A TREATISE

ON THE

JURISDICTION OF COURTS.

IN TWO VOLUMES,

EACH VOLUME COMPLETE IN ITSELF.

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VOLUME I,

CONTAINING

PART I. Elementary Principles.

PART II. Specific Original Jurisdictions.

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PREFACE.

THIS work is offered to the profession under the belief that a treatise on the subject of jurisdiction has long been a *desideratum*; since, while the subject enters into everything, there is no distinct treatment of it available. Four years ago I undertook the task which is now embodied herein. What degree of merit may attach to the performance of it is not for me to say. I am strongly induced to hope that it will be found acceptable, from the very flattering reviews which my former works have called forth; and especially from the late explicit commendation of Res Adjudicata, by the Supreme Court of the United States, in an important case, wherein my remarks were cited as authority. Almost without exception the critics have treated me with very gratifying kindness and indulgence; for which I here express my heart-felt gratitude.

Owing to the length of time the manuscript was in hand after the first draft was prepared, to my desire to have the latest cases available inserted, and to the great labor which would have been involved in rewriting, there are more foot-notes contained in the work than I approve. These notes consist mainly of the late cases, which, however, are mostly confirmatory and explanatory of the doctrines stated in the text originally. Lengthened foot-notes are very undesirable in a legal text-book, I think, since they tend to divide or chop up the discussion of the topics presented. My idea is, that, as a general rule, whatever, besides the mere references, ought to be wrought into a book at all, should be given in the text.

I have not hesitated to cite the exact language of the courts whenever I thought a well-considered quotation would add to the clearness of the explanations of the subjects treated.

To avoid quotations, professedly, is, it seems to me, the very affectation of originality; besides involving a very uncomplimentary contempt for the reasoning of the courts, if not for the courts themselves. The point to be avoided is stuffing a book with *prolix* or *irrelevant* passages. The very language of the courts must, of necessity, be more satisfactory to lawyers who have not access to extensive

libraries, than the mere statement by an author of what the cases teach. And good writers—such as Story, Cooley, and others—do not hesitate to quote freely whenever it answers their purpose, whether in the text, or in notes. As I am inclined to dispense with the latter, my quotations mainly appear in the former.

I have not been anxious to cite all merely confirmatory opinions; but have followed the example set by Greenleaf on Evidence, and by other standard works, in this particular. I have endeavored, however, carefully to note all principles, exceptions, modifications, and especially all contradictions, among the authorities. It would be pedantic in the highest degree to fling down a whole page of references to establish the universally conceded principle that consent cannot confer jurisdiction as to subject-matter; and so of others.

And, as a general rule, what is termed "clustering cases around a great leading principle," may sound very learned, but it merely amounts to this—that the *individuality* of the cases is ignored. Each case is likely to have some distinctive feature, which should be indicated, although sometimes merely by a word or phrase. Where a handful of cases is thrown down together, it will generally be found the majority of them mean absolutely nothing where they stand, and do not even directly support the point at which they are aimed. A very few cases will suffice to sustain an uncontradicted point; and if there is any variance or peculiarity, this should be distinctly noted—which cannot be done under the practice of huddling cases together in large mobs collected with but a vague general purpose, and without any specific definite end.

The present volume is entirely distinct and independent from the contemplated second volume; so that attorneys who only wish one volume will not be compelled to purchase both in order to have a complete book, so far as its scope extends.

I do not know that I need say anything more here. I await the verdict.

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THE

JURISDICTION OF COURTS.

PART I.

ELEMENTARY PRINCIPLES.

CHAPTER I.

JURISDICTION DEFINED.

§ 1. Etymology of the word "Jurisdiction."
2. Limits of jurisdiction.
3. Definition by the United States supreme court.
4. Plaintiff's right confers the jurisdiction.
5. Distinction between judicial and ministerial acts.
6. Judging the constitutionality of statutes—justices of the peace, etc.

§ 1. The word jurisdiction is derived, with but a slight change of form and none of meaning, from the compound Latin word *jurisdictio*, signifying a speaking of justice or of right. It therefore consists, primarily, of judging causes according to the law, wherein rights are actually disputed; and is secondarily applied sometimes to the limits of territory within which the right to judge thus is exercised.

§ 2. Hence it is no part of the business of courts entrusted with the high prerogative of jurisdiction, that is, speaking justice, to take cognizance in any manner of mere questions

of law, wherein no rights are actually disputed, nor to extend the jurisdiction in even an actual case beyond the limits of the essential controversy concerning the rights involved. Even in the highest courts, therefore, *obiter dicta* are, of necessity, extra-jurisdictional, and hence are not to be regarded as a declaration of the law. And in order to give any court jurisdiction of the subject-matter, so as to enable it to make orders, or issue process even, a suit must be instituted therein.(*a*) Although in an actual suit the parties may agree upon the facts, and have the court declare the law arising on those facts, this agreement must be strictly confined to matters involved in the cause, and not extended to disconnected circumstances.(*b*) And it is provided, in some states, that an affidavit must be made as to the reality of the controversy involving the facts agreed upon.(*c*) And it has been held that where a cause even has the appearance of being fictitious, it will be dismissed, unless an affidavit of its reality is filed.(*d*) Nor will a court entertain a suit merely for the purpose of declaring that one who claims to have a right which may arise thereafter, has no such right.(*e*)

§ 3. And accordingly the supreme court of the United States has succinctly defined jurisdiction thus: "The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction: whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case," etc.(*f*)

§ 4. It is the character of the suit on the part of a plaintiff which gives the right of jurisdiction to a court, so far as the subject-matter is concerned; and not of the defence thereto. Where a statute grants a right, jurisdiction attaches, even if

(*a*) *Ex parte* Cohen, 6 Cal. 318.
(*b*) Blair *v.* State Bank, 8 Mo. 313.
(*c*) Sharpe *v.* Adm'r, 27 Ind. 507.
(*d*) People *ex rel.* *v.* Leland, 40 Ill. 118.
(*e*) Jackson *v.* Lumley, 21 Eng. L. & E. 13.
(*f*) U. S. *v.* Arredondo, 6 Pet. 709.

another statute may make a certain circumstance a bar to that right,(*g*) if pleaded by the defendant.

§ 5. Jurisdictional or judicial acts are to be carefully distinguished from ministerial acts, for not all acts performed by a judicial officer are therefore judicial, since such an officer may be *enjoined* by law to act ministerially also, as for example in appointing an officer; and otherwise *empowered* by law to act ministerially, as in acknowledging a deed, or solemnizing a marriage.(*h*)

And it has been even held that although a power is delgated to *courts*, it is not therefore of necessity judicial; and that a *legislature* may authorize directly in a particular case a sale of lands belonging to minors, so as to transmute real estate into personal property.(*i*) But I think the soundness of this doctrine may well be called in question, at least so far as this application of it is concerned. The North Carolina court say: "We are of opinion that a power to appoint appraisers to assess the benefits to lands affected by a canal is not *exclusively* judicial."(*j*) But I cannot understand that anything inseparable can be partly judicial and partly otherwise. If a single *act* is judicial at all, it must be *exclusively* so, I think.

§ 6. Although statute law is often itself a source of jurisdiction, and a guide and limitation thereto, yet it is manifest it may pass under the exercise of jurisdiction as well as persons, and things disputed. This is the case when the question of the constitutionality of a law arises in a suit—a question, however, which can never arise where there is no written constitution, and the legislature is omnipotent, like the English parliament. And so in a leading case, in 1803, the supreme court of the United States say: "Certainly all those who have framed written constitutions contemplate them as

(*g*) Boone *v.* Poindexter, 12 S. & M. (Miss.) 647.

Nor can a court deprive a plaintiff of his right of election between different courts in which he may bring his action, or refuse to retain jurisdiction, unless the cause is removed by the defendant in the manner prescribed by statute. Mabley *v.* Judge, 41 Mich. 37.

(*h*) People *v.* Bush, 40 Cal. 346.

(*i*) Rice *v.* Parkman, 16 Mass. 328.

(*j*) Flat Swamp, etc., Canal Co. *v.* McAlister, 74 N. C. 163.

forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the constitution is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered by this court as one of the fundamental principles of our society. If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect; or in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution. If both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes to the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the legislature should do

what is expressly forbidden, such acts, notwi hstanding the express prohibition, are in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict its powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."(*k*)

It seems to be a necessary conclusion from the foregoing remarks, the power discussed being declared to be "of the very essence of judicial duty," that all courts of a higher or lower degree must possess authority to determine the question of constitutionality. And I see no reason why even a justice of the peace may not exercise the authority as belonging to the "essence" of his "judicial duty." And yet it has been argued that "all officers of the law, whether judicial or ministerial, or inferior or superior, are bound to know whether a law exists or not. But when a law does exist, inferior courts and ministerial officers are not bound to know whether it is constitutional or not. A contrary doctrine would require the sheriff—a mere ministerial officer—to decide and pass upon the constitutionality of a law passed by the wisdom of the legislature. And yet if he is to be made liable in damages if he acts under an unconstitutional law he must necessarily have the right to pass upon its constitutionality in order to avoid damages. Even the highest tribunals of the country for a long time hesitated to decide a law unconstitutional. Different judges decided this question in different ways, the weight of authority, however, being in favor of the right of the court to pronounce a law unconstitutional, and, therefore, not binding. But no court ever supposed for a moment that a constable or sheriff or other ministerial officer possessed such right."

But is it not a manifest *non sequitur* that an inferior court can not determine this question, because ministerial officers can not?

However, the argument goes on to say: "The most difficult questions presented to our courts for determination are fre-

(*k*) Marbury *v.* Madison, 1 Cranch, 177.

quently constitutional questions, and it not unfrequently happens that the ablest judges differ in opinion: one holding that a law is, and the other, equally learned, holding that it is not, constitutional. How absurd it would be to require an inferior court, having no pretensions to equal learning, or a sheriff or constable, to pass on grave and difficult constitutional questions."(*l*) But may we not suggest that learned judges often differ as much in construing a statute merely; that it is not necessarily any more difficult to interpret a constitutional provision than a statutory enactment; that inferior courts must of necessity interpret and construe statutes, and determine their meaning, and that if they can judically determine the meaning of statutes, they may also determine the meaning of a constitutional provision, and then may compare them together, and declare their agreement or disagreement? And if this be of the very essence of judicial duty, must not inferior courts exercise the power, when necessary, in the due discharge of that judicial duty? I think so. And it is not strange that the court was not convinced by the argument, but decided that a justice of the peace has a right, when necessary to the exercise of his judicial functions, to pass upon the constitutionality of a statute involved, provided, of course, that the court of last resort has not passed thereon. In passing it may be remarked, as a matter of course, that a somewhat similar duty is sometimes imposed on courts by the necessity of deciding between two conflicting statutes, or two repugnant provisions of the same statute. The rule is, to adopt such an interpretation as to give effect to both, if this is possible. If this cannot be done, then the court is to determine the legislative will from all the circumstances of the enactments.

(*l*)Mayberry *v.* Kelley, 1 Kan. 116.

CHAPTER II.

JURISDICTIONAL DISTINCTIONS.

§ 7. Jurisdiction *in personam* and *in rem*.
8. Law and equity.
9. Civil actions and criminal, military and ecclesiastical.
10. Superior and inferior jurisdiction.
11. Concurrent and exclusive jurisdiction.
12. Original and appellate jurisdiction—direct and incidental jurisdiction.

§ 7. The leading distinction herein is that of jurisdiction *in personam* and *in rem*. Ordinarily these must concur in judicial proceedings, and the former alone is never maintainable—not even in regard to criminal actions or the writ of *habeas corpus*.* The latter may exist alone, but not so as to result in a judgment that may be the foundation of an action subsequently in another state,(*a*) or, I suppose, even in the same state. As to the general distinction, the supreme court of the United States say: "This is the line which denotes jurisdiction and its exercise: in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties, but on a proceeding to sell the real estate of an indebted intestate there are no adversary parties—the proceeding is *in rem*, the administrator represents the land; they are analogous to the proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing, the subject-matter before them, without regard to the persons who may have an interest in it—all the world are parties. In the orphans' court, and all courts which have the power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate;

*As to that species of property which follows the person, such as choses in action, jurisdiction of the person includes jurisdiction of the thing. Keyser *v.* Rice, 47 Md. 204.

(*a*) McVicker *v.* Beedy, 31 Me. 314.

a purchaser claims not their title, but one paramount; the estate passes to him by operation of law; the sale is a proceeding *in rem*, to which all claiming under the intestate are parties, which divests the title of the deceased;"(*b*) and it is thus also in non-resident attachment suits.

§ 8. Another distinction is that of legal and equitable jurisdiction—the former pertaining to rights conferred by law, unwritten or enacted; the latter to equitable rights supplementing the legal, and, in theory at least, correcting the inequalities of the latter, and supplying their deficiencies. These branches are so distinct that no subsequent action at law will lie on a decree in equity, as, for example, an action to recover money decreed to be paid.(*c*)

§ 9. A civil action is one relating to rights of person or property. This has three *antitheses*, at least in a degree, namely: (1) Criminal actions, relating to public offences; (2) military, usually relating merely to military affairs, although military courts may take cognizance of matters usually cognizable in civil courts, as where martial law is declared, and thus civil courts superseded; and (3) ecclesiastical, relating to the power and authority of ecclesiastical courts over the rights of property as to members of the churches to which those courts pertain, and the common property held by the communities thereof. All these will be distinctively treated hereafter in the present work.

§ 10. Another distinction is, superior or inferior, and general or limited jurisdiction, and the rules concerning these are not only different in degree, but essentially so, as we shall see in the course of our investigation.

§ 11. Again, we have concurrent and exclusive jurisdiction; the former existing when some other court might have entertained the cause. Sometimes this is the case with courts of law and of equity, as in the matter of fraud. And sometimes this is exercised concurrently, in order that the court of equity may assist the court of law, as in a matter of discovery, although this is rapidly becoming superseded by the statutes

(*b*)Grignon's Lessee *v.* Astor, 2 How. (U. S.) 338.

(*c*)Hugh *v.* Higgs, 8 Wheat. 697.

allowing parties to testify in courts of law. Again, there is a mixed jurisdiction—the same court having legal and equitable powers.

§ 12. Also, there are original jurisdiction and appellate jurisdiction—the latter consisting of the power to review the proceedings of courts exercising the former; and, finally, there is probate jurisdiction, relating to estates of decedents, guardianship, etc.

All these will hereafter pass under special review, and are, therefore, merely mentioned now for the sake of classification, needful to a clear and connected view of the whole subject. And we may properly add here that there is a direct jurisdiction, and, subsidiary to this, an incidental jurisdiction—the latter signifying simply that wherever a general power exists all authority requisite to the execution thereof exists also by necessary implication, as, for example, in making partition, inchoate rights may be perfected in favor of legal representatives;(*d*) or, in determining the results of an election, the court may decide all the facts necessary to a fair and legal election.(*e*)

(*d*)Jenkins *v.* Simms, 45 Md. 533.

(*e*)Worsham *v.* Richards, 46 Tex. 441.

And so a court should decline to entertain jurisdiction if it is not in a condition to do full justice; as, if its decree would leave a party still in peril of being subjected to another and perhaps adverse decree or judgment in a different jurisdiction. Harrison *v.* Pullman, 84 Ill. 21. In Louisiana it is held that if different causes of action be brought in a probate court in a single action, some of which are within its jurisdiction and others are not, the court may sever them, rejecting the outside causes, and entertaining the legitimate causes of action. Succession of Hoover *v.* York, 30 La. An. 752.

The matter of incidental jurisdiction will be particularly considered hereafter.

CHAPTER III.

LEGAL EFFECT OF ACTING WITHOUT JURISDICTION.

§ 13. No opinion to be given without jurisdiction.
14. What may be done without jurisdiction.
15. Legal effect of acting without jurisdiction explained.
16. Example.
17. Application to *habeas corpus* to courts martial and to the transcending of the limits of jurisdiction.
18. Effect of subsequent investiture of jurisdiction.
19. *Stare decisis* in regard to jurisdictional questions.
20. Foreign courts.

There are two general branches of this inquiry—the first relating to legally constituted courts, and the other to illegal tribunals. These will together occupy this and the following chapter.

§ 13. Where there is no jurisdiction, it does not belong to the proper functions of a court to give an opinion upon a matter submitted to them, for the guidance of parties or inferior tribunals, even where the parties consent to it. The whole business of a court is confined to giving decisions in cases properly before it.(*a*)

§ 14. However, although when a court has no jurisdiction it is, in general, irregular to make any order except that of dismissing the suit, the rule does not, of course, prohibit the court from setting aside orders improperly made before the want of jurisdiction was discovered, and restoring the status of affairs existent prior to the making of the improper orders.

As, for example, where, under writs of injunction and sequestration, a marshal took possession of a steamer and held it subject to the order of the court, and it afterwards appeared that the writs were wrongly issued, on which the court

(*a*) Weeden *v.* Town Council, etc., 9 R. I. 131.

set them aside, and ordered the steamer returned to the one from whose custody it was taken, the proceeding was adjudged legitimate.(*b*)

§ 15. The legal effect of acting without jurisdiction is thus succinctly stated, in a leading case, by the supreme court of the United States: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."(*c*) The principle, then, is that a judgment thus pronounced is not merely erroneous, and so good and valid until reversed, but null and void *ab initio*.(*d*) Where the want of jurisdiction relates to the subject-matter a court cannot render a legal judgment in it, even for the defendant to recover his costs, unless this be expressly authorized by statute.(*e*)

§ 16. And so it is where the jurisdiction consists of the appointment of persons to discharge certain duties. For example, a probate court cannot appoint an administrator while there is a qualified executor capable of exercising the authority entrusted to him by the testator, either with or without limitation. And if such appointment be made, the letters of administration are absolutely void, and if a judgment be rendered against such an one in the usual forms, the estate of the testator is not thereby bound in any degree.(*f*)

(*b*)Elliott *v.* Piersoll, 1 Pet. 340.
(*c*)Elliott *v.* Piersoll, 1 Pet. 340.
(*d*)Fisher *v.* Harnden, 1 Paine C. C. 58.
(*e*)Collamer *v.* Paige, 35 Vt. 387.
(*f*)Griffith *v.* Frazier, 8 Cranch, 8.

§ 17. The principle has been carried so far as to include a discharge by *habeas corpus;* as, for instance, where a prisoner was released on *habeas corpus* from the custody of the sheriff who had made the arrest, on a *ca. sa.*, by a supreme court commissioner, and the sheriff was prosecuted for an escape, and offered the discharge in evidence as a justification, the court held that the proceedings on the *habeas corpus* were *coram non judice*, and no defence to the officer, because the power to discharge under the *habeas corpus* act did not relate to a prisoner in execution by legal process.(*g*)

The principle extends, too, to courts martial.(*h*) Nor is it different in a case where the jurisdiction is merely transcended. It is as if there were no jurisdiction, as, for instance, if the jurisdiction is enforced beyond the defined territorial limit within which it is to be exercised.(*i*)

§ 18. Where suit is instituted in a court without jurisdiction, and the court is afterwards invested with jurisdiction in such cases, this subsequent investiture does not cure the prior defect, since without jurisdiction all acts are not voidable, but void absolutely.(*j*)

§ 19. Nevertheless, sometimes the doctrine of *stare decisis* may, by way of estoppel, protect acts and proceedings had without jurisdiction, as where appeal is taken from the judgment of a court, and the appellate court reverses the judgment and remands the case for trial again, and the case comes up on appeal the second time, it has been held too late to object to the want of jurisdiction in the court below.(*k*) And this goes on the principle that "a superior court cannot review or reverse its own decisions, solemnly made, unless in some regularly prescribed method for rehearing."(*l*)

The supreme court of the United States have gone so far as to hold on this point that where the merits of a case have been passed upon by the supreme court, and the cause has

(*g*) Cable v. Cooper, 15 Johns. 152.
(*h*) Barrett *v.* Crane, 16 Vt. 250.
(*i*) Kenney *v.* Greer, 13 Ill. 441.
(*j*) Mora *v.* Kuzac, 12 La. Ann. 754.
(*k*) Semple *v.* Anderson, 9 Gil. (Ill.) 653.
(*l*) Hallowbush *v.* McConnell, 12 Ill. 203.

been remanded, it is too late to raise the question of jurisdiction even in the lower court;(*m*) and the ground of this is thus stated: "Whatever was before the [supreme] court, and was disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it, for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. And on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate."(*n*)

§ 20. The courts of a foreign nation must judge of their own jurisdiction so far as this depends on municipal rules, and the courts of other countries must respect the decision; but if they exercise a jurisdiction which the sovereign could not confer according to the law of nations, their judgments are not regarded by others, however available within the dominions of the sovereign.(*o*)

(*m*)Skillem's Exec'rs *v.* May's Exec'rs, 6 Cranch. 267.

(*n*)Sibbald *v.* U. S. 12 Pet. 492.

(*o*)Rose *v.* Himely, 4 Cranch, 276.

CHAPTER IV.

ILLEGAL COURTS.*

§ 21. General rule as to unauthorized courts.
22. Confederate courts.
23. Doctrine relating thereto in Louisiana.
24. An Alabama case at length.
25. Provisional courts afterwards declared illegal—general principle as to the confederate courts.

The principles set forth in the preceding chapter, it will be remembered, relate to legal tribunals, and while they are to some extent applicable to usurping courts, yet we shall find some modification therein, as applied to the latter, not, indeed, exclusively on the distinction of *de facto* and *de jure*, but on the ground of a *quasi* subsequent ratification in consequence of the necessity arising from the state of public affairs.

§ 21. The general rule is, of course, as stated by the supreme court of the United States, that "a sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, can have no legal effect whatever."(*a*)

§ 22. In this connection, the most important points of inquiry relate to the courts of the southern confederacy. And

*See my work on "Res Adjudicata and Stare Decisis," where the view is taken that the rebel courts were, on the ordinary principles governing a state of war, and on the principle of *de facto* officers, possessed of lawful jurisdiction after the rebellion had risen to the amplitude and dignity of civil war.

(*a*) Rose *v.* Himely, 4 Cranch, 268. Hence, an incompetent court cannot establish *res adjudicata*. Scully *v.* Lowenstein, 56 Miss. 652. And if a judge refuses to grant a motion for a want of jurisdiction this refusal does not bar the entertaining of the motion by a judge who has jurisdiction. Bank *v.* Wilson, 80 N. C. 200.

I shall set out pretty fully the litigation thereon, so far as it has been developed in the United States courts and state courts.

During the war a court was established by the rebel government, and called the "District Court of the Confederate States of America for the northern district of Alabama." In this, one was tried for treason against the confederate states in aiding the United States troops, and was acquitted. Subsequently he brought suit for malicious prosecution against the judge, clerk, marshal and members of the grand jury. Being defeated, he sued out a writ of error, and brought the cause before the United States supreme court, which remarked:

"The rebellion, out of which the war grew, was without any legal sanction. In the eye of the law it had the same properties as if it had been the insurrection of a county, or smaller municipal territory, against the state to which it belonged. The proportions and duration of the struggle did not affect its character, nor was there a rebel government *de facto*, in such a sense as to give any legal efficacy to its acts. It was not recognized by the national, nor by any foreign, government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government; that government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary states. The union of the states for all the purposes of the constitution is as perfect (1869) and indissoluble as the union of the integral parts of the states themselves, and nothing but revolutionary violence can in either case destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the confederacy; the intercourse was confined to its military authorities. In no instance was the intercourse otherwise than of this character. The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its

character, in its rise, progress and downfall. The act of the confederate congress creating the tribunal in question was void; it was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction; the forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted."(*b*)

§ 23. But in Louisiana it has been held that confederate legal proceedings may be so far legalized subsequently as to confirm titles acquired thereunder. And so, where suit was brought on promissory notes, and the defence was "that the land purchased, and for which the notes were executed, was sold at a probate sale under and by virtue of orders from a pretended court, which, with all its officers, held their assumed powers from the insurgent authorities then in rebellion against the government of the United States, and that the proceedings had under the illegal authority in relation to the sale of the property, the appointment of an administrator, etc., are null and void, and that the defendants being without title are not bound for obligations having no legal effect," the court held that the proceedings had been legalized by the constitution of 1868, which provided that "all judgments and judicial sales, marriages, and executed contracts made in good faith, and in accordance with existing laws in this state, rendered, made, or entered into, between the twenty-sixth day of January, A. D. 1861, and the date when this constitution shall be adopted, are hereby declared to be valid."(*c*)

§ 24. In Alabama, a controversy arose as to confederate money as legal tender—a rather common question after the close of the war in that and other southern states. The case is a very elaborate and important one, and coming from one of the states involved in the rebellion I feel myself justified in quoting somewhat fully from it. It was a case between a ward and his guardian, acting previously under the direction of a confederate probate court. The supreme court held:

"There is but one state of Alabama known to this tribunal

(*b*)Hickman *v.* Jones, 9 Wall. 200.

(*c*)Hughes' Adm'r *v.* Stinson, 21 La. Ann. 540.

by its laws; that is the state of Alabama, a member of the Union, acting under the constitution of the United States and in conformity to its requisitions. Any other state of Alabama is an usurpation, unconstitutional, illegal and void, and the acts of its general assembly partake of its own defects. They have no legal standing in this court, unless it is shown that they have been re-enacted, or adopted by the rightful government of the state. That the rebel government was an organized political body within the limits of this state is not enough to give its enactments the force of laws. It must be a state admitted into the Union, and must derive its powers from the constitution and laws of the United States. *Scott* v. *Jones*, 5 How. 343; *Cherokee Nation* v. *Georgia*, 5. Pet. 18.

"The rightful state of Alabama—the only one known to this court as a state—has never been out of the Union, nor has it ever been destroyed, though its government has been suspended. The ordinance of secession was a nullity. It neither overthrew the state nor repealed its laws. Its effects were therefore nothing. This is expressly affirmed by the supreme court of the United States in the case of *Mauran* v. *Insurance Company*, in which, speaking of the rebelling states, that court says: 'We agree that all the proceedings of these eleven states, either severally or in conjunction, by means of which the existing governments were overthrown, and new governments erected in their stead, were wholly illegal and void, and that *they* remained after the attempted separation and change of government, in judgment of law, as completely under all their constitutional obligations as before. The constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings, but they were, in every part of them, in express disregard and violation of it. 6 Wall. 13, 14.

"Then the rebel state government of Alabama was unconstitutional and wholly void—for what is unconstitutional is illegal and void, so far as law is concerned—and inasmuch as the rightful state of Alabama was never destroyed, or out of the Union, no new state could be formed or erected within

its boundaries without the consent of congress, which was neither asked nor obtained. Const. U. S. article 4, § 3, cl. 1; Pasch. Ann. Const. 234, 235. The general assembly of this illegal government and its laws could be no better than itself. All were void, *ex nihilo nihil fit*. To give such laws any validity would be to justify, so far as such laws went, the abortive attempt to overthrow the Union itself. These rebel governments have been declared illegal, and consequently void, by all the departments of the government of the United States, which is the supreme government in this nation. The legislative, the executive, and the judicial all concur in denouncing them as illegal. Act of Congress, March 2, 1867; President Johnson's Proclamation, June 21, 1865; *Mauran* v. *Insurance Co.* 6 Wall. 1, 13, 14; *Texas* v. *White*, January term Sup. Ct. U. S. 1869.

"The law, then, which is presumed to be appealed to by the defendant is not a law of this state as at present organized, and it never was a law of the rightful state of Alabama, nor is it a law of such a character as state or national comity requires should be treated with any respect; it afforded the guardian no authority to deal with his ward's estate as he has done, because it carried with it no authority to bestow for that purpose. * * * * * To give this enactment the validity of law would be to declare that the rebel organization holding control of the state of Alabama was the legal government of the state during the whole course of the late war, and that such government, for the time being, was a government in the state of Alabama above the constitution and laws of the United States, and that its enactments were legal—that is, they clothed those who acted under them with authority as valid laws, whatever might be their character.

"There were, doubtless, many things done, and some laws passed in this state, during the rebellion, which ought to be ratified and adopted, but this enactment is not one of them. To adopt it would be to sanction the late rebellion and disregard the constitution of the United States. It is known to the court as a matter of history that 'the confederate states' and 'the said state,' mentioned in the caption of said enact-

ment, were rebel organizations at war with the United States, seeking to destroy that government; and that 'the bonds and notes of the confederate states, or the state of Alabama,' were issued by such rebel organizations in aid of such rebel war, and as such they are illegal and void: if the rebellion failed, as every patriotic citizen had good reason to believe and to desire, then they were inevitably bound to be utterly worthless. They were not such a currency as any state government, either *de facto* or *de jure*, within the limits of the Union, could make a legal tender for the payment of debts, unless, perhaps, the agreement was to pay in such currency, and even then it may be doubted whether the courts of the state, as at present organized, would enforce such contracts as being tainted with crime and in contravention of public policy. 28 Ala. R. 514.

"It seems that this might suffice to settle the merits of this case, but, as it was passed in oral argument at the bar by the eminent counsel for the appellant, and is now again urged in his brief that this case turns wholly on a single proposition, it is fit that the court should so far consider this proposition as to settle it for the future. The proposition is: 'During the war the constitution and laws of the United States were wholly suspended in Alabama, and were revived as the forces of the United States acquired the control of the territory. The constitution and laws of the United States regained their power and control as the army did—they marched *pari passu* with the army.'

"This seems to me undistinguishable from the doctrine laid down in the case of *Watson and Wife* v. *Stone*, 40 Ala. 450, which has been repudiated and overruled by this court, *Coleman* v. *Chisholm*, January T. 1869. If it does not mean this, it is not perceived what the presence of the army had to do with the matters involved in this case in any way. The defendants below do not insist that they are excused by any military order, or that the guardian was forced by the insurrectionary army to make an illegal investment of his ward's estate. Unless, then, there was a government connected with this army whose laws the army supported and gave validity by reason of its support, it does not appear to me that its

presence or absence was of any consequence in this suit. If, however, it is intended that this military occupation, which suspended the constitution and laws of the United States during its continuance, gave validity and legality, whatever government may have been connected with it, so as to give force and effect to its laws in this court, without re-enactment or adoption by the legislative department of the government as now organized, then we cannot accept the proposition as true, nor sanction the consequences attempted to be adduced from it. This court can only acknowledge such states and such governments as have been previously acknowledged by the proper political department having the power to make such acknowledgment. *Scott* v. *Jones*, 5 How. 343; *Luther* v. *Borden*, 7 How. 1. No such government has ever been acknowledged, therefore this court does not know that it ever existed as a law-making authority. If it did exist as such it was forbidden by the constitution, and was wholly illegal and void. It had no legal authority and could communicate none to its enactments. The evil tree cannot bring forth good fruit. The offspring must follow the fate of the mother."(*d*)

§ 25. In another very elaborate case, decided at the same term, it was held that the provisional court or courts under the provisional government established by the president, in Alabama, in 1865, had jurisdiction, even although congress afterwards declared the presidential act to be illegal. And Judge Saffold, in a concurring separate opinion on this matter, and as to the authority of rebel courts, thus laid down the grounds for not allowing the adjudications to be disturbed, and holding them so far valid as to be capable of being afterwards ratified or legalized. "It is insisted that the rebel courts had no jurisdiction of the causes they determined, and that it is beyond the power of state legislation to validate their judgments; that the action of a court without jurisdiction is void, and the statute alone would constitute the adjudication upon the rights of the parties. This is an objection which ought to be conclusive against such legislation, except under those extraordinary circumstances which occur but seldom in the

(*d*) Hall *v.* Hall, 43 Ala. 497.

history of a people, and which may be admitted as exceptional cases. The federal constitution does not forbid a state legislature to exercise judicial functions. The ordinances of a state convention are of as high authority as the state constitution.* During the war the courts remained as they were constituted under the legal government. Most of the judges were legally elected; the jurors were such as were qualified to serve by the valid law. The people retained their right to the administration of justice without denial or delay; they resorted to these courts for a decision of the issues between them. When the war was over, what hindered them, in their sovereign capacity, from enacting a bill of peace to quiet the litigation of years? What was more just than to stamp the adjudications of the rebel courts with the character of provisional judgments—to be annulled and a new trial granted for good cause shown? The principle of the validity of *de facto* governments is undoubtedly applicable to the provisional governments since the war, and perhaps, on all ordinary subjects, to that existing during its continuance. It depends solely on the simple and sufficient reason that, when an illegal government has existed for a considerable time, it is better to acquiesce in what has been done than to still further convulse and demoralize society by vainly seeking to run a thread of legality through the mode of its doings."(*e*)

The principle is now well settled by the United States supreme court that the judgments rendered by confederate courts during the civil war were and are valid and binding, so far as they did not tend in themselves to the subversion of the national government or the rights of citizens under it.(*f*) In Virginia the confederate government has been declared to have been *de facto*, so that contracts made under it are valid.(*g*)

But Ohio holds that their acts could not affect non-residents, citizens of loyal states.(*h*) And this would seem to be a just, if not a necessary limitation.

*That I do not understand.

(*e*)Powell *v.* Boon, 43 Ala. 487.

(*f*)Horn *v.* Lockhart, 17 Wall. 570. (Swayne, Davis, and Strong, JJ., dissenting.)

See, to the same effect, Bailey *v.* Fitzgerald, 56 Miss. 579.

(*g*)Pulaski Co. *v.* Stewart, 28 Gratt. 872.

(*h*)Penniwit *v.* Foote, 27 Ohio St. 600.

CHAPTER V.

SUPERIOR OR GENERAL AND INFERIOR OR LIMITED JURISDICTION.

§ 26. Distinction not readily defined.
27. Bouvier's definition.
28. General jurisdiction limited to particular subjects.
29. Statutory innovations.

§ 26. It is not an easy matter to give an accurate definition of this topic, since all courts are, in one way or another, restricted within definite limits as regards extent, territory, and the like; and all courts are in a sense inferior which have a court above them entitled to review their proceedings; and yet such courts are often considered as general in their jurisdiction. Bouvier, in his Institutes, (vol. 3, p. 70,) says: "All other tribunals than the supreme court are inferior courts. These courts have, in general, original jurisdiction in cases both at law and in equity. Unlike a supreme or superior court, an inferior tribunal is a court of limited jurisdiction, and it must appear upon the face of its proceedings that it has jurisdiction, or its proceedings will be void." This is directly inconsistent with what the supreme court of the United States has said on this point: "All courts from which an appeal lies are inferior courts, in relation to the appellate court, before which their judgments are carried, but they are not therefore inferior courts in the technical sense of those words; they apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown on them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are

absolute nullities, which may be totally disregarded."(*a*)* In New York the courts of common pleas have been declared courts of general jurisdiction.(*b*) And so in other states; hence the statement of Bouvier is at least unauthorized.

§ 27. However, his definition of what constitutes a superior court may be accepted, namely: such as have their jurisdiction by the common law, and by the constitution of the United States, or of the state where located. (Page 69.) And, in general, an inferior court may be said to be one proceeding, by force of particular statutes, out of the course of the common law. Or, again, courts of record may be regarded so far as of general jurisdiction, and those not of record as inferior.(*c*) In New York the definition is laid down that a court of general jurisdiction has power to hear, try and determine, according to law, all actions local to the county where it sits, and all transitory actions wherever the cause may arise.(*d*) And again, if a court has "general jurisdiction of an enumerated class of actions, without reference to the place where they arise, or the parties to them reside, or to the amount sought to be recovered, being a court of record and proceeding according to the general course of the common law, it is regarded *quoad hoc* a superior court within the meaning of the rule; while a court is one of limited jurisdiction where its jurisdiction of every action—of the action itself—is made to depend on the place where the defendants reside, or the fact that they are personally served with a summons within a designated locality smaller than a county."(*e*) Again, it is said that "courts of record which have an original, general jurisdiction over any particular subjects are not courts of special or limited jurisdiction, or inferior courts, in the technical sense of the term, because an appeal lies from their decisions."(*f*)

§ 28. It will be observed that there may be a general jurisdiction, limited to particular subjects, applying, however,

(*a*)Kempe's Lessee *v.* Kennedy, 5 Cranch, 185.

*It does appear to me that there is a striking indefiniteness and confusion in this passage.

(*b*)Foot *v.* Stevens, 17 Wend. 484.

(*c*)Beaubien *v.* Brinkerhoff, 2 Scam. 272.

(*d*)Foot *v.* Stevens, 17 Wend. 484.

(*e*)Simmons *v.* De Bare, 4 Bosw. 555.

(*f*)Devaughn *v.* Devaughn, 19 Gratt. 565.

of course to the whole class to which the particular subjects belong. And this is also recognized in a case cited above from the supreme court of the United States, in regard to a court endowed with special power to ascertain who had sided with Great Britain in the revolutionary war, under certain legislative acts of New Jersey, confiscating the property of such persons. It was contended, in an action of ejectment brought by one who had been thus divested of property, that the court having the power of such inquiry must be regarded as an inferior court of special and limited jurisdiction. The court was the county court of common pleas, but it was held that the New Jersey statutes "could not be fairly construed to convert the court of common pleas into a court of limited jurisdiction in cases of treason," because "it remains the only court capable of trying the offenses described by the laws which have been mentioned, and it has jurisdiction over all offenses committed under them. * * * * It is understood to be a court of record, possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property. In treason, its jurisdiction is over all who may commit the offense. Every case of treason which could arise under the former statutes is to be finally decided in this court. With respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused."(*g*)

§ 29. In order to be a superior court it is not needful that in all particulars a court conforms to the common law course of proceeding. It may vary in obedience to a statute, and even thus go contrariwise to the common law. On this point the supreme court of the United States remark: "The jurisdiction which is now exercised by the common law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. Many of these statutes create for the first time the rights which the court is called upon to enforce, and many of them prescribe with minuteness the mode in which these rights are to be pursued. Many of the powers thus granted to the court are not only at variance with

(*g*) Kempe's Lessee *v.* Kennedy, 5 Cranch, 185, 186.

the common law, but often in derogation of that law. In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court, and the conclusiveness of its action, will be made as in cases falling more strictly within the usual powers of the court. On the other hand, powers may be conferred on the court, and duties required of it, to be exercised in a special and often summary manner, in which the order or judgment of the court can only be supported by a record which shows that it had jurisdiction of the case. The line between these two classes of cases may not be very well defined, nor easily ascertained at all times. There is, however, one principle underlying all these various classes of cases which may be relied on to carry us through them all when we can be sure of its application. It is that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose. The only difficulty in applying the rule is to ascertain the question of jurisdiction."(*h*)

It is a legitimate conclusion, from the preceding quotation, that the same court may be one of general jurisdiction in regard to some subjects, and of special in regard to others, or superior and inferior at once, from the nature of the subjects submitted, and the mode of determining them respectively.

(*h*)Harvey *v.* Tyler, 2 Wall. 342.

CHAPTER VI.

PRESUMPTIONS.

§ 30. Presumptions as to superior courts and to inferior courts.
31. Classification.
32. What is presumed as to superior courts.
33. How jurisdiction of a superior court impeached.
34. The general rule of presumption.
35. How it is limited as to superior courts.
36. How limited in reference to the mode of procedure.
37. Particular jurisdictional facts presumed.
38. Regularity of proceedings presumed.
39. Presumptions conclusive as to discretion.
40. Presumptions adverse as to limits of jurisdiction of inferior courts.
41. Specific facts must appear.
42. Examples.
43. Powers of inferior court subject to a strict construction.
44. Justification of ministerial acts under proceedings of courts.
45. Legislature may change presumptions.
46. Presumption of regularity as to inferior courts.

§ 30. The preceding chapter has led the way to a very important principle of jurisdiction, namely, the exactly opposite points of view in which the decisions of superior and of inferior courts are regarded, which may be briefly stated thus in general terms: nothing will be presumed to be without the jurisdiction of a superior court of general jurisdiction, and nothing presumed to be within the jurisdiction of an inferior court having limited or special jurisdiction. We proceed to consider the illustrations and logical consequences of the principle thus standing upon the distinction between the two classes of tribunals.

§ 31. The presumptions, however, are also of two classes in regard to all courts: (1) those concerning the possession of jurisdiction; and (2) those concerning its proper exercise. We consider these in their order.

§ 32. In regard to superior courts, it is not only presumed

that they have jurisdiction, but also every presumption must be indulged in all things necessary to the jurisdiction of a court having exclusive jurisdiction of the subject. And in such case, the judgment is not liable to attack by other parties, and in another tribunal, for the supposed irregularity of proceedings. A domestic judgment on a subject within the jurisdiction of the court, and apparently regular on the record, is to be taken as conclusive of the regularity of proceedings by which jurisdiction was acquired over the parties, unless attacked in a direct proceeding.(*a*)

§ 33. For, in a direct proceeding, the jurisdiction of even a superior court may be assailed and disproved by parol evidence,(*b*) the rule being applied in a conclusive manner only in a collateral proceeding, as, where the record of a judgment or decree is relied on collaterally, jurisdiction must be presumed in favor of a superior court conclusively, although it be not alleged or fails to appear in the record;(*c*) but otherwise the presumption is liable to be rebutted. And also on apparent defect jurisdiction may be impeached collaterally; as, for instance, where a summons either shows a want of service or insufficient service, and the record does not show that the court found that it had jurisdiction, the presumption will be overcome, and it will be held that the court acted upon the insufficient service, since the presumption must then be that the court acted on the service appearing in the record.(*d*)

§ 34. The rule is that jurisdiction is to be presumed until the contrary is proved. And so, where one contended that entire copies of the record were annexed to his bills, but only portions were incorporated in the bills, and these portions did not show the appearance, plea, and submission to judgment; whereas the portions annexed, but not set out, did show these particulars, the court stated the rule, and then remarked: "We certainly should not hold the contrary to be

(*a*)Black *v.* Epperson, 40 Texas, 179.

(*b*)Spaulding *v.* Record, 65 Me. 220.

(*c*)Swearengen *v.* Gulick, 67 Ill. 211.

(*d*) Clark *v.* Thompson, 47 Ill. 27.

proved as long as any part of the record in which the fact of jurisdiction would be likely to be shown is withheld."(*e*)

§ 35. Furthermore, the rule of presumption as to superior courts is limited, as to persons, to those within their territorial limits—those who, therefore, can be reached by their process. And if it appears, either by the record or by extrinsic evidence, that defendants were beyond reach at the time of alleged service on them, the burden of proof as to jurisdiction is changed to the other side, and thrown upon the party invoking the benefit or protection of the judgment and decree.(*f*)

§ 36. Likewise, it is limited to proceedings in general accordance with the course of the common law. In regard to other proceedings, the rule is, that superior courts, although possessing general authority in other respects, only exercise a limited and special jurisdiction. And the rule regarding inferior courts applies *quoad hoc* herein to them.(*g*) Hence, as the jurisdiction of the United States courts is merely statutory, there is no presumption in favor thereof, but the jurisdictional facts must always appear.(*h*) The principle is, that if proceedings are not *as a whole* in accordance with the course of the common law, jurisdiction will not be presumed even as to a court of general powers.(*i*)

§ 37. Not only jurisdiction is presumed, but also the particular facts included in the jurisdiction, so that they need not be averred in a declaration, as, for instance, that the lands on which a mortgage is foreclosed lie in the county.(*j*) The Iowa supreme court say: "The court rendering the judgment was one of general jurisdiction; as such, a want of authority to act will not be presumed. Nor, to affirmatively establish its jurisdiction, is it necessary that the facts, evidence, or circumstances conferring it, should be set out in the record. And should the record disclose nothing, jurisdiction over the person, as well as the subject-matter, will always

(*e*)Slocum *v.* Steam, etc., Co. 10 R. I. 116.

(*f*)Gray *v.* Larrimore, 2 Abbott, (U. S.) 549.

(*g*)Ibid; Gray *v.* Steamboat, 6 Wis. 59.

(*h*)*Ex parte* Smith, 94 U. S. 455.

(*i*)Prentiss *v.* Parks, 65 Me. 559.

(*j*)Brownfield *v.* Weight, 9 Ind. 395; Markel *v.* Evans, 47 Ind. 329.

be presumed when the validity of the judgment is questioned collaterally. On the other hand, if it is shown by the record that the judgment was rendered when no jurisdiction was acquired over the subject-matter or the person, it is void, and will be so treated in a proceeding direct or collateral."(*k*)

§ 38. The regularity of subsequent proceedings—that is to say, the exercise of jurisdiction obtained—rests on the same principle until sucessfully impeached; as, for instance, that a cause was regularly continued till a subsequent term, and that parties were in court until the cause was finally disposed of.(*l*) And to impeach the proceedings irregularities must be affirmatively shown, as also all acts or omissions affecting the validity of the judgment.(*m*) The sufficiency of the evidence on which a judgment rests is likewise presumed.(*n*)

§ 39. Presumptions are conclusive, and not to be rebutted where a matter is confided to discretion, and no appeal is given. "It is a universal principle that where power is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer, and fraud in the party. All other questions are settled by the decision made, or the act done, by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law."(*o*)

§ 40. In regard to inferior courts the presumption is adverse, and their action must be confined strictly within the prescribed limits, and must appear so on the face of the proceedings, as also all the facts and grounds of the jurisdiction.

(*k*)Baker *v.* Chapline, 12 Ia. 204, and cases cited.

(*l*)Housh *v.* The People, 66 Ill. 181.

(*m*)People *v.* Robinson, 17 Cal. 371.

(*n*)Grignon's Lessee *v.* Astor, 2 How. (U. S.) 340.

(*o*)U. S. *v.* Arredondo, 6 Pet. 729.

The rule is still more stringent in criminal proceedings, even in a preliminary examination before a justice of the peace,(*p*) or the taking of a recognizance by a justice.(*q*)

And in a civil case the docket of the justice must show that he had jurisdiction of the plaintiff as well as defendant.(*r*)

§ 41. Hence a general averment of jurisdiction amounts to nothing; the facts upon which it depends must specifically appear.(*s*) Nor is it sufficient that jurisdiction may be inferred argumentatively from the averments, but the jurisdiction must be positively averred, and the fact on which it depends expressly set forth.(*t*) The facts to be thus set forth are defined to be all such as in the absence thereof the court cannot rightfully hear and determine any question concerning the matter in dispute:(*u*) that is to say, every fact essential to the jurisdiction(*v*) should appear in the record.

§ 42. The principle applies to the laying out of a road, so that proceedings for this purpose must show affirmatively that the road established lies within the limits of the county, or the jurisdiction cannot be sustained; nor is the objection waived by the failure of a party to appear and allege the want of jurisdiction.(*w*) It also applies to an officer imposing a military fine, as, where a warrant was issued by a captain against a private for "a fine legally imposed upon him for neglecting to perform military duty," but the warrant did not state by whom the fine was imposed, it was held that the warrant was void, and the officer was liable to trespass for arresting the private.(*x*) Moreover, it has been strangely held that it may apply even to a supreme court, as in Mississippi, formerly, where the supreme court said of itself: "By a uniform train of decisions in this tribunal, from its establishment to the present time, it has been held to be a court

(*p*)State *v.* Metzger, 26 Mo. 66.

(*q*)State *v.* Gatchenheimer, 30 Ind. 63.

(*r*)Clark *v.* Holmes, 1 Doug. (Mich.) 400.

(*s*)People *v.* Koeber, 7 Hill (N. Y.) 41.

(*t*)Browne *v.* Keene, 8 Pet. 115.

(*u*)Board of Com. *v.* Markle, 46 Ind. 111.

(*v*)State *v.* Ely, Judge, 43 Ala. 575.

(*w*)Commis. *v.* Thompson, 18 Ala. 694.

(*x*)Hall *v.* Howd, 10 Conn. 514.

of limited, and not of general, jurisdiction—a court scrupulously jealous of its own powers, and one that could exercise none except in cases where they were expressly given by law, without resorting to forced constructions, intendment, or implication. * * * This, then, is a court of limited jurisdiction, and in no case can its jurisdiction exist unless it appear."(*y*) Probably it is not so held there now.

§ 43. It results necessarily from the general principle which we are considering, that the powers of a court of inferior jurisdiction must be subject to a strict construction, so that they cannot be enlarged by implication.(*z*) But this rule, as we have already intimated, does not extend so far as to exclude all implications in regard to the proper and necessary exercise of these powers. The rule, with its limitations, has been thus stated: "The authority, however, to do certain acts, or to exert a certain degree of power, need not be given in express words, but may be fairly inferred from the general language of the statute; or if it be necessary to accomplish its objects, and to the just and useful exercise of the powers which are expressly given, it may be taken for granted."(*a*) But nothing is to be held granted by implication except what is absolutely necessary to a full exercise of expressly granted powers.(*b*)

§ 44. Where a party undertakes to justify the taking of goods under a process sued out by himself from a limited court, he must show that the court had jurisdiction of the subject-matter, and further, that by taking the legal steps it acquired jurisdiction of the defendant.(*c*) And so, if a party justifies under an officer having a limited authority, he must show that the officer had jurisdiction of the cause and the parties, and the law authorized the issuance of the order under which he acted—as, for example, in the proceedings of school officers. But there is a qualification to this, namely: where an order on its face is such as the officer may make for the guidance and control of another officer, the latter may

(*y*) Linn *v.* Kyle, Walker, 315.

(*z*) Thompson *v.* Cox, 8 Jones (N. C.) 315.

(*a*) Dubois *v.* Sands, 43 Barb. 412.

(*b*) School Insp. *v.* People *ex rel.* 20 Ill. 530.

(*c*) Ford *v.* Babcock, 1 Denio, 158.

justify under the order without showing the jurisdiction of the particular proceeding.(*d*) It is a settled principle that, where courts of a special or limited jurisdiction exceed their powers, their whole proceedings are *coram non judice*, and all concerned in such void proceedings are trespassers.(*e*)

§ 45. But it is competent to a legislature to change or qualify the principles of presumption we have been considering, at discretion, and where the observance of the general rule is dispensed with in a particular case, the law creating the exemption is alone to be regarded.(*f*)

§ 46. As to the *exercise* of jurisdiction once acquired, the presumption of regularity is the same as to both superior and inferior courts. The subsequent proceedings are presumed to be regular, unless the contrary is affirmatively shown, and this extends, too, even to justices of the peace.(*g*) So that the statement of the rule is that, "when the jurisdiction of even a limited court is once established, it is entitled to the same presumption in favor of its acts with a superior one, and subsequent irregularities will not render its proceedings void." In the above statements the authorities are in accord, so far as subject-matter of jurisdiction goes. We shall speak of statutory jurisdiction hereafter.

(*d*) Bennett *v.* Burch, 1 Denio, 145.

(*e*) Walbridge *v.* Hall, 3 Vt. 114; Lange *v.* Benedict, 48 How. Pr. 465; Kemp *v.* Kennedy, 1 Pet. (C. C.) 36.

(*f*) Wight *v.* Warner, Doug. (Mich.) 384.

(*g*) Little *v.* Sinnett, 7 Clarke (Ia.) 334; Smith *v.* Engle, 44 Ia. 265.

Excepting, of course, proceedings which are required to be entered of record, (Church *v.* Crossman, 49 Ia. 444;) as, for example, when the jurisdiction of a United States court depends upon the citizenship of the parties, such citizenship must be explicitly shown by the record, and not merely the fact of residence—this being fundamental. Robertson *v.* Clark, 97 U. S. 646. Indeed, whenever an authority to proceed is conferred by statute, and the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must appear to be strictly complied with. Beisch *v.* Coxe, 81 Pa. St. 349. But, as to *general jurisdiction*, even due notice will be presumed in support of a judgment, (Guilford *v.* Love, 49 Tex. 716;) and so in regard to the regularity of a grant of a new trial. Shrewsbury *v.* Miller *et al.*, 10 W. Va. 116. Jurisdiction having been acquired, the proceedings are not to be subject to collateral attack; and so a notice of confirmation in proceedings for condemnation of lands for railroad purposes will be conclusively presumed. Allen *v.* R. R., 15 Hun. 81.

CHAPTER VII.

CONSTITUTIONAL LIMITATIONS.

§ 47. Different departments of government.
48. Discretionary acts not controllable.
49. Example in Missouri.
50. No waiver allowed by executive officer, etc.
51. Presumption as to executive action.
52. Courts will interfere in personal contests for a state office.
53. Courts cannot compel collection of public revenue by the executive department.
54. National boundaries.
55. Unconstitutional laws.

§ 47. It is a fundamental principle that the three departments of our national and state governments—the judicial, legislative and executive—are co-ordinate in their spheres of action. No one being subordinate, except in a quite limited sense, the control of each over the other extends no further than a mere check or balance requires, taken in a general sense. And so, where a member of the house of representatives applied for a *mandamus* to compel the speaker to send a bill which had passed the house to the senate for its action thereon, the application was refused, and the supreme court, to which the application was made, remarked: "This court will not interfere with either of the other co-ordinate departments of the government in the legitimate exercise of their jurisdiction and powers, except to enforce mere ministerial acts required by law to be performed by some officer thereof, and not then, if the law leaves it discretionary with the officer or department. To this extent, and no further, do the decisions of this court go upon this branch of the subject. * * * Among all the cases and text-books, none goes to the length of laying down the doctrine that the speaker of the house of representatives, or of a legislative body, in a

matter arising in the regular course of legislation upon which he is called to decide, can be controlled by this or any other tribunal, except by the one over which he presides."(*a*)*

The language of the supreme court of the United States is still stronger, namely: "The power of the courts of the United States to command the performance of any duty, by either of the principal executive departments, or such as is incumbent upon any executive officer of the government, has been strongly contested in this court; and in so far as that power may be supposed to have been conceded, the concession has been restricted by qualifications which would seem to limit it to acts or proceedings by the officer not implied in the several and inherent functions or duties incident to his office—acts of a character rather extraneous, and required of the individual rather than of the functionary. Thus it has been ruled that the only acts to which the power of the courts by *mandamus* extends are such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of his duties is left to the officer, but that wherever the right of judgment or decision exists in him, it is he and not the courts who can regulate its exercise."(*b*) Justice McLean dissented in the case, but not from the doctrine in the above quotation.†

§ 48. I do not think, indeed, that there is any variance of opinion as to the principle that discretionary acts are not controllable by the courts as to the other departments of the government, and that the performance of a ministerial duty

(*a*) *Ex parte* Echols, 39 Ala. 700.

*In some states the constitution gives the legislature the right to call for the opinion of the justices of the supreme court on important questions of law, etc. And it has been held that this power only extends to important questions of law arising in the direct business of legislation, and not to a question arising merely in the course of judicial administration, and which cannot be affected by legislative action—such as a disqualification of one of the members. Answer of the Justices, 122 Mass. 600.

(*b*) U. S. *v.* Guthrie, 17 How. 304.

† In Wisconsin it is held that a secretary of state may be compelled to cancel the license of a foreign insurance company. State *ex rel.* *v.* Doyle, 40 Wis. 176, 220.

may be enforced.* But the difficulty is to distinguish between an act performed in the ordinary discharge of official duties and a ministerial act. An elaborate case arose involving this question, thus: Under a general law of July, 1832, the secretary of the navy was made trustee of the navy pension fund, with the duty charged of granting and paying pensions out of it. In 1837, a resolution of congress specially provided for a pension and half-pay arrearages to the widow of Commodore Decatur. The secretary, on her application for pay both under the general law and the resolution, decided, with the advice of the attorney general, that she was not entitled to both, but gave her the election. She elected to receive under the law, but without waiving her claim under the resolution, and petitioned for a *mandamus* to compel the secretary to pay the other also. The circuit court for the District of Columbia refused the writ, and on appeal the refusal was sustained by the supreme court, which said: "In the case of *Kendall* v. *The United States*, 12 Peters, 524, it was decided in this court that the circuit court for Washington county, in the District of Columbia, has the power to issue a *mandamus* to an officer of the federal government commanding him to do a ministerial act. The first question, therefore, to be considered in this case is whether the duty imposed upon the secretary of the navy, by the resolution, in favor of Mrs. Decatur, was a mere ministerial act.

"The duty required by the resolution was to be performed by him as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration

*When a discretion is given to any branch of the government, no other branch is authorized to interfere with it. March *v.* State, 44 Tex. 64. Thus, where a governor has power to remove an officer for cause, the exercise of that power cannot be inquired of by the courts. State *ex rel.* Cohen, 28 La. An. 645. And so a court cannot take upon itself the prerogative of compelling the *promulgation* of a law where this is neglected by the legislative or executive department. State *v.* Des Londe, 27 La. An. 71.

of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress, under which he is from time to time required to act. If he doubts, he has a right to call on the attorney general to assist him with his counsel, and it would be difficult to imagine why a legal adviser was provided by law for the heads of departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion were to be exercised. If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by *mandamus*, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties."(*c*)

§ 49. In Missouri, it has even been held that where state bonds are payable on their face in gold and silver, but the legislature directs the fund commissioners to pay them in legal-tender currency, the courts will not entertain a petition to compel the fund commissioners to pay them in gold and silver—although holding such payment to be the duty of the commissioners—since this is a matter of public faith only, subject exclusively to the legislative control. And, although the change may be in violation of good faith in the payment, the courts cannot interfere.(*d*) And so it has been held that, as the administration of the funds of a public treasury belongs

(*c*)Decatur *v.* Paulding, 14 Pet. 514.

(*d*)State *ex rel. v.* Hays *et al.*, Com'rs, 50 Mo. 36.

alone to the executive department, the courts will not entertain an action by county and school commissioners against one holding, as bailee, moneys belonging to the different departments of the government, as if those moneys were assets subject to the control of a court of equity.(*e*) And in Texas, where a petition was brought to compel, by *mandamus*, the state comptroller to countersign and register railroad bonds, under "An act to incorporate the International Railroad Company, and to provide for the aid of the state of Texas in constructing the same," it was held, by a divided court, that the duty was not of a ministerial nature, compellable by *mandamus*.(*f*)

§ 50. Nor will a court take jurisdiction in order to declare the law or construe it, even where the officer waives his constitutional exemption, and joins with the relator in asking the exercise of this jurisdiction. In a case of this kind the court held that "the exemption from coercion by the courts is not a personal privilege of the incumbent of the office, created for his benefit, and to be asserted or waived at his pleasure. An executive officer cannot surrender the defences which, not for his but for the public good, the constitution has placed around his office. Still less can his consent authorize this court to transgress the constitutional limitation of its powers and assume a jurisdiction which by the fundamental law it is expressly forbidden to exercise."(*g*) And so a governor cannot submit to the courts in this way any more than a subordinate officer.(*h*) But there is not a universal acquiescence herein. The supreme court of Illinois, in 1872, accepted a voluntary submission of Governor Palmer, and thereon determined the effect of the constitution of 1870 on the office of police magistrate in the city of Chicago, and remarked: "This voluntary submission by the executive of the matter involved, to the adjudication of this court, relieves the court of all consid-

(*e*)Commissioners *v.* Bank, 7 S. C. 78.

(*f*) Bledsoe *v.* R. R., 40 Tex. 559.

(*g*)County Treasurer *v.* Dike, 20 Minn. 366.

(*h*)People *v.* Governor, 29 Mich. 329.

eration of the question as to the authority of the court to coerce the performance of a public duty by the executive of the state, and we may proceed to determine the question as if it were a controversy between private individuals."(*i*) It seems to me, however, that the doctrine that "consent cannot confer jurisdiction" applies here, in the absence of an express constitutional warrant. But I suppose there is no barrier to having official bonds run to "The Governor," and then suit may be brought for breach in the name of the governor for the use of the injured party.(*j*)

§ 51. It is held that the presumption is well nigh conclusive that any duty whatever entrusted to the head of the government—as the president of the United States, or the governor of a state—is executive, and not ministerial; so that any special act entrusted to him is to be regarded as confided thus because his superior judgment, discretion, and sense of responsibility would be likely to insure a more accurate, faithful, and discreet performance than could be expected ordinarily from an inferior officer.(*k*) And so it has been held the courts have no power to compel a secretary of state to promulgate laws enacted by the legislature.(*l*)

§ 52. But a court will interfere in a case of contest as to the personal right to a state office, and, where there is a hindrance thrown in the way of him who is determined to be the lawful incumbent, will aid him in assuming the duties of the office. But in such a case in Texas, where an order was given, it does not seem to have been peremptory so as to authorize a subsequent proceeding for contempt on disobedience, but was in this form: "The relief now invoked we believe to be within our jurisdiction, and in the solemn discharge of our official duties we do order, adjudge, and decree that A. B. do, by the hour of 5 P. M. this day, deliver to C. D., treasurer *pro tem*

(*i*) People *v.* Palmer, Governor, 64 Ill. 42.

(*j*) See The Governor, for use, etc., *v.* Woodworth, 63 Ill. 254, and The Governor, for use, etc., *v.* Dodd, 81 Ill. 162.

(*k*) People *v.* Governor, 29 Mich. 329.

(*l*) Honey *v.* Davis, 38 Tex. 71; (see page 35, *supra*, note, of this work.)

of the State of Texas, all the keys and secrets of the combinations of the locks of the safes and vaults of the treasury, and that he no longer hinder or delay the said C. D. from the due execution of the office of treasurer of the state of Texas, and that, in default of due compliance with this order, the said C. D. do proceed to open the vaults and safes of the office of the state treasury by any available means within his power, having due regard to the preservation of public property."(*m*) But certainly the order could be enforced by proceedings in contempt for disobedience, if the order itself was proper.

§ 53. Courts have no power to compel the executive department to levy on property to collect the public revenue, nor to restrain it from doing so, nor dictate as to the kind or sufficiency of evidence under an enabling statute which shall be necessary to authorize such levy.

§ 54. The settlement of the national boundaries is a political question, and therefore not within the province of the courts; and even when individual rights depend on such boundaries, the duty of the courts is simply to determine those rights according to the principles laid down by the political department of the nation.(*n*)

§ 55. The courts are not in any instance at liberty to decide a cause in a manner contrary to the provisions of the constitution; and, therefore, it may become a duty to refuse to enforce an unconstitutional law. Yet extreme caution is requisite in coming to a conclusion that a law is unconstitutional. It is not enough that a law is unjust and subversive of rights, or is contrary to the fundamental principles of our government, or is at war with the spirit of the constitution. It must be expressly forbidden, either by positive terms, or by fair implication from the terms of the constitution.(*o*)

Nor is it the business of the court to inquire into the regularity of the adoption of a constitution itself after it has been

(*m*)Scofield *v.* Perkerson, 46 Ga. 359.

(*n*)U. S. *v.* Arredondo, 6 Pet. 710.

(*o*)See Cooley's Const. Lim. and cases cited (p. 159, *et seq.*;) also see § 6, *supra*, of this work.

acted upon, and the state government is actually in operation under it, it being remarked by a court hereon that such an attempt is not only treating political questions as judicial, and is liable to destroy the state government, but at the same time presents the singular spectacle of a court sitting as a court to declare that it is not a court.(*p*)

A part of a statute, however, may be decided unconstitutional, and the remainder sustained,(*q*) provided it is thus separable.

(*p*)Brittle *v.* The People, 2 Neb. 214.

(*q*)Myers *v.* People, 67 Ill. 503.

CHAPTER VIII.

HOW JURISDICTION IS INQUIRED OF.*

§ 56. Axioms.
57. Collateral inquiries as to jurisdiction.
58. The United States supreme court on reviewing foreign decisions.
59. Courts in sister states.
60. Jurisdiction as to a pending case in another court.
61. Judgment of inferior courts on jurisdictional facts.
62. Courts bound to inquire as to jurisdictional facts.
63. Time of objecting.
64. How a want of jurisdiction may be taken advantage of.
65. General observation as to tests of jurisdiction.

§ 56. It has been declared by the highest tribunal in the land that these are judicial axioms: (1) That in every state the court of dernier resort decides upon its own jurisdiction; and (2) that it decides also upon the jurisdiction of all the inferior courts to which its appellate power extends.(*a*) Nevertheless, it has been held in New York that, where the higher court has not decided upon its own jurisdiction, a lower court may inquire into it on a reversal or affirmance.(*b*)

Prima facie, every court has the power of judging concerning its own jurisdiction in cases where the want of jurisdiction is not apparent on the face of the proceedings. But in some states, at least in South Carolina, it has been held that a party is not compelled to submit the question of jurisdiction to the decision of the inferior court, but may remove it at once to the superior court by applying for a prohibition.(*c*)

§ 57. As to collateral inquiries, the principle is, "that the jurisdiction of any court exercising authority over a subject

*For full explanation of the topic of this chapter, I refer to my recent work on "Res Adjudicata."

(*a*) Davis *v.* Packard, 8 Pet. 323.
(*b*) People *v.* Clark, 1 Parker C. R. 361.
(*c*) State *v.* Scott, 1 Bailey, 296.

may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."(*d*) And the inquiry may relate to jurisdiction of either subject-matter or parties, and the only difference herein as to courts of superior and of inferior jurisdiction is as to the presumptions of which we have treated in a previous chapter.(*e*) And where proceedings are found to have been without jurisdiction it is unimportant how technically correct and precise the record may appear, the judgment is void to every intent, and must be so declared by every court in which it is presented, although on the other hand no judgment is to be impeached collaterally, even for the grossest irregularities or errors, where the jurisdiction was complete.(*f*)†

§ 58. In an early case the question arose in the supreme court of the United States whether the decisions of foreign courts were reviewable in American courts. It was said thereon: "The court pronouncing the sentence of necessity decided in favor of its own jurisdiction, and if the decision was erroneous, that error, it is claimed, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted in its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court, then, is of necessity examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes jurisdiction of causes must

(*d*)Lessee of Hickey *v.* Stewart, 3 How. 762.

(*e*)Gray *v.* Larrimore, 2 Abbott, (U. S.) 548.

(*f*) Sheldon *v.* Newton, 3 Ohio St. 498; Rose *v.* R. R., 47 Ia. 422.

†But recitals of records are often conclusive as to parties and jurisdictional facts. See "Res Adjudicata."

be inspected in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example: in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn as prize of war a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that to a certain extent the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

"Passing from principle to authority, we find that in the courts of England, whose decisions are particularly mentioned because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter."(*g*)

§ 59. On much the same principle the matter of the juris-

(*g*) Rose *v.* Himely, 4 Cranch, 268.

diction of courts in another state will be inquired into by inspection, or on a plea.(*h*)*

§ 60. In no case, however, will a court inquire into the question of jurisdiction as to a case pending and undetermined in a court of general jurisdiction legally competent to determine its own jurisdiction, and having acquired a prior *de facto* jurisdiction—a rule founded on comity, and necessary to prevent injurious collisions.(*i*)

§ 61. Where the jurisdiction of even an inferior court is dependent on a fact which that court is required to ascertain and settle by its decision, such decision is held conclusive; and, furthermore, it has been claimed that this principle is not confined to determinations of a judicial character.(*j*)

§ 62. Not only may courts look into the matter of jurisdiction, but in every case they are bound to inquire whether facts, as presented to them, give them jurisdiction.(*k*)

§ 63. It is a settled rule that an objection to the jurisdiction as to the subject-matter may be taken at any time.(*l*) And even for the first time in the appellate court, because the objection lies at the foundation of the whole case.(*m*) Yet the question of jurisdiction cannot properly be made to depend upon a subsequent fact disclosed by the evidence.(*n*) But as to divorce cases the reverse has been held in Illinois,(*o*) and rightly, I judge, although it be an exception.

§ 64. There are three methods by which the want of jurisdiction may be taken advantage of: (1) by motion to dismiss; (2) by demurrer; (3) by plea. And, where the former is employed, it is no valid objection to the motion that it was made

(*h*)Kelly *v.* Hooper's Ex'rs, 3 Yerg. (Tenn.) 396.

*See also my work on "Res Adjudicata."

But where a judgment or decree of a court of general civil jurisdiction is offered as evidence collaterally, its validity cannot be questioned for errors which do not affect the jurisdiction. Hall *v.* Hall, 12 W. Va. 1.

(*i*)*Ex parte* Bushnell, 8 Ohio, 601.

(*j*)R. R. *v.* City of Evansville, 15 Ind. 421, 423.

(*k*)Stamps *v.* Newton, 3 How. (Miss.) 34.

(*l*)Stearly's Appeal, 3 Grant, 270.

(*m*)Coleman's Appeal, 75 Pa. St. 460.

(*n*)Sheldon *v.* Newton, 3 Ohio St. 499.

(*o*)Way *v.* Way, 64 Ill. 410.

by the party who brought the cause to the court.(*p*) And such a motion is never out of time where the want of jurisdiction pertains to the subject-matter.(*q*) The motion also may be made for the absence of an allegation in the declaration which may be amendable in the discretion of the court.(*r*) In such case, of course, granting leave to amend is equivalent to overruling the motion to dismiss.(*s*) It is manifest that such a motion usually relates to a want of jurisdiction of the subject-matter,(*t*) unless, indeed, on a defective allegation as above noted.

