St. 456.

[2] Johnson *v.* Futch, 57 Miss. 73.

[3] Willingham *v.* Long, 47 Ga. 540; Thomas *v.* Malcom, 39 Ga. 328; see Wilie *v.* Brooks, 45 Miss. 542; Booth *v.* Van Arsdale, 9 Bush (Ky.), 718.

[4] Wendell *v.* Moulton, 26 N. H. 41; Griswold *v.* Bragg, 18 Bla. C. C. 202.

[5] Johnson *v.* Futch, 57 Miss. 73. See § 685.

[6] Merritt *v.* Scott, 81 N. C. 385.

[7] Rainer *v.* Huddleston, 4 Heisk. (Tenn.) 223.

which proceeds illegally to take lands for a school-house, is not entitled to an allowance for improvements.[1] And in Texas, a tax-title does not sustain a suggestion of possession and improvements in good faith,[2] and something more is required to support the suggestion of good faith and claim for improvements, than a deed from one having neither title nor possession.[3] So improvements and expenditures on the faith of a contract void by the statute of frauds, made with the knowledge of the owner, give no equity to the purchaser to retain possession until repaid.[4] And where the defendant set up that he entered under an agreement with plaintiff, by which he was to be paid for the improvements, it was held to be no defense to the ejectment; the remedy of the parties, in such a case, is by a direct action upon the agreement.[5] In Hatchett *v.* Conner,[6] the Supreme Court of Texas say: "The jury were instructed in substance, that, if the appellant honestly believed his title to be good, or that his vendor's title was good, he was entitled to the value of his improvements, &c. This is clearly erroneous with reference to the facts of this case, as it is not pretended that the appellant has shown that either he or his vendor hold by any claim or title derived from the government. It is difficult to perceive how a party can honestly believe that his title is good, or how his possession can be in good faith, when he is unable to trace his title back to the government, the only source of title to land. While a defective or irregular apparent title may be the basis of a recovery for improvements made in

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[1] Spalding *v.* Chelmsford, 117 Mass. 393; Crosby *v.* Dracut, 109 Mass. 206.

[2] Robson *v.* Osborn, 13 Tex. 298; see Oberich *v.* Gilman, 31 Wis. 495.

[3] Miller *v.* Brownson, 50 Tex. 583.

[4] Harden *v.* Hays, 9 Penn. St. 151.

[5] Norris *v.* Hoyt, 18 Cal. 217. A parol contract to pay for improvements upon land is not within the statute of frauds, as being a sale of an interest in lands. Thouvenin *v.* Lea, 26 Tex. 612; Godeffroy *v.* Caldwell, 2 Cal. 489; Lower *v.* Winters, 7 Cowen (N. Y.), 263; 4 Kent's Com. p. 450.

[6] 30 Tex. 104.

good faith, a void title (if such an expression may be used) cannot be."[1] This is practically equivalent to holding that color of title consists of an apparent chain of title from the original source—the government. This, as we shall see, is not the true test in cases of adverse possession. The requirement that the occupant, to establish good faith, should trace an apparent title from the government is too exacting, and would, in many instances, practically defeat the operation of the improvement statutes.[2]

§ 709. *Improvements by husband on wife's land.*—On the death of a wife without issue, the husband was held, in Tennessee, to have no claim against his wife's heirs for the value of the improvements, made by him on the land, though made with her assent and approbation.[3] In a case which arose in Massachusetts, an owner of land died, leaving a widow and children. The widow married again, and the husband improved and lived on the property, and enjoyed the rents and profits, thinking it belonged to his wife. On her death the children brought a writ of entry, and the husband was not allowed compensation for his improvements.[4] So, as we have seen, it has been held in New York, that a married woman can maintain ejectment for her lands against her husband, and the fact that he had made improvements, while they resided together thereon, constituted no defense, and, at best, the improvements could only be allowed to the extent of the mesne profits claimed.[5] It would be practically impossible for a husband to prove that he had held his wife's land adversely, having no knowledge of her title.

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[1] See Rogers *v.* Bracken, 15 Tex. 568; Robson *v.* Osborn, 13 Tex. 298; Pitts *v.* Booth, 15 Tex. 454.

[2] In Michigan the improvement statute is interpreted to apply only to cases in which the plaintiff establishes a title in fee simple. Burkle *v.* Ingham Circuit Judge, 42 Mich. 513.

[3] Marable *v.* Jordan, 5 Humph. (Tenn.) 417.

[4] O'Brien *v.* Joyce, 117 Mass. 360.

[5] Wood *v.* Wood, 83 N. Y. 575; see Minier *v.* Minier, 4 Lans. (N. Y.) 424.

§ 710. *Mortgagee in possession.*—An occupant having really only the rights of a mortgagee in possession, but believing himself to have an absolute title, and who, in good faith, makes valuable improvements, is entitled to be paid for them.[1] Thus, in Mickles *v.* Dillaye,[2] it appeared that valuable and permanent improvement had been made, in good faith, by a party standing upon the legal footing of a mortgagee in possession, but who believed that he held the title to the property as the absolute owner. The mortgagor brought a bill to redeem, and the court held that, as the plaintiff found himself compelled to resort to a court of equity to enforce his rights, he had placed himself within the range of the great principle that he who seeks equity must himself do equity, and that, as the improvements had enhanced the value of the property, and were really the inspiring cause of the suit, and the defendant had occupied, in the belief that the plaintiff had no right to the property, and the plaintiff had, for a long time acquiesced in the adverse possession of the premises by the defendant, and thereby contributed to the mistake under which the latter acted, the plaintiff, if permitted to redeem, must pay for the improvements to the extent of the benefit.[3] These cases must be distinguished from the cases which hold that the mortgagee is not to be allowed for general improvements, made without the acquiescence or consent of the mortgagor, especially if the improvements tend to cripple the power of redemption.[4]

§ 711. *Co-tenants.*—In the case of Logan *v.* Goodall,[5] in the Supreme Court of Georgia, it was held that one

[1] Green *v.* Dixon, 9 Wis. 532; Neale *v.* Hagthrop, 3 Bland's Ch. (Md.) 590.

[2] 17 N. Y. 80. See McSorley *v.* Larissa, 100 Mass. 270.

[3] See Dows *v.* Congdon, 28 N. Y. 132; Benedict *v.* Gilman, 4 Paige's Ch. (N. Y.) 62; Hubbell *v.* Moulson, 53 N. Y. 225; Atkinson *v.* Morrissy, 3 Oregon, 332.

[4] Moore *v.* Cable, 1 Johns. Ch. (N. Y.) 385; see Mickles *v.* Dillaye, 17 N.Y. 80–91; Russell *v.* Blake, 2 Pick. (Mass.) 506; Woodward *v.* Phillips, 14 Gray (Mass.), 132. As to improvements made by a vendee, where the vendor's title has failed, see § 323.

[5] 42 Ga. 95.

tenant in common might recover an undivided half interest, in ejectment against the co-tenant, who was in adverse possession of the whole. Whatever equities there might be, between the co-tenants, based upon improvements made in good faith, and under the belief of a perfect title, were left unadjusted, but the court remarked that equity would not permit injustice to be done, nor allow one tenant in common to get the benefit of improvements made by his co-tenant, under the honest belief that he held the whole title.[1] The Supreme Court of Pennsylvania held, in Walker *v.* Humbert,[2] that, in a claim for mesne profits made by a co-tenant against his companion, the latter was not chargeable with rent paid in the form of permanent improvements on the land. In Massachusetts, it has been decided, on a writ of entry by two tenants in common against a third, that the demandants might recover rents and mesne profits, and that the tenant was also entitled to have the value of his improvements ascertained, and to recover compensation therefor.[3] In Wisconsin, it was decided that the Betterment Statute of that State, which allows the *bona fide* possessor to recover the value of his improvements, applied to actions brought to recover an undivided interest in land, so as to give a tenant in common, who has been defeated in an action to recover possession of such undivided interest, a claim against his co-tenant for his improvements in part. It was admitted that the statute was imperfectly drawn, and that the power of the court to apportion the expense of the improvements, between the tenants in common, according to their respective interests, was one arising by implication rather than conferred by express grant, yet, they say, it would be manifestly unjust in such cases to impose upon one party the entire burden of the improvements.[4]

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[1] See Strong *v.* Hunt, 20 Vt. 614. [2] 55 Penn. St. 407.

[3] Backus *v.* Chapman, 111 Mass. 386; see Silloway *v.* Brown, 12 Allen (Mass.), 30.

[4] Phœnix Lead Mining, &c. Co. *v.* Sydnor, 39 Wis. 600; see Davis *v.* Louk, 30 Wis. 308; Walker *v.* Humbert, 55 Penn. St. 407; see § 660. In Michigan a

§ 712. *Constitutionality of the improvement statutes.*— In Pacquette *v.* Pickness,[1] the improvement statute of Wisconsin is said to be founded upon "the broad principles of equity." The making of lasting and valuable improvements requires time, and, when made by an adverse possessor, constitute an evidence of laches on the part of the real owner. If the legislature can declare a lapse of time an absolute bar to a recovery, by enacting a statute of limitations, it certainly possesses the power to declare the lapse of time necessary for making such improvements a conditional bar.[2] It cannot be claimed that the statutes are unconstitutional because they deprive the owner of the land without his consent. Their effect is to punish him for his laches in remaining quiet and failing to assert his title, or give notice of it to the occupant while the improvements are in progress.[3] The improvements, as we have seen, become a part of the freehold, and belong to the owner, who recovers the land in its improved condition; having neglected to assert his title during the years in which the innocent party was expending money and labor upon the land, the owner cannot be said to be wholly free from blame. It may be true that he did not authorize or need the improvements; but as he takes them by the recovery in ejectment he is, by reason of his laches and neglect in asserting his title, justly chargeable with the increased value which they give to the land. The plaintiff is the proper party to bear the

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somewhat similar statute has been interpreted so as not to apply where the defendant in ejectment, claiming for improvements, is one of several tenants in common. The statute, however, was so framed that the court concluded that if it was applied to tenants in common, the defendant might recover from each the full value of the improvements. See Martin *v.* O'Conner, 37 Mich. 440; see Comp. Laws Mich. §§ 6252–3, Act 180 of 1875; Sands *v.* Davis, 40 Mich. 14; Morris *v.* McKay, 40 Mich. 326.

[1] 19 Wis. 219. [2] See Armstrong *v.* Jackson, 1 Blackf. (Ind.) 374.

[3] Ross *v.* Irving, 14 Ill. 171; see Davis *v.* Powell, 13 Ohio, 308; Longworth *v.* Wolfington, 6 Ohio, 10; Shaler *v.* Magin, 2 Ohio, 236; Bodley *v.* Gaither, 3 Mon. (Ky.) 58; Pope *v.* Macon, 23 Ark. 644; Scott *v.* Mather, 14 Tex. 235; Green *v.* Biddle, 8 Wheat. 1; Bright *v.* Boyd, 2 Story, 605.

expense of the improvements, not only because he takes them, but for the additional reason that he ought to have known of the existence of his own title; and his opportunities for gaining knowledge of it are manifestly superior to those of the adverse occupant.[1] It follows that a properly framed improvement or betterment statute is both equitable and constitutional. An examination of the cases holding particular statutes unconstitutional, will show that special facts were involved. Thus, in Green *v.* Biddle,[2] the leading case on the subject, the statute was adjudged unconstitutional because it impaired the provisions of a compact between Virginia and Kentucky.

§ 713. *In what tribunals improvements are recoverable.* —The claim for improvements is usually asserted as an offset in the action for mesne profits, whether the latter action be joined with the ejectment or prosecuted separately. In Missouri it has been held that a claimant who had been evicted from land could not maintain an action for improvements. The action must be brought in the same court in which the recovery in ejectment was had, and prior to eviction from the premises.[3] In Virginia, the claims for mesne profits and improvements must all be passed upon by the same jury.[4] In Sherry *v.* The State Bank,[5] the defendant in ejectment prosecuted a writ of error from a judgment rendered against him, and executed a *supersedeas* bond with sureties to stay further proceedings upon the judgment. The judgment having been affirmed, it was held, in a suit brought upon the bond, that the defendant could not be allowed in that suit to deduct the value of the improvements. It has already been shown that the claim for compensation for improvements made by the occupant is an

[1] See Green *v.* Biddle, 8 Wheat. 1; Billings *v.* Hall, 7 Cal. 1; Griswold *v.* Bragg, 18 Bla. C. C. 202.

[2] 8 Wheat. 1. See Billings *v.* Hall, 7 Cal. 1.

[3] Malone *v.* Stretch, 69 Mo. 25; see Webster *v.* Stewart, 6 Iowa, 401; Claussen *v.* Rayburn, 14 Iowa, 136.

[4] Goodwyn *v.* Myers, 16 Gratt. (Va.) 336.

[5] 6 Ind. 397

equitable lien which cannot be made the subject of an independent ejectment.[1]

§ 714. *Pleading.*—The defendant, in order to be allowed for his improvements, must plead them by way of set-off in his answer,[2] and must state that he entered upon the disputed land under claim of title.[3] The answer should aver that the improvements were made while holding under color of title adversely to plaintiff in good faith, and that they are permanent; otherwise evidence as to the improvements cannot be given.[4] And it is not sufficient to set up that the occupant has made permanent improvements in good faith and allege their cost. It must be shown that the improvements are still of value and better the condition of the property. The counterclaim for permanent improvements is confined to their value at the time of the trial.[5] In some States the defendant, in an action of ejectment, cannot plead the value of improvements unless the plaintiff has made a demand for mesne profits.[6] The defendant cannot ordinarily have the value of his lasting improvements ascertained until the determination of the question of title.[7] And in California, where no evidence is introduced to show damages, it is error to admit evidence of improvements.[8]

§ 715. *Verdict.*—In Hutchins *v.* Bacon,[9] the jury returned a verdict for plaintiff, incorporating in it, however, the following words: "the present occupants to hold their improvements." The court treated the latter portion of the verdict as surplusage. It was held, on review, that the

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[1] Paull's Executors *v.* Eldred, 29 Penn. St. 415; see § 159.

[2] Moss *v.* Shear, 25 Cal. 38; see Bonner *v.* Wiggins, 52 Tex. 125.

[3] Ragsdale *v.* Gohlke, 36 Tex. 286; Powell *v.* Davis, 19 Tex. 380.

[4] Carpentier *v.* Small, 35 Cal. 346; Powell *v.* Davis, 19 Tex. 380.

[5] Wythe *v.* Myers, 3 Sawyer, 595; Wendell *v.* Moulton, 26 N. H. 41; Griswold *v.* Bragg, 18 Bla. C. C. 202.

[6] Learned *v.* Corley, 43 Miss. 687; Daniels *v.* Bates, 2 G. Gr. (Iowa), 151.

[7] Wernke *v.* Hazen, 32 Ind. 431.

[8] Ford *v.* Holton, 5 Cal. 319.

[9] 46 Tex. 408.

verdict clearly intended to protect the defendants to the extent of the value of their improvements, and that it could not be disregarded as surplusage.[1]

§ 716. *Judgment for improvements.*—In Scott *v.* Reese,[2] in the Supreme Court of Wisconsin, it was held that it was improper practice to enter two judgments in the action; one in favor of the plaintiff, for the possession of the land, the other in defendant's favor for the value of his improvements. The court decided that there should be but a single judgment, determining the amount assessed in defendant's favor, for the value of the improvements, and awarding plaintiff the possession of the land, conditional upon his paying the amount of the assessment within the statutory period. In the case cited separate judgments had been entered. The court decided that on appeal from the judgment in defendant's favor, for the value of the improvements, the judgment for possession was not up for review.[3]

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[1] Roberti *v.* Atwater, 42 Conn. 266; Martin *v.* Martin, 17 S. &. R. (Penn.) 431; see §§ 502, 503.

[2] 38 Wis. 638.

[3] See Russell *v.* Defrance, 39 Mo. 506.

CHAPTER XXVII.

POSSESSION.

§ 717. Possession as evidence of title.
718. Prior possession sufficient against a trespasser or intruder.
719. Character of the possession.
720. The cases considered.
721. Possession which will warrant ejectment against a defendant not the test.
722. When possession not sufficient to support ejectment.
723. Distinction between prior possession and adverse possession.

§ 717. *Possession as evidence of title.*—Allen, J., in delivering the opinion of the New York Court of Appeals, in Rawley *v.* Brown,[1] said: "Possession of property alone, and without explanation, is evidence of ownership; but is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner." The possession raises a presumption of fact which may be rebutted.[2] So it was held in Kansas, that possession was a low degree of title, and descended to heirs,[3] and such is the general rule.[4] A debtor, as we have seen, may have homestead in a possessory interest,[5] and a naked possession can be sold at sheriff's sale, and the purchaser acquires the right to recover it in ejectment.[6] Possession of land is *prima facie* evidence of the highest estate in the property, viz.: a seizin in fee,[7] and, as we shall see, is alone sufficient to support ejectment against trespassers.[8] This is the general rule.

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[1] 71 N. Y. 85. See Thompson *v.* Burhans, 79 N. Y. 93.

[2] Yates *v.* Yates, 76 N. C. 142. [3] Mooney *v.* Olsen, 21 Kansas, 691–697.

[4] See Ludlow *v.* McBride, 3 Ohio, 241; Phelan *v.* Kelly, 25 Wend. (N. Y.) 389; Gillett *v.* Gaffney, 3 Col. 351; Teabout *v.* Daniels, 38 Iowa, 158. See § 296.

[5] McGrath *v.* Sinclair, 55 Miss. 89.

[6] Knox *v.* Herod, 2 Penn. St. 26; Hughes *v.* Devlin, 23 Cal. 501.

[7] Ricard *v.* Williams, 7 Wheat. 59; Preston *v.* Bowmar, 6 Wheat. 580; Blunt *v.* Aikin, 15 Wend. (N. Y.) 522; Adams on Eject. (4th Am. ed.) p. 137; Sparkman *v.* Porter, 1 Paine, 457; Yates *v.* Yates, 76 N. C. 142.

[8] Jones *v.* Easley, 53 Ga. 454; Bates *v.* Campbell, 25 Wis. 613.

Thus, a person in possession of land is presumed to have acquired the title which the people, in their capacity of sovereign, once held;[1] and it is not always a prerequisite to a recovery in ejectment that the plaintiff should trace his title back to the government, as peaceable possession under claim of right will prevail against a mere intruder, and the length of the possession is not material.[2] A widow as demandant in dower establishes *prima facie* a seizin in fee, in her husband, by showing his actual possession of the premises, claiming as owner.[3]

§ 718. *Prior possession sufficient against a trespasser or intruder.*—In Christy *v.* Scott,[4] Curtis, J., in delivering the opinion of the United States Supreme Court, said: "A mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practiced,[5] or by an ejectment,[6] or he may maintain trespass."[7] The same rule, of course, appertains in trespass to try title,[8] and, as against an intruder, it is immaterial whether the legal title is vested in the holder of it ab-

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[1] People *v.* Trinity Church, 22 N. Y. 44. See § 192.

[2] Doe *v.* West, 1 Blackf. (Ind.) 135.

[3] Sparrow *v.* Kingman, 1 N. Y. 242; Ward *v.* McIntosh, 12 Ohio St. 231; Jackson *v.* Waltermire, 5 Cow. (N. Y.) 301; Bancroft *v.* White, 1 Caines (N. Y.), 190.

[4] 14 How. 282. See Burt *v.* Panjaud, 99 U. S. 180.

[5] Citing Jackson *v.* Boston & W. R. R. Co. 1 Cush. (Mass.) 575.

[6] Citing Allen *v.* Rivington, 2 Saund. 111; Doe *v.* Reade, 8 East, 356; Doe *v.* Dyeball, Moo. & M. 346; Jackson *v.* Hazen, 2 Johns. (N. Y.) 438; Whitney *v.* Wright, 15 Wend. (N. Y.) 171.

[7] Citing Catteris *v.* Cowper, 4 Taunt. 548; Graham *v.* Peat, 1 East, 246.

[8] Caplen *v.* Drew, 54 Texas, 493.

solutely, or whether he holds it in trust for another. Hence where an attorney purchased land in his own name, it was held that the nature and extent of his interest could only be questioned by his client, or those claiming under him.[1] It follows from these cases that where there is an absence of proof of title on either side, a presumption of title in favor of the first possessor may be indulged. And so the authorities hold.[2] This is necessarily the rule, for it rarely happens that in the older portions of the country a possessor can trace his title, by an uninterrupted chain, to its original source. To raise a presumption, however, as to the quality or degree of the interest claimed, if not an absolute fee, proof of possession must be accompanied by evidence of some claim of title.[3]

§ 719. *Character of the possession.*—The question of what constitutes evidence of possession of land sufficient to raise a presumption of title and to support ejectment without other proof of title, has been before the courts in many forms. The varied uses to which real property may be put render the task of formulating a rule governing the subject one of extreme difficulty. A distinction, which will be presently considered, has been suggested, and to some extent established, between the possession which will uphold a recovery in ejectment against an intruder, and the possession which will ripen into an adverse title. This distinction is not easily traced, and the wisdom of the policy of engrafting into the law disseizins of different degrees, may certainly be ques-

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[1] Lair *v.* Hunsicker, 28 Penn. St. 115.

[2] Fowke *v.* Darnall, 5 Litt. (Ky.) 317; Whitney *v.* Wright, 15 Wend. (N. Y.) 171; Doe *d.* Harding *v.* Cooke, 7 Bing. 346; Hunter *v.* Starin, 26 Hun (N. Y.), 529; Schultz *v.* Arnot, 33 Mo. 172; Wilson *v.* Palmer, 18 Texas, 592; Nagle *v.* Macy, 9 Cal. 426; Shumway *v.* Phillips, 22 Penn. St. 155; Burt *v.* Panjaud, 99 U. S. 180; Yates *v.* Yates, 76 N. C. 142; Kline *v.* Johnston, 24 Penn. St. 72; Oregon, &c. R. R. Co. *v.* Oregon Steam Nav. Co. 3 Oregon, 178; Kelly *v.* Mack, 49 Cal. 524; 2 Greenl. Ev. § 618; Clarke *v.* Clarke, 51 Ala. 498; Lum *v.* Reed, 53 Miss. 73.

[3] See Ricard *v.* Williams, 7 Wheat. 59.

tioned. Acts which constitute mere trespasses or depredations upon land, cannot often be distinguished from acts of ownership, which amount to a disseizin ; the introduction of an additional classification of acts of possession, where the line of distinction is still narrower, will be very difficult of application, if not practically an impossibility, in ordinary cases. In Woods *v.* Banks,[1] it appeared that the plaintiff's agent entered upon the land, with a view of taking possession of it under a claim of title, and marked the lines by spotting the trees around it. It was held, in trover, for timber cut on the lot, that this was a sufficient prior possession of the land to uphold a recovery against a trespasser who subsequently entered upon it, and that it was not necessary to cultivate or to build a fence in order to take possession of land. This case was substantially followed, by the Supreme Court of New York, in Thompson *v.* Burhans,[2] but this latter case was reversed in the New York Court of Appeals.[3] Earl, J., in delivering the opinion of the court, said: " In Woods *v.* Banks,[4] it was held that an entry upon a lot, with a view of taking possession of it under a claim of title, and marking the lines of it by spotting the trees around it, is a sufficient possession of it against one who can show no right to enter upon the land, to sustain an action of trover for timber cut and taken from the lot. It is sufficient to say of that case that it is sustained by neither principle nor any authority to be found in this State. Can one mark the trees around one thousand or fifty thousand acres of forest land, and thus gain a possession which will shut out all the rest of the world but the true owner? If the land were derelict, without an owner, according to the philosophic writers on the origin of society and of property, such acts would not give such possession as would exclude others. Passing around land or over it, asserting title ever so loudly, does not give possession." In this case of

[1] 14 N. H. 101.
[2] 15 Hun (N. Y.), 580, 584.
[3] 79 N. Y. 93, 101.
[4] 14 N. H. 101.

Thompson *v.* Burhans, it appeared that the *locus in quo*, which consisted of a very extensive tract of woodland, was not inclosed; no part of it had ever been cultivated or improved; whatever work had been done upon it consisted in taking value from it, and not in putting value upon it; and it did not appear that any one had ever lived in the shanty which had been erected upon the lands. The court said: "Payment of taxes, surveying and assertion of right do not constitute possession. They merely show a claim of title. * * * Going upon land, from time to time, and cutting logs thereon does not give possession. Such acts are merely trespasses upon the land against the true owner, whoever he may be. Any other intruder may commit similar trespasses, without liability to any other trespasser. Such acts do not constitute a disseizin of the true owner." The court, in the course of the opinion, observed that it had never been supposed that the hunter had possession of the forest through which he roamed in pursuit of game, or that the wood-chopper could be said to be in possession of the woods into which he entered to cut logs. It will thus be apparent that, at least, so far as the State of New York is concerned, the case of Woods *v.* Banks, *ubi supra*, is not an authority. Indeed, it seems remarkable that such slender and shadowy proofs of assertion of ownership should ever have been considered sufficient to form the basis of a finding of possession. This case is clearly the result of the attempt to establish disseizins of different grades. In Miller *v.* Long Island Railroad Company,[1] the question of the possession of woodland was considered in the New York Court of Appeals. Earl, J., said: "The possession, unaccompanied with paper title, requisite to furnish the presumption of ownership sufficient to maintain this action, must be actual; nothing less will answer. When lands are unoccupied, unimproved, and uninclosed, it is quite difficult to make out such possession. It can be done by showing

[1] 71 N. Y. 380.

that the lot was kept as a wood lot of suitable size for an improved farm, and that the owner of the farm habitually, for some years, cut thereon his firewood, saw logs, and fencing and building timber."[1]

§ 720. *The cases considered.*—In Sankey *v.* Noyes,[2] the Supreme Court of Nevada said: "What acts are sufficient to constitute such a possession of public land as will maintain ejectment, has long been a vexed question in the courts of California, and our own courts have found it impossible to announce any general rules that would meet the varying circumstances of every case. But it seems to be generally agreed that these acts must in a great measure depend upon the character of the land, the locality, and the object for which it is taken up. While arable or meadow land should be inclosed with a substantial fence, cultivated and improved land, which is only valuable for the timber upon it, might be held by a much less substantial inclosure, and cultivation or improvement would not be necessary." In Lea *v.* Hernandez,[3] in the Supreme Court of Texas, the rule is recognized that a plaintiff may, by reason of his prior peaceable possession of lands, recover an ejectment against a mere trespasser by whom he has been dispossessed. The court supplement this by saying that "the fact of his prior possession must be clearly and unequivocally proved." The *indicia* of possession which the court in this case considered insufficient to uphold ejectment, are not fully stated in the report of the case. In Plume *v.* Seward,[4] the Supreme Court of California, after deciding that possession is *prima facie* evidence of title and sufficient to support ejectment, said: "There must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contra-distinguished from the mere assertion of title, and the exercise of casual acts of ownership,

[1] See Machin *v.* Geortner. 14 Wend. (N. Y.) 239. This subject is discussed in treating of adverse possession.