Where a defect of jurisdiction is manifest from the pleadings, a demurrer is the proper course.(*u*)

Where the want is not apparent, it may be set up by plea.(*v*) But in regard to the person, it must of course be put in as a plea of abatement, and it is too late to object after pleading in bar to the merits.(*w*) And, like other pleas in abatement, it must give a better writ, and therefore give jurisdiction to some other court of the state, although where it appears that neither the party nor his property is within the jurisdiction of the state, the court will stay all further proceedings at any stage.(*x*) And, if no court of the nation has jurisdiction, the defendant may avail himself of the defence under a plea to the merits of the action or a plea in bar,(*y*) a distinct plea to the jurisdiction being only proper when some court in the nation has jurisdiction of the cause, but not the court wherein the suit is brought. And it has been held in Pennsylvania that state courts having no jurisdiction of a consul, they will stop the proceedings at any stage, even after the general issue is pleaded, if it appears that the defendant is a consul.(*z*)

But where the want of jurisdiction arises from the fact that

(*p*) Wildman *v.* Rider, 23 Vt. 176; *In re* College Street, 11 R. I. 472; Graham *v.* Ringo, 67 Mo. 324.

(*q*) Stoughton *v.* Mott, 13 Vt. 181.

(*r*) Wakefield *v.* Gandy, 3 Scam. 134.

(*s*) Shepard *v.* Ogden, 2 Scam. 257.

(*t*) Mastin *v.* Marlow, 65 N. C. 701.

(*u*) Grant *v.* Lavis, 7 Monr. 222.

(*v*) Keiser *v.* Yandes, 45 Ind. 174.

(*w*) Smith *v.* Elder, 3 Johns. 113.

(*x*) Daniel *v.* Smith, 5 Mass. 362; Jones *v.* Winchester, 6 N. H. 491.

(*y*) Rea *v.* Hayden, 3 Mass. 26.

(*z*) Manhardt *v.* Soderstrom, 1 Binn. 142.

the defendants do not reside in the county, the only mode of taking advantage of it is by plea; since proceeding in the cause waives the objection,(*a*) except as above stated, where it is required to allege the residence in the declaration, in which case the want of the averment is demurrable.

§ 65. It is held in Wisconsin that a common law *certiorari* in causes before justices of the peace reaches questions of jurisdiction only, and not matters of error.(*b*) Also, that on appeal from a justice of the peace the appellate court acquires no jurisdiction if the justice had none.(*c*) But informalities in making up a docket-entry do not deprive the justice of jurisdiction,(*d*) although he may lose jurisdiction by not proceeding in a reasonable time to tax the costs and perfect the judgment.(*e*)

A voluntary appearance in a cause may confer jurisdiction, although that appearance may be avowably for only a special purpose, in Iowa,(*f*) and probably other states, by statute. As to subject-matter, however, a justice of the peace and all inferior courts can only exercise such jurisdiction as is expressly conferred by statute.(*g*)

It has been held in Illinois that where a justice of the peace exceeds his jurisdiction, and an appeal is taken from his decision to the circuit court, advantage may be taken of the want of jurisdiction, even after trial in the appellate court, and on motion for a new trial, since the objection cannot be waived by not urging it sooner.(*h*)*

(*a*) Hughes *v.* Martin, 1 Ark. 463.
(*b*) Vanell *v.* Church, 36 Wis. 320; Barnes *v.* Schmitz, (1878.)
(*c*) Coohan *v.* Bryant, 36 Wis. 612.
(*d*) Coffee *v.* City, 36 Id. 126.
(*e*) Kleinstuber *v.* Schumaker, 35 Id. 612.
(*f*) Rapud *v.* Green, 37 Ia. 630.
(*g*) Dillard *v.* R. R., 58 Mo. 74.
(*h*) Taylor *v.* Smith, 64 Ill. 446.

*In collateral proceedings specific recitals are usually held conclusive unless the record furnishes its own refutation—an officer's return being held to be a part of the record for this purpose. Andrews *v.* Bernhardi, 87 Ill. 365; Barnett *v.* Wolf, 70 Ill. 76; Searle *v.* Galbraith, 73 Ill. 269; Harris *v.* Lester, 80 Ill. 308; Woodbury *v.* Maguire, 42 Ia. 339. See "Res Adjudicata."

CHAPTER IX.

SOURCES OF JURISDICTION AS TO SUBJECTS.

§ 66. Consent cannot confer jurisdiction of subject-matter.
67. Sources: (1) Common law, (2) Constitutions, (3) Statutes.
68. Organization of courts and granting jurisdiction.
69. Repealing statutes.
70. Statutory authority to be strictly pursued.
71. Probate powers of common law courts statutory.
72. Remarks on strict construction.

§ 66. In considering the question whence jurisdiction is derived as to the subjects offered for judicial decision, we may first begin negatively and consider the principle, running through all the authorities, that the consent of parties cannot confer on the courts power to investigate. We had occasion, in the chapter on Constitutional Limitations, to consider the doctrine as to a submission of executive officers to the courts by waiving their constitutional exemptions. But we are now to explain it in relation to ordinary judical proceedings between private parties.

Thus, consent cannot give jurisdiction in a criminal case, where the indictment is for a subject-matter out of the jurisdiction, (*a*) not even if the prisoner enter of record a waiver of "all objections to any irregularity in finding of indictment, and to jurisdiction;"(*b*) or in civil causes in courts of limited jurisdiction, where there is no authority given by the constitution or some law pursuant thereto;(*c*) or where the action is not transitory in its character, but strictly local, and beyond the territorial jurisdiction of the court,(*d*) as, for instance, an action of trespass *quare clausum fregit;*(*e*) or

(*a*)Foley *v.* People, Breese, 58.
(*b*)State *v.* Bonney, 34 Me. 225.
(*c*)Hurd *v.* Tombes, 7 How. (Miss.) 231.
(*d*)McHenry *v.* Wallen, 2 Yerg. (Tenn.) 444.
(*e*)Chapman *v.* Morgan, 2 Greene, (Ia.) 375.

where the jurisdiction is only appellate, and an attempt is made to give original jurisdiction,(*f*)—although, where the appellate court has also original jurisdiction of the subject-matter, consent may waive irregularities of the appeal, or even defects in the jurisdiction below, the trial being *de novo*;(*g*) and, indeed, although no appeal would lie, as, for example, directly from the verdict of a jury, whereon no judgment had been entered;(*h*)—or where jurisdiction over the person is positively localized by statute;(*i*) or where the law imperatively requires twelve jurors, and by consent the case is tried by six only;(*j*) or where suit is brought for an amount beyond jurisdiction by an administrator before a justice of the peace;(*k*) or where suit is brought against sureties on an administrator's bond in the wrong court;(*l*) or where suit is brought against school commissioners for moneys in their hands in a court not invested with jurisdiction;(*m*) or on a motion by a sheriff against his deputies;(*n*) or an appellate jurisdiction not possessed.(*o*)

Nor is express consent any more effectual than an implied consent or implied waiver.(*p*) Neither is the principle different as to an agreed case in which, usually, to guard against imposition, an affidavit is required that the controversy is real, and the proceedings in good faith, to determine the legal rights of the parties.(*q*)*

(*f*)Ginn *v.* Rogers, 4 Gil. (Ill.) 134; Ames *v.* Bowland, 1 Minn. 368; Dicks *v.* Hatch, 10 Ia. 384.

(*g*)Randolph County *v.* Ralls, 18 Ill. 30.

(*h*)Danforth *v.* Thompson, 34 Ia. 243.

(*i*)Bank *v.* Gibson, 11 Ga. 455.

(*j*)Falkenburgh *v.* Cramer, Coxe (N. J.) 31.

(*k*)Leigh *v.* Mason, 1 Scam. (Ill.) 249.

(*l*)Dodson *v.* Scroggs, 47 Mo. 286.

(*m*)Jeffries *v.* Hardin, 20 Ala. 387.

(*n*)Lindsey *v.* McClelland, 1 Bibb, (Ky.) 262.

(*o*)Winn *v.* Freele, 19 Ala. 172.

(*p*)Wyatt *v.* Judge, 7 Port. (Ala.) 40.

(*q*)Jones *v.* Hoffman, 18 B. Mon. 656.

*And the court is to keep in view *sua sponte* the boundary of its jurisdiction. Phillips *v.* Welsh, 11 Nev. 188. A consenting corporation stands as an individual powerless to confer unauthorized jurisdiction. Callahan *v.* New York, 66 N. Y. 656. The principle applies to amount as well as to the nature of the controversy. Tippack *v.* Briant, 63 Mo. 580. The law must determine what subjects a court may act

The principle, however, that consent cannot give jurisdiction does not prevent parties, where the court has jurisdiction of the subject-matter, from admitting, by consent, irregular proof of such facts as show that the particular case is properly before it;(*r*) that is to say, irregularities may be waived. But even this is subject to some restrictions, as where a process is imperatively enjoined by a statute. Concerning this, the supreme court of the state of New York have said: "A number of cases have been cited to show that where an informal process is issued, a defendant waives the informality by appearing and pleading over. In those cases the practice of the court or statute prescribed certain forms, but did not declare that the omission of them should prevent the court from having jurisdiction. In such case the court might well hold that the objection to the want of form in process was waived by a plea which admitted that the party was properly in court. But here the statute is imperative. It expressly declares that 'if the defendant be proceeded against otherwise the justice shall have *no jurisdiction* of the cause.' It does not make any exception to this—as that the justice shall have no jurisdiction unless the defendant plead over or waive the objection—but it positively precludes the justice from acquiring jurisdiction if the defendant be proceeded against otherwise than as the law prescribes. The legislature no doubt had a motive in this. They meant to protect the non-resident defendant from being sued out of his own county, except in the prescribed manner. They may have apprehended that, if they only forbade it, plaintiffs and inferior courts would disregard the law, trusting that the defendant, by his ignorance of his rights, might so act as to waive them. And to prevent any chance of this the law may have been made as it is expressly that the justice shall not have jurisdiction of the cause if the defendant be not proceeded against as the

upon. Brown *v.* Woody, 64 Mo. 550. And pleading to the merits does not waive a question of jurisdiction as to the subject-matter, (Nazro *v.* Cragin, 3 Dillon, 474,) nor a failure to object at the time, (Mathie *v.* McIntosh, 40 Wis. 120.)

(*r*)Hills *v.* Mills, 13 Wis. 628.

law prescribes, thus stripping the justice of all official authority, and giving him no more power to accept a waiver and acquire jurisdiction than a private individual would have. As Chief Justice Oakley says, in an analogous case, (*Cornell* v. *Smith*, 2 Sand. 291,) 'the imperative direction to dismiss the suit precludes any waiver from being inferred by pleading over to the action and going to trial.' This statute is stronger than a direction to a justice in certain events to dismiss a suit, as that would almost imply that he once had control over it. But here the beginning of jurisdiction is prevented by the words of the act. The court below say that the defendant, by pleading over, must have agreed to enter an action in the court without process. This would be to infer an agreement contrary to all the facts of the case brought home to the knowledge of the court by the record. The return shows that the defendant was brought before the court by this illegal process, and that it was under that process that he asked for an adjournment, and obtained it, and asked that he might send for counsel, and got ten minutes to do it in, and under the force of that process he pleaded; and by virtue of that process, and not of any agreement to enter the action without process, the plaintiff took judgment against the defendant, after waiting more than an hour for his return. The process is returned as the foundation of the action, and no agreement to enter the action without process is pretended in the return. To infer such an agreement, under these circumstances, is to do violence to one's common sense. The suit being commenced by process, an agreement to enter the action without process could hardly be established without an express abandonment of the process, or an express agreement to enter or commence the action anew without process."(*s*)

I doubt whether this decision can ever be drawn into precedent, or the construction of the prohibitory clause of the statute referred to therein would be assented to generally. It would, I think, be held not imperative, but directory merely, although, indeed, strongly so. It was meant, as the court

(*s*)Robinson *v.* West, 11 Barb. 310.

say, as a protection of the defendant. It is, therefore, a privilege, and any private privilege may be waived, and any mere personal protection may be renounced. Besides, the court seem to hold that the defendant might be "proceeded against otherwise," namely, by an express agreement to commence the action without process. I judge that always, where process may be dispensed with altogther, any irregularity therein may be waived. If one may go to trial without process, he may surely go to trial with a defective process. It is different where, as a matter of public policy, parties are prohibited from waiving any right, as we have seen in the chapter on Constitutional Limitations a public officer holding a public trust is. Thus, also, in Louisiana, a defendant is expressly prohibited by statute from electing any other than his own domicile or residence as the venue of a suit at law.(*t*) Anything short of this, I apprehend, is to be construed as directory, and as conferring an inviolable privilege on a party, which, being a privilege, may be waived, as we shall see in a subsequent chapter.

Where a court has once had jurisdiction, although the authority has been executed so that without consent the court could not open or change the former judgment or decree, the jurisdiction may be restored by consent; the maxim "consent takes away error" herein applying.(*u*).

And parties may consent to submit matters in dispute, of whatever nature, to arbitrators chosen by themselves. In a certain case it was claimed that the "parties, by an agreement of their own, created a tribunal to try their cause which the law does not recognize, and whose proceedings cannot lay the foundation of any judgment of the court." But the appellate court replied that "the principle supposed to be involved in this objection is undoubtedly correct, and in its general application of unquestionable importance; for no one pretends that parties of themselves can create courts of justice, or judges, or other tribunals, or clothe them with legislative authority; these can be created only by the legislature. Arbi-

(*t*)State *v.* Fosdick, 21 La. An. 258.

(*u*)Brown *v.* Heirs, Hardin, (Ky.) 449.

trators may be chosen by the parties, and be clothed with such power and authority as they agree to, and their doings will, in that case, be as final and conclusive as the judgment of a court would be; not, however, as the doings of a court constituting an integral part of the judiciary of the state, but the court of the parties."(*v*) However, arbitration may become statutory, and courts may be authorized to refer causes to it by consent, and register the award as a judgment, in which case, of course, the ordinary jurisdictional principles would apply, since such submission could only be of matters within jurisdiction. The awards in private arbitration are rather considered contracts than judgments, and hence the submission may be withdrawn by either party before it is completed, by a formal revocation.

§ 67. We have already remarked, incidentally, that superior courts proceed according to the course of the common law, and we may, in general terms, speak of the sources of our jurisdiction as three in number: (1) Common law; (2) Constitutions; (3) Statutory law.

§ 68. But as it is evident that the existence and organization of courts is the fundamental principle underlying the exercise of judicial jurisdiction and action, it will be appropriate to consider this first in order.

It is competent for a legislature to establish new tribunals for the trial of offences previously committed.(*w*) A law for this purpose is not an *ex post facto* law within the meaning of the constitution, which consists either in defining that to be an offence which was not an offence before, and punishing it, though committed before the enactment of the law, or else increasing the penalty attached to an offence, and inflicting the increased penalty upon one whose act was previously committed. Again, a legislature may create a new offence, and designate a particular tribunal to take cognizance of it, and in such case (as well as others) the statutory provisions must be strictly followed, and no court except the one designated can take jurisdiction of the offence provided against.(*x*)

(*v*) Andrews *v.* Wheaton, 23 Conn. 115.
(*w*) State *v.* Shumpert, 1 S. C. 86.
(*x*) Aldrich *v.* Hawkins, 6 Blackf. 126.

Where an offence is committed within a particular district or county to which venue is confined as to the court therein, and before a prosecution is begun the county is divided, action may be brought within the limits of the new district or county if the *locus in quo* is embraced within its limits, but the special fact of venue must be alleged and shown.(*y*)

And the jurisdiction of courts already established may be enlarged; and even where a constitution provided that certain county courts should exercise "their present jurisdiction" until suspended in a manner prescribed, this was held to mean only a limitation on the power to change from county to civil or criminal business, and not a prohibition of additional laws regulating such courts, or enlarging their powers as to county business,(*z*) the word "present" being regarded evidently as not implying degree, but quality of jurisdiction. An enlargement of equitable jurisdiction as to state courts may be availed of by the United States circuit courts.(*a*) But the state courts can derive power only from state laws, and cannot execute a penalty arising under a United States statute or the statutes of another state.(*b*) It is held essential to a grant of jurisdiction in special cases, under a constitutional provision conferring upon a class of courts original jurisdiction of "all such special cases and proceedings as are not provided for," that it be granted to another tribunal in "providing for" the special cases, and not to a judge at chambers. In a case bringing up this matter the court say: "It is beyond question that the county judge is not the county court; and although the legislature may authorize the judges of the several courts to perform certain duties at chambers in respect to proceedings in a cause, yet some court has jurisdiction of the cause; and the judge at chambers, whether of the same or another court, acts as a commissioner, or in some other capacity, merely in aid of and subordinate to the court having jurisdiction of the cause. It being, we think, beyond dispute that a county judge is not the county court, if jurisdiction of

(*y*) State *v.* Jackson, 39 Me. 294.

(*z*) Broadwell *v.* People, etc., 76 Ill. 554.

(*a*) Broderick's Will, 21 Wall. 504.

(*b*) Tele. Co. *v.* Nat. Bank, 74 Ill. 217.

special cases could be conferred upon the county judge, it is equally competent to the legislature to confer it upon the county clerk, recorder or sheriff, or to create a new tribunal for the exercise of such jurisdiction."(*c*)

It is evident, too, that new courts may be endowed with exclusive jurisdiction in definite classes of cases, and that the words "until otherwise provided," in a constitution, may, with entire grammatical propriety, be taken to qualify whatever succeeds them in the sentence, and the whole be interpreted to mean that the determination in the constitution, both of the number of courts and of their respective jurisdictions, is provisional, and is to last until otherwise provided, and that when the legislature shall choose to act, the provisional *regime* shall cease to the extent indicated by the law-maker.(*d*)

But where the right of trial by jury attaches to a particular kind of cases by the constitution, it is not competent for the legislature to add to a court having no power to empanel a jury the jurisdiction of that kind of cases, without securing, either by special or general law, the right of trial by jury.(*e*)

On the other hand it has been held that a legislature cannot, under a constitution recognizing the distinction between law and equity by the phrase "judicial power as to matters of law and equity," compel a court of equity to refer all matters of fact to a jury, any more than a court of law to refer all questions of law to a jury—in other words, that judicial power cannot be taken from a court and conferred upon a jury. The power to refer to a jury is matter of discretion with the chancellor at common law, and he may, after taking a verdict, disregard it; and, where a constitution does not change this, a legislature cannot.(*f*) And this seems to be placed on the principle that a legislature cannot essentially alter or abolish constitutional courts—this only being possible by a modification of the constitution itself—although it can, of course, enlarge the jurisdiction thereof; that is, by

(*c*)Spencer Creek Water Co. *v.* Vallejo, 48 Cal. 73.
(*d*)State *ex rel. v.* Judge, 22 La. An. 567–8.
(*e*)Thomas *v.* Bibb, 44 Ala. 723.
(*f*)Callahan *v.* Judd, 23 Wis. 348

annexing statutory jurisdiction to the constitutional.(*g*) The essential distinction between constitutional and statutory courts is, that the former are not subject to the will of the legislature, so far as their constitutional jurisdiction extends, whereas the latter may be restricted or abolished, as well as created and enlarged, at pleasure,(*h*) and may be abolished, even where the constitution makes provision for them, if the creation is left to the discretion of the legislature. And even where a court may be by statute endowed with large and general powers as to law and equity, yet as the statute made it, a repeal of the statute may destroy it.(*i*)

So a legislature may abolish the writ of *ne exeat*.(*j*) And in no case is a legislative grant to be reviewed unless directly unconstitutional.(*k*)

In all cases, whether with a superior or inferior court, a purely statutory authority must be pursued,(*l*) and it cannot be extended by implication.(*m*) But herein there seems to be a distinction, as to matters of a penal nature, between superior and inferior courts. The supreme court of Illinois quote this rule from Espinasse on Penal Statutes: "With respect, however, to statutes giving jurisdiction, a difference must be observed as to the superior and inferior courts. The courts above may have jurisdiction by implication, as in the case of penal statutes mentioned before, such as *Rex* v. *Mallard*, *ante*, folio 9, prohibiting any matter of public concern under a penalty, but without appropriating it, and which is a debt due to the person, and recoverable in the court of exchequer. That might be sued for in the courts above, though they are not named, but no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute

(*g*)Harris *v.* Ex'rs, 21 N. J. Eq. 426, 430; Supervisors *v.* Arrighi, 54 Miss. 668; Heath *v.* Kent, 37 Mich. 373; People *v.* Hurst, 41 Mich. 328.

(*h*)State *v.* Smith, 65 N. C. 370; Bank *v.* Duncan, 52 Miss. 740; Martin *v.* Harvey, 54 Miss. 685; Keal *v.* Judge, 36 Mich. 332.

(*i*)Perkins *v.* Corbin, 45 Ala. 119.

(*j*)Harker's Case, 49 Cal. 465.

(*k*)Stoudinger *v.* Newark, 28 N. J. Eq. 187.

(*l*)See 1 Smith's Leading Cases, (6 American Ed.) 1024, 1011, and cases there cited; R. R. *v.* Campbell, 62 Mo. 585.

(*m*)Buck *v.* Dowley, 16 Gray, 558; Solon *v.* State, 5 Tex. App. 301.

by implication. They must be expressly mentioned in the statutes themselves, and cognizance given to them in express terms."(*n*)

It sometimes becomes a matter of importance to determine when the provisions of a statute are mandatory, and when directory. On this, the supreme court of Pennsylvania remark: "It would not, perhaps, be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category. 'A clause is directory,' says *Taunton*, J., 'when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibition.'"(*o*) But even under this definition there is room for inquiry as to what are words of positive prohibition.

§ 69. As to the effect upon pending cases of a repeal of the statute by which a court was established, and from which, therefore, it derived authority, of course, in ordinary cases, there is usually a provision for their transfer to another tribunal, which thereby is invested with jurisdiction by the transfer; when immediately full jurisdiction attaches in the new forum.(*p*) And the cause should be transferred without motion of parties.(*q*) But where such a repeal occurs, and there is a *mandamus* pending against the judges of the court abolished, the suit cannot be renewed against the successors, and it of course abates, as the judges themselves lose and do not transmit their official character. Thus, in North Carolina, while a *mandamus* suit was pending against the justices of a court, the court was abolished by the adoption of a new

(*n*)Bowers *v.* Green, 1 Scam. 44.
(*o*)Bladen *v.* Philadelphia, 60 Pa. St. 466.
(*p*)Kruse *v.* Wilson, 79 Ill. 233.
(*q*)Knox *v.* Gurnett, 28 La. An. 601.

state constitution, and the proceedings were sought to be revived against the county commissioners, on whom devolved the authority lately held by the abolished court. On this, the supreme court held that "the order that notice issue to the commissioners of the county of Cleveland, to show cause why they should not be made parties to a proceeding by writ of *mandamus* heretofore directed to the justices of the county, is based on two mistaken ideas: the one, that the writ of *mandamus* may be revived like an ordinary action—no precedent can be cited to support it; the other, that the commissioners represent the justices of the county, as an executor or administrator represents his testator or intestate. It is true the county court is abolished by the constitution, and may be said to be 'civilly dead;' but the commissioners are not its representatives. The one corporation simply succeeds and takes the place of the other in respect to certain of its functions. The county court exercised both judicial and administrative powers. The former have devolved upon the superior courts, the judges of probate, and the justices of the peace; the latter devolved upon the county commissioners, to whom county affairs, taxes, bridges, roads, poor-houses, and the like, are entrusted. So the commissioners are, in respect to administration matters, the successors, not the representatives, of the county court. It follows, that proceedings against the justices of the county court cannot be revived, either by motion or *scire facias*, against the commissioners of the county, so as to bind them by the proceeding, answer, etc., had under a writ of *mandamus*. The instance of the incumbent of a benefice, a corporation sole, furnishes an analogy. Proceedings against a deceased incumbent, although it concerns the church property, cannot be revived against his successor; it must be by original bill in the nature of a supplemental bill. 3 Dan. Chan. 13. If a writ of *mandamus* can be revived at all, which I very much doubt, it cannot be by bill of revivor or motion to revive, but it must be by some original process which my researches have not enabled me to find. We concur in opinion with his honor: 'A suit against

the justices cannot be renewed against the commissioners.'"(*r*)

§ 70. The rule that statutory authority is to be strictly pursued, is applicable as well to superior courts as to inferior; and where an act of congress gave jurisdiction to a district court of the United States to adjudicate on the title to particular land, it was held that it did not give authority to adjudicate similar claims to other lands.(*s*) And so it is usually held that all exceptional modes of obtaining jurisdiction over natural or artificial persons must be strictly conformed to the statute prescribing them, as, for example, in regard to non-residents.(*t*) All special statutory powers are strictly held, even as to contempts.(*u*) Nor does an enlarged authority extend to pending suits, at least by implication, although I suppose it is competent for the legislature to so provide, expressly, that pending suits should be subject to the enlarged power. And so a plaintiff cannot avail himself of a distinct head of equity jurisdiction which the court did not have at the commencement of the suit;(*v*) as, for example, if, when a suit is entered, a court has limited equity powers, but during pendency general equitable jurisdiction is conferred on it.(*w*) And, moreover, although courts having full equity jurisdiction may sometimes treat a refusal to perform a parol contract partly performed as a constructive fraud, this is not to be done by a court possessing under a statute merely equity jurisdiction "in all cases of fraud;" because the rule of strict construction prevails, and constructive frauds are therefore not included in the phrase "all cases of fraud."(*x*) And so it is held that under a statutory authority to determine in equity "all suits and matters concerning waste, where there is not an adequate remedy at law," the authority extends,

(*r*)Carson *v.* Commissioners, 64 N. C. 566.

(*s*)Umbarger *v.* Chaboya, 49 Cal. 525.

(*t*)Ins. Co. *v.* Owen, 30 Mich. 441-2; Haywood *v.* Collins, 60 Ill. 333.

(*u*)Johnson *v.* Von Kettler, 84 Ill. 316.

(*v*)Sanborn *v.* Sanborn, 7 Gray, 146.

(*w*)Buckley *v.* Dowley, 16 Gray, 557.

(*x*)Ibid, 558.

not to such trespasses as courts with full chancery powers will enjoin, but only to cases of technical waste.(*y*) And so, where inferior courts were authorized by law to establish small-pox hospitals, it was held this did not grant the right by implication to impress the private property of citizens for that purpose.(*z*).

§ 71. The authority of common law courts to entertain suits for the recovery of distributive or residuary shares of personal estates from administrators, arises solely by statute, and must be strictly pursued.(*a*)

§ 72. In general, a strict construction of statutes is best, at any rate. When implications are admitted, beyond the limits of the most rigid necessity, it is very easy to drift unconsciously away from the meaning of the law-giving power altogether, and establish what was never intended, or even thought of. The supreme court of Massachusetts say: "Equitable constructions according to what may be deemed the spirit of a statute, though they may be tolerated in remedial and perhaps some other statutes, should always be resorted to with great caution, and never extended to penal statutes or mere arbitrary regulations of matters of public policy. The power of extending the meaning of a statute beyond its words, and deciding by the equity and not the language, approaches so near the power of legislation, that the wise judiciary will exercise it with reluctance and only in extraordinary cases."(*b*) Judge Hebard, in a Vermont case, very pointedly says: "I am not very well satisfied with the summary mode of getting rid of a statutory provision by calling it directory. If one positive requirement and provision of a statute may be avoided in that way, we see no reason why another may not."(*c*) I suppose the true principle of interpretation is to make no changes in the literal

(*y*) Attaquin *v.* Fish, 5 Met. (Mass.) 150.

(*z*) Markham *v.* Powell, 33 Ga. 511.

(*a*) Ducasse *v.* Richard, Anthon's N. P. (N. Y.) 192.

(*b*) Monson *v.* Chester, 22 Pick. 387.

(*c*) Briggs *v.* Georgia, 15 Vt. 72.

import of statutory language, further than this is necessarily modified by settled legal principles and rules. So far it is needful, in order to have harmony and give all active statutes a co-ordinate operation.

The question as to how jurisdiction may be ousted or defeated might appropriately be considered here, as germane to the topics of this chapter. But, as the chapter has become quite extended, we will assign this inquiry to a separate chapter immediately succeeding.

CHAPTER X.

DEFEAT OF JURISDICTION.

§ 73. Jurisdiction of superior courts only taken away expressly or by necessary implications.
74. Creating new courts with exclusive jurisdiction.
75. Repeal of criminal law.
76. Effect of bankruptcy.
77. Effect of appeal.
78. Arbitration.
79. Effect of subsequent fact occurring.
80. Giving special powers does not oust general powers.
81. Example of subsequent fact in lunacy proceedings.

§ 73. It is a settled rule that the jurisdiction of superior courts cannot be taken away, except by express words or necessary implications,(*a*) and, as we have previously remarked, constitutional powers cannot be taken away by mere legislation. Even where a legislature grants a certain body "full power and authority to approve or set aside an election," it is not to be implied that the usual supervisory power of the supreme court is taken away. Of this the supreme court of Pennsylvania remark: "These words cannot have greater effect than the words 'final and conclusive between the parties,' used in a great variety of acts of assembly; and yet it is a well-settled principle that these expressions do not take away the jurisdiction of the court. The legislature, being aware that this is a well-settled rule of construction, would, if they had intended to preclude inquiry, have prevented this court from exerting their superintending authority by express prohibition."(*b*) And this matter has even been carried so far as to hold that "where a statute says such a matter shall *finally* be determined by the quarter sessions *only*, and that

(*a*) King *v.* Canal Co. 6 Eng. L. & E. 246.

(*b*) Commonwealth *v.* McCloskey, 2 Rawle, 380.

NO OTHER *court* shall intermeddle," these negative words do not prohibit a *certiorari*.(*c*) This appears extreme, but the rule herein would probably prevail, and the words be construed only to forbid any other original jurisdiction. However, in Potter's Dwarris, 229, we find this remark quoted from *Tindal*, C. J.: "Yet, where the object and intent of the statute manifestly require it, words that appear to be permissive only shall be construed as obligatory, and shall have the effect of ousting courts of their jurisdiction;" and the author appends the remark that "in that case, [wherein the rule was thus laid down,] on a full analysis of the statute in question, the courts thought the jurisdiction was taken away." And, I suppose, in all cases a manifest legislative intention will prevail in the courts over the language of a statute, in accordance with the principle declared in the same work, page 231: "The sense and spirit of an act, however,—its scope and intention,—are primarily to be regarded in the construction of statutes; and it matters not that the terms used by the legislature, in delivering its commands, are not the most apt to express its meaning, provided the object be plain and intelligible, and expressed with sufficient distinctness to enable the judge to collect it from any part of the act. The object once understood, judges are so to construe an act as to suppress the mischief or advance the remedy. But yet the court is not at liberty, even for that purpose, to introduce [into] or exclude words from any clause of a statute, but is bound to construe the words which the clause contains, with reference always to that which appears to be plainly and manifestly its object." Of course, great care is requisite in applying this principle, for otherwise it leads directly to judicial legislation.

Moreover, where the matter of jurisdiction is doubtful as to any court, the court is entitled to the benefit of the doubt, and will not be ousted by a strict construction; but where a party in good faith as to the validity of a jurisdiction invokes it in his behalf, it will, in general, be sustained.(*d*)

(*c*) Burgenhofen *v.* Martin, 3 Yeates, (Pa.) 480, note.

(*d*) Stanley *v.* Barker, 25 Vt. 510.

The word "shall," (imperative,) and conferring exclusive jurisdiction, will be construed to mean "may," (permissive,) and conferring only concurrent jurisdiction, when the literal construction would bring the act into conflict with a constitutional provision.(*e*)

§ 74. The creation of new courts, with exclusive jurisdiction in a certain class of cases, will oust the jurisdiction already attached in pending cases; at least this is so in criminal matters, and, by parity of reason, I judge in civil matters also. For example, where an act declared "that there is hereby created a court of original and exclusive criminal jurisdiction in all cases of felony and misdemeanor in said counties," etc., it was held to oust the jurisdiction of the district court in cases then pending,(*f*) and on a rehearing the result was the same. And more especially is this the case where the act provides that immediately on its passage all suits and proceedings, the jurisdiction of which is vested in the new court, shall be transferred, and the other courts divested of all power to make any order in them, except an order of transfer; and this is held to apply to cases where there is a temporary order of injunction existing,(*g*) notwithstanding the general rule that one court cannot dissolve an injunction granted by another.

§ 75. And, indeed, the repeal of an act creating an offence discharges all pending indictments for that offence, unless there is a saving clause inserted therein.(*h*) And so as to civil suits; when a statute conferring that kind of jurisdiction is repealed, without a saving clause, pending suits altogether fail.(*i*) But this, I think, is unusual legislation. And in criminal cases the principle prevails where the jurisdiction is exclusively transferred to another, even an inferior court; so that indictments pending fail, there being no provision especially for them.(*j*)

(*e*)Burns *v.* Henderson, 20 Ill. 265.

(*f*)Stubbs *v.* State, 39 Tex. 571.

And this is more especially the case in regard to a new constitution. Knox *v.* Gurnett, 26 La. An. 601.

(*g*)State *ex rel.* *v.* Judge, 22 La. An. 569.

(*h*)Taylor *v.* State, 7 Blackf. (Ind.) 93.

(*i*)Hunt *v.* Jennings, 5 Blackf. 195.

(*j*)Spriggs *v.* State, 2 Carter, (Ind.) 75.

§ 76. It is held that, under the United States bankrupt law of 1867, a state court loses all jurisdiction of a bankrupt and his estate, even in pending cases, whenever the bankruptcy occurs, except in regard to enforcing prior liens on the estate of the bankrupt,(*k*) and, perhaps, excepting also plaintiffs in pending actions should have notice of the bankruptcy.

However, at the suit of an assignee state courts may aid in the enforcement of bankrupt laws, as by setting aside fraudulent conveyances.(*l*) But (at least after notice) all efforts to obtain a lien, and all ordinary proceedings, are to be stayed at once.(*m*) An assignee may likewise foreclose a mortgage in a state court,(*n*) or, in general, collect the assets in the state courts.(*o*)

§ 77. Where a court has power to certify a case to an appellate court, and makes an order to that effect, it loses jurisdiction until the case is remanded, and any further proceedings, after the order, will be disregarded by the higher court,(*p*) the case then standing as if it were appealed.

§ 78. Although parties may enter into a valid and binding agreement to submit questions in dispute to arbitration, yet public policy requires that such agreement must relate to matters now disputed, or immediately likely to be disputed. "We understand the law to be settled," say the Delaware court, "that a prospective agreement to refer all matters in dispute, which may hereafter arise, cannot be shown as a defence to an action for the recovery of such disputed matter, for the superior courts will not suffer themselves to be ousted of their jurisdiction by the private agreement of the parties."(*q*) And the Pennsylvania court say: "General clauses providing for the settlement by arbitration of disputes that may arise between the contracting parties are not infrequently inserted in partnership agreements, leases, and other

(*k*) Elliott *v.* Johnson, 44 Tex. 180; Boone *v.* Revis, Id. 384; Hancock *v.* Henderson, 45 Tex. 479; Doe *v.* Childress, 21 Wall. 643.

(*l*) Isett *v.* Stuart, 80 Ill. 404.

(*m*) Bratton *v.* Anderson, 5 S.C. 504.

(*n*) Burlingame *v.* Parce, 12 Hun. 145.

(*o*) Waite *v.* Young, Id. 221, Tolcott, J., dissenting.

(*p*) Murry *v.* Smith, 1 Hawkes, (N. C.) 43.

(*q*) Randel *v.* Canal Co., 1 Harr. 275; Pearl *v.* Harris, 121 Mass. 390.

instruments of writing, but they do not take away the jurisdiction of the courts. Whether they would be a ground of action should one party, on request of the other, refuse to concur in naming an arbitrator, may be doubted, but certainly a plea of this kind, in nature of a plea to the jurisdiction, would not be entertained. It is not to be supposed that parties to such agreements waive the jurisdiction of the ordinary tribunals of the country, unless they expressly include them. Even a nomination of an arbiter, under a submission of existing controversies, may be revoked, and, though the party may forfeit his bond, the jurisdiction of the court remains. It is possible special cases may exist where a court of equity might deem it expedient to hold the parties to a tribunal constituted by themselves, but, generally speaking, these clauses are of no avail, and amount only to an empty name."(*r*)

§ 79. It is stated, as a general rule, that where jurisdiction is once lawfully and properly acquired no subsequent fact in the particular cause can defeat that jurisdiction; as, for instance, where the amount sued for is within the jurisdiction at the inception of the suit, but by delay and consequent accumulation of interest the amount is increased beyond the jurisdiction, while the matter is pending, and before judgment.(*s*) Further, it is declared that if there is any exception to this rule it is when a change in the parties, after suit commenced, is of a nature to work an abatement. And the acceptance of the office of consul, after the commencement of a suit, is not such a change.(*t*) Nor is the removal of parties from the state after suit is commenced.(*u*) Nor does dismissing as to a party improperly joined of itself oust jurisdiction.(*v*) The loss of the basis of the action does not oust, necessarily. Thus, the supreme court of Kentucky say: "Nor have we any doubt that, as the covenant was in existence, and within the

(*r*)Gray *v.* Wilson, 4 Watts, 41.
(*s*)Tindall *v.* Meeker, 1 Scam. 139.
(*t*)Koppell *v.* Hendricks, 1 Barb. 451.
(*u*)Tapley *v.* Martin, 116 Mass. 275; Upton *v.* R. R. 25 N. J. Eq. 372.
(*v*)Dickson *v.* R. R. 81 Ill. 275.

power of the plaintiff in the action when the suit was commenced, the accidental destruction of it by burning, *pendente lite*, did not oust the common law court of jurisdiction, even if it should be conceded that here now, where *profert* is not essential, an action at law cannot be maintained on a covenant lost at the date of the writ."(*w*) And so it has been held in New York that if the lien of a mechanic fails, pending a suit to enforce it, a personal judgment may still be rendered in the action.(*x*)

In a criminal case, where one of the judges had occasion to leave the bench for a few moments to hand a paper to a person waiting to receive it, and before his return an objection to the admission of a deed was decided, it was claimed, on error, that this circumstance vitiated the proceedings. But the court held that the objection was hardly worthy of notice, and that the action of the judge neither broke up the court nor impaired the validity of the proceedings, since there was still a quorum on the bench to decide questions arising in the cause.(*y*) And so, in the same state, it has been decided that if, in a criminal proceeding, one of the judges necessary to constitute a duly organized court is called from the bench to testify as a witness, this does not oust the jurisdiction.(*z*) But of course the principle would not apply to the absence of a juror, since it requires the whole panel to constitute a quorum. And where jurisdiction is limited to sums above a certain amount, and an action is brought in good faith wherein the

(*w*)Bliss *v.* Turnpike, 9 Dana, 265.

(*x*)Darrow *v.* Morgan, 65 N. Y. 333. And see Hunt *v.* Hunt, 72 N. Y. 217, where it is declared that jurisdiction is not dependent on the state of facts in any particular case, or the ultimate existence of a good cause of action in the plaintiff. The mere granting of a like jurisdiction to another court does not oust previous jurisdiction. In such case the grant is construed to be that of a concurrent jurisdiction. Hays *v.* McNealy, 16 Fla. 409. In Texas it has been held that the escape of a prisoner, after conviction and before sentence, ousts jurisdiction, so that if the prisoner is afterwards apprehended he cannot be sentenced on the verdict. Brown *v.* State, 5 Tex. Ct. App. 546. The death of a defendant does not *ipso facto* work a transfer of the case to the probate court from a court of ordinary jurisdiction. Bussy & Co. *v.* Nelson, 30 La. An. 25.

(*y*)Tuttle *v.* People, 36 N. Y. 440.

(*z*)State *v.* Dohring, 59 N. Y. 374.

amount is found to be below the limitation, this fact will not in general oust the court from its jurisdiction, whether it be *ex contractu*(*a*) or in tort.(*b*) (See chapter on Values.)

In the case of a vacancy in the office of municipal judge, the insertion of the name of the recorder of the court, on whom the duties devolve during vacancy, in a warrant as a witness, will not deprive him of jurisdiction, since in such cases, otherwise, "jurisdiction might be the creature of a fiction."(*c*)

An incidental question concerning the title to land does not oust the jurisdiction of a court forbidden to try titles, although it has no jurisdiction when there is a direct and distinct issue of title made by the pleadings, since, in that case, the matter of title is the foundation of action, at least in part. So if suit be brought on a promissory note, and the defence is that the note was given for land to which the plaintiff had no title, and for which he had failed to make a deed, this does not oust jurisdiction.(*d*) The prohibition relates to cases in which the purpose of the action is to recover the land or settle the question of title.(*e*)

On this principle it is that a plea to the jurisdiction of the circuit courts of the United States, on the ground of citizenship, must allege that the parties were citizens of the same state when the action was commenced, and not that they afterwards became so.(*f*) And, also, in order to have a case transferred to the United States courts, under the act of 1867, it is requisite that the ground should not be that the parties were citizens of different states at the time the motion is made for a transfer, but at the time of commencing the suit.(*g*) The necessity of this rule is obvious, for otherwise the jurisdiction of courts could be trifled with at will. Of course a proper removal of a cause to the United States courts at once stops proceedings in the state courts.(*h*)

(*a*) Spafford *v.* Richardson, 13 Vt. 226.

(*b*) Waters *v.* Langdon, 16 Vt. 570.

(*c*) Wills *v.* Whittill, 45 Me. 547.

(*d*) Rogers *v.* Perdue, 7 Blackf. 303; Hawey *v.* Dakin, 12 Ind. 481.

(*e*) Macy *v.* Alley, 18 Ala. 128; Ohse *v.* Bruss, 45 Wis. 442.

(*f*) Mollan *v.* Terrence, 9 Wheat. 539.

(*g*) Tapley *v.* Martin, 116 Mass. 276.

(*h*) Durham *v.* S. L. I. Co. 46 Tex. 182.

The rule does not apply to cases of attachment, where the proceedings are properly commenced, but there is a failure to give the statutory notice within the prescribed period. This failure has the effect of destroying the jurisdiction of the court over the pending case, and a subsequent notice will not restore it so as to preserve the lien of the attachment.(*i*)

§ 80. The fact that a private act of a legislature by its terms provides that the judge of a county court may remove a particular nuisance, is held not to imply that a circuit court is thereby ousted of its usual jurisdiction to abate the nuisance by indictment.(*j*) At the most, the act must be construed to give a concurrent jurisdiction.

§ 81. Where a person became a lunatic, and conservators were appointed according to law, and began proceedings in chancery to subject his estate to the payment of his debts, and while these proceedings were pending the lunatic recovered his reason and appeared in court, asserting the recovery, and moving thereon to set aside all that had been done in the matter, it was held the subsequent recovery did not oust the jurisdiction previously acquired.(*k*)

(*i*)Millar *v.* Babcock, 29 Mich. 527.
(*j*)State *v.* Bell, 5 Port. (Ala.) 377.
(*k*)Salter *v.* His Creditors, 6 Bush. 630.

CHAPTER XI.

PARTIES.

§ 82. "Day in court"—notice.
83. Summons.
84. Fraud on party defendant.
85. Party in court bound to take notice of the proceedings.
86. Conferring personal jurisdiction by appearance.
87. Non-residents.
88. Notice as to non-residents.
89. Foreign corporations.
90. Equity jurisdiction from residence.
91. Record party gives the jurisdiction.
92. State as party.
93. Consuls.
94. Indians.
95. Non-resident plaintiffs.
96. Officers of U. S. government.
97. Service and return statutory.

§ 82. It is imperative that any person to be affected by the action of the court should, when possible, "have his day in court," and, therefore, have personal notice of the proceeding; and, in no case, can a personal judgment be entered without this. And *Livingston*, J., in a New York decision, declared that "a sentence obtained in defiance of the maxim *audi alteram partem* deserves not the name of judgment."(*a*) The court of Maine say: "In a suit brought in a court of common law a service upon the person or persons adversely interested is essential; without this, in some mode recognized by law, the court cannot proceed, and if, inadvertently, a judgment should be rendered, it would be a nullity, or would be reversed on proper proceedings. Before a conclusive judgment can be rendered, which can in any manner affect another party in the most trivial suit, that party must have legal notice of its pendency."(*b*) When a court acts without

(*a*) Hitchcock *v.* Aiken, 1 Caines, 473. (*b*) Davis, *Ex parte*, 41 Me. 59.

jurisdiction of the subject or the person, its proceedings are not merely erroneous, therefore, but wholly void, and may be attacked in a collateral as well as in a direct action.(*c*) *Bronson*, C. J., in a New York case, boldly declared, in most emphatic language, that "the state must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has power to provide that a man may be condemned unheard," even where he is jointly liable, and the other defendant was served with process.(*d*) But one of the judges dissented from the opinion of the court, on a ground which he fortified most ably with authorities, namely, that where there is but one cause of action, whether it be against a single person or many, the original cause of action is merged in a judgment, and that neither the matter nor parties can be severed, unless the cause of action is joint and several; which, for example, is not the case in actions against partners. There is no doubt, I suppose, that where interests are absolutely inseparable, as partnerships may be, service on one defendant may justify a judgment merging the entire cause of action, so that no action could be sustained afterwards against either of the defendants on the original promises, but only an action of debt on the judgment. In a joint and several action, however, the several service of process would be required on a judgment against all the co-debtors.

And it is so where an action is brought individually against the members of a firm, even if the action might have been brought against the firm itself.(*e*) And, in a suit against a firm, service on an alleged partner will not give jurisdiction of the person of another alleged partner, if it turns out that no partnership existed between them.(*f*)

The principle is that, "if requisite notice has not been given to, or process has not been served upon, a party, the court has no more authority to adjudicate upon his rights than a stranger

(*c*)Barnes *v.* Harris, 4 Comst. 379.

(*d*)Oakley *v.* Aspinwall, 4 Comst. 521. See dissenting opinion, and cases therein cited.

(*e*)Weaver *v.* Carpenter, 42 Ia. 343.

(*f*)Nixon *v.* Downey, 42 Ia. 78.

or a private individual. And all that the court does, all its findings, are absolutely void—as well the finding that the notice was given or process served as the others;" although such finding in regard to notice or process is *prima facie* evidence of the fact(*g*) in a direct attack, and in a collateral attack is so far conclusive that it can, in most if not all the states, be contradicted only by other facts of the record, since a record imports absolute verity in all collateral proceedings.(*h*) And after the term at which a judgment is rendered it cannot be attacked by a motion to set it aside, supported by affidavits, because of its absolute verity.(*i*)

And, moreover, where a statute prescribes the mode of obtaining personal jurisdiction it must be strictly pursued, or the proceeding will be a nullity, whether in a superior or inferior court, and as utterly void, indeed, as if it undertook to adjudicate where it had no jurisdiction of the subject-matter. But in Minnesota it has lately been held that if a statute provides that "no summons shall issue until complaint be filed," and also provides that all pleadings shall be verified, the latter provision is not jurisdictional, since a verification is not, properly speaking, a part of the pleading to which it is attached. *McNath* v. *Parsons*, unreported. And the principle applies to a probate court ordering a sale of lands when infant heirs were not represented by a guardian *ad litem*.(*j*) A guardian *ad litem* cannot enter an appearance for minors without service of process.(*k*) It is, however, held in Illinois that where there is service on minors the failure to appoint a guardian *ad litem* is error, but does not render the judgment or decree absolutely void,(*l*) such appointment not being regarded as jurisdictional.

And where a statute requires service of notice upon an individual it means personal service, unless some other is indicated. And if the statute requires personal notice of a village ordinance to be given owners of lots to be affected by

(*g*)Goudy *v.* Hall, 30 Ill. 116.

(*h*)Lawver *v.* Langhans, 85 Ill. 138; Harris *v.* Lester, 80 Ill. 307.

(*i*)Humphreyville *v.* Culver, etc., 73 Ill. 487.

(*j*) Bloom *v.* Burdick, 1 Hill, 139.

(*k*)Chambers *v.* Jones, 72 Ill. 275.

(*l*)Gage *v.* Schroder, 73 Ill. 44.

the ordinance, a notice by mail will not suffice, even if it reaches the party. And so, if a statute requires that *notice* of a village ordinance shall be published, such publication of the ordinance will not suffice, without a notice that it is an ordinance duly passed.(*m*) A statutory requirement of service means a summons in law suit.(*n*) And even as to a non-resident a statute may imperatively require the mailing of a summons.(*o*)

The rule in equity is the same, namely: "The power of the court to proceed to a decree in the absence of parties depends on the nature of their interest and the mode in which it will be affected by the decree. If they are only passive objects of the judgment of the court, or their rights are incidental to those of parties before the court, a complete determination may be obtained. But if they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them."(*p*)

§ 83. The usual mode of giving notice is by summons, served by an officer of the court, and duly returned into the the court. The date of the commencement of the suit is held to be the date of the writ; but actual jurisdiction is, of course, not acquired until service is made. And, where a court has enlarged jurisdiction as to subject-matter, a service is wholly void which was made of a writ issued between the passage of the enlarging act and the time prescribed for its taking effect; it being held in such case that the suit was commenced before the court had any right to take jurisdiction.(*q*) Whether this could be cured by subsequent consent of the parties is not determined; but I judge not, under the inflexible rule that, as to subject-matter, consent cannot give jurisdiction. This

(*m*) Rathburn *v.* Acker, 18 Barb. 395.

(*n*) Smith *v.* Wells, 69 N. Y. 600.

(*o*) Ibid.

(*p*) Coleman's Appeal, 75 Pa. St. 457.

(*q*) Wheatland *v.* Lovering, 10 Gray, 16. Service of summons must be by an authorized person, or there is no personal jurisdiction acquired thereby. Kyle *v.* Kyle, 55 Ind. 387. And the return of the officer must specify the name of the defendant on whom service is had if the name does not appear in the summons. Brooks *v.* Allen, 62 Ind. 401.

would seem to lead to the logical deduction that an unauthorized institution of suit could not afterwards be in any manner legalized, but proceedings would of necessity have to be begun anew. It is even held doubtful, indeed, whether a statute expressly designed to be retroactive upon proceedings in court can be allowed to have that effect in operation.(*r*)

§ 84. It is a settled principle, however, that a court will not sanction any fraud or misrepresentation or trickery in bringing a party within the jurisdiction; and so, where one is induced by a false statement to come within the reach of process, and then is personally served, the service will be set aside on motion.(*s*) And, also, where a non-resident comes in good faith within the state to testify as a witness, and for that purpose only, it is usually held that he is exempt from the service of a summons, and if one be served it will be set aside.(*t*) And this is held to be of great practical importance, inasmuch as "principles of public policy require that no unnecessary obstacles should be interposed to prevent the attendance and examination of witnesses in the presence of the court and jury."

§ 85. When a party is once in court by any legal means he is then bound to take notice of all subsequent proceedings in the cause.(*u*) But it is not so where there is an actual discontinuance; as, for example; where two defendants were summoned before a magistrate, and appeared on the return day, whereas both the magistrate and the plaintiff were absent, so that no proceedings were had in the case. But three days afterwards one of the defendants, in presence of the other, and also of a witness, in the absence of the justice, indorsed on a note found in the office of the justice (being a joint and several note of the two defendants) his individual confession of judgment, and on the same day the justice rendered judgment thereon in favor of the plaintiff.

(*r*)Warren Manuf. Co. *v.* Ins. Co. 2 Paine C. C. 517.

(*s*)Carpenter *v.* Spooner, 2 Sandf. (N. Y.) 717; Wanzer *v.* Bright, 52 Ill. 41.

And in all cases an appearance must be voluntary. People *v.* Judge, 40 Mich. 729.

(*t*)Seaver *v.* Robinson, 3 Duer, (N. Y.) 623.

(*u*)Thomas *v.* Alford, 20 Tex. 492.

Execution having been levied on the property of the defendant who had not joined in this confession he brought trespass against the justice, and it was held that when the judgment was rendered the justice had no jurisdiction over this defendant—the summons having spent its force on the return day—so that the parties were out of court and the cause discontinued, and therefore the justice was liable in the action.(*v*)

§ 86. However, in the absence of service of process a party may give personal jurisdiction to a court either by an actual or virtual consent.(*w*) And the principle applies to an im-

(*v*)Clark *v.* Holmes, 1 Doug. 391.

(*w*)McCormick *v.* R. R. 49 N. Y. 309.

Where there is a voluntary appearance, for the general purpose of defence, there is, of course, no necessity of a summons. And the appearance may be by attorney. Wasson *v.* Cone, 86 Ill. 46. If an appearance is made specially for the purpose of objecting to the jurisdiction, the motion must be restricted to this specific purpose or else it will confer general jurisdiction in the case. Aultman & Taylor Co. *v.* Steinau, 8 Neb. 109. A motion to change the venue confers such jurisdiction. Taylor *v.* R. R. Co. 68 Mo. 397. And more especially, if there is a plea entered as to the merits, it is too late afterwards to raise the question of jurisdiction of the person. Gott *v.* Brigham, 41 Mich. 227. And it has even been held that if one appears by attorney or in person to object to the jurisdiction he cannot afterwards object to the *sufficiency* of the summons or notice. Church *v.* Crossman, 49 Ia. 444. And an appearance may be made by a written memorandum of the defendant, stating that he waives notice and makes a voluntary appearance. Shaw *v.* Bank, 49 Ia. 179. And so a party who voluntarily *intervenes* in an action cannot afterwards deny the jurisdiction of the court therein. Jack *et al. v.* R. R. 49 Ia. 627. In all cases the objection must be raised promptly. Dake *v.* Miller, 15 Hun. 356. However, where the objection is not as to personal jurisdiction, but is to the effect that the court has not jurisdiction of the action, on the ground of venue, or any other ground going to the *essential* jurisdiction of the *cause*, a general appearance is not a waiver. Wheelock *v.* Lee, 74 N. Y. 495. On the general principle that consent cannot give jurisdiction of a subject-matter, parties cannot waive the want of jurisdiction so as to make experimental cases for the courts, (Georgia, etc., Loan Association *v.* McGowan, 59 Ga. 811,) for waiver pertains alone to jurisdiction of the person. Where jurisdiction depends on the "residence" of a person, the word "residence" is to be regarded as denoting permanence, and not a mere temporary stay in a particular locality. Bank *v.* Reed, 45 Conn. 391; Church *v.* Crossman, 49 Ia. 445. A minor cannot make an appearance so as to waive service of process, or legal notice. Bonnell *v.* Holt, 89 Ill. 72; Carver *v.* Carver, 64 Ind, 196; Helms *v.* Chadbourne, 45 Wis. 61.

proper change of venue.(*x*) And where suit is originally brought in a wrong county, a failure to make objection will operate as a waiver; as where a statute requires suit on an official bond to be brought in the county where the bond was executed.(*y*) And objection must be made in apt time.(*z*) In all ordinary cases a failure to object, and taking steps in a cause, waives the right to object.(*a*) And for this purpose, too, a general appearance will suffice. The principle underlying this is, that one may waive a personal privilege in all cases where public policy is not contravened thereby. Otherwise a defendant may submit his person to the jurisdiction of any court.(*b*) Thus, where a defendant appeared, and on motion obtained a change of venue to a court not then having equity jurisdiction, and then, after equity jurisdiction had been conferred upon the court, demurred, because of the want of equity jurisdiction when the change of venue was made, it was held that his general appearance precluded his objecting to the jurisdiction to which he had voluntarily transferred the cause, and where, until filing the demurrer, the cause had been pending as a law action, though properly belonging to the equity side of the court. And especially as the jurisdiction had been obtained before the filing of the demurrer.(*c*) And so, where a defendant appeared and filed a set-off, and then moved to dismiss for want of personal jurisdiction, it was held that his motion came too late.(*d*) And thus, after a general appearance, (with the exception I have intimated above,) one cannot submit himself to the jurisdiction, and then object that the suit ought to have been brought in another county.(*e*) And if a defendant appears in court to give notice of an appeal, he cannot afterwards be allowed to deny the jurisdiction over his person.(*f*) Where

(*x*)Carpenter *v.* Shepardson, 43 Wis. 406.

(*y*)Cloman *v.* Staton, 78 N. C. 235.

(*z*)McMinn *v.* Hamilton, 77 N. C. 300.

(*a*)Eitel *v.* Bracken, 38 N. Y. Superior Ct. 13; Ward *v.* Roy, 69 N. Y. 96.

(*b*)Campbell *v.* Wilson, 6 Tex. 392.

(*c*)Polk Co. *v.* Hierb, 37 Ia. 362.

(*d*)Thornton *v.* Leavitt, 63 Me. 385.

(*e*)Brown *v.* Webber, 6 Cush. 563.

(*f*)Fee *v.* Iron Co. 13 Ohio St. 565.

venue is changed by agreement, an appearance to the action afterwards, in the court to which transfer was made, waives objections as to the jurisdiction and the regularity of the change of venue.(*g*)

But where a defendant appears specially to contest the jurisdiction, the appearance does not waive the objection;(*h*) although such an appearance must be understood to be made upon application to the court, in New Hampshire.(*i*) Probably leave would be implied under the general practice.

Even an unauthorized appearance by an attorney will bind defendants so far that they cannot question its validity collaterally.(*j*) This seems to be on the ground that attorneys are officers of the court, and *prima facie* their acts are presumed regular.

There are exceptions to the general rule of consent as to personal jurisdiction; as, for example, where, to subserve public interests, a bank corporation is prohibited from consenting to jurisdiction out of its county,(*k*) or where a statute positively requires an action against an officer to be brought in the county where the cause of action arose.(*l*)

§ 87. It is held to be a principle of the common law that any non-resident defendant voluntarily coming within the jurisdiction may be served with process, and compelled to answer.(*m*) Where the jurisdiction, however, depends upon the residence, there must usually be an averment of the residence.(*n*)

In New York it is held that the courts have jurisdiction of actions for torts as to property, even where the parties are non-resident, and the torts were committed out of the state, if the defendant is served with process within the state.(*o*) But *Clerke*, J., very vigorously dissented in the case, and, I judge, with good reason.

(*g*) Aurora Fire Ins. Co. *v.* Johnson, 46 Ind. 321.

(*h*) Branner *v.* Chapman, 11 Kan. 121.

(*i*) Wright *v.* Hayward, 37 N. H. 19.

(*j*) ..eed *v.* Pratt, 2 Hill, (N. Y.) 66; Rust *v.* Frothingham, Breese, (Ill.) 331.

(*k*) Central Bk. *v.* Gibson, 11 Ga. 459.

(*l*) Cowen *v.* Quinn, 13 Hun. 344.

(*m*) Semple *v.* Anderson, 4 Gilm. (Ill.) 559.

(*n*) Haddock *v.* Waterman, 11 Ill. 476.

(*o*) Latourette *v.* Clark, 45 Barb. 331.

Beyond all doubt, where a person is absent from a state, but by means of an innocent agent or instrument commits a crime in the state, he will be held amenable to its laws. If the crime is the immediate results of his acts he is to be made to answer for it, because, in contemplation of law, he is present at the perpetration thereof.(*p*) Thus it has been held that one who forges titles in one state, to take effect on lands in another state, may be indicted in the state where the lands are situated.(*q*) And in Massachusetts an accessory, either before or after the fact, may be punished as a principal for a crime committed in another state, as if it were committed in the home jurisdiction.(*r*)

§ 88. Even where party defendants are non-residents, and the proceedings are *in rem*, notice is essential in actions by common law courts. The ownership of property, of whatever kind, does not give jurisdiction of the person;(*s*) and it is requisite that personal jurisdiction be had, so far as possible, in all suits. This is to be done by notice in some manner prescribed by law. A proper basis for the notice is an affidavit of non-residence,(*t*) since this alone can establish the fact on which the right to issue notice by publication, for example, rests, because a resident is entitled to a regular summons personally served. Yet, when the record of a court states that the required notice has been given, it will be presumed, when the question arises collaterally, that the notice so passed upon by the court had all the essential requisites to give personal jurisdiction.(*u*) And accordingly, also, one who would impeach a notice by publication, on the ground that he was a resident, has the burden of proof on him.(*v*) It is stated, as a general rule, that where there is a legal notice or publication in requisite form, or whatever a statute requires in regard to matter or parties, the sufficiency thereof is not a subject for collateral inquiry.(*w*)

(*p*)State *v.* Chapin, 17 Ark. 566; U. S. *v.* Davis, 2 Sumn. 482; People *v.* Adams, 3 Denio, 207; People *v.* Rathburn, 21 Wend. 500.

(*q*)Ham *v.* State, 4 Tex. Ct. of Appeals, 645.

(*r*)Gen. Stat. 266, §§ 1, 3.

(*s*)McVicker *v.* Beedy, 31 Me. 316.

(*t*)Quman *v.* Allport, 65 Ill. 542.

(*u*)Logan *v.* Williams, 76 Ill. 182.

(*v*)Kitchen *v.* Crawford, 13 Tex. 521.

(*w*)Morrow *v.* Weed, 4 Clarke, (Ia.) 89.

As to non-resident defendants, the supreme court of Pennsylvania say: "It will be seen from this brief review that it has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts, unless in very special cases. In proceeding against them for torts, even property belonging to them cannot be reached by process, and in cases of contract nothing but the property can be affected, unless the defendant voluntarily appear and submit to the jurisdiction. We may congratulate ourselves that such has been the policy, for nothing can be more unjust than to drag a man thousands of miles, perhaps, from a distant state, and, in effect, compel him to appear and defend under the penalty of a [personal] decree or judgment against him *pro confesso*. There exists no good reason why courts of equity should be invested with a more enlarged jurisdiction against non-residents than courts of law. On the contrary, as trial by jury is a constitutional right, guarantied to strangers as to our own citizens, the inclination should be in a contrary direction. Though it be an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy between all the parties, it would be an extreme consequence from that principle to hold, as we are asked to do in this case, that any subject of property within its reach will give it jurisdiction of the person of a non-resident defendant, so as to authorize a service of process in any other state or country, and to enter a personal decree against him, if he does not appear, for the payment of money. Such must be the practical consequences, if the contention of the appellant is supported, and the order of the court of common pleas of Lycoming county held sufficient to bring the defendant into court to answer the appellant's bill. A defendant, living in a remote state or foreign country, charged, by a bill in equity, with a fraud, the damages for which are estimated and claimed to be thousands of dollars, becomes subject to this, to him, foreign tribunal, not, let it be remarked, by a voluntary appearance in a case where there has been no service, but by service of process upon him, if fifty dollars of the fruits of the alleged fraud can be followed

and ear-marked in a share of stock, a horse, or any goods or chattel. A construction which leads logically to such a result cannot be sound, and would require that the legislature should have used language making their intention unquestionable. It would be to impute to the legislature a disregard of the most important principle of all municipal law of Anglo-Saxon origin that a man shall only be liable to be called on to answer for civil wrongs in the forum of his home and the tribunal of his vicinage, though his property may be subject to the jurisdiction of the courts of the country where it may happen to be."(*x*)

§ 89. The rule is not essentially different in regard to foreign corporations, which, though having their being in the state creating them, may yet contract and be recognized in other states, and hence sue and be sued out of their own states, and also make appearance by attorney, and thus consent to the jurisdiction.(*y*) And, when it has thus appeared, a foreign corporation is as fully within and subject to the jurisdiction of the court as if it were a domestic corporation.(*z*) Yet, although a state should enforce against foreign corporations debts due its citizens in the same manner as against individuals, and, also, by all means available, protect citizens against fraud, yet this does not empower the courts to regulate the internal affairs of foreign corporations, to exercise visitorial power over them, enforce a forfeiture of their charters for misconduct, or remove directors—all which things exclusively belong to the state creating the corporation.(*a*) And also, accordingly, no equitable relief can be granted against a foreign corporation, having neither officers nor place of business in the state, for a failure to declare and pay dividends as required by their certificates of stock.(*b*) But where a corporation establishes an agency in a state it thereby becomes amenable to the laws and process of the state, where this is the legislative condition on which the agency is allowed to be established.(*c*)

(*x*)Coleman's Appeal, 75 Pa. St. 459.
(*y*)McCormick *v.* R. R. 49 N. Y. 309.
(*z*)Dart *v.* Bank, 27 Barb. 343.
(*a*)Howell *v.* R. R. 51 Barb. 383.
(*b*)Williston *v.* R. R. 13 Allen, (Mass.) 406.
(*c*)French *v.* Ins. Co. 5 McLean, 466.

And, as an individual can waive objection to the jurisdiction by appearing in the action to give notice of an appeal, and thereon cannot afterwards object to the want of jurisdiction, so it is with a corporation.(*d*) And, as it is with individuals, also, there can be no personal judgment against a foreign corporation in proceedings *in rem*, as attachment; and where goods attached are insufficient to satisfy a judgment, no suit can be sustained on the judgment for the deficiency, because the defendant, in such case, is not personally amenable to the court rendering the judgment. The judgment can operate no further than the property goes, and the property actually attached, for if there be other property, not attached, no execution can be issued against it for any deficiency.(*e*)

Where a non-resident plaintiff sues a foreign corporation, the jurisdiction cannot be maintained unless the cause of action, or the subject of it, arose or existed within the state.(*f*) And the reason is quite manifest.

§ 90. In equity, where a defendant resides within the jurisdiction of the court, this residence gives jurisdiction, even if the cause of action did not arise therein, nor the subject-matter in controversy is situated therein. So decided in New York, and it is probably the general rule.(*g*)

§ 91. It is the record party who gives jurisdiction, and the court will not look beyond him. And so, in a case where a suit was brought in equity to compel a conveyance of lands, and the plea was interposed that the defendant had no personal interest in the lands, but was only a trustee for the British government, and that this fact was known to the complainant when suit was brought, the court, on demurrer, held the plea admissible, and said: "In disposing of the question thus presented it is not necessary for us to decide whether a foreign sovereign could be sued in our courts upon a contract, entered into by such sovereign, with our own citizens; nor whether, where such a sovereign is interested in real estate

(*d*) Fee *v.* Iron Co. 13 Ohio St. 565.

(*e*) Warren Manuf. Co. *v.* Ins. Co. 2 Paine C. C. 511; Young *v.* Campbell, 5 Gil. (Ill.) 83.

(*f*) Harriott *v.* R. R. 2 Hilton, (N. Y.) 268.

(*g*) Clasen *v.* Corley, 5 Sandf. 461.

within this state, our courts can entertain a bill in equity, to which such sovereign is made a direct party, for the purpose of adjudicating the rights of various parties in the property. The question here is, whether a suit can be maintained for the adjudication of the rights of different parties to real estate situated in this state, where the party in whom the title stands on the public records, and who alone is made respondent in the suit, is a private person, but who in fact is a trustee for a foreign sovereign. On this point it is our opinion that the jurisdiction of the court is to be determined by the character of the party to the record, and is not affected by the fact, though brought upon the record by the pleadings, that the respondent is a mere nominal party, and the party represented by him, and having the real interest, is beyond the jurisdiction of court."(*h*)

But, as to a party complainant, he must claim the right for himself, and not for a third person in whose title he has no personal interest, or the court will not exercise jurisdiction.(*i*) This is certainly the general rule, but the case just cited, wherein this was decided, was disposed of by a divided court, four judges dissenting on the ground that a state court had overruled a treaty connected with the title.

And it has been held that if a suit has been commenced in a United States circuit court, by one acting only under a general or assumed authority or permission, or otherwise, he having no interest therein, either legal or equitable, the court has no personal jurisdiction; and, if such suit is commenced without authority, it cannot afterwards be ratified, even by transferring, subsequently, the interest to him in the cause of action. And so, if the alleged cause of action be an indorsed note, or a note payable to bearer, and it afterwards appears that the note was not actually negotiated to him before the suit was commenced, it ousts the jurisdiction of the court, without remedy.(*j*) So, if by means of a fictitious

(*h*)Sharps' Rifle Manuf. Co. *v.* Rowan, 34 Conn. 329. (See, also, 4 Cranch, 306; 8 Wheat. 738; 1 Pet. 122; 14 Pet. 293; 13 How. 574.)

(*i*)Henderson *v.* Tennessee, 10 How. U. S. 323.

(*j*)Vase *v.* Morton, 4 Cush. 32.

co-defendant one is drawn into the jurisdiction by process, the jurisdiction cannot be sustained unless the real defendant voluntarily appears to the action.(*k*)

But the general rule, notwithstanding these apparent exceptions, is undoubtedly that it is the relative situation of the record parties which gives or ousts jurisdiction; and where jurisdiction depends on the party, it is the party named on the record.(*l*) The exceptions noted go only to the length of requiring complainants to have rights to be enforced by the courts, and to obtain the jurisdiction by *bona fide* proceedings. And the reason is, that they invoke the jurisdiction and aid of the court. Even where the state is interested in a suit, but is not a record party defendant, the jurisdiction may be maintained, notwithstanding the rule that a state cannot, except on consent, be sued in its own courts.(*m*)

§ 92. Although it is a settled rule that a state cannot be sued in its own courts, yet, where it brings suit, as it is entitled to do, in a civil action, the defendant has the right to bring in a set-off, although this is in the nature of a cross-suit.(*n*) However, a state may consent to be sued in its own courts, as the United States has done in its court of claims.

§ 93. A consul may sue in the state courts, although not liable to be sued therein. If sued therein, however, he may waive his privilege, not only expressly, but also by prosecuting an appeal to the supreme court to reverse the decision below.(*o*)

§ 94. It is held that Indians may sue or be sued in the state courts.(*p*) But where there is a statute prohibiting this, of course it is otherwise, as in the state of New York,(*q*) where an Indian, if sued, need not plead his exemption. This regulation rests on the idea that the tribes have independent sovereignty; an idea, the prevalence of which has

(*k*) Henderson *v.* Kissam, 8 Tex. 54.

(*l*) Gill *v.* Stebbins, 2 Paine C. C. 417.

(*m*) Michigan State Bank *v.* Hastings, 1 Doug. (Ia.) 237.

(*n*) Commonwealth *v.* Todd, 9 Bush, 714.

(*o*) Koppel *v.* Heinrichs, 1 Barb. 452.

(*p*) Swartzel *v.* Rogers, 3 Kan. 377.

(*q*) Hastings *v.* Farmer, 4 Comst. 295.

wrought vast mischiefs in our governmental dealings with those tribes. Their tribal relations ought never to have been recognized as a political fact.

§ 95. In New York, the question arose whether a court has power to arrest proceedings in behalf of a non-resident plaintiff, in order to compel him to appear and be examined as a witness in the cause, at the demand of the defendant. It was held—but by a divided court—that the power did not exist, on the ground that "the power of the court is limited to the territory of the state, and in the absence of any statute undertaking to authorize a service out of the state, the service of the judge's summons, and of the notice, in the state of Massachusetts, must be deemed to have been utterly void and ineffectual."(*r*)

§ 96. Officers of the United States government are liable to be sued in the state courts except in such cases as are especially exempted by the national constitution(*s*) and acts of congress.

§ 97. The manner of actual service and return is purely statutory, and the general rule is that statutes prescribing such manner must be strictly complied with, being mandatory, and not directory; with some exceptions, however, which we have previously noticed, based on the principle that form must give way to substantial justice when necessary. Accordingly, officers are allowed to amend their returns when this can be truthfully done.

(*r*) Appleton *v.* Appleton, 50 Barb. 486.

(*s*) Crawford *v.* Waterson, 5 Flor. 474.

CHAPTER XII.

PARTIES (CONTINUED)—CONFEDERATE SOLDIERS.

§ 98. Judicial results of the civil war.

§ 98. In the preceding chapter the general rules relating to parties passed under review. But our civil war gave rise to many questions of a somewhat peculiar nature, although resolvable, in the main, by the application of settled rules. The rights of Confederate soldiers under judicial proceedings were exhaustively adjudicated in an elaborate case in Kentucky,(*a*) in which Judge Lindsay delivered

THE OPINION OF THE COURT.

"B. G. Thomas, a citizen of Kentucky, residing in the city of Lexington, some time in the early part of the year 1862, became embroiled in an unfortunate difficulty with a soldier of one of the regiments of United States troops then stationed at that place, and was finally compelled, in necessary self-defence, to kill the soldier. The act was held to be excusable by both the civil and military authorities, but the comrades of the soldier were so much incensed that they openly announced their intention to avenge his death, and made repeated attempts to execute their threats. Their officers either could not, or would not, restrain them, and it eventually became necessary that Thomas should virtually abandon his business to escape the impending danger.

"While affairs were in this condition the southern army, under General Bragg, advanced into Kentucky, and occupied the city of Lexington. During its occupation Thomas remained at home; but a day or two after it was abandoned by the retiring Confederates, and before the Federal army

(*a*)Thomas *v.* Mahone, 9 Bush, 114.

resumed possession he started south, and some time in the month of November, 1862, he, being then in the state of Tennessee, joined the Confederate army.

"On the fifth of November, 1862, Rufus Lisle, a creditor of Thomas, brought his suit in the Fayette circuit court, and sued out orders of attachment against his property, on the grounds that he had left the county of his residence for the purpose of joining, and had joined and entered into, and was then in, the service of the so-called Confederate States, and that he had removed, and was about to remove, a material part of his property out of Kentucky, not leaving enough to pay his debts. The real and personal property of Thomas, situated or found in Fayette county, was shortly thereafter seized by the sheriff.

"On the fourteenth of December, James and Mansfield also filed their suit to enforce the collection of certain notes held by them as assignees of Jackson, the payment of which was secured by a vendor's lien on a tract of about one hundred acres of land, situated near the city of Lexington, and purchased by Thomas from said Jackson. They also procured an order of attachment upon the alleged ground that their debtor had voluntarily left the county of his residence and gone within the lines of the Confederate army, and there voluntarily remained for more than thirty days. In both these suits the land in question was attached, and in each of them orders of warning against the absent defendant were made.

"In February, 1863, the two suits were consolidated and a judgment rendered, directing, amongst other things, the sale of so much of the tract of land already mentioned as might be necessary, the proceeds therefrom to be applied, first, to the satisfaction of the lien notes held by James and Mansfield, and then to the payment of such balance as might remain unpaid on the claim of Lisle after the sale of the personal property. Under this judgment the entire tract was sold, the appellee, Mahone, purchasing it for the sum of $10,613. The sale was confirmed, and with the sanction and approval of the court a conveyance to Mahone

was executed by the sheriff (who acted as the court's commissioner) on the seventeenth of June, 1864.

"Shortly after the termination of the civil war Thomas returned to his home, and on the twenty-first of April, 1870, instituted this suit, seeking to have the judgment and sale, under which Mahone claims title to the land, declared void, the land restored to his possession, and judgment for such amount as might be found due him after an account for rents and improvements should be rendered. He alleges that at the time of the proceedings resulting in the sale of his land he was kept away from his home, and prevented from making defence, by the lawless condition of the country, and the inability of the civil and disinclination of the military authorities to protect him from threatened assassination; that Mahone, the purchaser of his land, had contributed to bring about the condition of lawlessness then prevailing, and was thereby indirectly responsible for his (appellant's) enforced absence; that the levies of the orders of attachment were, as matter of law, void, because of the failure of the officer to comply with the law in making them, and because the land was at the time in the actual possession of the military authorities of the United States, and, therefore, not subject to seizure by the officer of the state court; that the military authorities intimidated bidders, and prevented competition at the sale; that this fact was a matter of public notoriety, and was well known to the purchaser, who took advantage of the circumstance to bid in the land at greatly less than its actual value; that the premises were in the actual possession of the military when sold; and, finally, that the judgment was void for want of jurisdiction in the court—it not having power, because of its belligerent character, and by reason of his absence within the lines of a hostile government, to bring him before or into court by constructive service.

"No appeal was prosecuted from the original judgment, confirming the sale of the land, nor did appellant, within five years after either of these judgments, enter his appearance, and move for a retrial of the issues settled by either, as

authorized by section 445 of the Civil Code of Practice. Nor is this action in the nature of a bill of review. It is, in every essential, a collateral proceeding, seeking no correction of errors, and asking no relief, except that the original proceedings shall be absolutely ignored.(*b*) Such being the case, it is not necessary that we should direct our attention to any of the grounds set up in the petition, which will not of themselves, or in connection with others, authorize us to conclude that the judgment or the sale, or both, were and are utterly null and void.

"That, in 1862, the civil authorities of Fayette county were not able to protect appellant from the soldiery, and that the military officers did not afford him protection, is sufficiently proved; yet the hostility toward him seems not to have extended beyond the friends and comrades of the man who had been killed, and it is certain he remained at home, notwithstanding the apprehended danger, until the command to which these soldiers belonged was compelled to withdraw from Lexington by the advance of the southern troops. He started south at a time when he was in no immediate danger, and when he had no sufficient reason to anticipate the return to Lexington of the hostile soldiers, if, indeed, they ever did return. But, even if prudence dictated that he should secure his personal safety by leaving his home, he could have secured this security as well within as without the Federal lines. We are constrained to conclude that while he would have preferred to remain at home, if he could have been assured that he would be permitted to do so without further molestation, it was his sympathy for the southern cause, and not fear of the soldiery, that induced him to go south.

"Appellant's absence within the Confederate lines was not that character of enforced absence which, in the case of *Dean* v. *Nelson*, 10 Wall. 158, was held by the supreme court of the United States to render void the order of publication

(*b*)Certainly this is an inadvertent declaration of the court. How can that be a "collateral proceeding," which is a direct assault on the validity of the judgments, and has no other view than to set aside the judgments and all proceedings under them? I cannot see.

by which the civil commission, sitting at Memphis, attempted to acquire jurisdiction of the persons of Nelson and his wife. They had been expelled from the Union lines by the military commander, and were not allowed to return, and, therefore, could not have obeyed the order of publication, even if it had been brought to their notice.

"There is nothing in the record before us authorizing the conclusion that Mahone was responsible for the lawlessness complained of by Thomas, nor that he personally contributed to bring about that disregard by the military of law and order which it is insisted prevailed in Lexington, in 1862, and afterwards. This court cannot recognize and act upon the idea that there is a general equity, growing out of the disturbed condition of Kentucky during the late civil war, which converts into trustees those who purchased property at judicial sales during that period. To uphold such a doctrine would be to practically reopen all the litigation settled by the courts during that unhappy epoch of our country's history.

* * * "We are of opinion that the premises were subject to attachment notwithstanding the Federal government had upon them at the time a military encampment. The occupation of the military was merely temporary. The general government asserted no claim to the land actually occupied, and had done nothing indicative of an intention to seize and permanently hold the premises in the furtherance of military operations. Although the officer of the state could not force his way within the guard-lines of a military encampment, yet the occupation of the army was not so exclusive as to prevent him from doing such acts as the law required to be done to put the court in constructive possession of the land, and this was all that was necessary to perfect the attachment liens. If it is true, as charged, that Warner, to whom the deputy sheriff delivered copies of the orders of attachment, was a Federal officer, it is equally clear that he recognized the right of the deputy to make the levies, and, it seems from the testimony of appellant's witness, (Merrill,) held possession of the dwelling under the officer of the state

court, and surrendered it to the officer at the decretal sale. The seizure by the state court did not interfere with the encampment of the Federal troops and the concurrent possession of the state court, and the troops were in no wise inconsistent with the rights of either. We do not regard the temporary encampment established on appellant's farm as such a possession by the Federal government as to compel the process of the state court to pause until the encampment was discontinued. There is no analogy between the facts involved in this and in the cases of *Harris* v. *Denny*, 3 Pet. 292, and *Amy* v. *Supervisors*, 11 Wall. 138.

* * * "The only remaining questions necessary to be noticed are—*First*, could the Fayette circuit court entertain jurisdiction of, and render judgment in, an action prosecuted against Thomas while he was a soldier in the Confederate States army; and, *second*, did the orders of warning sued out against him have the legal effect of constructive service of process?

"It does not follow, because appellant was at the time a soldier in the army of a belligerent power, and that all unlicensed communication with him by the people of the states adhering to the Federal Union was inhibited, not only by the laws of war, but by express statute, that resident creditors might not sue him in the courts of this state, and subject to the payment of their debts such of his property as might be found within the local jurisdiction of the court in which he was sued. The right of resident creditors to so proceed against parties indebted to them, residing within the lines of this hostile power, and held to be public enemies by reason of their participation in the southern movement, was recognized by the Federal congress in the act of March 3, 1863, (2 Brightley's Digest, 1238,) providing for the seizure and confiscation of the property of such persons. In the case of *Crutcher* v. *Herd and Wife*, 4 Bush. 362, this court held that a proceeding by a Kentucky creditor to enforce his lien on land situated in this state was not interdicted, notwithstanding the existence of the war, and the residence of the debtor within the Confederate lines. And in the case of *Burnam* v.

Commonwealth, 1 Duvall, 210, an act of the legislature authorizing suits against the members of the provisional government of Kentucky, for the recovery of public revenues seized by them or those claiming to act under them, and the rendition of personal judgments upon constructive service, was declared to be liable to no constitutional objection, although it was applied to persons whose absence from the state within the Confederate lines was as notorious as was the additional fact that they were engaged, when the act was passed, (March 15, 1862,) in giving active aid and encouragement to the hostile government of the south. If the state could authorize such proceedings in its own behalf, without contravening the war policy of the general government, or infringing upon its war powers under the Federal constitution, it is clear that it could provide the same, or similar remedies, for its citizens. Such has all the while been the opinion of this court, as is manifested by its action in the cases. 2 Duvall. 288, 480; 1 Bush. 467; 2 Bush. 201; 4 Bush. 498, and numerous others. Even if a citizen of Kentucky, who joined the Confederate army, became thereby invested with the character of an alien enemy, as is insisted by appellant, it is by no means clear that his property in Kentucky could not be lawfully seized by its courts, and subjected to the payment of his debts. The supreme court of the United States, upon the authority of a case in the English court of exchequer, cited in the case of *Albrecht* v. *Sussman*, 2 Vesey & Beavens, 324, and the doctrine enunciated in Bacon's Abridgment, title 'Alien, D,' and in the 53d section of Story's Equity Pleadings, decides, that 'whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued.' *McVeigh* v. *U. S.*, 11 Wall. 259. The jurisdiction of the courts of Tennessee to sell the lands of one of her citizens, who had left his home and become a participant in the war being waged against the United States by the Confederates, was directly called in question in the case of *Ludlow* v. *Ramsay*, 11 Wall. 581, and upheld by the supreme court.

"The judgment in the case of *Dean* v. *Nelson* was declared

void because the defendants were not permitted by the military commander to return to Memphis and make defence. Under the circumstances, the order of publication was held to be an idle form, not on account of Nelson and his wife being public enemies, and therefore not liable to be sued, but because the military would neither allow them to see nor to obey it. So far as the civil or military authorities in Kentucky were concerned, Thomas could have returned and resumed his status as a non-combatant citizen at any time; but he did not choose to do so upon the terms prescribed. We are satisfied that the power of the courts of the states adhering to the Federal Union to entertain jurisdiction of suits against such of their citizens as joined in the Confederate army is upheld by the decided weight of authority.

* * * "As persons serving in the Confederate army, or adhering to the Confederate cause, could be lawfully sued, the constructive notice necessary to give the courts jurisdiction to render judgments in suits instituted against them was a question of legislative discretion, and not of power. As the act [authorizing constructive service] was intended to apply to belligerents, to persons who were within the lines of the public enemy, the fact that attorneys appointed to defend could not lawfully communicate with them does not render void the judgments in such actions.

* * * "The warning orders, resulting in the judgments by virtue of which appellant's land was sold, were based upon the alleged ground that he had departed from the county of his residence and voluntarily gone and continued within the military lines of the Confederate States. The evidence establishes the truth of these allegations. It does not matter that Thomas remained at home until the advance of Bragg's troops brought him within the lines of the invading army. He continued a non-combatant citizen of Kentucky until the confederates left Lexington on their retreat from the state. Whether his remaining at home until the day after the southern troops had retired brought him again within the advancing lines of the Federals, or whether his home continued constructively within the southern lines until the Union troops actually re-

occupied the country, we do not deem it necessary to decide. He left his home when there was no public enemy present to interfere with the execution of the process of the courts, and, by voluntarily continuing absent and within the hostile lines, he forced his creditors to resort to the remedies provided by a law enacted long before he was in anywise connected with the Confederate army. His action brought him within the letter as well as the spirit of the law, construing it strictly and confining its operations within the narrow limits insisted upon by his learned counsel."

I have given this opinion almost wholly because of its containing a pretty full summary of the authorities on the doctrine involved. When we come to treat specifically of the United States courts, we shall have some other questions in relation to parties to consider, as also when treating of specific jurisdictions in the state courts.*

*It may here be remarked that some states, as Kansas, Nebraska, and New York, have provided for the actual service of a summons in another state precisely as it is served within the state. But I do not think one state can be authorized thus to reach into another jurisdiction; although provision may be made, as in Illinois, for serving a summons on a defendant in another *county*, in cases where another joint defendant is in the county where the suit is instituted. See Wallace *v.* Cox, 71 Ill. 548. In Iowa notice may be given to a non-resident by serving a copy of a *judgment* rendered against him; and then the non-resident may apply for a new trial within six months. But the judgment cannot be a personal one. In some states copies of bills in chancery may be served in actions *in rem*, and then the decree will be at once conclusive as to the property involved. But personal equity proceedings cannot be established in that way, I judge.

CHAPTER XIII.

JURISDICTION DETERMINED BY VALUES.

§ 99. Various limitations.
100. How limitation by value is estimated.
101. Unbalanced account.
102. Remitting excess.
103. Consolidation of claims.
104. Value in ejectment suits.
105. *Ad damnum* clause.
106. Values in crimes and torts.
107. No waiver as to jurisdiction measured by value.
108. Set-offs.
109. Aggregating claims in declaration.
110. Various mortgage claims.
111. Purchase price of property involved is not the standard.

§ 99. There are many ways in which the jurisdiction of even superior and appellate courts may be limited, whether in regard to subject-matter, as law, equity, admiralty, probate, appeals, original proceedings, civil or criminal cases, special subjects, etc., or in regard to other matters, as to single judges, or courts having more than one judge, special qualifications of judges, territorial limits, particular times and modes, particular classes of persons as parties, modes of procedure, etc.(*a*) A limitation by the amount in controversy is a common one, and is the subject of the current chapter. It may prevail in equity courts as well as in law courts. *Gamber* v. *Halben*, 5 Mich. 335. And so, where an action is brought to enjoin a judgment, the amount of the judgment is the standard. *Cushing* v. *Sambold*, 30 La. An. 426.

§ 100. The first inquiry is as to the mode of *estimating* the amount prescribed as the statutory limitation. It is the gen-

(*a*)See 6 Foster, (N. H.) 240, and cases there referred to.

eral rule that inasmuch as the verdict is both unknown at the commencement of the suit, and cannot be known until after jurisdiction has been taken, the amount actually rendered therein cannot be a proper standard, as, for example, where the limitation is *minimum*, requiring the court to refuse cognizance of sums *below* a particular amount, and the verdict renders less than the amount, or extinguishes the plaintiff's claim altogether, it would surely be a practical absurdity to relinquish jurisdiction thereupon. It may, of course, determine the controversy, or the respective rights of the parties, but not what the amount of the original controversy was, unless it be a finding on a plea of abatement as to the jurisdiction.(*b*) However, it must not on verdict appear that the amount was *fraudulently laid* in order to give jurisdiction; and, in North Carolina, it has been held that a smaller verdict is *prima facie* evidence of an evasion as to jurisdiction, to be overcome only by an affidavit of good faith by the plaintiff.(*c*) And it seems that, in an action on a book account, proof that the debtor side of the account is less than the requisite amount will oust the jurisdiction absolutely. So held in Vermont,(*d*) perhaps on the ground of a conclusive presumption of fraud. An attempted evasion will vitiate when it appears. *Fenn* v. *Harrington*, 54 Miss. 733. But where the claim is made in good faith, it is the amount set up in the declaration which determines the jurisdiction.(*e*) *Abney* v.

(*b*)Hilman *v.* Martin, 2 Pike, (Ark.) 170; Tarbox *v.* Kennan, 3 Tex. 8; Sherwood *v.* Douthit, 6 Tex. 224; Ellett *v.* Powers, 8 Tex. 113; Griffin, Adm'r, *v.* Lomer, 37 Miss. 458; Pennebecker *v.* McDougal, 48 Cal. 161.

In Vermont it is held that the *belief* of the plaintiff may be the standard as to a minimum amount, (Field *v.* Randall, 51 Vt. 33;) although the amount must always be ascertainable, and jurisdiction will not be assumed on a mere inference. Wade *v.* Loudon, 30 La. An. 660.

Yet it is held in Alabama that a bill is not demurrable because it does not show affirmatively a jurisdictional amount. The fact of a defect in the amount may be set up by answer or plea. Abraham *v.* Hall, 59 Ala. 386.

(*c*)Johnson *v.* Francis, 13 Ired. 465.

(*d*)Paul *v.* Benton, 32 Vt. 155.

(*e*)Muns *v.* Dupont, 2 Wash C. C. 463; 4 J. J. Marshall, (Ky.) 242; Singleton *v.* Madison, 1 Bibb. 343; Wightman *v.* Carlisle, 14 Vt. 298; Odell *v.* Culbert, 9 Watts & Serg. (Pa.) 66; Hapgood *v.* Doherty, 8 Gray, 374; Murrill *v.* Butler, 18 Mich. 291; Solomon *v.* Reese, 34 Cal. 33 (overruling Votan *v.* Reese, 20 Cal. 90.)

Whitted, 28 La. An. 818. And hence it is a matter of judicial notice. *Dartez* v. *Lege*, Id. 640. But in New York, as affecting the question of costs, the recovery is the standard of estimation, and a plaintiff is not allowed to oust jurisdiction by demanding an excessive sum, so as to entitle himself to full costs in a superior court on the recovery of a small sum. *Powers* v. *Gross*, 66 N. Y. 646. And this applies to a contest for an office; the salary gives the jurisdiction in some states. *State ex rel.* v. *De Vargas*, 28 La. An. 342.

An unintentional mistake in figures in an account will not oust jurisdiction, even though the correction of the error discovered on the trial reduces the claim below the jurisdictional standard. "In such cases the jurisdiction of the court would be no more affected by such error than it would be by the disallowance, on trial, of a portion of a claim, which, in the aggregate, was within the jurisdiction of the court, for any other cause or reason. The criterion is, the amount of the matter in demand, as distinguished from the amount recovered."(*f*)

Whether interest, or damages, or costs must be counted in when estimating the amount of the demand, has been variantly decided; but it is now settled, doubtless, that interest is to be computed on a certain claim, but not costs. Damages, however, are certainly to be computed, these being part of the demand.(*g*) However, interest accruing after action begun cannot be taken into the estimate,(*h*) nor indeed any fact strictly subsequent, as we have seen in a previous chapter. Damages may be disregarded in California. 22 Cal. 468.

§ 101. Where an account is unbalanced, the amount is the debit side. But where balanced, it is the amount due on the settlement which determines the jurisdiction.(*i*) And the

(*f*)Scott *v.* Moore, 41 Vt. 210.

(*g*)See Fisher *v.* Hall, 1 Pike, (Ark.) 275; Grant *v.* Lams, 7 Mon. (Ky.) 221; Inhab., etc., v. Weir, 9 Ind. 22; Solomon *v.* Reese, 34 Cal. 32, as to excluding interest, etc., and Paul *v.* Arnold, 12 Ind. 198; Schlenker *v.* Taliaferro, 20 La. An. 565; Butler *v.* Wagner, 35 Wis. 55; Van Guisen *v.* Van Houten, 2 South, (N. J.) 822, *contra*, costs not estimated; Oglesby *v.* Helm, 26 La. An. 61.

(*h*)Trego *v.* Lewis, 58 Pa. St. 469.

(*i*)Willard *v.* Collamer, 34 Vt. 597.

principle is the same with regard to payments made on a definite claim. The balance settles the question of jurisdiction—the payment being made before suit, and with reference to *minimum* as well as *maximum* limitations.(*j*)

§ 102. There is no good reason why a plaintiff may not remit any excess over a jurisdictional amount in order to bring a claim within the reach of a court. And so, although one has no right to divide up a book account and sue upon it by piecemeal,* yet he may remit by credit.(*k*)† And even an accidental remitting will save the jurisdiction and operate as a credit for the excess.(*l*) And where a note in suit is filed with the declaration, and the debt thereon is beyond the jurisdiction, but the declaration only claims a competent amount, the jurisdiction may be sustained, under a statute assigning the amount "claimed" as the basis of the authority of the court to adjudicate.(*m*)

§ 103. As to the consolidation of claims in order to confer jurisdiction, the matter has been variantly decided. It is very emphatically condemned by some courts, but allowed by others. And it seems quite reasonable where there are several claims which, according to the rules of pleading, can be properly consolidated in a suit by including them in the same declaration, to combine the amounts, as to the question

(*j*) Watts *v.* Harding, 5 Tex. 388; Ansley *v.* Alderman, Phill. (N. C.) 216.

*That is, the same account cannot be divided. But different accounts, or different acceptances, being distinct, can be separately sued on. Frank *v.* Lee, 51 Miss. 101. A bill of goods purchased in one day is entire. Magruder *v.* Randolph, 77 N. C. 79.

(*k*) Fuller *v.* Sparks, 39 Tex. 136.

†So, a plaintiff may waive interest to reduce the sum claimed to the jurisdictional limit. Wright *v.* Smith, 76 Ill. 216. And I am not aware of any good reason for not allowing him to remit part of the principal likewise, although the Pennsylvania court pointedly and emphatically forbids it. Peter *v.* Schlosser, 81 Pa. St. 439. But if interest has accrued after suit commenced, so as to carry it beyond jurisdiction, the jurisdiction is not ousted thereby, and judgment can be entered for the whole amount. Bell *v.* Ayres, 44 Conn. 35. Georgia forbids an optional credit. Cox *v.* Stanton, 58 Ga. 406.

(*l*) Alexander *v.* Thompson, 38 Tex. 535.

(*m*) Wilhelms *v.* Noble, 36 Ga. 601. For the right to remit see Ramsey *v.* Wardens, 1 Bay, (S. C.) 182; Hempler *v.* Schneider, 17 Mo. 260; Matlock *v.* Lane, 32 Mo. 264; Litchfield *v.* Daniels, 1 Col. T. 268.

of jurisdiction.(*n*) But it has been held that such a "conclusion, if fully carried out or pushed to its legitimate consequence, would enable a court, by construction to change the entire jurisdiction of the different legal tribunals."(*o*) Why this declaration is not a *non sequitur*, however, I am unable to see. "It is the whole amount of the several sums demanded in the declaration, and not the amount of any one particular item, that is to be considered in respect to the jurisdiction," says the supreme court of Indiana;(*p*) and is it not so, inevitably? It is true policy, at any rate, to consolidate when possible. *Symmes* v. *Strong*, 28 N. J. Eq. 131.

The supreme court of Connecticut hold that several claims may be combined, provided they are properly combined in a single count of the declaration, but not where the distinct claims are separately set out in different counts. There seems to be good reason for this standard of judging(*q*) in one respect. And yet it is impracticable on the rule that the amount claimed in the *ad damnum* is the standard, which consists of the aggregate amount of the entire series of claims.(*r*) Distinct claims against different persons are not to be combined. *Broadwell* v. *Smith*, 28 La. An. 172.

It is evident, likewise, that separate *suits* in a court below cannot be combined so as to give jurisdiction to an appellate court.(*s*)

(*n*)Laugham *v.* Boggs, 1 Mo. 474.

But, if contempt proceedings are instituted, the amount in controversy in the case wherein the contempt occurred cannot be used to invoke the jurisdiction of the appellate court; and it is held an allegation that the prisoner will suffer damages to a larger amount than the jurisdiction amount will not give the right of appeal. Wood's Case, 30 La. An. 672.

(*o*)Berry *v.* Linton, 1 Pike, (Ark.) 256.

(*p*)State Bank *v.* Brooks, 4 Blackf. 486.

(*q*)Main *v.* School District, 18 Conn. 218; Dennison *v.* Dennison, 16 Conn. 35; Nichols *v.* Hastings, 35 Conn. 548.

(*r*)Hapgood *v.* Doherty, 8 Gray, 373; Ladd *v.* Kimball, 12 Gray, 139; Ashuelot Bank *v.* Pearson, 14 Gray, 521.

(*s*)Collins *v.* Draining Co., 26 La. An. 277.

And if plaintiffs unite in a suit it is not the aggregate of their claims, but the amount of each claim severally, that gives jurisdiction. Lavieux *v.* Company, 30 La. An. 609.

And particularly where a creditor siezes property, claiming the whole, which is more than the jurisdic-

In Mississippi, where separate suits were brought before *different justices of the peace* on distinct promissory notes, which combined amounted to more than the sum to which the jurisdiction of a justice of the peace was limited, and the defendant appealed, the suits were dismissed for want of jurisdiction below.(*t*) The court said: "Suppose both suits had been brought before the same justice, could he have entertained jurisdiction of the causes of action? The constitution declares that the jurisdiction of justices of the peace shall be limited to causes in which the principal of the amount in controversy shall not exceed fifty dollars. The principal sum of these notes is ninety-seven dollars and sixty cents, and this was the amount in controversy, because it was what plaintiff claimed and what the defendant refused to pay. It is, then, clear that the claim was one of which a justice of the peace could take no jurisdiction whatever, and it is difficult to see how the powers of two justices could be made greater than those of one in regard to the same controversy." Nevertheless, I am quite unable to see how this case can be sustained on principle. In the absence of a statute requiring the consolidation of similar claims sued on, the acts of the parties should determine the nature of the controversy in such case. Why were separate notes given but that they were to be regarded as distinct claims? A book account or a single note is not divisible; but how can one be compelled to sue on all notes in his possession at once; or, suing, why may he not treat distinct promissory notes as distinct claims, and so separately collectible? I suppose statutes of consolidation only compel the combination of different suits pending in the same forum. The nature of the claims, the action of the parties in establishing them in distinction, and the rights of the holder, would seem to justify treating throughout, as distinct and separable claims, what was so made separable and distinct at the beginning by the acts of the parties in

tional value, and another antagonist creditor, claims less than the jurisdictional amount necessary to an appeal, the latter cannot appeal. Pickard *v.* Wade, 30 La. An. 623.

(*t*) Scofield *v.* Parsons, 26 Miss. 403.

the execution of different promissory notes or other choses in action.

In actions for negligence, it has been held that the immediate consequences of a *single act* of negligence may be combined, but not the damages resulting from several acts; as, for example, where several animals are killed at one time by a railroad train, the claim for damages will be considered a unity, but claims for damages in killing animals at several different times cannot be consolidated.(*u*)

§ 104. In ejectment, it has been held that the value of the lands in controversy determines the jurisdiction.(*v*) But where property is levied on in attachment, it is the amount of the claim and not the value of the property which constitutes the standard.(*w*) Where the ejectment is by a landlord against a tenant, it is held to be the value of the lease which gives jurisdiction to the court.(*x*) Under the penalty of a bond, the amount of the penalty is the limitation in Pennsylvania.(*y*) But, in Connecticut, the rule seems to be the other way, as decided in a case where a "receipt" was held as security for the delivery of property. The court said: "Though the receipt was absolute in its terms, yet it was nevertheless contingent by operation of law, and it was accordingly held as a security only for the actual value of the property which had come into the receiptor's hands. The five hundred dollars, therefore, was in the nature of a penalty to secure the return of the property, or the payment of its value. As such, it was a security only for the value of the property, which value alone, when shown, could be recovered,

(*u*)R. R. *v.* Elliott, 20 Ind. 430; R. R. *v.* Litton, 27 Ind. 71.

(*v*)State *v.* Smith, 14 Wis. 567.

And so in Michigan, where title or possession of land is involved the value of the land gives the jurisdiction. Fuller *v.* Grand Rapids, 40 Mich. 395.

But, in Connecticut, it is held, *contra*, that it is not necessary for a declaration to state the value of the land in ejectment. And if it does not do so no implication is indulged against the jurisdiction. And even if the proof shows the value of the land to be beyond the jurisdiction in amount, the court will not be ousted of its jurisdiction thereby. Sullivan *v.* Vail, 42 Conn. 90.

(*w*)Hoppe *v.* Byers, 39 Ia. 573.

(*x*)Ellis *v.* Silverstein, 26 La. An. 47.

(*y*)Forrester *v.* Alexander, 4 Watts & Serg. 312.

and it was on this ground that only the sum of one hundred dollars was recovered in the case. This being so, it follows, of course, that the five hundred dollars was not a debt to that amount on the non-delivery of the property, but only to the amount of the value of the property; which, being less than five hundred dollars, the city court had jurisdiction of the subject-matter."(*z*)*

§ 105. Where the *ad damnum* exceeds the jurisdiction, it is held that the jurisdiction is excluded, even although the actual amount in controversy is not beyond the prescribed limit.(*a*) But where there is no amount named in the general conclusion, or *ad damnum* clause, it is held, in Indiana, that the aggregate amounts claimed in all the counts may be taken.(*b*)†

§ 106. In matters of crimes, misdemeanors, and torts, the principle of limitation by amount is essentially the same. Thus, in larceny, the jurisdiction is to be determined by the value of the property claimed in the indictment, and not by that assigned in the verdict of the jury,(*c*) although, of course, the penalty may be guided by the latter. But when a court has only jurisdiction in misdemeanors where the fine does not exceed five hundred dollars, it cannot take cognizance of

(*z*)Fowler *v.* Bishop, 32 Conn. 206.

*In Connecticut a statute provides that the debt secured in a mortgage shall determine the jurisdiction in foreclosure in certain courts; and even if the foreclosure is for the interest only, which is less than the jurisdictional limit as to amount, the statute applies. Stone *v.* Platt, 41 Conn. 285. And, on the other hand, if the amount secured is only five hundred dollars, the courts have jurisdiction although the added interest takes the amount beyond the jurisdictional limit. Boyle *v.* Rice, Id. 418.

(*a*)Ashuelot Bank *v.* Pearson, 14 Gray, 521.

(*b*)Culley *v.* Laybrook, 8 Ind. 286.

†The *ad damnum* clause governs in Connecticut, unless it clearly appears on the face of the declaration or the bill of particulars that the debt or damage actually claimed is of necessity too small to confer jurisdiction. Hunt *v.* Rockwell, 41 Conn. 51. In Massachusetts the *ad damnum* clause absolutely governs, without regard to the amount claimed in the body of the declaration, or proved at the trial. Clay *v.* Barlow, 123 Mass. 378.

(*c*)State *v.* Church, 8 Clarke, (Ia.) 258.

an offence where the fine may be five hundred dollars, and, in addition, the offender may be declared infamous, and incapable of voting or holding office.(*d*)

In trespass to real estate the amount demanded limits the power of the court.(*e*) And so, if a demand exceeds the authority of a justice, a verdict for less than the limitation on the justice's court will not save the jurisdiction. But in Louisiana it is the value of the land that controls. *Derbies* v. *Romero,* 28 La. An. 644.

In replevin, if the property is distrained for rent (or levied on under execution) the amount claimed is the standard; but where it is in the nature of detinue, to try the right of property, the value of the property furnishes the rule.(*f*)

In a continuing trespass, day after day, under a statute prescribing a fine for the continuance, as, for example, a fine of one dollar for every twenty-four hours a fence shall continue across a public road, the demand for the whole time determines the jurisdiction, because the offence is indivisible.(*g*)

§ 107. As the limiting amount is of the subject-matter, and not pertaining merely to a privilege of defendant, it follows that it cannot be waived. But when it becomes apparent that the jurisdiction has been exceeded, it is the duty of the court to dismiss *sua sponte*, without objection by the defendant,(*h*) and the rendering of a judgment is actionable to the defendant.(*i*)

Yet, as in other cases, where there is a well-founded doubt as to the amount, the jurisdiction will be sustained.(*j*) And a

(*d*)Flynn *v.* Commonwealth, 2 Bush. 593.

(*e*)Linduff *v.* Plank-road Co., 14 Ohio St., 336.

(*f*)Peyton *v.* Robertson, 9 Wheat. 528.

(*g*)Commonwealth *v.* Mills, 6 Bush. 296.

And in the latter case if the damages assessed for the wrongful taking and detention, added to the value of the property, exceed the jurisdiction, this will not oust the jurisdiction. Higgins *v.* Deloach, 54 Miss. 498.

(*h*)Gamber *v.* Holben, 5 Mich. 333.

(*i*)Morgan *v.* Allen, 5 Ired. 156.

(*j*)Henry *v.* Tilson, 17 Vt. 484.

manifest error will be allowed to be corrected in order to save jurisdiction, (*k*) if the amendment is made before trial.(*l*)

Although, in doubtful cases, all intendments are in favor of the jurisdiction, yet it is a proper ground for dismissing a case, on motion, that the declaration does not show, or else a promissory note on the trial, that the sum due is within the jurisdiction.(*m*) And if the plaintiff claims to bring down the amount below the limitation by payments not indorsed on the note, the payments must be set out in the declaration.(*m*)

In Vermont, however, where these points were decided, jurisdiction has been made to depend on the *proof*, not only in book accounts, but in trover, in *assumpsit*, and in trespass *de bonis asportatis*,(*m*) which is not the general rule.

A want of jurisdiction as to amount is not cured by a transfer to another court under the provisions of a statute providing for such transfer,(*n*) though such court would otherwise have jurisdiction.*

§ 108. As to set-offs, where a statute allows a judgment for an excess, such excess is taken to be the sum in dispute; as, for example, where a suit was for one thousand dollars, and a set-off was brought in for four thousand dollars, and judgment for the balance, it was held that the amount in dispute was three thousand dollars, and, therefore, that the supreme court of the United States had jurisdiction of an appeal.(*o*)

In Kentucky it appears that where a plaintiff *demands* a sum which is *reduced below the limits*, by set-off or counter claim, the appellate court may take jurisdiction notwithstanding the smallness of the judgment; but if the demand is

(*k*)Temple *v.* Bradley, 14 Vt. 257.

(*l*)Whitney *v.* Sears, 16 Vt. 590.

(*m*)Perkins *v.* Pick, 12 Vt. 596.

(*n*)Parker *v.* Shropshire, 26 La. An. 38.

*And a party is not allowed to remit in an appellate court so as to give jurisdiction. McDonald *v.* Dickens, 58 Ga. 77. It is a settled principle that an appeal cannot confer jurisdiction, in any way, whereof the lower court had none, even if the case is otherwise within the jurisdiction of the appellate court. Billingsly *v.* State, 3 Tex. Ct. of App. 686.

(*o*)Ryan *v.* Bindley, 1 Wall. 67.

thus reduced by *verdict*, there is no appeal, on the ground that the sum in controversy is the judgment rendered, when the case is brought up for review(*p*)—a ground sustained by the United States supreme court in part, except that if the *plaintiff* appeals his original claim is the sum in dispute.(*q*)

In California, where a plaintiff claimed two hundred dollars, and an off-set was pleaded of one hundred and twenty-five dollars, and judgment was given for plaintiff for eighty-six dollars, from which the plaintiff appealed, the supreme court refused to entertain jurisdiction, on the ground that the sum in dispute was less than two hundred dollars.(*r*) But, on principle, is not the rule in the United States court the better one? When a plaintiff appeals is it not because he claims he has been wronged by the judgment as to his demand? Therefore, ought not the demand to be the criterion?

Where a set-off is interposed, and the excess over and above the plaintiff's demand exceeds the amount of jurisdiction, the set-off should be rejected.(*s*) But the excess may be remitted over and above the jurisdictional amount.(*t*)

§ 109. In Indiana, where there is no general sum stated in the conclusion of a declaration, the aggregate of the different counts may be taken as the value of the claim.(*u*)

§ 110. But where there are several mortgagees brought before the court in a suit to foreclose, entered by a senior mortgagee, and the aggregate claims are beyond the jurisdiction, it is held that this does not oust the jurisdiction of the court, the case being similar to that of an attachment where separate creditors file their respective claims.(*v*)

§ 111. The allegations of a declaration are not annulled by proof of the purchase price of the property in controversy being less than the limitation value.(*w*)

(*p*)Tipton *v.* Chambers, 1 Met. (Ky.) 568; Williams *v.* Wilton, 5 Dana, 597.

(*q*)Gordon *v.* Ogden, 3 Pet. 33; Smith *v.* Honey, 3 Pet. 469.

(*r*)Simmons *v.* Brainard, 14 Cal. 278.

(*s*)Murphy *v.* Evans, 11 Ind. 518.

(*t*)Pate *v.* Shafer, 19 Ind. 174.

(*u*)Culley *v.* Laybrook, 8 Ind. 286.

(*v*)Mack *v.* Grover, 12 Ind. 255.

(*w*)Oakey *v.* Aiken, 12 La. An. 11.

And so, on the other hand, if a declaration lays an amount within the jurisdiction, but the proof shows a larger amount, the suit will be sustained provided the verdict is only for the amount within the jurisdiction; and if there are two counts, and the proof shows one of them to be beyond the jurisdiction, the suit may be maintained on the other, the one in excess being considered merely auxiliary.(*x*) And so in an action before a justice of the peace.(*y*)

(*x*) Cotton Press Co. *v.* Chevelier, 56 Ga. 494.

(*y*) Ehey *v.* Engle, 1 Wash. Ter. 72.

CHAPTER XIV.

VENUE.

§ 112. Meaning of term "Venue."
113. General jurisdiction of state.
114. Suits between non-residents.
115. Torts committed without the jurisdiction.
116. Venue in regard to lands.
117. Venue in regard to counties.
118. Process in another county.
119. Jurisdiction by levy on land.
120. Venue in regard to boundaries.
121. Place of holding court.

§ 112. The term "Venue," in relation to actions brought, means simply the place of trial. As to what are styled local actions—such, for example, as an interest in lands—usually the venue is the district or the county, as the case may be, where the subject-matter lies. But, in general, transitory actions may be tried wherever personal service can be made on the defendant;* and these may be either *ex contractu* or *ex delicto*, with exceptions to be noted below.

§ 113. As to the general jurisdiction of the courts of a state this is, of course, co-extensive with its sovereignty, which is limited only by the territory of the state, and attaches

*A party must have an opportunity to be heard as to his rights in a personal action, and even where the proceedings are *in rem* there must be some kind of notice, so that, as far as possible, the opportunity may be given the owner to appear and defend. Windsor *v.* McVeigh, 93 U. S. 274. In a personal action there must be personal service, or a personal appearance, or appearance by an attorney. And where defendants indorsed on the back of a complaint, in vacation, "we hereby enter an appearance to the foregoing action, and waive the issuing and service of process," this was held not to constitute an appearance, and, there being no service of process, no personal judgment could be entered. McCormack *v.* Bank, 53 Ind. 466. While a non-resident may appear by an attorney, and thus, in all re-

to all the property and persons within the limits thereof, although to be so exercised as only to conclude by judgment parties to the actions brought in the courts, and not the citizens of other states *in personam*, except those who consent to the jurisdiction.(*a*) And on this principle a crime committed in another state can never be tried in the domestic tribunals. Thus, in Louisiana, where a gun was stolen in another state, and conveyed across the border and sold, it was held that as the mere selling the gun in the state was no violation of the laws, although it might be in proof that the original intention in taking it was to steal it, the seller could not be prosecuted there; the larceny, if such it was, having been perfected in the adjoining state.(*b*) And, on the other hand, where a statute prohibits the removal out of the state, or selling or otherwise disposing of property under a specific lien, as a chattel mortgage, and property is taken to another county and there sold unlawfully, the place of sale is the venue of the offence. *Roberson* v. *State*, 3 Tex. Ct. of App. 502.

In Massachusetts it has been decided that an offence committed on board a merchant ship in tide-water, lying at anchor between one-third and one-half mile distant from the Charlestown navy yard, is exclusively cognizable in the state courts.(*c*) And yet, for the purposes of certain criminal actions, the navy yard itself is considered out of the state sovereignty and jurisdiction, because the United States has purchased the

spects, submit to the jurisdiction, (Wilson *v.* Zeigler, 44 Tex. 657,) it is held in New York that the authority of an attorney to appear in a justice's court must be shown, and will not be presumed. Sperry *v.* Reynolds, 65 N. Y. 179. The appearance must not be merely for a special purpose, as to question the jurisdiction of the court, (McNab *v.* Bennett, 66 Ill. 158,) or to move to set aside an attachment, (Tiffany *v.* Lord, 65 N. Y. 310.) or to testify as a witness, (Nixon *v.* Downey, 42 Ia. 80.) An application to defend will be conclusive, however. Smith *v.* Denman, 48 Ind. 65. Service by publication must be strictly according to the statute, and particularly in divorce —the only personal action wherein a decree can be rendered by publication. Stanton *v.* Crosby, 9 Hun. 370. Notice by publication gives jurisdiction as to property within the jurisdiction. Johnson *v.* Herbert, 45 Tex. 304.

(*a*) Adams *v.* Lamar, 8 Ga. 89.

(*b*) State *v.* Reunnals, 14 La. An. 279.

(*c*) Commonwealth *v.* Peters, 12 Met. 390.

yard, and the state has only reserved such concurrent jurisdiction over it as that process might run therein for crimes committed elsewhere in the state. And so, where the statute required that all vessels carrying stone within the commonwealth should be weighed and marked, under penalty for neglect, and a *qui tam* action was brought against the owner of a vessel not thus weighed and marked, which was employed in carrying stone from Maine to the navy yard, it was held the action was not maintainable, on the ground that the vessel was not employed in conveying stone within the commonwealth, within the meaning of the statute.(*d*)

The rule of tide-water jurisdiction is thus stated by the New York court: "Where a body of water, in which the tide ebbs and flows, is situated between a range of islands and the main shore, and all are so near to each other that a person with the ordinary power of vision can see with the naked eye, from point to point, on every part of the connecting line, what is doing on each, it is included in the county adjoining, according to the *rationale* of the rule which extends the jurisdiction of the county to a line running from one to the other of the *fauces terræ*."(*e*) And, previously, it was held that "Long Island Sound is, by well settled rules, a part of the high seas, and no one of the states bordering upon it has the right, by any statute or other act of sovereignty, to extend her jurisdiction over it. The high seas include all those parts of the main ocean which are not within the *fauces terræ*, the mouth or chops of a channel—that is, the space between the headlands so near to each other that a person on one of them can see with the naked eye what is doing on the other. If the headlands, or points upon the main-lands, are thus near, the water within them is an arm of the sea, denominated a bay, gulf, estuary, etc., as the case may be, and is included, or may be, in the adjoining state or county. If the distance between the headlands is greater than that mentioned, the waters between and within them belong to the high seas, and

(*d*) Mitchell *v.* Tibbetts, 17 Pick. 300.

(*e*) People *v.* Wilson, 3 Park Crim. Cases, 205.

are exclusively under the maritime jurisdiction of the federal courts."(*f*) This topic will recur again, more particularly, in the chapter on admiralty.

It is exclusively for the political department to define state boundaries; and the courts cannot act upon it when the government has so exercised its prerogative.(*g*)

§ 114. There is no impropriety in a cognizance by the courts of actions brought wherein both parties are non-residents and citizens of different states.* On this the supreme court of North Carolina remarks: "To many purposes the citizens of one state are citizens of every state in the Union. They are not aliens, one to the other; they can purchase and hold, and transmit by inheritance, real estate of every kind in each state. It would be strange, indeed, if a citizen of Georgia, meeting his debtor, a citizen of Massachusetts, in the state of New York, should not have a right to demand what was due him, nor be able to enforce his demand by a resort to the courts of that state. It is said that the federal court is open to him. That is so, provided the sum claimed is to an amount authorizing the interference of the latter court, to-wit, $500. What is to become of those numerous claims falling short of that amount? Must a citizen of California, to whom a citizen of Maine owes a debt of $490, go to Maine and bring his suit there, or wait till he catches him in California? We hold not; but the courts of every state in the Union, where there is no statutory provision to the contrary, are open to him to seek redress. The case of *Stramberg* v. *Heckman*, 1 Busbee, 250, to which our attention has been drawn, was between two foreigners. The court, in sustaining the demurrer to the plea in abatement, stated that it did not appear in the plea where the contract sought to be enforced was entered into—whether in a foreign country or in this state—and thereupon the demurrer was sustained. If the principle enforced there between foreigners is to be ap-

(*f*) Manley *v.* People, 3 Seld. 300.
(*g*) Bedel *v.* Loomis, 11 N. H. 15.
*And so a non-resident can foreclose a mortgage against another non-resident. Butler *v.* Carter, 44 Tex. 485.

plied to the citizens of the different states of the Union when seeking to enforce a contract in the courts of a third, then the plea here is defective; there is nothing in it to show that the contract was not made in North Carolina. In England a contract made in a foreign country may be enforced there by the parties to it."(*h*) *Delavidge* v. *Vianna*, 1 B. & A. 284; Story's Conf. Laws, §§ 538–554.

But, unless in attachment or other proceedings *in rem*, there must be personal service, and no publication can be allowed so as to permit the entry of a personal judgment.* Says the Texas court, in a case involving this matter: "The petition appears to be an anomaly in judicial proceedings, and not in conformity or reconcilable to either the common or statute law of this country. It seems to be an effort to call upon the court, without having either person or property within our jurisdiction, to decide an issue between citizens of another state, that could never be of consequence to either party, except on the future contingency of the defendant hereafter introducing property within our jurisdiction on which the judgment could operate; and could this issue be forced on us it would be a precedent for exercising jurisdiction on issues sent from any part of the world."(*i*) Personal service, however, may be waived by appearance.(*j*)

Massachusetts goes further than North Carolina, in which latter state, as we have seen above, the comity is not extended to foreigners. But the court of the former state declares: "Personal contracts are said to have no *situs* or locality, but follow the person of the debtor wherever he may go, and there seems to be no good reason why courts of any country may not lend their aid to enforce such contracts,

(*h*)Miller *v.* Black, 2 Jones L. 342.

*However, as to foreign corporations, they may be served by summons read to a resident agent, and leaving a copy, wherever the corporation does business by means of an agency or branch office. The mode and the venue are usually prescribed by statute, specifically. Insurance Co. *v.* Collins, 54 Ga. 376. And the same rule may be established as to different counties in the case of a resident corporation. R. R. *v.* Oaks, 52 Ga. 410.

(*i*)Ward *v.* Lathrop, 4 Tex. 181; Bartlett *v.* Holmes, 12 Hun. 398.

(*j*)Campbell *v.* Wilson, 6 Tex. 392.

especially since it is a well known principle that, in construing such contracts, the law of the place where they are made will be administered. So that the objection made in this case of the possible difference between the laws of Demerara and this commonwealth can have no influence on the question."(*k*)

§ 115. As to torts committed without the jurisdiction, the influence of which extends into the jurisdiction, an interesting question arose in a case, which, however, passed off unfortunately on another ground, leaving the question undecided. The case was in one of the circuit courts of the United States, and involved these facts: A manufactory was located on Goose Island, near the state of Connecticut, whence the noxious odors were blown to the plaintiff's residence in the state, injuring the health of his family, destroying their general comfort, and impairing the value of the property. On the argument of a bill to enjoin the nuisance it was claimed that even if Goose Island were outside of the limits of the district of Connecticut, yet, as the odors were wafted to the shore, and there inflicted the injury, the offence was thereby within the jurisdiction.(*l*)

In New York it is held that, as a matter of law, the courts have jurisdiction of torts committed abroad, in a foreign country, between non-resident foreigners, but will only exercise it, in their discretion, in exceptional cases, on account of public policy.(*m*) The matter is closely discussed, and the reasons set forth as follows: "Actions for injuries to the person are transitory, and follow the person; and, therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts, for a tort committed in another country, the same as on a contract made in another country. It is now settled that the courts of this state have and will entertain jurisdiction of actions for personal injuries,

(*k*)Barrell *v.* Benjamin, 15 Mass. 356.

A void contract, by the laws of the state where made, will not be enforced in another jurisdiction. Kennedy *v.* Cochrane, 65 Me. 594.

(*l*)Keyser *v.* Coe, 9 Blatchf. 33.

(*m*)Dewitt *v.* Buchanan, 54 Barb. 32.

committed abroad, when both or either of the parties are citizens of the United States. *Glen* v. *Hodges*, 9 Johns. 67; *Smith* v. *Bull*, 17 Wend. 323; *Lister* v. *Wright*, 2 Hill, 320; *Johnson* v. *Dalton*, 1 Cowen, 548. I am aware that the New York common pleas, in *Malony* v. *Dows*, 8 Abb. 316, held otherwise, but that case is not regarded as authority in this court. That decision was probably affected by the necessities of the case, overlooking the second section of the fourth article of the constitution of the United States. The case of *Fabrinas* v. *Mostyn*, 2 Black. 929, is referred to on this question. In that case Lord Mansfield put, by way of illustration, the case of two Frenchmen fighting in France, and expressed a doubt of the jurisdiction of the courts of England in such case. But the reason given why the court would not have jurisdiction in such case has been held in this state not sufficient. See *McIvor* v. *McCabe*, 26 How. Pr. 261, and *Gardner* v. *Thomas*, 14 Johns. 134. In the latter case the action was for a tort committed on the high seas, on board a British vessel, both parties being British subjects. It originated in a justice's court, where the plaintiff had judgment. The court held that, although it might take cognizance of torts committed on high seas, on board foreign vessels, when both parties were foreigners, yet, on principles of policy, it would often rest in the sound discretion of the court to afford jurisdiction or not according to the circumstances of the case. On this ground the judgment of the justice was reversed. I have been unable to discover any *principle* on which the jurisdiction of the court in such a case as this can be denied; but, as a question of *policy*, there are many reasons why jurisdiction should not be entertained. Unless for special reasons nonresident foreigners should not be permitted the use of our courts to redress wrongs or enforce contracts committed or made within their own territory. Our courts are organized and maintained at our own expense, for the use, benefit and protection of our own citizens. Foreigners should not be invited to bring their matters here for litigation. [Section 114, *supra*.] But if a foreigner flee to this country he may be pursued and prosecuted here. Nothing appears in this

case showing why jurisdiction should be entertained. It seems an ordinary case of assault and battery committed in Canada, both parties still residing there, the defendant being casually here when arrested. It is most clearly against the interests of those living on the border for our courts to encourage or entertain jurisdiction of such actions. To do so would establish a practice which might often be attended by serious disadvantage to persons crossing the border. The true policy is to refuse jurisdiction in all such cases except for special reason shown." And this policy is extended expressly to cases between mariners and master on board a vessel lying in port.(*n*) But not to the extent which would prohibit a discharged seaman, though a foreigner, from bringing an action against the foreign master of the ship for a tort committed on the high seas.(*o*)

An action cannot properly be brought in one state for *official misconduct* in another state.(*p*) And in New York, not in another county, by express statute.

§ 116. Although no real action can be maintained in one state as to lands situated in another, yet, where a defendant resides within the jurisdiction, there is nothing to hinder a suit from lying against him in regard to the proceeds of lands so located; as, for example, to compel distribution thereof as a part of an estate under administration.(*q*) And so, in winding up the affairs of a partnership, a court may order the sale of real estate in another district or state. "Such an order does not require the agency of any officer out of the jurisdiction of the court. The order is to act upon the parties in the cause, and the transfer of the title is to come from them, and not from the person through whose agency the sale is to be made. It is not like the case of land sold under execution. If the court has not the power to order a sale, it has not jurisdiction over the subject-matter at all, and cannot divide the land, or compel either party to release his title to it when

(*n*) Gardner *v.* Thompson, 14 Johns. 137.

(*o*) Johnson *v.* Dalton, 1 Cowen, 543.

(*p*) Flower *v.* Allen, 5 Cowen, 669.

(*q*) Edwards *v.* Ballard, 14 La. An. 362.

lying in another state, and suits must be commenced in each state where the land lies. Such inconvenience in the administration of justice cannot be tolerated, and hence the court must have power to direct a public sale of the land, and compel the parties to convey the title accordingly,"(*r*) although this is a well-marked exception to the general rule concerning local and transitory actions. The principle does not apply to cases of partition, because therein the court makes the titles,(*s*) and the proceeding is *in rem*. In all cases, however, wherein the action is merely *in personam*, the rule prevails.(*s*) And so a court of equity may entertain a bill for the specific performance of a contract respecting land in a foreign country, the parties being resident in the jurisdiction.(*t*)

§ 117. We now consider the subject of venue, in its more common view, in relation to different counties of the same state, as usually, for the purpose of convenience, courts of original jurisdiction are limited to a single county, and sometimes to a smaller territory, as a town or city. And, in a modified form, the same principles, to a considerable extent, apply to such limits as to those of a state jurisdiction. The division of a county does not, however, oust jurisdiction already attached in pending causes. *Barnes* v. *Underwood*, 54 Ga. 88. Even a partial jurisdiction does not draw the entire cognizance of a case within the power of the court necessarily. Thus, where the validity of a will was in question, and suit was brought in a county other than where the testator had been domiciled, in which it was contended that, as the court had jurisdiction to settle with the executor for the rents and profits of the land of the estate, and to decree a partition thereof among the claimants, it had also acquired jurisdiction thereby to inquire into the validity of the will, which was an essential prerequisite to partition. But the court held that the admixture of subjects, concerning some of which the court had jurisdiction, could not operate to confer jurisdiction of the others; for, if this were allowed, there would be no diffi-

(*r*)Lyman *v.* Lyman, 2 Paine C. C. 46.

(*s*)Johnson *v.* Kimbro, 3 Head. (Tenn.) 559.

(*t*)Ibid; 2 Story Eq. Jur. §§ 743, 744.

culty in so changing the jurisdiction in nearly all instances where a will was contested. And so it was held the only jurisdiction in the case was exhausted in entering a judgment for costs against the complainant; and this rested on the ground that, although the court had no right to try the validity of the will, yet it had jurisdiction to try similar cases arising within its own territorial limits.(*u*)

In Mississippi it is declared that actions of ejectment and *trespass quare clausum fregit* are the only actions which may be brought in a county where the defendant does not reside and is not found.(*v*) I judge usually such actions cannot be so brought elsewhere. And, more especially, an action in the nature of a review cannot be brought in the court of one county to reverse a judgment rendered in the court of another county. Where this was attempted, on the ground of newly discovered evidence and error in law, it was declared that such proceeding can only be had where the records are; that is, in the court which rendered the judgment sought to be reviewed.(*w*) And, on the same principle, it has been held that a bill of revivor, concerning an action relating to land, must be brought in the court where the records are, notwithstanding a change in the boundaries of the county has brought the land into another county, after the rendition of the original judgment.(*x*) It is, moreover, competent for a legislature to provide, in establishing a new county, that pending suits in ejectment shall not be disturbed, even as to lands falling within the limits of the new county.(*y*)

But, as above stated, where a court has jurisdiction (as in partnership accounts) of the persons and cause of action, proceedings *in rem* may attach as an incidental remedy, so that the court may order a sale of lands in another county, as we noticed above in regard to lands in another state.(*z*) And, on the other hand, "if there are equities, arising from con-

(*u*)Moran *v.* Masterton, 11 B. Mon. (Ky.) 20.

(*v*)Elder *v.* Hilzheim, 35 Miss. 243.

(*w*)Parish *v.* Marvin, 15 Wis. 248.

(*x*)Arnold *v.* Styles, 2 Blackf. 393.

(*y*)Jackson *v.* Dains, 2 Cowen, (N. Y.) 526.

(*z*)Webb *v.* Wright, 2 Bush, (Ky.) 126.

tract or by operation of law, by virtue of which a party is entitled to subject specific property, real or personal, to sale for the purpose of satisfying a debt," jurisdiction *in rem* may be taken, even when both parties reside out of the jurisdiction. "Whenever it becomes necessary for the decree to act upon the thing, (directly,) upon the particular property, the jurisdiction attaches to the thing, abides with it, and can only be brought into action by suit where the thing is;"(*a*)* even if all the parties reside elsewhere, as in *trespass quare fregit*. *Goram* v. *Merry*, 65 Me. 168.

§ 118. Where a case is pending in a defendant's own county, a judge has not power to compel the defendant to appear before him at chambers, in another county, to answer interrogatories with a view to appointing a receiver of the property in dispute, since "parties have rights which may not yield even to judicial convenience."(*b*) Nor can a court, in Illinois—nor, perhaps, anywhere else—send its process into another county in a suit on a promissory note, by an assignee against an assignor, merely on the ground that the note was executed and indorsed in the foreign county.(*c*) Yet, in that state, by statute, a summons may be sent into another county where there are two defendants and one resides in the county where suit is brought. So in Kentucky;(*d*) and in Georgia, where it is held that an acceptor may hold the drawer and indorser of a draft as joint promissors, and therefore bring suit in a county where either resides. *Ross* v. *Saulsbury*, 52 Ga. 380. But in Illinois it was formerly held that a place of payment, if specifically set out, and suit was brought within the county where payment was to be made, would of itself authorize sending process into

(*a*)Latrobe *v.* Hayward, 13 Flor. 203.

*Divorce is regarded as a proceeding *in rem* because it fixes the status of persons. But where the statute requires the residence of the applicant, it means a *bona fide*, permanent residence, and not a temporary residence for the mere purpose of applying for the decree. Whitcomb *v.* Whitcomb, 46 Ia. 437.

And, indeed, this is the general rule in all cases as to venue. Church v. Crossman, 49 Ia. 444.

(*b*)Cook *v.* Walker, 15 Ga. 466.

(*c*)Maxwell *v.* Vansant, 46 Ill. 60.

(*d*)Dyers *v.* Lindsay, 5 Bush, 507.

another county, since it was held that "the court in such case had jurisdiction without regard to the residence of the parties. It was the place of payment which controlled the jurisdiction* and authorized process to issue to a foreign county against the debtor."(*e*) In Georgia, in cases of lien, a summons may issue in the county where the property is, and be made returnable where the defendant resides. *Thorpe* v. *Foster*, 52 Ga. 80. Where a statute does not authorize service of summons in transitory actions wherever the defendant is found in a county where he does not reside, no action can be *commenced* in such foreign county merely in order to be removed to the county where a trial may be had. *Haywood* v. *Johnson*, 41 Mich. 598; *Barnard* v. *Hinkley*, 10 Mich. 458; *Insurance Co.* v. *Judge*, 23 Mich. 492.

§ 119. Where one obtained a judgment against two defendants, and levied on property belonging to one in one county, and on personal property belonging to the other in another county, where he resided, but where the plaintiff did not reside, and the owner filed a bill to compel a release of the levy, on the ground that it was made in fraud of an agreement, and claimed that the levy gave jurisdiction over the person of the plaintiff in the original action, it was held the levy had no such effect, and the court could not entertain the complaint without personal service.(*f*)

§ 120. The matter of boundaries may come before the courts in determining the question of venue.† In New York the statute provides that when an offence is committed on a

*Thus, where a banker's certificate of deposit was by its terms payable at a certain date, "on the return of the certificate," it was held to be payable where the bank was located, and that an action on it should be instituted there, and not where the banker resided. Sanbourne *v.* Smith, 44 Ia. 152. But, where there was a verbal contract that payment for goods should be made at the place of sale, the purchaser's residence being in another county, it was held the action must be brought in the latter county, when the statute merely provides that a written contract may be sued on where executed. Hatch *v.* Johnson, 44 Ia. 536. The present rule, in Illinois, is, I think, more fair and equitable, namely, suit may be brought in any county where personal service can be had on the defendant.

(*e*) Waterman *v.* Peet, 11 Ill. 649.

(*f*) Mays *v.* Taylor, 7 Ga. 242.

†When a stream is the boundary, it continues so notwithstanding a change of place by a gradual wear-

boundary line, or within five hundred yards of it, the offender may be indicted in either county. And it is held that, under that statute, it is not requisite that the indictment should allege the commission of the offence in the county where the prosecution is pending. It is sufficient that it shows jurisdiction in the grand jury finding the indictment and in the court.(*g*) In Minnesota, under a similar statute, the indictment may allege the place to have been in the adjoining county, within one hundred rods of the boundary line.(*h*) A similar statute exists in Illinois and probably in other states.

In Iowa it has been held that where one county incurs expense in prosecuting a crime committed near the border of another, and within its limits, the county where the prosecution takes place cannot recover the expense from the county wherein the crime occurred. *Floyd County* v. *Cerro Gordo County*, 47 Ia. 186.

§ 121. The place of the sitting of the court, however, is not so rigidly fixed as that all proceedings in another *room* are unauthorized and void—one court remarking, quaintly, that it would hardly be pretended that it is "sacramental" to use one room rather than another in holding open court.(*i*) But a removal to another *town* within the county, unauthorized, will fatally vitiate all proceedings.(*j*) A judge may sign an order outside of his territorial jurisdiction, if it be an order which can be granted at chambers, on an *ex parte* application.(*k*) Yet, final jurisdiction is always conferred on courts, and not upon judges at chambers.(*l*) See chapter XVI., on TERMS OF COURT.

ing of the banks. But if it suddenly makes a material change, as by a "cut-off," the boundary remains in the abandoned channel. Collins *v.* State, 3 Tex. Ct. of App. 323.

(*g*)People *v.* Davis, 56 N. Y. 100.

(*h*)State *v.* Robinson, 14 Minn. 449.

(*i*)Smith *v.* Jones, 23 La. An. 44.

And where a state removes a county seat, and the act is to take effect on its passage, it is not to be construed so strictly as to make a subsequent term, held at the former seat, illegal, when suitable conveniences have not been provided at the new county seat. Bouldin *v.* Ewart, 63 Mo. 330.

(*j*)Northrup *v.* People, 37 N. Y. 204.

(*k*)Succession of Jacob Weizel, 17 La. An. 70.

(*l*)Board of Education *v.* Scoville, 13 Kan. 32.

CHAPTER XV.

CHANGE OF VENUE.

§ 122. Transfer of cause to another tribunal.
123. Cause for change of venue—prejudice.
124. Cause of action arising in another county
125. Convenience of witnesses.
126. Must be in accordance to statute.
127. Discretion of the court.
128. Notice to change.
129. Change to remote county.
130. Parties to application.
131. Provisional courts.

§ 122. There are various circumstances which may authorize and even require,* the transferring of a cause to the jurisdiction of another tribunal to be tried. This is not to rectify a mistake in the place of bringing an action; for, where a wrong venue is laid. it is a subject of demurrer, if apparent, or otherwise of a plea in abatement; or, in some states, it will nonsuit the plaintiff at the trial.(*a*) Sometimes, however, a want of jurisdiction of subject-matter will justify a transfer, instead of a dismissal; as in an action against a tenant for unlawfully holding over—of which the court has jurisdiction—but in which a distinct and direct issue of title is raised, of which the court cannot take cognizance; (*b*) or, in like manner, where an action of trespass is brought in a police court, and the question of title arises—

*Counter affidavits may be filed under an application for a change of venue; and where this is done, the granting or refusing the motion is discretionary; and unless the discretion is abused, a supreme court will not review the decree. Hall *v.* Barnes, 82 Ill. 228. In Iowa changes of venue are in general discretionary, even if there is no counter affidavit. State *v.* Spurbeck, 44 Id. 667.

(*a*)Morgan *v.* Lyon, 12 Wend. (N. Y.) 266.

(*b*)Henderson *v.* Allen, 23 Cal.520.

although in Massachusetts the removal in such case seems subject to the defendant's option.(*c*)

Yet it has been held that where a statute requires a bill in chancery, relating to lands, to be filed in the county where the land lies, an equitable court may retain its jurisdiction to decree the sale of real estate in another county, so far, at least, as that it cannot be collaterally questioned, if it has jurisdiction on general equitable principles, independently of the special and local jurisdiction given by the statute.(*d*)

§ 123. The most usual and imperative cause for changing a venue proper in itself is that an impartial trial may be thereby secured. This may be based on the alleged ground that the judge is prejudiced. But the application in such case must be timely. The Wisconsin statute requires that, in a criminal case, "such change shall not be awarded after the next term succeeding that at which the accused shall have been arraigned, unless such petition states facts showing the existence of prejudice on the part of the judge unknown to the petitioner at any term of the court prior to the making and filing of such petition."(*e*) And the right to apply for a change of venue may be waived by mere delay to apply early in the pending term. *R. R.* v. *Mitchell*, 74 Ill. 394. And especially by suffering two successive defaults—the first default having been set aside, and an application for changing the venue coming after the defendant is again defaulted. *Bank* v. *Krance*, 50 Ia. 236. But in this, as in other changes, I suppose, the jurisdiction of the court would not be ousted merely by a failure to enter a transcript of the record on the minutes of the court at the first term.(*f*)

General prejudice, also, is a ground of change. Where this is the ground it is not necessary to specify facts. A general allegation of the existing prejudice is sufficient because of the vague and indefinite nature of even actual and general prejudice existing in a community at large. *Taylor*

(*c*) Leary *v.* Reagan, 115 Mass. 558.

(*d*) Britain *v.* Cowan, 5 Humph. (Tenn.) 316.

(*e*) State *v.* Rowan, 35 Wis. 305.

(*f*) Calhoun *v.* State, 4 Humph. 477.

v. *Gardiner*, 11 R. I. 182. As, where a jury cannot be impaneled,(*g*) or the people are prejudiced against a prisoner.(*h*) And it is imperative where the facts appear.(*i*) Indeed, usually, the court has no discretion,(*j*) and parties may change, by consent, without a petition to the court,(*k*) in a civil case.

It is held that in actions at law a change of venue for the prejudice of the judge cannot be had on the application of some only of several defendants, whether joining or severing in their defences; but all must unite in the application. *Rupp* v. *Swineford et al.* 40 Wis. 28. A recusant witness, however, cannot, in proceedings for contempt, apply for a change of venue on account of alleged prejudice of the judge or justice of the peace. *State* v. *Newton*, 62 Ind. 517.

But, in a criminal case, while the place of trial is changed, the indictment may, as to venue, remain unchanged.(*l*) In New York, even the prosecution has a right, in order to secure an impartial trial, to remove a criminal case, by *certiorari*, to a higher court; and, moreover, where a cause is removed as to one of several defendants it will be removed as to all, although the defendants are entitled to a separate trial.(*m*) And, in such case, the indictment itself may be removed, making a total instead of a partial transfer, as where a trial is changed but the indictment not.

In New York, where there have been two trials in a civil case, and disagreement of the jury in each, and it is apparent that, on account of prevailing excitement, a trial cannot be had, a motion for change of venue will be granted.(*n*) But there is no necessity of an experiment in a criminal case by trying the cause or impanelling a jury therein, in order to justify a public prosecutor in taking a change on the

(*g*) Ibid.

(*h*) Clark *v.* People, 1 Scam. 120.

(*i*) Burrows *v.* People, 11 Ill. 121.

(*j*) Walsh *v.* Ray, 38 Ill. 30.

(*k*) Pierson *v.* Finney, 37 Ill. 29.