[2] 1 Nevada, 71. [3] 10 Texas, 137. [4] 4 Cal. 95.

such as recording deeds, paying taxes, etc." The mere staking off of land, without occupation or other acts of ownership, does not constitute such a possession as would maintain ejectment, unless such acts were closely followed up by other and continuous acts of ownership.[1] In California it has been held to be sufficient proof of prior possession if the plaintiff shows that for several years before defendant's entry, plaintiff inclosed the premises with a fence, and until the adverse possession, cultivated the inclosure by raising and gathering crops thereon, though no direct proof of the character of the fence is given.[2] And in Pennsylvania, a person who entered upon vacant land with a view to acquire title under the laws of the State, may recover against one who turns him out of possession without right.[3]

§ 721. *Possession which will warrant ejectment against a defendant not the test.*—In Quicksilver Mining Company *v.* Hicks,[4] it was said that any subjection of land to the dominion of an individual, as owner, would constitute possession sufficient to enable an adverse claimant to maintain ejectment against him; that actual occupation in person or by an agent or servant was not essential. Hence, maintaining a bridge, one end of which springs from a small strip of land on the bank of a creek, under a claim to own the strip, is sufficient evidence of possession to warrant ejectment. The test of the sufficiency of the possession which will warrant the owner in instituting an ejectment, and making the alleged occupant a defendant, cannot be applied in determining the sufficiency of the proof of possession which will support ejectment; for, as we have seen, trespasses committed by one claiming title, may be con-

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[1] Sankey *v.* Noyes, 1 Nev. 68–72.

[2] Hestres *v.* Brannan, 21 Cal. 423.

[3] Kline *v.* Johnston, 24 Penn. St. 72.

[4] 4 Sawyer, 688. See Ward *v.* Parks, 72 N. C. 452; Burke *v.* Hammond, 76 Penn. St. 172; Courtney *v.* Turner, 12 Nev. 345.

sidered acts of possession,[1] and squatters,[2] and even servants,[3] who manifestly could not support the action, may be made defendants.

§ 722. *When possession not sufficient to support ejectment.*—The Supreme Court of California held that inclosing land with a fence, consisting of posts seven feet apart, and one board six inches wide nailed to the posts, but which was not sufficient to turn cattle, and the land being uncultivated, did not constitute possession sufficient to sustain ejectment.[4] The mere taking from the land of a portion of the herbage growing thereon, is not sufficient to give the right of possession.[5] The principle of law, which permits a recovery against a trespasser, intruder or wrongdoer, upon proof only of prior possession of the land by the plaintiff, does not extend to the case of a defendant who acquired the possession peaceably, and holds it under a claim or color of title. In the latter case the defendant may protect the possession so acquired and held, and may force the plaintiff to recover solely upon the strength of his own title, and may avail himself of defects in plaintiff's title, or prove that the true title is outstanding in another.[6]

§ 723. *Distinction between prior possession and adverse possession.*—This distinction has already been noticed. In Hunter *v.* Starin,[7] Cullen, J., in delivering the opinion of the Supreme Court of New York, said: "It is urged by the defendant that the facts proved are insufficient to constitute an adverse possession in the plaintiff, and numerous cases are cited to establish this contention. I think defendant is correct, and the finding of the court below of an adverse possession erroneous. But I think there is a plain difference

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[1] See § 234. [2] See § 241. [3] See § 242, n.

[4] Baldwin *v.* Simpson, 12 Cal. 560; see Hughes *v.* Hazard, 42 Cal. 149; Southmayd *v.* Henley, 45 Cal. 101.

[5] Steinback *v.* Fitzpatrick, 12 Cal. 295.

[6] See Fowler *v.* Whiteman, 2 Ohio St. 270; Drew *v.* Swift, 46 N. Y. 204.

[7] 26 Hun (N. Y.), 529.

between the possession which will bar the true owner of his title, and commonly called 'adverse,' and the possession which is sufficient to support a title as against third parties. I think the cases recognize this distinction. In Smith *v.* Burtis,[1] the plaintiff claimed title by adverse possession. Kent, Ch. J., says: 'We may infer title from his ten years possession sufficient to put the tenant upon his defense, but we ought not to *infer* a tortious entry or an actual ouster sufficient to bar every defense.' So in Wheeler *v.* Spinola,[2] the distinction even in physical elements between possession and adverse possession is recognized. To constitute the latter the possession must be exclusive, while the exercise of ordinary control and dominion of the land, I think, constitutes a sufficient possession from which to infer title as against strangers." The principal acts of dominion and control proved to have been exercised in Hunter *v.* Starin, the case from which we are quoting, consisted in cutting sedge and wood from the land. Such acts, however, unless the woodland is connected with a farm, may be treated as mere trespasses, and do not necessarily constitute occupancy, or amount to a claim or assertion of possession or ownership, and the case ought properly to be classed with Woods *v.* Banks, *ubi supra*, where the acts of possession consisted of spotting the trees around the *locus in quo*, which latter case, as we have seen, the New York Court of Appeals refused to follow.[3] Indeed, Hunter *v.* Starin can hardly be reconciled with Thompson *v.* Burhans, for, in the latter case, aside from the question of extent of territory, the acts of possession, and assertions of ownership, were more numerous and defined than in the former case, and in addition to cutting timber included payment of taxes, sur-

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[1] 6 Johns. (N. Y.) 197.

[2] 54 N. Y. 377.

[3] See Woods *v.* Banks, 14 N. H. 101; Thompson *v.* Burhans, 15 Hun (N. Y.), 584; reversed, 79 N. Y. 93.

veying, and other *indicia* of claim and assertion of ownership.

The distinction, which some of the cases seek to establish, between prior possession and adverse possession, may be likened to the distinction applicable to a disseizin between strangers, and between tenants in common, or parties occupying a relation of trust; the difference is in degree, or in the amount of proof which must be furnished in each case, though otherwise the analogy does not hold good.

CHAPTER XXVIII.

ADVERSE POSSESSION UNDER STATUTES OF LIMITATIONS.

§ 724. Limitations and prescription historically considered.
725. Statutes of limitation governing real actions in the different States.
726. Theory of prescription and limitations.
727. Purpose and policy of statutes of limitations.
728. General principles of possession, seizin, ouster, &c.
729. What constitutes adverse possession in general.
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732. Possession must be "actual;" what constitutes, &c.
733. Requisites of possession as affected by nature of the land.
734. What is a sufficient actual possession.
735. Possession must be "open" and "notorious."
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737, 738. Possession must be "continuous."
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740. Interruption of the possession.
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742. Statutory regulations as to an effectual re-entry.
743. Effect of bringing an action or recovering a judgment in ejectment.
744. Possession lost or interrupted by abandonment.
745. Interruption by other adverse claimants.
746. Tacking.
747, 748. Privity, what constitutes for purposes of tacking.
749. Possession must be "hostile."
750. Where the possession is begun in subserviency to the owner's title. The question as between tenants-in-common.
751. The rule applied generally where there is a privity of possession or title.
752. Possession must be "exclusive."
753. Conflicting possessions, general principles regulating.

§ 724. *Limitations and prescription historically considered.*—It has sometimes been said that at common law there were no stated or fixed times of limitation for the recovery of lands,[1] and that the matter is wholly one of statutory regulation. This statement of the matter is, however, inaccurate. The statute of Merton,[2] usually referred to as the source of all modern legislation on the subject, did indeed provide various periods of limitation for different real writs, but an examination of the writs in use before its passage shows that limitations of some sort had always been required. The limitation was indeed fixed by the writ itself.

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[1] People *v.* Gilbert, 18 Johns. (N. Y.) 227, per Woodworth, J.

[2] 20 Hen. III, c. 8, A. D. 1235.

Thus among the pleas in the time of John, we find the limitation *de tempore quo rex Henricus avus noster fuit vivus et mortuus;* in a writ of aiel *die quo rex Henricus abiit* appears; and so in a writ of *mort d'ancestor*, the first coronation of Henry II (a limitation of between thirty and forty years), is fixed as a limit.[1] The original periods of limitation seem, from this early evidence, to have been arbitrarily fixed by the royal authority, and it was not until the middle of the thirteenth century that they can, in the modern sense of the word, be said to have been at all defined by law. This is in accordance with, and what might in fact be inferred from what we know, in other respects, of the history of procedure in England. The writ, introduced into England by the Normans, was not, at first, anything more than a device for bringing the controversy to which it related within the royal jurisdiction. It had nothing to do with the form or nature of the action, except that it usually specified the nature of the demand. During the period which roughly covered the two centuries between the Conquest and the statutes of Merton, the king's prerogative to issue and sell writs was unquestioned. As is pointed out by Mr. Bigelow in his recent learned work on the History of Procedure in England,[2] "There is no evidence that the adoption of the writs of Glanvill laid any restriction upon the king in this particular. He continued to issue writs whenever it suited his pleasure, or answered his pecuniary needs. The king sanctioned the use of the writs of Glanvill; and probably his justiciar gen erally felt bound to follow them. The court clerks certainly were bound to do so. Suitors must have had to go to the king (or possibly to the Council) for writs adapted to special and peculiar cases" (p. 197). It was not until the year 1258, that the Provisions of Oxford bound the Chancellor to issue no more writs, except writs of course, without com-

[1] See Glanvill, lib. 13, c. 3.

[2] History of Procedure in England, from the Norman Conquest. The Norman period. By Melville Madison Bigelow, Ph.D. Boston: Little, Brown & Co., 1880.

mand of the king and of his council present with him. "This, with the growing independence of the judiciary on the one hand, and the settlement of legal process on the other, terminated the right to issue special writs, and at last fixed the common writs in unchangeable form." The periods of limitation, originally fixed at the pleasure of the king, now gradually became matters of statutory regulation. By the statutes of Westminster, 3 Edw. I, c. 39, A. D. 1275, the writ of right was limited to the first day of the reign of Richard I, and other limitations were fixed for other cases. The period established by this law, originally nearly a hundred years, increased every day, and not being capable of any abridgement, as in early times, by the use of royal prerogative, gave rise to much trouble and inconvenience, which finally led to the passage of the first general statute of limitations (32 Hen. VIII, c. 2, A. D. 1540). This was followed, nearly a hundred years later, by the more comprehensive statute of 21 James I, c. 16, entitled "An Act for limitation of actions, and for avoiding of suits in law." This statute has been the model of all the legislation on the limitation of actions for the recovery of land in this country. It was generally adopted here during the colonial period, and though now superseded by more modern legislation, the rules of construction laid down by the courts with regard to it, are held to govern the statutes which have been modeled upon it and taken its place.[1] The period fixed by the statute of Westminster, as a limitation in cases of writs of right, has led to some confusion with regard to the analogy between titles by prescription and titles by limitation. Technically and strictly, prescription only applies to incorporeal hereditaments, such as a way, a water-course, or the like, *i. e.*, interests in land which lie in grant. The theory of prescription in the case of easements, originally was that an incorporeal right in the lands of another, the origin of which could not be traced, must have been enjoyed from a

[1] Walden *v.* Gratz, 1 Wheat. 292.

time exceeding the limit of human memory.[1] The date of the coronation of Richard I, established by the statute of Westminster as a period of limitation in writs of right, had no necessary bearing, therefore, upon the question of prescriptive titles to easements, or other incorporeal hereditaments; nevertheless the courts, proceeding by analogy, at an early date, applied the period appropriate in one class of cases to the other. It was held that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession, was sufficient also to give a title to the easement.[2] On this principle, when the limitation was reduced to sixty years by the statute of 32 Henry VIII, c. 2, the period of legal memory ought to have been reduced by the courts to the same period. But this was not done, probably because the introduction by the courts of the doctrine of a presumed grant made it a matter of little importance. According to this doctrine, after the lapse of a period which would, under the statute of limitations, be sufficient to bar an action for the recovery of lands, the jury in the case of an incorporeal hereditament was directed that they might presume a grant.[3] Whether the period of legal memory, therefore, still goes back to the date of the coronation of Richard I, is, at most, a matter of curious learning, and does not even affect title to incorporeal hereditaments by prescription, while neither the doctrine of legal memory, nor the theory of a presumed grant, has any application to the matter we are now considering—the length of time under the statutes of limitation by which an action to recover land by the real owner is barred or taken away.

§ 725. *Statutes of limitation governing real actions in the different States.*—Without attempting to discuss in detail the

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[1] Hall *v.* McLeod, 2 Metc. (Ky.) 98.

[2] 2 Rolle's Abr. p. 269; 2 Inst. p. 238; Rex *v.* Hudson, 2 Stra. 909; 3 Starkie on Ev. 1205; Coolidge *v.* Learned, 8 Pick. (Mass.) 503; 3 Washb. R. P. p. *449.

[3] Hill *v.* Crosby, 2 Pick. (Mass.) 466; Carlisle *v.* Cooper, 4 C. E. Green (N. J.), 259.

various statutes of limitation applicable to real actions adopted by the different States, we may say generally, that, being of the same origin historically, and adopted upon the same considerations of public policy, and having the same main object, namely, the quieting and settlement of titles to land by barring any assertion of title, even by the owner, if he has been out of possession of the land for a fixed time, they differ from one another only in respect to the extent in time of the limitation imposed, and in respect to minor provisions, such as those suspending the operation of the statute in favor of persons under "disabilities." All these statutes are, in substance and effect, as follows: No person shall commence an action for the recovery of lands, except within a certain number of years from the time when the right to bring such action accrued, or unless within the same number of years he, or one with whom he is in privity, has been in possession of the premises. As a rule, there are no provisions in the statutes of the different States providing in terms that adverse possession shall confer a title upon the adverse possessor, nor any provisions as to what will constitute a disseizin of the true owner and an adverse possession in another, but questions of seizin and disseizin, entry and ouster, and as to what acts will establish an adverse possession by a stranger, and, hence, whether the statute can be pleaded as a bar to an action by the owner, are left to be determined by the courts, in each case, by the principles of the common law. In New York, however, and the several States which have adopted almost *verbatim* its Code of Procedure, there are expressly laid down in the statute certain requirements, which must exist to constitute adverse possession under it, and a distinction is made in the statute itself between possession under color of title and a naked possession under a claim of title founded upon no written instrument. So, there are certain provisions as to presumptions of possession in certain cases, &c.[1] But it

[1] See N. Y. Code of Civil Procedure, §§ 362–375, and the statutes of following

seems that these provisions, for the most part, are but declaratory of the common law, and the general rules as to adverse possession which have always obtained are, in the main, adopted by all the courts in construing and applying the statutes of their respective States. We shall, therefore, confine ourselves to the consideration of these general principles without attempting to further notice the distinctions between, or the special provisions of, the various statutes as enacted by the several States.

§ 726. *Theory of prescription and limitations.*—As we have seen, the theory of *prescription*, and of the title thereby acquired, rests upon the presumption of a past grant inferred from, and evidenced by, an adverse enjoyment for a period fixed by law. A title to an incorporeal hereditament is thus said to be *acquired* by prescription. The essence of this doctrine is, therefore, the enjoyment of the right by the claimant, which enjoyment *creates* the title. The doctrine of limitations, on the other hand, rests upon no such presumption of a right or title in one other than the true owner of the land; on the contrary it assumes the title to be in the latter, but refuses to allow him to assert it because of his *want of possession.* The essence of the doctrine of limitations is technically, therefore, the *non-possession* of the true owner, not, as under the theory of prescription, the *adverse enjoyment* of some one else. Prescription is positive and creates; limitation is negative and destroys. The latter can properly be said to create only so far as it destroys a remedy, or, as is said in the leading case of Humbert *v.* Trinity Church,[1] "It is of the nature of the statute of limitations * * to mature a wrong into a right by cutting off the remedy."

§ 727. *Purpose and policy of statutes of limitations.*—Statutes of limitations applicable to actions for the recovery

States: South Carolina, Wisconsin, Florida, California, Nevada; see also Maine R. S. c. 147, § 11.

[1] 24 Wend. (N. Y.) 587.

of land are, like all statutes of limitations, founded upon considerations of public policy ;[1] "to promote the peace and good order of society, by quieting possessions and estates, and avoiding litigation."[2] Such statutes are, therefore, characterized as statutes of "repose,"[3] and, with respect to land, are founded upon the additional consideration, that it is contrary to the interests of the State that lands should lie uncultivated during the litigation over the title to them, and that, therefore, a limitation should be put upon such litigation.[4] So also it has been said, that "The statute protects the occupant, not for his merit, for he has none, but for the demerit of his antagonist in delaying the contest beyond the period assigned for it, when papers may be lost, facts forgotten, or witnesses dead."[5] The policy upon which the statute of limitations, for the recovery of land in Texas, is stated also to rest, is that "of compelling those who had a right of entry under title, to take actual possession of their lands, and have the country settled, at the peril of being ousted by those who would settle the lands and improve the country."[6] But whatever the theory of *limitations* may be, as distinguished from *prescription*, and whether the title, resulting from adverse possession, be considered as created or transferred by the statute,[7] or as founded upon a presumed grant,[8] or as conveyed to the adverse possessor by the possession itself for the required time,[9] and though the prime object of these statutes may be the destruction of the right of re-entry, the necessary result and legal effect[10] is, at any rate, the establishment of the exclusive adverse rights of him through whose possession the right to

[1] Elder *v.* Bradley, 2 Sneed (Tenn.), 253; McElmoyle *v.* Cohen, 13 Pet. 312.
[2] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 614.
[3] Bledsoe *v.* Little, 5 Miss. 24.
[4] Angell on Limitations, 6th ed. p. 6.
[5] Gibson C. J., in Sailor *v.* Hertzogg, 2 Penn. St. 182.
[6] Kinney *v.* Vinson, 32 Tex. 128.
[7] Jones *v.* Jones, 18 Ala. 253.
[8] Davis *v.* McArthur, 78 N. C. 357; Melvin *v.* Waddell, 75 N. C. 361.
[9] Winthrop *v.* Auburn, 31 Me. 465.
[10] Crispen *v.* Hannavan, 50 Mo. 550.

assert a paramount title has been extinguished, and the vesting in him of the *only* title to the land.[1]

§ 728. *General principles of possession, seizin, ouster, &c.*—It is a familiar rule of law that there can be but one actual seizin of an estate; that possession follows the title[2] in the absence of any possession adverse to it, and, as a result of these two principles, that the rightful owner of land is deemed to have the possession until he is ousted from it or disseized, and also, in the absence of limitations, that he is restored to possession when the hostile possession or disseizin ceases. Want of possession, therefore, in the true owner necessarily implies an ouster of him by another through an entry and hostile possession. Hence, the ultimate test of the want of possession of the true owner, and his neglect to assert his right to the possession, upon which the statutes of limitation rest, is the existence of an adverse possession of another denying the owner's right. What constitutes, then, such an adverse possession of land as, under the statutes of limitation, will bar the right of the true owner to recover it?

§ 729. *What constitutes adverse possession in general.*—It may be laid down as an indisputable general rule of law that, to constitute an effectual adverse possession, there must concur two things: first, an ouster of the real owner, followed by an *actual possession* by the adverse claimant; and, second, an *intention* on his part to so oust the owner and possess for himself;[3] or, as it is sometimes called, there must be a "claim of right" or "title" in himself adverse to

[1] Langford *v.* Poppe, 56 Cal. 75. The use of such a term as "prescriptive title," or "title by prescription," which the code and courts of Georgia seem to have exclusively adopted, to designate a title acquired by adverse possession, seems objectionable in connection with land itself, in distinction from easements and the like, as confusing and as an improper use of terms. For the use of the terms "prescriptive title" and "titles by prescription," see Jones *v.* Bivins, 56 Ga. 538; Castleberry *v.* Black, 58 Id. 386; Ford *v.* Holmes, 61 Id. 419; Farrow *v.* Bullock, 63 Id. 360.

[2] Bradley *v.* West, 60 Mo. 40.

[3] Davis *v.* Bowmar, 55 Miss. 765.

the true owner. It is sometimes asserted that the possession, to be adverse, must be under "claim or color of title," and even that "the possession must have commenced under "color and claim of title."[1] The latter is certainly an inaccurate statement; for the books are full of cases, where a tortious entry upon, and possession of lands, without a pretense of a paper title, or rightful claim, have ripened into a title by adverse possession. The statement that there must be "claim or color of title" is also, strictly speaking, inaccurate; for it would imply that there might be an effectual adverse possession under color of title, without any claim of title. We shall see hereafter, that "color of title" is, in its very essence, a *claim* of title, and is chiefly important in the subject under discussion as an assertion of title, and as defining its extent.[2] There can be no effectual color of title without a claim of title, whereas there can well be a *claim* of title or right adverse to the owner's without any color of title whatever. To repeat, then, two ingredients are essential to constitute adverse possession: the *factum*, possession, and the hostile *intention*. "So the whole inquiry is reduced to the fact of entering and the intention to usurp possession."[3] Mere possession alone would be neither the foundation of a legal right, nor a bar to the assertion of the owner's title.[4] In the absence of evidence to the contrary, if there be possession of land by another than the true owner, the presumption of law is, that such possession is in accord with, or in subservience to the true title, and the legal possession of the owner.[5] Permissive possession is never a basis for the statute of limitations. On the other hand, a mere claim or assertion of title to land, unaccompanied by pos-

[1] Tyler on Ejectment and Adverse Possession, p. 859.
[2] See *infra*, Chap. XXX.
[3] Bradstreet *v.* Huntington, 5 Peters, 439.
[4] Jones *v.* Hockman, 12 Iowa, 107.
[5] Jackson *v.* Thomas, 16 Johns. (N. Y.) 293.

session, would neither benefit the claimant or affect the rights of the owner.[1]

§ 730. *Entry and ouster, effect and requisites of.*—It is axiomatic that the possession which follows the title to land must cease before a hostile possession can commence. There cannot be two possessions, actual or constructive, of the same land at the same time. There must, therefore, be an ouster of the true owner and an entry by another before an adverse possession is established. "The requisites in order to constitute an actual possession are that there should be made an entry, so that there may be an ouster effected and an adverse possession begun."[2] The true owner being "in possession, by force of his title, he so remains until disseized or ousted by some one who enters with a claim of adverse possession. When this ouster takes place, the limitation of the statute begins to run."[3] Bearing in mind at the outset that the object of the statute is to cut off and defeat the claim or rights of the true owner, we arrive at the general principle, that the criterion of the time when the statute begins to run is the *ouster of the true owner* and his consequent right to be reinstated in the possession, and that it is not in theory the entry of the adverse claimant. To determine, then, the character and sufficiency of an entry as the foundation of an adverse possession, we inquire whether it is sufficient to constitute an ouster of the one entitled to the possession. An entry by an adverse claimant, as the first act of adverse possession, must be characterized by most of the same elements as, we shall see, are essentials in such possession. What will constitute an entry sufficient to oust the one entitled to possession will, like the adverse possession which follows it, depend upon a variety of considerations, such as the character of the land and the uses to which it may be naturally put; the previous rela-

[1] Magee *v.* Magee, 37 Miss. 138.

[2] Bradley *v.* West, 60 Mo. 41; see Thomas *v.* Marshfield, 13 Pick. (Mass.) 250.

[3] Robinson *v.* Lake, 14 Iowa, 421, 424.

tion of the parties, whether strangers or in some privity with one another; whether the owner be in actual possession, or simply in the constructive possession which his title gives him; and whether the entry be made under some color of title, or a naked claim, &c. Entry and ouster, too, may, like possession, be either actual or constructive. Thus the entry and ouster may be a physical invasion of the land and an actual forcible ejectment of the possessor, or the adverse claimant being already in possession, under, for example, a lease or agreement with the owner, and the owner out of the actual possession, the entry and ouster may be constructively accomplished by a hostile act on the part of the tenant, equivalent in its legal effect to an actual invasion and ejectment. It may be well here to call attention to the two leading requisites in an entry sufficient to set in motion the statute of limitations, which are, first, that the entry must be sufficiently notorious and open to give the owner notice of the hostile claim and possession begun; and, second, that it must be hostile. The owner must, or with diligence could, have knowledge of the adverse entry. "Such knowledge, or the means by which such knowledge may be attained, must be brought home to the person who was seized or possessed of the land; because the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain the possession of his land in the mode provided by law. A clandestine entry or possession will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land because he has failed to sue for its recovery, when he had no notice that it was held or claimed adversely; but the statute cuts off his remedy only when he has neglected to commence his action beyond the period assigned for it."[1] So an entry to work an interruption to

[1] Thompson *v.* Pioche, 44 Cal. 508.

possession "must be made under such circumstances as to enable the party in possession, by the use of reasonable diligence, to ascertain the right and claim of the party making the entry."[1] Without such an entry, or hostile acts, from which the jury may find the fact of notice to the true owner, it has been held there can be no ouster, and the entry would be a mere act of trespass.[2] Thus, a survey of land has been held to be "not such a distinct and notorious act of possession as will justify the reasonable presumption of an ouster, or that the party went upon the land with a palpable intent to claim the possession as his own."[3]

In the second place, the entry, or the first act of possession on the part of the claimant, must be hostile. The presumption of law, according to a familiar rule, is in favor of regularity as against irregularity, of what is lawful as against what is unlawful. An entry upon the land of another will, therefore, by presumption of law, be deemed permissive, in accord with, and not in defiance of the owner's right. "Every presumption is in favor of possession in subordination to the title of the true owner. An entry adverse to the lawful owner is not to be presumed, but must be proved."[4] Hence the mere entering upon and taking possession of land, however notorious, is not sufficient, unaccompanied by acts or declarations, or both, which rebut the presumption that it is in subservience to the rights of the owner, and which leave no doubt of its hostile character. The evidence necessary to establish the hostility of the acts necessary to set in motion the statute of limitations on the part of a stranger taking actual possession, and that required on the part of such persons as stand in some relation of privity with the true owner, and who may be already in possession of the

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[1] See Wing *v.* Hall, 47 Vt. 182; Soule *v.* Barlow, 49 Vt. 329.

[2] Pray *v.* Pierce, 7 Mass. 383; see also Holley *v.* Hawley, 39 Vt. 534; Carrol *v.* Gillion, 33 Ga. 539, 548.

[3] Beatty *v.* Mason, 30 Md. 414.

[4] Hart *v.* Bostwick, 14 Fla. 178, and cases cited.

land, we shall further discuss in considering the various requisites of adverse possession.[1]

§ 731. *Adverse possession in general, requisites of, &c.*— The owner of the land, or the one entitled to the possession, having been ousted by the entry of an adverse claimant, the adverse possession of the latter being thus established and the statute being set in motion, there remain to be considered the character and requisites of the possession, which, continued for the time prescribed by the statute, will both bar the right of recovery of the owner, and will confer upon the adverse possessor the only title to the land. We shall consider this subject under two heads; first, *naked* possession, where the rights of the adverse occupant depend upon possession alone, and, second, possession under *color of title*, where, in addition to an actual occupation of the land, or some part of it, the adverse occupant claims the right to do so under some deed, writing or paper title to the same. Under the latter head, to which alone it belongs, we shall consider the subject of "constructive" adverse possession.[2] In general, it may be stated that, whether the adverse claimant bases his rights under the statute upon mere naked possession, or, in addition to the latter, upon some color of title, some actual adverse possession is necessary, and, though the rule as to the sufficiency of the actual possession may in some cases be somewhat relaxed, when the possession is accompanied with color of title, yet, in the main, in both cases the requisites of the actual adverse possession are the same. Though we find a great variety of terms in use in the authorities on this subject defining adverse possession, its requisites may be reduced to the following: the possession under consideration must be *actual*, *open*, *continuous*, *hostile*, and *exclusive*. That such possession shall ultimately establish the adverse rights of the possessor, it must be accompanied by the intention, on his part, to claim adversely, or a "claim of right," as it is called, in himself.

[1] See *post*, § 751.

[2] See *infra*, Chap. XXX.