(*l*) People *v.* Vermilyea, 7 Cowen, 157.

(*m*) People *v.* Baker *et al.* 3 Park Crim. 188.

In Louisiana, by statute, a prosecuting attorney may apply for a change of venue. State *v.* McCoy, 29 La. An. 593. And see below.

(*n*) Messenger *v.* Holmes, 12 Wend. 203.

ground that a fair and impartial trial cannot be had,(*o*) as in a case of libel. And, on the other hand, it is not indispensable that there should have been an ineffectual attempt to obtain a jury in order to justify defendants in a criminal case to apply for a change.(*p*)

§ 124. In New York, another ground for changing venue is that the cause of action arose in another county. And a motion on this ground by a defendant is imperative, unless the plaintiff will stipulate to give material evidence in the county where suit is brought, which may defeat the application.(*q*) But this whole matter seems anomalous and in contravention of the general rule as to transitory actions, and sometimes actually takes on the form of balancing and bargaining.(*r*) And by statute in New York, the supreme court may draw a pending cause to itself in order to change the venue. *Quinn* v. *Van Pelt*, 12 Hun. 632.

§ 125. Another similarly anomalous ground of change, in the same state, is that for the convenience of witnesses, not, however, availing in strictly local actions.(*s*) Where application is made herein it should appear what it is expected to prove by the witnesses.(*t*)

Where a change is made by a public prosecutor, on the ground of prejudice, and it appears in opposition to the application that the defendants' witnesses are poor, a change may be granted and the condition imposed that the prosecutor shall make provision to pay the necessary expenses of such witnesses.(*u*)

The nature of the action is immaterial in such a case, except it must be transitory. The ground is, the number and residence of witnesses, and their value in the cause.(*v*) But an application may be resisted on the ground that the plain-

(*o*) People *v.* Webb, 1 Hill, 179, (the celebrated J. Fennimore Cooper libel case.)

(*p*) People *v.* R. R. Co. (indictments for public nuisance,) 4 Park Crim. 603.

(*q*) Bentley *v.* Weaver, 1 Johns. Cases, 241.

(*r*) Woods *v.* Van Ranken, 1 Caines, 122.

(*s*) Park *v.* Carnley, 7 How. Pr. 355.

(*t*) American Exchange Bank *v.* Hill, 22 How. Pr. 29.

(*u*) People *v.* Baker, 3 Park Cr. 181.

(*v*) Anonymous, 1 Hill, 669.

tiff has witnesses in the county where the venue is laid.(*w*) And the mere residence of witnesses is not sufficient; it must also be shown that evidence will be given where the cause is to be removed of some material fact which happened there.(*x*) That witnesses reside near where the venue is to be removed, but out of the state, is no sufficient ground of change.(*y*) Where the venue is properly laid, a motion to change should be made after issue joined, otherwise not.(*z*) But how vastly better is the deposition arrangement, resident and non-resident, is evident at a glance, I think; being more direct, and less expensive and dilatory.

§ 126. It is a general principle that the transfer of a cause must be in the exact manner prescribed by statute.(*a*) And where only a part of the proceedings necessary is perfected, the jurisdiction is not transferred—as, for instance, where one fails to have the cause duly entered in the court to which venue is sought to be changed, or even sometimes where the clerk is not paid the entry fee.(*b*) Nothing but an actual removal, in accordance with the statute, can impair an already duly attached jurisdiction.(*c*) A mere order of transfer does not divest it; nor has the substituted court any jurisdiction until the papers reach the clerk thereof;(*d*) nor, in a criminal case, (in Texas,) unless the defendant be recognized to appear before the court to which the venue is changed.(*e*)

But, where a transfer is fully made, the substituted court, in a civil case, has as plenary power over the case as if originally commenced there; and, where the records of one court are transferred to another, judgments formerly rendered in the prior court are under the same control as judgments rendered in the succeeding tribunal.(*f*)

§ 127. Accordingly, courts may refuse, as well as grant,

(*w*) Du Boys *v.* Frouk, 3 Caines, 95.

(*x*) Gourley *v.* Shoemaker, 1 Johns. Cas. 392.

(*y*) Canfield *v.* Lindley, 4 Cow. 532.

(*z*) Hubbard *v.* Ins. Co. 2 How. Pr. 152.

(*a*) West *v.* State, use, etc., 2 Eng. 293.

(*b*) Rice *v.* Nickerson, 4 Allen, 67.

(*c*) McMurray's Adm'r *v.* Hopper, 43 Pa. St. 469.

(*d*) Simpson *v.* Call, 13 Flor. 337.

(*e*) State *v.* Butler, 38 Tex. 560.

(*f*) Clark *v.* Sawyer, 48 Cal. 138.

changes of venue where the imperative statutory requirements are not met. And, in some cases, a sound discretion is to be exercised; as, for example, the probable dispatch or delay of suits, on change, where the ground of application is the convenience of witnesses.(*g*) And where, on the ground of prejudice, a change is sought, a court will not presume that an impartial trial cannot be had merely because the parties differ in politics, and there is a strong party spirit bearing against the applicant. The requisites, in such a case, are something like this: that the inhabitants had prejudged the question at issue, or were especially interested in it, or that, for certain reasons, they entertained personal prejudice, or that the opposite party was a person of uncommon influence in that community.(*h*) In a turnpike case, a cause will not be changed because of an allegation that the disposition of the people is averse to turnpikes,(*i*) nor any cause, as libel, merely because there is a strong excitement prevailing as to the subject-matter of the suit.(*j*) Hence, the mere fact that a county is the plaintiff, in an action for the recovery of a forfeiture, is not a sufficient ground for an application to change the venue. *State* v. *Merrihew*, 47 Ia. 112.

Where the motive is evidently delay, a motion may properly be refused; as where a plaintiff agreed to the defendant's desire for change, on condition that he would accept short notice for trial, which the defendant refused, without showing that he could not prepare for trial on short notice.(*k*) And so an application must be timely, and laches will waive a right of change. *Hoffman* v. *Sparling*, 12 Hun. 83; *Quinn* v. *Van Pelt*, Id. 633.

It is held, in New York, that in an action in the nature of a *quo warranto* the place of trial may be laid anywhere in the state, on the ground that the people are a party whose residence is co-extensive with the state; and so, where such an action was pending against one for an alleged usurpation of

(*g*) King *v.* Vanderbilt, 7 How. Pr. 385.

(*h*) Zobieskie *v.* Bander, 1 Caines, 488.

(*i*) Turnpike Co. *v.* Wilson, 3 Caines, 127.

(*j*) Bowman *v.* Ely, 2 Wend. 251.

(*k*) Smith *v.* Prior, 9 Wend. 499.

the office of state treasurer, it was held that he could not be allowed a change on the ground that he resided in another county at the commencement of the suit.(*l*) I am unable to perceive the reason of this. The reason assigned does not seem to be adequate, or even appropriate.

§ 128. Where an act of the legislature transfers causes from one court to another, the act itself is notice to the parties.(*m*) In changes made by application of a party, it may be necessary to serve notice of the rule for change.(*n*) But not even this, in most states, I presume. But where it is required it is imperative. *Taylor* v. *Lucas*, 43 Wis. 156.

§ 129. In general, venue is changed to an adjoining county; but it may be changed to a remote county when necessary.(*o*) But if to a remote county the entire removal must be made at once, since successive changes are not allowable at the instance of the same party. Each party exhausts his right by a single exercise of it, (*Hutts* v. *Hutts*, 62 Ind. 240,) unless the cause on which a second application is based is shown not to have existed when the first change was granted. *Schaentgen* v. *Smith*, 48 Ia. 359.

Thus the New York criminal court, so holding, remarked: "However, there is no express limitation; and if the necessity which may require any change should call for a more remote county that should be selected. In this case it is probable that the constant intercourse between the inhabitants of New York and the adjoining counties, and the free circulation of the newspapers of the city in its vicinity, have effected an extensive coincidence of sentiment, and the embarrassment in obtaining a fair and impartial trial in an adjoining county would be very great. I must, therefore, direct that the trial shall be had in a remote county."(*o*) But there cannot be a second change in the same cause. *State* v. *McGeghan*, 27 Ohio St. 284. (See preceding paragraph.)

Sometimes, by statute—as in Illinois—a change of venue in an action pending before a justice of the peace takes it

(*l*)People *v.* Cook, 6 How. Pr. 448.
(*m*)Shean *v.* Cunningham, 6 Bush, 124.
(*n*)Smith *v.* Sharp, 13 Johns. 466.
(*o*)People *v.* Baker, 3 Park Crim. 198.

imperatively to the nearest justice. In Minnesota a cause cannot be thus removed on the ground of prejudice. But this is exceptional.(*p*)

§ 130. It is a general principle, I judge, that where there are joint defendants they must all unite in an application in order to change the venue,(*q*) and it is held, accordingly, that where the maker and indorsers of a promissory note are sued together, the indorsers alone cannot successfully apply for a change of venue; the maker must also apply.(*r*) But the rule is different where one of them has suffered a default;(*s*) and, in such case, the whole cause is removed.(*t*)

§ 131. It has been held that where provisional courts are established because of the necessities arising from a state of war, and these courts entertain jurisdiction of suits which are pending when the regular courts are re-established, this jurisdiction will not be lost, or ousted, merely by the re-establishment of the regular courts.(*u*) This, however, rather pertains to an ousting of jurisdiction than to a mere change of venue. See chapter X., *supra*.

(*p*) Cooper *v.* Brewster, 1 Minn. 96.
(*q*) Sailly *v.* Button, 6 Wend. 508; Rupp *v.* Swineford, *supra*.
(*r*) Legg *v.* Dorsheim, 19 Wend. 700.
(*s*) Chace *v.* Benham, 12 Wend. 199.
(*t*) Wight *v.* Meredith, 4 Scam. 360; Hitt *v.* Allen, 13 Ill. 592.
(*u*) Reynolds *v.* McKenzie, Phill. Eq. (N. C.) 54.

CHAPTER XVI.

TERMS OF COURT.

§ 132. Must be as prescribed by statute.
133. What is a compliance.
134. Mistake in statute—discretion of judge.
135. Extension of term.
136. Change by statute—notice to parties.
137. When term is to be extended.
138. Term regarded as one day.
139. Effect of lapse of a term as to sureties on a recognizance.

§ 132. When a statute prescribes a term time, it is essential to the jurisdiction that it should be exercised at that time; and if it transacts business at a different time, its proceedings will be void. Different courts may be assigned to different terms, notwithstanding a constitutional provision that all laws concerning courts shall be uniform. *Karnes* v. *The People*, 73 Ill. 274. The rule is that where the law authorizes a court to do an act it is meant that the court, in term time, must do it, and not the judge, in vacation. That is, a court has no jurisdiction, even with consent of parties, to enter, in vacation, a decree as of a past term, where a statute does not so provide expressly. *Puget Sound Agr'l Co.* v. *Pierce County*, 1 Wash. Ter. 75. And, on like principle, where a statute limits a time for an appeal, consent of parties cannot waive it so as to give jurisdiction to an appellate court. *Stark* v. *Jenkins*, Id. 421. And so, unless expressly authorized by law, a judge has no authority to appoint a receiver in vacation. *Newman* v. *Hammond*, 46 Ind. 119. Although if the term, by mistake, begins a week too soon, the transactions of the second week will be valid.(*a*) However,

(*a*)Garlick *v.* Dunn, 42 Ala. 404.

there are courts required to be kept open all the time for certain purposes.(*b*)

§ 133. If a term is to open on Monday, by the statute, it has been held in Tennessee (*c*) a sufficient compliance if it opens on Tuesday, on the ground, it seems, that it will be presumed that an adjournment occurred from Monday to Tuesday, in the regular way; and adjournments will always be presumed when necessary to support the validity of proceedings had.(*d*) And so, where the law allows a court to adjourn, before the close of a term, to a period beyond the limits of the term, or where it adjourns before the close of the time limited until the next term, the adjournment thus is to be regarded as wholly discretionary, and reasons for it need not be given, unless under a statute expressly requiring the reasons to be stated.(*e*) And it may properly be left to the discretion of a judge to appoint *special terms*, where the business requires it; and then these have all the force of law, as the regular terms have.(*f*) And it may be so as to a supreme court. *Moore* v. *Packwood*, 5 Oreg. 325.

The presumption of regularity, however, fails under a protracted postponement of opening the term; as, for example, where a judge attempted to hold the regular term seventeen days after the time, it was held that the term had lapsed, and all the proceedings were *coram non judice*, and void.(*g*) But if a term fails, all causes are continued till court in course, (*Whitman* v. *Fisher*, 74 Ill. 147;) and if by accident, as by

(*b*)State *ex rel. v.* Judge, 21 La An. 733.

(*c*)Henslie *v.* State, 3 Heisk, 202.

(*d*)Talbut *v.* Hopper, 42 Cal. 398; Springbrook Road, 64 Pa. St. 451

(*e*)Casily *v.* State, 32 Ind. 64.

And so it is held in Louisiana, that, where a statute limits an adjournment as to time, a judge may adjourn for that period, and then immediately adjourn again for a like period, if the statute does not in terms prohibit more than one adjournment Willis *v.* Elam, 28 La. An. 857.

Where there is no such limitation by statute a term continues until ended by final order of adjournment, or by the expiration of the period prescribed by law, and the sittings of the court are within the absolute discretion of the court. Labadie *v.* Dean, 47 Tex. 90.

(*f*)Blimm *v.* Commonw. 7 Bush, 320.

(*g*)State *v.* Roberts, 8 Nev. 239.

fire, rendering it impossible to provide a suitable place to meet. *Larkin's Case*, 21 Nev. 90.

§ 134. Where, by mistake, a law requires court to be held in two places in the circuit, on the same day, it is in the discretion of the judge to select which one he will hold; and under this election the proceedings will be valid.(*h*)

§ 135. An adjourned term (not special) is not distinct, or independent, but a continuance or prolongation of the present, and so an order of continuance to the next term passes the case to the next regular term; and it was held error, in one case, to try it at such adjournment, when it had by consent been continued to the next term.(*i*)

A judge cannot voluntarily *extend* a term. *Lilly's Case*, 7 S. C. 372. And the expiration of a term usually deprives a court of all control over its judgments and decrees, at least so far as the merits of a case are concerned, its jurisdiction being exhausted by the close of the term. *Milam Co.* v. *Robertson*, 47 Tex. 222; *De Castro* v. *Richardson*, 25 Cal. 52; *Daniels* v. *Daniels*, 12 Nev. 121, and cases cited. And it has no power *sua sponte* to correct its judgment at a subsequent term, unless for a mere clerical error, (*Dariess Co. Court* v. *Howard*, 13 Bush, 102,) nor vacate it; *Latimer* v. *Morrain*, 43 Wis. 107. But in Iowa the supreme court can, on motion, vacate a judgment at a succeeding term, because there is no higher court to review it. *Drake* v. *Smythe*, 44 Iowa, 410.

§ 136. Where a change is made by statute as to the time of holding a term, parties in court or served with process are held to have notice and are bound to appear, without further service, at the time to which the session is thus changed.(*j*)

§ 137. In Indiana, where a trial is pending and in progress at the time fixed by law for the expiration of the term, the term is deemed to extend to the close of the trial(*k*)—a good rule, though liable to abuse if not guarded.

(*h*)Brock *v.* Gale, 14 Flor. 531.

(*i*)Sawyer *v.* Bryan, 10 Kan. 199.

(*j*)Insurance Co. *v.* Dickerson, 28. Ia. 274

(*k*)Dorsch *v.* Rosenthall, 39 Ind. 211. And so, in Pennsylvania, in a criminal case. Carroll *v.* Commonwealth, 84 Pa. St. 107. A court is to be considered always open as to a case submitted to a jury. Edwards *v.* Territory, 1 Wash. Ter. 195.

§ 138. A term of court is regarded, for most purposes, as a single day, so that any recovery therein will be held to relate to the first day;(*l*) but not as to the lien of judgments.

§ 139. In a recognizance the lapse of a term will not discharge the sureties; but the recognizance will stand continued until the next regular term, and then a forfeiture may be taken on failure of the principal to appear.(*m*)

(*l*) Manchester *v.* Herington, 10 N. Y. 164.

(*m*) Landis *v.* People, 39 Ill. 79.

CHAPTER XVII.

INCIDENTAL JURISDICTION.

§ 140. In general.
141. Regulation of practice.
142. Publication of proceedings—power to prohibit.
143. Amendments, discretionary.
144. Power over process and officers.
145. What is a pending suit.
146. Supplementary proceedings.
147. Over boats in navigable waters.

§ 140. There are of necessity many things resting exclusively in the discretion of a court as to pending causes, and the proceedings, which we need not particularly notice in detail;* but there are some incidental to the general exercise of jurisdiction which we may refer to as illustrations and examples of the whole. We shall also see that sometimes, as to subject-matter, there is a kind of jurisdiction which is but incidental or subsidiary to other than law courts. This we shall explain in its proper order, first considering that which is incidental to the adjudication of causes coming in the regular order of things, before legal and equitable tribunals.

§ 141. A court may regulate the convenience and facility of practice, I suppose, to any extent which does not contravene any statutory provision; and so may establish binding rules, a non-compliance with which will banish parties from the courts or dismiss a pending action. And this has been carried so far as to hold that a court may adopt a rule com-

*And gross abuse only will justify interference by a supreme court therein. Reynolds *v.* Zink, 27 Gratt. 29. But a court cannot institute proceedings, or make motions, in a cause *sua sponte*. These must be invoked by the interested parties, as also all orders made in a cause. State *v.* Parker, 7 S. C. 235.

And incidental jurisdiction is wholly dependent on rightful general jurisdiction of a pending cause. Gay *v.* Eaton, 27 La. An. 166.

pelling a defendant to make an affidavit of merits, or suffer a default; and that this does not contravene the provision of the constitution allowing a trial by jury.(*a*) Again, it has been decided that a court may oblige an appellant to give notice of the time and place of entering an appeal, and of the names of the sureties offered.(*b*)

§ 142. A court has power to protect itself by forbidding the publication of proceedings pending therein, but this cannot be done by injunction, but by means of an order regularly made in the cause. Said Judge Duer, in a certain case: "Sitting as judge in equity I am satisfied that I have no power to continue this injunction. I do not believe that a court of equity has ever attempted to restrain the publication of the proceedings in a pending action at law, either upon the grounds set forth in this complaint, or upon any other; nor do I believe that, had the jurisdiction ever been claimed, the courts of law would have submitted to its exercise. It would have been regarded and resisted as a manifest usurpation of power. It is the exclusive privilege of the court in which the action is pending to determine whether, for any reason, the publication of the proceedings ought to be forbidden; and, where the prohibition is deemed to be necessary or proper, it can only be regularly made by an order in the cause. The case is not altered by the fact that the action is pending in this court, which is now a court of equity as well as law."(*c*)

§ 143. And, in the absence of statutory requirements on the matter, all amendments of the pleadings of parties are within discretion, and may accordingly be allowed or refused, as the court may deem most conducive to justice under the circumstances,(*d*) although a court cannot, of course, in any way control a statute.* And so a record may be amended, even in

(*a*)Vanatta *v.* Anderson, 3 Binn. (Pa.) 422.

(*b*)Hany *v.* Randolph, Id. 278.

(*c*)Wood *v.* Marvine, 3 Duer, (N. Y.) 675.

(*d*)Jackson *v.* Warren, 32 Ill. 337.

*For the legislature can authoritively regulate practice. Yoe *v.* McCord, 74 Ill. 34. So that a court is absolutely powerless to abrogate any statutory provision by a rule. Hayward *v.* Ramsey, Id. 379. And the legislature has the power to require all rules to be approved by the supreme court. Rolling Mills Co. *v.* Robinson, 34 Mich. 428. Nor

material matters, as to the parties to the suit, but not, indeed, in a way prejudicial to third parties, for "there is no doctrine resting on a more stable ground, both of reason and authority, than that all material amendments of a record must be made with a saving of intervening rights acquired by third persons. In an order allowing an amendment, it is proper to express this by way of removing all doubt. But, whether expressed or not, the law makes the reservation. For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record. These minutes, it is true, are a proper means of amending a record; but, until the amendment is made, the public can act on no other means of information than the official records of the court as kept by an officer appointed by the law for that purpose. How often

has a court power thus to change any provision or maxim of common law; as, for example, to make a rule that a special appearance in a cause shall have the force of a general appearance. Huff *v.* Shepard, 58 Mo. 242.

And where a statute provides for the order of docketing causes, and trying them in their order, a court cannot by rule establish a different order. Angel *v.* Mfg. Co. 73 Ill. 413.

A court can enter judgment *nunc pro tunc*. Fuller *v.* Stephens, 49 Ia. 376.

In the absence of a statute, and within the limits of the law, a court is the exclusive judge of the expediency of its own rules. Gannon v. Fritz, 79 Pa. St. 303. As, for instance, in regard to the order of business. State *v.* Sawyer, 56 N. H. 175. And may excuse, at discretion, an infraction of its rules; as, in setting aside a default at the term when entered. Sheldon *v.* Risedorph, 23 Minn. 518. And especially when a default is taken in the absence of service on the defendant. Wyman *v.* Hoover, 10 S. C. 135. Or permit an act to be done after a time prescribed. Martine *v.* Lowenstein, 68 N. Y. 456.

It is held in Wisconsin, and, I think, justly, that a supreme court may appoint janitors free from the control of the legislature, though in the state capitol. Janitor Case, 35 Wis. 410.

A court may regulate its own sittings during a term. Labadie *v.* Dean, 47 Tex. 90.

One court cannot properly communicate with another except under its seal. Stitson *v.* Com'rs, 45 Ind. 173.

have this and other courts expressed the maxim that 'a record imports absolute verity!' * * * * Parties cannot be held to notice of what has no legal existence, and we should be going quite too far were we to hold them to notice of informal memoranda on the docket of the judge, by which the record might possibly, at some future time, be amended, and require them to act as if such amendment had been already made. The public is bound by the record of a court, and, on the other hand, has a right to abide by it. What we have said in regard to the judge's minutes applies, with at least equal force, to the unsigned and undated memorandum upon the execution docket."(*e*) The amendment of the records by the court, *sua sponte*, may be made at any time during the judgment term.(*f*) After that only by motion of a party, and on notice given.

§ 144. The court exercises a plenary power of control over its process and over the officers* who serve it, until the rights of third persons intervene. The Alabama court say, on this matter: "There can be no doubt of the jurisdiction and power of the common law courts over their process, and also over the officers who execute it. And, in the due exercise of this power, such courts may, upon motion, not only quash and set aside their judicial process and the returns made by the officer under it, but may, also, at any time before a deed is executed to the purchaser, and approved of and acknowledged and entered of record, upon a proper presentation of facts, quash the process and set aside the sale, because, up to that time, no title has been perfected in the purchaser to the property so purchased, and when he comes before the court to

(*e*)McCormick *v.* Wheeler, 36 Ill. 120.

(*f*)Smith *v.* Vanderburg, 46 Ill. 36.

*Somewhat strongly stated, I think.

In Arkansas a court may suspend a clerk for misdemeanor in drunkenness, or illegal acts. This power is conferred by statute. Coit *v.* State, 28 Ark. 417. And generally a court has the right to compel the performance of ministerial acts by a summary rule. Duncan *v.* Baker, 13 Bush, 514. If a rule is made against a sheriff, the court may modify it so as to meet the justice of the case. Gibson *v.* Gibson, 7 S. C. 356.

have his deed acknowledged and entered of record, or when it is made to appear, upon the motion of either the plaintiff or the defendant, that the process of the court has improvidently issued, or, through the fraud or neglect of the officer or of the parties, it has been abused, to the prejudice of the rights of either the plaintiff or the defendant in execution, the court has the power, and it is its duty, to withhold its assent to an affirmance of such acts, and to set them aside that a new and more regular proceeding may be had. This power is indispensably necessary to enable the court to execute its judgment: and, so far as the mere setting aside of the process or the return on it is concerned, the power exists as well after as at the return term of the process, because this is a proceeding between the parties to the proceeding and the officers of the court in which the rights of third persons are not involved.

"But after the court has approved the sale, and caused a deed to be acknowledged and delivered to the purchaser, whereby he has had assured to him a perfect legal title to the property, should the court, at a subsequent period, upon the ground of fraud, accident or mistake, or for any irregularity in the proceedings which must of necessity in most instances arise out of one or other of these causes, upon motion assume jurisdiction, and the power to hear and determine the merits of such motion, it would thereby, in effect, take jurisdiction of matters not properly cognizable before it, even upon a regular proceeding instituted in such court for that purpose, for these are all matters properly cognizable before a court of chancery; and, whether presented by bill or motion, does not in anywise change or affect the question itself. The purchaser, when he leaves the common law court with perfect legal title, sanctioned and approved by the court, is no longer to be considered before that court; his rights are matured, and he is so far disconnected from the proceeding that he is not affected with notice of any after order made in regard to his title, and when brought before the court again by notice and motion, or otherwise, he stands there as a party defending his right to hold an estate to which his legal title is perfect; and when the validity of the title itself is assailed, for

fraud, accident or mistake arising out of the irregularity of the acts or proceedings of the parties, he has a right to be heard before a tribunal that can rightfully exercise jurisdiction in such matters, with power and process to bring all parties in interest before it, to put them upon their consciences to answer, to cancel deeds, to restore possession, and award equitable compensation.

"In view of the general powers of the common law and chancery courts, we feel clear on this point; and although there are several reported cases which would seem to question the correctness of our conclusions, yet, when carefully examined, they will be found to have been made under statutes which authorize such summary proceedings."(*g*)

§ 145. A suit is regarded as pending until the judgment is not only rendered, but satisfied. And no court will entertain a distinct suit designed to accomplish nothing beyond what can be effected by orders in a cause, or a rule on the parties therein.(*h*) And it is a business of a court to give full effect to its rules; as, where one obtains possession of property by a fraudulent use of a rule of court, or wrongfully retains possession, though for a temporary purpose, without fraud, it is the duty of the court to dispossess him summarily.(*i*) And so it is that, as we saw in the preceding section, a court of law will exercise an equitable jurisdiction over the execution of its own judgment and process, if it can do as complete justice as a court of equity could do.(*j*) Moreover, on the explicit ground that "when jurisdiction has once attached it continues necessarily, and all the powers requisite to give it full and complete effect can be exercised until the end of the law shall be attained," it is competent for a court, even of local and inferior jurisdiction, to send final process anywhere within the state, and outside of its territorial limitation, in any case where jurisdiction to render judgment has

(*g*)State Bank *v.* Woland, 8 Eng. (Ark.) 301.

(*h*)Mann *v.* Blount, 65 N. C. 101.

(*i*)Winters *v.* Helm, 3 Nev. 397.

(*j*)Watson *v.* Reissig, 24 Ill. 284; Mason *v.* Thomas, Id. 287.

properly been acquired;(*k*) although, of course, the manner of doing this may be prescribed by statute. And when money is collected on execution, its disposal belongs to the court issuing the execution.(*l*)

§ 146. By the New York code—as also in Wisconsin, and elsewhere—is established an incidental jurisdiction in what is called supplementary proceedings—a kind of new suit, but strictly subordinate to the original suit, answering, indeed, to a creditor's bill in equity. It consists in an examination of a judgment debtor, in order to discover his assets, and is, therefore, in the nature of an equitable proceeding, and is a substitute for a creditor's bill. However, it is an action in the original cause, and is so regarded as a kind of additional or equitable execution, penetrating further than an ordinary execution.(*m*) Yet it is not imperative; but, at any time before the appointment of a receiver, the judgment creditor can abandon the supplementary proceedings, and bring a creditor's bill.(*n*)*

Where there was a parol agreement between parties that the suit pending was to be discontinued, without costs, and, by mistake, a judgment for costs was entered against the plaintiff, notwithstanding the agreement, whereon an execution was issued, and then supplementary proceedings were instituted, it was held the plaintiff could not vacate the order for

(*k*) People *ex rel. v.* Barr, 22 Ill. 243.

(*l*) Bevard *v.* Young, 26 La. An. 598.

(*m*) Sale *v.* Lawson, 4 Sandf. 718; Gould *v.* Torrance, 19 How. Pr. 561.

Different creditors may have supplementary proceedings pending at the same time in Wisconsin, and, when a receiver is appointed, the court determines the matter of priority among them. Kellogg *v.* Caller, 47 Wis. 665.

(*n*) Bennett *v.* McGuire, 58 Barb. 634.

*Where an execution is issued on a judgment of the supreme court, on an order of a county judge issued in supplementary proceedings thereon, both courts have so far a concurrent control of the order as that either can punish disobedience as a contempt. Tremain *v.* Richardson, 68 N. Y. 617.

A demand must be made for property of the debtor before supplementary proceedings can be instituted. Bank *v.* Wilson, 13 Hun. 232.

See State *v.* Becht, 23 Minn. 411; Rand *v.* Rand, 78 N. C. 12, as to supplementary proceedings.

his examination on the supplementary proceedings on the ground of the mistake in entering the judgment—his remedy being a direct application to open the judgment.(*o*) Indeed, in no case, can the merits of the original action be brought into question in such proceedings(*p*) except where there is a want of jurisdiction in the original suit.(*q*)

§ 147. The authority of a state over boats in its navigable waters may, perhaps, be regarded more as an incidental than a direct result of its essential jurisdiction. And so, in regard to a statute of Missouri in regard to collisions of steamboats on the Mississippi and other rivers, a question came up, in a certain case, as to the application of the statute, when the boats were owned by non-residents. The court maintained jurisdiction, and said: "The only question in this case is, whether, under our statute concerning boats and vessels, the courts of this state have jurisdiction where the boat employed in navigating the waters of this state is owned, in whole or part, by citizens of other states, or foreign countries. It is very clear that if the non-residence of one or more owners of a steamboat divests the jurisdiction of our courts in such proceedings, the statute is an entire failure. The purpose of the law is defeated in the very cases where its provisions are most needed. The main object of the law is, undoubtedly, to give redress against the boat without requiring the party aggrieved to look up the owners. Probably a large proportion of the boats which navigate the waters within this state, and upon her borders, are, either in whole or in part, owned by citizens of other states; and to give a construction to our statute which would oust the jurisdiction of our court upon the discovery of the fact that there was a non-resident owner, would, virtually and substantially, annul the law. But we are not apprised of any provision in the federal constitution, or any principle of inter-state comity, which requires such a construction to be given to the law. Citizens of other states,

(*o*)Gardner *v.* Lay, 2 Daly, 114.
(*p*)O'Neil *v.* Martin, 1 E. D. Smith, 405.
(*q*)Griffin *v.* Dominguez, 2 Duer, 657.

or of foreign countries, who bring or send their property within the jurisdiction of this state, have surely no ground of complaint if that property is treated precisely as it would be if its owners resided here. They cannot claim exemptions which our own citizens are not allowed. No principle of comity requires a discrimination in their favor."(*r*) This will be further noticed in relation to admiralty jurisdiction in Part II., *infra*.

(*r*) Yore *v.* Steamboat, 26 Mo. 428.

CHAPTER XVIII.

INCIDENTAL JURISDICTION AS TO CHURCHES AND OTHER VOLUNTARY SOCIETIES.

§ 148. In general.
149. As to lodges.
150. Action against secret organizations, etc.—boards of trade.
151. Church regulations.
152. Forfeiture of property in church by members seceding.
153. Interference with church affairs.

§ 148. So far as churches, lodges, etc., are incorporated, they fall under the same principles of control that other corporations do, and hence the jurisdiction they may invoke in their behalf, or that may be invoked against them, is merely of the direct and ordinary character; since it is a well-settled rule that, as to legal proceedings for or against them, corporations are individual persons. But the matter is essentially different when judicial cognizance is taken of the internal rules and actions thereunder of ecclesiastical organizations, and similar institutions. In England, the ecclesiastical courts have been regarded as part of the national judicial system, and were therefore endowed with a large measure of judicial authority. But they hold no such rank here; and, moreover, they are, in a degree, under the supervisory authority of the courts, so far as necessary to prevent flagrant abuses of discipline over their members. They may, uncontrolled, establish such rules and regulations as they please, and therein they will not be meddled with, if they keep within the compass of their own rules, and these do not contravene, in any way, individual rights, as defined by the laws of the land.

§ 149. For instance, referring first to lodges, they cannot be allowed to impair the rights of property as against the will

of the owner. Said *Brown* J., in an Odd-Fellow case, in New York: "The by-laws and regulations of these voluntary associations may all be very well in their place and sphere, and may command generally the obedience and submission of those upon whom they are designed to act; they cannot, however, have the force of law, nor impair or affect the rights of property against the will of its real owners. So long as the members of these bodies yield their assent, or concurrence, it is all very well; the law interposes no obstacle, or objection. But when orders and decrees of the character of those referred to are resisted, [as in confiscation by a grand lodge of subordinate lodges' property,] and the owners of property refuse to be deprived of it, then it will be found that property has rights, and the courts of justice have duties of which the plaintiff in this action seems to have an indifferent conception. The courts of justice cannot be called upon to aid in enforcing the decrees of these self-created judicatories. The confiscation and forfeiture of property is an act of sovereign power, and the aid of this or any other court will not be rendered to enforce such proceedings, or to recognize legal or supposed legal rights founded upon them."(*a*) And, in the same case, *Selden*, J., said: "Were it distinctly averred that the defendants had subscribed the constitution of the grand, as well as of the subordinate lodge, I should still be of the opinion that public policy would not admit of parties binding themselves by such engagements. The effect of some of the provisions of these constitutions is to create a tribunal having the power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject, in any case, to the selection or control of the parties upon whose rights they sit in judgment. To create a judicial tribunal is one of the functions of the sovereign power; and although the parties may always make such tribunals for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules." A contract that the parties will submit

(*a*) Austin *v.* Loring, 16 N. Y. 124.

confers no power upon the arbitrator; and, even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen. It would hardly accord with this scrupulous care to secure fairness in such cases that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation."

And, quoting from Lord Eldon, in a case where a bill was brought to obtain the possession of books, papers, decorations, dresses, etc., of a Freemason lodge, (*Lloyd* v. *Loring*, 6 Ves. 733,) it was held that "a bill might be filed for a chattel, the plaintiffs stating themselves to be jointly interested in it with several other persons, but it would be a very dangerous thing to take notice of them as a society having anything of a constitution in it. In this bill there is a great affectation of a corporate character. They speak of their laws and constitution, and the original charter by which they were constituted. In *Allen* v. *Duke of Queensbury*, Lord Thurlow said he would convince the parties that they had no laws and constitutions. * * * That this court will hold jurisdiction to have a chattel delivered up I have no doubt, but I am alarmed at the notion that these voluntary societies are to be permitted to state all their laws, forms and constitutions upon the record, and then to tell the court that they are individuals, etc. The bill states that they subsist under a charter granted by persons who are now dead, and, therefore, if this charter cannot be produced the society is gone. Upon principles of policy the courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters."

§ 150. So we see the courts will protect and shield individual rights of property, and refuse, accordingly, to aid such organizations to divest them under the force of their internal rules, and in accordance with the demands of their tribunals. But it seems, on the other hand, that a court will entertain an action against a secret organization for benefits guaran-

tied by its rules, and will entertain in such an action the defence that the member through whom the benefit is claimed was in his life-time expelled, and, under this, the replication that the expulsion was not according to the constitution and by-laws of the society.(*b*) As to boards of trade, I think the Wisconsin rule that the by-laws are subject to judicial control, even as to conditions of membership, (*State ex rel.* v. *Chamber of Commerce*, 20 Wis. 63; *Dickensen* v. *Chamber of Commerce*, 29 Wis. 45; *State ex rel.* v. *Chamber of Commerce*, 47 Wis. 679,) is better than the Illinois rule, which strongly leans to the opposite, (*People ex rel.* v. *Board of Trade*, 80 Ill. 134; *Fisher* v. *Board of Trade*, 80 Ill. 84; *Baxter* v. *Same*, 93 Ill. 146; *Sturges* v. *Same*, 86 Ill. 441,) because membership in a board of trade may involve essential property rights or privileges of trade.

§ 151. Church regulations are held in a similar control. It is well settled that to give the courts jurisdiction there must be an invasion of property or personal rights, for they will never interfere in this country merely where there is a religious controversy, or in disciplinary matters, or in elections, or mere choice of pastors, or anything of the kind.(*c*) Thus far it is a purely ecclesiastical act, but where it has effect upon property the courts may interfere *quoad hoc*,(*c*) and no further. Yet the New York court, in the elaborate case just referred to, could not forbear admonition in so eloquent and forcible language that I am tempted to transcribe it, in view of the importance of the subject—for when laymen officially preach to the ministry, from a judicial pulpit, all the world should listen. Besides, the extract tends to illustrate the boundary of judicial interference: "This cause is of importance, not only in a legal point of view, but also of vast importance to the church and society interested in this litigation. Perhaps the clerical gentlemen who have been the principal actors in this case did not duly weigh the consequences, or there would have been more forbearance. Here were five ministers of

(*b*) Osceola Tribe of Red Men *v.* Rost. Adm'r, 15 Md. 295.

(*c*) See Robertson *v.* Bullion, 9 Barb. 65, where the subject is elaborately examined, and the cases selected.

that peaceful and holy religion, to the truth and value of which all well informed and reflecting minds must assent, having, as they no doubt honestly believed, causes of complaint among them; but which, with all due allowance, I must think could and should have been adjusted without delay and without difficulty. But, unfortunately, a different course was adopted, and the consequences have been calamitous indeed. The hallowed and mystic union of pastor and church, cemented and strengthened by the friendship, the communion and the vicissitudes of thirty years—a period which assigns a generation to the grave—has been dissolved; the ties and associations of Christian brethren and sisters have been severed and broken, and one portion of the church has expelled, or attempted to expel, the other from the enjoyments and consolations of the Gospel ordinances, striking off over one hundred and fifty at once, of whom more than two-thirds were females; and, finally, one of the most enlightened, benevolent and prosperous religious societies in the land has been rent by the elements of strife and plunged into sharp and expensive litigation for years. No man should judge another in matters of conscience and duty. But the retrospect in this case is painful in every aspect, and must produce a wish for peace and reconciliation in every benevolent heart."

The order was: "There must be a decree restraining the defendants from using the temporalities of the corporation for the support of Dr. Bullion's ministry, so long as he is under sentence of deprivation."

And so, in regard to matters of mere discipline, the supreme court of Pennsylvania remark: "If, therefore, the relator is injured by the decree of the consistory, his remedy is by appeal to a higher ecclesiastical court; which, no doubt, (and it is indecorous to suppose otherwise,) will afford him redress by reversing whatever may have been done by the inferior court inconsistent with the canons of the church. That the power of the *classis* and synod is advisory only, matters not, as we cannot suppose their decision will be disregarded, and if it should be, it will be time enough to seek redress from the civil authorities. The decisions of ecclesi-

astical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals. Until a final adjudication by the church judicatories we think the relator is without remedy by *mandamus*." (*d*)

In Kentucky, the court soothed certain excommunicated members, trying to enforce their right to vote at church elections even after they had been excluded, by the following pathetic exhortation: "The necessary consequences of the view we have taken of the proprietary or usufructuary rights of the parties is, that there can be no reversal of the decree on the errors assigned by the appellants. Having once associated themselves with many others as an organized band of professing Christians, they thereby voluntarily subjected themselves to the disciplinary and even expulsive power of that body. The voice of the majority has prevailed against them. They have, by that fiat, ceased to be members of that association, and with the loss of their membership they have lost all the privileges and legal rights to which, as members, they were ever entitled. Their only remedy now is, therefore, in their own bosoms, in a consciousness of their own moral rectitude, and in the consolations of that religious faith and those Christian graces which, under all temporal trials, will ever sustain the faithful Christian, and adorn the pathway of his earthly pilgrimage. Their expulsion ought not to brand them with 'immorality.' In this record there is no proof of immoral conduct, in either the popular, the ethical, or the Biblical sense. They were expelled for alleged non-conformity and contumacy, adjudged against them without a formal trial or hearing, by a dominant majority, as fallible, perhaps, as themselves. Self-doomed to the uncontrolled will of a

(*d*) German Reformed Church *v.* Seibert, 3 Barr. 291.

majority of a church selected by themselves, they can obtain no redress in this forum. If their sentence be unjust, the only appeal is to the omniscient Judge of all."(e)

Nevertheless, ecclesiastical organizations will be held to the limits of their own rules, strictly; and the courts will look into their proceedings rigidly to see whether these are justified by the standing and fixed regulations or not, especially where property is involved. And the principle of positive interference is thus laid down by the Kentucky court: "While we recognize the principle as firmly and correctly established that civil courts cannot, and ought not to, rejudge the judgments of spiritual tribunals as to matters within their jurisdiction, whether justly or unjustly decided, we cannot accept as correct the principle contended for in the argument for the appellees that whether the synod had jurisdiction and power over the subject on which it acted under the presbyterial system is a question purely ecclesiastical, to be settled by the synod itself and the general assembly. Such a construction of the powers of church tribunals would, in our opinion, subject all individual and property rights confided or dedicated to the use of religious organizations to the arbitrary will of those who may constitute their judicatories and representative bodies, without regard to any of the regulations or constitutional restraints by which, according to the principles and objects of such organizations, it was intended that said individual and property rights should be protected. Especially is this so with reference to the powers of the higher courts of the Presbyterian church. Those powers are not only defined, but limited by the constitution. But if it be true, as insisted for the appellees, that the inferior courts and people of the church are bound to accept as final and conclusive the assembly's own construction of its powers, and submit to its edicts as obligatory, without inquiring whether they transcend the barriers of the constitution or not, the will of the assembly and not the constitution becomes the fundamental law of the church. But the constitution having been adopted as the supreme law of the church must be supreme alike over the

(e)Shannon v. Frost, 3 B. Mon. 261.

assembly and the people. If it is not, and only binding on the latter, the supreme judicatory is at once a government of despotic and unlimited powers. But we hold that the assembly, like other courts, is limited in its authority by the law under which it acts, and when rights of property, which are secured to congregations and individuals by the organic laws of the church, are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract, or the fundamental law of a voluntary association.

"If those having control of church property and privileges, in a Catholic or Episcopal organization in this country, should attempt to transfer them to the use of another sect or denomination, in violation of the fundamental principles of such organization, and to the destruction of the very objects for which their authority was conferred; or even if a majority of the members of a Baptist or other congregational church should determine to sell and appropriate to individual use their church edifice, erected, by means of individual donations or the contributions of its members, as a house of worship, can it be said that a civil court may not interpose to give relief or protection against acts so flagrantly void for want of jurisdiction or authority for their commission?"(*f*)

§ 152. It is held, in Pennsylvania, that those who hold property as a constituent part of the church forfeit the property, if they secede, to those who retain the old status.(*g*) And even if the seceders constitute the majority they cannot carry the property with them.(*h*) And, if there is a state of anarchy prevailing, the court will regard the order formerly existing as still established, in determining the question as to who retains the real and original organization, and are, therefore, entitled to the property.(*h*)

§ 153. In the celebrated Chicago case of the Rev. Mr. Cheney a divided court declared that ecclesiastical tribunals are

(*f*) Watson *v.* Avery, 2 Bush, 348.
(*g*) McAuley's Appeal, 77 Pa. St. 413.
(*h*) Winebrenner *v.* Colder, 43 Pa. St. 244.

absolute within their sphere, and whether they conform or not to their own constitution, and whether the result is or is not to expel a minister from his office and salary, lawfully or unlawfully, according to the canons of the church, civil courts cannot interfere.(*i*) This is not the principle running through the cases, I think. Wherever rights of property or financial interests are essentially involved the secular courts assuredly have jurisdiction. The court elegantly say, however, in regard to the relation between the church and state: "Civil courts have duties and responsibilities devolved upon them, and a well-defined jurisdiction to maintain. The church has more solemn duties, more weighty responsibilities, and an authority granted by the infinite Author of all things. We shall not enter in and 'light up her temple from unhallowed fire.' The ministers selected to sit in judgment on the acts of a brother ought to be impartial and competent, prompted, as they doubtless are, by the teachings of Divine Revelation, and the kindly influences of Christian charity, which 'suffereth long and is kind, beareth all things, believeth all things, hopeth all things, endureth all things.'" And Judge Robertson, as quoted in this opinion, sums the whole up comprehensively thus: "Christianity, though an essential element of conservatism, and a great moral power in the state, should only work by love, and inscribe the laws of liberty and light on the heart, and the civil government has no just or lawful power over the conscience, or faith, or form of worship, or church creeds, or discipline, so long as their fruits neither unhinge civil supremacy, demoralize society, or disturb its peace or security."

(*i*)Chase *v.* Cheney, 58 Ill. 527.

CHAPTER XIX.

EXCLUSIVE AND CONCURRENT JURISDICTION.

§ 154. In general.
155. Between law and equity courts.
156. General principle.
157. Same rules apply as to concurrent that apply to separate jurisdictions.
158. Application of the rule.
159. Conflict of jurisdiction—priority.
160. Rule of priority—limitations.

§ 154. It is competent to the legislature to assign the adjudication of a particular class of subjects to a single court exclusively; or, otherwise, to allow several courts to exercise a special jurisdiction or the same branch of a general jurisdiction; and this may extend to justices of the peace, and district courts.(*a*) However, unless a concurrence is directly or indirectly provided for, it does not exist; as it does not come by implication merely. And so when a statute upon a general subject specifies or creates a tribunal to determine the questions thereon arising, the jurisdiction so conferred is exclusive, in the absence of anything to express the contrary,(*b*) in the statute itself, or elsewhere; although, if a statute gives a particular jurisdiction to a court, while another possesses such jurisdiction already, this does not oust the former, but the two are concurrent, when the statute does not expressly take away the pre-existent authority.

§ 155. The most common, though not the only, concurrence is between law and equity courts; as, for example, in matters of fraud. And they may co-operate on the same subject, at the same time. But usually when they do this the equity proceedings are subsidiary to the legal, as in a

(*a*) Clepper *v.* State, 4 Tex. 245. (*b*) Macklat *v.* Davenport, 17 Ia. 387.

discovery. However, it has been held in Maryland that there may be, at the same time, proceedings in equity to enforce a trust under a deed, and in a law court to set the deed aside.(*c*)

§ 156. The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout.* It has been observed that "great caution should be exercised lest the powers of these co-ordinate courts should be brought into conflict, as it is apparent the evils of such collision would be of serious magnitude; and the safer, if not the only course is that each court shall never suffer itself to indulge in a cause, or in regard to a subject-matter, over which another has exercised its jurisdiction."(*d*) And not only so, but a court has discretion to refuse jurisdiction of a concurrent matter, even in the first instance, especially, I suppose, a court of equity. *Jewett* v. *Bowman*, 29 N. J. Eq. 176. "This rule would seem to be vital to the harmonious movements of courts whose powers may be exerted within the same spheres, and over the same subjects and persons."(*e*) And so, where a suit involving conflicting liens and mortgages has been instituted in a court, and all the parties in interest are brought in, and some of the parties then institute suit in another court, this will not prevent the former court from determining the whole matter without regard to changes in the title or possession of the property,

(*c*)American Exchange Bank *v.* Inloes, 7 Md. 387.

The principle is a general one that concurrent remedies applying to the same subject matter, but for different purposes, may exist at law and in equity. State *v.* Bridge Co. 2 Del. Ch. 60.

*And this applies as between law and equity courts. Hardeman *v.* Battersby, 53 Ga. 36. And it goes through to include the execution of the judgment rendered. Hawes *v.* Orr, 10 Bush, 432.

Where an equity court appoints a receiver, it is held in Iowa not to be necessary to the jurisdiction of a court of law, in an action for damages against the corporation for whom the receiver is appointed, that the consent of the appointing court should be obtained to the institution of the action. Allen *v.* Railroad, 42 Ia. 683. But the rule elsewhere is directly the other way. Gest *v.* R. R. 30 La. An. 28.

(*d*)Winn *v.* Albert, 2 Md. Chan. Dec. 54.

(*e*)Brooks *v.* Delaplaine, 1 Md. Chan. Dec. 354.

(*Barkdull* v. *Herwig*, 30 La. An. 618;) since a court which has obtained rightful jurisdiction will retain it for all purposes within the general scope of the equities to be enforced. *Ober* v. *Gallaher*, 93 U. S. 199. And state courts and United States courts are to forbear, in like manner, from interfering with each other. *City of Opelika* v. *Daniels*, 59 Ala. 211. And neither can enjoin the process of the other. *Chapin* v. *James*, 11 R. I. 87. And the court must make a conclusive determination of the whole case, as the two cannot take it up piecemeal in any event, although the two may have jurisdiction in the same *class* of cases.(*f*) However, a court of equity may sometimes *enjoin* proceedings at law, but it has been held that, where the two courts have concurrent jurisdiction, the equitable court will not exert this power unless there are peculiar equitable grounds for its exercise.(*g*)

Jurisdiction *in rem* may co-exist, and be exercised at the same time, by several courts, where an actual seizure is not necessary.(*h*) But then the court whose mesne or final process has effected the first seizure will have exclusive power of disposal, and of the distribution of the fund arising from it, among the several courts whose adjudication is completed in regard to the matter.(*h*)

§ 157. Where the same court has law and equity jurisdiction, the rule is the same, as to the law side and equity side, that prevails as to separate courts.(*i*) And so, I suppose, even where a code abolishes the distinction between law and chancery proceedings, but leaves the principles distinct. But the rule disappears, of course, where the principles are merged, or blended, as in Texas: where an equitable defence may be interposed to a legal action, or *vice versa*.(*j*)

§ 158. The principle applies to a case where a petition has been filed before a board of county commissioners for the incorporation of a town, whereas the city has a right by its charter to extend its boundaries over the territory included in

(*f*) Henry v. Tupper, 2 Wms. (Vt.) 579; Hickman v. Painter, 11 W. Va. 386.

(*g*) Bank v. R. R. Co. 28 Vt. 477.

(*h*) Averill v. Steamboat, 2 Cal. 309.

(*i*) Mordecai v. Stewart, 37 Ga. 364.

(*j*) Neill v. Keese, 5 Tex. 23; Smith v. Doak, 3 Tex. 215.

the petition.(*k*) Also, where one after commencing a suit in one state brings an action on the same subject-matter in another state, then takes testimony in the first and breaks off to take testimony in the latter. Although the domestic tribunal cannot direct the discontinuance of the latter suit, it can put the plaintiff to his election, and, if he will not stipulate to discontinue the foreign suit, stay its proceedings therein until the end of the foreign suit, with leave thereafter to either party to apply for such further order as may be just.(*l*)

§ 159. Where there was a conflict in two courts of the same state, the question arose as to which ought to retain the cause. The matter was placed first on the ground of competency, and then on the ground of the rule of priority, and the supreme court—one of the conflicting tribunals—said: "The two courts thus pursuing opposite courses of decision, it is manifestly desirable that the litigation in one should be suspended, and the whole controversy carried to its conclusion in the other. It is more than desirable. It is indispensable to a reasonable, orderly and decorous administration of justice. How shall this be accomplished? How shall it be decided in which court it shall be continued? And, when that is decided, how shall the decision be enforced? Assuming that the two courts have jurisdiction to the same extent, and can administer justice with equal facility and benefit, the rule that the court first having cognizance of the subject shall retain it, and draw the litigation wholly to itself, seems to be palpably applicable. It is perfectly free from odium, is consistent with the fullest comity and the most delicate respect for the other tribunal. If there be no reason in the constitution of the courts why one is more competent, under all circumstances existing or likely to arise, to assume the whole of this controversy and conduct it to an issue than the other, priority in acquiring possession of the case may with propriety be allowed to determine in which it shall proceed. On the subject of jurisdictional power there can surely be no objection to this court succeeding as it does to all the powers

(*k*) Taylor *v.* City, 47 Ind. 280. (*l*) Hammond *v.* Baker, 3 Duer, 704.

of the court of king's bench; and having, on every subject within the jurisdiction of a state court, the fullest common law jurisdiction, it has also the powers of the state court of chancery in the administration of equity, and territorially its jurisdiction, for every purpose, is co-extensive with the state. The jurisdiction of the common pleas, on the contrary, for many purposes, is limited to the county, and although it may now have jurisdiction over all the parties to this litigation, circumstances may not improbably arise in which the addition of a party residing or tarrying without the county, or any one of numerous causes, may make the more comprehensive jurisdiction of this court desirable and necessary to the complete determination of the controversy."(*m*)*

§ 160. The rule of priority is subject to some necessary limitations, which are thus explained by the supreme court of the United States: "Seizing upon some remarks in the opinion of the court in the case of *Freeman* v. *Howe*, not necessary to the decision of that case, to the effect that a court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause, and that the federal court could not permit the state court to withdraw from the former the decision of such issues, the counsel for plaintiff in error insists that the present case comes within the principle of those remarks. It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters. At the same time, it is to be remarked that it is confined in its operation to the parties before the court, or who may, if they wish to do so, come before the court and have a hearing on the issue so to be decided. This limitation was manifestly in the mind of the court in the case referred to, for the learned

(*m*) Conover *v.* Mayor, 25 Barb. 524.

*As to co-ordinate courts the plea of a pending suit will justify a dismissal of the later action. Claywell *v.* Sullerth, 77 N. C. 287.

However, in the foreclosure of a mortgage, suits at law and in equity may be pursued simultaneously until the debt is satisfied. Ober *v.* Gallaher, 93 U. S. 199.

judge who delivered the opinion goes on to show that persons interested in the possession of the property in the custody of the court may, by petition, make themselves so far parties to the proceedings as to have their interests protected, although the persons representing adverse interests in such case do not possess the qualification of citizenship necessary to enable them to sue each other in the federal courts. The proceeding alluded to here is one unusual in any court, and is only to be resorted to in the federal courts in extraordinary cases, where it is essential to prevent injustice by an abuse of the process of the court, which cannot otherwise be remedied. But it is not true that a court having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law, in an action of ejectment, to get possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but, as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed, in its own mode, to foreclose the equity of redemption, by sale or otherwise. The first court of law cannot foreclose nor give a judgment in ejectment, but can render a judgment for the payment of the debt, and the third court can give the

relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts. The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other courts."(*n*)

And so the rule seems chiefly or solely to be confined to cases where the parties are identical, or are privy, and where the object of suit and the points involved are similar in all respects.(*o*) See my work on "Res Adjudicata" for further explanation.

(*n*)Buck *v.* Colbath, 3 Wall. 344.

(*o*)Putnam *v.* New Albany, 4 Bis. C. C. 369.

CHAPTER XX.

SUMMARY PROCEEDINGS.

§ 161. Former scope of such proceedings.
162. Authority must be strictly pursued.

§ 161. This topic needs not detain us long, as it is quite restricted, and closely guarded. Formerly, this kind of jurisdiction was exercised by giving common law courts a *quasi* equitable power, in small amounts, as in matters of account under twenty pounds sterling;(*a*) and damages for occupation where the title to land did not come into the controversy.(*b*) Landlords' distress warrants are somewhat in the nature of a summary action. However, this is chiefly confined now, where it has any operation at all, to eminent domain proceedings, tax collections, and proceedings against court officers; and to contempts.

§ 162. The rule of strict pursuance of authority prevails, as to all courts, herein. The supreme court of Illinois say: "Since the determination of the case of *Rex* v. *Croke*, 1 Cowper, 30, the rule has been recognized, and uniformly adhered to, that a special authority, delegated by legislative enactment, to particular persons, or summary proceedings, without personal service, to take away a man's property and estate against his consent, must be strictly pursued, and it must so appear on the face of the proceedings. This court has adopted and acted upon this rule, and it is believed every state in the Union has done the same, in sale of lands for taxes, and in appropriating private property for public uses. This rule is so uniform and familar that it would be useless to quote authorities in its support. To give the court juris-

(*a*)Lewis v. Kemp, 6 Rich. (S. C.) 515.

(*b*)Lightner *v.* Hammeter, 3 Brev. (S. C.) 12.

diction, the authority must be strictly pursued, and a failure to do so renders the whole proceeding void. The statute alone confers the authority, and the mode it prescribes can alone be adopted."(*c*) And there is no distinction herein between superior courts of general jurisdiction, and inferior courts of limited jurisdiction.(*d*)

And the rule applies to a proceeding, by motion, against a constable and his sureties for not returning an execution issued by a justice of the peace,(*e*) or for money collected by the constable.(*f*)

However, if a statute giving summary powers to a court having a common law jurisdiction does not detail the methods of proceeding the principles of the common law must guide.(*g*) In New York a landlord's proceeding must show venue.(*h*)

(*c*)City of Chicago *v.* Railroad, 20 Ill. 290.

(*d*)Foster *v.* Glazener, 27 Ala. 397.

(*e*)Cannon *v.* Wood, 2 Sneed. (Tenn.) 177.

(*f*)Barry *v.* Patterson, 3 Humph. 314.

(*g*)Stewart *v.* Walters, 38 N. J. 274.

(*h*)People *ex rel.* *v.* De Camp, 12 Hun. 378.

CHAPTER XXI.

JUDGES.

§ 163. Judicial purity.
164. Age—*de jure* and *de facto* judges.
165. Residence.
166. Official and personal bias.
167. Ministerial acts which do not disqualify.
168. Mere partisan feeling not a disqualification.
169. Having acted as counsel.
170. Kindred.
171. Pecuniary interest—fiduciary positions—surety.
172. Summary of disqualifications—Buford case.
173. Procedure in case of disqualification.
174. Substitution.
175. Liability of judges for official acts.
176. Wilful abuses—forfeiture.

§ 163. It would be a mere solecism to remark that the efficiency of courts depends on the character of the judges therein as to intelligence and uprightness. However, it is not needful that a judge should be a very fiend, like the infamous Lord Jeffreys, in order to perpetrate irreparable mischief on community. Even a minor degree of stupidity or arrogance on the bench may be sufficient to subvert all the ends of justice. And it is desirable always that the judicial system should be scrupulously shielded from the influence of partisan rancor; and so it should never be held as a depository of political rewards, to be bestowed for partisan services. But we must not depart into a disquisition on the merits of the system, but proceed to notice the legal safeguards which have been thrown around it as to the qualifications and disqualifications of those who are called to administer justice between the citizens of our common country, and others who may seek redress at their hands under the protection of our laws.

§ 164. It is legitimate to prescribe a certain age as a standard of qualification; and it does not follow that even every voter should be eligible. It is not uncommon to fix the period of eligibility at thirty years. Yet where this is fixed, and one is appointed judge within age, it will have the effect merely of leaving him liable to be removed by a proper proceeding at any time; but until this is done he will be regarded as a judge *de facto*, though not *de jure*, and his acts will be valid and binding, and his competency cannot be inquired into by parties before him, but must be the subject of a direct inquiry instituted for the purpose of removing him;(*a*) and that, too, by the state, because, acting under appointment and commission, he is judge *de jure* as to all citizens, although subject to be displaced by *quo warranto* at the suit of the commonwealth.(*b*) And hereon the supreme court of Pennsylvania very tersely remarks: "If a private suitor may not, by the *appropriate* process, question a judge's commission when he has a chance to be heard in defence of his right, much less may such a suitor do it collaterally in an action to which the judge is not a party, and where he cannot be heard by himself or counsel. If this defendant may plead to the jurisdiction of the judge, every defendant in Montour county, whether in civil and criminal proceedings, may do the same; and the judge, instead of trying the rights of parties, will be continually engaged in defending his own; not merely in defending them, but in adjudicating them, contrary to that law, which is too elementary, even for the bill of rights, that forbids a man to judge his own cause.

"He is a judge *de facto*, and, as against all parties but the commonwealth, he is a judge *de jure* also. If the legislation, or appointment, is to be tested, it must be at the instance of the attorney general, or of some public officer representing the sovereignty of the state.* The notion that the functions

(*a*) Blackburn *v.* State, 3 Head, (Tenn.) 690.

(*b*) Clark *v.* Com. 29 Pa. St. 138.

*And thus, in Massachusetts, although a judge is disqualified who takes a seat in the legislature, (Commonwealth *v.* Hawkes, 123 Mass. 525,) yet the question cannot be brought forward by a party who has been convicted before him and

of a public officer, or of a corporation existing by authority of law, can be drawn in question, not as to the mode of their exercise but as to their right of existence, except at the pleasure of the sovereign, is a mistake that springs from the too prevalent misconception that it is the duty of everybody to attend to public affairs. Public officers are provided for public duties, and the remedy for delinquencies is of frequent recurrence, is specific and effectual. This plea to the jurisdiction cannot avail the defendant even to raise the constitutional question intended."(*b*)

This, however, does not apply to a *special* judge, and his authority may be questioned by a party.(*c*) It is only one acting directly under the sovereign authority of the state who can claim the immunity.

§ 165. In Michigan, one needs not to be a resident of the circuit in order to his eligibility to hold the office of judge therein, but if he is actually residing in the circuit when elected and afterwards removes from it, he vacates his office,(*d*) which looks like a very strange anomaly indeed. One would suppose it will be all one way or all the other.

§ 166. A judge should be free from bias, official or personal. And so, where a probate judge was also a selectman of the town, and therefore a party respondent, by virtue of the latter office, to an application for the appointment of a conservator over a person in the town, which appointment usually belongs to the probate judge, it was held he was disqualified to act as judge therein.(*e*) And, formerly, in Massachusetts, a magistrate had no jurisdiction in an action wherein the inhabitants of his town were summoned as trustees for the defendant.(*f*) But this official or local disqualification has not been carried so far as to preclude a justice of the peace, who acted as coroner in the inquest upon a dead man, from acting as examiner in the charge of murder against the man

appealed. Commonwealth v. Taber, 123 Mass. 253. Nor upon a writ of *habeas corpus*. Sheehan's Case, 122 Mass. 445.

(*b*)Clark *v.* Com. 29 Pa. St. 138.

(*c*)White *v.* Reagan, 25 Ark. 624.

(*d*)Royce *v.* Goodwin, 22 Mich. 497.

(*e*)Nettleton's Appeal, 28 Conn. 270.

(*f*)Clark *v.* Lamb, 2 Allen, 397.

alleged to have caused the death;(*g*) nor even to exclude a judge who was formerly on a vigilance committee which had banished the defendant for another and distinct crime from the state;(*h*) nor to forbid a justice of the peace to take cognizance of a cause in which he once acted as arbitrator, although it was suggested he ought not to do so as a matter of good taste;(*i*) nor to debar a magistrate who, being also clerk of court, has official duties to perform as clerk on an appeal even from his own decision;(*j*) nor to prohibit a justice from hearing the disclosure of a poor debtor, because he had aided the debtor to prepare the disclosure, although this also was reckoned in bad taste.(*k*) (See § 172, *infra*, note.)

But holding a post-office, or any United States office, may properly disqualify one from holding the office of judge at all.(*l*)

§ 167. The jurisdiction of a magistrate in an action for possession of land is not necessarily ousted by his having executed the lease under which the premises were held, and was the only subscribing witness; nor by his having written the demand for possession.(*m*)

§ 168. Neither does a mere partisan feeling necessarily disqualify, notwithstanding it may make matters hot for some or all the parties to a suit, and is, withal, extremely out of place in a judge; yea, moreover, although political intrigues have led to terrible corruptions, when the judicial seat was less guarded by legal restrictions than now. If there should be such a thing as an elective judiciary in our republic, at least the terms of office should be long in their tenure.

But the supreme court of California say: "The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the

(*g*)Forde *v.* Commonwealth, 16 Gratt. 548.

(*h*)People *v.* Mahoney, 18 Cal. 185.

(*i*)Batchelder *v.* Norse, 35 Vt. 643.

(*j*)Commonwealth *v.* Keenan, 97 Mass. 591.

(*k*)Lovering *v.* Lamson, 50 Me. 335.

(*l*)Hoglan *v.* Carpenter, 4 Bush. 89.

(*m*)Cook *v.* Berth, 102 Mass. 373.

court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the qualification of judges from that applied to jurors. The reason of this distinction is obvious. The province of the jury is to determine from the evidence the issues of fact presented by the parties, and their decision is final in all cases, where there is a conflict of testimony. Therefore, the expression of an unqualified opinion on the merits of the controversy, which evinces such a state of mind as renders him less capable to weigh the evidence with entire impartiality, is sufficient to exclude a juror. The province of a judge is to decide such questions of law as may arise in the progress of a trial. His decisions upon these points are not final, and if erroneous the party has his remedy by bill of exceptions and appeal. If forming or expressing an opinion upon the merits of the controversy was sufficient to disqualify a judge, it would be necessary that the venue of a cause should be changed after a mistrial, or the granting of a new trial; for after hearing the evidence and argument of counsel upon a mistrial the judge would, of course, have formed an opinion upon the merits of the controversy, and the fact of granting a new trial is often equivalent to the expression of such opinion."(*n*) Yet, the general rule is that a judge should not express an opinion so as to bias the jury.

§ 169. A judge cannot properly act as counsel in his own court, nor decide a cause in which he has once been counsel, although this is not to be pressed so far as to hold that where a county judge has been of counsel for some parties interested in an administrator's sale of real estate, he cannot grant a license for the sale;(*o*) nor to hold that his acts are absolutely void instead of voidable;(*p*) or that the objection cannot be waived by the parties, either expressly or by proceeding in the cause.(*p*)

(*n*)McCauley *v.* Weller, 12 Cal. 523.

(*o*)Morgan *v.* Hammett, 23 Wis. 40. Nor does the disqualification extend to a subsequent independent suit between the *same parties*. Stewart *v.* Mix, Sheriff, 30 La. An. 1035.

(*p*)Stearns *v.* Wright, 51 N. H. 600.

Thus, a probate judge has been held not disqualified by having previously acted as counsel in regard to the settlement of an estate, unless objection is made on that ground.(*q*) And so, the parties consenting, a judge who has been of counsel may render a valid decree in chancery.(*r*)

However, without such consent, expressed or implied, a judge cannot properly exercise jurisdiction in any cause where he has been of counsel. And so carefully is this matter guarded all around in order to keep distinct the offices of attorney and judge, that, on the other hand, in Michigan, it is held that a judge who has resigned, intending to act no more officially, is not allowed to officiate in a criminal case, as assistant prosecutor, before the time fixed for his resignation to take effect. And the court said that this was not a matter of indifference, but opposed to public policy, and, therefore, subject to exception.(*s*)

§ 170. A judge should not be subject to the bias of kindred, which, indeed, may work either way, to the advantage or disadvantage of the related person. So, where a defendant objected to the jurisdiction on the ground that he was a brother of the judge, and it was replied that it was not for him to complain of this, the supreme court remarked that "the delicacy of the position would lead many a conscientious judge to lean against his relative; for fear of leaning in his favor, in striving to stand perfectly erect, to bend a little backward."(*t*) That the defendant married the sister-in-law of the judge's wife is held too remote to disqualify, (*Fort* v. *West*, 53 Ga. 584,) although the disqualifying relationship may be either by natural kindred, or by marriage; and, within the prohibited degrees, the disqualification is absolute. The proceedings are void even in the absence of objection;(*u*) and it is the business of the judge himself to notice the facts,

(*q*) Platt *v.* Railroad, 577.

(*r*) Jewett *v.* Miller, 12 Ia. 86.

(*s*) Bashford *v.* People, 24 Mich. 245.

(*t*) Kelley *v.* Hacket, 10 Ind. 300.

(*u*) Schoonmaker *v.* Clearwater, 41 Barb. 202, and cases cited.

In Louisiana the fact that the judge's wife is a party is sufficient to recuse him on the ground of personal interest, whether she is separate from him in property or not. Hyam's Succession, 30 La. An. 460.

and proceed no further in the cause than to regulate the calendar, or arrange the order of business, assigning the cause its place.(*v*) And even an order dismissing the action is void, because he is incapacitated to make any order.(*v*)

Relationship is, perhaps, in most of the states, estimated under the civil law, and the degree of consanguinity is the third therein, at which the disqualification of a judge is fixed,(*w*) including, therefore, the kindred of first cousins, but nothing more remote than that of second cousins.(*x*)

The matter seems to have been carried to an extreme, in Vermont, as to marriage relationship, since it has been held that one cannot even sit as auditor on a trial on a book account whose wife is first cousin to the wife of one of the parties: and it is intimated that the objection might be taken at a late stage in the progress of the cause.(*y*)

In Georgia, where one of the parties was an executor, and married the sister of the wife of one of the judges, it was held the fact worked no disqualification.(*z*)

A judge of probate is not disqualified from acting, in Massachusetts, in regard to a will, and the estate under it, simply because his father-in-law is a creditor of the estate, if the father-in-law is not a party to the proceedings; otherwise, he is incompetent; as, also, in the case of a brother-in-law.(*a*)

§ 171. More especially, where a judge is pecuniarily interested, he is disqualified; since no man can be judge in his own cause.* But it has been held that, in general, it must

(*v*)People *v.* Guerra, 24 Cal. 76.

(*w*)Ibid; De La Guerra *v.* Benton, 23 Cal. 593.

(*x*)Brady *v.* Richardson, 18 Ind. 1.

(*y*)Clapp *v.* Foster, 34 Vt. 583.

(*z*)Deupree *v.* Deupree, 45 Ga. 414.

(*a*)Aldrich, appellant, 110 Mass. 190.

But where the father of a probate judge is a creditor of an estate, and joins the administrator in a petition to sell lands, the judge should not pass on the application. Lacroix, Succession, 30 La. An. 924.