§ 732. *Possession must be "actual;" what constitutes, &c.* —It is impossible to lay down a general rule as to what constitutes an effectual *actual* adverse possession of lands and what falls short of it.[1] It is, necessarily, a question governed more or less by the facts of each case,[2] and particularly by the character and situation of the land in question, and the uses to which it would naturally be put.[3] In Ford *v.* Wilson, above cited, it is stated as the doctrine of the Supreme Court of the United States, that it suffices that "visible and notorious *acts of ownership* are exercised over the premises," &c. So, in a recent case in the Supreme Court of Illinois, it is held that actual residence is not indispensable, but that "if there is continuous dominion manifested by continuous *acts* of ownership, it is sufficient."[4] On the other hand, the limitation act of Texas giving, after a certain period, to a "naked possessor" the title to the land, is construed as requiring actual residence thereon, though the act requires, in terms, only "peaceable possession and cultivation, use or enjoyment."[5] It is held in Ohio, that the naked possessor "must show a substantial inclosure, an actual occupancy, a *pedis possessio,* which is definite, positive, and notorious."[6] In Illinois, on the other hand, it is held unnecessary to inclose *all* the land by a fence, and the court say, that, as a general rule, it is sufficient if the land is appropriated to individual use in such a way as to apprise all persons in the vicinity as to *who* has the exclusive use and enjoyment.[7] Mr. Justice Story, in delivering the opinion of the Supreme Court in Ellicott *v.* Pearl, stated that no authority was necessary for so plain a proposition, as that "to constitute actual possession, it is not necessary that there should be any fence or

[1] Ford *v.* Wilson, 35 Miss. 505.

[2] Leeper *v.* Baker, 68 Mo. 405; Turner *v.* Hall, 60 Id. 275.

[3] See *infra*, § 733.

[4] Coleman *v.* Billings, 89 Ill. 189; contra, under act of 1835, Martin *v.* Judd, 81 Ill. 488.

[5] Sloan *v.* Martin, 33 Texas, 418.

[6] Humphries *v.* Huffman, 33 Ohio St. 403; Bristol *v.* Carroll Co. 95 Ill. 93.

[7] Kerr *v.* Hitt, 75 Ill. 51.

inclosure of the land," for the reason that the erection of a fence is only an act presumptive of an intention to assert an ownership, and that there are many other acts equally evincive of such an intention.[1] In a late case in the Supreme Court of Missouri, it is said, that "a fence, building or other improvement, is not essential to constitute an adverse possession. Acts of ownership, under a claim of right, visible, are sufficient to authorize the court to find such possession."[2] So in a case in Alabama, the language used is that "the inclosure is but one act indicating possession and claim of ownership. There are many other acts equally indicative of possession," &c.[3] In a case in North Carolina, it is said, "the leading idea is, that there shall be notice to the world," and it was accordingly held that "building a shed, quarrying rock, erecting a lime-kiln, cutting wood," &c., were sufficient acts of ownership, because they were "of a nature calculated to attract more than ordinary notice."[4] On the other hand, in a case in New York, where the claimants under a tax deed caused some surveying to be done on the land, and paid some taxes thereon, it was held that "such acts have never been held to show a possession for any purpose,"[5] To the same effect, as in the cases above quoted from, is the language of the Supreme Court of Arkansas: "It is not the particular use made of the land, or whether built upon and used as a residence, or cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations, which show a visible, open and exclusive possession and use of the land."[6] So held where a plot of ground was used as a

[1] Ellicott *v.* Pearl, 10 Pet. 441, 442; see also Ewing *v.* Burnet, 11 Pet. 41; compare Davis *v.* Bowmar, 55 Miss. 671.

[2] Leeper *v.* Baker, 68 Mo. 400, 407; see also Turner *v.* Hall, 60 Mo. 275, 277.

[3] Bell *v.* Denson, 56 Ala. 448.

[4] Moore *v.* Thompson, 69 N. C. 120; compare Davis *v.* Bowmar, 55 Miss. 671, in which the fundamental principles of adverse possession are exhaustively and ably discussed.

[5] Thompson *v.* Burhans, 61 N.Y. 70.

[6] Mooney *v.* Cooledge, 30 Ark. 655; see also McCreery *v.* Everding, 44 Cal. 246; Brown *v.* Rose, 48 Iowa, 233.

family burial ground; the adverse possession being established by such a use, but being confined to the parts of the land *actually covered with graves.*

§ 733. *Requisites of possession as affected by nature of the land.*—In determining the sufficiency of an adverse possession, as stated above,[1] much depends upon the character and situation of the land in question. Thus, in a recent case in the Supreme Court of Massachusetts, the court said: "What is an adverse and exclusive possession, * * * depends very much upon the character of the land, and the purposes to which it is adapted, and for which it is used."[2] Again: "So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it; that it is difficult to lay down any precise rule adapted to all cases;"[3] and also "the jury may take into consideration the nature and situation of the land;"[4] and, "the possession must be by acts suitable to the character of the land."[5] So in the case of Draper *v.* Shoot,[6] cited in Leeper *v.* Baker, it is said: "It is no easy matter to say what is an adverse possession. It is a question compounded of law and fact, and every case in which it is involved must be determined by its own circumstances. What is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village." And in a case in California, it has been decided that "the acts of ownership and dominion over land, which may be sufficient to constitute an actual possession, vary according to the condition, size and locality of the tract."[7] Again, "the rule of law is very well settled that, where a person claiming land exercises acts of ownership of

[1] See *supra*, § 733, etc.

[2] Bowen *v.* Guild, 130 Mass. 123.

[3] Ewing *v.* Burnet, 11 Peters, 53.

[4] Turner *v.* Hall, 60 Mo. 271.

[5] Bell *v.* Denson, 56 Ala. 449.

[6] 25 Mo. 203. See Leeper *v.* Baker, 68 Mo. 407.

[7] Brumagim *v.* Bradshaw, 39 Cal. 24; see also Creech *v.* Jones, 5 Sneed (Tenn.), 631, 635.

it, by the use of it for the purposes to which it is adapted, he is in such actual occupancy of it as will even bar an action after the lapse of the statutory time. Such possession is as actual as that by inclosure."[1] So held in respect to uninclosed timber land on which the adverse claimant had cut wood and timber. It may be doubted, however, whether the mere cutting of timber would generally be held to be sufficient evidence of actual adverse possession. In the case last cited, the defendant held under color of title, and it is probable, from the statement of facts in the case, that the land in dispute was used as a timber lot in connection with other land owned by the defendant or his grantor. A distinction based upon the latter circumstance, *i. e.*, that the land was used *in connection with* other land as a timber wood-lot, is well drawn in the case of Miller *v.* Long Island R. R. Co.,[2] in the New York Court of Appeals, where it is made the ground of distinguishing the case of Machin *v.* Geortner,[3] in the same State. The same distinction is made in the case of Beaupland *v.* McKeen,[4] in the Supreme Court of Pennsylvania, where it is held as follows: "If the fact be that those in possession of the Patterson tract, at Bear Creek, made such use of the interference as owners ordinarily make of their *adjacent* timber lands—taking firewood, fence rails, or lumber from it, for the use of their mill, * * * this would be possession. * * * Such acts as I have enumerated, have repeatedly been held to constitute actual possession. * * * But, if this was mere marauders' ground—if anybody who wanted to get lumber manufactured at the Bear Creek mill went upon the interference to take timber without regard to the Patterson title—if, in a word, the only acts of possession were occasional entries for lumbering purposes, they would not constitute the possession essential to title."[5] In a case in the Supreme Court of Illinois, the court say,

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[1] Clement *v.* Perry, 34 Iowa, 567.
[2] 71 N. Y. 383.
[3] 14 Wend. (N. Y.) 239.
[4] 28 Penn. St. 134.
[5] See also Williams *v.* Wallace, 78 N. C. 354; Austin *v.* Holt, 32 Wis. 478.

"When a party has title, or color of title, to woodland, and uses the land for the purpose of obtaining wood for fuel, or fencing for a farm in the neighborhood, under a claim of ownership, such facts have been held, under a number of decisions of this court, to constitute possession."[1] But *non constat*, that if there had been *no color of title* in the claimant, such occupation or use of woodland for a farm in the neighborhood—in this case half a mile distant—would have been held sufficient actual adverse possession. We shall see later that when an adverse possession is coupled with "color of title," oftentimes less positive actual and notorious acts of ownership over the land are required.[2] In a recent case in Tennessee, where the land in dispute was uninclosed and unimproved timber land, and where the testimony did not "show absolutely that the land was not susceptible of cultivation or residence," but had been used by defendant simply for the purpose of cutting timber, and was situated about three-fourths of a mile from land on which the defendant resided, it was held, that the possession was insufficient to defeat ejectment by the owner, and the rule was reiterated, that, in general, nothing short of actual inclosure will be regarded as sufficient evidence. Some exceptions, however, were recognized to this rule, as, for example, where the property consisted of an ore bank, a sand pit, stone quarry, or the like.[3] So, in a case in the Supreme Court of Minnesota, it is held, that the mere cutting of timber from wild lands without actual occupancy or cultivation, or inclosure of the land or some part of it, when it is adapted to and capable of such improvement, will not constitute adverse possession sufficient to maintain an action of replevin for logs cut and carried away.[4] In Alabama, however, it is said, that "cutting timber on land fit for no other purpose might be adverse pos-

[1] Scott *v.* Delany, 87 Ill. 148; citing Davis *v.* Easley, 13 Ill. 199; Austin *v.* Rust, 73 Ill. 491.

[2] See *infra*, Chap. XXX. [3] Pullen *v.* Hopkins, 1 Lea (Tenn.), 741.

[4] Washburn *v.* Cutter, 17 Minn. 361; see also Carrol *v.* Gillion, 33 Ga. 539.

session, but if the land were suitable for other purposes such mere acts of occupation would not be sufficient."[1] In the case of Leeper *v.* Baker, cited above, where some swamp land mostly unfit for cultivation, and incapable of being fenced without a risk of the fences being washed away by high water, and when it would not have paid the plaintiff to have cultivated the few acres susceptible of cultivation, had been used as incident to other land of the plaintiff, and adjoining it, to obtain wood, &c., from, that circumstance in connection with payment of taxes, and a survey on record, &c., was held sufficient evidence of adverse possession.

§ 734. *What is a sufficient actual possession.*—It is sometimes said or implied,[2] that one criterion to determine whether the acts of possession of the claimant are sufficient to constitute adverse possession, is the inquiry—what would be the character of the real owner's possession, or treatment of the particular land in question? In many cases this would be a proper test; but, in the class of cases just discussed, such a criterion would be a very unreliable one. In the case of remote and wild lands, for example, an owner would usually be content with the constructive possession of the land which his title would give him, and with, it may be, the payment of taxes. Improvement, fencing, and the like, would, for years, perhaps, be out of the question. Should, however, an adverse claimant, by asserting color of title by a deed on record, and by paying taxes, show thus a treatment, in such a case, in all respects such as the real owner would give the land, that would, alone, be clearly insufficient to establish any adverse title.[3] However, in view of the main object of the requirements of the statutes of limitation as to the character of the adverse possession which will bar the owner's right, being *notice* to the owner of the adverse claim, and such acts of ownership

[1] Rivers *v.* Thompson, 46 Ala. 338; see Ewing *v.* Burnet, 11 Pet. 53.

[2] See Ewing *v.* Burnet, 11 Pet. 53; Beaupland *v.* McKeen, 28 Penn. St. 134.

[3] Brown *v.* Rose, 48 Iowa, 233; Turner *v.* Hall, 60 Mo. 271.

therefore being required as are presumed of themselves to give such notice—actual or constructive—it would seem, that, if it were proved that the owner of the land had actual notice of the adverse claim, and of some acts of ownership thereunder, it might be sufficient to bar the owner under the statute, though, in the absence of actual notice, such acts of ownership of the adverse claimant would not be held sufficient to constitute an adverse possession. Accordingly, such acts as putting deeds on record, passing over the tract, employment of an agent living near by to look after the land, and the payment of taxes, were held insufficient to constitute adverse possession, unless such acts were known to the party holding the legal title, and they were done under claim of adverse title.[1] In view of what has been said above, we can lay down only the very general rule, that, to constitute the actual possession required by the statute, there must be some tangible, positive acts of ownership upon, and some actual use or appropriation of the *locus in quo;* and that the nature of such acts, use or appropriation is determined, in large measure, by the character and location of the land, and the uses to which it would naturally be put.[2]

§ 735. *Possession must be "open" and "notorious."*—The next requisite of adverse possession which we shall consider, is, that it must be "open," or, as it is sometimes called, "visible" and "notorious." He who would claim by reason of his adverse possession must, as has been said, "keep his flag flying."[3] The main reason for the requirements of the law respecting the character of the adverse possession which will set in motion the statute, and will ultimately bar the rights of the true owner of land, is, that the possession shall be of such a character that it itself shall

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[1] Turner *v.* Hall. 60 Mo. 271; compare Clark *v.* Gilbert (39 Conn. 97), § 736.

[2] See cases cited above. As to the statutory regulations in respect to what constitutes adverse possession in several of the States, see *supra*, §§ 729-731.

[3] Wood *v.* Drouthett, 44 Tex. 370; see Stephens *v.* Leach, 19 Penn. St. 265.

notify the owner of the land of the adverse claim,[1] and force him to protect his rights, or, by acquiescing in the adverse claim for a certain period, lose them altogether. "The ground upon which the junior claimant acquires title by adversary possession, is the supposed laches of the owner. The latter sees his boundaries invaded by an adverse claimant asserting title, and, if he remains passive under such circumstances a sufficient length of time, he is held to acquiesce in the adverse claim." So the adverse possession, like the original entry,[2] "must be such as to notify the real owner, at least as against him, of the possession and claim."[3] "Notoriety is only important when the adverse character of the possession is to be brought home to the owner by presumption;"[4] "because it gives the owner notice that his seizin is interrupted, and that his title may be endangered."[5] Moreover, "acquiescence," upon which the whole doctrine of adverse possession rests, "cannot be presumed, unless the owner has, or may be presumed to have, notice of the possession." It is said, "The law designs that the owner shall have ample knowledge on the subject, and a full opportunity to assert his claim, but if he sleeps upon his rights for a period of fifteen years he is presumed to have acquiesced in the claims of another."[6] So we have seen that a "clandestine entry" is insufficient to set the statute in motion,[7] because the owner must have "knowledge or means of knowledge." So "a silent possession, accompanied by no act which can amount to an ouster or give notice to his cotenant of his intention to exclude him, will not make a possession adverse."[8] "Secret possession will not do, as pub-

[1] Turpin *v.* Saunders, 32 Gratt. (Va.) 27.
[2] Soule *v.* Barlow, 49 Vt. 329; Wing *v.* Hall, 47 Id. 182.
[3] Fugate *v.* Pierce, 49 Mo. 447.
[4] Clark *v.* Gilbert, 39 Conn. 97.
[5] Cook *v.* Babcock, 11 Cush. (Mass.) 210.
[6] School District *v.* Lynch, 33 Conn. 334.
[7] Thompson *v.* Pioche, 44 Cal. 508.
[8] Abercrombie *v.* Baldwin, 15 Ala. 370; see McClung *v.* Ross, 5 Wheat. 116; Willison *v.* Watkins, 3 Pet. 51; Turpin *v.* Saunders, 32 Gratt. (Va.) 34.

licity and notoriety are necessary as evidence of notice and to put those claiming an adverse interest upon inquiry."[1]

§ 736. *Notice to the owner, actual or constructive.*— The test, therefore, as to whether acts of ownership or possession are sufficiently open and notorious, is whether they are sufficient in themselves to notify the owner of the possession and its hostile character.[2] Hence it is not necessary to prove actual knowledge on the part of the owner. "All that is necessary to constitute disseizin is actual, adverse and exclusive possession, so open and notorious that it *may be presumed* to have been known to the rightful owner."[3] And whether the notoriety is such as to raise such presumption of knowledge is for the jury to determine. Thus, "where an inclosure, consisting partly of natural and partly of artificial obstructions, is relied upon as, in itself, establishing a *possessio pedis*, it is the province of the jury, upon all the proofs, and considering the quantity, locality and character of the land,[4] to decide whether or not the artificial barriers were sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the notoriety and *indicia* of ownership which constitute so important an element in a *possessio pedis*."[5] But the following language in a charge to the jury, "that any acts done on the premises indicating an intention to hold the land," is held "altogether too loose."[6] In view of the reason for the rule requiring notoriety of possession, namely, that notice may be given to the owner, and according to the case of Clark *v.* Gilbert above quoted from, it would seem

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[1] Armstrong *v.* Morrill, 14 Wall. 145.

[2] Moore *v.* Thompson, 69 N. C. 121; see also a recent case in the Court of Errors and Appeals of the State of New Jersey, in which the subject of the requisites of adverse possession is admirably treated by Depue, J., in Foulke *v.* Bond, 12 Vroom (N. J.), 527.

[3] Samuels *v.* Borrowscale, 104 Mass. 210; see also Alexander *v.* Polk, 39 Miss. 755.

[4] See *supra*, § 733.

[5] Brumagim *v.* Bradshaw, 39 Cal. 50.

[6] Lynde *v.* Williams, 68 Mo. 370.

that if the owner had already actual knowledge of the adverse possession and claim, then, as it is expressed in the case just cited, "openness and notoriety are unimportant."[1]

When the possession is taken under a deed which is placed on record, it has been held that there is a *constructive* notice to the owner[2] of the claim and its extent. Any such effect, however, given to a deed on record would not relieve the adverse claimant from proving an "actual" and "open" possession of some part of the *locus in quo*, in accordance with principles already stated; the effect of the recorded deed would, no doubt, as regards notice to the owner, be confined to the part of the land outside the actual possession of the claimant,[3] and claimed only by a constructive possession.

§ 737. *Possession must be "continuous."*—The one entitled to the possession of land being ousted by the entry of an adverse claimant, and the adverse possession of the latter being begun by actual and open acts of ownership upon the land, in order that the owner shall be barred of his right of re-entry and recovery of the land, such adverse possession must continue uninterruptedly for the period of time limited by the statute. This period, as we have remarked, varies in the different States of the Union; and in the same State there are often different limitations, depending upon different conditions, such, for example, as whether the possession be accompanied with color of title—so-called—or with payment of taxes, or has been begun in good faith, and the like. As a rule, we find, on examination of the statutes, that, in the older and more settled portions of the country, where the conditions of property of all kinds are more stable, the periods prescribed by the statute are longer than in the more recently settled communities, where land, as well as property of all kinds, is constantly changing hands, and varying in value. In the latter, too, it is the

[1] Clark *v.* Gilbert, 39 Conn. 97; compare Turner *v.* Hall, 60 Mo. 271; see § 734.

[2] Forest *v.* Jackson, 56 N. H. 357.

[3] As to this and kindred subjects, see *post*, Chapter XXX.

policy of the State that the lands should be quickly settled, as is stated in a Texas case cited above[1]; and every encouragement, therefore, is given to "enter and take the land." While in New York, for example, the period of limitation for the recovery of real property is twenty years, in California, which in other respects has adopted the New York statute, the period is but five years. As we have seen, the time when the statute begins to run is when the party entitled to the possession is disseized, or, in other words, when his right of action for the recovery of the possession accrues. As the possession by presumption of law follows the title, except in the case of an adverse possession,[2] it follows, that the adverse possession ceasing, either by the abandonment of the disseizor or by the re-entry of the true owner before the adverse possession has ripened into title, the true owner is restored to the possession.[3] The adverse possession must, therefore, continue as it has begun, to work ultimately a forfeiture of the right of the owner. To determine, then, in this respect, the sufficiency of the adverse possession, we inquire whether the adverse tenant has ever within the period abandoned the possession, or ceased to exercise the acts of dominion which we have found are necessary to constitute adverse possession, or whether, meanwhile, the true owner has been restored to the possession, either by his re-entry and ouster of the tenant, or by any other interruption of the latter's possession. In connection with this subject, we shall also consider how far the periods of time, during which different occupants have held possession of the land, may be joined or "tacked" together to constitute *one* continuous possession.[4]

[1] See *supra*, § 727.

[2] Ruggles *v.* Sands, 40 Mich. 559; Williams *v.* Wallace, 78 N. C. 354.

[3] Armstrong *v.* Morrill, 14 Wall. 120; Potts *v.* Gilbert, 3 Wash. C. C. 479; Holdfast *v.* Shepard, 6 Ired. (N. C.) Law, 364; see also Smith *v.* Chapin, 31 Conn. 531, where it is said: "Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them."

[4] See *infra*.

§ 738. It is hardly necessary to cite authorities, in addition to those already given on the requisites of adverse possession, to support the general proposition that the adverse possession must be continuous. Moreover, the "continuity" of the adverse possession is the very essence of the doctrine and policy of the statutes of limitation. As the court say in Groft *v.* Weakland, "If there be one element more distinctly material than another in conferring title, where all requisites are so, it is the existence of a continuous adverse possession,"[1] &c. So in the case of Armstrong *v.* Morrill, in the Supreme Court of the United States, Mr. Justice Clifford, in delivering the opinion of the court, says: "Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, a *new adverse possession* for the time limited must be taken for that purpose."[2] In other words, the underlying reason for requiring continuity of possession is, as above stated, the principle of law that an adverse possession ceasing or being interrupted for any cause, the possession of the true owner is restored, and the latter, having actually or constructively re-entered, the statute limiting his right of re-entry of course stops running, to be set in motion again only by a *new* entry, ouster, and hostile possession. As is said in Olevine *v.* Holman, in the Supreme Court of Pennsylvania, "If the continuity of the possession be broken for a single day before the twenty-one

[1] 34 Penn. St. 308; see also Bell *v.* Denson, 56 Ala. 449; Riggs *v.* Fuller, 54 Ala. 141.

[2] Armstrong *v.* Morrill, 14 Wall. 146.

years have elapsed, the previous possession goes for nothing, and the wrong-doer must commence *de novo*."[1] As to the necessity, in general, of continuity in adverse possession, we shall, in addition, quote only from a few authorities on the subject, as it is one that hardly demands or admits of further discussion.

§ 739. *Requisites of continuity in possession.*—"The statute protects only such adverse possession as has been continuous in fact, both as to time and interest, during the prescribed period."[2] The jury "must find that such possession was continuous as well as adverse, and if they further find that there was a break in such possession, or that said premises were not in the possession of any one for one or more years during that time, that the same was not continuous."[3] "Such a temporary occupancy for such an important purpose, really nothing but trespasses repeated from year to year, can confer no title by adverse possession."[4] So held when the adverse possession sought to be established consisted in entries upon the land once a year for over twenty years, and in the cutting and removal of grass. Such acts are plainly separate acts of trespass and not such a constant and continuous possession as is required to ripen into title.[5] So the adverse claimant "must also continue in possession for seven years. Occasional entries upon the land will not serve, for they may either be not observed, or if observed, may not be considered as the assertion of rights."[6] But it is said: "To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact

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[1] 23 Penn. St. 284; see also Brolaskey *v.* McClain, 61 Id. 166.

[2] San Francisco *v.* Fulde, 37 Cal. 353.

[3] Lynde *v.* Williams, 68 Mo. 365. [4] Wheeler *v.* Spinola, 54 N. Y. 387.

[5] White *v.* Reid, 2 N. & McC. (S. C.) 535; see also Ward *v.* Herrin, 4 Jones' (N. C.) Law, 25; Austin *v.* Holt, 32 Wis. 478; see also Gudger *v.* Hensley, 82 N. C. 481, 483.

[6] Williams *v.* Wallace, 78 N. C. 356, 357, and cases cited; see also McCullough *v.* Wall, 4 Rich. (S. C.) Law, 81; Washabaugh *v.* Entriken, 34 Penn. St. 74.

that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession."[1] Moreover, "his possession must not only have been adverse * * * but he must also have claimed the title * * * during the entire statutory period."[2] So "the adverse enjoyment must have been continuous, and to the full extent for the whole of the time. * * * It is not sufficient that a person entering upon lands, has entered more than twenty years ago, if there have been one or two years in which he has had no possession within the twenty years."[3] "To make the bar of twenty years possession operative and effectual to destroy a right of entry, it is necessary that the possession claimed as adverse should be shown to be continued and uninterrupted,"[4] and the ground of this requirement, as stated in the case cited, is, that there must be at any period of the twenty years some occupant against whom the owner might bring an action of ejectment in order that the latter should be barred by the statute. Or, as it is elsewhere expressed, the occupation must be such "as to shew an uninterrupted exercise of ownership, or continued assertion of right, and liability at all times to the possessory action of the owner."[5] So it is stated, as another reason for requiring the tenant to "remain permanently upon the land," that the possession should be such "as to leave no doubt on the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land."[6] Or, as it is expressed in cases above cited, the tenant must "keep his flag flying."[7] On the principle that the constructive possession of the owner revives when the land ceases to be actually adversely possessed by another, the continuous possession required must

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[1] Webb *v.* Richardson, 42 Vt. 473. [2] Lovell *v.* Frost, 44 Cal. 475.

[3] Carlisle *v.* Cooper, 4 C. E. Green (N. J.), 259.

[4] Trotter *v.* Cassady, 3 A. K. Marsh. (Ky.) 366.

[5] Holdfast *v.* Shepard, 6 Ircd. (N. C.) Law, 365; see Moss *v.* Scott, 2 Dana (Ky.), 274.

[6] Denham *v.* Hollman, 26 Ga. 191. [7] See *supra*, §§ 737, 738, 739.

be, so to speak, *stationary*. As it is said in Potts *v.* Gilbert,[1] above cited: "The adverse possession before mentioned, must not only continue, but it must continue the *same, in point of locality*. * * * A roving possession from one part of a tract of land to another, cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels, should amount, in the whole, to that number of years."

§ 740. *Interruption of the possession.*—The requirement of continuity implies that the possession shall not have been interrupted, either by the act of the owner, or the interference of another adverse occupant, or by the abandonment of the adverse claimant himself. In either case, as we have seen, the constructive if not the actual possession of the owner revives,[2] a new entry on the part of the adverse claimant becomes necessary, and a new adverse possession must be inaugurated, which his previous possession can in no respect assist.[3] The important question, therefore, in this subject, is, what amounts to an interruption of an existing adverse possession sufficient to stop the running of the statute, and render the previous possession of no avail as against the true owner; in other words, to restore the latter to the possession from which he had been ousted? As is said in the case of San Francisco *v.* Fulde,[4] above cited, "it makes no difference by whom, or in what manner, the continuity of the adverse possession is broken, so only that it is broken."

§ 741. *By re-entry of the owner.*—If the theory of limitations rests upon the *neglect* and *acquiescence* of the owner of the land, it naturally follows that, should he re-assert his rights as owner, by again exercising acts of dominion over his land, hostile to any pretended adverse right, the adverse

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[1] 3 Wash. C. C. 478.

[2] Mally *v.* Bruden, 86 N. C. 259.

[3] Jackson *v.* Leonard, 9 Cow. (N. Y.) 653; Melvin *v.* Proprietors of Locks, &c. 5 Metc. (Mass.) 32; Allen *v.* Holton, 20 Pick. (Mass.) 465.

[4] 37 Cal. 353.

possession will be defeated, and the running of the statute stopped.[1] And such an entry "has the same effect in arresting the progress of the limitation as a suit."[2] In other words, the re-entry of the owner ousts the former disseizor. Moreover, the adverse occupant need not be *actually* turned out of possession by the owner, to defeat the statute, and that, too, on account of the same rule of law that makes it necessary, in order to establish an effectual adverse possession to the owner, that the latter should be *actually* ousted if in actual possession; namely, the principle that if two or more persons are in actual occupation of the land, the legal possession follows the title. But, in most respects, we find that the requisites for an effectual re-entry by the owner are the same as to establish an adverse possession in the case of an entry by a disseizor. That is to say, the re-entry must be evidenced by distinct acts of ownership inconsistent with any adverse claim, and be done with the intent to claim the exclusive possession. As it is said by Gibson, C. J., in a leading case on this subject in Pennsylvania, "there must be an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant; or it cannot perhaps be better defined than by saying that the entry must bear, on the face of it, an unequivocal intent to resume the actual possession."[3] As to what acts by the owner, in themselves, will constitute an interruption of the adverse possession, it is impossible to lay down any rule. It has been held that it is for the jury, under proper instruction, to determine from the number, character and time of such entries by the owner, whether the possession of the owner was exclusive, and, in the case before the court, it was held improper for the trial judge to characterize the entries of the owner from time to time as trespasses, and say they were

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[1] Pederick *v.* Searle, 5 S. & R. (Penn.) 239.

[2] Henderson *v.* Griffin, 5 Pet. 158.

[3] Altemas *v.* Campbell, 9 Watts (Penn.), 31; see also Holtzapple *v.* Phillibaum, 4 Wash. C. C. 356.

ineffectual to prevent the operation of the statute, unless accompanied by such an assertion of title as would be necessary to toll the statute in the case of an actual disseizin.[1] In the case, however, of Holtzapple *v.* Phillibaum,[2] above cited, it is said, admitting that the *quo animo* with which the entry is made is to be decided by the jury, yet that "whether the entry was made in a legal form or not, is exclusively a question of law, when the fact is ascertained." But in a recent case in Massachusetts, where the entry was followed by no act of ownership, and was simply a passing over the land for the purpose of ascertaining its condition, to see whether any use had been made of it, or whether any buildings or structures had been erected upon it, &c., and "the presiding judge having ruled that this single fact * * * was in itself a matter of law, an interruption of the possession," it was held error,[3] the court holding, that, "although there may be cases in which the occupation by the true owner may be of such a nature, and so continued, that it would be the duty of the court, upon the truth of such facts being apparent, to rule, as matter of law, that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted."

§ 742. *Statutory regulations as to an effectual re-entry.* —The rules of law, as above stated, as to the effect of re-entry by the owner in interrupting the adverse, and restoring his own possession, are those which obtain at common law. Many of the States, however, have enacted statutory regulations as to what is necessary to constitute an effectual entry upon land, so as to defeat the statute. Generally, in these States, it is necessary, in addition to making an entry,

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[1] O'Hara *v.* Richardson, 46 Penn. St. 385.

[2] 4 Wash. C. C. Rep. 370.

[3] Bowen *v.* Guild, 130 Mass. 121, 124, and cases cited; compare Ransom *v.* Lewis, 63 N. C. 45; but see O'Hara *v.* Richardson, 46 Penn. St. 385, 391.

either to bring an action within a certain period—usually one year—from the time of entry, or to maintain an open and peaceable possession for the same period.[1] On this subject, therefore, the laws of each State must be consulted. On the subject, too, of forcible entry and detainer, there are statutory regulations in some of the States, which would materially modify, if not destroy, the common law rule as to the effect of a forcible entry by the owner.[2] In the absence of statutory regulations, however, it may be stated generally, that an unequivocal entry and assertion of ownership upon the land, evidenced by an open and hostile act of dominion, combined with an intention so to assert exclusive rights on the part of the owner, will effectually interrupt the adverse possession and defeat the statute of limitations.

§ 743. *Effect of bringing an action or recovering a judgment in ejectment.*—The main object of the statute of limitations being to bar an action by the owner for the recovery of the land, it follows, of course, that if an action is instituted by the owner before the statutory period has elapsed, the running of the statute, and the adverse possession upon which it depends are, at least, suspended, and the rights of the parties, according to the general rule, are to be determined as they existed at the time the action was brought. If, then, at that time the statute had already run in favor of the defendant, the plaintiff must fail; but if at that time the statute had not run, the plaintiff is entitled to recover, though the statutory period might elapse during the progress of the action. These rules hardly admit of discussion. When, however, the plaintiff has recovered judgment in such a case, the question arises, whether it is necessary for him to follow up such recovery by an actual entry and taking possession, or whether the recovery of the judgment is

[1] See, for example, the laws of Massachusetts, New York, Michigan, Wisconsin, Missouri and others.

[2] For example, see Ferguson *v.* Bartholomew, 67 Mo. 219; Cary *v.* Edmonds, 71 Id. 525.

itself an *interruption* of the adverse possession, rendering the former adverse possession entirely ineffectual, and necessitating a new adverse possession for the whole statutory period. In support of the latter view is the case of Brolaskey *v.* McClain,[1] in the Supreme Court of Pennsylvania, in which it is said, "If Wester" (under whom the defendant in the ejectment claimed) "and his heirs had the continued and adverse possession of the lot during all this time, it would be sufficient to give them a title under the statute. But, as we have already seen, Richard Peters brought an action of ejectment against Henry Wester in 1818, and recovered a verdict and judgment therein in 1825. This recovery stopped the running of the statute, and even if the Westers held adverse possession of the lot thereafter until the house was torn down in 1838, they acquired no title under the statute of limitations." In an earlier case however, in the same court, it is certainly implied, if not held directly, that something more than a mere recovery of judgment is needed to interrupt the course of the statute.[2] But in a recent case in Michigan, where a decree had been rendered requiring a prior occupant of the land to convey it to one standing in privity with the plaintiff in ejectment, it was held as follows: "Whatever may have been the true character of Mrs. Smith's possession * * * the decree made * * * which required her to convey * * * shifted her position, and placed her in the same condition in regard to her possession as though she had then voluntarily made conveyance. * * * Her previous possession was of no avail any longer as a holding to help make out a continuous adverse possession. Her entire right was determined by the decree, and her possession thereafter, even

[1] 61 Penn. St. 166; see also the case of Hood *v.* Palmer, 7 Rich. (S. C.) Law, 138, where it is held that the issuing of a writ of ejectment stops the running of the statute, so that a subsequent possession cannot be joined with a prior occupation, to make out the requisite period.

[2] See Groft *v.* Weakland, 34 Penn. St. 307, 308; see also Pederick *v.* Searle, 5 S. & R. (Penn.) 235, 239.

when joined to that of her successors in the same right, appears to have been too short to give rise to a title under the mortgage, founded on adverse possession."[1] On the other hand, it is held in Alabama,[2] that "the fact of a recovery in ejectment, without an entry under it, did not stop the statute of limitations," citing the New York case of Jackson *v.* Haviland.[3] In the latter case, when the plaintiff had failed to enter after recovering judgment in ejectment, the court say: "he (the plaintiff) now stands in the same relation to the defendant as if he had never attempted a legal remedy by the former suit." And in a case in the United States Supreme Court, it was decided that the recovery of a judgment in ejectment did not, alone, suspend the statute, but that there must be also *a change of possession.*[4]

§ 744. *Possession lost or interrupted by abandonment.*— If continuity is an essential element in adverse possession, it is, of course, a truism to say, that, should the adverse claimant abandon his possession before the period prescribed by the statute has run, no bar under the statute will have been created. What amounts to an abandonment depends upon the principles which we have already considered; that is to say, when the possession ceases to be of a character required to destroy the actual and constructive possession of the true owner, *i. e.*, ceases to be adverse, then the rights and possession of the true owner revive, provided he is not already barred by the statute. Therefore, openness being required, should the possession of the claimant become secret and not such as continually to notify the owner of the adverse claim; or, actual residence or cultivation being required, should the residence be given up, or the cultivation be abandoned, the possession of the owner would revive, and the statute cease running. Again, hostility to the true owner being the most

[1] Gower *v.* Quinlan, 40 Mich. 572, 575.
[2] Doe *v.* Reynolds, 27 Ala. 364, 377.
[3] Jackson *v.* Haviland, 13 Johns. (N. Y.) 229, 235.
[4] Smith *v.* Trabue, 1 McL. (U. S.) 87.

essential requisite of adverse possession, should the tenant, by a distinct recognition of the title of the true owner, give up his hostile intent, the possession, though outwardly continuing the same in character, would cease to be adverse. So we find, that, if a party in possession of land offers to purchase it from the true owner, and this offer is made, not merely to buy an outstanding or adverse claim in order to quiet his possession, or protect himself from litigation, the offer is a recognition of the owner's title, and will stop the running of the statute.[1] Again, in reference to the effect of attornment, it was held, that "the surrender was equally involuntary, when the attornment is the alternative of actual ouster."[2] An agreement to submit a question of location of a boundary line to arbitration, is such an abandonment of the requisite hostile intent, as to interrupt the adverse possession and the running of the statute.[3] As already shown, the possession required in particular cases depends upon the character of the land, so that what would amount to abandonment in one case would be insufficient in another.[4] So, also, it is said, "while an abandonment of the premises will so break the possession of him who has occupied, that the constructive possession of the true owner will again attach, and thus save his right of entry, every failure to cultivate the field for a season, or a delay in repairing the fences when destroyed, will not be held to be an abandonment if a sufficient reason appears."[5]

§ 745. *Interruption by other adverse claimants.*—As the adverse possession may be interrupted by the re-entry of the owner, or lost by the abandonment of the tenant, so it may be interrupted by the entry of a new adverse claimant, ousting the former tenant and establishing a new possession,

[1] Lovell *v.* Frost, 44 Cal. 471; compare Bowen *v.* Guild, 130 Mass. 121.

[2] Groft *v.* Weakland, 34 Penn. St. 308.

[3] Hunt *v.* Guilford, 4 Ohio, 310; compare Trustees, &c. *v.* Kirk, 84 N. Y., 215.

[4] Nixon *v.* Porter, 38 Miss. 415; see, in addition, cases cited in § 733, &c.

[5] Crispen *v.* Hannavan, 50 Mo. 550. On the principle that an abandonment restores the possession of the true owner; see also Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

adverse to the true owner. We have seen that the constructive possession is restored the moment the adverse possession ceases; consequently, before a second adverse possession is inaugurated, the true owner must be again disseized or ousted. The possessions of two successive adverse claimants not in privity are, therefore, distinct, and, as we shall see below, the later possession must be judged by its own merits alone, in determining whether it has ripened into title. What hostile act of another adverse claimant will interrupt the possession of the first tenant, by establishing the former's possession, will, in general, be determined by the same requirements, as, we have seen, belong to an entry sufficient to oust the owner in the first place; that is to say, it must be an open hostile act of ownership, coupled with the intention to hold the possession exclusively. Thus it is said in a recent case in Alabama.[1] "The unknown intrusions of mere trespassers will not interrupt the continuity unless continued for such a length of time as to become assertions of adverse right." In a late case in Texas, where a few days after the occupant of land had gone into possession, he was driven away by the Indians, but returned "as soon as it was safe for him to do so," but about a year after his expulsion, the court refused to reckon a part of the time of his absence to complete the bar of the statute, on the ground that he had not "such actual, continuous, adverse possession as was contemplated by the statute."[2]

§ 746. *Tacking.*—Under the head of continuity, as an essential ingredient in effectual adverse possession under the statute of limitations, may be considered the subject of "tacking," as it is called, or, in other words, the joining together of the periods of time during which two or more successive occupants have had possession of the premises, with a view to form one continuous and complete adverse possession. Although the expression, "tacking of possessions,"

[1] Bell *v.* Denson, 56 Ala. 449; see also Doe *d.* Farmer *v.* Eslava, 11 Ala. 1028.

[2] Fitch *v.* Boyer, 51 Tex. 349, 350; see especially Clark *v.* Potter, 32 O. S. 49; Smith *v.* Lorillard, 10 Johns. (N. Y.) 338.

is frequently met with, it is, strictly speaking, incorrect. It is not the case that different possessions are tacked, but rather the successive periods of time during which different occupants have held the same possession. There is but one possession, which, however, may be begun and continued by different occupants; or, as it is expressed, "it is immaterial whether the possession be held for the entire period by one party, or by several parties in succession, * * * provided the possession be continued and uninterrupted."[1] The very test of whether "tacking" may be permitted to make out the necessary statutory period for adverse possession, is, whether the successive occupancies, so to speak, may be considered as forming a single, uninterrupted possession, a "unity of possessions" as it is called,[2] or in other words, one begun and continued in the same right. It may, then, be stated generally, that tacking is permissible only when the successive occupants have held the possession in the same right; in other words, when there is a privity of estate between them.[3] The Supreme Court of Alabama use this language:[4] "Continuity is an indispensable element of an adverse possession. If several persons enter on lands at different times, and there is not a privity of estate between them, the several possessions cannot be tacked so as to make a continuity of possession on which the statute of limitations will operate. But if there is such privity of estate, or of title, as that the several possessions can and should be referred to the original entry, they are regarded as joined and continuous. The possession of a landlord and his tenant, of an ancestor and his heirs, of a vendor and his vendee, may be tacked to complete the bar of the statute of limitations. There is no break or inter-

[1] Benson *v.* Stewart, 30 Miss. 57.

[2] Schrack *v.* Zubler, 34 Penn. St. 41.

[3] See Haynes *v.* Boardman, 119 Mass. 415; Chandler *v.* Rushing, 38 Tex. 595.

[4] Riggs *v.* Fuller, 54 Ala. 146; compare Clark *v.* Chase, 5 Sneed (Tenn.), 636; see also Baker *v.* Hale, 6 Baxter (Tenn.), 46; Jackson *v.* Leonard, 9 Cow. (N. Y.) 653.

ruption in the possession, each possessor is connected with his predecessor, and the whole is a continuous possession." But, on the other hand, we may add, unconnected possessions, though successive, cannot be tacked, for the reason that the moment that one possession ceases, there is a break in the continuity, and, as we have above shown, in that moment the possession of the owner is restored, and a new period under the statute must therefore begin with the new adverse possession, however immediately it may have succeeded its predecessor. In such a case, as it is expressed by the Supreme Court of California,[1] "the possession of each is distinct, and cannot constitute one adverse possession, for they are referable to different entries; and because, as the defendant merely succeeds the former possessor, without privity, there may be an immediate succession of possessions, but not a continuity of possession." In Melvin *v.* Proprietors of Locks, etc.,[2] the Supreme Court of Massachusetts said: "It is a principle well established, that where several persons enter on land in succession, the several possessions cannot be tacked, so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. Whenever one quits the possession, the seizin of the true owner is restored, and an entry afterward by another, wrongfully, constitutes a new disseizin."[3] As it is expressed also by the Supreme Court of Connecticut: "The possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them."[4] So, and for the same reasons, two or more distinct possessions of the same occupant cannot be tacked to make out a sufficiently long adverse possession, for, as we have seen, in such a case the continuity has been interrupted.[5] It was held in a case in the United States Su-

[1] San Francisco *v.* Fulde, 37 Cal. 353, and cases cited.

[2] 5 Metc. (Mass.) 32.

[3] See also Morrison *v.* Hays, 19 Ga. 294; Sawyer *v.* Kendall, 10 Cush. (Mass.) 244; Crispen *v.* Hannavan, 50 Mo. 536.

[4] Smith *v.* Chapin, 31 Conn. 531.

[5] See Austin *v.* Bailey, 37 Vt. 219, 224.

preme Court, that, though the actual possession of the claimants had never in point of fact been interrupted, yet the land in the meantime having been forfeited to the State for non-payment of taxes, the possession in law had been interrupted, and consequently the possession of the same occupant prior and subsequent to the forfeiture could not be tacked.[1] The Supreme Court of Georgia, in which State the statutes of limitation were suspended from the 14th of December, 1861, to the 1st of January, 1863, decided that a possession enjoyed prior to December 14th, 1861, could be tacked to a possession subsequent to January 1st, 1863.[2]

§ 747. *Privity, what constitutes for purposes of tacking.*—The cases already referred to are sufficient to support the general principle that *privity* of some sort between successive occupants is essential to tacking their periods of possession, so as to preserve its continuity;[3] the main question remaining, then, is, what connection or relation between successive tenants will be held to constitute such privity? It is held by the Supreme Court of Missouri,[4] that "there must be a privity of grant or descent, or some judicial or other proceeding, that shall connect the possessions, so that the latter shall apparently hold by right of the former;" and the court add, "not even a writing is necessary, if it appear that the holding is continuous and *under the first entry.*" The ordinary relations of landlord and tenant, ancestor and heir, and vendor and vendee, specified in cases already cited,[5] clearly constitute such a privity, as that the "latter shall apparently hold by right of the for-

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[1] Armstrong *v.* Morrill, 14 Wall. 121, 145 and 146.

[2] Pollard *v.* Tait, 38 Ga. 443.

[3] Though the principle stated in the text may be laid down as an indisputable rule of law, yet occasional *dicta* are to be met with holding the contrary doctrine, namely, that "no privity or connection among the successive tenants" is necessary. See Davis *v.* McArthur, 78 N. C. 359, and cases cited; Scales *v.* Cockrill, 3 Head (Tenn.), 432; but see Baker *v.* Hale, 6 Baxter (Tenn.), 46.

[4] Crispen *v.* Hannavan, 50 Mo. 549.

[5] See Riggs *v.* Fuller, 54 Ala. 141; Sawyer *v.* Kendall, 10 Cush. (Mass.) 244.

mer," and that the possessions of both shall be "referable to the same entry," and, consequently, tacking in such cases is clearly allowable. The test question as to whether the requisite privity exists between successive tenants is, whether the occupation of the subsequent tenant is referable to the same entry, and under the same "claim of right," as it is called, as that of the prior occupant: in other words, whether the occupation of the one constitutes but a continuation of the possession of the other. We need not inquire, in addition, whether the occupation of the subsequent tenant was derived directly from the prior tenant. It was decided, however, by the Supreme Court of Vermont,[1] that there was not the requisite privity between one in possession of land under a will under color of a life estate, and one in possession, after the termination of the life estate, under the same will, claiming in remainder. But the contrary and better doctrine, it seems to us, is held in a later case in Massachusetts,[2] wherein the opinion of the court is thus expressed: "It is claimed that there is no such privity between the life tenant and the remainderman, because the latter in no sense claims under the former. But the answer is, that both claim under the same will by one title. The disseizin, which was commenced by the testatrix, is continued by each in accordance with that title, and is referred by each only to the entry of the testatrix. There has been no loss of possession; no restoration of the seizin to the true owner; no new entry. The disseizin which commenced with the testatrix has been continuous in her devisees, and establishes her title by lapse of time. It is plainly distinguished from a case of successive entries and new disseizins by different and independent parties. * * * The test of title is that there has been no interruption of possession, and no new entry required."

§ 748. In the following cases, which we cite as illustra-

[1] Austin *v.* Rutland R. R. Co. 45 Vt. 215.

[2] Haynes *v.* Boardman, 119 Mass. 415.

tions, it has been held that the relation between the successive tenants, constituted such a privity that their possessions could be tacked: between a purchaser of land at a sale by an administrator of a prior occupant and the latter;[1] a husband, possessing land in the right of his wife during his life, and the widow continuing the possession in her own right;[2] officers and members of an unincorporated society, occupying land, and the society after its incorporation continuing the possession;[3] the vendor and vendee of land, where no deed has been given of the premises in question, and the transfer of possession is shown only by parol.[4] This question of whether a deed, or writing effectual to pass title, is necessary, in order to connect the occupancy of a transferee of the possession with that of the prior occupant, has often arisen, but there is no doubt that, where the question only of an actual, in distinction from a constructive, possession arises, no necessity for such written evidence of transfer exists in order to show a continued possession. The Supreme Court of Ohio remarked:[5] "The mode adopted for the transfer of the possession may give rise to questions between the parties to the transfer; but, as respects the rights of third persons against whom the possession is held adversely, it seems to us to be immaterial, if successive transfers of possession were in fact made, whether such transfers were effected by will, by deed, or by mere agreement, either written or verbal." In such a case, too, as far as the *actual* possession transferred is concerned, it makes no difference if one of the occupants had color of title and the other had

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[1] Cochrane *v.* Faris, 18 Tex. 850.

[2] Holton *v.* Whitney, 30 Vt. 405. On the other hand, it has been held that a wife has no such privity of estate with her husband, in land of which he died in an adverse possession to the real owner, that her continued possession after his decease can be tacked to his occupancy. Sawyer *v.* Kendall, 10 Cush. (Mass.) 241.

[3] Reformed Church *v.* Schoolcraft, 65 N. Y. 134.

[4] Weber *v.* Anderson, 73 Ill. 439.

[5] McNeely *v.* Langan, 22 Ohio St. 32; see Weber *v.* Anderson, 73 Ill. 444; citing Smith *v.* Chapin, 31 Conn. 531; Menkens *v.* Blumenthal, 27 Mo. 203; Crispen *v.* Hannavan, 50 Mo. 544.

not. The actual possession of the prior will avail the subsequent occupant.[1] But when it is attempted to apply the doctrine of privity of possession to a constructive as well as an actual possession, claimed to be continued in the subsequent occupant, the possession of the latter must be under either the same "color of title," or written instrument, under which the prior occupant claims, as, for example, a will; or under such an instrument derived from the prior occupant,[2] as, for example, a deed. As we shall see presently, a deed void upon its face cannot constitute "color of title;" and so it has been held in the Supreme Court of New York, that such a deed from one possessor to another will not preserve the continuity of a *constructive* possession.[3]

§ 749. *Possession must be "hostile."*—It is, of course, but tautology to say that adverse possession must be "hostile," and, on the general principle that possession, to be an effectual defense under the plea of the statute of limitations, must be in "derogation of," and not in "conformity with," the rights of the true owner,[4] it is hardly necessary to cite any further authorities. We repeat, that the whole doctrine of the bar of the statute is based upon the acquiescence of the owner in the hostile acts and claim of the adverse possessor. As we shall see hereafter, there must exist in the occupant an hostile intent or a claim inconsistent with any right of the owner; and, as already shown, such intent or claim must be manifested by acts of possession sufficiently actual, open, and continuous. To say that the possession must be hostile, is, in effect, to say that it must not be with the permission or in subserviency to the rights of the true owner. Where, therefore, there is already existing any relation or agreement between the owner and the occupant, in pursuance of which the latter is in possession of the

[1] Day *v.* Wilder, 47 Vt. 583; see also Howland *v.* Newark Association, 66 Barb. (N. Y.) 366.

[2] Crispen *v.* Hannavan, 50 Mo. 549; see also Cooper *v.* Ord, 60 Mo. 431.

[3] Simpson *v.* Downing, 23 Wend. (N. Y.) 316, 320.

[4] Compare Farish *v.* Coon, 40 Cal. 33.

land, as where the occupant has merely been in possession by sufferance, and without any intent to appropriate the land for himself, though such possession may have been exclusive[1] in fact,—there can be no question of adverse possession. It may be here remarked that there are two presumptions of law always entertained; first, that every possession is presumed to be in accordance with right,[2] *i. e.*, with the title of the owner, or the converse that no entry or possession is presumed to be adverse to the lawful owner;[3] and, secondly, that a condition or relation, shown once to exist, is presumed to continue till facts are shown to overcome such a presumption. Hence, to establish that a possession has been adverse, acts must be shown by the possessor which negative the presumption that it has been in subserviency to the rights of the owner;[4] and where a relation, such as, for example, that of owner and tenant at will, has been shown once to exist between the owner and the occupant, the adverse character of the latter's possession can be established only by proof of acts on his part sufficient to rebut the presumption that such relation has continued.[5]

§ 750. *Where the possession is begun in subserviency to the owner's title.—The question as between tenants in common.* —It may be generally stated, that when a relationship which is not only consistent with, but is in itself, a recognition, by the occupant, of either the paramount right of the owner, as in the case of an owner and a tenant at will, or the

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[1] Russell *v.* Davis, 38 Conn. 562.

[2] Alexander *v.* Polk, 39 Miss. 738; Alexander *v.* Stewart, 50 Vt. 87; Parker *v.* Banks, 79 N. C. 480; Davis *v.* Bowmar, 55 Miss. 671. The New York Court of Appeals uses the following language: "Possession alone, unexplained by collateral circumstances, evidences no more than that the occupation is rightful." Bedell *v.* Shaw, 59 N. Y. 50. So the possession of a judgment debtor holding over after a sale of the land under execution is presumed to be by the indulgence of the purchaser at such sale. Cook *v.* Travis, 20 N. Y. 403.

[3] Hart *v.* Bostwick, 14 Fla. 162; Brandt *v.* Ogden, 1 Johns. (N. Y.) 156; Jackson *v.* Vredenburgh, Id. 159–163; Jackson *v.* Parker, 3 Johns. Cas. (N. Y.) 124.

[4] Davis *v.* Bomar, 55 Miss. 671.

[5] Buchanan *v.* King, 22 Gratt. (Va.) 414.

equal rights of another, as in the case of co-tenants in common, has been shown to exist, the acts of hostility, sufficient to manifest an *exclusive* claim on the part of the occupant, must be of a more unequivocal character than when such relation has existed. Thus it is held in a late leading case in New Jersey, as follows: "In the acquisition of title by adverse possession the distinction between strangers and tenants in common relates to the character of the evidence necessary to prove that the possession was adverse. * * If the parties are strangers in title, possession and the exercise of rights of ownership are in themselves, in the absence of explanatory evidence, proof of an ouster of the true owner; whereas, in cases of privity of title, such as subsists between tenants in common, the acts of possession of one tenant will, in the absence of satisfactory evidence to the contrary, be referred to the community of title, and there must be clearer and more decisive evidence of an ouster by one tenant in common of his associate than is necessary to prove that a person having no right to possession has ousted an owner in severalty."[1] To the same effect it is held by the Supreme Court of Illinois, in respect to the claim of adverse possession by one tenant in common against his co-tenants, as follows: "When one tenant in common is in possession of land, it requires clear and satisfactory proof of a subsequent disseizin of a co-tenant to characterize his possession as being adverse, so as by lapse of time to bar a right of entry. It is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight improvements on the land and pays the taxes. To constitute a disseizin there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the co-tenant that an adverse possession and an actual disseizin are intended to be as-

[1] Foulke *v.* Bond, 12 Vroom (N. J.), 538; compare Sherman *v.* Kane, 86 N. Y. 68, 69; Zeller *v.* Eckert, 4 How. (U. S.) 296; see §§ 278, 280.

serted against him."[1] So it is held in New York, that full possession by a tenant in common for many years, will not, *per se*, constitute adverse possession. There must be an open claim of exclusive right, a refusal to account, or a denial of title to constitute ouster. So again, ouster will not be presumed from a sole possession, unless accompanied with some notorious act or claim sufficient to give character to the possession; as if the tenant purchase his co-tenant's interest at a sheriff's sale.[2] Where, however, one of the tenants had been guilty of fraud, though he had procured a tax deed of the property which had been on record for five years, it was held that the statutes meanwhile had not been set in motion against his co-tenants in common.[3] So in a case in Vermont, it is held that nothing short of an ouster of his co-tenants in common can establish an adverse possession in favor of one co-tenant.[4] Although in general the rule is as stated, that, as between co-tenants, some unequivocal act of ouster sufficient to indicate the adverse claim must be shown, yet, in a recent case in New York, it was held that the jury might *presume* an ouster from the fact of an exclusive occupation by one co-tenant for forty years, he having, during that time, conveyed in his own name portions of the land by deeds on record, and otherwise ignored the rights of his co-tenant.[5] In the case in the same court, however, above quoted,[6] where an undivided portion of land had been sold by one tenant without objection

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[1] Busch *v.* Huston, 75 Ill. 343; see also Lapeyre *v.* Paul, 47 Mo. 586.

[2] Kathan *v.* Rockwell, 16 Hun (N. Y.), 90; see also Millard *v.* McMullin, 68 N. Y. 352; Culver *v.* Rhodes, 13 N. Y. Weekly Dig. 563; S. P. McQuiddy *v.* Ware, 67 Mo. 74.

[3] Austin *v.* Barrett, 44 Iowa, 488. Where one heir took exclusive possession of the land and improved it for more than twenty-five years, it was held that ejectment would not lie against him by the other heirs. Campau *v.* Dubois, 39 Mich. 274. Similarly in respect to tenants in common. See Lapeyre *v.* Paul, 47 Mo. 586.