*In Louisiana, a parish judge who is interested in a cause before him should refer it to the district judge; but if he is not interested, nor of kindred by blood or marriage, but otherwise disqualified, he may appoint a lawyer to act as temporary judge in the matter. State *v.* McCoy, 29 La. An. 593; State *v.* Williams, Id. 785. This is a constitutional power; but the lawyer so appointed is not obliged to serve; nor is he obliged to act even after he has accepted and passed upon some preliminary matters in the

be a direct and immediate interest in the cause or proceeding.(*b*) And so, where a probate judge receipted for confederate treasury notes as full payment of a decree rendered in his court, and afterwards the guardian who had paid the notes made a motion to quash a *fi. fa.* issued thereon, and to enter satisfaction on account of the payment of the confederate notes, his jurisdiction was sustained, on appeal.(*b*)

The remote and minute corporate interest of a police judge in fines collected is no disqualification for taking jurisdiction of the offences from which the fines arise.(*c*)

And the fact that a judge is joint owner with an estate in a tract of land, does not deprive him of jurisdiction of the estate in matters not pertaining to that tract of land.(*d*) And so, if the mayor is the owner of a lot on a street to be widened, this does not disqualify him to preside in the mayor's court before which the proceedings are had.(*e*)

And, in general terms, it is declared that the incapacity of interest does not extend to merely formal orders, and probably not to a case in which no other judge could act.(*f*)

But holding the relation of administrator to an estate involves, necessarily, an obligation to act for the interest of that estate, and so a judge sustaining such relation cannot act in matters where the estate is interested.(*g*) And so of any other fiduciary relation.(*g*) And so a judge having a power of attorney to receive money for heirs, on a percentage, or for reward, cannot act in the estate from which the money is to come, further than arranging the calendar and changing the venue.(*h*)

case. State *ex rel.* Brame, 29 La. An. 816. In such case no writ of *mandamus* will lie against the recalcitrant substitute. State *ex rel.* Chargois, 30 La. An. 1102.

(*b*)Ellis *v.* Smith, 42 Ala. 349.

Moreover, an objection on the ground of pecuniary interest may be waived by failing to object at the trial. Such objection cannot be allowed on a subsequent motion to quash the execution, or even to vacate the judgment. Collins *v.* Hammock, 59 Ala. 448.

(*c*)State *v.* Intoxicating Liquors, 54 Me. 564; Commonwealth *v.* Burding, 12 Allen, 506.

(*d*)Glavecke *v.* Tijirina, 24 Tex. 663.

(*e*)Mayor *v.* Long, 31 Mo. 369.

(*f*)Heydenfelat *v.* Towns, 27 Ala. 424.

(*g*)Cabot Bank Appeal, 26 Conn. 15.

(*h*)Estate of White, 37 Cal. 192.

If a judge is surety on an administration bond he is incompetent to act with regard to the estate. If the administrator is guardian for a distributee, the judge is also disqualified, thus being surety, from taking jurisdiction of the settlement of the guardian's accounts. And even if the guardian is removed, and a successor appointed, the change does not restore the competency of the judge.(*i*)

Where a judge was administrator, and, as such, contracted to convey lands belonging to the estate to a person who gave his note for the consideration money, which note the administrator discounted, and applied the avails to discharging claims against the estate, and, the buyer being unable to meet the note, advanced him money out of the funds of the estate, holding the lands as security—they not being conveyed—and, afterwards, the debtor made an assignment for the benefit of his creditors, it was held that such an interest disqualified the judge from acting officially in any matter pertaining to the debtor's estate under the assignment.(*j*)

In Texas, an objection on the ground of interest cannot be waived by the parties, but the proceedings are wholly void.(*k*) But it appears to be different in Iowa, where the objection must be made below, which intimates that the proceedings are merely error, but valid until reversed—that is, are not absolutely void.(*l*) And it is expressly so decided in New Hampshire, except under an express statutory prohibition, when all the proceedings are void.(*m*) And even where a judge takes a matter under advisement and his term expires before he renders the decision, no consent of parties can give effect to the decision as a judicial act.(*n*) Yet, in doubtful cases, one who alleges incapacity has the burden of proof on him to show it.(*o*)

(*i*)Wilson *v.* Wilson, 36 Ala. 659.

(*j*)Cabot Bank Appeal, 26 Conn. 15.

(*k*)Chambers *v.* Hodges, 23 Tex. 112.

(*l*)Ellsworth *v.* Moore, 7 Clarke, 487.

(*m*)Moses *v.* Julian, 45 N. H. 52. See note above under (*b*).

(*n*)Coopwood *v.* Prewett, 30 Miss. 212.

(*o*)Simon *v.* Haiffeigh, 21 La. An. 607.

§ 172. The supreme court of New Hampshire has summed up the matter of disqualification, and collected the authorities, thus: (1) A judge who is satisfied of his legal incompetency should, without objection, refuse to sit. (2) But if he knows nothing about it until his attention is drawn to it by parties, he should not too readily abandon his seat, but wait for clear proof, and a judge should not be permitted to withdraw without sufficient grounds. (3) Even a judge disqualified may make all mere formal orders, or such as may be needful for a continuance. (4) In cases where the statute does not make the proceedings void, parties must object before trial, or the objection will be considered waived, unless it be shown affirmatively, after trial commenced, that the party was not aware of the ground of objection, and was not in fault for his ignorance. (5) And, unless the statute forbids, parties may expressly waive objection—which is called in civil and Scotch law *prorogated jurisdiction;* and this may be tacitly conferred by bringing an action before a judge known to be disqualified. (6) But a party who has once properly declined the jurisdiction of a judge will not be deemed to have waived it by any subsequent defence. (7) At common law, the recusation of a judge is merely error. (8) But statutes may make proceedings void. (9) No man ought to be judge in his own cause, is a maxim aimed at the most dangerous source of partiality in a judge. (10) It is not necessary that a judge be a party in the cause, to create this disqualification, but only that he have any the slightest pecuniary interest in the result, not merely possible and contingent. The interest which, in former times, would have disqualified a witness, is sufficient. (11) Members of partnerships and corporations, though their interest may be very trifling—except in cases where one is merely an inhabitant of a municipal corporation, entitled to receive fines and costs from offenders—are incompetent. (12) An interest in the question merely, without a pecuniary interest in the result, is no valid ground of recusation, except where the judge has a lawsuit pending or impending with another person of a similar nature. (13) Stockholding in

a corporation is a ground. (14) Kindred or affinity by marriage to the fourth degree (civil law.)* (15) Friendly or hostile relations with the parties, having received gifts, the relation of master and servant, guardian and ward, enmity and threats, bias or prejudice, judge having acted as counsel; but not the mere relation of creditor, lessee or debtor, unless the suit endangers financial claims of the judge, indirectly or directly(*p*)—may disqualify.

In the *Central Law Journal* for October 24, 1879, I find a novel phase of disqualification given in connection with the noted Buford case, in Kentucky. Buford murdered one of the judges of the court of appeals on account of an opinion rendered. He was condemned for the murder, and appealed. And it was held that the associate judges who had concurred in the said opinion were disqualified by their interest in the event of the appeal, and could only certify the fact to the governor, who, under the constitution, can thereon appoint a special court.

§ 173. When the judge is disqualified there are two methods of proceeding in the matter; the first by transferring the cause to another court, and the second by substituting a special judge; or, where practicable, a regular judge from another court.

Sometimes a practicing attorney is substituted; but it is held in Indiana that the judge cannot appoint such without the agreement of the parties, for such a special judge can have no other authority than by the agreement.(*q*) But where a statute expressly prescribes such substitution, and authorizes the appointee, by the selection of the litigants, to exercise "all the functions of a judge," this provision clothes him with judicial authority, and he stands as does the regular judge while his *pro tempore* appointment lasts.(*r*) But, in any

*Usually the third, I think, now.

(*p*)Moses *v.* Julian, 45 N. H. 53, and authorities collected.

Where a judge is merely an honorary member of an incorporated bar association, this fact does not disqualify him from acting in case of an information filed by a committee of such association in order to disbar an active member thereof. Bowman's Case, 67 Mo. 150.

(*q*)Barnes *v.* State, 28 Ind. 82.

(*r*)Henderson *v.* Pope, 39 Ga. 364. See p. 163, note *.

event, the parties must select.(*s*) And then the functions of the *pro tempore* judge continue even to the hearing of a motion for a new trial; and even if, meanwhile, the regular judge has resigned; and it is held error in the *pro tem.* judge to refuse to hear the motion for a new trial.(*t*)

In Kentucky a special judge may be elected by the members of the bar, instead of the parties, which is an apparent anomaly.(*u*) And there is another in Mississippi where a chancellor interested can select by lot a member of the bar, whose functions, however, are held rather ministerial than judicial, so that his decrees have no validity until signed by the chancellor.(*v*) In Texas, also, when a chief justice of the county court is disqualified, the statute authorizes any two of the county commissioners to act in his place.(*w*) This, however, is rather a substitution of judges than of non-judges.

So in Maine a justice of the supreme judicial court may preside at the request of a disqualified judge of the superior court.(*x*) And so generally.

§ 174. As to substitution, when there is no official disqualification, it is held in Indiana that a common pleas judge, holding a circuit court, has jurisdiction to try the title to real estate, which he cannot do in his own court.(*y*) And he can hear all causes as if he were the regular judge,(*z*) while, at the same time, he is not disfranchised of his own official authority, but retains it likewise,(*a*) unless in a case of actual exchange.(*b*)

However, in Missouri, although a judge may assign to a

(*s*)Smith *v.* Frisbie, 7 Clarke (Ia.) 486.

(*t*)Clayton *v.* Wallace, 41 Ga. 270.

(*u*)Smith *v.* Blakeman, 8 Bush. 477.

(*v*)Gimstead *v.* Buckley, 32 Miss. 149.

(*w*)Glavecke *v.* Tijirina, 24 Tex. 663.

(*x*)State *v.* Thomas, 56 Me. 492.

In Louisiana, where an injunction is applied for which falls within the jurisdiction of the district court, and the district judge is absent and the parish judge legally recused, the parish judge of an adjoining parish may act in the matter. Hyam's Succession, 30 La. An. 460.

A district attorney, who is a practicing lawyer, may serve as a substitute, in Louisiana. State *ex rel.* Chargois, 30 La. An. 1102.

(*y*)Malady *v.* McEnery, 30 Ind. 276.

(*z*)Application of Judges, 64 Pa. St. 34.

(*a*)Bear *v.* Cohen, 65 N. C. 511.

(*b*)Hawes *v.* Mauney, 66 N. C. 221.

neighboring judge the whole business of a term, he cannot call him in to try a particular cause, in order to obviate the necessity of a change of venue, or for any other reason, and if he does so the proceedings are all void.(*c*)

Judicial power cannot be delegated; as where an absent judge telegraphed the clerk to discharge the jury in a criminal case, and the clerk did so, it was held to be error of so fatal a character that the prisoner was thereon entitled to his discharge.(*d*)

And the power of substitution must be strictly pursued; as where a statute authorizes a justice of the peace to take jurisdiction in a case where, on the part of the municipal judge, there is "absence, sickness, or other inability," the fact that the judge declines to act does not confer jurisdiction on the justice.(*e*) And so where a clerk of the district court is authorized to discharge the duties of the county judge, when the county judge and prosecuting attorney are both unable to act, the inability and the cause thereof must appear of record, and if this is not so an appellate court will not entertain an appeal from the judgment rendered by the clerk.(*f*)

§ 175. Although judges act under grave responsibilities, yet they are not held liable in pecuniary damages for mere mistake, void of malice or gross negligence.(*g*) And this rule applies as well to inferior as to superior courts,(*h*) except to the former in a less degree, since it is held that, as to judges of courts of record of superior or general jurisdiction, they

(*c*)Gale, Adm'r, *v.* Michie, 47 Mo. 326.

(*d*)State *v.* Jefferson, 66 N. C. 309.

(*e*)Klaise *v.* State, 27 Wis. 462.

(*f*)Burlington University *v.* Executors, 12 Ia. 442.

(*g*)Cope *v.* Ramsey, 2 Heisk. (Tenn.) 197. Or corruption: Gault *v.* Wallis, 53 Ga. 675.

There is a rule in Louisiana—unique but judicious—intended, evidently, to guard against mistakes from inefficiency, viz.: that one cannot act as district judge who has not practiced law in that state for two years next preceding his election; or, if he has practiced without the formal admission to the bar prescribed by the constitution; and one is not held to have practiced law, in the constitutional sense, merely because he has acted as district attorney. State *ex rel. v.* Marks, 30 La. An. 97.

(*h*)Londegan *v.* Hammer, 30 Ia. 509.

are not liable in civil actions for their judicial acts, even if those acts are in excess of their jurisdiction, and are alleged to have been corrupt or malicious. There is, however, a distinction between such acts and such as are performed in the entire absence of any jurisdiction over the subject-matter, for these latter are trespasses *ab initio.*(*i*)

An able opinion of the supreme court of the United States, delivered by Justice Field, holds this language in regard to the subject of judicial liability: "It is a general principle, of the highest importance to the proper administration of justice, that a judicial officer in exercising the authority vested in him shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, a deep root in the common law. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption, impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it

(*i*) Bradley *v.* Fisher, 13 Wall. 347.

would tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations.

"The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is in precisely this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character; and, from the imperfections of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. * * * * * A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over

the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."(*j*)

§ 176. Nevertheless, for wilful abuses of authority, or for malfeasance, misfeasance, or non-feasance in office, a judge may be removed by impeachment,(*k*) or otherwise, as by address of the legislature; but never by mere legislation.(*l*) Or if, while one is judge he is convicted of felony, this not only vacates his office, but no pardon can restore him.(*m*)

And, in Alabama, it has been held that one who occupied the office of judge of the circuit court vacated the office and forfeited all his rights therein by entering into the military service of the rebellion, and there was no need of any judicial proceeding to determine the fact of forfeiture and vacancy. And if afterwards he was elected judge under the confederacy he did not thereby become even judge *de facto*; and when the legitimate government resumed its sway, it was under no obligation, legal or moral, to pay him for his labors as such rebel judge.(*n*)

(*j*) Bradley *v.* Fisher, 13 Wall. 347, *passim*; Davis and Clifford, JJ., dissenting.

(*k*) Commonwealth *v.* Gamble, 62 Pa. St. 343.

(*l*) State *ex rel.* *v.* Towne, 21 La. An. 491; even by abolishing the office he holds. State *ex rel.* *v.* Jumel, 30 La. An. 861

(*m*) State *v.* Carson, 27 Ark. 469.

(*n*) Chisholm *v.* Coleman, 43 Ala. 216.

CHAPTER XXII.

CONTROL OF ATTORNEYS.

§ 177. Removal from the bar.

§ 177. It is a general principle that the jurisdiction of a court includes the power of enforcing rules of order, and of governing its officers, including attorneys. And, moreover, a court may compel obedience upon the part of attorneys by various modes, extending to their exclusion from the bar, if necessary. The supreme court of the United States say in regard to this matter:

"This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession, as it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on

his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper apology and reparation. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar, therefore, should never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine, would accomplish the end desired.

"But, on the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take it upon themselves when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain, at all times, the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. 'In matters collateral to official duty,' said Chief Justice Gibson, in the case of *Austin and others*, 'the judge is on a level with the members of the bar, as he is with his fellow citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is, nevertheless, evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street, for a judgment in court. No one would pretend that an attempt to control the deliberation of the bench by the apprehension of violence, and subject the judges to the power of those who are or ought to be subordinate to them, is compatible with professional duty, or the judicial independence

so indispensable to the administration of justice. And an enormity of this sort practiced but on a single judge, would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated upon the person of each of them; because the consequences to suitors and the public would be the same, and whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll.'

"The order of removal complained of in this case recites that the plaintiff threatened the presiding justice of the criminal court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending. The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine, in this case, whether, under any circumstances, the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action, or in any civil action against the defendant; and, if the matters recited are taken as true, there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offence of such gravity would soon find himself a subject of pity rather than respect.

"The criminal court of the district erred in not citing the plaintiff before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defence, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for

it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction over its attorneys."(*a*)

But the control and regulation of attorneys in their conduct are not confined to courts having power to disbar offenders. Even the humblest court may amply protect itself against insult by fines: and, usually, if need be, imprisonment. Attorneys are officers of all courts in which they practice, and hence, whenever they enter the precincts of a court-room, they pass under a just and enforceable authority. See Contempts and Newspaper Contempts, *infra*.

(*a*)Secomb's Case, 19 How. 9; Garland's Case, 4 Wall. 379; Randall *v.* Brigham, 7 Wall. 523.

CHAPTER XXIII.

CONTEMPTS.

§ 178. Power to punish for contempts essential.
179. Nature of the power.
180. Nature of proceedings in contempt.
181. Contempt of witness.
182. Bringing a fictitious suit.
183. Quarreling or fighting.
184. Extent of power to punish.
185. Attempt to obtain opinion when there is no real controversy.
186. Client not answerable for contempt of attorney.
187. Contempt committed by a court.
188. Disobedience of orders made out of court.
189. Contempts by not paying money.
190. Violation of injunctions.
191. Insolent language of an attorney to J. P.
192. Proceedings not retroactive.
193. When citation to show cause must issue.
194. Clearing contempt.
195. Remitting sentence by pardon.
196. Denial of right to litigate to one in contempt.

§ 178. It is apparent, even at a casual thought, how essential it is to the administration of justice that all courts of justice should have the power, in a summary manner, to guard their inherent dignity from injurious aspersions, and to enforce obedience to their orders. Contempts may relate either to matters in the cause, such as disobedience to process, rules, orders, etc., or to matters without, such as misconduct tending to obstruct the proceedings of courts or mar their efficiency.

We shall consider these two divisions in the order named: First, then, contempts in the cause. However, before setting out, we must observe that not all failures in the cause to comply with the requisitions of the court will subject one to

proceedings for contempt; as, for example, the mere non-payment of a judgment, and the like, will not; although, as we shall see, a non-compliance with *some orders* for the payment of money will.

§ 179. It is conceded by all that the right to protect itself against contempt, in some way, belongs to every court. But there is a variance in the authorities as to the manner and degree, some holding it to be inherent, and not subject to review, even when exercised by lower courts in the absence of statutory authority, except in the way of subjecting a magistrate to indictment or impeachment, if he acts maliciously or oppressively;(*a*) others holding that none but courts of record can punish summarily for contempt, the inferior courts having only a right to procure an indictment against the offender.(*b*) The reason of the case seems to be decidedly with the former, when we consider the necessity of a prompt, decisive, immediate suppression of an existing obstruction to justice in pending proceedings. And the remark of the New Jersey court seems painfully inadequate, that "to compel sureties, for the peace or bail, to answer an indictment, or to commit in default of either, besides the other remedies stated, are powers sufficient to protect these inferior jurisdictions from obstruction; and he who disturbs them, although they may be inferior in a legal sense, should understand, by the penalties of a conviction on an indictment, that they perform a very important and necessary part in the administration of the laws, both general and local, and will receive the full protection that punishment for misdemeanor can secure." It is certainly evident that remote and uncertain punishment has infinitely less restraining power than immediate and inevitable consequences.

Yet there is a well-founded distinction between superior and inferior courts, in this, that the latter cannot punish, as for a criminal contempt, except for interruptions to business during

(*a*) Clark *v.* People, Breese (Ill.) 340.

(*b*) In the matter of Peter Kerrigan, 33 N. J. L.; Bradley *v.* Fisher, 13 Wall. 354, 350.

judicial proceedings, and cannot enforce civil remedies by proceedings as for contempt.(c)*

The supreme court of Mississippi well remarks, on the power to fine and imprison for contempt, that "from the earliest history of jurisprudence it has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees against the recusant parties before it, would be a disgrace to the legislation and a stigma upon the age which invented it. In

(c)In the matter of Watson, 3 Lans. (N. Y.) 414.

*A court which has no power to disbar an attorney may yet report to the licensing court disorderly conduct on the part of an attorney, whose duty it is to look into the report. Brewster's Case, 12 Hun. 110.

In New York it has lately been held that the power of a justice of the peace to punish for contempt is wholly statutory. Rutherford *v.* Holmes, 66 N. Y. 368; Andrews and Miller, JJ., dissenting. And also as to a surrogate's court. Watson *v.* Nelson, 69 N. Y. 536. In Connecticut it is held that the statute only regulates the power, and does not confer it—the power being inherent in all courts. Middlebrook *v.* State, 43 Conn. 257. So that a decision thereon, where the proceeding is according to the common law practice, is not reviewable by the supreme court, because at common law the power of review did not exist, and this can only be conferred by statute. Wilson *v.* Territory, 1 Wy. 114. Tyler *v.* Hamasley, 44 Conn. 393. In Alabama it is held not only absolute, but the party does not even need to be allowed an opportunity of defense, the proceeding not being regarded as a criminal trial. *Ex parte* Hamilton, 51 Ala. 66. But, in Texas, a party is entitled to a rule *nisi* when disobedience to process is charged against him, which doubtless is, in effect, the general rule in such cases. *Ex parte* Kilgore, 3 Tex. Ct. of Ap. 247. And especially is an officer entitled to a rule when proceeded against for not executing process. Wheeler *v.* Harrison, 57 Ga. 24; Wheeler *v.* Thomas, Id. 161. Where a contempt is committed in the presence of the court, the court has immediate jurisdiction of the offender, and, although he leaves the court room and absconds, he may be sentenced, in his absence, without the issuing of process for his arrest. Middlebrook *v.* State, 43 Conn. 257. See, also, People *ex rel. v.* Nevins, 1 Hill, 154. But, if one is *discharged* on the ground that the punishment imposed was in part unknown to the law, he cannot be re-sentenced for the same contempt. Snyder *v.* Van Ingen, 9 Hun. 569.

this country all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state all judges are elected by the people, and hold their authority in a double sense directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people which the judges sit to exercise and enforce. Contempts against these courts, in the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law whom they employ in the conduct of their government. The power to compel the lawless offender against decency and propriety to respect the laws of his country and submit to their authority (a duty to which the good citizen yields hearty obedience without compulsion) must exist, or courts and laws operate at last as a restraint upon the upright, who need no restraint, and a license to the offenders whom they are made to subdue."(*d*)

It seems reasonable that each court should be its own judge as to the contempt, and perhaps, usually, its decision is not reviewable.(*e*) But a statute may, of course, make it subject

(*d*)Watson *v.* Williams, 36 Miss. 341.

Wherever a party relies on the disqualification, by interest, of a magistrate, to nullify contempt proceedings, it is his place to establish such disqualification, and not to require the magistrate to aver in the *mittimus* that he is not interested in the cause. Call v. Pike, 68 Me. 219.

In New York it has been held that a justice of the peace may proceed, by warrant, to cause the arrest of an offender for contemptuous words spoken to him by the party, after judgment rendered against the party, and while the justice is not actually holding court. Richmond *v.* Dayton, 10 Johns. 395. And, more especially, while conducting proceedings in a cause, it is the imperative duty of a justice of the peace to repress all disorderly behavior of parties, counsel, or bystanders. Onderdonk *v.* Ranlett, 3 Hill, 329. Although the mere neglect to comply with an order, such as an order to produce a paper in evidence, will not justify him in punishing the neglect as a contempt. People *ex rel.* *v.* Benjamin, 9 How. Pr. 419. As to the power of a public officer, as a commissioner, or of a committee, to commit for a contempt, it must not be implied, but must be clearly conferred by law. Noyes *v.* Byxbee, 45 Conn. 382. (See p. 179, note.)

(*e*)State *v.* Thurmond, 37 Tex. 341; Clark *v.* People, Breese (Ill.) 340.

to appeal.(*f*) In the United States courts contempts are exclusively cognizable by the courts where they arise, and cannot be appealed.(*g*) In Kentucky, while the question of contempt or no contempt is not reviewable, the sentence inflicted is so; as, for example, striking an attorney from the rolls.(*h*) And in Maine the question of jurisdiction may be examined;(*i*) as, also, in California.(*j*) In Iowa, while not coming under the power of criminal appeals, yet matters of contempt are reviewable on *certiorari*. As to such appeals we will treat fully in the second volume of the present work.*

§ 180. As to the nature of proceedings in contempt it is held that these are of a *quasi* criminal character, and consequently the state is the real prosecutor, and where the proceeding is against a party in a civil cause for misconduct or disobedience therein it should not be entitled as of such action;(*k*) and still less should a fine imposed be allowed to the opposite party.(*l*) Imprisonment, too, must be for a certain and definite time, or must expire on the performance of a condition.(*m*) So that the remarks of Chancellor Pirtle are worthy of close attention: "Is it necessary that the courts of

(*f*) Whittem *v.* State, 36 Ind. 197.

(*g*) New Orleans *v.* Steamship Co. 20 Wall. 387.

(*h*) Turner *v.* Commonwealth, 2 Met. 619.

(*i*) Railroad *v.* Railroad, 49 Me. 401.

(*j*) Batchelder *v.* Moore, 42 Cal. 414.

*A recent case in Missouri has decided that where a person refused to serve as a juror, on the ground that he was exempt by statute, and was thereupon committed for contempt, the legality of the committal could not be inquired of by *habeas corpus* proceedings. *Ex parte* Goodwin, 67 Mo. 637. And so in Michigan, where one is committed for refusing to pay alimony. Bissell's Case, 40 Mich. 63. And this rests on the ground that one court cannot properly review a contempt committed in another court. Shattuck *v.* State, 51 Miss. 50; Phillips *v.* Welch, 12 Nev. 159. Yet, even if a court commissioner has authority to punish for contempt, the court may do so, if he does not exercise such authority. Niellmankamp *v.* Ullman, 47 Wis. 168. And of course there may be an appeal in some cases, in which, however, the point of inquiry relates to the jurisdiction of the inferior court, and the regularity of the exercise thereof on the face of the proceedings. Phillips *v.* Welch, *supra*.

(*k*) Haight *v.* Lucia, 36 Wis. 360.

(*l*) In the matter of Rhodes, 65 N. C. 519, and Morris *v.* Whitehead, Id. 637.

(*m*) Whittem *v.* State, 36 Ind. 216; Leach's Case, 51 Vt. 630.

this country should have power to commit until further order of the court? I cannot find it. I can see no call for it. I can see danger in it, and the law should not make danger where there is no necessity. A freeman should never, by the laws of freemen, be placed in such dreary uncertainty of imprisonment as that when he inquires of 'the law of the land' it cannot tell him when it shall end. No absolute power lives in this country. It cannot exist in a republic. Suppose the court should adjourn without having made any further order, the consideration of the case is cut off at once, and entirely, until the next term. So he must be left without any authority of the judiciary even to mediate his case. And a person committed for contempt cannot be bailed." Quoted 36 Ind. 216.

In the United States courts it is treated as a criminal proceeding, in the name of the United States; and in matters of mere disobedience the party is heard in his own behalf,(*n*) while in direct contempt, by misbehavior in the face of the court, sentence is given on view only.(*o*)

Fine and imprisonment are the usual modes of punishment. But the court is not always confined to these, but can refuse to allow one in contempt any aggressive proceedings against his adversary in a cause pending, although it cannot stay him in his proceedings, by motion or appeal, where appeal is allowed, when his object is to rid himself of the alleged contempt, or show that the order he disobeyed was in itself erroneous.(*p*)

§ 181. A witness is not only liable in contempt for insolence and contumacy in open court, but also before the grand jury in refusing to answer proper questions, and threatening some of the grand jurors. And he may not only be fined, but also required to give security for his good behavior for a year.(*q*) And, universally, wilful disobedience to a subpœna is a contempt in superior courts. A justice of the peace,

(*n*) Fanshawe *v.* Tracy, 4 Bis. 498.

(*o*) Whittem *v.* State, 36 Ind. 217.

(*p*) Brinkley *v.* Brinkley, 47 N. Y. 40.

(*q*) United States *v.* Caton, 1 Cranch, C. C. 150.

however, in New York, cannot commit for a contempt in refusing to answer a question, until the party desiring his testimony files affidavit that the testimony desired is material in the cause.(*r*)

But while the refusal of a witness to answer a proper question is a contempt, no matter how respectful and deferential the refusal may be, yet, if the inquiry is an improper one as to the subject, it is not a contempt, and one imprisoned thereunder will be released on *habeas corpus*.(*s*)

It is held a contempt for one, in an examination before a referee, to refuse to allow a witness, while testifying, to examine account books, to enable the adverse party to question him thereon; although it is doubted whether a court can order the books of a party to be left with a referee for the purpose of accounting; and, certain it is, that where such books are not left when there is no such order of the court, this is no contempt.(*t*)

It has even been held that for an attorney to refuse to produce papers in his possession, on the ground that it would be a breach of his privilege as an attorney, is a contempt, since it belongs not to himself, but to the court, to determine the question of his privilege.(*u*) But if papers are not under control, it is a sufficient excuse if a witness does what he can to comply.(*v*) And where the court allows a party to examine part of his adversary's books, and he breaks open other parts sealed up, he is guilty of contempt.(*w*)

(*r*) Rutherford *v.* Holmes, 5 Hun. (N. Y.) 317.

(*s*) Holman *v.* Mayor, 34 Tex. 669.

Where a witness refuses to answer several questions addressed to the same point, the court is not justified in punishing each separate refusal to answer as a separate contempt. Only one sentence can be imposed. Maxwell *v.* Rives, 11 Nev. 214.

(*t*) Ludlow *v.* Knox, 4 Abb. App. Dec. 326.

(*u*) Mitchell's Case, 12 Abb. Pr. 249.

(*v*) Headt *v.* Wetmore, 2 Rob. (N. Y.) 691.

(*w*) Dias *v.* Merle, 2 Paige (N. Y.) 494.

There is a distinction between civil and criminal contempts, and also between actual and constructive contempts. The same act cannot be the basis of an award of indemnity, and, at the same time, be punished as a criminal contempt. Pierce's Case, 44 Wis. 412. The distinction is that, in a civil contempt, the offense consists in *refusing* to obey some order made for the

§ 182. It has been held punishable as a contempt to bring a fictitious suit in the name of another without the privity or

benefit of the opposite party; but if the offence is directed against the dignity of the court, or if it consists of doing something positively to the injury of the opposite party, it is criminal in its nature. Phillips *v.* Welch, 11 Nev. 187.

An executor may be compelled to pay stipends by contempt proceedings, provided he has opportunity to be heard thereon, but not otherwise. Leach's Case, 51 Vt. 630. And, in all cases, the violation must be clear. If an order disobeyed is capable of a construction which of itself will obviate the contempt, this construction must be given it. Weeks *v.* Smith, 3 Abb. Pr. 211. And, as to orders commanding the payment of money, the failure must be *wilful* in order to constitute a punishable default. Dinet *v.* People *ex rel.* 73 Ill. 183; Myers *v.* Trimble, 3 E. D. Smith, 607; Russell *v.* Russell, 69 Me. 336, (relating to the payment of alimony.) And it has been held that a demand for performance under an order for the payment of money, or the delivery of property, even to a receiver, is needful to justify proceedings for contempt. McComb *v.* Weaver, 11 Hun. 271.

The enforcement of civil remedies by contempt proceedings is to be regarded as an extreme resort, not to be allowed where there is any other adequate remedy. Haines *v.* Haines, 35 Mich. 138. And so if there is an order requiring the delivery of a deed, there is no actionable contempt until after the party entitled to the deed has prepared one and presented it for examination, and the execution is refused. Barry *v.* Junes, 35 Mich. 189. But a *wilful evasion* of the *service* of a known order constitutes a contempt, (Conover *v.* Wood, 5 Abb. Pr. 84;) and, if service is made on a solicitor, the client, knowing such service, must obey it, or he will be in contempt as fully as if the service were personal. People *ex rel. v.* Brower, 4 Paige, 405.

If one disposes of property which he *knows* is the subject of an order commanding it to be delivered to a receiver, he is in contempt. Hull *v.* Thomas, 3 Edw. 236. A trustee can only be adjudged in contempt, however, for not paying over money, when the money is actually in his hands, or, having been in his hands, has been paid out by him under such circumstances as involved a breach of trust. Williams *v.* Dwinelle, 51 Cal. 442. But, of course, orders can only bind parties in the cause. Watson *v.* Fuller, 9 How. Pr. 425. But, as to these, the power to punish for contempt extends even to supplementary proceedings. Smethust's Case, 2 Sandf. 724. And an order binding on a a corporate body—even upon a common council—is binding upon all the individuals severally who compose the corporation, and all who act in its behalf, and to whom knowledge of the order comes. People *v.* Sturtevant, 5 Seld. 263.

It is held, usually, (Iowa excepted,) that it is a contempt for one having a claim to bring an action against a receiver, without leave of the court appointing the receiver. Richards *v.* People, 81 Ill. 551. The reason is, that the property is then considered in the custody of the court. Noe *v.* Gibson, 7 Paige, 513. And the *possession*

consent of the nominal plaintiff; the judgment, however, only extending to the payment of the costs.(*x*)

§ 183. It is contempt to call another a liar openly in the presence of the court while in session, and in hearing of the officers of the court; and an assault and battery committed in a hall of entrance, within hearing of the court, is so likewise.(*y*)

§ 184. The power of the courts to punish for contempt is

sion of the receiver must not be disturbed, although, if the property be real estate, it may be sold by a sheriff on execution; but the purchaser must have the permission of the appointing court to take the possession. Albany City Bank *v.* Schermerhorn, 9 Paige, 373. And the rule is the same as to the committee, conservator or guardian of a lunatic, idiot or drunkard. L'Amoreaux *v.* Crosby, 2 Paige, 422; Heller's Case, 3 Paige, 199; Hepper's Case, 5 Paige, 489; Lynch's Case, 5 Paige, 120.

In proceedings for contempt it cannot be shown that the order disobeyed was erroneous, provided the court had jurisdiction of the cause. People *ex rel. v.* Sturtevant, 5 Seld. 263; Higbie *v.* Edgarton, 3 Paige, 253; Smith *v.* Reno, 6 How. Pr. 126; Insurance Co. *v.* Hicks, 7 Abb. Pr. 204. Even the advice of an attorney that an order is illegal will furnish no excuse. Capet *v.* Parker, 3 Sanf. 662.

As to *criminal contempts*, whatever tends to obstruct the administration of justice, directly, is a punishable offence, even if it consists of abuse of a judge out of court. Thus, where an attorney wrote a letter to a judge, stating in substance, "The ruling you have made is directly contrary to every principle of law, and everybody knows it, I believe;" and "It is my desire that no such decision shall stand unreversed in any court I practice in," it was held to be a flagrant contempt. Pryor's Case, 18 Kan. 72.

Where a contempt is committed in one jurisdiction, an arrest therefor cannot be made in another, even in the matter of a violation of the order of a district court of the United States in a bankruptcy case. Allen's Case, 13 Blatch. C. C. 272.

In constructive contempts jurisdiction is sometimes made to depend on the filing of an affidavit. Wilson *v.* Territory, 1 Wy. 155.

And imprisoning for a contempt in disobeying an order of court is not a violation of a constitutional provision forbidding imprisonment for debt, or of one requiring a trial by jury in criminal cases, (State *ex rel. v.* Becht, 23 Minn. 411;) unless in case of an order requiring the payment of money merely. Insurance Case, 17 Bank Reg. 368.

A commitment is not avoided by including some improper items in a fine. People *ex rel. v.* Jacobs, 66 N. Y. 9.

Res adjudicata applies to defences in contempt cases. Thweatt *v.* Kiddoo, 58 Ga. 300.

(*x*) Butterworth *v.* Stagg, 2 Johns. Cas. 291.

(*y*) United States *v.* Emerson, 4 Cranch, C. C. 189.

not confined to officers thereof, parties and witnessses, but extends to strangers, who are punishable for attempting to make any arrangement with a juror to signal the state of affairs in a jury room while the jury are considering their verdict; it being the policy of the law to secure complete seclusion. And a court remarked, in a case of the kind, that there is "nothing which calls for keener vigilance on the part of judges than everything which has a tendency to expose jurors to the arts of the friends or followers of litigants."(*z*)

§ 185. "Any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interests, or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." And it does not matter whether the suit is collusively brought, or one party buys out the interest of the other, *pendente lite*, or even on appeal.(*a*)

§ 186. In no case, however, can a client be held answerable for the contempt of an attorney, involved in an act of which the client knew nothing. The supreme court of New York say concerning this, by *Jones*, J.: "I do not perceive on what principle the client can be punished as for a contempt for an act done by his attorney, without his direction, knowledge, privity or procurement. The proceedings to punish for a contempt are, in their nature, *quasi* criminal. The party adjudged guilty is to be punished by fine or imprisonment, or both. By his act of contempt he subjects himself to a liability to punishment in either of those modes. If, then, the client is guilty of a contempt for an act done by his attorney without his knowledge, he becomes liable to be punished by a fine or imprisonment, or both, for an act done by another, without his participation. Thus he may be imprisoned sim-

(*z*)State *v.* Doty, 32 N. J. L. 403.

And so an evasion of an injunction against using a particular sign or firm name. Devlin *v.* Devlin, 12 Hun. 212.

(*a*)Cleveland *v.* Chamberlain, 1 Black (U. S.) 426.

ply as a punishment for the illegal act of another. It is no answer to say that the court has a discretion to impose on him simply a fine sufficient in amount to make good the damage done by the acts of his attorney; for the mode of punishment is discretionary, and if a contempt by an attorney is a contempt by the client, then the client is liable to the same punishment as the attorney; and if, under the circumstances, the attorney would be punishable with imprisonment, it follows that the client would be also. This necessarily results from regarding the acts of the attorney as the acts of the client for the purpose of contempt proceedings. And, further, the infliction of a fine of only sufficient amount to compensate the aggrieved party is by way of punishment for the misconduct complained of, and, as such, imprisonment follows until payment be made.* To punish one for the act of another is contrary to natural justice and the established principles of law."(*b*)

§ 187. A court may be in contempt, and the judge punished, for obstructing in any way the execution of a judgment in a higher court.(*c*)†

§ 188. There can be no punishment for contempt in disobedience of an order made by a judge out of court, and not relating to any case pending in the court.(*d*) Yet, where one has been dispossessed of a tract of land by a judgment and process of court, and afterwards re-enters, he may be punished for contempt notwithstanding there is no action pending at the time of the re-entry.(*e*)†

§ 189. Contempts for not paying money are mainly, perhaps exclusively, confined to matters of alimony, although

*But this is certainly an anomaly, although a party injured by an act of contempt doubtless might have an action of trespass.

(*b*)Satterlee *v.* De Comeau, 7 Rob. 671.

(*c*)State *ex rel. v.* Herron, 24 La. An. 624.

†But a court of equity cannot punish the officer of a law court for obeying the orders of the latter. Railroad *v.* Judge, 10 Bush. 564. Nor can one court review, by *habeas corpus*, the judgment of another in contempt proceedings. Shattuck *v.* State, 51 Miss. 50; Phillips *v.* Welch, 12 Nev. 159; People *ex rel. v.* Jacobs, 68 N. Y. 8.

(*d*)People *v.* Brennan, 45 Barb. 347.

(*e*)People *ex rel. v.* Dwinelle, 29 Cal. 633.

herein these are not regarded as criminal so much as in the light of a civil execution, though criminal in form.(*f*) But it is not allowed in New York.(*g*) In Michigan there must be a demand and refusal.(*h*) And it is a sufficient answer that the respondent is unable to pay, and that this inability is not his intentional fault.(*i*)

§ 190. Injunctions may be enforced by proceedings in contempt, as an injunction against the infringement of a patent,(*j*)* or against waste; and not only must the party abstain from violating the injunction himself, but he must require its observance by his employes, or he will subject himself to attachment.(*k*)

The mere wrongful suing out of an injunction is not a contempt of the authority of the court.(*l*)

Where there has been a clear breach of an injunction, it is held that, as a part of the fine, the opposite party may have expenses and attorney's fees in prosecuting the proceedings in attachment allowed him in the United States courts(*m*) and in New York.(*n*)

§ 191. Where a justice of the peace was hearing a motion for continuance, an attorney, on resisting the motion, became angry and addressed to the justice this language, "You can fine and be damned," on being reproved for his violence. This was held to be a contempt in open court, for which it was the duty of the justice to punish him, and for this purpose a warrant of arrest could be directed by the justice to the sheriff of the county.(*o*)

§ 192. Proceedings for contempt are never retroactive, so

(*f*)Buck *v.* Buck, 60 Ill. 106.

(*g*)Lansing *v.* Lansing, 4 Lans. 380.

(*h*)Brown *v.* Brown, 22 Mich. 299.

(*i*)Galland *v.* Galland, 44 Cal. 475. And in New York. Cochran *v.* Ingersoll, 13 Hun. 368.

(*j*)Sickels *v.* Borden, 4 Blatch. C. C. 14; also p. 191.

*Or interference with a patent-right, even which, by order of court, is vested in a receiver on the dissolution of a corporation. Woven Tape Skirt Co. 12 Hun. 111.

(*k*)Poltner *v.* Russell, 33 Wis. 203.

(*l*)Villavas *v.* Walker, 24 La. An. 213.

(*m*)Doubleday *v.* Sherman, 8 Blatch. C. C. 46.

(*n*)People *v.* Spalding, 2 Paige, 326; Davis *v.* Sturtevant, 4 Duer, 148.

(*o*)Hill *v.* Crandall, 52 Ill. 73.

as to include acts performed before the existence of the order which is claimed to have been thereby violated; as, for instance, for publishing proceedings before there was an order or rule prohibiting such publication;(*p*) or where there is an injunction forbidding the removal of certain bonds beyond the jurisdiction of the court, which bonds had already been thus removed.(*q*)

§ 193. It is a rule that unless there is a positive order of court to be obeyed without delay, or unless the acts are in the presence of the court, a citation to show cause should first issue,(*r*) which, generally, may be served on the attorney of the party, unless in criminal contempts, in which personal notice is necessary.(*s*) The defendant may then appear and clear himself of the contempt by answer, if at law, or by proof, if in chancery.(*t*)

§ 194. Where one makes answer that he had no intention to obstruct the execution of a decree of the court, but, as a practicing attorney, he had acted therein in good faith and without disrespect to the court, it will clear him of the contempt,(*u*) the actual intention of the respondent being material.(*v*) But it is no defence that an appeal has been taken from the order disobeyed.(*w*) Nor where there has been a commitment for contempt by a justice of the peace can the order or judgment of the justice usually be reviewed as to its validity.(*x*) Nor is it a defence that the order was irregularly served,(*y*) or an injunction of which the party has actual knowledge.(*z*) Nor will a continuance after refusal, as, for example, in disobeying a decree to convey land, always clear the contempt.(*a*) But in all cases in courts of law where there is a disavowal of disrespect and no order is violated,

(*p*) Dunham *v.* State, 6 Clarke, 253.

(*q*) Witter *v.* Lyon, 34 Wis. 576.

(*r*) *Ex parte* Ireland, 38 Tex. 356.

(*s*) Pitt *v.* Davison, 37 N. Y. 235.

(*t*) Buck *v.* Buck, 60 Ill. 106; State *v.* Earl, 41 Ind. 464.

(*u*) Wells *v.* Commonwealth, 21 Gratt. 506.

(*v*) In the matter of Moore, 63 S. C. 408.

(*w*) People *ex rel.* *v.* Bryan, 53 N. Y. 410.

(*x*) Robb *v.* McDonald, 29 Ia. 330; Williams, J., dissenting.

(*y*) Billings *v.* Carver, 54 Barb. 41.

(*z*) Mead, Trustee, *v.* Norris, 21 Wis. 315.

(*a*) Snowman *v.* Harford, 57 Me. 398.

there being a negative rather than positive and remote rather than direct infraction, a disavowal will clear the contempt.

It is a defence that one was hindered from obeying the order of court by the act of the adverse party, even if that act was lawful.(*b*)

§ 195. A sentence for contempt may be remitted by the pardon of the executive power, but not by the court itself.(*c*)

§ 196. A party while in contempt also may defend but not prosecute litigation.(*d*) And so in New York it was held proper to strike out a plaintiff's complaint when he refused to produce a paper in his possession.(*e*)

(*b*) McCartan *v.* Van Syckel, 10 Bosw. 694. See, to the same effect, Hull *v.* Harris, 45 Conn. 546.

(*c*) *In re* Mullee, 7 Blatch. C. C. 24.

(*d*) Mead *v.* Norris, *supra*. But see Hazard *v.* Durant, 11 R. I. 209.

(*e*) Shelp *v.* Morrison, 13 Hun. 110.

CHAPTER XXIV.

NEWSPAPER CONTEMPTS.

§ 197. Indirect contempts—general rule and examples.

§ 197. We treated of direct contempts in the last chapter, and now the question of indirect or constructive contempts comes up for consideration, these not being in the cause, nor involving violence in the presence of the court. It is not wonderful that such cases as involve the right of newspaper publications should awaken intense public interest, since herein there is immediate collision between two of our most cherished and most essential institutions—courts of justice and the press.

The general rule is held to be that where a publication, being read by jurors and attendants on the court, would have a tendency to interfere with the proper and unbiased administration of the law in pending cases, it may be adjudged a contempt, and accordingly punished. A libel not directly calculated in some way to hinder, obstruct or delay the administration of justice is not to be summarily punished as a contempt; so that a publication reflecting on a grand jury, or on any member of it, relating only to a past action thereof, and not tending to interfere with future duties, cannot be treated as a contempt of court. *Storey* v. *People*, 79 Ill. 45. And so, where a newspaper publication misrepresented the action of a chancellor, in modifying a decree of injunction, and yet there was no apparent obstruction to justice arising from it, it was held there was no contempt, and especially as the defendant disclaimed all intentional disrespect to the court. *Morrison* v. *Moat*, 4 Edw. 25. The contempt must be directed against the court, or some part thereof, as the judge, or the jury, and not against the parties merely. And so, where a governor brought suit for libel against the chair-

man of a public meeting, and, pending the suit, another public meeting was held, which passed resolutions on the subject of the suit, and bitterly denounced it, the court would not punish the critics although the language employed in the criticism was very severe, viz.: "Resolved that we consider the prosecution commenced by Governor Lewis against Thomas Farmer, as chairman of a public meeting of free citizens, to be an unwarrantable attempt to suppress and destroy one of our dearest and most valuable privileges—that of assembling together openly and publicly; of discussing freely the conduct of public men and public measures; and of expressing our resolutions and opinions to the world; and that, therefore, such prosecution evinces an intolerant spirit, unbecoming the chief magistrate of a free state, disgraceful in a free government, and insulting to the feelings of every citizen who was present at that meeting." Which attack was also duplicated in the following breezy resolution: "In prosecuting the chairman of a general meeting of citizens, for resolutions publicly passed as the sense and opinion of that meeting, thereby exhibiting an instance of and disposition towards tyranny, novel and unprecedented, dangerous to civil liberty, repugnant to the spirit and genius of our free constitution, and utterly subversive of the principles of an elective government." *People ex rel.* v. *Few et al.* 2 Johns. 290. But criticism, on the other hand, is not to be suppressed, even as to courts and their proceedings, and the New Hampshire court say, per *Perley*, C. J.: "The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of courts and parties, after the decision has been made; and, provided the publications are true and fair in spirit, there is no law, and I am sure there is no disposition, to restrain or punish the freest expression of the disapprobation that any person may entertain of what is done in or by the courts."(*a*)

But this rule, in Iowa, is very closely restricted. And in

(*a*) Sturoc's Case, 48 N. H. 432. Herein it was held that strictures on a court, which would reach jurors, and thus tend to obstruct the administration of justice, must be held as a contempt.

a case where there were no less than three arrests for contempt, for successive publications, the fines assessed were, on appeal, judged erroneous. The first article (*Burlington Hawkeye*, 1857) was the following: "In the malicious prosecution pending against J. F. Abrahams, under the rulings of the court, he was convicted of leasing his house for improper purposes, and fined by Judge Claggett one hundred dollars. Upon his appearing and offering to appeal to the supreme court, Judge Claggett fixed the bail at *fifty thousand dollars*. What do our readers think of the fairness and impartiality of a judge who is guilty of this extortionary demand, in direct violation of the eighth amendment to the constitution—'excessive bail shall not be required?' In the light of this oppressive demand, it is easy to see what an engine of injustice and outrage our courts of justice are capable of being made in the hands of a vindictive and implacable man, such as we hope Judge Claggett will not prove himself; or corrupt and infamous men, such as Lecompte and Cato, of Kansas. We do not believe our records have ever before been disgraced by, or our archives contained, such a bail-bond as that demanded by Claggett, and given yesterday by J. F. Abrahams. Fifty thousand dollars bail in a case wherein the sentence of the court was a fine of one hundred dollars! Has the case a parallel?"(*b*) If the statement above was correct, it is hard to say that the court was not worthy of contempt.

In North Carolina, in 1869, a publication appeared, reflecting on the supreme court, from one hundred and ten members of the bar, out of about five hundred, who, however, were discharged on a disavowal, in a way that intimates clearly that the liberty of the press, so far as the bar is concerned, has become full-blown in that state, and showing, also, conclusively that disavowals are readily available and exceedingly effectual there. The disavowal reminds me, indeed, of one attributed to an eminent attorney, who abandoned a case in the very midst, on the ruling of the judge, thrusting his books into his green bag, and stamping down the aisle to the door, in a rage,

(*b*) Dunham v. State, 6 Clarke (Ia.) 250.

and who, on being called to by the judge and threatened with a fine for contempt of court, whirled and replied: "Your honor, I have *expressed* no contempt for this court, but have, on the contrary, done my utmost to conceal my real feelings;" and then continued his exit, muttering that he found it very hard to do so!

The North Carolina utterance was in the following words:

"A SOLEMN PROTEST OF THE BAR OF NORTH CAROLINA.

"The undersigned, present or former members of the bar of North Carolina, have witnessed the late public demonstrations of political partisanship, by the judges of the supreme court of the state, with profound regret and unfeigned alarm for the purity of the future administration of the laws of the land. Active and open participation in the strife of political contests by any judge of the state, so far as we recollect, or tradition or history has informed us, was unknown to the people until the late exhibitions. To say that these were wholly unexpected, and that a prediction of them by the wisest among us would have been spurned as incredible, would not express half of our astonishment, or the painful shock suffered by our feelings, when we saw the humiliating fact accomplished. Not only did we not anticipate it, but we thought it was impossible in our day. Many of us have passed through political times almost as excited as those of to-day, and most of us recently through one more excited, but never before have we seen the judges of the supreme court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics, under the excitement of drums and flags. From the unerring lessons of the past we are assured that a judge who openly and publicly displays his political party zeal renders himself unfit to hold the balance of justice, and that whenever an occasion may offer to serve his fellow partisans he will yield to the temptation, and the 'wavering balance' will shake. It is a natural weakness in man that he who warmly and publicly identifies himself with a political party will be tempted to uphold the party that

upholds him, and all experience teaches us that a partisan judge cannot be trusted to settle the great principles of a political constitution while he reads and studies the book of its laws under the banners of a party.

"Unwilling that our silence should be construed into an indifference to the humiliating spectacle now passing around us, influenced solely by a spirit of love and veneration of the past purity which has distinguished the administration of the law in our state, and animated by the hope that the voice of the bar of North Carolina will not be powerless to avert the pernicious example which we have denounced, and to repress its contagious influence, we have, under a sense of solemn duty, subscribed and published this paper."

The court, thus assailed by its own bar, in part, cited the signers to answer, and the return was essentially that the publication did not tend to impair the respect due to the authority of the court; that it was not libellous; that the paper was prepared during the presidential canvass, and was withheld until after the close thereof, to avoid the appearance of issuing a partisan document; that its purpose was to express disapprobation of the conduct of individuals occupying high judicial stations, but that, so far from committing an intentional contempt of the supreme court, or impairing the respect due to its authority, the motive of the respondents was to preserve the purity which had ever distinguished the administration of justice by the courts of the state.

The court, in self-defence, declared: "The paper is drafted with all the adroitness of a skilful lawyer, and, under cover of 'love and veneration for the *past* purity which has distinguished the administration of law in our state,' aims a deadly blow at the court to which that sacred trust is *now* confided. Stripped of the beautiful dress by which it is artfully disguised it amounts to this: A judge who openly and publicly displays his political party zeal renders himself unfit to hold the 'balance of justice,' and whenever an occasion may offer to serve his fellow partisans he will yield to the temptation, and the 'wavering balance will shake.' 'Never before have we seen the judges of the supreme court, singly

or *en masse*, rush into the mad contest of politics under the excitement of drums and flags;' *therefore*, the supreme court, which is composed of these judges, is 'unfit to hold the balance of justice,' and will, on occasion, yield to temptation in favor of a fellow partisan.

"If you hurt the head, or arm, or leg, or limb, or member, or any part of the body, you hurt the man. And the idea of an intention to injure the character of the justices who compose the supreme court, singly or *en masse*, without an intention to injure the court, is simply ridiculous.

"The only allegation of fact on which rests this 'solemn protest' is that the 'judges singly or *en masse* did rush into the mad contest of politics under the excitement of drums and flags.' Is this allegation of fact true, or is it false? There is no pretence that it is *true*. It is said this is a figure of speech suggested by something that was expected to occur but never did occur, so the allegation of fact is false, and the inference drawn from it is also false.

"In our judgment the paper is libellous, and 'doth tend to impair the respect due to the authority of the court.' Indeed, the learned counsel did not press this point, and were content to take the ground that there was no *criminal* intent. Every man is presumed to intend the natural consequence of his act. If one wilfully sets fire to his own house, which is so near his neighbor's house that if the one burns the other must burn also, and both houses are burned down, the man is guilty of arson—the criminal intent is presumed. So, in an indictment for libel, this ground would be untenable except on proof of insanity. * * * * * * * * *

"In this proceeding, as the court is judge in its own case in the *first* instance, where a case is made out in the judgment of the court, the party in the *last* instance is allowed to *try himself*. His *intention* is locked within his own breast, is known to himself alone, and he is allowed to clear himself by his own avowal."(*c*)

But the supreme court of Illinois made more thorough work of its visitation on the proprietor and managing editor of the

(*c*) Matter of Moore *et al.* 63 N. C. 398.

Chicago Evening Journal, although a similar disavowal was interposed, and although the former never had seen the article until it was printed. The court, however, was divided, standing four to three.

The publication was made in regard to a murder case pending before the supreme court on error, in October, 1872, and was as follows:

"THE CASE OF RAFFERTY.

"At the time a writ of *supersedeas* was granted in the case of the murderer, Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court and decided at once; that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere within a year or two.' He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this in spite of all our public meetings, resolutions, committees, virtuous indignation, and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime. If next winter's session of the legislature does not hermetically seal up every chink and loophole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our modes of procedure in murder trials. The criminal should be tried at once, and when found guilty should be hanged at once, and the quicker hanged the better. The courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession—who feast and fatten on

human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found."

The court, while commenting upon the disastrous consequences of such publications, even upon the supreme court, and citing authorities as to constructive contempts, enter this disclaimer: "Let us say here, and so plainly that our position can be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions or official conduct, in regard to cases that have passed from our jurisdiction, so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying, in their answers, that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny the right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But, certainly, neither these respondents, nor any intelligent person connected with the press, and having a just idea of its responsibilities, as well as its powers, will claim that it may seek to control the administration of justice, or influence the decision of pending causes."

Justice Scott, dissenting, denied the power of courts to punish constructive contempts, this power being limited properly to contempts committed in the presence of the court. In addition to this, Justice Sheldon, also dissenting, said he was unwilling to admit that an appellate court was likely to be affected or embarrassed, in the administration of justice, by newspaper paragraphs.

The editor was fined two hundred dollars for admitting the article after seeing it, although it was not written by him; and the proprietor one hundred dollars for not watching out for it, it would seem. But they were consoled by the ultimate hanging of Rafferty.(*d*)

I presume there is no need of pursuing this subject any further than to remark that, while the liberty of the press

(*d*) People v. Wilson, 64 Ill. 195.

ought to be maintained, there is, at the present time, a very great danger to the perpetuity of all our institutions arising from the disorganizing consequences of newspaper licentiousness. The limit laid down by the majority of the court in the *Journal* case may be found, perhaps, to be the true one after all. There must be barriers erected somewhere, and they might as well, probably, stand at this point as at any other boundary. The Iowa court has held that, notwithstanding a disavowal of intentional disrespect, the meaning and intent of a publication may be proved by appropriate evidence, and judgment be rendered accordingly.(*e*)

(*e*)Henry *v.* Ellis, 49 Ia. 305.

PART II.

SPECIFIC ORIGINAL JURISDICTIONS.

PREFATORY NOTE.

In treating of the topics of this Part of the present Treatise we shall have occasion to notice—*First*, Specific Jurisdictions of a general nature, as Common Law, Equity, Admiralty, Probate, etc.; and, *second*, Specific Jurisdictions of a special nature, as *Habeas Corpus*, and the like.

Moreover, it will be needful to keep original and appellate jurisdictions distinct, although both co-exist often in the same court. The latter are reserved for the second volume. The matters of exclusive and concurrent jurisdiction have very little practical importance, as to state courts, any further than the principle goes which is explained in the First Part, namely: that where two equal courts have concurrent jurisdiction of the subject-matter of a cause, the one first acquiring actual jurisdiction of the cause retains it free from interference by the other. It is much to be desired, and, I think, it will eventually be realized, that such a thing as concurrent jurisdiction should not exist, but that all courts should have distinct, and not overlapping, boundary lines thrown around their legitimate spheres of action.

THE
JURISDICTION OF COURTS.

PART II.

SPECIFIC ORIGINAL JURISDICTIONS.

CHAPTER I.

THE COMMON LAW.

§ 198. Explanation of the common law.
199. Basis of jurisprudence.
200. Modification of the common law.
201. Distinction between principles and rules.
202. The standard of judgment herein.
203. What the common law is.
204. Examples of modification.
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206. Effect of statutes prescribing remedies.
207. Common law as to the United States courts.
208. Sources of knowledge of common law—general rules.
209. Effect of a want of early precedents in this country.
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212. Remedies in United States courts.
213. Offences and crimes.
214. Felony merging private wrongs.

§ 198. Although what we term the common law was derived from the common law of England, yet it is not, in all respects, identical therewith. The general principles were held to be

the birthright of the colonies; but the system was adopted, modified, or discarded, according as it was suitable to the situation and circumstances of the settlers.(*a*) In consequence, the system has never been in force, in all of its provisions, anywhere in our country. No state has ever adopted it, with all its incidents; so that what is common law in one state may not, in some particulars, be so in another state; and the judicial decisions, and usages, and customs in each are to be taken as the true criterion. And there is no principle prevading the Union, with the authority of law, which is not embodied in the constitution or laws.

Even as to the federal system itself, the common law can only be made a part of it by actual legislative adoption.(*b*)

§ 199. Nevertheless, certain states excepted, the common law is the chief basis of the jurisprudence of the state;(*c*) and hence, in the absence of evidence to the contrary, each one presumes the common law to prevail in sister states, the same as within its own limits, or the same as it existed in England.(*d*) But a similar presumption does not, of course, exist as to statutes, for this would directly contradict the presumption as to the existence of the common law.(*e*)

California includes within the exception the states of Florida and Texas, as well as Louisiana. And the court thus lay down the distinction: "In the present case there is no proof what the law of Texas is upon these subjects. One of the counsel of the defendants insists that, in the absence of such proof, the rule is to presume the existence of the common law,

(*a*) Van Ness *v.* Pacard, 2 Pet. 144. As expressed by the Alabama court: "The common law of England is not in all respects the common law of this state. It was adopted and prevails here only so far as it is consistent with our institutions and the public policy of the state as deduced from our legislation." Nelson *v.* McCrary *et al.* 60 Ala. 309; R. R. *v.* Peacock, 25 Ala. 229; Barlow *v.* Lambert, 28 Ala. 704.

(*b*) Wheaton *v.* Peters, 8 Pet. 658, 659.

(*c*) Baines *v.* Schooner, 1 Bald. (C. C.) 557.

(*d*) Shepherd *v.* Nabors, 6 Ala. 637; Walker's Adm'r *v.* Walker's Adm'r, 41 Ala. 358; Pomeroy *v.* Ainsworth, 22 Barb. 129; Miles *v.* Collins, 1 Met. (Ky.) 312; Titus *v.* Scantling, 4 Blackf. 92; Schuman *v.* Marley, 29 Ind. 461.

(*e*) Houghtaling *v.* Ball, 19 Mo. 86; White *v.* Knapp, 47 Barb. 554.

and to be governed by its principles. There is no doubt that the common law is the basis of the laws of those states which were originally colonies of England or carved out of such colonies. It was imported by the colonists and established, so far as it was applicable to their institutions and circumstances, and was claimed by the congress of the United States, in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies' were entitled. 1 Kent's Com. 343. In all the states thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists. It has been so held in repeated instances, and it rests upon parties who assert a different rule to show that matter by proof. A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the revolution, where such territory was not, at the time of its acquisition, occupied by an organized and civilized community; where, in fact, the population of the new state, upon the establishment of government, was formed by emigration from the original states. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law, so far as it is applicable to their new situation, so, when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition, under the influence of modern civilization and republican principles, as is suited to their new condition and wants. But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated, and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law. They were independent of the

English law in their origin, and hence no presumption of the existence of the common law of England can be indulged. In countries conquered and ceded to England the common law has no authority without positive enactment, and for the same reason that they were not part of the mother country, but distinct dominions. 1 Black. 107; 1 Story on Const. 150.

"As Texas was an independent country at the time of its accession to the United States, having laws of its own, not being carved out of the ancient colonial provinces of England, like the original thirteen states, or formed by immigration into an uncultivated country from those states,* but from a Mexican province by a successful revolution against the republic of Mexico, no presumption can arise of the existence therein of the common law, which is the basis of the jurisprudence of the other states.

"The question then recurs as to what is presumed as to the law of Texas, in the absence of any proof on the subject. We can perceive only one way in which the question can be answered, and that is to presume the law of that state to be in accordance with our own. We are called upon to determine the matter in controversy, and are not at liberty to follow our own arbitrary notions of justice. We cannot take judicial notice of the laws of Texas, and we must, therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision upon which we can act; and, to meet the requirement that the case is to be disposed of according to the laws of Texas, the presumption is indulged that the laws of the two states are in accordance with each other. The authorities, with some exceptions, are to this effect."(*f*)

This reasoning appears sound, so far as it is applicable. Nor is it necessarily contradicted by the principle that territory acquired must be held according to the constitution and laws of the nation acquiring it, and not according to those of

*But Texas was mainly settled at first by emigration from the United States, which fact, it seems, ought to support the ordinary presumption, according to the above reasoning of the court.

(*f*)Norris *v.* Harris, 15 Cal. 252, citing Smoot *v.* Baldwin, 1 Martin, N. S. (La.) 523; Allen *v.* Watson, 2 Hill, (S. C.) 319; Monroe *v.* Douglass, 1 Selden, (N. Y.) 452; Castleman *v.* Jeffries, 60 Ala. 381.

the government by which it is ceded;(*g*) since, as we shall see hereafter, the United States government merely recognizes the common law as it exists in the individual states.

The principle, then, is, that on a common law question the presumption obtains, in the absence of proof to the contrary, that the common law is in force in a sister state. The exception is, a settled and organized territory acquired by the United States from a foreign power.

§ 200. The modifications of the common law, as it exists among us, arise from three sources: (1) The circumstances of the territory adopting it; (2) English statutes; (3) domestic statutes. The first of these we have already alluded to, incidentally. But we may remark further upon it that the modifying circumstances are such as render the common law inapplicable to the actual situation, or repugnant to other rights and privileges, of the residents of the locality.(*h*) This is a matter resting largely in the discretion of a court applying the rules, and is, therefore, somewhat indefinite, and proportionately dangerous. For, as the supreme court of Pennsylvania has justly observed: "We should have a motley system of patchwork, indeed, if the principles of the law were to be wrested or bent to obviate every inconvenience that may be felt in a single case, or even in a few cases. Even courts of equity are governed by general rules, which are sometimes inadequate to the doing of exact justice in particular cases. There can be no rule for the application of the argument *ab inconvenienti*, but every court must, in that respect, be governed by a sound discretion on a view of the whole ground."(*i*) As a safeguard, then, it is needful to keep in sight what it is in which the common law system consists. In a case before the court of errors, in New York, Spencer, senator, remarked: "I admire that principle of flexibility in the common law which enables it to be adapted to the ever varying condition of human society; and it is, in that respect, unquestionably superior to any written code. But I understand that flexibility to

(*g*)Pollard's Lessee *v.* Hagan, 3 How. (U. S.) 225.

(*h*)Town *v.* Clark, 9 Cranch, 333.

(*i*)Lyle *v.* Richards, 9 Serg. & R. 351.

consist, not in the change of great and essential principles, but in the application of old principles to new cases, and in the modification of the rules flowing from them to such cases as they arise, so as to preserve the reason of the rules and the spirit of the law."(*j*)

Hence, it is not a loose system, to be employed at will, but is as binding when once established as is a statute law. "Whenever a principle of the common law," say the Mississippi court, "has been once clearly and unquestionably recognized and established, the courts of the country must enforce it, unless it be repealed by the legislature, as long as there is a subject matter for the principle to operate on; and this, too, although the reason, in the opinion of the court, which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country in every state where the principles of the common law prevail. Were it otherwise, the rules of law would be fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them."(*k*)

§ 201. The chief distinction is between the principles and the rules resulting from them—the former being held immutable, unless especially repealed, but the latter subject to circumstantial modification. On this the supreme court of New York remark: "The common law consists of those principles and maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society, and the affairs of life have commended to enlightened reason as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise, from time to time, demanding the application of those principles to particular cases in the administration of justice. The authority of its rules does not depend upon positive legislative enactment, but upon the principles which they are designed to enforce,

(*j*)Renss. Glass Factory *v.* Reid, 5 Cow. 628.

(*k*)Powell *v.* Brandon, 24 Miss. 363.

the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice. It follows that these rules are not arbitrary in their nature, nor invariable in their application; but from their nature, as well as the necessities in which they originate, they are and must be susceptible of a modified application suited to the circumstances under which that application is to be made.

"The principles of the common law, as its theory assumes and its history proves, are not exclusively applicable or suited to one country or condition of society; but, on the contrary, by reason of their properties of expansibility and flexibility their application to many is practicable. The adoption of that law, in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules, without regard to local circumstances, however well settled and generally received those rules might be.

"Its rules are modified upon its own principles, and not in violation of them. Those rules being founded in reason, one of its oldest maxims is that where the reason of the rule ceases the rule also ceases. * * * This apparently qualified adoption of the common law is, after all, nothing more nor less than an adoption of its essential *principles*, the application of which to our circumstances would result in a modification or entire change of some of its rules, which are nothing more than the result of the application of general principles to particular facts. The *principle* is essentially the same, under all circumstances, but the *rule* or result of its application will vary with the facts to which it is applied, or the conditions under which the application is made."(*l*)

§ 202. But whether there is any standard to estimate the applicability, or otherwise, of the common law rules may be an important practical inquiry. In a case before the Illinois supreme court, *Caton*, J., in a dissenting opinion, asks: "What did the legislature mean by the use of the word 'applicable?' Applicable to the nature of our political institutions, and to the genius of our republican forms of govern-

(*l*) People *v.* Randolph, 2 Park Crim. R. 176, 178, *passim*.

ment, and to our constitution, or to our domestic habits, our wants, and our necessities? I think I must ever be of opinion that nothing but the former was meant, and that to adopt the latter is a clear usurpation of legislative power by the courts."(*m*) And he proceeds to fortify this position, quite ably, by the argument that the former is a certain and general standard, the latter variable and local. The majority of the court, in that case, held that "in adopting the common law it must be applicable to the habits and condition of our society, and in harmony with the genius, spirit and objects of our institutions;" thus blending together what Justice Caton thought should be kept separate as incompatible grounds. In viewing his dissenting opinion, in this particular, the Iowa court respond: "There would seem to be much propriety in saying that the distinction attempted is more speculative than practical or real; for what is applicable to our wants, habits, and necessities as a community, or state, must, necessarily, to some extent, be determined from the nature and genius of our government and institutions. Or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and lives under these institutions. We have adopted a republican form of government because we believe it to be better suited to our condition, as it is to that of all people,* and thereunder we believe our wants, rights, and necessities, as individuals and as a community, are more likely to be protected and provided for. And the conclusion would seem to fairly follow that a principle or rule which tends to provide for and protect our rights and wants would harmonize with that form of government, or those institutions which have grown up under it. But, however this may be, we do not believe that, in determining as a court whether a particular rule of the unwritten law is applicable, we are confined alone to its agreement or disagreement with our peculiar form of government."(*n*)

(*m*) Seeley *v.* Peters, 5 Gil. 149.

*France, Spain, or Mexico?

(*n*) Wagner *v.* Bissell, 3 Clarke, 402.