[4] Holley *v.* Hawley, 39 Vt. 534.

[5] Woolsey *v.* Morss, 19 Hun (N. Y.), 273; see § 289.

[6] Kathan *v.* Rockwell, 16 Hun (N. Y.), 90.

by his co-tenant, and the purchaser—a school district—had erected a school-house upon the land, which had been standing for forty years, it was held that this was insufficient to raise the presumption of ouster and adverse possession by the district, as against the co-tenant, but that the purchase of the undivided portion was a recognition of the co-tenancy, rather than an act in derogation of it. Had however, the court added, one of the co-tenants attempted to convey the whole land, and had the district occupied under such a conveyance, an adverse possession would have been inaugurated.[1] It would also seem, for the same reasons, that had a portion of the land been conveyed by one tenant, by metes and bounds—not an undivided portion—the grantee would have held possession adverse to the co-tenant. So we find it generally stated, that a conveyance by one tenant in common to a third person, works in favor of the latter a disseizin of a co-tenant;[2] though it may well be doubted whether such a conveyance would alone be sufficient notice to effect an ouster of a co-tenant.[3] It is a familiar principle, that the possession of one tenant in common is the possession of his co-tenants.[4] So long, therefore, as the relation of co tenancy continues, one tenant cannot possess the land exclusively for himself, and thus establish a possession adverse to his co-tenants; the acts of hostility, therefore, required of one tenant in common sufficient to oust his co-tenant, must be such as amount to a renouncing of the co-tenancy, and which shall put an end to the relation previously existing.

§ 751. *The rule applied generally where there is a privity of possession or title.*—As in the case of co-tenancy,

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[1] Citing Florence *v.* Hopkins, 46 N. Y. 182.

[2] Riggs *v.* Fuller, 54 Ala. 141; Horne *v.* Howell, 46 Ga. 9; Kinney *v.* Slattery, 51 Iowa, 354; Foulke *v.* Bond, 12 Vroom (N. J.), 527.

[3] Holley *v.* Hawley, 39 Vt. 531; Culver *v.* Rhodes, 13 N. Y. Weekly Dig. 563; Buchanan *v.* King, 22 Gratt. (Va.) 414; see §§ 283, 287, 288.

[4] Kinney *v.* Slattery, 51 Iowa, 354; Foulke *v.* Bond, 12 Vroom (N. J.), 527; see also Lapeyre *v.* Paul, 47 Mo. 586; Neely *v.* Neely, 79 N. C. 478; see § 276.

so in general it is true, that whenever such a relation or trust or privity of estate exists between the actual occupant of the land and another, that, in respect to the possession, there is between them an identity or subordination of interests, then the possession of one—the occupant—becomes, as in the case of co-tenancy, the possession of the other, through the principle of agency or trust. For instance, the possession of a tenant is the possession of his landlord, and, it may be added, as it is expressed by the New York Court of Appeals, "a tenant for years is possessed, not properly of the land, but of the term for years."[1] Moreover, while such tenancy continues, and until the expiration of the term, the statute will not run against the landlord or reversioner, for the reason that he is not entitled to the immediate actual possession.[2] Such relation, privity, or trust must be explicitly renounced or disclaimed by declarations or acts unmistakably hostile to it, and an exclusive adverse claim asserted, before the possession of the occupant can be considered adverse.[3] In other words, there must be a concurrence of two things: a repudiation of the previously existing relation, and an assertion of an appropriation[4] by the occupant for himself, accompanied, of course, by an actual exclusive occupation. As a rule, both these essentials are manifested by the same acts, which at once amount both to a repudiation of any pre-existing relation of privity or trust, and to an assertion of an exclusive adverse claim. Thus, where land had been conveyed by a

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[1] See Bedell *v.* Shaw, 59 N. Y. 49.

[2] See Sands *v.* Hughes, 53 N. Y. 294; or, in other words, "no possession can be deemed adverse to a party who has not, at the time, the right of entry and possession." Devyr *v.* Schaefer, 55 N. Y. 446.

[3] Estes *v.* Long, 71 Mo. 605; Long *v.* Mast, 11 Penn. St. 189; Hall *v.* Stevens, 9 Metc. (Mass.) 418; Day *v.* Cochran, 24 Miss. 261; Clarke *v.* McClure, 10 Gratt. (Va.) 305; Criswell *v.* Altemus, 7 Watts (Penn.), 581; Harrison *v.* Pool, 16 Ala. 167; Zeller *v.* Eckert, 4 How. (U. S.) 289; Williams *v.* Cash, 27 Ga. 507; Hamilton *v.* Boggess, 63 Mo. 233; Burhans *v.* Van Zandt, 7 N. Y. 527; Bazemore *v.* Davis, 48 Ga. 341; Catlin *v.* Decker, 38 Conn. 262.

[4] As to the necessity for *an intent to appropriate for himself*, on the part of the claimant, see *post*, Chap. XXIX.

plaintiff, a religious society, to a town, in trust for the use and support of ministers of the gospel, it was held that the application by the town of the rents to municipal purposes, with the knowledge of the plaintiff, was a repudiation of the trust by the town, and an assertion of such adverse claim as, after a long period of time, vested an absolute title in the town.[1] So an agency may be renounced by the "hostile attitude" of the agent, manifesting an intent to hold for himself and not for his principal;[2] and so may a tenancy, it seems, by an open and notorious act of appropriation, inconsistent with the rights of the landlord and the continuance of the tenancy.[3] Authorities are numerous to the effect that a tenant for years cannot possess adversely to his landlord, nor impeach his landlord's title. This general rule rests, for the most part, upon the principle of estoppel. There can be no doubt that, *so long as the tenancy continues*, the possession of the tenant cannot be adverse; but, unless it can be maintained that a tenant cannot, by any act, renounce his tenancy, and thus put an end to the privity before existing between him and his landlord and the consequences of it, and thus assume the position of a stranger to the title and possession, it would seem that a tenant, like any other person in privity with, or occupying a position of trust toward, the owner of the land, might originate an adverse possession.[4] In New York, it is held that possession under a deed from a tenant is subordinate to the tenancy, and hence cannot be adverse,[5] though it is also held that such a rule applies only to the "conventional" relation of landlord and tenant, and not to a holding under an assessment lease.[6]

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[1] Congregational Society *v.* Newington, 53 N. H. 595; compare Catlin *v.* Decker, 38 Conn. 262.

[2] Whiting *v.* Taylor, 8 Dana (Ky.), 403.

[3] Sharpe *v.* Kelly, 5 Denio (N. Y.), 431; Holley *v.* Hawley, 39 Vt. 534; see also Sherman *v.* Kane, 86 N. Y. 68; citing Jackson *v.* Burton, 1 Wend. (N. Y.) 341.

[4] See Sherman *v.* Champlain Trans. Co. 31 Vt. 162.

[5] See Christie *v.* Gage, 71 N.Y. 189–193; Jackson *v.* Davis, 5 Cow. (N.Y.) 123.

[6] See Sands *v.* Hughes, 53 N. Y. 287.

Following the rule, that so long as such a relation or privity exists as those discussed in the text, the possession (of a tenant, for example,) cannot be adverse, it is held in North Carolina, that the possession of a tenant of the widow of the deceased owner of the premises under a lease, which the widow had no authority to make, could not be adverse to the heirs of the deceased owner.[1] A trustee's possession of land purchased with trust funds, though in his individual name, is the possession of the beneficiaries, until he does some "unequivocal act denying their right,"[2] when the statute would begin to run. In a recent case in the New York Court of Appeals,[3] the doctrine is reiterated, that a grantor, even with warranty, may originate a possession adverse to his grantee. The court on this point say: "When there is a disclaimer by the grantor of the title of the grantee, subsequent to the delivery of the grant, an adverse possession may be acquired, and it is not necessary that such possession should be hostile in its inception." And in California, it is held that a grantor of a quitclaim deed may remain in possession, and "assert an adverse possession," which will ultimately lead to title.[4] In Iowa, the possession of a grantee in possession, who has recovered judgment against his grantor on his covenant of title, is adverse only from the time of recovery of judgment.[5] So a possession commenced by a permissive entry may become adverse by a distinct disclaimer of the possession and title of the owner.[6] In Iowa, it is held that in the case

[1] Melvin *v.* Waddell, 75 N. C. 361; compare Kincaid *v.* Perkins, 63 N. C. 282. So the statute does not run against the reversioner until termination of the life estate. Pinckney *v.* Burrage, 31 N. J. L. 21; McCorry *v.* King, 3 Humph. (Tenn.) 267; Christie *v.* Gage, 71 N. Y. 189–193; Dewey *v.* McLain, 7 Kans. 126; Doe *v.* Gregory, 2 Ad. & E. 14; Poor *v.* Larrabee, 58 Me. 543.

[2] Butler *v.* Lawson, 72 Mo. 227; citing Norris' Appeal, 71 Penn. St. 106; see also Paschall *v.* Hinderer, 28 Ohio St. 568; but see Bargamin *v.* Clarke, 20 Gratt. (Va.) 544.

[3] Sherman *v.* Kane, 86 N. Y. 68, 69, and cases cited.

[4] Dorland *v.* Magilton, 47 Cal. 485.

[5] Davenport *v.* Sebring, 52 Iowa, 364.

[6] Hudson *v.* Putney, 14 W. Va. 561; Ford *v.* Holmes, 61 Ga. 419; S. P. Collins *v.* Johnson, 57 Ala. 304.

of a tenant at will, notice to quit to the latter is necessary, before his possession can be adverse to the owner.[1] And in Alabama, an "overt act of hostility" is required to set the statute in motion in favor of a mortgagor, or his vendee, against a mortgagee out of possession.[2] On the other hand, in Iowa, it is held, that in the case of a mortgagee in possession, the statute does not begin to run till the debt has been paid. After such an event, the possession of the mortgagee would, if sufficiently open, and accompanied by acts of ownership, be deemed adverse to the right of the mortgagor.[3] So, also, it is held in Mississippi, that from the time of the forfeiture of the mortgagor's estate by a breach of condition, his possession is, as to the mortgagee, adverse,[4] though, in general, the statute will not run in favor of a mortgagor against an equitable mortgagee.[5]

When there is a contract of purchase or agreement to convey, between the owner of the land and the occupant, the question often arises as to when the possession of the latter can become adverse. In general, it may be said that such possession is deemed subordinate to the rights of the

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[1] Austin *v.* Wilson, 46 Iowa, 362.

[2] Boyd *v.* Beck, 29 Ala. 703; see Parker *v.* Banks, 79 N. C. 480.

[3] Green *v.* Turner, 38 Iowa, 112. It must be borne in mind that the estate of the mortgagee in the mortgaged premises is somewhat different in Alabama from what it is in Iowa—see, on this subject, Barker *v.* Bell, 37 Ala. 358; Hall *v.* Savill, 3 Greene (Iowa), 37; Babcock *v.* Hoey, 11 Iowa, 377;— and, in general, that on the question of adverse possession, arising between mortgagor and mortgagee, much depends upon their respective interests in the land as they have been construed by the courts of the different States. For example, the question of adverse possession cannot arise at all in favor of a mortgagor in possession, against a mortgagee, in those States where the latter's interest is considered a mere chattel interest, and not an interest in the land. So, also, the question would be determined differently, where a mortgage conveys an absolute estate. On this subject see, *e. g.*, Poignand *v.* Smith, 8 Pick. (Mass.) 272; Sheafe *v.* Gerry, 18 N. H. 247; Foster *v.* Perkins, 42 Me. 168; Northy *v.* Northy, 45 N. H. 144; Johnson *v.* Phillips, 13 Gray (Mass.), 198; Kortright *v.* Cady, 21 N. Y. 343; Grattan *v.* Wiggins, 23 Cal. 26; Philips *v.* Bank of Lewistown, 18 Penn. St. 402. See §§ 327, 345.

[4] Wilkinson *v.* Flowers, 37 Miss. 579, 585; but see Seeley *v.* Manning, 37 Wis. 574.

[5] Green *v.* Mizelle, 54 Miss. 220.

owner,[1] till the conditions entitling the possessor to a conveyance have been fully performed, when the possession will become adverse.[2] Thus in Hart *v.* Bostwick,[3] cited above, it is held, that when one under an agreement to buy land pays the consideration money, and enters with the owner's consent, the statute begins to run in favor of the purchaser. In the same case, it is said (*obiter*) that if a purchaser enters under a contract for a deed with one, but subsequently takes a deed from another, the possession thereupon becomes adverse to the first party, but we doubt whether the mere taking of a deed from another would be a sufficient "repudiation" of the contract under which he entered. If an entry is made under a bond for a deed, the possession prior to the time of payment of the purchase money cannot be adverse,[4] and the same may be said of any entry and possession under an executory contract to convey.[5]

§ 752. *Possession must be "exclusive."*—That possession to be adverse must be in exclusion of the rightful owner, is a self-evident corollary of the principles already stated. There can be no such thing as a conflict of actual possession of the same premises between the owner and another; the owner's seizin continues till he is disseized. The hostile

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[1] See Hart *v.* Bostwick, 14 Fla. 162, where it is held that if an entry merely be made under a contract to purchase, the statute will not run till the contract is repudiated. See also Fulkerson *v.* Brownlee, 69 Mo. 372.

[2] Matter of Department of Parks, 73 N. Y. 560; Fulkerson *v.* Brownlee, 69 Mo. 372. In an earlier case, in New York, it was held that in an action of ejectment, where the defendant had occupied the premises more than twenty years under a contract of purchase, the purchase money not being paid, the statute of limitations would be a defense to the payment of the purchase money, but not a defense to uphold an equitable title in the defendant through the presumption of payment arising from the lapse of time. See Lawrence *v.* Ball, 14 N. Y. 477.

[3] 14 Fla. 162; see cases cited.

[4] Ormond *v.* Martin, 37 Ala. 604; but see Outcalt *v.* Ludlow, 32 N. J. Law, 239.

[5] Brown *v.* Supervisors, 54 Miss. 230; Nowlin *v.* Reynolds, 25 Gratt. (Va.) 137; Benson *v.* Stewart, 30 Miss. 49.

act of an adverse claimant sufficient to establish an adverse possession will at the same time oust or disseize the owner; any hostile act of less effect will at most amount to a mere trespass, sufficient to disturb, perhaps, but not to destroy the owner's possession. But the claimant's possession, whenever once established, must be exclusive of all others,[1] as well as of the owner, to be effectually adverse against the latter. The reason for this rule is obvious when we consider the general principle, that the moment the possession of an adverse occupant ceases, the seizin or possession of the owner is constructively, at least, restored. In the case, therefore, of several adverse occupants who, at the same time, or successively, occupy the *locus in quo*, and between whom there is no privity, as the adverse possession of each ceases, so often is the owner restored to his rightful possession;[2] therefore in such a case there can be no effectual continuous adverse possession.

§ 753. *Conflicting possessions, general principles regulating.*—But there may be an apparent conflict of possession between two or more occupants of the same land, each of whom claims adversely to the true owner, when the question will arise as to which possession shall be effectual, both as against the other adverse claim and as against the owner. For example, one adverse claimant may have an actual possession of a part of a tract of land, of which another part may be in the actual possession of another claimant, who at the same time has "color of title" to the whole tract. In such a case it has been claimed that the actual partial possession of the former should yield to the possession under color of title, even though the latter is subsequent in time to the former.[3] For the solution of

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[1] Boulo *v.* New Orleans, &c. R. R. Co. 55 Ala. 480; Thomas *v.* Marshfield, 13 Pick. (Mass.) 250.

[2] Compare *supra*, §§ 738, 739, 740, 741, 744, and Smith *v.* Chapin, 31 Conn. 531.

[3] Norris *v.* Russell, 5 Cal. 249.

such questions, the following rules, which we consider consistent both with principle and authority on this subject, are deemed adequate: First, there cannot be two actual possessions of the same identical land at the same time. What may appear to be such, are either possessions of different parts of the same tract, or are alternately possessions of the whole. In the former case, each adverse possession depends upon its own merits alone; in the latter neither is effectual against the true owner, unless one is continued exclusively for the statutory period. Second, where one of the adverse occupants has, besides a partial actual possession, color of title to the whole tract, and thereby claims constructive possession of the remainder, such circumstance is as ineffectual against an actual possession of a part of the same by another adverse claimant, as would be the constructive possession of the true owner against an actual ouster from a part of his land. Third, where two or more claimants are in possession of land, each actually occupying a part of the same, and each having color of title to the whole, the junior must yield to the senior possession or title,[1] as to the part claimed by both through constructive possession under color of title, on the same principle that the possession of an adverse claimant must be confined to what he actually occupies, though he have color of title to the whole tract, if the rightful owner be still in the actual possession of any part of the same,[2] or recovers possession of some part of it.[3] So, also, it may be added, that in all cases of conflict of possessions, or of possession under different claims of right, or of "lapping," or interfering conveyances, where a constructive possession is called in question, such

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[1] Where, however, the junior claimant has an *actual* possession, there can be no question of conflict. See McAllister *v.* Devane, 76 N. C. 57.

[2] Armstrong *v.* Risteau, 5 Md. 256.

[3] Semple *v.* Cook, 50 Cal. 26.

possession follows the title,[1] or the better right,[2] or the older color of title,[3] as the case may be.

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[1] Kitchen *v.* Wilson, 80 N. C. 191; Barr *v.* Gratz, 4 Wheat. 213; Smith *v.* Burtis, 6 Johns. (N. Y.) 218; Codman *v.* Winslow, 10 Mass. 146, 151; Whittington *v.* Wright, 9 Ga. 23; Brimmer *v.* Proprietors of Long Wharf, 5 Pick. (Mass.) 131; Stevens *v.* Hollister, 18 Vt. 294; Crispen *v.* Hannavan, 50 Mo. 536; Semple *v.* Cook, 50 Cal. 26.

[2] Hunt *v.* Wickliffe, 2 Pet. 201; S. P. Bradley *v.* West, 60 Mo. 33; compare Martin *v.* Bonsack, 61 Mo. 556; McAllister *v.* Devane, 76 N. C. 57.

[3] Borrets *v.* Turner, 2 Hay. (N. C.) 113; compare Hodges *v.* Eddy, 38 Vt. 344; Ballance *v.* Flood, 52 Ill. 49.

CHAPTER XXIX.

INTENTION.—CLAIM OF RIGHT.

§ 754. Possession must be accompanied by an adverse intent.
755. Intent the essence of adverse possession.
756. Variously designated.—"Claim of ownership" necessary.
757. Good faith in assertion of adverse claim.
758. Acts and declarations of the occupant indicating intent.
759. Possession under a mistake.
760. Boundary lines erroneously located between adjoining proprietors.

§ 754. *Possession must be accompanied by an adverse intent.*—We come now to consider the second essential of an effectual adverse possession under the statute of limitations. The possession of the adverse claimant must not only be actual, open, hostile and continuous, but it must be accompanied by an intention on his part to hold the land so possessed for himself and as the owner of it; or, in other words, such possession must be under a claim of title or ownership. There must concur at the same time the *factum*—of possession, and the *intentio*—of a claim of ownership; as it is said: "The fact of possession, and the intention with which it was commenced and held, are the only tests" of whether a possession be adverse.[1] In other words, no matter how exclusive and hostile to the real owner a possession may be in fact and in appearance, it cannot be effectually adverse, unless accompanied by the intent on the part of the tenant to make it so, or, as it is expressed: "The possession of no person can be adverse to the title of the true owner, unless the person intends it to be adverse to that title."[2] Adverse possession must be, therefore, so to

[1] Davenport *v.* Sebring, 52 Iowa, 366; see also Jackson *v.* Wheat, 18 Johns. (N. Y.) 44; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 609, 613, 617; Grant *v.* Fowler, 39 N. H. 104; Root *v.* McFerrin, 37 Miss. 51; Davis *v.* Bowmar, 55 Miss. 671.

[2] Stamper *v.* Griffin, 20 Ga. 321.

speak, subjectively as well as objectively hostile, though, of course, in the absence of express declarations of the claimant, his intent is to be proved, oftentimes, merely by the character of his acts of possession.

§ 755. *Intent the essence of adverse possession.*—The claim by the tenant, "in opposition to the title to which his possession is alleged to be adverse," has been called "the very essence of an adverse possession."[1] And it has been said, that, if there be "a naked possession, not accompanied with any claim of right, it will never constitute a bar, but will inure to the advantage of the real owner."[2] It is the intention which "fixes the character of the original entry," and determines whether it be an ouster or a mere trespass,[3] or whether the possession established be in subordination or in hostility to the real owner.[4] So it is said, that "he who sets up the title, must go upon the lands with a palpable intent to claim the possession as his own. The intent to claim and possess the land is one of the qualities necessary to constitute a disseizin and to hold under an adverse possession;"[5] and also, that "the intention of the possessor to claim adversely, is an essential ingredient;"[6] and "The statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world."[7]

§ 756. *Variously designated—"Claim of ownership" necessary.*—This adverse intention on the part of the claimant has been called by a variety of names, such as "claim of right,"

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[1] Farish *v.* Coon, 40 Cal. 57.

[2] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 597.

[3] Ewing *v.* Burnet, 11 Peters, 41; Wiggins *v.* Holley, 11 Ind. 2; Austin *v.* Holt, 32 Wis. 490.

[4] Society, &c. *v.* Town of Pawlet, 4 Peters, 506, 507; Clarke *v.* McClure, 10 Gratt. (Va.) 305; Bedell *v.* Shaw, 59 N. Y. 46.

[5] Bradley *v.* West, 60 Mo. 41.

[6] See Washburn *v.* Cutter, 17 Minn. 368; Pepper *v.* O'Dowd, 39 Wis. 538; French *v.* Pearce, 8 Conn. 445; see also Grube *v.* Wells, 34 Iowa, 149, 150; McNamee *v.* Moreland, 26 Iowa, 109.

[7] McCracken *v.* City of San Francisco, 16 Cal. 635.

"claim of title," "claim of ownership," and "claim of appropriation."[1] Of these expressions, perhaps the last is the most accurate, for, except in the case of a *bona fide* claimant, who actually believes that he is the rightful owner, there cannot be properly, at the inception of an adverse possession, and until the same has continued for the statutory period, any claim of title or right, or ownership in the premises, but only an intention to appropriate and hold the same as owner, and to the exclusion, rightly or wrongly, of every one else.[2]

The intention of the tenant must be not only to hold the land exclusively and adversely, but to hold it for himself, and as the owner. Thus, it is held in New York,[3] that possession to be adverse, so as to ripen into a title, must be accompanied by a claim of title in fee. "The quality and extent of the right, (the court say) depends upon the claim which goes with it," and it was accordingly held that possession under a claim for an unexpired term could not be adverse and ripen into title, because it was not a "claim to the entire title." It has been decided that entry under a deed, which admits title in another than the grantor, could not, in the absence of any disclaimer on the part of the grantee, be under the requisite "claim of title exclusive of any other right."[4] Again it is said that a "claim of ownership" is necessary.[5] Therefore, a claim having been made to the "ownership of the improvements," such fact was held evidence of the absence of the requisite "claim of title and right to the land," upon which to base adverse possession.[6] So it was decided that acts of ownership upon the land, should be such as to indicate a notorious "claim of property in it."[7] In a case in the Supreme Court of Indiana, where it

[1] See, *e. g.*, Brumagim *v.* Bradshaw, 39 Cal. 24.

[2] See *infra*, § 758, and note.

[3] Bedell *v.* Shaw, 59 N. Y. 49, 50.

[4] Furlong *v.* Garrett, 44 Wis. 111.

[5] Hollister *v.* Young, 42 Vt. 407.

[6] Davenport *v.* Sebring, 52 Iowa, 367, 368.

[7] Ford *v.* Wilson, 35 Miss. 505; see also the leading case of Davis *v.* Bowmar, 55 Miss. 671.

was contended that, by a "constant and exclusive" occupancy and use of a part of a street by a railroad company "as and for a right of way," the company became the owners of the part so occupied, the court held that such use could not ripen into an "absolute ownership of the part of the street." The court use this language: "It is not alleged that the use was under a claim of ownership of the soil, nor is it claimed or averred that the use was adverse to the right of the public to use the place as part of the street."[1] In a case in the Supreme Court of Connecticut,[2] a charge that "it is essential that the possessor should hold the land, claiming it as his own, and denying the right of everybody else," was held to be erroneous; and in an earlier case in the same court,[3] it was said that, "to make a disseizin, it is not necessary that the disseizor should claim title to the lands taken by him. It is not necessary that he should deny or disclaim the title of the legal proprietor," but, the court added, "It is necessary only, that he should enter into and take the possession of the lands, as if they were his own." These cases are perfectly consistent with the principle laid down on this subject in all the cases above cited, to the effect, that, to constitute a disseizin of the true owner, there must be, on the part of the adverse occupant, an intention to appropriate the land as his own; the cases differ only in respect to the language used to express such an intention. As we have remarked above, the expressions, claim of title, or right, or ownership are, in connection with a naked adverse possession, inaccurate, for they imply a belief in the validity of the claim, or good faith on the part of the claimant. This leads us to the subject of good faith in connection with an adverse possession.

§ 757. *Good faith in assertion of adverse claim.*—As we shall see hereafter, the question of good faith is important

[1] Indianapolis, &c. R. R. Co. *v.* Ross, 47 Ind. 30.

[2] Johnson *v.* Gorham, 38 Conn. 520, 521, and cases cited and discussed.

[3] Bryan *v.* Atwater, 5 Day (Conn.), 181.

only in connection with a constructive possession, through the instrumentality of a deed or other instrument, giving the claimant under it "color of title" to land, of a part of which he is in actual possession. In connection with the subject of a naked actual adverse possession, good faith has no place. The whole theory as to the necessity for an "intention to appropriate," as we prefer to call it, and as to the further necessity for good faith in such an appropriation, when a constructive possession is claimed under color of title, may be summed up as follows: "It is the possession that bars the owner of a recovery," as the court say in a case in Illinois,[1] that is, the possession of an adverse claimant. No such possession is acquired without a disseizin of the true owner; for otherwise, the owner's possession, constructively or otherwise, continues, and the occupation of any one else is permissive and not adverse. But no one can be a disseizor without the intention to disseize, or to possess for himself, which is equivalent to it. Hence, in all cases of adverse possession, there must be present the intention to appropriate. But the appropriation once made, the possession begun, the presence or absence of good faith in the possessor is immaterial. It is the possession that bars the owner, and this is true whether the possession be actual or constructive, a naked one or accompanied by color of title. The necessity for good faith in claiming under color of title applies only so far as the possession claimed is derived from and depends upon the instrument constituting the color of title, *i*, *e.*, it applies only to the constructive possession which such an instrument gives the claimant under it. Should such an instrument (assumed to be defective because it is only color of title) be entirely annulled or invalidated by the fraud of the claimant, it can no longer create any constructive possession or perform any other office for such claimant. Hence, as soon as bad faith in the claimant, or a want of belief in the genuineness of his title

[1] Weber *v.* Anderson, 73 Ill. 442.

has vitiated the instrument constituting his color of title, so soon does the constructive adverse possession which it creates cease to exist, though his actual adverse possession may continue. This subject has been much discussed in the books, though the distinction which we make between actual and constructive possession, through some written instrument, has been often overlooked in considering the necessity for good faith. Thus, in the case of Livingston *v.* Peru Iron Co.,[1] in the Court of Errors of New York, it was held, that a deed fraudulently obtained was not available as the foundation of an adverse possession and, in general, that, to constitute a possession adverse, the adverse claimant must act *bona fide*, and must believe the land to be his. It is, however, no longer a question, that, in claiming title to land under the statute of limitations, through a naked or actual adverse possession simply, accompanied by the necessary adverse intention, the good or bad faith of the adverse possessor, in acquiring or in continuing the possession, is of no importance. "The statute of limitations * * does not involve the question of good faith in the naked possessor" as the court say in a case in Texas,[2] or "if the possession of the intruder has in fact been adverse, and has been asserted by such open and notorious acts of ownership as are essential in the acquisition of title by adverse possession," as is held by the Court of Errors of New Jersey.[3] So, in the Connecticut case above cited, it is said: "If the property be so taken and so used by any one, though he claims no title, but avows

[1] 9 Wend. (N. Y.) 511. The ruling in this case, in spite of what seems unequivocal and general language, on the essentials of adverse possession, has been treated in subsequent cases in the same State, to have applied only to an adverse possession in reference to the Champerty Act. Furthermore, the apparent ruling, that good faith is necessary in acquiring adverse possession, has been overruled in the same court, in the case of Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587, where, in equally general language, it is held that the question of good faith in the adverse claimant is immaterial. The distinction between claiming by actual possession and by constructive possession, is, in the latter case, also ignored. For a further discussion of this subject, see *infra*, Chap. XXX.

[2] Kinney *v.* Vinson, 32 Tex. 125.

[3] Foulke *v.* Bond, 12 Vroom (N. J.), 541.

himself to be a wrong-doer, yet, by such act, the legal proprietor is disseized."[1]

§ 758. *Acts and declarations of the occupant indicating intent.*—The adverse intention of the tenant, in the absence of proof of his own admissions to the contrary, or other proof that his possession was only permissive or, in fact, without hostile intent, may be generally evidenced by the character of his possession and acts of ownership. If these are sufficiently definite, open and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts, it is said, the party proclaims to the public that he asserts an exclusive ownership over the land.[2] Thus, it is said that an assertion, other than by acts, of such intention is unnecessary, and that the mere fact of possession would, in general, indicate that the possession was adverse.[3] So it is has been held competent, to prove the occupant's "claim of ownership," that "while he occupied he asserted ownership by bringing his suit of trespass against others who attempted to enjoy the premises."[4] A mere hostile assertion of ownership is of no consequence, unaccompanied by acts of appropriation or ownership:[5] to establish therefore, the requisite adverse intent of the claimant, his "actions speak louder than words." To disprove such intent, on the other hand, the declarations or admissions of the tenant showing an absence of an intent to appropriate, or a purpose on his part in acquiring or retaining the possession, consistent with the rights of the true owner of the land,

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[1] Bryan *v.* Atwater, 5 Day (Conn.), 189. In a later case in the same State, it it said: "Into the recesses of his (the possessor's) mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason; that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor." French *v.* Pearce, 8 Conn. 443; see also Smith *v.* Roberts, 62 Ala. 83; Munro *v.* Merchant, 26 Barb. (N. Y.) 383, 402.

[2] Brumagim *v.* Bradshaw. 39 Cal. 46; see also Davis *v.* Bowmar, 55 Miss. 671.

[3] Johnson *v.* Gorham, 38 Conn. 522.

[4] Holliston *v.* Young, 42 Vt. 407.

[5] Pitts *v.* Wilder, 1 N. Y. 527, 528.

are competent evidence to show the character of the possession, and that it lacks the essential element of being hostile.[1] Thus, it is held that it is clearly competent to show by the declarations of the occupant, that he did not hold adversely,[2] for "it is enough," as is elsewhere held, to show the absence of an hostile intent, "that he does not himself consider it to be adverse."[3] So it has been decided, that evidence of acts and declarations made after the statute was claimed to have run, "which had a tendency to show the motives and views" of the occupants before the statute had run, was proper "to show the nature of the occupancy."[4]

Admissions of this kind by the claimant, are competent evidence against him on general principles of the law of evidence, but there seems to be a disposition to go farther and to admit as evidence, declarations either of the tenant or his grantor, to establish the adverse character of a possession, or by such declarations to show its extent.[5]

§ 759. *Possession under a mistake.*—Assuming that possession must be accompanied by an intent to appropriate, in order to be adverse, the question arises, whether a possession acquired and held under a mistake of fact—a misapprehension, for example, as to the true boundary of a piece of land—can be strictly adverse as to the part erroneously occupied. On the one hand, it may be said, that, in such a case, the intention, upon taking possession, was to occupy a part only, perhaps, of the land actually occupied, and that as to the excess, the necessary intent or adverse claim is lacking, and that consequently as to such excess, the possession is more

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[1] Pitts *v.* Wilder, 1 N. Y. 525, 526.

[2] McNamee *v.* Moreland, 26 Iowa, 109.

[3] Sailor *v.* Hertzogg, 2 Penn. St. 184, 185; see also Day *v.* Wilder, 47 Vt. 593, 594; Brolaskey *v.* McClain, 61 Penn. St. 167.

[4] Church *v.* Burghardt, 8 Pick. (Mass.) 327, 328.

[5] See, on this subject, Abeel *v.* Van Gelder, 36 N. Y. 513; Swettenham *v.* Leary, 18 Hun (N. Y.), 285, 286; Harnage *v.* Berry, 43 Tex. 567, 570; Hannibal, &c., R. R. Co. *v.* Clark, 68 Mo. 374.

accidental than strictly adverse. To corroborate this view, it is said that "a disseizin cannot be committed by mistake, because the intention * * * is an essential ingredient in a disseizin."[1] On the other hand, it may be contended that the intention in such a case is two-fold: first, to take possession in accordance with some extrinsic plan or ulterior facts, such as the description in a deed; and second, the intention as manifested by the very fact of taking possession, to possess the particular piece of land actually occupied, without regard to the original motive or purpose of the possessor; that such intention, in the latter aspect, though it might not have been carried out were the possessor not laboring under a mistake, exists none the less, and that it is an intention to appropriate that particular land, and that consequently the possession is in fact adverse, whatever the original purpose of the possessor may have been. So it may be said, that such a possession can be called unintentional only in the same sense in which the possession of any honest man can be called unintentional, who, in good faith, under color of title perhaps, occupies land supposing it is his own, and who thus acquires title to it under the statute, on the ground that had he known that he had no right on the land, he would not have begun or continued a possession which infringed on the rights of the true owner. Would the possession of a man who entered upon and held land under a mistake, supposing that it was his own, be the less a possession with intent to appropriate, because the occupant had no tortious, hostile intent against the true owner, but simply the purpose to appropriate what he supposed was his own? In a case in the Supreme Court of Missouri, it is said: "Honest men always inclose land not their own by mistake, or with the consent of the owner, and if the law on this subject were not as this court has held, the statute of limitations in such cases would never run in favor of an honest man, because he would never avow his purpose to have been to take the land of another."[2] Whether, in general, the mistake or ignorance

[1] Ross *v.* Gould, 5 Me. 212.

[2] Cole *v.* Parker, 70 Mo. 380.

of the occupant in taking and keeping possession of land will be held fatal to the existence of the necessary hostile intent, is a question which has received, unfortunately, too little judicial discussion, and respecting which the decisions are in conflict. Thus, in a case in the Supreme Court of Iowa,[1] where the defendant's grantor had inclosed, by mistake, more land than he was entitled to, and possession had been continued for twenty-five years, it was held that something more was necessary than the mere belief on the part of the defendant and her grantor, that they were entitled to the land in dispute, though accompanying the actual possession of it; that there was needed an "active assertion of right," and that such a right is not "asserted by the possession;" or, in other words, that "simple belief on the part of defendant of her right to the land * * is not equivalent to * * * the claim required by the law, and * * possession will not establish the *quo animo*." It would seem, from the reasoning of this case, that if the "belief" of the defendant had been wanting, and she had tortiously continued the possession of what she knew did not belong to her, there would then have existed the necessary adverse claim and "active assertion" of right. Therefore, in such a case, bad faith in the occupant is more profitable than an honest mistake. Directly opposed to the case last cited is that of French *v.* Pearce, in the Court of Errors of Connecticut,[2] where it is held, that though "the intention of the possessor to claim adversely is an essential ingredient," yet that "the person who enters on land believing and claiming it to be his own," though under a mistake, "does thus enter and possess. The very nature of the act is an assertion of his own title and the denial of the title of all others." The court say further, that

[1] Grube *v.* Wells, 34 Iowa, 150, 151, and cases cited; compare S. P. Skinner *v.* Crawford, 54 Iowa, 119; Thomas *v.* Babb, 45 Mo. 384, and cases cited; Gates *v.* Butler, 3 Humph. (Tenn.) 447; but see Cole *v.* Parker, 70 Mo. 380; Howard *v.* Reedy, 29 Ga. 152; Worcester *v.* Lord, 56 Me. 265; Brown *v.* Cockerell, 33 Ala. 45.

[2] 8 Conn. 439, 445.

"it is as certain that a disseizin may be committed by mistake, as that a man may, by mistake, take possession of land, claiming title, and believing it to be his own." And further: "Adopt the rule, that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession, and a new principle is substituted. The inquiry no longer is, whether visible possession, with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseizin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explained; and the inquiry is to be had whether the possessor of land acted in conformity [1] with his best knowledge and belief." We may add, that the protection of a possession taken under a mistake, accords certainly with the policy of the law in imposing limitations to actions for the recovery of real property, as well as the upholding, through such limitations, of a possession tortiously taken and continued for the requisite period with full knowledge, on the part of the occupant, of the rights of the true owner.

§ 760. *Boundary lines erroneously located between adjoining proprietors.*—The question which we have been considering usually arises in connection with the possession of adjoining proprietors according to a boundary line between them which has been erroneously supposed to be the true line. It often happens that the actual and visible boundary between adjoining lands, such as a fence, hedge or wall, is not identical in location with the line defined by the respective muniments of title. So, also, by agreements between adjoining proprietors, a line may be fixed as the true line, though in fact it is not, or a temporary boundary may be agreed upon, till the true line be ascertained. In such cases, where the possession has continued for the

[1] Compare, S. P., Schneider *v.* Botsch, 90 Ill. 577; Swettenham *v.* Leary, 18 Hun (N. Y.), 284; Grimm *v.* Curley, 43 Cal. 250; Cole *v.* Parker, 70 Mo. 372.

statutory period, though the courts are, at least apparently, in some conflict, and the decision of each case depends, in some measure, upon its peculiar circumstances, the question whether there has been an effectual adverse possession depends upon well settled principles which we have already discussed. Hence, in disputes arising from the wrong location of the actual dividing line, whether the possession of the encroaching proprietor, assuming that it has been notorious, continuous, &c., has been adverse in its character is, as in other cases, to be determined by his intent. Therefore such possession must not be permissive; hence, if the evidence shows that there was a mutual understanding or agreement that the visible boundary was not the real one, the necessary hostile intent is lacking, and the mere occupation up to the visible boundary cannot affect the title to the part beyond the true line. So it is held[1] that, under such an agreement, a temporary boundary line being fixed till the true line should be ascertained, the possession of neither proprietor could be adverse till such agreement is repudiated. As the court say: "Each party entered upon the portion of land which was outside his true line, in subordination to the title of the party upon whom he encroached, * * * and he held the possession by the license or permission of the owner of the adjoining land."[2] So, in a case where there being doubt as to whether adjoining buildings were located correctly, their respective owners agreed, in writing, that neither would disturb the other in the occupation of his building, it was held that such agreement was, by each, a recognition of the other's title to the true line, and inconsistent with an adverse claim to any part beyond it, so long as the agreement was in force.[3] In such cases, the principle laid down can admit of no

[1] Irvine *v.* Adler, 44 Cal. 559; see also Cole *v.* Parker, 70 Mo. 372, 380.

[2] Irvine *v.* Adler, 44 Cal. 559.

[3] Devyr *v.* Schaefer, 55 N. Y. 446, 451; compare Corning *v.* Troy, &c. Factory, 44 N. Y. 577; Reed *v.* McCourt, 41 N. Y. 435.

doubt; the chief difficulty and the conflict of the authorities in this class of cases, are to be met with when there is no agreement to consider the boundary line fixed upon as one for convenience only, the true line being in doubt, or till the true line be discovered. The difficulty arises from the notion that possession, under a mistake as to the extent of the possessor's rights, cannot be under the necessary adverse claim. As we have seen, the views of the courts are directly opposed on this general subject, and we find the same conflict where coterminous possessions are held under a mistake as to the true boundary. Thus it was held by the Supreme Court of Maine, where two adjoining proprietors had occupied lots divided by a fence placed upon a wrong divisional line by mistake, which the parties erroneously supposed was substantially upon the true line, and had occupied according to the fence only because they supposed it was on the true divisional line, that there was no adverse possession of the portion beyond the lines described in the deed under which the land was occupied.[1] On the other hand, the Supreme Court of Alabama[2] decided that, where two adjoining owners unconditionally establish a dividing line by consent and occupied up to it, the possession of each was adverse. The court say: "In such a case, there would be a clear assertion that such was the dividing line, and that each claimed title up to it." Should, however, the dividing line be placed beyond the true line, it is added "through mere inadvertence, or ignorance, or from convenience, and with no intention to claim it; in such a case, the possession, up to the dividing fence, would not be adverse." But in a case in Missouri, already cited,[3] it was held that, though the claimant intended to claim only to the true line, "still, if he inclose to a certain line, claiming it to be the true one, and that the land to

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[1] Dow *v.* McKenney, 64 Me. 138.

[2] Brown *v.* Cockerell, 33 Ala. 38; S. P. Smith *v.* McKay, 30 Ohio St. 409, 418; Foulke *v.* Stockdale, 40 Iowa, 99; Hiatt *v.* Kirkpatrick, 48 Id. 78.

[3] Cole *v.* Parker, 70 Mo. 380.

that line is his, his possession is adverse." And again in an earlier case[1] in the same court, it was held of coterminous proprietors that, if they fix upon a division line, and each holds possession to such line, claiming it to be the true one, the possession is adverse. The court use this language: "The mere fact that he claims that line to be the true one cannot negative the intention and make him hold, if mistaken, under the opposing claimant." On the other hand, it seems to be held, in a recent case in Iowa,[2] that, in the absence of a presumption that the claimant intended to disregard the true line, his possession of the part erroneously occupied would not be deemed adverse. Much of the conflict in the rulings of the courts, on this subject, arise from the different presumptions which they entertain at the beginning of their reasoning. Thus, on the one hand, the actual possession alone raises the presumption of an intent to claim,[3] which must be rebutted by the true owner by showing, for example, that the boundary line fixed upon and the possession taken were temporary or conditional. On the other hand, the presumption *omnia rite acta esse*, and hence, that the intention to claim extends only to the true line, places the burden upon the claimant of showing that he had an actual adverse intent in taking possession beyond the true line, and that there was an actual disregard of the true boundary.[4] With regard to these presumptions, it should be observed that the first is only the ordinary inference of a particular intention from facts which are shown by common experience to warrant it; the second, on the other hand, seems to us to confuse a simple question of evidence by the unnecessary introduction of a vague maxim, which certainly ought not to affect the

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[1] Tamm *v.* Kellogg, 49 Mo. 123; but see Knowlton *v.* Smith, 36 Mo. 507. *Contra*, Smith *v.* McKay, 30 Ohio St. 418; compare also Houx *v.* Batteen, 68 Mo. 84; Walbrunn *v.* Ballen, 68 Mo. 164; Bader *v.* Zeise, 44 Wis. 96.

[2] Hiatt *v.* Kirkpatrick, 48 Iowa, 78.

[3] See French *v.* Pearce, 8 Conn. 439.

[4] See *e. g.*, Brown *v.* Cockerell, 33 Ala. 45, 46.

burden of proof. In a leading case in New York,[1] the general doctrine as to actual possession taken under a deed by mistake, is thus summed up: "Where a grantee, in taking possession under his deed, goes unintentionally and by mistake beyond his proper boundaries, and enters upon and actually occupies and improves land not included in the deed, claiming and supposing it to be his, this occupation is to be deemed adverse within the meaning of the statute of limitations." And it is added: "It cannot be denied that this doctrine is in accordance with the strict letter of the statute; and it may perhaps be equally within its spirit and intent."

[1] Crary *v.* Goodman, 22 N. Y. 175, and cases cited; see also Pope *v.* Hanmer, 74 N. Y. 245.

CHAPTER XXX.

COLOR OF TITLE.

§ 761. General character of adverse possession with color of title.—Principal effect of color of title.
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§ 761. *General character of adverse possession with color of title.—Principal effect of color of title.*—One of the most frequent expressions, in connection with the subject of adverse possession, to be met with in the books, is that "possession, to be adverse, must be under claim or color of title." The expression would be, perhaps, more accurate and clear if it were: possession, either with or without color of title, to be adverse must be under a claim of right. The existence of a color of title in the claimant does not dispense with the necessity for an hostile claim on his part; every adverse possession, must be under a claim or assertion of ownership, whether with or without color of title; in fact, the color of title is itself an assertion or at least evidence of such a claim.[1] So, too, the possession of

[1] See Jackson *v.* Woodruff, 1 Cow. (N. Y.) 285, where it is said: "There is no doubt that actual occupancy, and a claim of title, whether such claim be by deed or otherwise, constitute a valid adverse possession, &c.;" see also Clapp *v.* Bromagham, 9 Id. 557.

a deed or other written muniment of title does not dispense with an occupation of some part, at least, of the premises; whether the adverse claimant has color of title or not, he must, except perhaps in exceptional cases provided by statute, have some actual possession of the *locus in quo*. It is "the possession that bars the owner of a recovery," as the court say in Weber *v.* Anderson,[1] and not any "deed or instrument of title." So it is said: "The muniment is but one circumstance by which to make out an adverse possession."[2] And, also, "it is the possession under claim of right to which the law attaches most significance, and, if such possession commenced under a written instrument of any kind, * * * it may be looked to for the purpose of showing the character and extent of the possession and claim, and the intent with which the entry was made." We have heretofore considered the requisites of such actual possession; these in general apply as well to possession with color of title as without it. Hence, we conclude, an adverse claimant having color of title to land, must have been in actual possession of at least some part of the land, with an intent to appropriate the same, and such possession must also have been hostile, open, exclusive, continuous, &c., in order to bar the owner's right of entry. It may be stated generally that the only exclusive effect of what is called "color of title," in connection with adverse possession is, to define the extent of the possession claimed, and, by creating a constructive possession, beyond the actual possession, or *pedis possessio*, of the claimant, to ultimately shut out the owner of the land from a much larger tract, than in the case of an adverse claimant relying simply upon his naked possession. The subject, therefore, of color of title, becomes one of great importance.

§ 762. *Color of title.—Definition, &c.*—In the case of Wright *v.* Mattison, in the Supreme Court of the United

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[1] 73 Ill. 442.

[2] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 604; see also Mead *v.* Leffingwell, 83 Penn. St. 191.

States, it is said: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title."[1] And, as is added by the Supreme Court of California: "It is that which the law will consider *prima facie* a good title, but which, by reason of some defect, not appearing on its face, does not in fact amount to title."[2] So, in New York, color of title has been defined to be that which "the law will, *prima facie*, consider a good title;"[3] and in the case of a deed, relied upon as color of title, "it must be such an one as might be valid."[4] On the other hand in Indiana, it is said that the New York doctrine that "color of title is that which appears *prima facie* to be a 'good title,' is without reason and is being abandoned."[5] In Maryland it is held that "the paper title, to give color, must be so far *prima facie* good in appearance as to be consistent with the idea of good faith, &c."[6] And in Illinois the instrument relied upon "must profess to convey a title to the grantee,"[7] or "must purport, on its face, to convey title."[8] In an earlier case, however, in the same court, it is said: "Color of title may be made through conveyances, or bonds and contracts, or bare possession, under parol agreements."[9] So, in Massachusetts, an entry under a parol gift was designated as an entry under color of title.[10] In South Carolina, however, color of title was very loosely defined to be "any semblance of title by which the extent of a man's possession can be ascertained."[11] By the Supreme Court of Georgia, color of title

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[1] Wright *v.* Mattison, 18 How. (U. S.) 56, and cases cited; see also Edgerton *v.* Bird, 6 Wis. 527; Baker *v.* Swan, 32 Md. 355; see also cases cited, and especially Jackson *v.* Frost, 5 Cow. (N. Y.) 346; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589.

[2] Bernal *v.* Gleim, 33 Cal. 676.

[3] Jackson *v.* Frost, 5 Cowen (N. Y.), 351.

[4] Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 522.

[5] Bell *v.* Longworth, 6 Ind. 277.

[6] Baker *v.* Swan, 32 Md. 355.

[7] Coleman *v.* Billings, 89 Ill. 190.

[8] Kruse *v.* Wilson, 79 Ill. 240.

[9] Woodward *v.* Blanchard, 16 Ill. 430. Quoted from at length in Wright *v.* Mattison, 18 How. (U. S.) 58.

[10] Sumner *v.* Stevens, 6 Metc. (Mass.) 338.

[11] Turpin *v.* Brannon, 3 McC. (S. C.) 261.

is defined to be a "writing, upon its face, professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used; a title that is imperfect, but not so obviously so, that it would be apparent to one not skilled in the law."[1] And subsequently by the same court color of title is loosely defined to be anything in writing, connected with title to land, which seems to define the limits of the claim;[2] but in a later case the same court say that "color of title cannot rest in parol; there must be a document of some sort."[3] So, in Vermont, color of title is defined to be a "deed or survey of the land, placed upon the public records of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title." On the other hand, it is held in Missouri that "it does not always require a written instrument to constitute color of title, but there must be some visible acts, signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title."[4] In Tennessee, color of title has been defined to be "where the possessor has a conveyance of some sort, by deed or will or inheritance, which he may believe to be a title."[5] So in Iowa, it is held that if an adverse possessor die, the possession devolves upon his heirs, and the possession of the latter is under color of title.[6] In a case in Pennsylvania, Gibson, C. J., delivering the opinion of the Supreme Court, said: "The words (color of title) do not necessarily import the accompaniment of the usual documentary evidences; for though

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[1] Gittens *v.* Lowry, 15 Ga. 338; see Beverly *v.* Burke, 9 Id. 443.

[2] Walls *v.* Smith, 19 Ga. 8.

[3] Roe *v.* Kersey, 32 Ga. 155; as to necessity for a writing, see also Tate *v.* Southard, 3 Hawks (N. C.), 121.

[4] Cooper *v.* Ord, 60 Mo. 431; see Hughes *v.* Israel, 73 Mo. 547; Rannels *v.* Rannels, 52 Mo. 108.

[5] Wilson *v.* Kilcannon, 4 Hayw. (Tenn.) 185; see also Darby *v.* McCarrol, 5 Id. 286.

[6] Teabout *v.* Daniels, 38 Iowa, 161. In an earlier case in Iowa, it is said that to constitute color of title, "he (the claimant) must have a paper title." Hamilton *v.* Wright, 30 Iowa, 486.

one entering by a title depending on a void deed, would certainly be in by color of title, it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seized, should be deemed otherwise. * * * To give color of title, therefore, would seem not to require the aid of a written conveyance, or a recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title when it is made under a *bona fide* and not pretended claim to a title existing in another."[1] In Oregon it is held that "if from the face of the deed compared with the law regulating the subject, he (the grantee) might have had title," such conveyance gives color of title to possession taken under it.[2] In Alabama it is held that "he who holds under a paper title, which apparently gives him a right to the land, which would lead an honest mind to the conclusion that the right to the land passed by the deed * * * must be considered as holding under color of title."[3] And in North Carolina it is held that, to constitute color of title, there must be "some written document of title, professing to pass the land, and one not so obviously defective that it could not have misled a man of ordinary capacity."[4]

§ 763. *Distinction between "claim" and "color of title."—Color of title as showing the character and extent of the possession.*—From the above quotations it will sufficiently appear that considerable diversity of opinion exists on the subject of color of title, inasmuch as the very definitions of the term are so various and irreconcilable. Hence, too, it

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[1] McCall *v.* Neely, 3 Watts (Penn.), 72; see also Abercrombie *v.* Baldwin, 15 Ala. 372, where color of title is regarded as a "synonym of a *bona fide* claim of title." See also Herbert *v.* Hanrick, 16 Ala. 595, where it is said by the court: "he must have color of title, in other words, some deed or written evidence of title." That to constitute color of title there must be a paper title, see also Hamilton *v.* Wright, 30 Iowa, 486.

[2] Stark *v.* Starr, 1 Sawyer, 20.

[3] Saltmarsh *v.* Crommelin, 24 Ala. 352.

[4] Dobson *v.* Murphy, 1 Dev. and Bat. (N. C.) Law, 586; see McConnell *v.* McConnell, 64 N. C. 342.

is impossible to lay down any definition of color of title which will not conflict with many to be found in the books. Much, however, of the confusion on this subject arises undoubtedly from confounding color of title with claim of title, which, as we have already seen, are by no means identical.[1] This confusion is evident from the argument in the Pennsylvania case quoted from in the preceding section, where, as in other cases above cited, the technical sense of the term color of title is lost sight of.

The possession of color of title by an adverse claimant to land is important for two things: first, as showing the *animus* of his possession and its character, *i. e.*, that he lays claim to the possession as the owner; and, second, as defining the amount of his possession and extending it by means of a constructive possession.[2] As is said in a case in the Supreme Court of Pennsylvania, "It is not to be forgotten that mere color of title is valuable only so far as it indicates the extent of the disseizor's claim;"[3] and in the Supreme Court of Minnesota, "The effect of color of title * * * is to define the extent of the possession claimed."[4] Regarded as showing the *animus* of the possessor, or his claim of exclusive ownership, color of title is merely a piece of evidence, like any hostile act or assertion of ownership by the claimant, which establishes the necessary adverse character of the possession, or as has been already quoted: "The muniment is but one circumstance by which to make out an adverse possession."[5]

§ 764. *Misapplication of the term color of title.—Color and claim of title confounded.*—It is when so regarded, *i. e.*, as showing the intent of the claimant, that the

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[1] That "color" and "claim" of title are not synonymous terms, see the case of Hamilton *v.* Wright, 30 Iowa, 486, where it is said: "The defendant may rely upon either a color of title or a claim of title. To constitute the former, he must have a paper title, but the latter may exist wholly by parol."

[2] Welborn *v.* Anderson, 37 Miss. 155.

[3] Ege *v.* Medlar, 82 Penn. St. 99.

[4] Washburn *v.* Cutter, 17 Minn. 369.

[5] Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 604.

term "color of title" has been so often misapplied and wrongly defined. For example, in the case of Edgerton *v.* Bird, in the Supreme Court of Wisconsin,[1] it was held that, though color of title be "that which in appearance is title, but which in reality is no title," and though the tax deed under which the defendant went into possession was "void upon its face," yet that such a deed was admissible in evidence to show "colorable title" in the defendant, and the "character of the possession," and that the possession was "adverse." In this case there seems to be no question of constructive possession through color of title, but simply whether the possession in its inception could be "adverse," or in other words under a claim of ownership, in the face of the presumption of law (arising from the fact that the deed was void on its face) that the claimant knew that the deed "was not adequate to carry the true title;" though the fact was, as the court say, that the defendant "undoubtedly supposed that the tax deed was good." The question, therefore, was as to the character of the defendant's claim, not whether the deed in question amounted to color of title in its proper sense. It may be remarked, moreover, that, so far as this case implies, that good faith is necessary in order to give an actual adverse possession the benefit of the statute of limitations, it is at variance with the great weight of authority on this subject.[2] As another example of the same misuse of the term "color of title," we may cite the opinion of Chancellor Jones, in the case of La Frombois *v.* Jackson, in the Court of Errors in New York.[3] The Chancellor says: "His (the grantor) assuming to be entitled, and contracting to convey, gave to the purchaser under him a color of title, which would characterize the possession of such purchaser under such contract as adverse against all other claimants." Though literally this is holding that an executory contract to convey may be color of title, it is apparent from the rest of the Chancellor's opinion, and from the

[1] 6 Wis. 527. [2] See *post*, § 775 *et seq.* [3] 8 Cow. (N. Y.) 589.

other opinions in the case, that the only question of importance in the case was, as the Chancellor says: "Whether this documentary evidence (the document being admitted to be void on its face) * * * is not sufficient to give a character of adverse possession to the occupancy" to the defendant in ejectment, and "to rescue him from the reputation of being a mere trespasser." That is, whether the possession of the defendant under this document did not give his claim the character of a claim of ownership, and thus render his possession adverse. So in all the opinions in this case, the possession of the void written contract was treated as evidencing the intention or adverse claim of the defendant, which could have been evidenced as well by other things. So it is said by one of the senators, in his opinion: "This possession, accompanied by claim of title, was good without the paper." There was evidently no question of constructive possession under color of title.