And so, "when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England, and we have adopted it as a constantly improving *science*, rather than as an *art*; as a system of *legal logic*, rather than as a *code of rules*. In short, in adopting the common law, we have adopted its fundamental principles, and modes of reasoning, and substance of its rules, as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed."(*o*)

§ 203. In general, the common law of this country is that of England, as amended or altered by English statutes prior to the revolution,(*p*) with some variation as to the date; some holding it as it was on the nineteenth of April, 1775,(*q*) others on July 4, 1776,(*r*) and others still confining the modifications by constitutional provision to the statutes passed prior to the fourth year of James I.(*s*) Those passed before the first emigration to America are, of course, a part of the common law in all the states.(*t*) This, however, is also subject to the principle of modification by circumstances varying their applicability.

§ 204. It may not be amiss, by way of illustration, to give a few examples of such modification by circumstances. In an early case in Vermont, (1827,) the question of water privilege was involved, and the court say: "The common law of England seems to be that each land-owner, through whose land a stream of water flows, has a right to the water in its natural course, and any diversion of the same to his injury gives him a right of action. He must have previously appropriated it to some use before he can be said to sustain any damage. If this common law is to govern, it supports the

(*o*)Morgan *v.* King, 30 Barb. 14.
(*p*)Coburn *v.* Hanely, 18 Wis. 147.
(*q*)People *v.* Randolph, 2 Park C. R. 176.
(*r*)Hamilton *v.* Kneeland, 1 Nev. 56, and authorities there cited.
(*s*)Seeley *v.* Peters, 5 Gil. 148.
(*t*)Carter *v.* Adm'r, 19 Ala. 829.

defendant in his defence. But the court consider it not applicable to our circumstances, and not of binding force here. There must have been a time when it was not applicable, so as to do justice in all cases, in England. Should this principle be adopted here, its effect would be to let the man who should first erect mills upon a small river, or brook, control the whole, and defeat all the mill privileges from his mills to the source."(*u*)

In Georgia, (in 1822,) it was held that the common law rule, requiring proof of the signatures in a prosecution for forgery, was inapplicable to the forgery of a bank note.(*v*)

In Ohio, the ancient common law conveyances, resting on parol proof, are held altogether invalid on account of "the policy of law, the custom of the country, the danger of perjury, and the many inconveniences that must necessarily result from the establishment of such a principle."(*w*)

In Illinois it has been determined that the common law rule, requiring every man to enclose his cattle to prevent them ranging upon land owned by others, is inapplicable to a newly settled, open country.(*x*) And the same principle is recognized by the supreme court of the United States as to matters between landlord and tenant.(*y*)

§ 205. The common law, as adopted, is not modified by implication from a statute;(*z*) and hence questions of property, unless clearly excepted, must be determined by it;(*a*) but, by positive enactment, it may be repealed to any extent, unless where such repeal is prohibited by the constitution in express terms.(*b*)

§ 206. When a statute merely gives a new remedy, where one existed before at the common law, it is to be regarded as cumulative, so that the party may pursue the one or the other

(*u*)Martin *v.* Bigelow, 2 Aik. 187.

(*v*)State *v.* Calvin, Charlt. 172.

(*w*)Lindsley's Lessee *v.* Coats, 1 Ham. 243.

(*x*)Seeley *v.* Peters, 5 Gil. 142.

(*y*)Van Ness *v.* Packard, 2 Pet. 144.

(*z*)Goodwin *v.* Thompson, 2 Greene (Ia.) 333.

(*a*)Lorman *v.* Benson, 8 Mich. 25.

(*b*)Noonan *v.* State, 1 S. & M. (Miss.) 573; Dawson *v.* Shaver, 1 Blackf. 205.

at discretion. If it gives the same remedy, it is merely confirmatory. But if it denies or positively withholds the common law remedy, this is a repeal.(*c*)

§ 207. There is no common law of the United States, as contradistinguished from the common law of the individual states; which arises, however, from the fact that the United States circuit and district courts, instead of administering this or any particular system, conform to the law of the states where they are situated—at any rate in civil matters.(*d*) However, in the District of Columbia, the common law prevails as in the states by which it was ceded.(*e*)

§ 208. As to what is, in general, included within the common law, resort must, of course, be had to English and American reports of decisions by the courts. But trial by jury is regarded as the leading distinctive peculiarity of the common law system.(*f*)

It is a general rule that all the statutes for the administration of justice by which the common law proceedings were regulated, up to the time of the adoption of the system by the colonies, were included in the system so far as they were applicable.(*g*) The *lex mercatoria*, or law merchant, constitutes a part of it, I believe, in all the states where the system prevails. This, indeed, was not a peculiarity of the common law of England, but was of a general nature, not local to the kingdom, but recognized and enforced by its courts as of universal use and application in all mercantile transactions throughout the commercial world; being a rule of decision to all nations and courts,(*h*) so that it was a part of the common law of England by adoption; but this did not hinder its re-adoption here. Say the supreme court of Illinois: "Were we now to strike from the common law all it has borrowed from the law merchant, we should find it unfitted for the most rural districts of this country; for agriculture has

(*c*)Gooch *v.* Stevenson, 13 Me. 376.

(*d*)People *v.* Folsom, 5 Cal. 379.

(*e*)State *v.* Cummings, 33 Conn. 264, and cases cited.

(*f*)Reynolds *v.* Steamboat, 10 Minn. 249.

(*g*)Sibley *v.* Williams, 3 Gill. & J. 62.

(*h*)Piatt *v.* Eads, 1 Blackf. 82.

become so intimately connected and associated with commerce that the rules which govern one must seriously affect the other. With all its avenues of intercommunication, commerce now extends itself to the granaries and pasture fields of the remotest frontiers. Thus dismembered, the common law would only be a fit code for the government of a fox-hunting gentry, and their dependent serfs. While elementary writers, and the judges of courts, have been in the habit of speaking of the *lex mercatoria* distinctively, they have, for a very long time, spoken of it and treated it as a part of the common law;" and, therefore, in the same case, they held that days of grace were attached to all bills of exchange.(*i*)

It appears singular that in this country there should ever have been a plea preferred for the benefit of clergy. But, as late as 1859, the Minnesota court was called upon for a decision concerning such a plea. The court responded, however, in this discouraging style: "This plea has never had any practical operation in the United States, and had it, in the absence of any statutory provision, been claimed as a common law right, in any state, it would have been denied."(*j*) And, in another case, where the benefit of clergy was claimed, in Indiana, the court was so uncomplimentary as even to be unwilling to admit that it ever had been a common law privilege, and as to declare that "it originated with that (privilege) of sanctuary in the gloomy times of popery; it was the offspring of that absurd and superstitious veneration for a privileged order in society, which unfortunately existed in those ages of darkness, when the persons of clergymen were considered sacred, and church-yards were viewed as consecrated ground. The statutes of England on the subject are local to that kingdom. They were not made in aid of the common law, and are certainly not adopted as the laws of our country."(*k*)

Yet, in Virginia, it has been held, the common law concerning ecclesiastical property vesting in the clergy was adopted and continued, notwithstanding the revolution and the subse-

(*i*) Cook *v.* Renick, 19 Ill. 602.
(*j*) State *v.* Bilansky, 3 Minn. 255.
(*k*) Fuller *v.* State, 1 Blackf. 66, 67.

quent constitutional provision in the state on the subject of religious freedom.(*l*) And it is decided, also, in Vermont, that the ecclesiastical laws of England, and the powers of ecclesiastical courts thereunder, as, for example, in matters of divorce, were adopted in that state as a part of the common law. The court say: "The adoption of the common law of England by the legislature of the state was an adoption of the whole body of the law of that country, aside from their parliamentary legislation, and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts, so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws, as well as that portion of their laws administered by the ordinary and common tribunals. As the jurisdiction in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country until it was vested in them by the law-making power. As we have never had any ecclesiastical courts in this country which could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it, or rested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces, as many of them did in former times. When the legislature establishes a tribunal to exercise this jurisdiction, or invests it in any of the already established courts, such tribunal becomes entitled and it is their duty to exercise it according to the general principles of the common law of the subject and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute."(*m*)

As with chancery courts, so likewise with courts of admiralty, the courts of common law may have concurrent jurisdiction; and, in such a case, if the parties seek the remedy provided by the common law, they are considered as submitting voluntarily to the legal principles and modes of pro-

(*l*) Terrett *v.* Taylor, 9 Cranch, (U. S.) 45.

(*m*) Le Barron *v.* Le Barron, 35 Vt. 367.

cedure prevailing in common law courts. And thus, in such courts, rules of navigation and customs of the sea are not regarded as of positive authority, and one electing to proceed therein cannot adduce such rules and customs as binding in themselves.(*n*)

§ 209. The want of early precedents in this country, on any particular matter, is not held conclusive as against the fact of the adoption of the common law on that subject by the colony or state. Where this was claimed otherwise, in a case in Massachusetts, in regard to waste by tenants, the court said: "If the foregoing be a true enumeration of the materials which compose the common law, by which our ancestors, under their colonial institutions, were governed, then it is very clear that the action of waste was the same, and had the same consequences, with them as it had in England under the statute of Gloucester, namely, forfeiture of the place wasted, and treble damages. Nor does it in any way affect the argument that no instance can be produced of such an action from the records, for it is known that the colonial records were but imperfectly preserved, and it may be that no occasion for the use of that action occurred in those times of simplicity and of crude administration of law, especially in regard to real property, which had hardly begun to be of value. Without doubt many principles of the common law have been brought into view and applied in later times which, in the early period of our history, there was no occasion to use, as well as many forms of action which, though now necessary, were then of no practical value. But the common law existing then as it does now, its copious fountain was resorted to for relief as the exigencies of the rapidly increasing community required."(*o*)

§ 210. The statutes of 3 Edw. VI. *c.* 4, and 13 Eliz. *c.* 6, whereby patentees, and all claiming under them, were allowed to give in evidence *exemplifications* of public grants under the great seal, instead of producing the original patent itself, are held to be a part of our common law, being passed before the

(*n*)Sawyer *v.* Steamboat Co. 46 Me. 404.

(*o*)Sackett *v.* Sackett, 8 Pick. 317.

emigration of our ancestors, and, moreover, being "a recognition, in the most solemn form, by the government itself, of the validity of its own grant under its own seal, and therefore importing absolute verity as matter of record."(*p*)

Also the statute of 8 and 9 William III. *c.* 11, § 7, allowing a survivor in an action of trespass to continue the suit, being in amendment of the common law, as were the above mentioned statutes, is probably a part of our common law, although this has been rather loosely held in Massachusetts.(*q*)

Also the statutes of Edw. III. *c.* 1, defining the jurisdiction and powers of justices of the peace, are part of our common law.(*r*)

And, in New York, the statute of 6 Anne, *c.* 3, as amended prior to April 19, 1775, by 14 George III., providing that there shall be no liability for damage done by an accidental fire, is part of the common law of that state.(*s*)

§ 211. The process of attachment does not belong to the common law as to foreigners. "The process of the common law could not reach foreign corporations, for the plain reason that they were not inhabitants of the realm, and had no corporate existence within it. This was equally true in respect to natural persons not inhabitants of the realm, and not found within it. Foreigners who were non-residents could not be served with process to appear in any of the courts of common law, nor could their property be attached to compel their appearance. Whenever and wherever, in any such cases, process can be served upon the property either of foreign corporations or of foreign natural persons who are non-residents, the authority to do so results either from special custom, or from statute provisions"(*t*)—indeed, almost exclusively from the latter.

Neither are matters of impeachment by a legislature, or senate rather, within any rules of the common law, so far as the organization of the court is concerned, since there is so

(*p*)Satterson *v.* Winn, 5 Pet. (U. S.) 240.

(*q*)Boynton *v.* Rees, 9 Pick. 532.

(*r*)Commonwealth *v.* Leach, 1 Mass. 59.

(*s*)Lansing *v.* Stone, 37 Barb. 17.

(*t*)Clarke *v.* Nav. Co. 1 Story C. C. 538.

little resemblance to the British parliament in our legislative assemblies. Yet, as to proceedings, the nature of the duties imposed, and, in a degree, the limits of the powers of such court, the common law principles may be an effective guide.(*u*) Yet, in no case, can any court of impeachment claim the full extent of the powers of parliament; so that, in this regard, the restrictions only upon those powers are to be regarded as authoritative.

§ 212. In regard to remedies, merely, the United States courts are to be regarded as having a kind of distinct common law jurisdiction, so that, in these, they do not conform to the practice of state courts, but to the principles of common law and equity defined in England.(*v*)

§ 213. As to offences and crimes at common law there is quite a variance in the different states. As, for example, in Indiana, there are no common law offences; but crimes and misdemeanors must be defined by statutes prescribing a definite punishment, or they are not punishable.(*w*) But, formerly, the opposite was held to be the case.(*x*) It is so, likewise, in Ohio. And, in Iowa, it has been held that sodomy, however abhorrent in its nature, was not a punishable crime because of the absence of statutory definition; although the court say: "It would be a most difficult matter to administer criminal justice under our code of procedure, without the aid of common law, in the light of which statutory crimes are to be interpreted, and their definitions, if defective, to be expounded and explained. While, therefore, the principles of the common law do enter into all our criminal adjudications, when the jurisdiction of our courts over criminal offences has been established by law, still they do not confer upon the courts, in this state, the power to try and punish an offence that is such at common law, but which has not been ordained as such by the supreme law-making power of the state."(*y*)

But in most of the states the criminal common law has

(*u*) State *ex rel. v.* Hillyer, 2 Kan. 26.

(*v*) Robinson *v.* Campbell, 3 Wheat. 221, and note.

(*w*) Hackney *v.* State, 8 Ind. 495.

(*x*) Fuller *v.* State, 1 Blackf. 65, 66; State *v.* Bertheal, 6 Blackf. 474.

(*y*) Estes *v.* Carter, 10 Ia. 401.

been adopted under the same restrictions and limitations as civil actions therein. In Maryland even the law of conspiracy was (in 1821) held to have been adopted, inasmuch as it was suitable as well to the circumstances of the colonists as to the state of society in England.(*z*) In Connecticut the matter was quite earnestly contested in a dissenting opinion by *Peters*, J., against the majority, consisting of four judges, who on their part held, very reasonably, I think, that "it is indispensably necessary that there should exist a common law, on the broad principles of public convenience and necessity, defining crimes and prescribing adequate punishments. To determine, by statute, every offence, and direct the punishment which shall be inflicted, has not, so far as I know, ever been attempted, and would be nearly impracticable. The community must, at least, be left exposed to injuries the most atrocious, and the evils resulting would be much greater than any reasonable mind will anticipate from the exercise of a sound discretion in the application of principles and analogies which the common law supplies."(*a*)

But *Peters*, J., maintained most vigorously, in opposition, that the common law had never been adopted as to crimes, nor, indeed, even the civil portion of it. "I have sought in vain," he says, "in the history and legislative acts of our ancestors, for a confirmation of this doctrine. But it is apparent to my understanding that their sole object was to found a pure government in church and commonwealth, 'surely bottomed on the word of God;' and that they brought with them no more affection for the common law than the canon law, the court of star chamber, and high commission, from which they fled with horror and detestation! Accordingly, we find, in the first page of their statutes, a solemn provision against all indefinite laws and discretionary punishments, which remained for substance the same until the adoption of the constitution. * * * * * In this state our courts seem not to have considered the common law

(*z*)State *v.* Buchanan, 5 Han. & J. 356.

(*a*)State *v.* Danforth, 3 Conn. 114.

in force *proprio vigore*, but the judiciary as auxiliary to the legislature, extending the written law, and supplying its defects. * * * * * * At what period of our judicial history our courts assumed this prerogative of the *aula regis* does not appear; but it does appear that, in 1743, the superior court suspended judgment against a malefactor convicted of an atrocious mayhem, which was felony by common law, because no punishment was prescribed by statute, and petitioned the legislature for direction. * * * * * The common law may be extended to all acts *contra bonos mores*, which vary with climate, and the education and habits of men. Thus, in some countries, to kill or enslave a negro, an Indian, or a Christian, is an atrocious crime; in others, a mere *bagatelle*. * * * * * * It is said the exercise of this power is necessary. If so, statutes are unnecessary. If the judiciary is competent to adopt statutes, define crimes, and prescribe punishments, a legislature is needless. Whatever may have been the effect of constitutions in other states upon the common law, many of which have adopted it, it was certainly the object of the projectors of our constitution to separate, define, and limit the constituent powers of government."(*b*)

As to the United States courts the decisions on this point have denied the existence of a common law cognizance of crimes; the decisions, however, not being unanimous, but by a majority. It is said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence. Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers; to fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and, so far, our courts, no doubt, possess powers not immediately derived from statute, but all cogniz-

(*b*)Pp. 118, 120, *passim*.

ance of criminal law cases, we are of opinion, is not within their implied powers."(*c*) This was in 1812; but in 1816 the court was not united on it, and said: "Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to hear the question discussed upon solemn argument. But the attorney general has declined to argue the cause, and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision, in the case of the *United States* v. *Hudson and Goodwin*, or draw it into doubt."(*d*)

Justice Story has declared that, in his judgment, the whole difficulty and obscurity on the subject has arisen from not keeping in view the distinction given above in the language of the Iowa court, and which he sets forth thus: "I admit, in the most explicit terms, that the courts of the United States are courts of limited jurisdiction, and cannot exercise any authority not confided to them by the constitution and laws made in pursuance thereof. But I do contend that, when once an authority is lawfully given, the nature and extent of that authority, and the mode in which it shall be exercised, must be regulated by the rules of the common law.

"Whether the common law of England, in its broadest sense, including equity and admiralty, as well as legal doctrines, be the common law of the United States, or not, it can hardly be doubted that the constitution and laws of the United States are predicated upon the *existence* of the common law. This has not, as I recollect, been denied by any person who has maturely weighed the subject, and will abundantly appear upon the slightest examination. The constitution of the United States, for instance, provides that the 'trial of all crimes, except in cases of impeachment, shall be by jury.' I suppose that no person can doubt that, for the explanation of these terms and for the mode of conducting trials by jury, recourse must be had to the common law. So the clause

(*c*) United States *v.* Hudson *et al.* 7 Cranch, 33.

(*d*) United States *v.* Coolidge, 1 Wheat. 415.

that 'the judicial power shall extend to all cases in law and equity arising under the constitution,' etc., is inexplicable, without reference to the common law; and the extent of this power must be measured by the powers of courts of law and equity, as exercised and established by that system. Innumerable instances of a like nature may be adduced. I will mention but one more, and that is in the clause providing that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. What is the writ of *habeas corpus?* What is the privilege which it grants? The common law, and that alone, furnishes the true answer. The *existence*, therefore, of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers."(*e*)

§ 214. Probably the ancient doctrine of the common law, arising from the feudal system, that a felony merges a private wrong, is not adopted in any of the states.(*f*)

(*e*) United States *v.* Coolidge, 1 Gall. 488.

(*f*) Plummer *v.* Webb, 1 Ware, (U. S.) 77.

CHAPTER II.

EQUITY.

§ 215. Basis of equity jurisdiction.
216. Concurrent jurisdiction.
217. Preventing multiplicity of suits.
218. Equity does not revise legal proceedings.
219. Nor supply defences.
220. When legal proceedings may be set aside.
221. Erroneous but not void judgments not set aside.
222. Equity will not revise proceedings of inferior courts.
223. Equity does not entertain direct suits for money, nor determine cases involving mere legal questions.
224. Penalties and forfeitures.
225. Election cases.
226. When legal rights will be enforced.
227. Doing full and complete justice.
228. Equitable conversions.
229. Discretion of equity.
230. Classification of equitable remedies—trusts.
231. Frauds.
232. Cancellation and rescission.
233. Reformation.
234. Specific performance.
235. Clearing titles.
236. Partnership—heirs.
237. Suretyship.
238. *Ne exeat* writs.
239. Bills of discovery.
240. Injunction.

It is manifest that all which can be embraced in this chapter is a mere outline of the general principles of equity jurisdiction, in a connected view, as a kind of guide in conducting a full research. For details, resort must be had to works especially devoted to equity in general, or to particular topics embraced within the range of the subject of equitable jurisdiction.

§ 215. The fundamental basis of equitable jurisdiction is

the want of a full and adequate remedy at law. The whole superstructure rests on this, as the foundation. To prevent the jurisdiction, however, "it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."(*a*) And so, courts of equity will interpose, even when legal questions alone are involved, if the remedy at law is not clear, certain or adequate.(*b*) And it is no bar to a proceeding in equity that

(*a*) Boyce's Ex'rs *v.* Grundy, 3 Pet. 215.

(*b*) Nevitt *v.* Gillespie, 1 How. (Miss.) 110; Swift *v.* Larrabee, 31 Conn. 237.

It is not enough that there may be a *possible* remedy at law; and more especially if a remedy at law has become embarrassed by the fraud of a defendant will equity entertain jurisdiction. Richardson *v.* Brooks, 52 Miss. 119. The legal remedy must be plain and adequate. Thus, although the general rule is that a court of equity is not the proper tribunal for determining the *legal title to lands*, yet the rule does not apply where, in a suit at law, the title comes into the controversy only incidentally, so that a decision for one party will leave an apparent record title in the other. R. R. *v.* Gordon, 41 Mich. 420.

Equity may *clear clouds from legal titles*, (Handy *v.* Noonan, 51 Miss. 166,) especially under statutory authority; but it is a limited power, and cannot be invoked merely to try conflicting titles to lands, or to usurp the place of ejectment suits at law. And it is held that the jurisdiction does not draw to it the powers incident to the exercise of general equity jurisdiction, to take control of the entire controversy as to title, possessory rights, and claims to rents and profits. Phelps *v.* Harris, 51 Miss. 789. And so a suit in equity, to recover the *possession of lands* under a legal title, and for mesne profits, cannot be sustained; because this is essentially an action of ejectment. Cavedo *v.* Billings, 16 Fla. 261. And so, equity will not entertain a suit to *settle boundaries* between land owners. Hill *v.* Proctor, 10 W. Va. 59. So, where the *title to personal property* can be settled in an action of replevin, (which is almost or quite invariably the case,) equity will not intervene, even on a petition by the claimant that his vendor and the plaintiff may be compelled to interplead and settle the question of title between them. Long *v.* Barker, 85 Ill. 431.

Even if equity may entertain jurisdiction, yet, if questions of ownership and possession and dedication to the public use arise, and are left doubtful on the evidence, it is held that it is proper to dismiss the bill without prejudice, so that the doubtful questions may be settled in a legal proceeding—after which either party will be at liberty to invoke the court of equity to prevent vexatious litigation as to the same subject-matter. Hacker *v.* Barton, 84 Ill. 313. And so, equity will not entertain a bill merely to ascertain whether the

the complainant had commenced an action at law, which he

relation of *mortgagor* and *mortgagee* exists. Micou *v.* Ashurst, 55 Ala. 607.

As to the *administration of an estate*, equity will not ordinarily entertain jurisdiction therein. There must be some special reason for such interference with a probate court. If it appears that the probate court can grant due relief the parties will be left to the remedies thereby available. Heustis *v.* Johnson, 84 Ill. 61. Nor will a court of equity entertain an action merely to construe the provisions of a will relating, not to trusts, but only to legal rights. Chipman *v.* Montgomery, 63 N. Y. 221; Whitman *v.* Fisher, 74 Ill. 149. And so, a court of equity will not determine the right of one claiming to be heir of an intestate by contract and adoption. Ross *v.* Ross, 123 Mass. 212. Nor will equity entertain a bill to compel an administrator to perform his legal duty, (Collins *v.* Stephens, 58 Ga. 284,) or intermeddle in matters of settlement on behalf of minor distributees on coming of age. Platt *v.* Longworth, Ex'r, *et al.* 27 O. St. 160. But where, by statute, an equity court has the right to decree the sale of lands by an administrator, the court has incidental power to enforce a bond given therein for the proper application of the proceeds. Brunini *v.* Pera, 54 Miss. 651. And may direct the proceeds of crops raised on lands by an administrator under the order of the chancery court. Evans *v.* Robertson, 54 Miss. 683.

Equity will not supply mere *defects of statutory remedies.* Janney *v.* Buell, 55 Ala. 408. Nor can it relieve parties from the mere effects of a *failure to execute* an instrument, as, for example, an instrument intended to effect the adoption of a child. Long *v.* Hewitt, 44 Ia. 363. And so, equity will not *enforce a voluntary contract*, or *unexecuted gift*, even in matters of family settlement. Wadhams *v.* Gay, 73 Ill. 417.

In regard to *matters of account*, it is not every account which will entitle a court of equity to interfere; as, for instance, a claim of one executor against a co-executor, for a *pro rata* share of commissions paid to and retained by the former, is no foundation for an equitable suit, since it can be enforced at law. Bellamy *v.* Hawkins, 16 Fla. 737. Nor can a corporation sue its *former officers*, in equity, for the misappropriation of funds coming into their hands while they were officers. Bay City Bridge Co. *v.* Van Etten, 36 Mich. 210. And if, on the formation of a corporation, two persons enter into an agreement that one of them, as a trustee, shall hold certain shares of stock, to be issued to the other on payment of assessments, a failure to issue the stocks on such payment will not justify a suit in equity on the ground that the holder had sold the shares and appropriated the proceeds, since there is an adequate remedy at law in such case. Frue *v.* Loring, 120 Mass. 507. And a bill alleging that the defendant had agreed to pay the plaintiff a certain commission on merchandise consigned to the defendant either by the plaintiff or by other persons; that there had been large consignments thus made, but to what amount the plaintiff is not informed; that the accounts are too complicated to be conveniently adjusted in a court of law; and

finally abandoned on discovering that it would be of necessity ineffectual.(*c*)

§ 216. The jurisdiction, moreover, is not ousted merely by the fact that courts of law have come to exercise a kind of equitable jurisdiction. But the correct view in such case is held to be that, where equity originally possessed exclusive jurisdiction, but afterwards courts of law came to exercise an equitable jurisdiction, this will be regarded as concurrent, so that a party may proceed in either court for relief, notwithstanding the rule in other cases that, where a court of law can give a full and adequate remedy, equity will not take cognizance of a cause.(*d*) But this cannot apply where all distinctions between law and equity are done away by legislative enactment, and there is, therefore, but a single forum for all matters in controversy.(*e*)

It is, on the general principle herein stated, that a court of equity will decline to decide whether a private nuisance

praying for a discovery and for an account, has been held not to be maintainable. Badger *v.* McNamara, 123 Mass. 117.

Accounts must be *mutual* to justify interference, and not all on one side, and must consist of a series of demands and payments, and not mere set-offs by way of payment. Porter *v.* Spencer, 2 Johns. Ch. 169; Pearl *v.* Nashville, 10 Yerg. 179; Foley *v.* Hill, 1 Phillips, 407; Warren *v.* Coal Co., 83 Pa. St. 441. And as to a *mechanic's lien*, under a statute which gives priority to the claim as against subsequent conveyances, the statutory relief must be relied on, and equity will not interfere to settle the respective rights of the lien-holder and incumbrancers or purchasers. Cole *v.* Colby, 57 N. H. 101; Colly *v.* Doughty, 62 Me. 501; Wall *v.* Robinson, 115 Mass. 429. Yet, where there is a deed of trust on land, and the land is sold to two purchasers, one of whom is compelled to pay the amount of the mortgage debt in order to protect his own portion of the land, equity will apportion the encumbrance, and compel the other to contribute his share, and pay it to the purchaser who has discharged the claim by payment. Briscoe *v.* Power, 85 Ill. 420. In Alabama it has been held that a statute allowing suits at law to recover for labor performed for the benefit of trust estates has the effect of ousting equity jurisdiction therefor. Askew *v.* Myrick, 54 Ala. 30. Equity still appears to have jurisdiction to establish a claim founded on an *instrument under seal* which is *lost*. Patton *v.* Campbell, 70 Ill. 72; Hickman *v.* Painter, 11 W. Va. 386.

(*c*) McCloskey *v.* McCormick, 44 Ill. 338.

(*d*) Heath *v.* Bank, 44 N. H. 177.

(*e*) Carpenter *v.* City, 30 Cal. 442.

exists or not, even for the purpose of an injunction, until the party asking the interference of the court has established his rights by law.(*f*)

§ 217. It may, perhaps, be regarded as a partial exception to the above rule, that a court of equity will entertain a cause in order to repress a multiplicity of suits at law; a principle well established wherever distinct equity powers exist. It applies where, by the interposition of the court, the plaintiff is relieved against the necessity of bringing a large number of separate suits against different individuals, merely to quiet the same common right, where only the same right would be involved in each. And, on the same principle, a court of equity will interpose to put an end to vexatious and ruinous litigation, where a party has satisfactorily established his legal rights.(*g*) And the principle applies either to a plaintiff or defendant, liable to a multiplicity of suits. But, in such cases, there must be such a unity of interest, on one side or the other, as to bring the litigation within the ordinary rules of equity pleading.(*h*)

An apparently marked exception is laid down by the supreme court of the United States, in a case wherein it was decided that even although an action would lie under a statute, and although a writ of mandamus might be issued, yet equity would interfere. Nevertheless, exceptional as it appears, the equitable jurisdiction was placed on the ordinary ground of inadequacy of the law.

The case was this: The town of Beloit, Wisconsin, by authority of the legislature, subscribed to the capital stock of

(*f*)Eastman *v.* Co. 47 N. H. 77.

And where the law provides for the keeping of jails in a healthy condition, equity has no jurisdiction to enjoin the use of a particular jail on the ground that it is a nuisance, and endangers the health of the prisoners confined therein. Stuart *v.* Supervisors, 83 Ill. 341. And where a statute authorizes the *abatement* of private *nuisances*, in actions at law, equity is held to have no jurisdiction to order such abatement. Remington *v.* Foster, 42 Wis. 608. Unless, indeed, many persons are alike affected, and by joining may prevent a multiplicity of suits. Cadigan *v.* Brown, 120 Mass. 493.

(*g*)Nevitt *v.* Gillespie, 1 How. (Miss.) 110.

(*h*)Swift *v.* Larrabee, 31 Conn. 240.

a railroad company, and issued bonds upon the subscription. Three years afterwards the city of Beloit was formed within the same territory occupied by the town of Beloit, and the charter contained this provision: "All principal and interest upon all bonds which have heretofore been issued by the town of Beloit * * * shall be paid when the same, or any portion thereof, shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved. And in case either town or city shall pay more than its just and equal portion of the same at any time, the other party shall be liable therefor." Suit was brought on the bonds against the town of Beloit and judgments recovered. The judgments being unpaid, the plaintiff filed a bill against both city and town, averring that the amount of the judgments ought to be paid proportionately by the defendants, as provided by the above quoted provision of the charter; that the taxable property of the city exceeded that of the town, and that, although the city ought to pay its proportion, the complainant was remediless at law. It also set out the proportions, and concluded with a general prayer for relief.

It was contended that, on bonds given by the town, a joint action at law could not be brought against both town and city; that, if the city were sued alone thereon, the plea *non est factum* could be successfully interposed; and that if an action of debt, founded on the statute alone, were brought, then it would be difficult [not impossible, but difficult] to settle the proportion between the city and town in an action to which the town was no party; and that these facts gave jurisdiction to a court of equity, which was the only tribunal competent to render full justice between the parties—especially so, since, if the town were compelled to pay the entire debt, it would have an action against the city, under the statute, for contribution, and it is the policy of courts to prevent a circuity of actions, which is avoided by bringing suit in equity against both. On the other hand, it was maintained that "on merits the case was not good. Though equity is liberal in the adaptation of its remedies, it does not give a remedy to every party merely because he is in difficulty, nor unless his difficulty be

covered by some specific ground of equitable jurisdiction. Here there is an adequate legal remedy by *mandamus*. It may be a troublesome remedy, but he has it. And equity will not devise a new ground of jurisdiction because a speculator in town bonds is unlucky in his legal remedies."

The court held that "the two corporations are as separate and distinct as if the territories they embraced respectively had never been united. It is obvious that, without a legislative provision to that effect, the city would not be answerable at law for the debts of the town incurred before the former was created. Whether but for the statute the city would have been chargeable in equity it is not necessary to consider. The statute is conclusive as to a liability to be enforced in some form of procedure. The only question before us is whether there is a remedy in equity. It may be, as suggested by the counsel for the appellant, that an action would lie upon the statute. It is also possible that a proper case for a writ of *mandamus* might be made. But these inquiries are only material as bearing upon the question whether there is an adequate remedy at law. If so, a suit in equity cannot be maintained. To have this effect the remedy at law 'must be as plain, adequate and complete,' and 'as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity.' When the remedy in law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial by jury. 19 How. 278. The objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. The provision upon the subject in the sixteenth section of the judiciary act of 1789 was only declaratory of the pre-existing rule.

"In the case before us the adjustment of the amount to be paid by the city will depend upon accounts and computations founded upon the proper assessment rolls. In order to bind the town it is necessary that it should be made a party. This cannot be done in proceedings at law. If the town should be compelled to pay the entire amount the right is given by

the statute to recover back the proportion for which the city is liable. This would involve circuity of litigation. The remedy at law, therefore, is neither plain nor adequate.

"The question whether a bill in equity will lie is disembarrassed by this obligation.

"The authority to tax for the payment of municipal liabilities, in cases like this, is in the nature of a trust. 4 Wall. 555. The jurisdiction of a court of equity to interfere, in all cases involving such an ingredient, is too clear to require any citation of authorities. It rests upon an elementary principle of equity jurisprudence.

" 'The power is reserved to a court of equity to act upon a principle often above mentioned, namely, that whenever there is a right it ought to be made effectual.' 1 Kaine's Prin. of Eq. 3. Where there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy."(*i*)

§ 218. It is no part of equity jurisprudence, accordingly, to revise or correct actual proceedings in a court of law. And so, equity will not revise, cancel or correct the records of a court of law. *Farmers' Bank of Kentucky* v. *Collins*, 13 Bush, 139. It has no superintending power belonging to it, as to other courts: and hence a court of equity has no right to inquire even into the proceedings of subordinate courts of special or local jurisdiction, in order to set them aside if void at law, or in order to restrain or stay them. Such proceedings are to be reviewed in the regular course of error or appeal. And the fact that the error of an inferior court may not be corrected by a common law *certiorari*, does not constitute a ground for equitable jurisdiction.(*j*)

This principle rests upon this basis, namely: "The unfitness and vexation and indecorum of permitting a party to go on successively, by way of experiment, from one concurrent tribunal to another, and thus to introduce conflicting decisions."(*k*) And yet it has been held that a court of equity

(*i*)Morgan *v.* Beloit, 7 Wall. 614.
(*j*)Hyatt *v.* Bates, 35 Barb. 316.
(*k*)Simpson *v.* Hart, 1 Johns. Ch. 98.

will sometimes hear the same subject of controversy upon grounds not litigated in the court of law, and which could not have been there litigated, either for want of legal testimony outside of the oath of the party available in equity, or because it was a subject of equity jurisdiction, and therefore not admissible at law, or perhaps other causes; and, in the end, may enjoin the judgment obtained on such defective proceeding.(*l*) Where there is an equitable defence, not available at law, equity may enjoin legal proceedings and draw the controversy to itself. *Cornelius* v. *Morrow*, 12 Heisk. 630. And, likewise, in a case which involves the charter rights of two corporations to a stream of water, it has been held that equity will enjoin suits at law, and determine the matter itself; and this is said to be on the ground of both public and private necessity. *R. Co.* v. *Mfg. Co.* 30 N. J. Eq. 145. It has been held that equity will *enjoin an action of ejectment* where the heirs of an estate have instituted such action against the purchaser at a voidable probate sale, and will thus compel the refunding of the purchase money used in paying the debts of the estate. *Cole* v. *Johnson*, 53 Miss. 94. But an action of ejectment will not be enjoined on the ground of an absolutely void deed, on which the plaintiff relies; because there is an adequate defence herein at law. *Bishop of Chicago* v. *Chiniquy*, 74 Ill. 317. Nor will a suit be enjoined on the ground of the invalidity of a village ordinance. *Yates* v. *Batavia*, 79 Ill. 500.

§ 219. Equity will not, however, undertake to supply defences, nor counteract the neglect of a party in a legal action. Thus, where a party has a legal defence, but through carelessness loses the opportunity afforded him of making it good in a suit at law, he has no right in equity to relief against his own default. This principle is so reasonable that it is surprising that any occasion should ever arise for an appellate court to announce it. And yet the attempt has sometimes been made to induce a court of equity to rectify the consequences of a personal negligence, but it is hardly necessary to

(*l*) Dana v. Nelson, 1 Aik. 256.

say it has always failed utterly of success.(*m*) Hence, where resort is had to equity, after a legal trial, the complainant must be able to impeach the verdict on just and equitable grounds, and grounds which could not be made available in the action at law, or which fraud, accident, or the wrongful act of his opponent prevented him from setting up without his own fault or neglect. And a voluntary absence from the state is no valid excuse for failure therein.(*n*) Because "every person is bound to take care of his own rights, and to vindicate them in due season and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defence in his own power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded."(*o*) And so equity will not restrain a judgment on the ground of usury or fraud even in the contract sued on, when the defence of usury had not been interposed;(*p*) nor, indeed, if it was interposed, but the issue, on a full investigation, was found against the pleader.

§ 220. Nevertheless, under certain circumstances, legal proceedings will be set aside in equity; when, for example, a party has been prevented by circumstances over which he had no control, nor could obtain control by any reasonable effort.(*q*) While a court of equity will never question the correctness of a judgment for any irregularity, however gross, yet it will even award a new trial at law where a manifest fraud or gross injustice is shown in the act of obtaining the judgment.(*r*) But the evidence must be very clear, and it would

(*m*) Peoria *v.* Kidder, 26 Ill. 358; Slaughter *v.* Gleason, 13 Wall. 553.

(*n*) Burnley *v.* Rice, 21 Tex. 183.

And not on the ground of an involuntary absence by reason of political excitement, and threats of violence from others than a party in the cause. Prater *v.* Robinson, 11 Heisk. 395. And the failure of a witness to attend, or the forgetfulness of a witness, will not justify equity interference. Tallman *v.* Becker, 85 Ill. 183.

(*o*) Le Guen *v.* Gouverneur, 1 Johns. Cases, (N. Y.) 436.

(*p*) Crawford *v.* Wingfield, 25 Tex. 415. (See cases cited in *Res Adjudicata*.)

(*q*) Chittenden *v.* Rogers, 42 Ill. 99.

(*r*) Crafts *v.* Hall, 3 Scam. 133, citing 1 Johns. Ch. (N. Y.) 466, and 3 Johns. Ch. 275.

be a dangerous precedent to hold that random, casual expressions, sworn to after a long lapse of time, and improbable, withal, can be sufficient grounds for awarding a new trial.(*s*)

In a case where application was made for relief against a judgment at law, on the ground that it was contrary to equity, and that the complainant had a defence to all except merely nominal damages, which he was prevented from making by accident, since, at the time of the rendition of the judgment, he had necessarily been in attendance on another court, where he had prepared an affidavit for a continuance, and sent it to his attorney, which affidavit could not be used in consequence of the clerk's accidental omission to affix his seal to the jurat, the court held that the bill failed to show due diligence in the defence, because it did not directly show that the complainant had employed an attorney to appear for him in the cause, and did not show that any motion for a continuance had been made, or that there had been any pleas filed in the cause; the principle being that the defendant in a judgment complained of is not entitled to relief against it unless he was ignorant of the fact in question pending the suit, or it could not have been received as a defence, or he could not avail himself of it by reason of fraud, accident, or the act of his opponent, unmixed with negligence or fault on his own part.(*t*)

A party must first exhaust his remedy in the law court, against a void judgment rendered therein, by motion to set it aside, before equity will interfere. And although a judgment rendered out of term time is absolutely void, yet where a bill was brought in equity, to set aside a judgment on an injunction bond, on the ground that the judgment in the injunction suit itself had been rendered out of term, and was, therefore, a nullity, relief was refused, since the facts impeaching the validity of the prior judgment should have been presented in the suit on the bond; and, also, equity will not relieve against a judgment void on its face, such form of relief being unnecessary in such a case.(*u*)*

(*s*)Hewett *v.* Lucas, 42 Ill. 299.
(*t*)Smith *v.* Allen, 63 Ill. 475.
(*u*)Dalton *v.* Libby, 9 Nev. 195.
*See *Res Adjudicata.*

§ 221. Where a judgment is not void, but is merely erroneous, equity will not interfere, even though it would evidently be reversed on error. But yet, where there is an abuse of the process of the law court, it has been held, in Illinois, that equity will give relief; as, for example, where a person knowing the defendant in attachment is not indebted, yet, by false affidavit, secures a levy, judgment and sale, the sale may be set aside and the proceedings vacated.(*v*) But I know of no just reason why the power to set aside the sale would not be inherent in the court itself, whose process was so abused, on motion, duly sustained by proof of the facts.

§ 222. Equity will not supervise the proceedings of a justice of the peace on any other grounds than those pertaining to the proceedings of a court of record. And so, where judgment was rendered against a plaintiff who brought a bill to enjoin the sale of property levied upon, because, as was alleged, the judgment was a nullity, and was obtained by fraud, the court said: "If the judgment was erroneous, the remedy of plaintiff was by appeal; if void, she had a remedy, by motion, to have the execution set aside. If these remedies have been lost without any fault or negligence of the plaintiff, and if we concede that the judgment is entirely void, (a question we have not examined,) still there is no necessity for the interference of a court of equity to restrain the enforcement of the execution, because there is no showing that the plaintiff cannot have an adequate and complete remedy at law. There is no allegation that defendants are insolvent, or unable to respond in damages."(*w*)

§ 223. And a direct action for the payment of money merely cannot be brought in equity, and without a warrant in the constitution the legislature cannot endow a court of equity with the power of determining legal questions merely, because thereby the right of trial by jury is contravened. There must be equitable grounds of relief, as contradistinguished from legal grounds.(*x*) And, moreover, a court of equity cannot properly be called upon, in general, to determine future rights;

(*v*) Gibbons *v.* Bressler, 61 Ill. 112.
(*w*) Connery *v.* Swift, 9 Nev. 43.
(*x*) Haines' Appeal, 73 Pa. St. 171.

as, for example, under a will(*y*)—except, indeed, where protection to future rights is necessary to be afforded in the present.(*z*) But such cases as this, even, do not involve mere declaratory decrees as to future rights.

§ 224. Ordinarily penalties and forfeitures are not enforceable in a court of equity, and, indeed, it has been declared that courts of law will exercise jurisdiction in civil forfeitures with great reluctance, and only in clear and positive cases.(*a*) And, in equity, penalties, forfeitures, and securities for conditions broken, are strictly regarded as mere securities for the payment of money or performance of terms, and where compensation can be made for breach, in some other mode, relief will be afforded against the rigid enforcement of the letter of the contract. And this is said to be upon the principle that a court of equity is a court of conscience, and will permit nothing unconscionable to be inflicted within its jurisdiction.(*b*)

§ 225. A court of equity will not inquire into the validity of elections, even in case of an omission of the particular case from the operation of the general law as to contested elections, unless such jurisdiction be expressly conferred by statute.(*c*)

§ 226. Although equity will not exercise jurisdiction to establish a disputed legal right which the parties can as well settle in a court of law, yet, where a right is admitted or established at law, and the parties disagree as to the extent of the right or the mode of using it, equity may interfere to define the right and regulate its use, upon the ground of preventing a multiplicity of suits.(*d*)

§ 227. It is a settled principle that where a court has properly acquired jurisdiction of a cause for one purpose, it will retain it in order to do full and complete justice between the parties—especially if there are incidental matters to be determined, in order to give effect to its decree,(*e*) so that litigation

(*y*)Cross *v.* DeValle, 1 Cliff. C. C. 285.

(*z*)Same case, 1 Wall. 15.

(*a*)White *v.* R. R. 13 Mich. 363.

(*b*)Grigg *v.* Landis, 21 N. J. Eq. 502, and authorities cited.

(*c*)Moore *v.* Hoisington, 31 Ill. 247.

(*d*)Beam *v.* Coleman, 44 N. H. 542.

(*e*)De Bemer *v.* Drew, 39 How. Pr. (N. Y.) 471.

may be terminated as well as the remedy facilitated.(*f*) And this is so more particularly if the available remedy in equity as to a cause already in the court is more full than could be afforded by a court of law.(*g*)

§ 228. It is, probably, in part upon this principle that the doctrine of equitable conversion rests; so that if by statute a charitable corporation can hold a devise of money, but not of land, and a court of equity has cognizance of a will containing such devise of land, the court may, in order to effectuate the purpose of the testator, regard the devise as of money, and not land, and thereupon direct the sale of the land by the executor, and the paying over of the proceeds to the corporation.(*h*) For a court of equity is not bound by the literal expressions of a statute, but where a case comes within the equity of the statutory provisions it is held to be within the provisions themselves.(*i*)

§ 229. We are not, however, to suppose that there is any absolute discretion vested, in equity, in anything; but proceedings in an equitable court are as fully subject to established rules as those in a court of law, and the exercise of jurisdiction is so likewise. And, indeed, it has been held that the rules of decision are the same in both tribunals.(*j*) The leading and fundamental jurisdictional rules or maxims, as I understand, are these three: (1) Equality is equity. (2) He who would seek equity must do equity. (3) He is first in right who is first in time. As to the second rule, however, it must not be carried so far as to hold a party who has committed an error responsible for all the remote and possible consequences that may arise from its leading others to error likewise, through a false confidence in it, without their examination for themselves.(*k*) But, for example, if a grantee in a deed of trust seeks to reform it, and a defense of usury is successfully maintained as to the note which the deed was given to secure, the plaintiff can be required to rebate the usurious interest before relief will be given him.(*l*)

(*f*) Sanders' Appeal, 57 Pa. St. 502.
(*g*) Conyers *v.* Brown, 31 Ga. 385.
(*h*) Harris *v.* Slaght, 46 Barb. 504.
(*i*) Davis *v.* Harkness, 1 Gil. 181.
(*j*) Moreland *v.* Bank, Breese, 265.
(*k*) Peterson *v.* Grover, 20 Me. 366.
(*l*) Corley *v.* Bean, 44 Mo. 381.

And so a court of equity will never assist a party to recover an unjust claim. And if a complainant bases his demand upon a hard, oppressive or technical advantage, he must be content with his strict and technical legal rights.(*m*)

As to the first rule, it does not mean that equity is merely a chancellor's sense of moral right, justice or equality. It must be applied according to established rules.(*n*) And Justice Story has remarked that "if by an equity is meant a mere dictate of natural justice, in a general sense, it is not worth while to discuss it, because this court is not called upon to administer a system of mere universal principles. If by an equity is meant a right which a court of equity ought to enforce, it remains to be proved that such an equity exists in the jurisprudence which this court is called upon to administer."(*o*)

§ 230. The remedies in equity are (1) curative, in which particular they agree with remedies at law; and (2) preventive, in which particular they are entirely distinct and peculiar. A brief summary of each class in order will occupy our attention here.

And, in the first place, as a court of equity is regarded in the light of a court of good conscience, all matters of trust come specially under its supervision, sometimes exclusively, and sometimes concurrently with courts of probate and other courts. And this supervision extends to implied, as well as express, trusts—that is to say, whether trusts arise from a will or by deed, or operation of law, or by the acts or relations of the parties, they may be enforced in equity; and whether they are established, therefore, by direct proof, or legal presumption.(*p*) And a court may remove a delinquent trustee, in order to enforce the execution of a trust; as, for example, a trustee or executor under a will.(*q*) And in matters of official trusts, as, for example, the misapplication of assets by a sheriff, a court of equity will take cognizance of the breach

(*m*)Stone *v.* Pratt, 25 Ill. 34.

(*n*)Savings Inst. *v.* Makin, 23 Me. 360.

(*o*)Greene *v.* Darling, 5 Mason, 215.

(*p*)McCartney *v.* Bostwick, 32 N. Y. 57.

(*q*)Tasley *v.* Tasley, 1 Dew. 119.

thereof, although the complainant may have a perfect remedy at law on the official bond of the defendant.(*r*)

But a court is not inclined to establish an implied trust from remote or general circumstances, as, for instance, mere relationship. Thus, a bill was brought in a case where a fraudulent concealment of the value of the property was alleged on the part of a son-in-law of the complainant, whereby she parted with her life estate to him at a greatly reduced price. The bill averred that her confidence in the son-in-law, naturally superinduced by the relationship, continued and increased until the day of the sale; that she reposed entire and implicit confidence in him, believing that he was truly and unselfishly promoting, as he best could, her pecuniary interest; and that he was well aware that she reposed such confidence, and that he knew, before the purchase, that the remainder-men had authorized him to offer her a much higher price than he had paid; and that he had, nevertheless, represented to her that her interest was worth even less than the sum he had paid, by which concealment and misrepresentation she was induced thus to sell to him. The court held, however, that the mere fact of such relationship was not sufficient to impose the legal duty of disclosing the value of the property, but, in order to have that effect, it must appear that there was such a trust growing out of the relation as to authorize the complainant to act upon the presumption that there had been no concealment of any material fact from her: and, moreover, that this could not be inferred under the facts of the case, namely, that the parties resided at a remote distance from each other; that, although the social and family relations were cordial, yet the intercourse was only occasional, owing to the distance; that the son-in-law had not apparently acted as the complainant's business agent or adviser in any way, and had not agreed, in this special instance, to ascertain the value of her life estate, or the price at which it could be sold. It was not enough that the complainant actually did place confidence in him, by reason of which she sold to him, when she had not directly informed him

(*r*) Norton *v.* Hixon, 25 Ill. 452.

during the negotiation that she relied upon him, and sold to him in consequence of her confidence in him.(*s*)

As to a trust deed, the rule is thus laid down by the supreme court of Rhode Island: "The proposition of the counsel for the respondents that mere volunteers have no equity on which to ground a claim for equitable relief is quite too broad. If the deed under which they claim be defective, and inoperative at law, they cannot have the aid of a court of equity to complete and perfect it, any more than they can have the aid of the court to enforce a promise, or even covenant, without consideration, to execute the deed. In other words, the court will not help them *to be cestuis que trust*, but remain neutral in regard to the defective deed, or executory contract to give one. On the other hand, if the legal conveyance be effectually made, the court will protect all equitable interests, and enforce all equitable rights and duties under it, as promptly and completely, though made without, as if made with, consideration. The party who makes a voluntary deed, whether of real or personal estate, without reserving a power to alter or revoke it, has no right to disturb it, and as against himself it is binding both in equity and at law.(*t*)

§ 231. Closely connected with this is equitable jurisdiction in frauds. And I think that in most of the states even frauds for which an adequate remedy may be had at law are cognizable at equity likewise. However, it is otherwise in New Hampshire, under the general fundamental principle that equity will not interfere where courts of law can give full relief.(*u*)

Never will a court of equity lend its power to assist or protect a fraud. It will not even enforce an unconscionable bargain, as we have before seen. And thus the supreme court of the United States have said: "He who asks relief must have acted in good faith. The equitable powers of this court can never be exerted in behalf of one who has acted

(*s*)Cleland *v.* Fish, 43 Ill. 284. (Justice Lawrence dissenting.)

(*t*)Stoner *v.* King, 7 R. I. 365.

(*u*)Miller *v.* Scammon, 52 N. H. 610. And so in Alabama, (Youngblood *v.* Youngblood, 54 Ala. 486;) and in Georgia, (Huff *v.* Ripley, 58 Ga. 11.

fraudulently, or who, by deceit, or any unfair means, has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity."(*v*)

§ 232. From this results the power of cancellation and rescission, even to the extent of setting aside formally executed conveyances in fraud of legal or equitable rights. Where there is an adequate remedy at law, even an agreement for the sale of real estate will not be rescinded for sufficient cause shown. *Bruner* v. *Meigs*, 74 N. Y. 406. But, misrepresentation in procuring a bargain will furnish an equitable ground for setting aside a conveyance whereby the bargain was consummated.(*w*) And so, where there has even been a complete execution of the terms of a contract for the purchase of land, by the delivery of a deed and the payment of money, and then the title fails, in part, equity will decree a return of the money, if there had been a fraudulent misrepresentation of the title.(*x*)

Also, voluntary conveyances, designed to defraud creditors, may be set aside, subject, however, to the general rule that no interference will be granted at the instance of a general creditor before judgment.(*y*)

In Illinois, where a woman, three days before her marriage, sold to her brother, *in loco parentis*, without the knowledge of her intended husband, and with the avowed purpose of preventing him from forbidding such sale, certain premises, at less than one-fourth their value, it was held that the conveyance should be set aside as in fraud of the husband's marital rights, the same as if it had been purely voluntary.(*z*) Whether this would be the case under later statutes is perhaps an open question.

Where a bidder at a judicial sale of real estate makes false representations which prevent bidding, and thereby obtains the property at a disproportionate price, relief will be given,

(*v*)Bein *v.* Heath, 6 How. 247, approved in Kitchen *v.* Raybun, 19 Wall. 263.

(*w*)Allen *v.* Bratton, 47 Miss. 130, and cases cited.

(*x*)Idem.

(*y*)Oberholsen *v.* Greenfield, 47 Ga. 553.

(*z*)Freeman *v.* Hartman, 45 Ill. 59, and authorities cited.

in equity, either by setting aside the proceedings, or holding the purchaser to an account.(*a*) And so the unfair proceedings of an officer, or purchaser, at a tax sale, will vitiate it, so that chancery will interfere.(*b*)

Where there was an agreement to exchange real estate, and one party so conducted himself as to induce the belief of the other that he was getting all of a certain number of lots, whereas, after he executed and delivered his deed, he found two of the supposed lots were not included in the exchange, it was held a proper subject for relief by a rescission of the agreement.(*c*)

Moreover, if a purchaser has notice how the vendor *considers* a sale of other property in the neighborhood as affecting the sale of his, he is held liable if he wilfully takes advantage of the delusion, however illogical or absurd it may be. And the materiality of a false representation does not depend upon its actual effect upon the value or price, but upon its influence on the mind of the contracting party. And so, if a vendor relies upon a representation made by a vendee, or his agent, as to the non-occurrence of a certain event, without any knowledge on his part as to whether it has occurred or not, after being informed by the vendor that, in case of the non-occurrence, he will accept a much lower price, the vendor has a right to have any contract made on such representation rescinded, in case the event has occurred, although the fact misrepresented does not directly affect the value or price of the land.(*d*)

Whether a strict relation of principal and agent exists or not makes no difference in this matter. And so, where one places himself in a confidential relation to another, as by voluntarily undertaking to assist him in getting his property out of the hands of others, and then takes advantage of the relation to acquire the property through deception or improper influence at an inadequate price, equity will relieve.(*e*)

(*a*)Cocks *v.* Izard, 7 Wall. 562.
(*b*)Sratel *v.* Maxwell, 6 Wall. 277.
(*c*)Underwood *v.* West, 43 Ill. 404.
(*d*)Masterton *v.* Beers, 6 Rob. (N. Y.) 383.
(*e*)Harkness *v.* Frasers, 12 Fla. 337.

However, there are well-defined limitations to the exercise of this jurisdiction of cancelling contracts or instruments; as, for instance, one cannot have a deed set aside because he has not received the consideration merely. Nor can a grantor have his deed annulled and his land restored because the deed was not executed in accordance with the requirements of the law.(*f*) Nor can a decree of rescission properly be made when both parties cannot be restored to their original *status* in reference to the matter, nor if the party seeking to rescind is himself in default, or has not offered to restore the other party to the condition he occupied before the contract was made.(*g*) Neither will a contract be rescinded on the ground of subsequent fraud. And where one sold land to another, who, some years afterwards, forced the seller by violence to give up the unpaid notes for the purchase money, it was held he could not obtain a rescission of the contract of sale.(*h*)

Nor, if the invalidity of a void instrument appears on the face of it, will equity interfere, although otherwise it will, even if a defence may be made thereon at law, and even if the holder has first begun suit on the instrument.

In general it is held, however, that a right to cancellation is not an absolute right of a party, but rests largely in the sound discretion of the court. Sometimes, notwithstanding both parties may be *in pari delicto*, in an illegal transaction, where the principle of public policy comes in, and sets aside the rule that a party in default cannot apply for a cancellation, equity may intervene. So that, in such matters, as, for example, where a note is made void by an illegal consideration, the questions occur, (1,) has the complainant made such a case as that, if he were innocent, he would be entitled to relief? and, (2,) if so, does the best interest of society require the granting of relief, notwithstanding the complainant's guilt? for, if not, the court will deny the claim, and leave both parties in whatever difficulties their conduct has brought upon them. But the illegal transaction must be execu-

(*f*) Ibid.

(*g*) Stewart *v.* Ludwick, 29 Ind. 235.

(*h*) Fulton *v.* Loftis, 23 N. C. 394.

tory, and then the public interests must demand its rescission; because it is held that, "much as the community is interested to discountenance immoral and illegal contracts, its interests will not be subserved by setting aside executed contracts and unsettling legal titles."(*i*)

§ 233. Sometimes instruments which are not subject to rescission nevertheless require to be reformed in order to give effect to the intention of the parties thereto: when, through mutual mistake, they have imperfectly or improperly drawn the instruments; and this belongs exclusively to equity jurisdiction. Thus, a deed conveying the wrong land;(*j*) even a deed of gift(*k*) accidentally conveying the house of the grantor,(*l*) although, in such case, it has been held, the grantor's evidence of his intention is insufficient; or a mortgage misdescribing the land;(*m*) or having the grantee's name where the grantor's should be;(*n*) or a deed omitting the grant of a right of way;(*o*) or a deed of trust wherein the debt is made payable to the trustee instead of the beneficiary, and misstating the date of the accompanying bond;(*p*) or bonds having the penalty omitted;(*q*) or a written agreement with an excessive consideration which has been paid;(*r*) or a judgment wherein is an error of computation in rendering it;(*s*) or a printed copy of a will, in the record of a court of appeals, in which the true will is changed, and on which judgment is rendered in the court;(*t*) or a policy of insurance in which the name of an individual partner is inserted instead of the name of the firm;(*u*) and such like matters may be reformed on the proper showing, sustained by clear and satisfactory evidence of the mistake. But, without an allegation and proof of mistake, a party cannot be allowed to prove

(*i*)Porter *v.* Jones, 6 Coldw. (Tenn.) 320, and authorities cited.

(*j*)Parker *v.* Benjamin, 53 Ill. 257.

(*k*)Huss *v.* Morris, 63 Pa. St. 372.

(*l*)Mitchell *v.* Mitchell, 40 Ga. 16.

(*m*)Schwickerath *v.* Cooksey, 53 Mo. 76.

(*n*)Miller *v.* Davis, 10 Kan. 547.

(*o*)Blakeman *v.* Blakeman, 39 Conn. 325.

(*p*)Bank *v.* Russell, 50 Mo. 532.

(*q*)State *ex rel. v.* Frank's Adm'r, 51 Mo. 98.

(*r*)Boyce *v.* Wilson, 32 Md. 125.

(*s*)Barthell *v.* Roderick, 34 Ia. 518.

(*t*)Byrne *v.* Edmonds, 28 Gratt. 200.

(*u*)Keith *v.* Insurance Co. 52 Ill. 522.

merely the intention of one of the parties, or both, in opposition to the plain meaning of a writing.(*v*)

Instruments may be so reformed, however, as to *enlarge* their terms and so enforce rights not therein expressed, and thus make them conform to the prior oral agreement, as proved by parol evidence, and this is said to rest on the ground that the subsequent omission, by mutual mistake in the attempt to reduce the contract to writing, could not invalidate the contract itself, which, therefore, still subsists, so that the incorporation of the omitted clause may be compelled. But not if the omitted clause is within the statute of frauds, for then it is not valid until written. Yet, even then, relief may be had against the enforcement of the contract as written, or the assertion of rights acquired under it contrary to the terms and intent of the real agreement between the parties, since it is held that the statute of frauds does not forbid the defeat or restriction of written contracts, nor the use of parol evidence to establish equitable grounds therefor.(*w*) However, part performance will justify the reformation which otherwise would fail.

A mistake must be mutual, as a general rule, or if it is the mistake of one party alone it must be caused by the fraudulent concealment of the other.(*x*) And so the correction must, in the absence of fraud, express the understanding of both parties thereto when the contract was executed.(*y*) But the rule that a mistake must be mutual and prevent the instrument from expressing the terms as fully understood by both parties is relaxed, as above intimated, where the party against whom relief is sought has acted in bad faith, and with full knowledge that the instrument did not conform to the intention of the other, or where confidence has been reposed in him and abused; as, if the preparation of the writing was entrusted to him, during which he either carelessly or wilfully omitted the proper terms, and the other party relied on its correctness, without particular examination and under the

(*v*) Free *v.* Meikel, 39 Ind. 318.
(*w*) Glass *v.* Hulbert, 102 Mass. 34.
(*x*) O'Donnell *v.* Harmon, 3 Daly, (N. Y.) 424.
(*y*) Harter *v.* Christoph, 32 Wis. 248.

supposition that it embodied the actual agreement.(*z*) This is upon the general principle that no one shall be allowed to take advantage of his own wrong, and is embraced, also, within the general jurisdiction of equity in cases of fraud. And it is applicable to a policy of insurance as well as to any other contract.(*a*)

It is, also, a general rule that the mistake must be one of fact merely and not of law. So, if it be only a misapprehension of the legal effect of the terms of the instrument, equity will not interfere.(*b*) For if a party actually designs to perform an act, and does so, under a mistaken view of the law affecting it, he is to be held to the obligation resulting from his intention.(*c*) Equity cannot undertake to supply defects in the knowledge of the law,(*d*) but must hold parties to have comprehended the legal effect of the instruments they execute on agreement.(*e*) The rule is thus stated: "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or to law, does not fulfil that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument.(*f*) That is, a mistake in law will be relieved against, if it be only on the part of the draftsman, but not if it be in the party. And it must be shown that the instrument misrepresents the intention and agreement of the parties.(*g*) And so, where there is a mistake, whether of law or of fact, in reducing an agreement to form, or in carrying it into effect, relief may be had; but where parties actually and intentionally adopt it, and then it should fail, through their ignorance of the law, to operate as they intended, the courts cannot substitute another for it.(*h*)

Yet where there has been actual or legal fraud, a mistake

(*z*)Brioso *v* Insurance Co. 4 Daly, (N. Y.) 247.

(*a*)Ibid; Bryce *v*. Insurance Co. 55 N. Y. 242.

(*b*)Hoover *v*. Reilly, 2 Abb. (U. S.) 473.

(*c*)Goltra *v*. Sanasack, 53 Ill. 457.

(*d*)Thurmond *v*. Clark, 47 Ga. 502.

(*e*)Fellows *v*. Heermans, 4 Lan. (N. Y.) 241.

(*f*)Hunt *v*. Adm'rs, 1 Pet. 13.

(*g*)Nelson *v*. Davis, 40 Ind. 368.

(*h*)Lanning *v*. Carpenter, 48 N. Y. 413.

of law will be relieved against; as, if necessary knowledge has been withheld, or an unreasonable advantage has been taken of circumstances under the pressure of which a party has been induced to do what he otherwise would not have done. The will must not be coerced.(*i*)

In California it has been held that a deed made under a mistaken view of the personal rights of the parties may be cancelled,(*j*) and, *per consequence*, reformed; and this is under the general rule, the question of personal right being one of fact.

In order to entitle one to relief on the ground of mistake, he must show that he has used diligence and good faith to avoid the consequences of the mistake, for he cannot be allowed, by delay and omission, to inflict irreparable mischief to the other party.(*k*) However, if one of the parties to a deed, executed in good faith, but not conforming really to the previous contract, delays, through an honest and reasonable reliance upon the deed, for years after he has had notice that its original construction is denied by the other party, the delay is not chargeable as laches against him.(*l*)

§ 234. Closely related to this subject of reformation is that of a specific performance of contracts, wherein there is a very marked difference between the jurisdiction of equity and law: the latter being unable to compel performance, but only having power to give damages, sometimes wholly inadequate, for breach of contracts, express or implied. And whether equity will enforce the performance of a contract does not depend upon the character of property involved, as whether it is real or personal, but largely upon the inadequacy of a recovery of damages in a legal action.(*m*)

The fixing of a penalty by the contract is accordingly no bar to a suit for specific performance.(*n*)

Yet, if the injured party may, in fact, be fully indemnified in damages, courts are unwilling to decree specific perform-

(*i*) Wheelan's Appeal, 70 Pa. St. 410.

(*j*) Hearst *v.* Pujol, 44 Cal. 234.

(*k*) Thomas *v.* Bartow, 48 N. Y. 200.

(*l*) Stockbridge Iron Co. *v.* Iron Co. 107 Mass. 323.

(*m*) Duff *v.* Fisher, 15 Cal. 381.

(*n*) Daily *v.* Litchfield, 10 Mich. 37.

ance,(*o*) on the general principle that equity jurisdiction attaches properly where there is not an adequate remedy at law.

The pre-requisities are thus stated: "In bills for specific performance the contract or assignment must be founded on a valuable or meritorious consideration, and the complainant who seeks the performance must show that he has performed, or offered to perform, all the acts which formed the consideration for the alleged undertaking on the part of the defendant. And if the contract be vague and uncertain, or the evidence to establish it be insufficient, the party will be left to his legal remedy. And a court will not decree a specific performance where the contract is founded in fraud, imposition or mistake, or where it would be unconscientious to enforce it; although, where a contract for the sale of land is unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for a breach of it, provided the contract is fair, and for an adequate consideration."(*p*)

It is not, however, a matter of course that a specific performance will be decreed where a legal contract is shown to exist. It must have been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression. Nor need an agreement be so tainted with fraud as that it might be cancelled, in order to justify a refusal of a decree for specific performance.(*q*)

Awards are considered so far in the light of contracts as that they may be enforced by a decree for specific performance.(*r*)

If to a bill brought to enforce a specific performance the defence is set up that there is a mistake in the contract, the contract may be reformed, and then a decree be rendered.(*s*)

Unless in exceptional cases, wherein it may be needful to protect an innocent purchaser against fraud, a contract will not be divided, but enforced entire.(*t*)

(*o*)McClane *v.* White, 10 Min. 192.
(*p*)Fitzpatrick *v.* Beatty, 1 Gil. 467, and authorities cited.
(*q*)Frisby *v.* Ballance, 4 Scam. 299.
(*r*)Ballance *v.* Underhill, 3 Scam. 453.
(*s*)Ibid.
(*t*)Stone *v.* Pratt, 25 Ill. 25.

§ 235. The removal of a cloud upon title to lands is a branch of equity jurisdiction. A cloud upon title is thus defined by the California court: "If the title against which relief is prayed be of such a character as that, if asserted by action, and put in evidence, it would drive the other party to a production of his own title in order to establish a defence, it constitutes a title which the latter has a right to call upon the court to remove and dissipate. If, on the other hand, the title be void on its face, if it be a nullity, a mere *felo de se*, when produced, so that an action based upon it will 'fall of its own weight,' as has been said, then the title of the party plaintiff is not necessarily clouded thereby, and he ought, if he would maintain an action to have it removed, show some special circumstances which entitle him, in the view of a court of equity, to a decree for that purpose."(*u*) But the complainant must be in possession, even if not in actual occupation; for if out of possession he has an adequate remedy in ejectment;(*v*) and a court of equity has no jurisdiction to restore possession, except where such restoration is merely incidental to the main purpose of a bill, the power of the court being invoked on some ground within the legitimate jurisdiction,(*w*) and this, therefore, falling under the general principle that when a court of equity has acquired jurisdiction of a cause for one purpose, it will retain the cause in order to do full justice between the parties, especially in effectuating its own decrees.

§ 236. Matters of partnership come appropriately within the province of equity, unless there has been a balance struck between the partners, or an express promise exists.(*x*) And, in New Jersey, an heir may bring a suit in equity for his distributive share.(*y*)

§ 237. Equity seems to possess concurrent jurisdiction in suretyship in most of the states, and exclusive jurisdiction in some of them.(*z*)

§ 238. In most of the states, I believe, by statute, equity

(*u*) Lick *v.* Ray, 43 Cal. 88.

(*v*) Burton *v.* Gleason, 56 Ill. 25; Gage *v.* Rohrback, Ibid, 263.

(*w*) Green *v.* Spring, 43 Ill. 280.

(*x*) Buell *v.* Cole, 54 Barb. 366.

(*y*) Dorsheimer *v.* Rorback, 23 N. J. Eq. 47.

(*z*) Heath *v.* Bank, 44 N. H. 175.

has power to issue *ne exeat* writs, which, however, are likely to become obsolete.

§ 239. Bills of discovery are becoming almost wholly superseded by the statutes removing the disqualification of parties in interest to testify in actions at law, which statutes will doubtless soon be universally enacted, inasmuch as they destroy a transparent legal absurdity, though hoary with age.

§ 240. We come now to the *preventive jurisdiction* of courts of equity. And this of late chiefly lies in the power to enjoin, which has almost superseded bills of peace. But, in South Carolina, if a surety apprehends danger from delay he can apply to equity to compel the debtor to pay the debt past due, although the surety has not been sued nor paid the debt. *Norton* v. *Reid*, 11 S. C. 593. These, also, may still have other applications, as in matters of disputed boundaries, wherein a court may "direct that a disputed boundary be surveyed and marked in a permanent manner, thus putting forever at rest a subject of chronic contention."(*a*)

Almost every abuse and oppression may be reached by injunction, provided there is no adequate remedy at law, for in this case an injunction will always be refused. Thus the prosecution of a multiplicity of suits may be enjoined;(*b*) or encumbering or conveying lands wrongfully;(*c*) or the wrongful use of a judgment improperly and fraudulently obtained;(*d*) or a nuisance;(*e*) or infringement of an exclusive trade-mark;(*f*) or any irreparable damage;(*g*) with this exception, however, that courts will not interfere to restrain the commission of an ordinary trespass merely on the ground that the defendant is not pecuniarily able to pay damages that might be recovered against him.(*h*) The insolvency of a party is a consideration only in waste or matters tending to permanent and irreparable injury to the estate.(*i*) (For enjoining

(*a*)Primm *v.* Raboteau, 56 Mo. 416.