§ 765. *Instrument insufficient, as color of title may be evidence of a claim of title.*—It may be generally stated that a deed or other similar document may be introduced to show the character of the claim of the possessor under it, though such writing would be insufficient to constitute color of title, and thereby create a constructive possession. As it is held in a case in the Supreme Court of the United States:[1] "Color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and, of course, adversely to all the world." So, also, in the case of Humbert *v.* Trinity Church, in the New York Court of Errors,[2] the court say: "It was very properly conceded, * * * that a claim of title, even under a paper altogether void and inoperative as a deed, will yet characterize a possession as adverse within the statute of limitations." So in the High Court of Errors and Appeals of Mississippi it is held, that "under the plea of the statute

[1] Pillow *v.* Roberts, 13 How. (U. S.) 477.

[2] 24 Wend. (N. Y.) 604.

of limitations, generally a void deed, record, or proceeding may be introduced to show the fact of possession held under it, and the *quo animo* with which such possession was taken."[1] It is held in the Supreme Court of Vermont, that the record of a survey of lands does not "constitute color of title; but might be evidence tending to show that he (defendant) was claiming title."[2] So an entry under a recorded deed may be shown, as is said, not to "prove notice, as such, but to show the claim of title under which he held possession."[3]

§ 766. *Color of title as creating a constructive possession.* —By far the most important effect of color of title is the creation of a constructive possession, or, as it is defined, "a possession in law, without possession in fact,"[4] by extending, as the Court say in Chapman *v.* Templeton, the possession of a part of a tract of land so as to include the whole tract.[5] Just as the true owner of land is deemed by presumption of law in possession of it through his deed and without any physical occupation of the land, so the law gives the adverse claimant constructive possession of all to which he has color of title. Or, as it is held, his possession is "co-extensive with the boundaries defined thereby"[6] (*i. e.*, by what constitutes his color of title); and, if he holds under a deed, "the deed gives him constructive possession of all the land embraced in the deed;"[7] and "where one is in actual possession of a part of a tract of land, and holding the whole under claim and color of title, he will in law be held to be in possession of the remainder;"[8]

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[1] Root *v.* McFerrin, 37 Miss. 51; see Welborn *v.* Anderson, Id. 161.

[2] Atkinson *v.* Patterson, 46 Vt. 765; see also Wing *v.* Hall, 44 Id. 122.

[3] Stevens *v.* Brooks, 24 Wis. 330; see also Foulke *v.* Bond, 12 Vroom (N. J.), 543, 544.

[4] Hodges *v.* Eddy, 38 Vt. 344; see also Buck *v.* Squiers, 23 Vt. 504.

[5] Chapman *v.* Templeton, 53 Mo. 465; see also Washburn *v.* Cutter, 17 Minn. 361.

[6] Wilson *v.* Williams, 52 Miss. 493; see also Cunningham *v.* Frandtzen, 26 Tex. 38; Pepper *v.* O'Dowd, 39 Wis. 544.

[7] Chandler *v.* Rushing, 38 Tex. 596.

[8] Powell *v.* Davis, 54 Mo. 318.

and "such possession would be a disseizin of the true owner of the whole tract described in his deed;"[1] and "he is presumed to enter according to his title;"[2] and "where one enters upon land under a recorded deed, his entry and claim are referred to that deed, and measured by it."[3] The only difference between the case of the true owner and one claiming under color of title is, that in the latter case there must be some actual or corporeal possession of the *locus in quo*, whereas in the case of the true owner, no such possession is necessary. It is held in Fugate *v.* Pierce, in the Missouri Supreme Court: "The doctrine of constructive possession, which follows the title, when there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters, and which he claims by virtue of such instrument."[4]

§ 767. *Color of title must describe and define the land.* —It is held in a recent case in Ohio: "that one in possession, claiming by metes and bounds under a paper title, and openly and notoriously exercising control and dominion on the land, is presumed to be doing so to the extent of his claim. Where, however, his paper claim is void for want of any description of the land, or anything to define its extent, his acts and dominion can create no such presumption. The occupancy must be such as to give notice to the real owner of the extent of the adverse claim. Hence it is, that occupancy, without a deed defining the land, is only notice to the boundaries actually inclosed or improved."[5] And it is said, a deed "which describes with pre-

[1] Putnam Free School *v.* Fisher, 34 Me. 177.

[2] Bailey *v.* Carleton, 12 N. H. 15; see also Brackett *v.* Persons unknown, 53 Me. 228; Wells *v.* Iron Co. 48 N. H. 530; Phillippi *v.* Thompson, 8 Oregon, 436; Coleman *v.* Billings, 89 Ill. 188; Barger *v.* Hobbs, 67 Ill. 592.

[3] Stevens *v.* Brooks, 24 Wis. 329.

[4] 49 Mo. 447.

[5] Humphries *v.* Huffman, 33 Ohio St. 404.

cision the boundaries of the land," shall be "a substitute for a substantial and permanent fence around the whole."[1] And it is also held in the case of Ege *v.* Medlar, cited above, that a disseizor holds constructive possession of the whole tract only when his entry was under "color of title by specific boundaries to the whole tract."[2] The first requisite of such color of title as will give constructive possession to the claimant is, therefore, some definite description showing the extent of the claim which, as to the part constructively possessed, may be said to perform the same office as acts of ownership upon the parts in actual possession.[3] So in the case of Livingston *v.* Peru Iron Company,[4] in the Court of Errors in New York, it is said: "Without the paper title the possession is limited by the *pedis possessio*," and, "it is immaterial whether the deed conveys a good title;" * * * "if no lands are described in it, nothing can pass, the deed is a nullity, and lays no foundation for a claim beyond the actual occupancy. It would be easy to multiply cases to the same effect, that an adverse possession, without paper title, is good only to the extent of actual inclosure, and no further."

§ 768. *Constructive possession limited to amount described.*—So, also, the extent of the adverse constructive

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[1] Chandler *v.* Spear, 22 Vermont, 405. So it is held that possession under a deed on record is itself a constructive notice of the adverse claim. Forest *v.* Jackson, 56 N. H. 357; see also Thompson *v.* Burhans, 79 N. Y. 99, 100; Ellicott *v.* Pearl, 10 Peters, 442. In the latter case, the court say: "The law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession."

[2] Ege *v.* Medlar, 82 Penn. St. 87.

[3] See Henley *v.* Wilson, 81 N. C. 405, where it is held that a description by metes and bounds is not necessary where the premises are well known by name, as, for example, "McClenahan Mills." A deed for a given number of acres out of a certain tract of land, without specifying the particular part, is void for uncertainty, as the land cannot be located by the description, and hence such a deed cannot be good color of title. Shackleford *v.* Bailey, 35 Ill. 387; see also cases cited; see § 461.

[4] 9 Wend. (N. Y.) 517; see also Kent *v.* Harcourt, 33 Barb. (N. Y.) 498.

possession will be limited to the amount described or defined by whatever constitutes the claimant's color of title. There can be no adverse possession, whether actual or constructive, where there has been no definite claim to it. The deed, or whatever writing constitutes the color of title, must, at least, "purport to include" the land claimed, "upon the general principle that a deed cannot operate as color of title so as to have effect beyond the estate which it professes to pass."[1] So, also, if the land actually occupied is a tract or lot altogether different from the one which the deed describes, under which the occupant claims, there will be no constructive possession created, but the claimant will be limited to his actual possession.[2] As is said by Chief Justice Church in a case in the New York Court of Appeals,[3] when construing the New York statute on this subject: "Where premises are included in the instrument under which the title is claimed, constructive possession, as provided by section 83, is sufficient, while to the land not included in the instrument, the possession must be actual, as required by section 85;" and, elsewhere in the same opinion, "it seems to me incongruous to say that a person claims title under a written instrument, to land not included in the instrument."

§ 769. *No constructive possession without written instrument.*—As the amount of land which can be claimed by constructive possession is limited by the terms of some written instrument, so, it can be stated generally, that there can be no constructive adverse possession which is not based upon a claim under some written instrument constituting in form a paper title. In a recent case in the New York Court of Appeals, the court say: "Constructive possession is based upon a written title, which may be valid or invalid."[4] In Jackson *v.* Woodruff,[5] cited above, it is said:

[1] McEvoy *v.* Loyd, 31 Wis. 147; and cases cited.

[2] Crary *v.* Goodman, 22 N. Y. 173, and cases cited; see also Swettenham *v.* Leary, 18 Hun (N. Y.), 286.

[3] Pope *v.* Hanmer, 74 N. Y. 244.

[4] Thompson *v.* Burhans, 79 N. Y. 99.

[5] 1 Cow. (N. Y.) 285.

"But when a party claims to hold, adversely, a lot of land by proving actual occupancy of a part only, his claim must be under a deed or paper title." So it is said in a case in the Supreme Court of New Hampshire,[1] that "there can be no constructive possession of land without color of title." And in Missouri,[2] it is held, that "such possession is never based upon a claim merely," but "there must be a deed, purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession of a part;" and again, "having no color of title, his possession could not extend beyond the limits of his actual occupation." In Humbert *v.* Trinity Church,[3] it is said, that to warrant the application of the statute of limitations in ejectment, "the books require color of title, by deed or other documental semblance of right in the defendant, only when the defense is founded on a constructive adverse possession."

§ 770. *Some actual possession necessary upon which to base constructive possession.*—It is hardly necessary to add, what has been already referred to, as a further essential to the existence of a constructive adverse possession, that it should be based, not only upon some written instrument, but upon an actual, though only partial, possession of the *locus in quo.* The necessity for some such corporeal possession will be readily seen, if we revert to the general rule of law that, until disseized by an actual adverse entry, the true owner is at least in the constructive possession of his land, and, in the case of an apparent conflict of constructive possessions, that the possession is deemed to follow the true title.[4] An actual entry and disseizin of the true owner by the adverse claimant under a paper title is, therefore, necessary for

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[1] Wells *v.* Iron Company, 48 N. H. 530.

[2] Long *v.* Higginbotham, 56 Mo. 251; but see Hughes *v.* Israel, 73 Mo. 547; see also Fugate *v.* Pierce, 49 Mo. 441; Crispen *v.* Hannavan, 50 Mo. 544; S. P. Scales *v.* Cockrill, 3 Head (Tenn.), 436.

[3] 24 Wend. (N. Y.) 604.

[4] Clarke *v.* Courtney, 5 Peters, 353, 354.

the latter to acquire any constructive possession under it.[1] So, it is said: "The constructive is dependent upon the actual possession, and must continue or fail with it."[2] Consequently, when an adverse possessor sells or parts with "that over which he had actual possession," he "loses his constructive possession of the remainder."[3]

§ 771. *Character of such actual possession.*—Though some corporeal possession be necessary as a foundation for a constructive possession, yet it may be doubted whether the same strictness would be required in determining the sufficiency of hostile acts to constitute "actual" possession, as would be in the absence of a paper title, when the adverse possession is based merely upon a naked claim of ownership. Thus it is held, that in respect to such acts of ownership, less notoriety will be required when the possession and claim are under color of title.[4] Though, as a rule, if there be a sufficient actual possession of a part, no acts of ownership need be shown upon the remainder of the land (when claimed under color of title), yet, in Missouri the statute expressly requires the exercise of the "usual acts of ownership over the whole tract so claimed."[5] So, too, in a recent case in the Court of Errors and Appeals of New Jersey,[6] where the general sub-

[1] Moingona Coal Co. *v.* Blair, 51 Iowa, 448; see also Thayer *v.* McLellan, 23 Me. 419, where it is held that the owner of land will not become disseized by a survey, allotment and conveyance thereof, and by recording the deed, but that an open occupation of some part of the premises purported to be conveyed by the deed, is necessary. So in connection with an adverse claim to land under color of title, "the entry and possession must be proved by acts sufficient in law to constitute such adverse entry and possession." Washburn *v.* Cutter, 17 Minn. 369; see also Baker *v.* Swan, 32 Md. 355. The existence of color of title alone is, like that of any bare claim to land, without some actual occupation of the land under it, of no avail to the claimant, for, as it is held in the case of Walls *v.* Smith, 19 Ga. 8, color of title can be of service only in aid of possession.

[2] Cunningham *v.* Frandtzen, 26 Texas, 38.

[3] Chandler *v.* Rushing, 38 Texas, 597.

[4] Hodges *v.* Eddy, 38 Vt. 327; see also Parker *v.* Propr's Locks, &c., 3 Metc. (Mass.) 99, 102.

[5] See Norfleet *v.* Hutchins, 68 Mo. 599.

[6] Foulke *v.* Bond, 12 Vroom (N. J.), 547; to same effect, see Den *v.* Hunt, Spencer (N. J.), 492.

ject of adverse possession is most ably and elaborately discussed, it is distinctly held, that "the rule of law, that possession by one having paper title, will be presumed to be co-extensive with the boundaries of the title deeds, applies only to the owner of the legal title," and that, consequently, though "color of title, and actual occupation by residence, cultivation or inclosure of part of the tract * * * may serve to give character to his (the disseizor's) acts of possession over the residue," yet it "will not relieve him from the obligation of satisfying a jury that his possession has been of such a character as, under the circumstances, may reasonably be expected to have informed the true owner of the nature of the possession and the extent of the title proposed to be acquired under it." And elsewhere in the same opinion, it is implied that "a substantial holding, co-extensive with the boundaries in the deed," must be established. So in New York, not only is the constructive possession given by a paper title limited in amount to a tract of land "of suitable size," for example, "to be kept for the balance of a farm," but it is intimated, at least, that the land not under actual cultivation or possession, must be used in some way habitually—not merely occasionally—in connection with the land actually cultivated.[1]

§ 772. *The underlying principles of color of title and constructive possession summed up.*—The cases cited in the preceding sections, which embody the generally accepted and best views on the subject of color of title and constructive possession, in connection with the statute of limitations, are, undoubtedly, based upon the following principles: First, that color of title is important in creating a constructive possession beyond the limits of the actual possession; Second, that such constructive possession is confined to cases where the adverse claimant is in possession under some documentary evidence of title; Third, and this is a necessary deduction from the first two, that color of title must neces-

[1] Miller *v.* Long Island R. R. Co., 71 N. Y. 384.

sarily consist in some written instrument describing the *locus in quo.*

§ 773. *Certain exceptions noticed.*—We have dwelt upon this subject somewhat at length in view of the misconception of the meaning and effect of color of title and the irreconcilable definitions of the term to be met with, and which are above referred to. The rule, for example, that color of title must consist in some written instrument upon which alone constructive possession can depend has been frequently questioned. Thus in the case of Rannels *v.* Rannels,[1] in the Supreme Court of Missouri, it is distinctly held that it is not necessary that color of title "should be created by deed or other instrument of writing," but, that "it may be created by an act *in pais* without writing." The cases cited and quoted from by the court only partially support this proposition. The opinion of Judge Gibson in the case of McCall *v.* Neely,[2] quoted from, the same court had already refused to follow in a case,[3] also cited in Rannels *v.* Rannels, which does not by any means go so far as to hold that no writing is necessary to constitute color of title. So also the two Massachusetts cases cited,[4] do not at all support such a proposition, but merely lay down the principle that a claim of title can be adverse as well without as with a deed. In fact the very citation of these two Massachusetts cases, in support of the proposition attempted to be laid down in Rannels *v.* Rannels, is but another instance of the disposition above commented upon,[5] to confound "color" with "claim" of title. Moreover, notwithstanding the general language in Rannels *v.* Rannels, the court, in view of the circumstances of the case, decided only that the defendant, to whom the plaintiff had made a verbal gift of the premises and had "put her (defendant) into possession under this survey

[1] 52 Mo. 112. [2] 3 Watts (Penn.), 69; see above, § 762.

[3] City of St. Louis *v.* Gorman, 29 Mo. 593; see also Crispen *v.* Hannavan, 50 Mo. 547.

[4] Ashley *v.* Ashley, 4 Gray (Mass.), 197; Sumner *v.* Stevens, 6 Metc. (Mass.) 337.

[5] See *supra*, § 764.

(made by plaintiff) and the description in his (plaintiff's) own deed," was in possession under "color of title." In one sense, therefore, there was a written instrument describing the *locus in quo*, *i. e.*, the plaintiff's own deed, which may well be considered as constituting for the purposes of constructive possession the defendant's color of title, since it performed its prime office—that of defining the extent of the occupant's claim.[1] Furthermore, the case of Rannels *v.* Rannels, though cited with approval in a later case[2] in the same court, is certainly inconsistent in its language with the two Missouri cases above cited,[3] which confine the doctrine of constructive possession to possession under some written instrument.

The decisions of the Supreme Court of Vermont seem to form an exception to the rules above stated. For example, the case of Hodges *v.* Eddy,[4] already referred to, although stating the general rule that, to constitute color of title there must be some written instrument, yet declares the law in Vermont, in distinction from "many of the other States," to be "settled, that where a person without title, or color of title, enters upon a vacant lot, and actually occupies a portion of it, and the lot has a definite boundary marked upon the land, such person by claiming to be the owner to the boundary lines of the lot, has a constructive possession of the whole." So, too, in an earlier case it is held, "if one's fence is in such a form, as to clearly indicate that, when completed, it will include a portion of wood land, which the party now only uses for making sugar or cutting wood, the person must be regarded as in the constructive possession of the whole lot, although there be no paper claim, or color of title."[5] In Hodges *v.* Eddy, however, the language last quoted was construed to mean "no more

[1] This view seems to be taken in a later case in the same court. See Hughes *v.* Israel, 73 Mo. 547.

[2] Cooper *v.* Ord, 60 Mo. 431.

[3] Long *v.* Higginbotham, 56 Mo. 245; Fugate *v.* Pierce, 49 Id. 441; see *supra*, § 769.

[4] 38 Vt. 327.

[5] Buck *v.* Squiers, 23 Vt. 503.

than this, that such claim of ownership and dominion, as the fence indicated, in connection with his acts done upon it, gave him a sufficient actual possession."[1] But, query, whether the same construction cannot be put upon the language used in Hodges *v.* Eddy, above quoted? If, in the case of Buck *v.* Squiers, the facts as stated are held to give the claimant actual and not constructive possession, why should not the entry upon a lot with a "definite boundary marked upon the land," and an actual occupation of a portion of it by a person "claiming to be the owner to the boundary lines," be deemed to give an actual rather than a constructive possession? So that, after all, the decisions of the Vermont court may not be so much an exception to the rule of constructive possession being confined to cases of possession under a written instrument, as they are authorities on the subject of what constitutes a sufficient actual possession.[2] Certainly in the absence of such circumstances or acts, as would sufficiently clearly indicate the extent of the claim, some deed or written instrument is held necessary, even in Vermont, to extend a "possession constructively beyond the limits of the land actually occupied."[3] Similarly in Indiana it is held that, though an adverse possessor "must be limited to that portion over which he exercises palpable and continuous acts of ownership, * * * there being no other evidence, in such case, to enable us to determine the quantity," yet, "where a party is in possession under and pursuant to a state of facts which, of themselves, show the character and extent of his entry and claim," that such facts "perform sufficiently the office of color of title," by evidencing "the character of the entry and extent of the claim,"[4] and hence give constructive possession. As in the Vermont cases, however, it may be questioned whether this is

[1] Hodges *v.* Eddy, 38 Vt. 348.

[2] See also Beach *v.* Sutton, 5 Vt. 209. [3] Wing *v.* Hall, 47 Vt. 216.

[4] Bell *v.* Longworth, 6 Ind. 277. In North Carolina in a recent case it is held that "The existence of visible and definite boundary marks is required to enlarge a possession beyond the limits of actual occupancy or a *possessio pedis*." Scott *v.* Elkins, 83 N. C. 427.

not rather an authority on what may constitute actual possession, than an exception to the rule that a purely constructive possession is limited to cases where partial possession is accompanied with color of title. In California the ordinary rule limiting constructive possession to cases where some actual possession is held under a "paper title" is not applied in the case of mining claims. On this subject, the court say: "But we think, where a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on, or of a part, and though the party does not enter in accordance with mining rules, or under a paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case."[1]

§ 774. *Qualifications of the general rule of constructive possession.—Extent of a constructive possession limited.*— There is an important qualification of the general rule that the adverse claimant under a paper title has constructive possession of all which the deed or other written instrument calls for, and in which possession the statute of limitations will protect him. In the case of Thompson *v.* Burhans,[2] above cited, the court, after affirming the general rule of constructive possession under a paper title, as above stated, qualifies it as follows: "The part not actually possessed must be for use with or subservient to that actually possessed, and have some necessary connection therewith." And, again, "such constructive possession will extend only

[1] English *v.* Johnson, 17 Cal. 116; see also Attwood *v.* Fricot, 17 Cal. 43. For an application of the general rule of constructive possession of the whole through a partial actual possession under a paper title, see Donahue *v.* Gallavan, 43 Cal. 575; see further Finlay *v.* Cook, 54 Barb. (N. Y.) 9; Scott *v.* Delany, 87 Ill. 146; Lynde *v.* Williams, 68 Mo. 360; Welborn *v.* Anderson, 37 Miss. 155; Chandler *v.* Rushing, 38 Tex. 591; Texas Land Co. *v.* Williams, 51 Tex. 51; Den *v.* Hunt, Spencer (N. J.), 487; Hannibal, &c. R. R. Co. *v.* Clark, 68 Mo. 371, 378; Wells *v.* Iron Co. 47 N. H. 253, and cases cited; Turney *v.* Chamberlain, 15 Ill. 271.

[2] 79 N. Y. 100.

to such land as is used in connection with the improved land actually possessed, and to only so much as is reasonable and proper for that purpose, according to the custom of the country." Accordingly, the plaintiff claiming title under a void tax deed, to some 6,000 acres of wild land, but having sufficient actual possession of less than a quarter of an acre, it was held that he had no constructive possession of the land not actually possessed. It may also be here remarked, that the court held in this case that evidence, to the effect that the plaintiff had paid taxes on the lands and caused them to be surveyed and had at times cut logs and roads upon them, was insufficient to establish the necessary actual possession required by the statute. On the other hand, the earlier case of Munro *v.* Merchant,[1] in the same court, which case, as is said by one of the Commissioners of Appeals, in Thompson *v.* Burhans,[2] "carried the rule farther than any other," held, that when about 300 acres out of 1,500 or 1,600 acres had been cleared, and the uncleared portion had been used extensively for cutting timber trees, to be drawn and manufactured into lumber upon the cleared portion and elsewhere, and for fencing timber and firewood, the claimants under a deed were in possession of the whole tract. This case, in its facts, differs from Thompson *v.* Burhans, not only in respect to the proportion which the land claimed bore to that actually occupied, but in respect to the relation and connection between the two tracts—that actually possessed and that claimed by constructive possession. The reason of the rule affirmed in Thompson *v.* Burhans, as is said by Commissioner Earl,[3] "is well stated by Judge Woodruff in Jackson *v.* Woodruff,[4] as follows: 'Possessions thus taken under a claim of title, are generally for the purpose of cultivation and permanent improvements. It is generally

[1] 28 N. Y. 9.
[2] 61 N. Y. 69.
[3] 61 N. Y. 69. See also Miller *v.* L. I. R. R. Co., 71 N. Y. 380, 384.
[4] Cow. (N. Y.) 276.

necessary to reserve a part for wood land. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership in parts not cultivated give notoriety to the possession. Under such circumstances there is but little danger that a possession of twenty years will be matured against the right owner; if it occasionally happens, it will arise from a want of vigilance and care in him who has the title. It is believed that no well-founded complaint can be urged against the operation of the principle; but the attempt to apply the same rule to cases where a large tract is conveyed, will be mischievous indeed.'" The case last quoted from is cited with approval in a case in the Supreme Court of Vermont,[1] where the court also say: "It is, doubtless, impracticable to specify any precise quantity of land, that ought to be considered so far appendant to an actual improvement, as to be the proper subject of a constructive possession;" and, "it is not intended to say, that any quantity of land, which may reasonably be supposed to have been purchased and entered upon for purposes of cultivation, and for use as a wood or timber lot, might not be protected by such a possession." So, in a case in the Supreme Court of Wisconsin,[2] the court, in construing the statute governing the subject of constructive adverse possession, held, first, where the premises were divided into known lots, that "actual use on one lot cannot carry with it constructive use on another lot of the same piece of timber,"[3]

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[1] Chandler *v.* Spear, 22 Vt. 406.

[2] Pepper *v.* O'Dowd, 39 Wis. 538, 550.

[3] On the other hand, it is held, in a recent case in Georgia, that possession of part of one lot embraced in the same deed with other lots, will not be extended, by construction, to the other lots, unless the deed be on record. If the deed is on record, however, it will give constructive possession of the other lots, for the reason, as stated, that the record of the deed being notice to the owner, is equivalent to the visible possession of the lot by an actual occupancy. Tritt *v.* Roberts, 64 Ga. 156; see also Janes *v.* Patterson, 62 Id. 527. In a case already referred to in Missouri (Fugate *v.* Pierce, 49 Mo. 447), the adverse possessor under

and secondly, that "the extent of land so used must bear a reasonable proportion to the rest; must not be positively greater than is reasonably sufficient for fuel and fencing, in the circumstances of each case," and that, "what is a reasonable quantity, in each case, is * * a question for the jury."

From the cases quoted in this and the preceding sections, it will be seen that the courts, in some States at least, are disposed to hold, that, as to the part claimed by constructive possession, something more is necessary than the mere possession of a deed including it, and that there must be *some use* made of the land in connection with the part actually occupied or improved. The effect, therefore, of having color of title to land would be, as to the part beyond the actual occupation or improvement, not to dispense with *any acts* of possession, but to relieve the claimant from such distinct and continuous acts of appropriation as would otherwise be required. In connection with the general rule of constructive possession it may also be remarked, that the actual partial possession and the claim under the instrument constituting the color of title, must be co-existing, *i. e.*, the constructive possession given by the instrument cannot relate back to the time when actual possession commenced, but before color of title was acquired. In other words the statute begins to run in favor of the adverse constructive possession, only from the time when both actual possession and color of title concur.[1] So also it must be borne in mind that where the legal owner takes actual possession of the premises or a part of them, the constructive possession of the former adverse claimant is destroyed, and the latter

color of title "is held to be possessed of the contiguous land covered by the instrument." This ruling, however, seems inconsistent with the language in a subsequent case in the same court, where it is said that actual possession, accompanied with color of title, carried the possession to the whole tract, though the part in controversy was a lot of timber land, and "situated some distance from plaintiff's other land." See Powell *v.* Davis, 54 Mo. 315, 319; compare Scott *v.* Delany, 87 Ill. 148.