(*b*)Railroad *v.* Mayor, etc., 54 N. Y. 159.

(*c*)Hoxie *v.* Price, 31 Wis. 89.

(*d*)Gainty *v.* Russell, 40 Conn. 451.

(*e*)Bishop *v.* Banks, 33 Conn. 118.

(*f*)Bradley *v.* Norton, Ibid, 165.

(*g*)Burnham *v.* Kempton, 44 N. H. 92; R. R. *v.* R. R. 57 N. H. 200.

(*h*)Morgan *v.* Palmer, 48 N. H. 338.

(*i*)Ibid.

judgments see "Res Adjudicata.") It may be merely remarked here that equity will not enjoin a judgment for mere irregularity. *Bowden* v. *Perdue*, 59 Ala. 409. Nor on this ground review the action of municipal corporations, as, for instance, in the matter of street assessments. *Guest* v. *Brooklyn*, 69 N. Y. 506. There must be a specific equity to justify interference herein. *Jersey City* v. *Lembeck*, 31 N. J. Eq. 255. Even persons claiming exemptions from assessment must apply to a court of law. *Improvement Co.* v. *Hoboken*, Id. 461. And if one has lost his legal remedy, by laches, as to such assessment, he cannot be relieved in equity. *Cleveland* v. *Road Board*, Id. 473.

CHAPTER III.

ADMIRALTY.

§ 241. Admiralty jurisdiction explained.
242. Distinction between admiralty and common law.
243. Extension of jurisdiction.
244. How jurisdiction exercised.
245. When jurisdiction attaches.
246. Effect of state statutes.
247. Seamen's wages.
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249. Ousting jurisdiction by mixed contract.
250. Vessel partnership.
251. Titles to ships—mortgages.
252. Contracts for building ships—repairs.
253. Furnishing supplies.
254. Maritime liens—maritime contracts.
255. Insurance, etc.
256. Salvage.
257. Supervision of seamen's contracts.
258. Contracts of transportation.
259. Lien by advancing money to release vessel seized by marshal.
260. When suit may be brought where a promissory note has been given.
261. Distinction between vessel and cargo.
262. Collision.
263. Torts.
264. Violations of revenue laws.
265. Felonies.
266. Pirates.
267. Admiralty jurisdiction as to foreigners.
268. Prize jurisdiction.
269. Repairs or supplies as to foreign ships.
270. Trusts—specific performance.

§ 241. This form of jurisdiction was confined to the United States courts in general, for the obvious reason that, in large measure, it is of necessity international, involving the interests of foreigners and their rights upon the high seas; although

it sometimes runs concurrently with the jurisdiction of state courts. Mr. Story, in his work on the Constitution, speaks of the confusion which exists, in many particulars, regarding this jurisdiction: and also sums up, succinctly, the subjects to which it attaches, thus: "It has been remarked by the *Federalist*, in another place, that the jurisdiction of the court of admiralty, as well as of other courts, is a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which it is circumscribed. This remark is equally true in respect to England and America; to the high court of admiralty sitting in the parent country, and to the vice-admiralty court sitting in the colonies. At different periods the jurisdiction has been exercised to a very different extent, and in the colonial courts it seems to have had boundaries different from those prescribed to it in England. It has been exercised to a larger extent in Ireland than in England, and down to this very day it has a most comprehensive reach in Scotland. The jurisdiction claimed by the courts of admiralty as properly belonging to them extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea; and to all maritime contracts—that is, to all contracts touching trade, navigation or business upon the sea, or the waters of the sea, within the ebb and flow of the tide. * * * * * The admiralty and maritime jurisdiction (and the word 'maritime' was doubtless added to guard against any narrow interpretation of the preceding word 'admiralty') conferred by the constitution embraces two great classes of cases; one dependent upon locality, and the other upon the nature of the contract. The first respects acts or injuries done upon the high seas, where all nations claim a common right and common jurisdiction; or acts or injuries done upon the coast of the sea, or, at furthest, acts and injuries done within the ebb and flow of the tide. The second respects contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches—one embracing captures and questions of

prize arising *jure belli*; the other embracing acts, torts and injuries strictly of civil cognizance, independent of belligerent operations.(*a*) * * * * * *

"The branch of jurisdiction dependent upon locality respects civil acts, torts and injuries done on the sea, or (in certain cases) on waters of the sea where the tide ebbs and flows, without any claim of exercising the rights of war. Such are cases of assaults, and other personal injuries; cases of collision, or running of ships against each other; cases of spoliation and damage, (as they are technically called,) such as illegal seizures or depredations upon property; cases of illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits; cases of seizure, under municipal authority, for supposed breaches of revenue or other prohibitory laws, and cases of salvage for meritorious services performed in saving property, whether derelict, or wrecked, or captured, or otherwise in imminent hazard from extraordinary perils.(*b*) * * * * * *

"The remaining class respects contracts, claims and services purely maritime. Among these are the claims of material-men and others for repairs and outfits of ships belonging to foreign nations or to other states; bottomry bonds for moneys lent to ships in foreign ports to relieve their distresses and enable them to complete their voyages; surveys of vessels damaged by perils of the seas, pilotage on the high seas, and suits for mariners' wages.(*c*) * * * * *

"We have thus far been considering the admiralty and maritime jurisdiction in civil cases only. But it also embraces all public offences committed on the high seas, and in creek, havens, basins and bays within the ebb and flow of the tide; at least, such as are out of the body of any county of a state. In these places the jurisdiction of the courts of admiralty over offences is exclusive; for that of the courts of common law is limited to such offences as are committed within the body of some county. And on the sea coast there is an alternate or divided jurisdiction of the courts of admiralty

(*a*) Vol. 2, p. 449, §§ 1665, 1666, (4th Ed.)
(*b*) Ibid, p. 453, § 1669.
(*c*) Ibid, p. 454, § 1671.

and common law, in places between high and low-water mark, the former having jurisdiction when, and as far as, the tide is out, and the latter when, and as far as, the tide is in, *usque ad filum aquæ*, or to high-water mark."(*d*)

§ 242. It has been held that, unlike the common law, admiralty jurisdiction is not defined or limited by the judical rules or legislation of England when the constitution was adopted; and that such legislation and rules go no further, as authorities, than merely to furnish analogies to aid in construing the provisions of the constitution. Nor is it held rigidly to the test of a jury trial, so as to hold that, where common law courts can give a remedy by jury trial, the admiralty jurisdiction is excluded. Nor, in cases of contract, does locality determine the jurisdiction, but the subject-matter only, although, formerly, it was otherwise in England, and although locality now determines the jurisdiction in torts and crimes.(*e*)

§ 243. There has been, of late, an extension of locality, even as to maritime jurisdiction; as, for example, by act of congress of February 26, 1845, which act has been sustained as constitutional, not on the ground of the power of congress to regulate commerce, but on the ground that the jurisdiction of admiralty is not confined to tide-waters, but extends to all public navigable lakes and rivers where commerce is carried on between different states, or with a foreign nation, and, therefore, to our northern lakes.(*f*) The court say: "If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted. If the meaning of these terms was now, for the first time, brought before this court for consideration, there would, we think, be no hesitation it saying that the lakes and their connecting waters were embraced in them. These lakes are, in truth, inland seas. Different states border on them on one side, and a foreign nation on the other. A

(*d*) Ibid, p. 456, § 1673.

(*e*) Waring *v.* Clarke, 5 How. 458, 459.

(*f*) Genesee Chief, 12 How. 453, overruling prior cases.

great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes have been made, and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic states, applies with equal force to the lakes. There is an equal necessity for the prize power of the admiralty court to administer international law, and if the one cannot be established, neither can the other.

"Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it." However, it was said that the distinction was proper in England, as a boundary between public and private rivers, and also in the original thirteen states, wherein the far greater part of the navigable waters were tidal.(*g*)

A late decision, reiterating the doctrine of the abolition of the tide-water test, construes the statute of 1845 as restrictive, instead of enlarging in its effects, and, therefore, as confining the jurisdiction of the courts to contracts and torts, and excluding cases of prize. And, moreover, it held that the entire act was obsolete, excepting only the clause allowing trial by jury if requested, and that, by the act of 1789, the courts had general jurisdiction on the lakes as well as high seas.(*h*)

The doctrine has been applied to a case of collision on the

(*g*)Ibid, pp. 454, 455.

(*h*)The Eagle, 8 Wall. 23.

And it is held, accordingly, that a collision occurring on an artificial ship canal, connecting navigable waters subject to admiralty jurisdiction, is cognizable in admiralty. The Oler, 2 Hugh, 12.

Mississippi river above the limit of tide-water.(*i*) And on the Alabama river, though wholly within the limits of a single state.(*j*) On this the court say: "When the exercise of admiralty and maritime jurisdiction over its public rivers, ports and havens was surrendered by each state to the government of the United States, without an exception as to subjects or places, this court cannot interpolate one into the constitution or introduce an arbitrary distinction which has no foundation in reason or precedent." It was also applied to a collision on the Yazoo, in the state of Mississippi, and it was held therein that the fact that a navigable river was sometimes unnavigable, by reason of low water, made no difference in the question of jurisdiction.(*k*)

In a case of collision, locality is the test, and it is not necessary to allege that it occurred while either of the vessels was engaged in foreign commerce, or commerce between the states. Nor does it matter that it occurred within the body of a county.(*l*)

And so, if a contract for affreightment is to be performed between two ports of the same state, it may be enforced in admiralty by a proceeding *in rem*. It is only requisite that the contract be for transportation on navigable waters to which the general jurisdiction of admiralty extends.(*m*)

But the principle does not apply to an action for wages on services rendered on a canal not connecting different territories, or states, or navigable waters, and not if even a minor part of the voyage be through navigable waters.(*n*)

When an action is founded upon the power of congress to regulate commerce between the states, it is requisite that when the action arose the vessel libelled should have been actually engaged in foreign or inter-state commerce.(*o*) And it is held that although a vessel does not itself go from

(*i*)Fretz *v.* Bull, 12 How. 468.

(*j*)Jackson *v.* Steamboat, 20 How. 298.

(*k*)Nelson *v.* Leland, 22 How. 56.

(*l*)Propeller Commerce, 1 Black, 578, 580.

(*m*)The Belfast, 7 Wall. 631.

(*n*)McCormick *v.* Ives, 1 Abb. Adm'r R. 421.

(*o*)Propeller Swan, 6 Ben. 45.

state to state, yet it is subject to the power of Congress to regulate, if it is within a state employed in transporting goods destined for other states, or goods brought into the state from another, since the fact that several different and independent agencies are employed in transporting a commodity, some acting entirely within the state and some through two or more states, cannot in any manner affect the character of the transaction.(*p*) But it is different where vessels are exclusively engaged in the internal commerce of a state.(*q*)

Where the larger part of a voyage is upon waters subject to admiralty jurisdiction, that jurisdiction is not ousted by the fact that the termination is upon water of a different character, as a canal.(*r*)

§ 244. Admiralty jurisdiction is exercised in two modes—*in rem* and *in personam;* the former being applicable especially where a lien exists or a capture is made.

It has been held, indeed, that it is a distinguishing and characteristic feature of a suit in admiralty, that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly; whereas, by the common law process, property is reached only through a personal defendant, and only to the extent of his title, so that the title of a purchaser can never be better than that possessed by the personal defendant.(*s*)

In order, however, that the jurisdiction *in rem* shall attach for any purpose, there must be an actual seizure and possession by the marshal. "In admiralty, all parties who have an interest in the subject of the suit, the *res*, may appear, and each may propound, independently, his interest. The seizure of the *res*, and the publication of the monition, or invitation to appear, is regarded as equivalent to the particular service of process in the courts of law and equity. But the *res* is in no other sense than this the representative of the

(*p*)The Daniel Ball, 10 Wall. 565.
(*q*)The Montauk, 47 Ill. 335.
(*r*)The Robert Morris, 1 Wall. Jr. 33.
(*s*)The Moses Taylor, 4 Wall. 427.

whole world. But it follows that to give jurisdiction *in rem* there must have been a valid seizure, and an actual control of the ship by the marshal of the court;" and hence, where a sheriff has a prior levy on it by process from a state court, there can be no jurisdiction. But in the case in which this was decided four of the judges dissented from the latter point—the suit being for seamen's wages—and held that this is entitled to priority over all others, and that state courts have no right to obstruct the United States courts in their legitimate sphere; and they lay down, as indisputable, the following principles: "The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must first be paid. By the constitution and laws of the United States the only court that has jurisdiction over this lien, or authority to enforce it, is the court of admiralty; and it is the duty of that court to do so. The seamen, as a matter of right, are entitled to the process of the court to enforce the payment promptly, in order that they may not be left penniless, and without the means of support on shore; and the right to this remedy is as well and firmly established as the right to the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given the seaman. A general creditor of the ship-owner has no lien on the vessel, and when she is attached (as in this case) by process from a court of common law, nothing is taken, or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them; the thing taken is not the whole interest in the ship; and the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seamen's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the court of admiralty."(*t*)

(*t*)Taylor *v.* Carryl, 20 How. 591.

I believe this case has never been overruled: but it does certainly seem that the dissenting judges had by far the greater weight of reason with them.

§ 245. In order to confer a jurisdiction *in rem* it is not necessary that the ship actually enter upon the performance of a maritime contract, or that the breach occur during a voyage. The obligation results not from the performance, but from the contract itself, and the contract binds the ship *in specie* whenever made; so that, if there is a refusal to take on board a cargo or passenger to be conveyed, there is a lien upon the vessel itself, and the party aggrieved is not remitted to an action *in personam* against the master or owner.(*u*) It is different in contracts which do not create a lien until performance; as, for example, for repairs or supplies. If a master refuse to allow the repairs or receive the supplies the action is *in personam*.(*v*)

§ 246. Proceedings *in rem*, and in the name of the vessel itself, have been made exclusive in the United States courts by act of congress, so that a statute of California, conferring such jurisdiction upon the state courts, was declared inoperative, although it might have been otherwise in the absence of the congressional act.(*w*) And so it has been held that a state law cannot give a lien to be enforced against a vessel by a proceeding *in rem*, even to a resident of the home port, and against a vessel whose owners reside in the same port, if the vessel plies between the home port and a port of another state;(*x*) although, in any case, an action *in personam* may be brought against the owners of such a vessel for negligence in transportation.(*y*)

For a breach of a contract to carry a passenger from one state to another the remedy is a proceeding *in rem* in admiralty.(*z*)

Yet, when a claim for labor, or for supplies, in fitting out a

(*u*) The Pacific, 1 Blatchf. 586.
(*v*) Ibid. 587.
(*w*) The Moses Taylor, 4 Wall. 411. See Ferran *v.* Hasford, 54 Barb. 208.
(*x*) Marshall *v.* Curtis, 5 Bush, (Ky.) 609.
(*y*) Rake *v.* Steamboat Owners, 6 Bush, 26.
(*z*) Steamboat *v.* Long, 18 O. St. 526.

vessel is presented, courts of admiralty enforce a lien provided therefor by the local law of the state where the contract was made; but if there be no lien by local law they will refuse the remedy.(*a*) Nor will they retain a suit *in rem* for the purpose of foreclosing a mortgage.(*b*)

In a libel *in rem*, for supplies furnished, the claimant is bound to show that the credit was not given to the owners but to the vessel, or the suit will not be entertained.(*c*)

§ 247. A seaman's claim for wages will be enforced in admiralty both *in personam* and *in rem.*(*d*) And also an action for tort will be entertained both *in rem* and *in personam.*(*e*)

As to repairs, a claim for them can only be enforced *in rem* where the workman has not parted with the possession of the vessel.(*f*) And, on the other hand, ship-owners cannot bring suit in admiralty *in personam*, or in any way, against a shipwright for damages committed in the construction of the vessel, the contract between them not being regarded as maritime,(*g*) as we shall notice still further hereafter.

§ 248. In general, whenever a proceeding conjointly *in personam* and *in rem* is available, it is encouraged; since it "avoids multiplicity of suits, and saves needless repetitions of proofs and discussions."(*h*)

§ 249. In matters of contract it is held that adjudication must not be partial but entire, and if there be any portion of the subject-matter of a suit which is not cognizable in an admiralty court, it will oust the jurisdiction altogether. The principle is thus stated: "If the contract of the appellee had been the ordinary one for repairs or supplies to a domestic ship, and the only matter in dispute was to whom the credit was given and who was liable for the amount, it is very clear that it would be a case for admiralty jurisdiction, and the

(*a*)The Infanta, 1 Abb. Adm. 263.
(*b*)The John Jay, 3 Cliff. 67.
(*c*)The Prospect, Ibid, 527.
(*d*)Sheppard *v.* Taylor, 5 Pet. 710.
(*e*)Manroe *v.* Almeida, 10 Wheat. 486.
(*f*)Cunningham *v.* Hall, 1 Cliff. 48.
(*g*)Ibid, p. 46.
(*h*)The Sloop Merchant, 1 Abb. Adm. 7.

court would undoubtedly be authorized to determine whether Turner or the anticipated and contingent partners would be liable to the libellant for the money; and this question, upon the testimony, could be easily disposed of. But, inseparably connected with this maritime contract, and forming a part of it, is the agreement to become a partner in a company to be formed to purchase the vessel. Now, a contract to form a partnership to purchase a vessel, or to purchase anything else, is certainly not maritime; a court of admiralty has no right to decide whether such a contract was legally or equitably binding, nor to adjust the accounts and liabilities of the different partners. These questions are altogether outside of the jurisdiction of the court, and yet the amount actually due to the libellant, by whomsoever it is to be paid, cannot be decided until these questions are first examined and determined. And I consider it to be a clear rule of admiralty jurisdiction that, although the contract which the party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one with justice to both parties without disposing of the other, the party must resort to a court of law or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of *Grant* v. *Poillon* was decided upon this ground at the last term of the supreme court. 20 How. 162.

"If the contract for repairs, and for the partnership, had been separate contracts, there would be no doubt of the jurisdiction; and so, also, if the partnership had related to some collateral matter. But, according to the testimony, the agreement to repair the boat and to become part owner of her, with the libellant and others, were but parts of one and the same contract, and in relation to one and the same thing—that is, the boat to be repaired: and this court cannot adjust the rights and liabilities of the parties upon one portion of the contract, and leave the other to be litigated in another court. If it has not jurisdiction over the whole contract, it could not, without great injustice, dispose of a part, and compel the

party to pay money on one portion of it, and leave it to another court to decide whether he had not claims against the libellant, upon the partnership branch of it, which ought to have been adjusted before the account for work on the vessel was paid. * * * * I have said nothing of the proceedings in the state court of equity, to which the appellant refers in his answer. They have not been filed in the case, and this court cannot, therefore, regard them as open to consideration here. Certainly, if the same question between the same parties, upon the same subject-matter, were pending in a state court of competent jurisdiction to decide upon all the rights in controversy, this court would refuse to entertain a suit upon any portion of the matters so in litigation in the state court."(*i*)

§ 250. In the above extract it is declared that a vessel partnership is not a subject of admiralty jurisdiction, where the matter of partnership is the owning of the vessel. The principle, likewise, extends to the operations of a vessel; as, for example, if parties make an agreement to share profits in a certain ratio, one contributing the vessel, and the other his skill and attention, this is held to be no maritime contract of which admiralty could take cognizance.(*j*)

On the same principle, admiralty cannot adjudicate questions of property between the mortgagee of a vessel and one who has purchased under a mortgage given by a majority of the owners, and has been ejected by the others, who did not join.(*k*) However, this, also, goes on the principle that mortgages are not subjects of admiralty, as we shall see hereafter.

As a consequence of partnership matters not being subjects of admiralty jurisdiction, the courts will not adjudge an accounting between part owners;(*l*) that is to say, where the accounting is the principal thing; for if it be incidental merely, it will not oust the jurisdiction; the rule being that

(*i*)Turner *v.* Beacham, Tany, 587.

(*j*)Ward *v.* Thompson, 22 How. 334. And so as to the Ohio river. Steamer Petrel *v.* Dumont, 28 Ohio St. 602.

(*k*)Morgan *v.* Tapscott, 6 Ben. 252.

(*l*)Steamboat *v.* Phœbus, 182.

if a court has proper cognizance of a principal thing, it has also of the incident, although the incident would not, of itself, and standing alone, be within the jurisdiction.(*m*)

It makes no difference that the claim of a part owner arises on the water. So, even where a part owner dissents from a voyage, he cannot, in admiralty, sue for the use or destruction of his share of the outfits during the voyage.(*n*)

The general principle is thus stated: "When it is said that the admiralty has no jurisdiction in matters of account, I understand the meaning to be—*First*, if the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item. *Second*, when it is not the sole object, if it is apparent, from the pleadings, that it is one principal object, though not the sole one, and the accounts are long, and intricate, and multifarious, the court will decline to take jurisdiction. It will not, as observed by Lord Stowell, allow its jurisdiction to be used as a peg to hang a case upon which properly belongs to another forum. When the account arises incidentally, it has been pointedly said that the court holds itself bound to move within restricted limits. But it is very clear that the jurisdiction is not excluded by the simple fact of there being cross-demands. In all cases where there are such incidentally arising in a case, it is a question addressed to the sound discretion of the court whether it will take cognizance of the case or not, and to be determined by the general principles before stated."(*o*)

Under this it has been held that, as a court of admiralty has jurisdiction to decree a fishing bounty to persons engaged in the cod-fishery, it may incidentally act upon a claim for an account of the fish taken.(*p*)

§ 251. The matter of title to ships has undergone a revolution in England. Formerly, the courts of admiralty entertained, without scruple, a jurisdiction in cases of title, as well as possession; but, of late, they will only entertain ques-

(*m*)Davison *v.* Seal-skins, 2 Paine, 333.

(*n*)The Marengo, 1 Low. 53.

(*o*)The Larch, 3 Ware, 34.

(*p*)The Lucy Anne, 3 Ware, 253.

tions of title where they are merely incidental, and not complicated in their nature. But the former rule is held to be the true one in the United States.(*q*) And suits for title are called petitory suits.

No jurisdiction has ever been exercised, in either country, to foreclose a mortgage; and the United States supreme court say: "It has been repeatedly decided in the admiralty and common law courts in England that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune*, 3 Hagg. Adm. R. 132, Sir John Nicholl, in giving his judgment, observes: 'Now, upon questions of mortgage, the court has no jurisdiction, whether a mortgage is foreclosed; whether a mortgagee has a right to take possession of a chattel personal; whether he is the legal or only the equitable owner; and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified is passed. The decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty, which never decide questions of property between the mortgagee and owner.' This is not so [merely] because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain, and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction.

(*q*) The Schooner Tilton, 5 Mason, 472; Taylor *v.* Royal Saxon, 1 Wall. Jr. 223.

In such a case the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay he cannot take the ship *manu forti*, but he must resort either to a court of equity or to statutory remedies for the same purpose, when they exist, to bar the mortgagor's right of a redemption by a foreclosure, which is to operate at such time afterwards when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. * * * * * Courts of admiralty have always taken the same view of a mortgage of a ship and of the remedies for the enforcement of them that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But from the organization of the former and its modes of proceeding they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. It is true that the policy of commerce and its exigencies in England have given to its admiralty courts a more ample jurisdiction in respect to mortgages of ships than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statutes 3 and 4 Vic. *c.* 65. Until that shall be done in the United States, by congress, the rule in this particular must continue in the admiralty courts of the United States as it has been."(*r*)

The distinction appears in part to be this: that a court of admiralty can only pass on legal titles, and not on equitable.(*s*)

(*r*)Bogart *v.* Steamboat, 17 How. 401; Morgan *v.* Tapscott, 5 Ben. 252.

(*s*)The William D. Rice, 3 Wall, 137.

§ 252. A contract to *build* a ship is not regarded as a maritime contract, and is, therefore, not cognizable in admiralty. And the ground of this is that it is a contract made on land, and to be performed on land.(*t*) And the principle, as a matter of course, extends to furnishing materials for the purpose of building, or fitting out the construction of a ship;(*u*) and it is not changed by the locality of the construction, applying where the building is on the shore of tide-water, and intended for ocean navigation.(*v*)

In consequence, the state legislatures may create such liens as they deem just and expedient, provided they do not amount to regulations of commerce;(*w*) and the state courts have full power to enforce such lien.(*x*)

However, repairs of a vessel fitting it for the navigation of the sea are recognized as maritime in their nature;(*y*) the basis for which distinction seems to be that mere repairs are made on the water; and so, if they are so extensive as to require the vessel to be drawn out of the water into a ship-yard, the matter passes under the same rule as the building, or furnishing materials or equipments.(*z*) But the distinction between repairs made on the water and those on ship-ways is formally repudiated by Justice Nelson, and both are made to be maritime contracts, provided it is the ship-master who owns the yard, and is employed to make the repairs; this being then regarded as part of the work of the ship-master, whereas it is different if the yard is owned by another, and hired for the purpose of repairs. But these distinctions look to me hopelessly confused.(*a*)

A contract to furnish materials to repair a vessel is not a maritime contract.(*b*)

§ 253. But an actual furnishing of supplies is, except in a

(*t*) Ferry Co. *v.* Beers, 4 How. 302.
(*u*) Leroy *v.* Latham, 22 How. 132.
(*v*) Young *v.* Ship, 2 Cliff. 38.
(*w*) Edwards *v.* Elliott, 21 Wall. 552.
(*x*) Sinton *v.* Steamboat, 46 Ind. 476; Thorsen *v.* Schooner, 26 Wis. 496; Mitchell *v.* Steamboat, 45 Mo. 67.
(*y*) Reppert *v.* Robinson, Taney, 497.
(*z*) Ransom *v.* Mayo, 3 Blatch. 70.
(*a*) Wortman *v.* Griffith, 3 Blatch. 529.
(*b*) Averill *v.* Steamboat, 20 La. An. 432; Hogan *v.* Steamboat, 40 Mo. 265.

home port;(*c*) or for a voyage between two ports of the same state;(*d*) or where the furnisher is also a co-owner.(*e*)

Yet a refusal to receive supplies is not a matter of cognizance in admiralty,(*f*) which is upon the principle that an executory contract is not actionable on breach in the court of admiralty,(*g*) but only in a court of common law.(*h*)

§ 254. A lien is created by maritime services rendered, which may be enforced by a proceeding *in rem*. But preliminary contracts leading to maritime contracts, of whatever sort, are not cognizable in admiralty: as, for example, a preliminary agreement to execute a charter-party for a voyage;(*i*) a principle stated above as to all executory contracts. And where a maritime lien exists, the authority to enforce it *in rem* is exclusive in the United States courts.(*j*)

To give a maritime character to services rendered on or in a vessel, they must be connected with the betterment or reparation of the vessel, or else in actual navigation, or else supplies for or relief to those conducting navigation.(*k*) Hence, where one is employed to visit a vessel in port, ventilate it, keep the pumps in order, etc., he cannot sue in admiralty for the compensation. But if, in the course of such employment, a necessity arises that he shall navigate the vessel from one anchorage to another, he may recover for such removal;(*l*) and, as to seamen's wages, they may be recovered *in rem* against a vessel plying on navigable waters, although the waters are entirely within the jurisdiction of one state;(*m*) and where one claims wages as master, he may enforce the claim *in rem*, even if he be also a part owner—the two relations being separable.(*n*)

The matter of pilotage is a kind of floating jurisdiction, it

(*c*) Boylan *v.* Steamboat, 40 Mo. 252.

(*d*) Magnire *v.* Card, 21 How. 250, (Wayne, J., dissenting.)

(*e*) Hall *v.* Hudson, 2 Sprague, 65.

(*f*) The Cabarga, 3 Blatch. 76.

(*g*) Cox *v.* Murray, 1 Abb. Adm. 341.

(*h*) The Pauline, 1 Biss. 390.

(*i*) The Schooner Tribune, 3 Sumn. 147.

(*j*) The Belfast, 7 Wall. 643.

(*k*) Gurney *v.* Crockett, 1 Abb. Adm. 492.

(*l*) Ibid.

(*m*) The Sarah Jane, 1 Lowell, 203, and cases cited.

(*n*) Dexter *v.* Monroe, 2 Sprague, 40.

being held that, so far as congress has legislated upon it, the authority of the national courts is supreme and conclusive; while, further than this, the matter is under state regulation.(*o*) But the admiralty courts may enforce the rights given by state law, on the principle that a party forfeits nothing by going into a United States tribunal.(*p*) And that, too, even in cases where the state law has given a lien to a pilot, in certain cases, whose services have been tendered and refused,(*q*) as where half-pilotage is allowed to him who first tenders his services to a vessel.(*r*) And this even extends to a canal-boat in the harbor of New York.(*s*)

And a state cannot change the character of maritime contract by legislation, for this would be to limit admiralty jurisdiction itself.(*t*)

Inasmuch as wharfage is not appurtenant to any other business than commerce, and as it is essential to this, a contract relating to wharfage is regarded as a maritime contract; and even with regard to a canal-boat in navigable waters.(*u*) However, a claim for wharfage against a domestic vessel is not cognizable in admiralty, and the state courts have the jurisdiction.(*v*)

The cost of advertising a vessel for sea, portage, commissions for procuring freight, wages of stevedores or lightermen, services in compressing cotton into smaller bulk to be loaded as cargo, are all excluded from admiralty jurisdiction as not being maritime services; and so with disbursements and advances by the agent of a charterer of a ship.(*w*) A maritime character only attaches when the matter done, or begun to be done, regards the fitting out of the vessel itself for a

(*o*)The Lottawanna, 21 Wall. 581, (Clifford, J., dissenting.)

(*p*)*Ex parte* McNiel, 13 Wall. 243.

(*q*)The Brig America, 1 Low. 176.

(*r*)Banta *v.* McNeill, 5 Ben. 74.

(*s*)The Canal-boat Walsh, Ibid, 72.

(*t*)The Bark Alaska, 3 Ben. 392.

(*u*)The Canal-boat Tremaine, 5 Ben. 62. And so, claims for wharfage are enforceable in admiralty, whether arising on an express or implied contract. Easton *ex parte*, 5 Otto, 68.

(*v*)City of Jeffersonville *v.* Ferry-boat, 35 Ind. 19.

(*w*)The Bark Cunard, Alcott, 121.

voyage, aid and assistance on board in prosecuting the voyage, or employing the vessel as a vehicle.(*x*)

§ 255. Insurance, and *respondentia* and bottomry loans are regarded as maritime contracts, although they are made on the land and to be performed on the land, because they relate to maritime risks.(*y*)

§ 256. Salvage is a subject of admiralty, and consists of services rendered in saving a vessel in distress by one not an owner. And one who holds a mortgage not yet due is not regarded as an owner, and is, therefore, entitled to compensation for salvage services:(*z*) and such claim takes precedence of all prior maritime liens.(*a*)

And it is immaterial whether the services are performed at the request of the owners or by persons accidentally falling in with the wreck; and if there are different sets of salvors, at different times, rendering service to a vessel in continuous peril, each is entitled to compensation, although the separate service of each would alone have saved the vessel.(*b*) And so where a dismasted bark, rudderless and without an anchor, was taken by a schooner to a safer position, and left there, and then the schooner arriving at port gave intelligence of the condition of the bark, whereby another vessel went out and saved the bark, it was held that the schooner was entitled to compensation.(*c*) But it is an essential prerequisite that the vessel be actually saved from peril, either from shipwreck, derelict or capture, as the case may be.(*d*) However, it is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute. It is sufficient if, at the time when the service is rendered, the vessel has encountered any damage or misfortune which may possibly expose her to destruction if the service be not rendered.(*e*)

In order to encourage the rendering of assistance, courts are liberal in compensating services of the kind, usually

(*x*)Cox *v.* Murray, 1 Abb. Adm. 340.
(*y*)Insurance Co. *v.* Dunham, 11 Wall. 30; Younger *v.* Ins. Co. 1 Sprague, 243.
(*z*)The Barney Eaton, 1 Biss. 240.
(*a*)Ibid.
(*b*)Adams *v.* Bark, 1 Cliff. 214.
(*c*)Norris *v.* Bark, 1 Cliff. 220.
(*d*)Ibid.
(*e*)The Saragossa, 1 Ben. 551.

awarding from one-third to one-half, and giving extra compensation to a passenger of the rescuing vessel who has exerted himself in an extraordinary manner, and effectively.(*f*)

Passengers on board the vessel relieved are, however, not entitled; but with a regiment of soldiers being transported under a contract with the government, the rule is different;(*g*) as, for example, where they keep a ship from sinking by bailing out the water admitted through a leak.(*h*)

Salvors may make a special contract before rendering services, and the courts of admiralty will enforce it, provided they have not taken advantage of the calamities of others to drive an unreasonable bargain. Where this is the case the courts will withhold the remedy.(*i*) In order, however, to bar a salvage claim, there must be a contract for a given amount, or a binding engagement to pay, at all events, whether successful or unsuccessful in the effort.(*j*)

Where a vessel is found derelict—that is, abandoned—and taken possession of, and brought into a place of safety, the rescuer is entitled to salvage on returning it to its owners. But where a bark was in tow of a steamer, and was anchored, and left for a needful temporary purpose, (the officers and crew being on board the steamer,) but nothing having been taken out of the bark, and the departure being with intent to return as soon as possible and take the bark into a place of safety, and in the absence of the steamer the bark was found by another vessel, it was held the bark was not derelict.(*k*)

A vessel is not derelict until wholly abandoned by the master, without any intention of returning to resume possession.(*l*)

Salvage may be forfeited by misconduct, as by acts of plundering by the crew of the rescuing vessel, showing a connivance of the officers, or gross negligence on their part.(*m*)

(*f*) Ibid; The Schooner Charles Henry, 1 Ben. 12.

(*g*) The Merrimac, 1 Ben. 204.

(*h*) The Merrimac, 1 Ben. 68.

(*i*) The Paint, 1 Ben. 545; The Anchors, etc., Ibid, 77.

(*j*) Coffin *v.* Schooner, 1 Cliff. 236.

(*k*) Cromwell *v.* Bark, 1 Cliff. 223.

(*l*) The Attacapas, 3 Ware, 67

(*m*) Ibid.

Seamen may have a lien on the savings of the wreck, and also a claim for salvage, when the wreck is partly saved by their exertions at the same time.(*n*)

Rafts, however, and coal barges, are not regarded as vessels, so as to entitle a rescuer to salvage services by a lien upon them.(*o*) Nor flat-boats.(*p*) Although a contract for the use of a barge is cognizable in admiralty.(*q*)

§ 257. A rigid supervision is exercised in admiralty over all contracts made with seamen, who, as a class, are proverbially helpless. So, if unusual terms are inserted in a contract, it must appear that they were explained clearly to the men, or the contract will be set aside, and the usual terms enforced. And every contract must be in writing, under act of congress of 1790.(*r*) And seamen are never presumed to advert to refined distinctions of law when they are not even alluded to by the terms of the contract.(*s*)

§ 258. In regard to transportation, there is no distinction between a contract for conveying passengers and one for conveying merchandise, each giving rise to the same liability and the same lien on the vessel,(*t*) whether on the ocean or on internal navigable waters.(*u*) And a contract for a charter-party or affreightment is always a matter of admiralty cognizance,(*v*) unless it be for carriage between ports of the same state. And an action is available to an assignee or to the transferee of a passage ticket.(*w*)

§ 259. One who advances money to release a vessel seized by the marshal in another state, has a lien upon the money so advanced enforceable *in rem*, in an admiralty court.(*x*)

§ 260. The question has sometimes arisen whether, when a note or other security has been given for the performance of a maritime contract, suit can be brought upon it in admiralty, since a note is a common law contract in itself. It has

(*n*)The Bowditch, 3 Ware, 71.
(*o*)Four Cribs of Lumber, Taney, 533.
(*p*)Leddo *v.* Hughes, 15 Ill. 41.
(*q*)The Dick Keys, 1 Biss. 408.
(*r*)The Australia, 3 Ware, 240.
(*s*)The Rochambeau, Ibid, 304.
(*t*)The Moses Taylor, 4 Wall. 427.
(*u*)Steamboat General Buell, 18 O. St. 527.
(*v*)Morewood *v.* Enequist, 23 How. 493.
(*w*)Cobb *v.* Howard, 3 Blatch. 525.
(*x*)The Hoyle, 4 Biss. 234.

been held, however, that a suit may be maintained provided the note be surrendered, so that the respondent will not be liable to another action thereon in a common law court.(*y*) But it is made to turn upon the question as to whether the note or other security, by the law of the place, extinguishes the original contract or not; for, if so, the original contract will not be enforced in admiralty, and the note must be sued on in a common law court.

§ 261. In a suit on a bottomry bond, executed on vessel and cargo by the master, where it appeared that the vessel was not hired, but retained by the owners, through the master, and that the cargo was property captured by the United States, a distinction was made betwen the vessel and cargo, the former being held under the lien, and the latter discharged of it.(*z*)

§ 262. In matters where the limitation of an owner's liability is concerned in cases of collision, it is held not strictly necessary that the vessel be actually arrested, or that a fund be in the possession of the court, although in England this must be the case, or else there must be the existence of "a state of things amounting to an equivalent for the arrest of the ship."(*a*)

§ 263. Much the same distinction exists in regard to torts which prevails in matters of contract; that is, the torts must be strictly maritime in their nature: and so, where the owners of a ship filed a libel against a tug, and alleged that while the ship was at anchor and ready for sea the tug took off eight sailors and their baggage, against the remonstrance of the officers of the ship, whereby the ship was detained from the voyage until new men could be obtained, and the libel claimed the demurrage and advance wages paid the deserters, the court intimated a doubt of the jurisdiction.(*b*)

Where a tort, however, is partly committed on the land and partly on the high seas, the whole being a continuance—as, for example, in the abduction of a minor, on board a vessel—it

(*y*) Reppert *v.* Robinson, Taney, 494, citing 12 Wheat, 611, 3 How. 573, and 2 Story, 460.

(*z*) The Othello, 5 Blatch. 342.

(*a*) The Norwich, 6 Ben. 335.

(*b*) The Starbuck, 5 Ben. 53.

will be cognizable in admiralty;(*c*) although there can be no joinder of a tort against two with another against one only,(*d*) since this is multifarious.

An assault committed by a master upon a seaman, on board a ship, in a port of the United States, is cognizable in the admiralty, even though the act be committed within the body of a county.(*e*) And torts, or wrongs, committed upon a passenger on the high seas, by the master of a ship, are cognizable in admiralty, whether they are direct trespasses or consequential injuries. On this, *Story*, J., remarks: "In respect to a case like this, a suit by passengers against the master of the ship, for continued wanton cruelty and ill-treatment, is certainly entitled to be listened to with attention. The authority of a master at sea is necessarily summary, and often absolute. For the time he exercises the rights of sovereign control, and obedience to his will, and even to his caprices, becomes almost indispensable. If he chooses to perform his duties or to exert his office in a harsh, intemperate or oppressive manner, he can seldom be resisted by physical or moral force; and, therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board, in a great measure, under his arbitrary discretion. He is, nevertheless, responsible to the law, and, if he is guilty of gross abuse and oppression, I hope it will be found that courts of justice are not slow in visiting him, in the shape of damages, with an appropriate punishment.

"In respect to passengers the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessaries and kindness. It is a stipulation, not for toleration, merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet further; it includes an implied stipulation

(*c*)Steele *v.* Thatcher, 1 Ware, 94.

(*d*)Roberts *v.*Stolfield,3 Ware,184.

(*e*)Ibid, p. 188.

against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror and cool malignancy of conduct, to inflict torture on susceptible minds. What can be more disreputable, and, at the same time, more distressing than habitual obscenity, harsh threats and immodest conduct to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny which denies them every reasonable request, and seeks revenge by witholding suitable food and the common means of relief in cases of sea-sickness and ill health? It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of cognizance. The master is at liberty to inflict the most severe mental sufferings, in the most tyrannical manner, and yet, if he witholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated, and the wrong is to be redressed as a cause of damage. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accompanied by habitual cruelty, it would be a reproach to the law if it could not award some recompense."(*f*)

The term "torts," therefore, includes consequential injuries; such as, at common law, are actionable in case. And so, where a railroad company left piles driven in a navigable

(*f*)Chamberlain *v.* Chandler, 3 Mason, 245.

river, so as to injure a vessel passing on its course, the company were held liable.(*g*)

Locality is the leading test of jurisdiction in torts. And where a vessel took fire at a wharf, alleged to be from the negligence of the officers, and the fire spread and consumed certain store-houses on the wharf, it was held not to be a case for admiralty proceedings, because the injury complained of occurred on the land and not on the water.(*h*) And yet this does not, at first view, seem altogether in harmony with the principle stated above, that, in case of a continuous tort, occurring partly on the water and partly on the land, admiralty has jurisdiction. The distinction, however, is probably this: that the one is a continuous act of tort, or trespass; the other is consequential, or case.

§ 264. As to violations of the revenue laws, a suit merely to enforce the payment of duties must be brought at common law, and cannot be entertained in admiralty; the jurisdiction of which *in rem* only extends to seizures for forfeitures under laws of impost, navigation, or trade of the United States.(*i*) And, even then, the seizure must be made on the water, and not on the land.(*j*) However, actual possession by the officers of the law needs not to be made, but a constructive seizure is sufficient to give jurisdiction in revenue cases, and the action may be *in personam*. And, having once acquired regular jurisdiction, no subsequent irregularity can defeat it; or accident, as, for example, an accidental fire.(*k*)

§ 265. As to crimes—that is, felonies—it is provided by congress that they are only cognizable in admiralty when committed on the high seas, or else in some bay, etc., outside of the jurisdiction of any state, or in some place on land exclusively within the United States jurisdiction, as distinguished from state jurisdiction; as, for example, forts, arsenals, dockyards, magazines, and the like.(*l*) The high seas may be

(*g*)R. R. *v.* Tow-boat, 23 How. 214.
(*h*)The Plymouth, 3 Wall. 33.
(*i*)250 Chests of Tea, 12 How. 487; 500 Boxes of Pipes, 2 Abb. (U. S.) 500.
(*j*)The Sarah, 8 Wheat. 394.
(*k*)The Bolina, 1 Gall. 83.
(*l*)United States *v.* Bevans, 3 Wheat. 388.

regarded as extending to a roadstead,(*m*) but not to a bay entirely landlocked and enclosed by reefs,(*n*) and still less to a river, within the ebbing and flowing of the tide.(*o*)

Upon the high seas, every vessel, public or private, is a part of the territory of the nation of the owners, for jurisdictional purposes, so that an offence committed on board is an offence against the sovereignty of the nation. But a private ship, entering a foreign jurisdiction, is subject to the laws there prevailing, and a crime may be punished by the local laws.(*p*)

And even on the high seas, of an offence committed on board one vessel, which takes effect and is consummated on board another vessel belonging to a different nation, the latter sovereignty has the jurisdiction. For example, an American vessel was lying at harbor, in one of the Society Isles, and a gun was fired, whereby a person was killed on board a schooner belonging to the natives, and lying in the same harbor. It was held that if the harbor was to be considered as part of the high seas, yet, in contemplation of law, the act was done on board the foreign schooner, where the shot took effect, so that jurisdiction belonged to the foreign government(*q*)—a principle prevailing everywhere; so that where a person on the high seas was killed by a shot fired by one on shore, the murder was declared to have been on the high seas, and therefore within admiralty jurisdiction.(*r*)

But to give jurisdiction, in a case of murder, not only must the stroke be given on the high seas, but the death must also occur there, it seems, and not afterwards on the shore.(*s*)

§ 266. The rule of jurisdiction does not apply to pirates, since these are outlaws, and may be destroyed by whomsoever finds them. A pirate is defined to be one who acts solely on his own authority, without any commission from a sovereign

(*m*) United States *v.* Pirates, 5 Wheat, 200.

(*n*) United States *v.* Robinson, 4 Mason, 307.

(*o*) United States *v.* Wiltberger, 5 Wheat. 93.

(*p*) People *v.* Tyler, 7 Mich. 209.

(*q*) United States *v.* Davis, 2 Sumn. 484.

(*r*) Ibid. 485.

(*s*) United States *v.* McGill, 4 Dall. *426. But see chapter on Crimes.

state, seizing by force and appropriating to himself, without distinction, every vessel he meets with. And robbery on the high seas is piracy, but, in order to constitute the offence, the taking must be felonious, and the *quo animo* may be inquired into. And so a commissioned cruiser does not become a pirate merely by exceeding his authority.(*t*) And robbery of one by another, merely, on board a lawful ship, is not piracy; but the pirate act implies robbery of another vessel, or else mutiny on board.(*u*) The offence includes freebooting, not under acknowledged authority or deriving protection from the flag or commission of any government.(*v*) And it extends to such an act committed *from* a lawful vessel.(*w*) But it does not extend to a murder committed by a foreigner on a foreigner on board a foreign vessel.(*x*)

§ 267. And this leads to the question of admiralty jurisdiction, in its relation to foreigners and foreign countries, in a general view. The principle on which the admiralty courts of England and the United States take cognizance of actions *in personam* and *in rem* between foreigners is to prevent a failure of justice, and where there is not a necessity in this particular, they will decline to entertain suits; as, where the voyage is not broken up or completed. In England, even then, but not in the United States, the assent of the representative of the government must be obtained.(*y*)

It rests, therefore, almost entirely in the discretion of courts whether to hear and determine a cause, or remit it to the forum of the nation to which the parties belong,(*z*) and the jurisdiction rests on expediency alone, whether on the matter of wages, salvage or any other claim; although, usually, suits for salvage are entertained even where all the parties are foreigners.(*a*)

The principle is thus stated: "A court of admiralty has

(*t*) Davison *v.* Seal-skins, 2 Paine, 333.

(*u*) United States *v.* Palmer, 3 Wheat. 625, 634.

(*v*) United States *v.* Smith, 5 Wheat. 163.

(*w*) United States *v.* Pirates, 5 Wheat. 195.

(*x*) Ibid, 194.

(*y*) Davis *v.* Leslie, 1 Abb. Adm. 134.

(*z*) 194 Shawls, Ibid, 321, and cases cited.

(*a*) The Bee, 1 Ware, 336.

jurisdiction in suits for wages promoted by foreign seamen against foreign vessels, as questions of general maritime law. But the exercise of such jurisdiction is discretionary with the court, and to be permitted or withheld, according to circumstances. The express consent of the foreign minister, or consul, is not essentially necessary to found such jurisdiction. Nevertheless, the exercise of it is rather a matter of comity than of duty. Whether it ought ever to be exercised against the remonstrance of the representatives of such foreign nation we need not inquire, as we cannot foresee all possible cases, and that question is not before us. But when the court does entertain such cases, without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice or injury likely to be suffered without such interference as would raise the presumption of a request; because it is, in fact, conferring a favor on such foreign state. If the contract with the mariners has been dissolved, if the voyage has been terminated, and there is a dissolution of the relation of the seamen with the ship, or if such dissolution has been caused by some wrongful act of the master, or if a bottomry bond has become due at the end of the voyage, and the remedy might be endangered by delay, in such and like cases, as a matter of comity, not of right, courts of admiralty will interfere to protect the rights of foreigners in our ports."(*b*)

Hence, it has been held expressly that a libel for wages, brought by British sailors against a British ship on a voyage ending in a home port, will not be entertained against the protest of the British consul, unless there be special circumstances to justify it; as a clear deviation from the voyage prescribed in the articles, or cruelty, or the breaking up of the voyage.(*c*)

A lien may be thus enforced, also;(*d*) and so, where a libel was filed against a foreign ship in an admiralty court of the United States, the libellant and claimant both being foreign-

(*b*)Gonzales *v.* Minor, 2 Wall. Jr. 353.

(*c*)The Becherdass Ambaidass, 1 Low. 570.

(*d*)The Maggie Hammond, 9 Wall. 435.

ers, the place of shipping and the place of consignment being foreign ports, and the whole ground of libel a matter which occurred abroad, the court considered the question of jurisdiction an open question; but entertained the jurisdiction.(*e*)

Even torts occuring between foreign vessels in foreign waters are sometimes entertained in our courts; as, in a certain case, where a Dutch schooner and a Russian bark collided in the North sea.(*f*)

§ 268. We now notice briefly the prize jurisdiction of admiralty, which, of course, pertains essentially to a state of war. And whenever war is declared, the property of the enemy, whether on land or sea, is a lawful subject of prize; although, as a matter of comity, a relaxation is mutually accorded to persons and property within the country belonging to the hostile nation for a certain period after the breaking out of war. And the question of prize does not depend upon locality—that is, where the capture is made; but, whether it be upon the high seas or in port, it is equally valid to support a condemnation. The validity of the capture itself is to be tried by the laws of war, *jure belli*, as determined by the law of nations, although the effect and ultimate direction of the forfeiture depends on the right given by the terms of a commission, according to universal usage and legal definitions. Vessels at sea are not considered as a part of the territory of a nation. Its flag is only a designation of where the vessel belongs, and protects nothing but the vessel itself.(*g*)

In time of war the courts of the belligerents have exclusive jurisdiction of the subject of prize, with all its incidents and consequences. And if prizes be made by a vessel equipped in a neutral port, and the prize be brought into the ports of the neutral nation, it will be restored, being illegal as to that nation. A seizure as a prize is, in itself, lawful, provided it be under the rightful authority; and, even if the condemnation fail, it is no ground of action against the capture.(*h*) Yet, on the other hand, an unjust condemnation may require redress

(*e*)Ibid.
(*f*)The Bark Jupiter, 1 Ben. 542.
(*g*) 21 Bales, etc., 2 Paine, 602.
(*h*)Juands *v.* Taylor, 2 Paine, 658.

by the state whose courts pronounce it; and, if redress be refused, may be a ground for reprisals or war.(*i*)

The prize court of an ally cannot condemn captured property, but the courts of the country to which the captor belongs may sit in an ally's territory, though not in neutral territory.(*j*)

Neither the president nor any military officer can establish a court in a conquered country and authorize it to decide upon the rights of the United States or of individuals in prize cases, nor to administer the laws of nations—this establishing of courts being a matter of legislative power wholly.(*k*)

A court may adjudicate in a matter of prize, even if the property has not been brought within the territory of its jurisdiction, and proceed *in rem* whenever the prize or the proceeds thereof can be traced into the hands of any person whomsoever.(*l*)

But, as a general rule, it is a captor's duty to bring the property to be adjudicated on by the courts of his nation, and if he fail to do so the courts will treat him as a trespasser *ab initio*, on suit by the captured party, unless there are circumstances requiring an immediate sale, which may be a sufficient excuse.(*m*)

It is held that our courts have no jurisdiction to redress any supposed torts committed on the high seas by a regularly commissioned cruiser of a friendly foreign power, unless such cruiser has been fitted out in violation of our neutrality.(*n*)

The prize court may hear and determine all claims arising after a capture against a vessel, even as to matters of tort. Thus, when a prize ship on the way from the place of capture to the port of adjudication committed a marine tort, by running into and sinking another vessel, and was afterwards duly condemned and sold, it was held that the claims for damages from the collision should be paid out of the pro-

(*i*)Halleck's Intern. Law, (1861,) p. 763.

(*j*)Ibid, p. 756.

(*k*)Jecker *v.* Montgomery, 13 How. 515.

(*l*)Ibid.

(*m*)Ibid, p. 516.

(*n*)L'Invincible, 1 Wheat. 252.

ceeds of the sale first, and the remainder distributed to the captors.(*o*)

On bills given to ransom a captured vessel, the court of admiralty has exclusive jurisdiction to entertain suits.(*p*)

In case of rebellion, where the rebels are recognized as belligerents, the same principles prevail as to prizes when these are taken by the concurrence of the naval arm of the government. This concurrence must be provided for by statute, however; or otherwise the capture must be made by war vessels alone. And vessels are not regarded as war vessels which are used merely as transports; and if, with their concurrence, the military forces on land make a capture, this does not bring the property captured within the prize jurisdiction. Captures on the great rivers are subject to prize laws; as, on the Mississippi.(*q*)

In matters of prize the supreme court can only exercise appellate, not original, jurisdiction, nor by order of transfer.(*r*)

§ 269. In regard to foreign ships, repairs or supplies, in our ports, create a lien on the vessel;(*s*) the contrary of the the rule as to home ports, as before set forth in this chapter.(*t*)

§ 270. The admiralty has no direct jurisdiction over trusts, nor can it decree a specific performance of any agreement, although relating to maritime affairs.(*u*)

(*o*)The Siren, 7 Wall. 153.
(*p*)Maisonnaire *v.* Keating, 2 Gall. 343.
(*q*)Bales of Cotton, 1 Woolw. 243.
(*r*)The Alicia, 7 Wall. 573.
(*s*)The Aurora, 1 Wheat, 96, 103; The Jerusalem, 2 Gall 349.
(*t*)The Lottawana, 21 Wall. 578.
(*u*)Davis *v.* Child, Daveis, 71.

CHAPTER IV.

PROBATE.

271. Nature of probate jurisdiction.
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299. Settlements and distributions.
300. Same—limitation of jurisdiction.
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302. Terms of court.

§ 271. Courts of probate have only a limited jurisdiction, and their powers are strictly construed; so that if a statute

requires notice, and no notice is given, the party entitled to notice may treat the judgment as a nullity.(*a*) However, they are courts of record;(*b*) so that they are not regarded as inferior courts in the technical sense, although limited in their jurisdiction;(*c*) and that, whether exercised by distinct courts or by chancery courts.(*d*) Their leading jurisdiction is the probate or proof of wills, and matters strictly incidental thereto. Such a court will decide only upon the *factum* of the will, but leave the disputed *rights of parties* to be determined by other tribunals thereafter.(*e*) And, in this particular, it has jurisdiction in wills pertaining to land as well as personal property.(*f*)

There are, however, many incidentals regarded as belonging to the exercise of this jurisdiction, which we shall hereafter notice—some of them an accretion of late years. Among these incidentals are granting letters testamentary, or of administration, and settling accounts of administrators, guardians, etc.;(*g*) and, in some states, determining questions of dower rights, so far as they are determinable as matters of law, and not of equity.(*h*)

§ 272. The authority exercised by these courts is mainly statutory. The authority to perform such and such functions, however, needs not be given in express terms, but may arise from the general language of the statute, or by implication from the necessity thereof to the proper exercise of the powers expressly given.(*i*)

§ 273. A court of chancery will not supervise the exercise of the jurisdiction of separate courts of probate, any more than they will intermeddle with the jurisdiction of courts of common law; as, for instance, in the settlement of estates,

(*a*) Matthewson *v.* Sprague, 1 Curtis, C. C. 457.

(*b*) Chase *v.* Whiting, 30 Wis. 547.

(*c*) Cody *v.* Raynaud, 1 Cal. T. 275; Davie *v.* McDaniel, 47 Ga. 195; Hanks *v.* Neal, 44 Miss. 213.

(*d*) Bernheimer *v.* Calhoun, 44 Miss. 426.

(*e*) Finch *v.* Finch, 14 Ga. 362

(*f*) Matthewson *v.* Sprague, 1 Curtis, C. C. 457.

(*g*) Steen *v.* Steen, 25 Miss. 514.

(*h*) Gardner *v.* Gardner, 10 R. I. 211.

(*i*) Seaman *v.* Duryea, 10 Barb. 523.

wherein probate courts have entire and exclusive jurisdiction;(*j*) with the exception of some states, however.(*k*)

The general rule is thus stated by the supreme court of Pennsylvania: "The orphans' court is sometimes called a court of limited jurisdiction. This is true, if regard be had to the *derivation* of its powers; for it possesses none inherently, and exercises such only as are conferred by or implied from legislation: and it is true, also, as to the *subjects* of its jurisdiction, for these are set down in the statutes; but, within its appointed orbit, its jurisdiction is exclusive, and therefore, necessarily, as extensive as the demands of justice;"(*l*) and, "being a court of equity, it can mould its process according to the necessities of the case which it has in hand."(*m*)

It is manifest, however, that, like other courts, these may have a concurrent, as well as exclusive, jurisdiction. Thus, while in Pennsylvania they have exclusive jurisdiction over questions of advancement and distribution,(*n*) and also in cases where grandchildren, whose father has died before the grandfather, take the father's share, subject to his debts to the intestate, so that in an action of ejectment the question of such indebtedness cannot be raised, but must be determined in the orphans' court,(*o*) on the other hand, the general jurisdiction is not exclusive of common law remedies against estates,(*p*) and as to legacies it is exclusive only when the legacy is charged on land.(*q*)

(*j*)Heirs *v.* Adams, 22 Vt. 52.

And so, the probate court can order the sale of personal property, as stocks, when this is necessary in order to a settlement and distribution. Bobb's Succession, 27 La. An. 344. Only the probate court has power to order final distribution in any case, or to compel an executor to account for the personal property in his hands, whether it be such as the testator owned at the time of his death, or the proceeds of the sales of personal property under a power in the will. Angisola *v.* Arnaz, 51 Cal. 435.

(*k*)Clarke *v.* Perry, 5 Cal. 60.

(*l*)Shallenberger's Appeal, 21 Pa. St. 341.

(*m*)Snyder's Appeal, 36 Pa. St. 168.

(*n*)Hughes' Appeal, 57 Pa. St. 179.

(*o*)Insurance Co. *v.* Wilson, Ibid, 182.

(*p*)McLean's Ex'rs *v.* Wade, 53 Pa. St. 146.

(*q*)Burt *v.* Ex'rs, 66 Pa. St. 400.

The jurisdiction may be concurrent with chancery,(*r*) or common law.(*s*)

In North Carolina it is held that, although a court of probate has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares, (a different rule from that in some other states,) yet, if the executor has so assented to a legacy as to amount to an implied or express promise to pay it, suit must be brought for it in the superior court.(*t*) It is different in Pennsylvania, by statute of 1836. *Ashford* v. *Ewing*, 25 Pa. St. 213.

The ordinary rule, that consent cannot give jurisdiction, is fully applicable in a matter belonging to the exclusive jurisdiction of the probate court.(*u*)

And, also, in such cases, mistakes in a judgment can only be corrected by appeal in the usual mode.(*v*)

§ 274. As to questioning, collaterally, the decisions of probate courts, the general rule applies, "that where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally before another court, the sentence in the former is conclusive upon the latter as to the matter directly decided, not only between the same parties, but against strangers, unless it can be impeached on the ground of fraud or collusion."(*w*)

Hence, a grant of letters cannot be collaterally attacked in another county, by showing that the last place of residence of the deceased was not in the county where the letters were issued.(*x*)

The danger of an opposite doctrine is quite clearly stated by the supreme court of New York: "Where the jurisdiction of a subordinate tribunal, having cognizance of the general subject, has attached by the presentation of a verified *prima facie* case, and by the appearance of the parties, its decision, even on a *quasi* jurisdictional fact, such as that of inhabitancy,

(*r*) Robinson *v.* Stanley, 38 Vt. 570.

(*s*) Shoemaker *v.* Brown, 10 Kan. 383

(*t*) Miller *v.* Barnes, 65 N. C. 67.

(*u*) Dodson *v.* Scroggs, 47 Mo. 285.

(*v*) Judge of Probate *v.* Lane, 51 N. H. 343.

(*w*) Lessee *v.* Selin, 4 Wash. C. C. 721.

(*x*) Irwin *v.* Scriber, 18 Cal. 503.

must be conclusive, unless reversed on appeal. To allow it to be called in question, collaterally, and on every occasion, and during all time, would be destructive of all confidence. No business in particular, depending on letters testamentary, or of administration, could be safely transacted. Payments made to an executor or administrator, even after judgment, would be no protection. Even if the debtor litigated the precise point and compelled the executor to establish it by proof, the adjudication would avail him nothing, should a subsequent administrator, as in this case, spring up, and, after the lapse of the fifth of a century, demand payment a second time, when a scintilla of evidence on one side remained, and all on the other had perished. A large number of titles, too, depend for their validity on decrees of foreclosure, and these decrees are often made in suits instituted by executors or administrators, or their assigns. Must these, too, be subject to be overhauled at any period, however remote, on the nice question of residence?—a question often difficult to decide where the facts are clear, and much more so, of course, where the facts are obscured by lapse of time, and loss of documents and witnesses."(*y*)

The principle, however, is dependent largely upon the fact of these courts being courts of record, and it, therefore, did not hold at the common law as to ecclesiastical courts, as courts of probate. "However the proceedings of a court of probate might formerly be avoided by plea, on account of any irregularity, it must now be held that if the court acts within its jurisdiction as to the subject-matter of its decisions, as to the persons to be affected, and as to the course of proceedings prescribed for it by law, its decisions are binding and conclusive upon all parties interested. They may be reheard and re-examined upon appeal, which is the mode appointed for the correction of its errors, but they cannot be questioned or impeached collaterally in any other court or course of proceedings, unless fraud is alleged."(*z*) Thus, in Pennsylvania,

(*y*)Monell *v.* Dennison, 17 How. Pr. (N. Y.) 426.

(*z*)Tebbets *v.* Tilton, 4 Fost. (N. H.) 124; Chase *v.* Hathaway, 14 Mass. 227.

it is held that the judgment of a register admitting a will to probate cannot be examined collaterally, whether the will was made in that state or in another.(*a*) In Alabama it is held that when the jurisdiction of a probate court depends upon a fact which such court is required to ascertain and settle by its decision, as a preliminary to its jurisdiction—as, for example, the necessity of an order of sale—then the exercise of the jurisdiction implies the previous ascertainment of the preliminary jurisdictional fact, and its decision thereon cannot be collaterally attacked.(*b*) In Louisiana it is held that the appointment of a guardian [tutor] cannot be questioned collaterally, but only in a direct proceeding to annul and set aside the appointment.(*c*) In Texas it is held that an entire want of jurisdiction may be questioned collaterally; as, for example, that the supposed decedent was living or otherwise; that the estate had been fully administered on previously; but not any irregularity or error in proceedings where jurisdiction had attached to the subject-matter.(*d*) In Missouri it is held that a grant of administration is conclusive on all other courts.(*e*)

(*a*)Lovett's Ex'rs *v.* Matthews, 24 Pa. St. 332.

(*b*)Wyatt's Adm'r *v.* Steele, 26 Ala. 650.

(*c*)Martin *v.* Jones, 12 La. An. 168.

(*d*)Fisk *v.* Norvel, 9 Tex. 14.

(*e*)Naylor's Adm'r *v.* Moffatt, 29 Mo. 126.

It is held in Illinois, and is, I think, the general rule, that, in regard to the administration of estates, the decisions of a probate court are supported by the same presumptions that attach to the actions of superior courts; and it is not necessary that the facts justifying the decision shall appear affirmatively on the face of the proceedings. People, for use, etc., *v.* Gray, 72 Ill. 343. Although probate courts are of limited jurisdiction, they are not to be regarded as having a mere special, instead of general, jurisdiction. Their jurisdiction is general over the *class of subjects* within their province, so that they are to be regarded as having the attributes of superior courts *quoad hoc*, and as, therefore, entitled to the benefit of presumptions similar to those which prevail as to superior courts generally. Bostwick *v.* Skinner, 80 Ill. 147. That is, collateral attacks are not to be allowed as to their findings. Gamble *v.* Jordan, 54 Ala. 368. This is the weight of authority, although it seems to be held otherwise in some states. The cases are collected in an article in the May number, 1880, of the *North American Review*, as to the various points necessarily included in probate

§ 275. The last domicile of the deceased determines the jurisdiction as to administration, and that, too, when patent interests are to be brought into litigation by or against executors;(*f*) unless in the case of a non-resident of the state, when usually administration may be granted wherever property exists within the state.(*g*) The residence of minors determines jurisdiction in matters of guardianship, and even on removal of the father holding the relation to another county, while the minors remain in the county from which he removed and where he was appointed.(*h*) In Mississippi there is a qualification to the general rule as to residence of decedent, namely, that if the greater part of his estate is in one county while his domicile had been in another, letters may be issued in the former.(*i*) Also, in Texas, the last residence must have been not a temporary one, but a fixed residence.(*j*) And probably this is the prevailing rule everywhere, although in Texas it is so defined by statute expressly.

In California, if a county is divided after the death of an intestate, the former county retains the jurisdiction, although the former domicile of the deceased may fall within the limits of the new county.(*k*) But, in Mississippi, the legislature may by special act transfer jurisdiction from one county to

business. The article discusses, also, the question whether the decision of a probate court, as to the fact of death, is conclusive or not; and while it agrees that the weight of authority sustains the position of Chief Justice Marshall, that the act of appointing an administrator on the estate of a person not really dead is totally void, (Griffith *v.* Frazier, 8 Cranch, 23; Moore *v.* Smith, 11 Rich. [Law] 569; Jochimssen *v.* Bank, 3 Allen, 87; Meliar *v.* Simmons, 45 Wis. 334) yet it argues, on principle, for the contrary doctrine with considerable force, which is sustained somewhat faintly by Roderigas *v.* Savings Institution, 63 N. Y. 460. The matter is worthy of close investigation, and it will not be very surprising if, in this, as in other instances, authority may be found opposed to legal principle. If a court of high standing once goes astray from fundamental principles, and their logical consequences, it may quite naturally draw into its wake the majority of courts in the country, and thus establish error by a general authority.

(*f*)Rubber Co. *v.* Goodyear, 9 Wall. 789.

(*g*)Miller *v.* Adm'r, 26 Ala. 247.

(*h*)Lyons *v.* Andrews, 12 La. An. 685.

(*i*)Cocke *v.* Finley, 29 Miss. 127.

(*j*)George *v.* Watson, 19 Tex. 367.

(*k*)Estate of Harlan, 24 Cal. 187.

another, where the intestate had not been domiciled, even without any division of counties.(*l*)

§ 276. As to jurisdiction in the case of wills I do not know that in any state the old common law rule prevails that probate courts have cognizance only of wills pertaining to personal property; but usually, I think, in all the states they have original and general jurisdiction of the probate of wills, whether of real or personal estates,(*m*) subject, sometimes, to special limitations; as, in Pennsylvania, where there is an objection raised on "a disputable or difficult matter," a register can proceed no further without calling, on request of the objector, or any person interested, a register's court, and a *mandamus* will lie to compel him to do so.(*n*) In New York a lost or destroyed will cannot be proved in the surrogate's court—the jurisdiction belonging to the supreme court, in such case.(*o*) And, probably, a missing will can never be probated in any of the states. For, indeed, while a will destroyed by spoliation may be restored in equity, yet even equity will not take jurisdiction to restore a lost will, or one that has been destroyed by accident, or one that has been suppressed by fraud.(*p*)

A will may be probated in a state wherein there is property, although the testator, at his decease, was domiciled in another state. And even where a testator had sold his domicile and died in traveling, without having acquired a new domicile anywhere, his will, it was held, could be rightfully

(*l*) Larned *v.* Matthews, 40 Miss. 210.

(*m*) Hall's Heirs *v.* Hall, 39 Ala. 295; Matthewson *v.* Sprague, 1 Curt. C. C. 457.

Courts of law and equity in this country will not consider testamentary papers, or rights dependent upon them, without the preliminary probate—this being regarded as fundamental and jurisdictional. Wood *v.* Matthews, 53 Ala. 1. And as this probate belongs essentially to the probate court, this court is regarded as having exclusive jurisdiction for this purpose, in the first instance; so that even a deed cannot be admitted in evidence to establish title under an unprobated will. Willamette Co. *v.* Gordon, 6 Or. 176. (See p. 284, *supra*, note *j*.)

(*n*) Commonwealth *v.* Bunn, 71 Pa. St. 405.

(*o*) Bulkley *v.* Redmond, 2 Bradf. (N. Y.) 281.

(*p*) Perkins *v.* Perkins, 21 Ga. 14, citing Story on Equity.

probated where he was domiciled before, even if he had no intention of ever returning to the place.(*q*)

In general, it does not belong to a court of probate to adjudicate on the rights of parties under a will; and if such a power does exist anywhere, it is wholly statutory.(*r*) Nor to determine the validity of a will concerning real estate, the probate being confined to its due execution;(*s*) nor after distribution on the basis of the validity of a will to entertain a suit to recover personal property upon the ground that the will was void.(*t*) However, as an instrument of settlement and distribution, it may take cognizance of ademption of legacies.(*u*)

§ 277. The power of appointment in a court of probate extends to administrators of intestate estates, administrators under a will which does not name an executor, administrators *de bonis non*, guardians, custodians, and trustees testamentary.

A custodian is appointed when needed to take care of personal property pending actual administration; as, where an executor under a will refuses to give a bond in such sum as required by the court, and proceedings are pending thereon.(*v*)

Testamentary trustees are appointable to fill vacancies in regard to trusts created by will,(*w*) the vacancies occurring while the active branch of the trust continues; that is to say, the appointment will be made when necessary, and only then.(*x*) And appointment of an administrator *de bonis non* is also to fill a vacancy; as, when an administrator dies or resigns, and the estate is not settled.