[1] Watson *v.* Tindal, 24 Ga. 494; see also Cooper *v.* Ord, 60 Mo. 420.

will thereafter be confined to his *possessio pedis*.[1] This is on the well-recognized principle that, in the case of a conflict of possession, the constructive possession always follows the true or better title.

§ 775. *Good faith as an ingredient in constructive possession.*—A very important qualification or condition in the law of constructive adverse possession frequently met with in the books is the presence of good faith in the claimant. It may be here stated generally that, when the adverse claim under the statute of limitations extends simply to the land actually occupied by the adverse claimant—his *possessio pedis*—the question of good or bad faith on the part of the claimant does not arise. Under the plea of the statute of limitations in such a case the only inquiry is, has the actual possession been sufficiently open, hostile, &c., and continued for the time required by the statute. Or, in such a case, as the court say in Smith *v.* Roberts: "It is the actual claim of ownership, not the *bona fides* which is the test."[2] When, however, the adverse claim is made under color of title, and, consequently, extends beyond the *possessio pedis* of the claimant to the limits of the instrument constituting the color of title by means of the constructive possession created by it,—in such a case, the *bona fides* of the claimant may become an important element. The necessity of good faith in the claimant under color of title is often taken for granted by the courts, though the subject, it must be admitted, is far from having been satisfactorily adjudicated upon. Thus, in a case in the Supreme Court of the United States,[3] Mr. Justice McLean, delivering the opinion of the court, says: "Upon their face, the deeds purport to convey a title in fee; and having been accepted in good faith, * * * they show the nature and extent of the claim to the premises;" the clear implication of

[1] Bradley *v.* West, 60 Mo. 33; see also Wing *v.* Hall, 47 Vt. 207; Brimmer *v.* Proprs. of Long Wharf, 5 Pick. (Mass.) 131.

[2] Smith *v.* Roberts, 62 Ala. 86.

[3] Gregg *v.* Sayre, 8 Peters, 253.

the opinion is, therefore, that the absence of good faith would have been fatal to the adverse possession claimed under the deeds. So, in a case in the highest court of Mississippi, the court say: "It is well settled that when a party enters into possession under a colorable title and holds adversely, that his possession is construed to be co-extensive with the premises, as described in the deed or will under which he claims, and which he *believes* gives him a sound title."[1] In a recent case in the Supreme Court of Pennsylvania[2] the court say: "If, however, it was known, or ought to have been known, that that sale did not in fact, embrace the Moses Foulke tract, then the purchaser acquired no color of title; for, as is said by Gibson, C. J., in McCall *v.* Neely,[3] 'An entry is by color of title when it is made under a *bona fide*, and not pretended, claim of title existing in another.'" And also, in a case in California, the court say: "If a party enters *bona fide* under color of a title, * * * the possession of a part * * * is the possession of the entire claim described by the paper."[4]

But in some cases the necessity for good faith under the circumstances in question is distinctly held. Thus, in a case in the Supreme Court of Missouri, it is held that, "In addition to the actual occupancy of a part * * * there must be a claim to the whole * * * and such claim must be *bona fide* and evidenced by some paper," &c.[5] And in another case in the same court, it is said, "Good faith may become an important element * * * in reference to defining the limits of the possession."[6] So in a case in the Supreme Court of Iowa, the court, in reference to a claim under color of title, say: "Of course he (the claimant) must make

[1] Welborn *v.* Anderson, 37 Miss. 163.

[2] Ege *v.* Medlar, 82 Penn. St. 98, 99.

[3] 3 Watts (Penn.), 72; see *supra*, § 762.

[4] Attwood *v.* Fricot, 17 Cal. 43; see also Buckley *v.* Taggart, 62 Ind. 238; Miss. & Tenn. R. R. Co. *v.* Devaney, 42 Miss. 555.

[5] Crispen *v.* Hannavan, 50 Mo. 544; see also Fugate *v.* Pierce, 49 Mo. 447.

[6] Bradley *v.* West, 60 Mo. 41; see also Chapman *v.* Templeton, 53 Mo. 465; Hannibal & St. Joseph R. R. Co. *v.* Clark, 68 Mo. 371.

the claim in good faith, and not in wantonness."[1] In a recent case in Texas, it is held that "It is unquestionably a well established general rule, that where entry is made upon land under color of title, * * * the party entering acquires constructive possession * * * to the extent of the boundaries in the title under which he enters. The extent of possession acquired by entry does not depend upon the character of the title, * * * but whether it is *bona fide* and under such color of right as that other parties can ascertain its character and extent."[2] That here the necessity for good faith is confined to a claim to constructive possession under color of title is shown by another case in the same court, where it is held, that "the statute of limitations does not involve the question of good faith in the naked possessor."[3] In a case in California, it is said by Field, C. J., in his opinion: The claim, "when founded upon a written instrument, * * * must be asserted by the occupant in good faith, in the belief that he has good right to the premises."[4] So, in a leading case in the Supreme Court of New Jersey,[5] the court say: "A party who sets up an adverse possession under color of title must act *bona fide*, or, in other words, he must be honest. He must believe his deed to be valid in law, and that it conveys to him a good title to the land." This doctrine has been recently followed in an important case in the Court of Errors and Appeals of the same State, which we have already cited, and to which we shall presently recur.[6]

The cases above cited, it is believed, reflect the prevailing opinion on this question of *bona fides* in claiming title to land by a constructive adverse possession through color of title,

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[1] Close *v.* Samm, 27 Iowa, 510.

[2] Texas Land Co. *v.* Williams, 51 Tex. 62.

[3] Kinney *v.* Vinson, 32 Tex. 128.

[4] McCracken *v.* City of San Francisco, 16 Cal 636.

[5] Den *v.* Hunt, Spencer (N. J.), 493. So also the "paper title" must warrant, by its appearance, good faith on the part of the person entering under it. See Baker *v.* Swan, 32 Md. 355.

[6] See *supra*, § 771; and *infra*, § 777.

though it is to be regretted that the subject has not received more general judicial investigation and adjudication. On the other hand, however, there are decisions, apparently at any rate, directly opposed to the opinions above quoted. In a case in the Supreme Court of Tennessee,[1] where the defendant in ejectment claimed under a void tax deed and pleaded the statute of limitations, and where, the "defendant, having been *particeps* to the pretended purchase for taxes," it was contended his possession was not adverse, the court held that such an objection was untenable, for, in such a case, "the jury would try the defendant rather than his title;" and so it was held, as the head note reads, that "the act of limitations will prove a bar to an action of ejectment, although the defendant, when he received his deed, knew that the person conveying to him had no title." But here there was no question of a constructive possession under the deed beyond the limits of the actual possession of the adverse claimant. The question simply was, "could an actual hostile possession, accompanied by a deed known to the claimant to be void, be strictly adverse?" and the ruling of the court to the effect that such possession can be adverse, no matter how tortiously obtained or how groundless the occupant may know his claim to be, will not be questioned by any one.

§ 776. *The New York doctrine on the subject.*—The most serious dissent from what we deem the prevailing and the better rule, as to the necessity for *bona fides* in one claiming constructive adverse possession through color of title, is to be found in New York, though the earlier cases in that State would seem to require good faith, not only in connection with a claim founded upon a written instrument constituting color of title, but also when the adverse possession is based upon a mere claim of title. Thus, in the case of

[1] Love *v.* Shields, 3 Yerg. (Tenn.) 405; see *contra*, Definition of Color of Title, above quoted; Wilson *v.* Kilcannon, 4 Haywood (Tenn.), 182; and Waterhouse *v.* Martin, Peck (Tenn.), 407.

Clapp *v.* Bromagham in the Court of Errors,[1] the Chancellor says, in reference to the contention that the purchase and possession of the adverse claimant were fraudulent, "if that objection to the title was well-founded, it might be fatal; for fraud vitiates whatever it touches." But the court held that fraud could not be imputed to the purchaser, through his negligence in not inquiring as to the validity of the title acquired, implying therefore, that actual fraud or knowledge of the defects of his title must be proved.[2] It may be remarked that this case has frequently been cited by the New York Courts, to the effect that constructive notice of defects in a title, arising out of neglect in the purchaser to investigate, is not applicable on the question of adverse possession,[3] but the decision, in respect to the language of the Chancellor above quoted, has never, so far as we are aware, been distinctly overruled. So, in a later case in the same court, the same doctrine as to the necessity of good faith in every adverse claim of title, whether founded upon a written instrument or not, is affirmed. In the course of his opinion the Chief Justice says: "The *animus*, then, or intent with which an entry is made, must be *bona fide* an entry believing in good faith that the land is his, and that he has title."[4] The doctrine of the earlier cases in New York seems, however, to have been discarded in the leading case, already cited frequently, of Humbert *v.* Trinity Church, in the Court of Errors,[5] where it is held that "neither fraud in obtaining or continuing the possession, or knowledge on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action within the prescribed period." In reference to the language in Livingston *v.* Peru Iron Co.,

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[1] 9 Cow. (N. Y.), 557.

[2] See also Foulke *v.* Bond, 12 Vroom (N. J.), 543.

[3] See for example Sands *v.* Hughes, 53 N. Y. 297.

[4] Livingston *v.* Peru Iron Co. 9 Wend. (N. Y.) 518; see also Howard *v.* Howard, 17 Barb. (N. Y.) 667, 668.

[5] 24 Wend. (N. Y.) 587.

above quoted, the court say: "The question is on the *quo animo*, the intent, not, I take it, as was suggested in Livingston *v.* The Peru Iron Co., the intent to claim honestly, but the intent to claim at all, right or wrong, with or without knowledge that another has title." The general language of the Chief Justice in the Livingston case is overruled, or at any rate is confined in its application to the case of an adverse possession, not under the statute of limitations, but under that against champerty and maintenance.[1] The language used in the several opinions delivered in the case of Humbert *v.* Trinity Church, on the subject of *bona fides*, is certainly general enough to warrant its application to all cases of adverse possession, under the statute of limitations, whether such possession be founded upon a mere claim or upon color of title, and whether the possession claimed be simply a *possessio pedis*, or, in addition, a constructive possession to the extent called for by a written instrument. We find, therefore, that the doctrine apparently laid down in Humbert *v.* Trinity Church, that *bona fides* is never necessary in adverse possession, is, on the authority of that case, applied to cases where, in fact, the adverse claim extended to land not actually possessed, but claimed by constructive possession under a deed or the like.[2] In a later case in the New York Court of Appeals,[3] however, we find the court basing the distinction between the cases of Livingston *v.* Peru Iron Co. and Humbert *v.* Trinity Church, upon the difference between the champerty act and the statute of limitations in that State. After drawing this distinction, the court say: "A deed fraudulently obtained is a nullity, and gives to the fraudulent grantee not even a color-

[1] See Crary *v.* Goodman, 22 N. Y. 177.

[2] See *e. g.*, Munro *v.* Merchant, 26 Barb. (N. Y.) 401, 402; Howland *v.* Newark Association, 66 Id. 367. Under the title "adverse possession," and the subheading "The claim must be under color of title," in Abbott's New York Digest, vol. I (p. 43), we find the following: "Whether defendant entered into possession in good faith, believing he had a good title, or not, is no longer material."

[3] Crary *v.* Goodman, 22 N. Y. 177.

able title. Hence, in the former of these cases (the Livingston case), which depended upon the champerty act, it was held that the possession of the grantee, under such a deed, was not such an adverse possession as would avoid a subsequent deed from the true owner. The other case (the Humbert case) turned upon the statute of limitations, and under that statute, as we have seen, the thing contemplated was a mere naked possession, irrespective of any right or color of right. Therefore the court held that even fraud in obtaining or continuing the possession would not excuse the negligence of the owner in not bringing his action within the prescribed period." The clear implication, at least, of this language is, that if "the thing contemplated" were a constructive possession through a deed fraudulently obtained, the fraud in obtaining such a deed—not in obtaining actual possession—would defeat the adverse claim to a constructive possession under it. This would, therefore, restrict the ruling in the Humbert case, that fraud is immaterial as an objection to the defense of the statute of limitations, to cases involving naked possession only, and would harmonize the New York rule on this subject with what we deem to be the prevailing opinion. But in a later case, in the same Court of Appeals,[1] it seems to be doubted whether this restriction of the language of the Humbert case, or the distinction attempted to be drawn, is warranted, though the reason for the doubt is not stated by the court.

§ 777. *Statement of the prevailing rule.—Doctrine of the New Jersey Court of Errors.*—Notwithstanding the New York cases above cited, we think the better and the prevailing opinion to be in effect, that fraud in acquiring an actual naked possession—whether accompanied by a deed or not—will not, on that account, render the possession less adverse, and will be no objection to the plea of the statute of limitations on the part of the disseizor or adverse claimant; but that no constructive possession can be ac-

[1] Sands *v.* Hughes, 53 N. Y. 296.

quired through a written instrument obtained through fraud, or with actual knowledge of its invalidity to convey a good title; in other words, that such a written instrument cannot perform the office of color of title. This rule, and the reasons therefor, are well stated in a recent important case in New Jersey,[1] as follows: "The general doctrine of the law is that fraud in obtaining or continuing possession, or knowledge that the party's claim of ownership is unfounded and wrongful, will not deprive him of his title by adverse possession, or relieve the true owner of the consequences of the bar of the statute of limitations, if the possession of the intruder has in fact been adverse, and has been asserted by such open and notorious acts of ownership as are essential in the acquisition of title by adverse possession (citing Humbert *v.* Trinity Church, 24 Wend. 587). * * * The statute of limitations establishes a peremptory and inflexible rule of law, which terminates the rights of the legal owner, and protects the disseizor in his possession, not out of regard to the merits of the latter's title, but for the reason that the real owner has acquiesced in a possession which was adverse for such a length of time that the statute has deprived him of all remedy for the enforcement of his legal title. Possession clandestinely taken and held for the purpose of fraudulently concealing from the real owner knowledge of the acts of ownership over his property, in virtue of which title is endeavored to be obtained, will defeat the effort to acquire title by such means, not on any general doctrine of fraud, but for the reason that possession under such circumstances would be devoid of that notoriety of the possession, and of the adverse claim which is necessary to perfect title by adverse possession. * * * This is the doctrine of the law in all cases where the adverse possession commences with an actual disseizin. But a disseizin may be effected by an entry under a deed or a feoffment, which is void in the sense that no title is actually conveyed there-

[1] Foulke *v.* Bond, 12 Vroom (N. J.), 541.

by, and where a party claims a disseizin by virtue of an entry under such a muniment of title, he is claiming the advantage of color of title. In such a case the rule above mentioned is not applied in all its strictness. A party cannot have the advantage of an entry under color of title unless his deed, which gives the colorable title, was obtained *bona fide*. If obtained by fraud, or with knowledge that the grantor had no title to convey, the deed will avail the grantee nothing. But a grantee will not be deprived of the legal advantages of an entry under color of title, unless it be for actual fraud on his part."

§ 778. *Good faith expressly required by statute in some States.*—The necessity for good faith in one claiming under color of title, has been expressly recognized by the statutes on this subject in several of the States, which, however, from our view, are merely declaratory of the common law on the subject, so far, at least, as the rule is applied in respect to constructive possession.[1]

§ 779. *Difficulty of laying down a general definition of color of title.*—As we have seen, it is by no means easy to lay down a satisfactory definition, which shall accord with the various opinions in the books, as to what, in general, constitutes color of title. It is no easier to so define the term as to include every instance of what may be held to be color of title, and to exclude all that has been or may be discarded as such. Each case must be decided in respect to its own circumstances and ingredients, controlled by the general principles which we have above attempted to deduce from the authorities. It may, however, be advantageous to enumerate some of the instances of color of title held to be such by the courts, as well as some of those deemed insufficient as such.

[1] See, for example, Georgia Code, 1873, § 2683; Revised Statutes of Illinois, 1874, c. 83, §§ 6, 7; see also Castleberry *v.* Black, 58 Ga. 386; McCamy *v.* Higdon, 50 Id. 629; Brown *v.* Wells, 44 Id. 573; Garrett *v.* Adrain, Id. 274; Stubblefield *v.* Borders, 92 Ill. 279; Russell *v.* Mandell, 73 Id. 136.

§ 780. *Instances of what held to be color of title.*—The following have been held sufficient to constitute color of title: A tax deed made under a sale of swamp land, which was exempt from taxation as belonging to a county, as well as the deed from the purchaser;[1] a tax deed of an auditor, regular on its face, "without regard to the constitutionality of the laws under which it was devised;"[2] a sheriff's deed of land not in his own county;[3] a deed made by an administrator with the will annexed, though no power of sale was given by the will, and no sale had been ordered by the court;[4] a deed of a grantor, purporting to convey as an administrator, under a special act of the legislature, which act was unconstitutional and void;[5] so also a conveyance by a guardian made in pursuance of a void decree of a probate court;[6] a paper writing purporting to be a will, proved before the proper tribunal by the oath of one witness only,[7] though *contra* had the writing never been proved as a will;[8] a claim to land through condemnation proceedings subsequently adjudged void was held to be under color of title;[9] a tax title subsequently becoming invalid through individual or judicial action.[10] So it has been held that color of title and possession under it were not disturbed by a mere judgment in ejectment against the claimant, and where the plaintiff's title was bought in by the claimant.[11]

An imperfect or invalid title bond;[12] a deed under a decree of a court void for want of jurisdiction, if the deed

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[1] County of Piatt *v.* Goodell, 97 Ill. 84.

[2] Woodward *v.* Blanchard, 16 Ill. 424; see also Stubblefield *v.* Borders, 92 Ill. 280.

[3] Beverly *v.* Burke, 9 Ga. 440.

[4] Riggs *v.* Fuller, 54 Ala. 141.

[5] Fagan *v.* Rosier, 68 Ill. 84.

[6] Molton *v.* Henderson, 62 Ala. 426.

[7] McConnell *v.* McConnell, 64 N. C. 342.

[8] Callender *v.* Sherman, 5 Ired. (N. C.) Law, 711.

[9] Mississippi, &c., R. R. Co. *v.* Devaney, 42 Miss. 555.

[10] Hamilton *v.* Wright, 30 Iowa, 490.

[11] O'Neal *v.* Boone, 53 Ill. 35.

[12] Bell *v.* Coats, 56 Miss. 776, 781.

purport to convey title;[1] a tax deed regular on its face;[2] a comptroller's deed executed without authority;[3] a deed by an attorney in fact without proof of his authority,[4] and a deed by a person representing himself to have a written authority from the owner, the deed being made by the assumed agent in his own name without mention of the principal.[5] A deed made without authority by the clerk of the board of bounty commissioners of land sold for taxes;[6] a tax deed of land against which no judgment had in fact been obtained;[7] a sheriff's deed without a seal, but otherwise formal;[8] a deed of a purchaser at a master's sale, where in the foreclosure a proper party had been omitted as defendant.[9] Where lands were sold for delinquent taxes under a judgment, and the sale made at a day later than that fixed by law, and this appeared from the recitals in the deed which purported to convey the land, such a deed was held color of title.[10] A deed with defective acknowledgment;[11] so a paper purporting to be a deed, but without a seal, though held to be not valid for the purpose of conveying title, yet is admissible in evidence for the purpose of showing the extent of the possession of the claimant under it, and hence fills the office of color of title.[12] So, also, a deed attested by the seal of a court stamped upon the paper, instead of wax or a wafer, was held to be admissible to show color of title, and as evidence of the adverse possession of the claimant under it.[13] Written memoranda by a sheriff,

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[1] Huls *v.* Buntin, 47 Ill. 396; S. P. Welborn *v.* Anderson, 37 Miss. 162.

[2] Stubblefield *v.* Borders, 92 Ill. 284; Woodward *v.* Blanchard, 16 Ill. 433; S. P. Dawley *v.* Van Court, 21 Ill. 460.

[3] Thompson *v.* Burhans, 61 N. Y. 60; S. P. Finlay *v.* Cook, 54 Barb. (N. Y.) 9; see also Ladd *v.* Dubroca, 61 Ala. 28; Washburn *v.* Cutter, 17 Minn. 361.

[4] Munro *v.* Merchant, 28 N. Y. 41. So a deed of a tax collector without proof of his authority. Ladd *v.* Dubroca, 61 Ala. 25.

[5] Payne *v.* Blackshear, 52 Ga. 637.

[6] Edgerton *v.* Bird, 6 Wis. 527.

[7] Coleman *v.* Billings, 89 Ill. 190.

[8] Kruse *v.* Wilson, 79 Ill. 233.

[9] Rawson *v.* Fox, 65 Ill. 200.

[10] Hardin *v.* Crate, 60 Ill. 215.

[11] Dalton *v.* Bank of St. Louis, 54 Mo. 105.

[12] Barger *v.* Hobbs, 67 Ill. 592.

[13] Pillow *v.* Roberts, 13 How. (U. S.) 472, 477.

regularly made in a book for that purpose, of a sale of land, the sheriff being dead, have been held admissible as evidence to show color of title, in a purchaser at such a sale.[1] Though a deed void for want of a description cannot be color of title,[2] yet a tax deed which designated the proper sections, townships and ranges, but not the county or State in which the land lay, has been held good color of title;[3] so a "bond for titles" received in good faith,[4] even though the bond were forged,[5] if, at any rate, the purchase money has been paid.[6] A void patent may be used to give color of title and fix the limits of possession;[7] and a certificate of entry obtained in good faith, upon the payment of the entrance money from an officer having the right to make sales of public land,[8] though such certificate be subsequently cancelled without, however, the knowledge of the claimant. An invalid tax deed without attesting witnesses;[9] a quit-claim deed from one having no interest;[10] a deed from the husband of a life tenant after latter's death, the former being simply in possession, and without any title to the land conveyed;[11] a deed of the wife's land, made by the husband and wife, but void as to the latter through want of her private examination;[12] a deed founded upon a void or voidable decree in chancery;[13] a written agreement to divide lands owned or claimed in common, though made by the adminis-

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[1] Field *v.* Boynton, 33 Ga. 239, 242.

[2] See *supra*, § 767.

[3] Hanna *v.* Renfro, 32 Miss. 128.

[4] Garrett *v.* Adrain, 44 Ga. 274.

[5] Griffin *v.* Stamper, 17 Ga. 108.

[6] Stamper *v.* Griffin, 20 Ga. 312, 322; see also S. P. McQueen *v.* Ivey, 36 Ala. 308.

[7] Logan *v.* Jelks, 34 Ark. 547, 549.

[8] Hannibal, &c. R. R. Co. *v.* Clark, 68 Mo. 371, 377.

[9] Dillingham *v.* Brown, 38 Ala. 311.

[10] Wells *v.* Iron Company, 47 N. H. 253; S. P. Castleberry *v.* Black, 58 Ga. 386, and cases cited; see also McCamy *v.* Higdon, 50 Ga. 629; but see Brown *v.* Wells, 44 Ga. 573, where it is held that if defendant knew he was only purchasing a mere squatter's title, he stands in no better condition than the original squatter.

[11] Forest *v.* Jackson, 56 N. H. 357.

[12] Ferguson *v.* Kennedy, Peck (Tenn.), 321.

[13] Whiteside *v.* Singleton, Meigs (Tenn.), 207.

trator of one of the tenants in common, without an order from the court for the partition thereof;[1] a forged writing believed to be genuine;[2] so a deed which had been cancelled may serve as color of title.[3]

§ 781. *What held insufficient to constitute color of title.* —The following have been held insufficient to constitute color of title: A sheriff's deed void because of its execution before the expiration of the time given by law for redemption;[4] a tax deed of 100 acres of land of a survey containing 600 acres and without specifying what particular portion;[5] an unprobated will, where also there was "nothing to show that it had ever been regarded and acted on as conferring any right;"[6] a guardian's deed where the sale is not confirmed by the court as required;[7] a bond, showing upon its face that the obligor claimed no title, but admitted it to be in another.[8] It has been held in Illinois that a bond for a deed, upon condition of a compliance with its terms in future, will not constitute color of title, inasmuch as it does not on its face "in terms purport to convey the title;"[9] and, for the same reason, that a "certificate of purchase at a tax sale," and "a certificate of a land officer, showing that, at one time, a party was entitled to a pre-emption," did not constitute color of title.[10] But in Alabama, it has been held that, though a vendor's bond conditioned to make titles where

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[1] Shiels *v.* Lamar, 58 Ga. 590. [2] Stamper *v.* Griffin, 20 Ga. 312.

[3] Hughes *v.* Israel, 73 Mo. 547.

[4] Bernal *v.* Gleim, 33 Cal. 668, 676; compare Annan *v.* Baker, 49 N. H. 161; but see cases cited above, § 780; and especially Hardin *v.* Crate, 60 Ill. 215.

[5] Humphries *v.* Huffman, 33 Ohio St. 395, and cases cited; S.P. Shackleford *v.* Bailey, 35 Ill. 387. The deeds in these cases being void for uncertainty, they did not on their face "purport to convey any title to a particular tract of land." See also S. P. Fraser *v.* Hunter, 5 Cranch's C. C. 470; Wray *v.* Chicago, &c. R. R. Co. 86 Ill. 425; Shiels *v.* Lamar, 58 Ga. 590.

[6] Rothschild *v.* Hatch, 54 Miss. 554, 558; see also *supra*, McConnell *v.* McConnell, 64 N. C. 342.

[7] Rawlings *v.* Bailey, 15 Ill. 178; compare Molton *v.* Henderson, 62 Ala. 426.

[8] Simmons *v.* Lane, 25 Ga. 181.

[9] Rigor *v.* Frye, 62 Ill. 508, 509, and cases cited.

[10] Bride *v.* Watt, 23 Ill. 507; Spellman *v.* Curtenius, 12 Ill. 409.

the purchase-money is paid, cannot be color of title so long as the purchase-money remains unpaid, yet it becomes so after such payment is made.[1] The same distinction is taken in New York.[2] A record of a survey of lands has been held insufficient to constitute color of title, though it may be evidence of a claim of title and of the character of the actual possession.[3] So also, as shown above, an indefinite description in a deed renders it insufficient to perform the office of color of title.[4] In the same way the deed must cover, in its description, a tract of land of which that in actual possession is a component part.[5]

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[1] See *supra*, McQueen *v.* Ivey, 36 Ala. 308; S. P. Stamper *v.* Griffin, 20 Ga. 322; see also Bell *v.* Coats, 56 Miss. 776.

[2] Briggs *v.* Prosser, 14 Wend. (N. Y.) 227. In this case, however, the contract to convey seems to have been by parol, and the main question seems to have been, whether, though the contract price had been paid, a claimant under such an executory contract could hold possession adversely, which the court decided in the affirmative, because, as the court say, "there is nothing in the character of it (such holding) inconsistent with the idea of an adverse possession." This case, however, so far as it decides that a parol agreement to convey, where the purchase-money has been paid, can be technically color of title, seems to us misleading. Were the executory contract in writing, the consideration-money being paid, there seems to be no doubt that possession thereunder would be under color of title strictly speaking. See for example, Jackson *v.* Foster, 12 Johns. (N. Y.) 488; La Frombois *v.* Jackson, 8 Cow. (N. Y.) 589; S. P. Furlong *v.* Garrett, 44 Wis. 111.

[3] See *supra*, § 765; Atkinson *v.* Patterson, 46 Vt. 750; see also Oatman *v.* Fowler, 43 Id. 462.

[4] See *supra*, § 767; Wray *v.* Chicago, &c. R. R. Co. 86 Ill. 425; see also Henley *v.* Wilson, 81 N. C. 405.

[5] Stephenson *v.* Doe, 8 Blackf. (Ind.), 508. Hence if the part claimed, by constructive possession, be a tract distinct from the part actually occupied, the deed, though covering both tracts, cannot, for the former, perform the office of color of title; in such a case there would have to be, therefore, some additional actual possession of the former tract.

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