As to the regular appointment of an administrator, it cannot be questioned, collaterally, even when there are irregularities in the manner; and the appointee is an administrator *de*

(*q*)Still *v.* Corporation, 38 Miss. 646.

(*r*)Willard's Appeal, 65 Pa. St. 267.

(*s*)Story on Equity, (Redfield's Ed.) §§ 184, 238.

(*t*)Carter's Heirs *v.* Adm'rs, 39 Ala. 585.

(*u*)May's Heirs *v.* Adm'r, 28 Ala. 152.

(*v*)Sarle *v.* Court of Probate, 7 R. I. 273.

(*w*)Shaw *v.* Paine, 12 Allen, 293.

(*x*)Graham *v.* Dewitt, 3 Bradf. (N. Y.) 186.

facto, notwithstanding such irregularities.(*y*) But if letters are issued where an intestate was not a resident of the state, and left no property in the state, and none afterwards comes into the state, a grant of letters is void, as *coram non judice*, there being no basis of jurisdiction.(*z*)

It has been held, in California, that the mere grant of administration to a public administrator is sufficient to give him authority even if the letters are not actually issued; and he will be allowed to adduce the judgment in support of his authority.(*a*)

The appointment of guardians is controlled by similar principles. But, in this, chancery may have concurrent jurisdiction.(*b*) A non-resident may be appointed guardian, in the discretion of the court.(*c*) But a court cannot appoint a resident guardian for non-resident minors, since it can only make such appointment when the minors are wards of the court, the relation being personal. As to property within the jurisdiction, however, a guardian may be appointed, as in the case of administrators.(*d*)

Where a guardian is appointed for a lunatic, the appointment is void unless there has been a preliminary inquest of lunacy.(*e*)

§ 278. The court has the power of controlling and of removing administrators, executors or guardians, and, therefore, of revoking letters actually issued; as, for instance, if the letters were obtained by fraud.(*f*) And it is held that a probate court can remove *public administrators* as well as others, and order them to make immediate settlement—a failure to obey which order is a punishable contempt. *Binson's Case*, 73 N. C. 278. The power of removal is an essential power, and exists at common law. *Taylor* v. *Biddle*, 71 N. C. 1.

Executors are controllable for gross abuses of their trust,

(*y*) Wight *v.* Wallbaum, 39 Ill. 563.

(*z*) Railroad *v.* Swayne's Adm'r, 26 Ind. 478.

(*a*) Abel *v.* Love, 17 Cal. 233.

(*b*) Campbell *v.* Conner, 42 Ala. 131.

(*c*) Berry *v.* Johnson, 53 Me. 401.

(*d*) Boyd *v.* Glass, 34 Ga. 256.

(*e*) Eslava *v.* Lepetre, 21 Ala. 504.

(*f*) Marsten *v.* Wilcox, 1 Scam. 60.

so far as it is discretionary under the will;(*g*) but courts of probate have no control over a bequest, coupled with a power to the executors to give the property to such children of the testator as "they shall think proper," although equity will take supervision of the discretionary trust thus conferred.(*h*) In New Jersey the removal of an executor belongs exclusively to the orphans' court, unless in some special cases, when it belongs to the ordinary.(*i*)

§ 279. The matter of assets belonging to an estate is within the jurisdiction of the court of probate; and so, where, in an action in a common law court for a legacy, the plea of a want of assets was put in, among other pleas, it was held that, while the jury might pass on the other pleas, they could not on this—they could decide the plaintiff's right, and then leave the question of assets to be determined afterwards in the orphans' court; and where a legacy is exclusively payable out of lands, the whole question belongs to the court of probate, in some states, at least.(*j*) However, in case of concealment of assets, the jurisdiction rests on such a concealment as renders the act *quasi* criminal, and the usual remedies at law, or in equity, difficult or impossible—the powers of the court not extending to mere breaches of trust or confidence.(*k*)

§ 280. As to claims against an estate, a court of probate has equitable jurisdiction in allowing them.(*l*) But legal claims must be settled elsewhere, in cases of dispute, because these courts have no jury, and they are not usually invested with common law powers, as judicial tribunals, to adjudicate controverted questions of law or fact. And, therefore, where the validity of an assignment is disputed, the assignors being deceased, a court of probate cannot determine such validity, but it may ascertain who are the legal representatives of the assignor thus deceased, and decree the share to those representatives

(*g*)Chew's Ex'rs *v.* Chew, 28 Pa. St. 17.

(*h*)Billingsley *v.* Harris, 17 Ala. 214.

(*i*)Leddel's Ex'r v. Starr, 4 Green, Eq. 159.

(*j*)Breden *v.* Gilliland, 67 Pa. St. 34.

(*k*)Taylor *v.* Burscup, 27 Md. 219.

(*l*)Hurd *v.* Slaten, 43 Ill. 349.

which may belong to them as such.(*m*) And so in regard to the evidence, validity, and amount of a disputed debt.(*n*) In some states there may be exceptions to this general rule, however, made by statute. But, otherwise, the decree of probate courts as to payment depends upon the judgments of courts of law in disputed claims.(*o*)

So, where a will creates a trust, and appoints a trustee, and a court of probate admits the will to probate, and supervises the administration of the estate under it, it has no jurisdiction to determine conflicting claims to the income of the trust fund, and compel the execution of the trust according to the will, although this may be regarded as an equitable, and not a legal, controversy.(*p*)

In like manner, if a third party claim property in the hands of an administrator, a court of probate cannot try the question of title, and make an order for the administrator to give up the property to the claimant.(*q*) Nor can a court of probate try the question of a disputed homestead, even where it has a right to set out a homestead.(*r*) But the right of a claimant is not prejudiced by bringing a petition therein. This being dismissed, a resort may afterwards be had to the appropriate court.(*s*)

However, in Alabama, the matter is made to depend on the plainness of the proof. And so, where there is an application to sell lands in partition, the court is held not to have jurisdiction to determine complicated questions of law and fact as to the title; but it may receive the ordinary evidence of title afforded by deeds of undisputed validity, when the

(*m*) Wood *v.* Stone, 39 N. H. 573.

(*n*) Disosway *v.* Bank, 24 Barb. 63; Andrews *v.* Wallace, 29 Barb. 350.

(*o*) Miller *v.* Dorsey, 9 Md. 323; Bowie *v.* Ghiselin, 30 Md. 555.

(*p*) Hayes *v.* Hayes, 48 N. H. 219.

While, as before stated, probate courts can compel *settlements* by administrators and executors, they do not attempt to enforce the performance of duties pertaining to matters of *trust*, technically so called; so that they cannot compel an administrator to convey property he holds in trust to the heirs of an intestate, and account for the rents and profits. The enforcement of such trust belongs to equity. Haverstick *v.* Trudell, 51 Cal. 431.

(*q*) Homer's Appeal, 35 Conn. 113.

(*r*) Lazell *v.* Lazell, 8 Allen, 575; Woodward *v.* Lincoln, 9 Allen, 239.

(*s*) Mercier *v.* Chase, 9 Allen, 242.

applicant's title is merely denied.(*t*) In Mississippi it is held that titles may be adjudicated upon as to their validity; as also contracts, incidentally, though not in a direct proceeding.(*u*)

§ 281. In matters of partition and dower the court of probate, in some states, has the power of assignment, in others not; the jurisdiction is altogether statutory. In Maine a court cannot only assign dower, but also sell the reversion.(*v*) In Alabama the jurisdiction in dower is modified, so that when dower can be assigned by metes and bounds, it may be done by the court of probate, otherwise not; especially if it be assignable in lands alienated by the husband in his lifetime, the wife not relinquishing her right.(*w*)

In Tennessee lands may be sold by order of the probate court for purposes of partition, but the jurisdiction extends no further than making a complete sale. If any matters of dispute arise afterwards, or if any equitable claims exist at the time, these are cognizable alone in a court of equity.(*x*)

In Mississippi, under the statute of 1833, and prior statutes, the court of probate can only entertain a suit for partition when lands are to be immediately divided among heirs of the intestate, or in case of the death of one joint tenant, tenant in common, or coparcener, and the descent of his share.(*y*)

§ 282. A court of probate usually has power to order the sale of lands for the payment of decedent's debts, when the personal property of the estate is not sufficient for that purpose. It may, also, by statute, sell the land of an infant, and invest the proceeds according to discretion, as to the best interests of the ward.(*z*) But it has been held, in New Jersey, that it cannot do so except in the case of minor orphans, and hence not on the application of a guardian by nature

(*t*) Guildford *v.* Madden, 45 Ala. 291.

(*u*) McWillie *v.* Van Vacter, 35 Miss. 445.

(*v*) Bent *v.* Weeks, 44 Me. 47. See, also, Leavitt *v.* Harris, 7 Mass. 292, and Perkins *v.* Fairfield, 11 Mass. 227.

(*w*) Snodgrass *v.* Clark, 44 Ala. 199.

(*x*) Bond *v.* Clay, 2 Head. 379.

(*y*) Smith *v.* Craig, 10 S. & M. 447.

(*z*) Stiles *v.* Beeman, 1 Lans. (N. Y.) 96.

to sell lands for the support of his minor children not orphans.(*a*)

In Pennsylvania it is held that the sale of lands to pay the debts of a deceased partner, under order of the orphans' court, only passes his interests, although the legal title may have been wholly in him.(*b*)

In Missouri the court of probate has authority to order the private sale of a minor's lands; but the matter is appealable to the circuit court.(*c*)

In Alabama a decree of insolvency may be connected with a decree to sell lands for the payment of debts of an intestate; and the proceedings to declare an estate insolvent are *in rem*.(*d*)

A decree for the sale of decedent's lands cannot be attacked collaterally.(*e*) In Mississippi it is held, and I suppose it is the rule everywhere, that the term "debt" does not include commissions of the administrator, and that a sale of lands cannot be ordered for the payment of such commissions.(*f*)

Where a court of probate vacates a sale previously made by an executor or administrator, under an order, it has no jurisdiction to determine the rights and equities of the purchaser consequent upon the order of vacation. This must be left to a court of equity.(*g*)

In Pennsylvania it is held that a court of probate has power to set aside a discretionary sale, and order a resale by executors under a will, on sufficient cause shown, and can also grant authority to a trustee, when necessary, to bid at his own sale; although this is declared to be a delicate power, and one to be cautiously exercised.(*h*)

An order of confirmation can be opened up for the purpose of correcting errors therein, provided the application for it be made in apt time, and under proper circumstances.(*i*) And,

(*a*)Graham *v.* Houghtalin, 30 N. J. (1 Vroom,) 557.

(*b*)McCormick's Appeal, 57 Pa. St. 54.

(*c*)McVey *v.* McVey, 51 Mo. 418.

(*d*)Hine *v.* Hussey, 45 Ala. 513.

(*e*)Collins *v.* Johnson, Ibid, 548.

(*f*)Hollman *v.* Bennett, 44 Miss. 322.

(*g*)Eichelberger *v.* Hawthorne, 33 Md. 596.

(*h*)Dundas' Appeal, 64 Pa. St. 332.

(*i*)Montgomery *v.* Williamson, 37 Md. 429.

likewise, an order of sale may be vacated at any time, if for any reason it is void;(*j*) or, perhaps, merely voidable.

§ 283. In some states, where the income from an orphan's estate will not support him, a court has power to bind him out.(*k*)

§ 284. A probate court has no authority to order the sale of a homestead to pay debts, even under a valid lien thereon.(*l*) This would subvert the very meaning of all homestead statutes, which is to provide a residence for the family of a deceased person, and if valid liens were created before the death of the head of the family, they must be enforced in another court than the court of probate, which has no power to enforce or cancel a mortgage or other real estate lien.(*m*)

§ 285. In Alabama a court of probate may determine the validity or invalidity of bequests, although the power does not extend to trusts created by will, nor to litigation between the executor, as trustee, and the *cestui que trust*.(*n*) And under this power it may decide whether a bequest to charitable uses, vested in the executor as trustee, is valid or not, and whether it has lapsed.(*o*)

Testamentary trusts, however, as such, are usually outside the jurisdiction of a probate court; trusts belonging specially and peculiarly to the province of chancery jurisdiction, as also any controversy between a trustee and the *cestui que trust* in regard to the settlement of accounts.(*p*) In Pennsylvania the orphans' court has concurrent jurisdiction therein.(*q*)

§ 286. Partnership accounts between a deceased and surviving partner are not within the purview of probate jurisdiction,(*r*) except given directly by statute, as in Illinois.

§ 287. In Missouri it has been held that a court of probate has no jurisdiction to hear or decide a set-off presented by an

(*j*)Johnson *v.* Adm'r, 40 Ala. 247.

(*k*)Mitchell *v.* Mitchell, 67 N. C. 307.

(*l*)Orr's Estate, 29 Cal. 101.

(*m*)Gilliland *v.* Adm'r, 2 O. St. 223.

(*n*)Harrison *v.* Harrison, 9 Ala. 470.

(*o*)Johnson's Adm'r *v.* Longuine, 39 Ala. 143.

(*p*)Parsons *v.* Lyman, 5 Blatch. C. C. 170.

(*q*)Brown's Appeal, 12 Pa. St. 333.

(*r*)Nelson *v.* Green, 22 Ark. 547; Booth *v.* Todd, 8 Tex. 137.

administrator against a claim exhibited for allowance by a creditor, if the set-off exceeds the amount of the demand.(*s*)

§ 288. In Alabama it is held that an orphans' court has no jurisdiction of personal property which at the time of the testator's death was at his domicile in another state, but afterwards removed into that state.(*t*) On the other hand, in Louisiana, if minors remove to another state after the death of a guardian, and there a guardian is duly appointed for them, the appointment will not be recognized as to property in that state. In order to obtain it the non-resident guardian must be re-appointed where the property is situated,(*u*) which is probably a general rule elsewhere.

§ 289. A court of probate has no control of the doings of an executor or administrator in another court, as to prohibit him from contesting the payment of promissory notes given by the testator or intestate, sued on in a court of law, or restrain him from prosecuting a bill of discovery in chancery for the purpose of ascertaining the consideration of such notes.(*v*)

§ 290. In New York it is held that if a will purport on its face to devise land situated in the county, it may be admitted to probate without trying an issue as to the testator's real ownership of the lands; which, indeed, is the general rule, doubtless.(*w*)

§ 291. In Pennsylvania courts of probate are endowed with a limited jurisdiction as to the specific performance of the contracts of the deceased; and, also, in rescinding the decree for specific performance thereof.(*x*) It may enforce the decree, also, by attachment.(*y*) And may entertain entire jurisdiction, provided there is no fact to be determined properly by a jury,(*z*) and against a vendee in favor of an executor not empowered by a will to sell (*a*)

(*s*)Dunnico *v.* Adm'r, 15 Mo. 385.
(*t*)Varner *v.* Bevil, 17 Ala. 286.
(*u*)Pray *v.* Herber, 19 La. An. 499.
(*v*)Parker's Case, 2 Barb. Ch. (N. Y.) 154.
(*w*)Vreeland *v.* McClelland, 1 Bradf. 415.
(*x*)Weyand *v.* Weller, 39 Pa. 443.
(*y*)Chess' Appeal, 4 Barr, 52.
(*z*)Cobb's Ex'r *v.* Burns, 61 Pa. St. 278.
(*a*)Bell's Appeal, 71 Pa. St. 465.

The jurisdiction obtains, also, in Indiana.(*b*) And in Texas, in sales of land under an executory contract of the decedent,(*c*) and to this the jurisdiction is confined.(*d*)

§ 292. A limited jurisdiction in matters of fraud is essential, for "if a court of probate must pass upon matters involving questions of fact, as it often must, in deciding upon matters of account, it must inquire into the truth of such facts judicially; and when a question of fraud is incidental to any subject of which it has jurisdiction, it must take cognizance of it, and try it as any other question of fact."(*e*) And where fraud is inherent in an executor's or administrator's account, the court of probate has exclusive jurisdiction therein as an incident of the settlement.(*f*)

§ 293. Probate courts, as other courts, may have power to order a change of venue in a proper case.(*g*)

§ 294. The ordinary principles of limitation apply to administrators and executors.(*h*)

§ 295. A probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he had been the administrator.(*i*)

§ 296. Rents for real estate accruing after the decedent's death are not a part of the assets of the estate, and so form no basis of administration.(*j*)

§ 297. The issuing of *habeas corpus* writs is not within the province of a court of probate,(*k*) so that it has no power to take cognizance of proceedings by a father to recover possession of a child alleged to be wrongfully withheld from him.(*l*)

§ 298. A court of probate may enforce its orders to an executor or administrator by attachment for disobedience,(*m*) but in New York cannot punish as for a criminal contempt,(*n*)

(*b*) Dehart *v.* Dehart, 15 Ind. 167.
(*c*) Todd *v.* Ca dwell, 10 Tex. 236.
(*d*) Booth *v.* Todd, 8 Tex. 137.
(*e*) Wade *v.* Lobdell, 4 Cush. 512.
(*f*) Sever *v.* Russell, Ibid, 517.
(*g*) People *v.* Almy, 46 Cal. 245.
(*h*) Emerson *v.* Thompson, 16 Mass. 428.
(*i*) Bush *v.* Lindsey, 44 Cal. 121.
(*j*) Kohler *v.* Knapp, 1 Bradf. (N. Y.) 242.
(*k*) Lee's Case, 1 Min. 60.
(*l*) Lowrey *v.* Holden, 41 Miss. 410.
(*m*) Saltus *v.* Saltus, 2 Lans. (N. Y.) 9.
(*n*) Watson's Case, 3 Lans. 408.

and so cannot fine, and then imprison on the fine.(*o*) However, it is different in Pennsylvania, Illinois and Missouri, where a recalcitrant executor or administrator may be imprisoned for contempt.(*p*)

§ 299. As an incident of the supervision of courts of probate over estates, their jurisdiction is exclusive in matters of settlement and distribution, (strictly such,) including the claims of creditors next of kin and legatees,(*q*) and also, *per consequence*, of the plea of an administrator that he had fully administered.(*r*) And a final decree of a probate court making distribution of an entire estate is, unless reversed or modified by an appeal, an investiture in the distributees of the absolute right and title thereto, insomuch that, while an appeal is pending from such decree, if the court makes another order making a different distribution in part, the latter order is wholly void.(*s*)

And a court has jurisdiction to examine and allow a final account rendered by an administrator after his letters have been revoked.(*t*) And it is a general principle that it can only be deprived of its jurisdiction for settlement by some process which would remove the cause to another tribunal; as, for instance, appeal. And the jurisdiction thereon remains, even if the administrator, on citation, had neglected to settle his accounts, and leave had been granted to sue on his bond for the neglect, provided no suit be actually commenced.(*u*)

If there be a partial settlement with an heir, and therein a sum of money be left in the hands of the executor to pay an illegal legacy, the probate court has jurisdiction to compel a distribution of that sum as assets.(*v*) And it is a general principle that on an accounting the jurisdiction extends

(*o*)Same, 5 Lans. 466.

(*p*)Tome's Appeal, 50 Pa. St. 297; Piggott *v.* Ramey, 1 Scam. 146; Greene Co. *v.* Rose, 38 Mo. 391.

(*q*)Linsenbigler *v.* Gourley, 56 Pa. St. 166.

(*r*)Bind's Ex'r *v.* Adm'r, 2 Grant, 353.

(*s*)Garrand's Estate, 36 Cal. 277.

(*t*)Davis *v.* Cheves, 32 Miss. 317.

(*u*)Sturtevant *v.* Tallman, 27 Me. 82.

(*v*)Wells *v.* Mitchell, 39 Miss. 801.

usually to the trial and decision of every question necessary to a settlement. The legatees may contend that the executor has more assets than he acknowledges, and, on the other hand, he may show in defence that what is claimed as assets is his own property, and not that of the estate.(*w*) And the correctness of an inventory may thus be disputed likewise.(*x*) However, the jurisdiction of the court is exhausted when the order of distribution is made, and cannot extend to enforcing the collection of the amounts.(*y*) The distribution may be in kind, and even where there are minors.(*z*)

A settlement may be opened and reviewed on sufficient cause shown, even if it be a final settlement, provided it was made in proper form, with due jurisdiction.(*a*)

§ 300. There are, however, distinct limitations to the jurisdiction in matters of settlement and distribution. As, for instance, an administrator cannot be allowed to set off a debt due him from a distributee;(*b*) nor, in Alabama, be allowed his attorney's fees;(*c*) nor appropriate a distributee's share to the payment of his debts,(*d*) except a debt due directly to the estate, which may be treated as an advancement;(*e*) nor adjudicate upon the validity of an assignment of a distributive share;(*f*) nor refuse a distributee his share on the ground that he has made such an assingment;(*g*) or, consequently, entertain a petition to enforce an alleged assignment;(*h*) nor, after the death of an administrator, to enforce against his personal representative a decree rendered against the administrator on final settlement;(*i*) nor decide upon the validity of a bequest.(*j*)

(*w*) Merchant *v.* Merchant, 2 Brad. (N. Y.) 432.

(*x*) Mims' Adm'r *v.* Mims, 39 Ala. 716.

(*y*) McLaughlin *v.* McLaughlin, 4 O. St. 508.

(*z*) Williams *v.* Holmes, 9 Md. 281.

(*a*) Pendleton *v.* Prestridge, 12 S. & M. 303.

(*b*) Bradshaw's Appeal, 3 Grant, 109; Carter's Appeal, 10 Pa. St. 144.

(*c*) Wright's Adm'r *v.* Wilkinson, 41 Ala. 268.

(*d*) Verac's Estate, 35 Cal. 393.

(*e*) Springer's Appeal, 29 Pa. St. 208.

(*f*) Locke *v.* Williams, 36 Miss. 187.

(*g*) Read *v.* Brown, Ibid, 329.

(*h*) Hill *v.* Hardy, 34 Miss. 289.

(*i*) Dilworth *v.* Carter, 32 Miss. 206.

(*j*) State *v.* Warren, 28 Md. 339.

§ 301. It is not a disqualification in a judge to have attested a will. He can, nevertheless, decide upon its probate;(*k*) and if the judge be interested, or of kin, his acts are not void, but only voidable.(*l*)

§ 302. Like other courts, a court of probate may be confined to terms.(*m*) Yet statutes concerning times and places of holding court are liberally construed.(*n*)

(*k*) Patten *v.* Tallman, 27 Me. 17.
(*l*) Hine *v.* Hussey, 45 Ala. 496.
(*m*) White *v.* Riggs, 27 Me. 114.
(*n*) Kimball *v.* Fisk, 39 N. H. 110.

CHAPTER V.

CRIMES.

§ 303. General remarks.
304. Source of criminal jurisdiction as to United States courts.
305. Statutory jurisdiction of United States courts.
306. Abuse of criminal law.
307. *Res adjudicata* in criminal prosecutions—explanation of "twice in jeopardy."
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318. Offences in foreign jurisdictions.
319. Offences in different counties.
320. Distinct constitutent acts in different states or counties.
321. Foreigners committing offences within the jurisdiction.
322. Extradition.

§ 303. As to criminal jurisdiction, relating to offences committed upon the high seas, we have already spoken in the chapter on admiralty, and hence will not refer particularly to this class of crimes herein. And, of course, our remarks must be confined simply to jurisdictional topics, these only falling within the compass of this work.

Our complicated system of state and national governments renders a distinction requisite throughout as to the spheres of jurisdiction in the state courts, and in the United States courts, respectively. And in this particular, also, we shall have occasion to treat some topics in the second volume of this work, which topics will likewise be omitted here; and we

refer the reader to "Res Adjudicata" for some of these; and also for the subject of Former Convictions, etc.

§ 304. After some hesitation and wavering in the line of decisions, it is now declared to be "the settled law, universally acted upon by the United States courts, that they cannot resort to the common law as a source of criminal jurisdiction. However, that body of jurisprudence may furnish these courts with rules of procedure, definition, and construction; they have no power to try any offences, except such as are, in some form, prohibited by the constitution, or by act of Congress." And on this ground, in dismissing a prosecution for forgery, brought under an act passed March 3, 1825, which provided, in regard to ceded places, that "if any offence shall be committed in any of the places aforesaid, the punishment of which offence is not specially provided for by any law of the United States, such offence shall, upon conviction in any court of the United States having cognizance thereof, be liable to, and receive, the same punishment as the laws of the state in which such fort, dock-yard, navy-yard, arsenal, armory, or magazine, or other place, ceded as aforesaid, is situated, provide for the like offence when committed within the body of any county of such state," and which act had been decided to relate only to the laws of the several states in force at the time of the enactment thereof, and, *per consequence*, to the places at that time ceded, whereas this alleged forgery was committed in a place subsequently ceded, namely, the United States custom-house at New York, *Shipman*, J., said: "I regret that I am compelled to announce this result. The crime charged in the indictment is a grave one, and I understand that one of the defendants is accused of having committed the act while in the employ of the government in an official position, the duties of which embraced the supervision of bonds of the character of the one alleged to be fraudulent. I regret that the charge cannot be investigated in this court, and the defendants be acquitted, if found innocent, and, if guilty, be properly punished. But I am satisfied that this court has no power to try the case, on this indict-

ment, and must, therefore, grant the motion that the indictment be quashed."(*a*)

The statute of 1866, however, obviates the difficulty met in that case, by referring specifically to future cessions, and making the rule applicable thereto, the language being: "If any offence shall be committed in any place which has been, or shall hereafter be, ceded to and under the jurisdiction of the United States, which offence is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offence shall, upon conviction in any court of the United States having cognizance, be liable to and receive the same punishment as the laws of the state in which said place is or may be situated, now in force, provide for the like offence when committed within the jurisdiction of such state, and no subsequent repeal of any such state law shall affect any prosecution for such offence in any of the courts of the United States."(*b*)

§ 305. In regard to the statutory jurisdiction of the United States courts I avail myself of the very comprehensive summary of Mr. Wharton, namely: "The offences thus particularly enumerated by congress may be collected under five general heads: *First*, those against the laws of nations; *second*, those against federal sovereignty; *third*, offences against the persons of individuals; *fourth*, offences against property; and, *fifth*, offences against public justice. Under the first head, namely, offences against the laws of nations, may be classed the accepting and exercising by a citizen of a commission to serve a foreign state against a state at peace with United States; fitting out and arming, within the limits of the United States, any vessel for a foreign state to cruise against a state at peace with the United States; increasing, or assisting within the United States, any force of armed vessels of a foreign state at war with a state with which the United States are at peace; setting on foot, within the United States, any military expedition against a state at peace with

(*a*) U. S. *v.* Barney, 5 Blatch. C.C. 303.

(*b*) Stat. April 5, 1866.

the United States; suing forth or executing any writ or process against any foreign minister, or his servants, the writs being also declared void; and violating any passport; or, in any other way, infracting the laws of nations, by violence to an embassador or foreign minister, or their domestics. Under the second head, namely, offences against federal sovereignty, may be classed treason against the United States, and misprision of treason; holding any treasonable correspondence with a foreign government; enlisting by a citizen within, or going out of the United States with intent to enlist in the service of any foreign state; fitting out and arming a vessel by a citizen of the United States, out of the United States, with intent to cruise against citizens of the United States; political offences against the federal government, committed by subjects abroad; and the various offences defined in the statutes relating to the post-office, to federal coin and notes, to piracy, revolt, and the slave trade. Under the third head, namely, offences against the persons of individuals, may be classed murder or manslaughter, in any fort, dock-yard, or other place or district of country under the sole and exclusive jurisdiction of the United States; murder, manslaughter or rape, upon the high seas, or in any river, haven, basin, or other like place, out of the jurisdiction of a state, which, if committed within the body of a county, would, by the laws of the United States, be punished with death, and the offences covered by the statutes protecting persons on the high seas. Under the fourth head, namely, offences against property, may be classed embezzling or purloining any arms or other ordnance, belonging to the United States, by any person having the charge or custody thereof, for purposes of gain, and to impede the service of the United States; burning or aiding to burn any dwelling-house, store or other buildings within any fort, dock-yard, or other place under the jurisdiction of the United States; setting fire to or burning, or aiding to set fire to or burn, any arsenal, armory, etc., of the United States, or any vessel built or building, or any materials, victuals, or other public stores; taking or

carrying away, with intent to steal, the personal goods of another from within any of the places under the sole and exclusive cognizance of the United States, or being accessory thereto; and the various forms of robbery and larceny on the high seas.* Under the fifth head, namely, offences against public justice, may be classed bribing any United States judge, with intent to obtain any opinion, judgment, or decree, in any suit depending before him; receiving such bribe; obstructing any officer of the United States in the service of any legal writ or process whatsoever; rescuing any person committed for or convicted of any offence against the United States; demanding and receiving, by reason of his office, any greater fees than those allowed by law, by a public officer or his deputy; endeavoring to impede, intimidate, or influence any juror, witness, or officer, in any court of the United States, in the discharging of his duties; or, by threats or force, obstructing, or impeding, or endeavoring to impede, the due administration of justice therein; bribing or attempting to bribe the president or any director of the bank of the United States;† committing perjury, or causing another to do so, in any suit or controversy depending in any of the courts of the United States, or in any depositions taken in pursuance of the laws of the United States, together with other forms of false oaths forbidden by act of congress."(*b*)

§ 306. In no case can a criminal law be justifiably employed merely to enforce the payment of a debt. And where this was attempted by one who sued out a warrant, and handed it to an officer, saying that all he wanted was his money, and that if the accused would pay it he desired the officer not to make the arrest; but the arrest was made, however, and the case afterward dismissed by the prosecuting attorney, the party suing out the warrant was made to respond in damages in an action for malicious prosecution. The court, on

*It will be noticed he has omitted inadvertently an important branch, namely, defrauding the public revenue by officers and individuals, which has of late been brought out very conspicuously.

†Obsolete.

(*b*) Wharton on Crim. Law, §§ 174-179.

appeal, declared "the criminal law was not designed to assist in the collection of debts, and he who attempts to so use it must expect to smart for it."(*c*)

However, it is sometimes provided by statute that fines may be recovered in a civil action. In such a case the rule is that where an act, not indictable at common law, is prohibited by statute, which gives a particular method of proceeding, such method must be strictly pursued, and an indictment will not lie; although, if the act is merely prohibited, and no method is pointed out, an indictment will lie.(*d*) But a statute may provide that the proceeding may be either by civil action or by indictment:(*e*) as, for example, in libel.

§ 307. It is a settled principle that an accused is not to be twice put in jeopardy for the same offence. And sometimes this appears to be considered as a safeguard peculiar to criminal prosecutions. But it seems to me it is nothing more than the universal principle of *res adjudicata* applied to criminal proceedings. The principle, however, is not to be held so as to include the idea that a conviction confers an immunity for crimes thereafter committed, while the sentence continues. Thus, if one is confined for life in the penitentiary, and while there commits murder, he can be tried, convicted, and sentenced for the second crime, notwithstanding the operation of the first sentence.(*f*) And, moreover, it has been held that where one confined in the penitentiary breaks out, and while at large commits another crime, and is thereon convicted and returned to the penitentiary on a new sentence, the officers of the prison may compel him to serve out his unexpired term on the former sentence, and the new sentence will begin at the expiration thereof.(*f*)

Nor is the principle violated by the operation of a statute providing increased punishments for a second offence, etc., unless the increased punishment is inflicted on information afterwards filed separately, and is not, as it should be, merely

(*c*)Kelley *v.* Sage, 12 Kan. 112.

(*d*)State *v.* Huffschmidt, 47 Mo. 76.

(*e*)State *v.* Stewart, Id. 385.

(*f*)State *v.* Connell, 49 Mo. 288.

All crimes are several, even if committed by two or more persons jointly. State *v.* Brown, 49 Vt. 437.

included in the sentence passed on the second conviction.(*g*) In cases of increased punishment the increase is not to be considered as visited on the first offence, thereby punishing it twice, but only upon the persistence in crime, which evinces a depravity that merits a greater punishment, and needs to be restrained by severer penalties, than if it were the first offence.(*h*) "The true view of it," say the Massachusetts court, "we think, is that it [the statute] imposes a higher punishment for the same offence upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the reform for which it was designed."(*i*)

Nor is it an objection, therefore, that the first offence was committed before the passage of the act authorizing this increased punishment, for this does not make the act an *ex post facto* law, since it is not the *past act* which is punished, but only the present, persistent depravity;(*j*) although it is true that a party must know beforehand the extent of his punishment incurred by a violation, so that the second offence for which increased punishment is inflicted must be committed, and not merely tried, subsequently to the passage of the statute providing the increase of penalty.

Nor is it any objection that the first offence was committed in another state and before the passage of the act,(*k*) the principle being, as above stated, that the punishment acts on the present depravity only.

§ 308. It may not, I judge, be amiss here to remark that there is a kind of distributive jurisdiction not confined to the courts, nor, indeed, even to public officers; but it may be exercised even by private citizens. On this, *Redfield*, J., remarked very forcibly, in a Vermont case, where counterfeit coin was taken and detained by officers without a warrant formally issued: "As the matter stands, the defendant's authority [in an action of trover] must rest merely upon general grounds of prevent-

(*g*) Plumbly *v.* Commonwealth, 2 Met. (Mass.) 413.

(*h*) People *v.* Stanley, 47 Cal. 116.

(*i*) Plumbly *v.* Commonwealth, 2 Met. (Mass.) 415.

(*j*) Ross' Case, 2 Pick. 169.

(*k*) Rand *v.* Commonwealth, 9 Gratt. 742.

ive justice, aside from any statute whatever on the subject. All governments, upon the most obvious principles of necessity, exercise more or less of preventive force in regard to all subjects coming under their cognizance and control. This is in analogy to the conduct of individuals, and, indeed, of all animal existence. Many of the instincts of animals exhibit their most astonishing developments in fleeing from the elements, from disease, and from death, at its most distant sound, long before the minutest symptom appears to rational natures. This is the great secret of personal enterprise and success. So, too, in the history of civil governments, prevention is more important, and far more available, than cure. All sanitary cordons and preventive regulations, everything in regard to the police of our cities and large towns, indeed, prohibitions of lotteries, gambling houses, brothels, and disorderly taverns, whether done by general statute, or mere police regulations, all come under the right of preventing more serious injuries by stifling the fountains of evil. *Obsta principiis* is as just a maxim here as anywhere. And, in doing all this, it must, of course, somewhat interfere with the natural rights of individuals. One infected with contagion is instantly removed beyond the reach of contact. A ship or cargo coming from an infected port is subjected to long delay and great expense to prevent the possibility of spreading pestilence. This may, in some instances, endanger the lives and health of the individuals concerned, and must always, more or less, affect property and abridge personal liberty. And it is often done without any special law of the state, and may always be so done, as in the case of cholera suddenly breaking out in some remote inland town. And what would be thought of an action of assault and battery brought against a health officer who removed the plaintiff from a town or village to prevent contagion; or against the peace officer who laid his hand upon one under an honest belief that he was insane, or when he was in fact so, and rushing through the street with a lighted torch to burn some public edifice, or commit some other irreparable injury; or, if you please, against the sheriff of the county, who, by the direction of the prosecuting officer

for the state, detains counterfeit coin, or those partly finished? We find no such actions in the books, and the want of precedents shows the general sense upon the subject, when it is notorious that the public officers in our cities subject persons suspected of crime, and every species of engine or material with which it is even suspected they intend to operate, to just such restrictions as they deem proper, and this without regard to any special provisions of statutory enactments. The same is true, also, of those suspected of infection. And in regard to unwholesome provisions, if found to be so in a dangerous degree, there is no doubt they might even be destroyed. So, too, of books and prints, and of all other devices to corrupt the public morals, property cannot exist in them. They are regarded as public nuisances, and any one may destroy them. So, too, certain trades are considered common nuisances in places of great public resort or concourse; like smelting of certain metals, slaughtering animals, etc., which would be likely to endanger the public health. And gambling houses and brothels have been regarded as common nuisances in the cities, and might justly be so regarded wherever they exist, perhaps. Society, in all these cases, and many others, has the right to anticipate, in order that it may prevent the injury which is thus threatened. If it were not so, men in a social state would be far more powerless for purposes of defence than in a natural state. All will admit the right to restrain a madman, or a mad animal, from committing injury. And is the rational man, or the senseless material, which threatens crime or irreparable injury, less subject to control than the maniac or his torch? And if the incendiary could hardly be expected to have an action of trespass, or trover, for his dark lantern, or the bank robber for his saws and files, and false keys, can the counterfeiter, or his accomplice, any more maintain an action for his base coin, whether in a finished or unfinished state?

"The right of private persons to make arrests on their own mere motion, without any special statute, and without express warrant, was distinctly recognized in the discussion of a late case, in the common pleas, in Westminster Hall—

Elliott v. *Allen*, 1 M. G. & Scott, 18, (50 E. C. L. 38, 1845)—long since the transaction occurred out of which the present action grew; and this right, in every subject of the realm, is there recognized for the mere purpose of preventing crime; and if the right of personal liberty, which is always recognized among the most sacred of civil rights, may be thus violated by private persons upon their own mere motion, much more, it would seem, may such rights of property, as one may be supposed to have, either in counterfeit coin, or in the materials in an unfinished state, be disregarded by a public officer.

"The following is the law, as laid down in 6 Bac. Ab., title, 'Trespass D,' 579, upon that subject: A private person may, without express warrant, arrest persons who are actually fighting, and keep them in custody until their passion is over. Has that state of safety yet occurred in regard to this coin? If surrendered it would seem there should be some security that it should not be applied to the same use—certainly not in this state. So, it is said by Bacon, one may arrest one coming to assist another in a fight. Id. 1 Hawk. Pl. Cr. *c.* 3, § 11. So may one arrest another who is on the point of committing murder or treason. So he may justify breaking and entering one's house, and imprisoning him, 'to prevent his committing murder on his wife.' *Handcock* v. *Baker*, 2 B. & P. 260. 'A private person may, without an express warrant, confine a person disordered in his mind who seems disposed to do mischief to himself or any other person.' Bro. Ab., title, 'False Imprisonment,' 25, 28. So he may arrest a night-walker. Id.

"One who sets himself deliberately at work to contravene the fundamental laws of civil governments—that is, the security of life, liberty or property—forfeits his own right to protection in those respects wherein he was studying to infringe the rights of others. The man who attempts the life or liberty of another forfeits, for the time, all right to the protection of his own life or person; and the person assailed may justly destroy both, if necessary, in his own defence, or if he may be fairly supposed to have esteemed it necessary

under the circumstances. So, too, if any member of the body politic, instead of putting his property to honest uses, converts it into an engine to injure the life, liberty, health, morals, peace or property of others, he thereby forfeits all right to the protection of his *bona fide* interest in such property before it was put to that use. And he can, I apprehend, sustain no action against any one who withholds or destroys his property with the *bona fide* intention of preventing injury to himself or others."(*l*)

§ 309. It is, doubtless, somewhat on this principle of preventive jurisdiction that sometimes mere attempts to commit crime are punishable. In New York it has been held that under an indictment for burglary, on the trial of which the proof fails to establish the crime because the entry had been prevented, the jury may find that an attempt to commit a burglary had been committed, this being expressly authorized as to crimes in general by the statute. Such an attempt, however, must be manifested by some act toward its accomplishment, though ineffectual or prevented. But this act needs not to be proximate, but may be remote; so that a mere solicitation to commit a crime may sometimes be regarded and punished as an attempt.(*m*) But, of course, the act must tend toward the accomplishment of the result. And the intention enters into the offence of an attempt, as well as the actual commission of crimes,(*n*) so that whatever prevented the consummation must be independent of the will of the party accused.(*o*) And there cannot properly be a conviction when there has been a mere partial preparation under the intention, but the time proposed for the consummation was so distant as to leave ample room for the *locus penitentiæ*, and to thus render it doubtful whether the accused had fully resolved on the commission of the act.(*p*)

§ 310. A wrongful intent is essential to the commission of

(*l*) Spalding *v.* Preston, 21 Vt. 12, *passim*.

(*m*) People *v.* Lawton, 56 Barb. 134, and cases and authorities there cited.

(*n*) Cunningham *v.* State, 49 Miss. 701.

(*o*) People *v.* Murray, 14 Cal. 160.

(*p*) Lovett *v.* State, 19 Tex. 177.

a crime; so that where this is wanting, an act completely within the words of a prohibitory statute is not punishable as criminal; and an act, therefore, must come not only within the words of a statute to render it criminal, but within the spirit and meaning thereof; so that criminal statutes are not to be construed literally and technically.(*q*)

An intent is inferable from circumstances. Where an accused commits an act in itself unlawful, he is held bound to know the law, and his criminal intent is held to be a presumption of law; and this is declared to be a sound and salutary principle, notwithstanding it may work hardship in particular cases. And it is no excuse that a wrong-doer was misled by bad advice of a magistrate or counsel. *State* v. *Goodmon*, 65 Me. 33; *Cutler* v. *State*, 36 N. J. 125; *U. S.* v. *Anthony*, 11 Blatchf. 200; *U. S.* v. *Taintor*, Id. 374; *Black* v. *Ward*, 27 Mich. 191; *Commonwealth* v. *Elwell*, 2 Met. 190; *Commonwealth* v. *Farren*, 9 Allen, 489; *Commonwealth* v. *Goodman*, 97 Mass. 117; *Commonwealth* v. *Emmons*, 98 Mass. 6. But Missouri vigorously protests, and claims that, as a criminal intent is an essential element of crime, it is absurd and meaningless to declare that when a crime is committed the law presumes the intent, in a case of murder, even. *State* v. *Painter*, 67 Mo. 84. But where a statute specifies an act with an intent, the intent must be clearly proved without any aid from legal presumptions; and no intent in law differing from the intent in fact can be indulged.(*r*) Thus, where a statute prescribes a punishment for "wilfully" removing an official seal from property sealed up by customs officers, and one does intentionally remove the seal, in ignorance of its character, and in the honest discharge of a supposed duty in caring for and transporting the property, he cannot, in the sense of the statute, be deemed to have acted wilfully. It must appear not only that the accused intended to remove the seal, but that he did so knowing its nature and character; for while, on the one hand, the maxim is *ignorantia juris non excusat*; on the other

(*q*) State *v.* Gardner, 5 Nev. 378, and authorities cited.

(*r*) Roberts *v.* People, 19 Mich. 415, and cases.

hand, the maxim is equally well established that *ignorantia facti excusat*. And in a case of the kind just alluded to, *Hall*, Justice, remarks: "It is true that a person who deliberately does an act which he knows to be unlawful or wrongful is generally held to have done it wilfully; and the familiar doctrine that a person is conclusively presumed to know the law of the country of his domicile, or temporary sojourn, was pressed upon the court for the purpose of bringing this case within the principle of the cases in which this doctrine has been applied. Without considering the question whether the regulations presented by the secretary of the treasury, under an act of congress, are to be considered as laws, it must be observed that, in all cases of this kind, the intention of the legislature is to govern; and that when, as in this case, the act must be *wilfully* done to make it criminal, it can hardly be supposed that the legislature intended to declare an act committed without any illegal or improper motive, and under the honest belief that it was entirely right and proper, to be a felony, punishable, in the discretion of the court, by a large pecuniary fine, and five years' imprisonment. Indeed, under such proof of the absence of all criminal, or improper intent or feeling, eminent judges have directed acquittals in cases where the punishment authorized was much less severe."(*s*)

§ 311. As to the effect of a pardon upon the jurisdiction of a criminal court, it is held that a pardon by law must be judicially noticed by the court, because it is the business of a court to judicially notice general laws. But a pardon issued by an executive is regarded as a private deed to the accused, and will avail nothing unless accepted by the accused and presented for a discharge;(*t*) not even while exceptions are pending.(*u*)

§ 312. Venue is as important a consideration in criminal as in civil jurisdiction. By the operation of a statute there may be, however, a shifting or discretionary venue. As, for example, the third section of an act of congress of March 2,

(*s*) United States *v.* 3 Railroad Cars, 1 Abb (U. S.) 202, and cases cited.

(*t*) United States *v.* Wilson, 7 Pet. 160.

(*u*) Commonwealth *v.* Lockwood, 109 Mass. 323.

1793, provided that the supreme court, or, when it is not sitting, any one of the justices thereof, together with the judge of the district within which a special session as thereafter authorized should be holden, might direct special sessions of the circuit courts to be holden for the trial of criminal causes at any convenient place within the district nearer to the place where the offences might be said to be committed than the place or places appointed by law for the ordinary sessions.

§ 313. There is, to be sure, nothing peculiar in the general principles of venue in criminal jurisdiction. They are the same as in civil causes, and need not to be specially noticed here. But our attention will be directed to extra-territorial offences and continuing offences in this connection.

It is a well-settled principle that a crime committed in one state is not punishable in another state, where there is an organized government, except as to citizens in foreign lands. So, where a prisoner was found guilty in North Carolina, in 1799, under a statute passed in 1784, he was, on appeal, discharged because of the unconstitutionality of the statute, the crime having been committed in Virginia.(*v*) The words of the statute were: "Whereas, there is reason to apprehend that wicked and ill-disposed persons resident in the neighboring states make a practice of counterfeiting the current bills of this state, and by themselves or emissaries utter or vend the same, with an intention to defraud the citizens of this state, be it enacted, etc., that all such persons shall be subject to the same mode of trial, and on conviction liable to the same pains and penalties, as if the offence had been committed within the limits of this state, and be prosecuted in the superior court of any district of the state."

The principles herein are so admirably set forth in a New Jersey case—wherein a mortal blow was struck in one state, (New York,) and after receiving the injury the wounded man died in another (New Jersey)—that I cannot forbear transcribing a part of the opinion therein rendered:

"Nothing was done by the defendant in this state. When the blow was given both parties were out of its jurisdiction,

(*v*)State *v.* Knight, 1 Taylor, (N. C.) 65.

and within the jurisdiction of the state of New York. The only fact connected with the offence, alleged to have taken place within our jurisdiction, is that, after the injury, the deceased came into and died in this state. This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so, the blow is, in fact, struck in New Jersey. It is the defendant's act in this state. The passage of the ball after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured; and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile, passes over a boundary, in the act of striking, is a matter of no consequence. The act is where it strikes; as much where the party who strikes stands out of the state, as where he stands in it.

"Here, no act is done in this state by the defendant, He sent no letter, or missile, or message, that operated as an act within this state. The coming of the party injured into this state, afterwards, was his own voluntary act, and, in no way, the act of the defendant. If the defendant is liable here, at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then, for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory, at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place; murder, in its various degrees, in another. Its punishment may be fine in one country; imprisonment, whipping, beheading, strangling, quartering, hanging or torture in another; and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel.

"This is not like the case of stolen goods carried from one state to another; or of leaving the state for any purpose whatever, like that for fighting a duel; or of sending a letter,

or messenger, or message, for any purpose, into another state; for in all these cases the cognizance is taken of an *act done* within the jurisdiction.

"If the acts charged in this indictment be criminal in New Jersey it must be either by force of some statute or upon general principles. There is no statute, unless it be the act to be found in Nix. Dig. 184, § 3. But this evidently relates to murder only, and not to manslaughter. But I cannot make myself believe that the legislature, in that act, intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defendant within our own. Such an indictment, upon general principles, would necessarily be void. It would give the courts of this state jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could, by force or fraud, get possession of their persons, in all cases where personal injuries are followed by death. An act, to be criminal, must be alleged to be an offence against the sovereignty of the government. This is of the very essence of crime punishable by human law. How can an act done in one jurisdiction be an offence against the sovereignty of another? All the cases turn upon the question where the act was done. The person who does it may, when he does it, be within or without the jurisdiction—as by shooting or sending a letter across the border—but the act is not the less done within the jurisdiction because the person who does it stands without. This case is not at all like those where the defendant is tried in England for a crime committed in one of the dependencies of the British empire. There the act is done, and the crime is in fact committed, against the sovereignty of the British crown, and only the place of trial is changed.*

"If our government takes jurisdiction of this case it must

*This illustration of the learned judge would hardly seem apposite, as the legality of this mode of trial will not readily be admitted by Americans, inasmuch as it stands out prominently as one of the unbearable grievances upon which our Declaration of Independence is based.

be, not by virtue of any statute, but because it assumes general power to punish acts *mala in se* wherever perpetrated in the world. The act of the party injured can give no additional jurisdiction.

"Such crimes may be committed on the high seas; in lands where there are or are not regular governments established. When done upon the high seas, they may be either upon our vessels, or upon vessels belonging to other governments. When done upon our vessels, in whatever solitary corner of the ocean, from the necessity of the case, and by universal acceptance, the vessel and all it contains are still within our jurisdiction; and when the vessel comes to port the criminal is still tried for an *act done* within our jurisdiction. But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government.

"Where an act *malum in se* is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. Further than this, it could not have been intended that our statute should apply. But here the act was done in the state of New York, a regularly organized and acknowledged supreme government. The act was a crime against its sovereignty. That was supreme within its territorial limits, and in its very nature, and, in fact, is exclusive. There cannot be two sovereignties supreme over the same place, at the same time, over the same subject-matter. The existence of theirs is exclusive of ours. We may exercise acts of sovereignty over the wastes of ocean, or of land, but we must necessarily stop at the boundary of another. The allegation of an act done in another sovereignty to be a violation of our own is simply alleging an impossibility, and all laws to punish such acts are necessarily void.

"It is said that, if we do not take jurisdiction, the defendant will go unpunished, inasmuch as, the party injured not dying in New York, he could not be guilty of murder there. But New York may provide by law for such cases, and if she does not it is her fault and not ours. The act done is against her sovereignty, and if she does not choose to avenge it, it is not for us to step in and do it for her."(*w*)

It is a necessary corollary of these principles that every statute is to be presumed to be enacted, and is to be interpreted, with reference to the local jurisdiction of the state whose legislation made it.(*x*)

The doctrine, however, held by the supreme court of New Jersey, though I think it is the general and more reasonable doctrine, that where a mortal blow is given in one jurisdiction, and the person dies of the injury in another, the former alone has cognizance of the crime, is vigorously denied and combated by the courts of Massachusetts and Michigan. Indeed, in Massachusetts, the statute (Gen. St. *c.* 171, § 19) provides that "if a mortal wound is given, or other violence or injury inflicted, or poison is administered, on the high seas or on land, either within or without the limits of this state, by means whereof death ensues in any county thereof, such offence may be prosecuted and punished in the county where the death happens."

The court declared that "this statute is founded upon the general power of the legislature, except so far as restrained by the constitutions of the commonwealth and of the United States, to declare any wilful or negligent act which causes an injury to persons or property within its territory to be a crime, and to provide for the punishment of the offender upon being apprehended within its jurisdiction."(*y*) This goes on the supposition (1) that the injury was caused to person or property within the territory, which is certainly not the case when the causing all occurred beyond the territory; and (2) that the death was a continuation of the crime—which

(*w*)State *v.* Carter, 3 Dutch. 500.

(*x*)People *v.* Merrill, 2 Park, Crim. R. (N. Y.) 590.

(*y*)Commonwealth *v.* Macloon, 101 Mass. 5.

cannot be, inasmuch as the will of the offender is not connected with it as to the venue of the death, for the exertion of will was exhausted in the act, and the act was completed without the jurisdiction. Nothing more was to be done; the act was fully done. And if intention defines crime itself, it certainly may define the continuance. Hereafter we shall have occasion to speak of continuing crimes in different jurisdictions, and I think they will be found very different, as embracing a continuous acting and intention, which seems to me the true distinction, instead of the mere passive consequences, without action or intention.

In Michigan a divided court decided that where a shooting occurred in Canada, and the death in that state, the offender was punishable in that state. The majority say: "We think it clearly within the scope of the legislative power. The expediency or policy of the statute has nothing to do with its constitutionality; and if it was a legitimate subject of inquiry and consideration, in determining the constitutional question, we should not hesitate in the present instance to declare in its favor; for the crime, though commenced in Canada, was consummated in Michigan. The shooting itself, and the wound which was its immediate consequence, did not constitute the offence for which the prisoner is convicted. Had death not ensued he would have been guilty of an assault and battery, not murder, and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones into Michigan, where they continued to operate until the crime was consummated in his death. If such a killing did not by the common law constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in the state."(z)

Now, with all due deference to the learned court, may we not say that plainly this decision rests the jurisdiction, not on the act and the immediate consequence as conferring it, but on the remote consequences, which are proper, of course, in

(z)Tyler v. People, 8 Mich. 333.

determining the nature of the blow, whether mortal or not, but not in conferring jurisdiction. Again, the court acknowledge that if death had not ensued, jurisdiction could only have been maintained in Canada. Yet, in such a case, the remote consequences, also, might be developed on removal to another jurisdiction, as permanent ill-health, etc. And these might properly be considered, too, so far as they were developed before trial, and enter into the measure of punishment. But would it be competent for a legislature to confer jurisdiction of the case upon the local courts, by reason of the remote or secondary consequences following after? It does seem to me that unless the *act* is continuous, jurisdiction must, of necessity, be confined to the place where the causal act was performed and fully completed, which produced the subsequent development of consequences tending to define the act itself, indeed, but, in no just sense, constituting a part of it.

As to a crime committed in one county, the development of which occurs in another, as the whole is within one general jurisdiction, it would, undoubtedly, be competent to a legislature to allow a trial in either. Yet, at common law, where an offence was commenced in one county, and consummated in another, it has been held it could not be tried in either; and it has been even doubted whether, if a mortal blow was given in one county, and the party died in another, the offender could be punished in either.(*a*) The venue was, doubtless, as in the case of different sovereignties, in the place where the act was done.

And an accessory before the fact can only be tried in the county where the intelligent agent is procured to commit the principal act, on the ground that there his crime is completed;(*b*) so held in New Hampshire. But the doctrine is justly repudiated in Connecticut,(*c*) and I doubt whether it is the general rule. And assuredly it is not the rule where the statute abolishes the distinction between principal and accessory, and makes all participants in felony principals.

§ 314. There is an apparent but not a real exception to

(*a*)State *v.* Moore, 6 Fost. (N. H.) 451.

(*b*)Ibid, 455.

(*c*)State *v.* Grady, 34 Conn. 131.

this rule in the matter of illegal voting, done by those who by special law are allowed to vote beyond the limits of the state. I say not real, because the act has a direct bearing upon the affairs of the state; indeed, has its immediate effect in the state, and there only; and so the matter falls within the operation of the general principle. In regard to statutes allowing such voting (in 1862) among the soldiers, the court of Wisconsin said: "This class of legislation has been universally recognized as valid, for the reason that, although it authorizes acts to be done outside of the country where it is enacted, and specifies in what manner they may be done, still the acts themselves relate to the internal affairs of the state over which it has acknowledged jurisdiction, and has no tendency to interfere with the sovereignty of other states in which they may be performed. The act authorized by the law in question seems to be purely of this character. It is the expression of the will of an elector of this state in regard to an office to be held and exercised here. It is an act that relates as entirely to the internal concerns of this state, and is as free from all tendency to interfere with the sovereignty or jurisdiction of any other state where the ballots might happen to be cast, as are any of the acts authorized by the legislature just referred to. This state has the acknowledged power of providing in what manner title to the soil here may be transferred. It provides a mode by which it may be done in other states, and if so done the transfer is valid. It has equal authority to provide the mode in which the elector shall cast his ballot. It provides that he may do it in another state. If so done, why is the act not equally valid with the other? I can see no distinction in principle between them, so far as it relates to the power of the state to authorize them to be done outside of its territorial jurisdiction; or, rather, if there is any distinction it is in favor of the law authorizing the ballot, for that is a matter entirely between the state and its own citizens. * * * * * * * It may not only pass permissive laws in respect to them when beyond its limits, but also laws which are binding and obligatory upon them everywhere, and for the violation of which they may be punished when-

ever the state can find them within its jurisdiction. * * * * * * It seems to be well established that every nation has the right to punish its own citizens for the violation of its laws, wherever committed. This right is based upon the duty of allegiance, and it does not rest upon the assumption that one state can extend its laws into another so as to make them directly operative there, or impose any obligation on such other state to observe them, or give any effect to them, but merely that they may be personally binding upon the citizen of the state which enacts them, and justify his punishment for their violation by such state when he returns within its limits. * * * * * I am unable to say, therefore, that the provisions of this law providing for the punishment of illegal voting under it might not be enforced against the citizens of this state who should violate it abroad, if they should afterwards be found here."(*d*)

§ 315. The doctrine, recognized in the above quotation, of the responsibility of citizens for acts done abroad, a responsibility resting upon their allegiance, is quite generally recognized as a reasonable safeguard. Yet it is, of course, subject to the qualification that the laws in regard to such acts can only be enforced, or have operation, within the jurisdiction enacting them, and not within the foreign jurisdiction where the acts were committed, any further than to the very limited extent defined by the *comitate gentium*.(*e*) The principle is thus stated: "Although the laws of a nation [or state] have no direct binding force, or effect, except upon persons within its own territories, yet every nation has a right to bind its own subjects, by its own laws, in every other place,"(*f*) subject to the limitation just stated, as to the *execution* of those laws.

§ 316. This matter has been set forth very clearly by *Christiancy*, J., in a separate opinion, given in a Michigan case, wherein he says: "It is well settled, as a general principle, that the laws of no nation have any extra-territorial

(*d*)State *ex rel. v.* Main, 16 Wis. 413–422, *passim*.

(*e*)Story's Confl. of Laws, §§ 540, 22.

(*f*)Ibid, § 21

force; that criminal laws, especially, cannot operate beyond the territorial limits of the government by which they are enacted. From this principle, mainly, but not entirely, results another general principle, that to give any government, or its judicial tribunals, the right to punish any act, or transaction, as a crime, the act must have been committed, or the transaction must have occurred, within its territorial limits. Hence, by the common law, which, in this respect, has always been acted upon in the United States, criminal offences are considered as entirely local. Story Confl. Laws, § 620. But the general principle, that the laws of a country cannot render an act criminal when committed beyond its limits, is subject to some qualifications, or exceptions. Thus, every sovereignty has the right, subject to certain restrictions, to protect itself from, and to punish as crimes, certain acts which are peculiarly injurious to its rights, or interests, or those of its citizens, *wherever committed*—at least, if committed by a citizen or subject of such sovereignty; and, *unless* calculated to injure the sovereignty, or its citizens, no government can have any legitimate right to punish offences committed within or without its limits. Most crimes are brought within this principle, and become injurious only by reason of being committed within such limits. In general, they have this effect only when so committed. But when committed within the territory they must always have this effect to a greater or less extent, as they tend to endanger the peace and good order of the community, or the property, interests, or lives of its citizens, to obstruct the laws, or to bring them into contempt, if not enforced. Hence, also, it becomes the duty of every government to repress crimes within its own dominions. But, though crimes in general thus become injurious to the sovereignty only when committed within its territories, there are exceptional cases, standing upon peculiar grounds, as already intimated. Thus (without attempting to enumerate all) the citizen may commit treason by acts or combinations abroad; the commerce of a nation may be injured, or its pacific relations with other governments endangered, by the criminal conduct of the crews

or passengers of its ships in foreign ports. In such cases, the offender may be punished by the government of which he is a citizen, with this qualification, that he be afterwards found within the territory or jurisdiction of the latter, or be brought there without a violation of the rights of the sovereignty within which the act was committed; for he cannot be arrested there without the consent of the latter."(g)

This doctrine is assented to, I believe, by all civilized nations, and thus may be said to have a permanent place in international law.

§ 317. Upon the general principle that acts committed within the jurisdiction are subject to the jurisdiction, one who perpetrates an offence within a state, by means of an agent, or letter, or other means, is punishable, though he himself did not enter the jurisdiction to perform the act. Sometimes, however, where the distinction prevails of principal and accessory—as in felonies—one procuring an act to be done elsewhere is considered an accessory before the fact, and his crime is held to be completed where his plan was set on foot, so that he is only responsible within that jurisdiction. But as, in misdemeanors, there are no accessories, (and also where a statute abolishes the distinction in felonies,) the rule is different therein. Also, where the distinction prevails, it is usually held that one is a principal who employs an innocent agent—as, for example, one to administer poison who does not know that the drug is poisonous; but an accessory only, where he employs an intelligent agent, as actor, who is aware of the nature of the transaction; and then the latter is the principal.

Thus the matter is stated by the New Jersey court: "The rule, therefore, appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency, or by a sentient agent, who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise

(g) People v. Tyler, 7 Mich. 221.

the anomaly would exist of a crime, but no responsible criminal. * * * * * * * If, then, the accessory, by the common law, was answerable only in the county in which he enticed the principal, and that, too, when the criminal act was consummated in the same county, it would seem to follow, necessarily, in the absence of all statutory provision, that he is wholly dispunishable when the enticement to the commission of the offence has taken place out of the state in which the felony has been perpetrated. Under such a condition of affairs it is not easy to see how the accessory has brought himself within the reach of the laws of the offended state. His offence consists in the enticement to commit the crime; and that enticement, and all parts of it, took place in a foreign jurisdiction. As the instrumentality employed was a conscious, guilty agent, with free will to act, or to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer."(*h*)

Thus, in the misdemeanor of defrauding by false pretences, it is held that the offence is committed where the false pretences are successfully used, and thus take effect, even where the fraud originated and was continued in another state.(*i*) If one fires a gun across a boundary, and kills a man in another state, the crime is committed in the latter, where the shot took effect.(*j*) Where a child, an idiot, or a madman, is induced to commit a felonious act, the principal is punishable for the act, although not present at its commission. And so, if one procures an innocent boy to pass a counterfeit note.(*k*) And the principle on which this is based is the maxim of the common law itself, *Qui facit per alium, facit per se*, which has been declared by the Connecticut court to be of "universal application, both in criminal and civil cases;" so that "he who does an act in this state, by his agent, is considered as if he had done it in his own proper person."(*l*) And so the

(*h*)State *v.* Wyckoff, 2 Vroom, (N. J.) 68, 69, *passim*.

(*i*)People *v.* Adams, 3 Denio, (N. Y.) 190.

(*j*)United States *v.* Davis, 2 Sumn. 485.

(*k*)Commonwealth *v.* Hill, 11 Mass. 136.

(*l*)Barhamstead *v.* Parsons, 3 Conn.* 8.

supreme court of New York say: "True, the defendant was not personally within this state, but he was here in purpose and design, and acted by his authorized agents. *Qui facit per alium, facit per se.* The agents employed were innocent, and he alone was guilty. An offence was thus committed, and there must have been a guilty offender; for it would be somewhat worse than absurd to hold that any act would be a crime if no one was criminal. Here the crime was perpetrated within this state, and over that our courts have an undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal. *Crimen trahit personam.*

"For all civil purposes a person out of this state may act by procuration within its limits, and thus, although absent at the time, he may become subject to the state law. Rights may thus be acquired by the absent party, as he may also become civilly liable under the laws of this state for what is done here by his authorization and procurement. The individual remedy, in such case, is perfect; and if the criminal law of the state is thus violated, why should not the absent offender be responsible criminally when afterwards found within the state? In authorizing another to act for him, the principal so far voluntarily submits himself to the law of the place where the authorized act is to be performed. This is confessedly so, for all civil purposes. If an act thus authorized results in wrong to an individual, his right to redress against the principal, though absent, is undoubted. As to the person injured, the local law was violated by the absent wrong-doer; and if the act done was also a violation of the local criminal law, is the author and procurer of the deed guiltless? Does the law hold him to have been within its jurisdiction so far as respects the civil remedy, but not for the purpose of punishment."(*m*)

Where the statute makes the crime of the accessory before the fact a substantive felony,—thus, in effect, making him a principal,—he can be punished where the principal act constituting the crime was committed, even if the crime is made the subject of separate prosecution and punishment instead

(*m*) People *v.* Adams, 3 Denio, 210.

of being included in an indictment with the principal offence; this provision not changing the definition, the facts and circumstances, or the proof.(*n*)

In matters of libel, the crime is held to be committed where the paper containing it is actually received and circulated.(*o*) And this is on the general principle above stated, the act being performed by a material agency.(*p*)

§ 318. According to Mr. Wharton, the principle involved in the case of *People* v. *White*, 1 Taylor, (N. C.) 65, does not always apply to a foreign jurisdiction; for if one establishes a manufactory within the boundaries of Mexico, for example, to forge United States securities, he holds that he may be punished, if arrested, in the United States. But he gives some peculiar grounds for this, it will be observed, namely: "Because, *first*, in countries of such imperfect civilization penal justice is uncertain; *second*, because Mexico holds that we have jurisdiction, and that therefore she will not exert it; *third*, because, in cases where, in such countries, the local community gains greatly by the fraud, and suffers by it no loss, the chances of conviction and punishment would be peculiarly slight; and, *fourth*, because all that the offender would have to do, to escape justice in such a case, would be to walk over the boundary line into the United States, where, on this hypothesis, he would go free." He adds: "In political offences there is this further consideration, that it is now an accepted doctrine of international law that no government will punish a refugee for treason against his sovereign, and hence a government, on the hypothesis here disputed, would have no redress for offences directed abroad by refugees against its sovereignty, even though the offenders were its own subjects, and should, after the commission of the offence, return to its soil."(*q*)

The patent objections to this passage are: *First*, as to the

(*n*)Commonwealth *v.* Smith, 11 Allen, 257.

(*o*)Commonwealth *v.* Blanding, 3 Pick. 304.

(*p*)On this general subject see, also, State *v.* Chapin, 17 Ark. 561, and cases there collected; Commonwealth *v.* Gillespie, 7 S. & R. (Pa.) 477; People *v.* Rathburn, 21 Wend. (N. Y.) 509.

(*q*)Wharton on Crim. Law, § 210.

last sentence, it is equally applicable to all crimes as well as political offences, and we have considered before the jurisdiction exercised over offences against the internal order of a state committed by subjects abroad, and also those committed within the jurisdiction by those not present in it; *second*, while the mere manufacturing of United States securities, confined to Mexican soil, might not be cognizable in the United States, the act of uttering and passing the counterfeit money within the United States would certainly be punishable here; and this uttering would, of course, be the substantive offence, since, without this, the mere manufacturing would be altogether harmless; so that we could have jurisdiction on the generally acknowledged principle, without any necessity of combating a visionary "hypothesis." It is somewhat similar to the case where homicide is punishable by *administering* poison, and one sends the poison prepared, and with directions, by a person who carries it into another local jurisdiction, and there takes it according to directions, and is poisoned; the administering is held to be where it was taken, and there, therefore, is the venue of the crime.(*r*)

§ 319. In Iowa it has been held that the jurisdiction in a case of abortion belongs to the county where the medicine was administered, and not where the miscarriage takes place; so that the provision of the statute, that where a public offence is partly committed in one county and partly in another, or where the acts or effects constituting the offence occur in different counties, the jurisdiction may be exercised in either, does not apply, because the administering the medicine with the intent charged makes the offence complete.(*s*) The principle of this is precisely that which has been already explained, as to a case where a mortal blow is struck in one state and the death occurs in another.

§ 320. This leads us to notice another class of offences, made up of distinct essential constituent acts, performed in different jurisdictions, whether of counties, states or nations. Mr. Wharton states the matter concisely thus: "Since, however, a crime may be organized in one country, advanced in

(*r*)Robbins *v.* State, 8 O. St. 131. (*s*)State *v.* Hollenbeck, 36 Ia. 112.

a second, and executed in a third, it is necessary to conceive of the crime in question as broken up into several sections, committed in distinct jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists, and such would, no doubt, (*e. g.*, under indictments for treason or conspiracy, where every overt act would give the local court jurisdiction,) under similar circumstances, be the practice of the English common law. And the same reasoning applies to all offences which are carried on in two or more jurisdictions. At the same time, it must be kept in mind that an attempt to commit, in a foreign state, an act lawful in such state, though unlawful in the place of the attempt, will not be punishable in the latter state. It has been held that, in such case, in adjusting the sentence, the grade of the consummated offence will be taken into consideration, and a punishment adequate to the whole imposed, allowing for what may have been inflicted by other tribunals. But on this point there is some conflict. Foreign jurists have, and not without reason, held that when an illegal transaction has been carried on in several territories, each territory can only punish for that segment of the crime committed within its own bounds. In the United States this is a question of growing importance. In England, by statute, wherever a felony or misdemeanor is committed in one county, and completed in another, the venue may be laid in either county; and offences committed when traveling may be laid in any county through which the passenger, carriage or vessel passes. Embezzlement or larceny can, therefore, in England, be tried in any county into which the spoils of the offence are brought. And similar statutes exist in most of the United States. When goods are stolen in one country, and brought by the thief into another country, the latter country, by the English common law, has no jurisdiction. In the United States, however, it has been held to be within the constitutional province of each state to pass statutes giving the country of arrest, in which the goods are so brought, jurisdiction. And, as between the several United States, this jurisdiction has been, in Massachusetts, Connecticut, North Carolina, Maryland, Kentucky, Mis-

sissippi, Missouri, Iowa, Oregon and Ohio, ruled to exist at common law. In other states such jurisdiction was held not to exist without a statute; and yet the statute conferring the jurisdiction has been held to be constitutional. In Vermont it has even been held that when the goods are stolen in Canada, and brought into Vermont, the Vermont courts have jurisdiction."(*t*)

In continuing crimes, as where property is stolen in one state and asported into another, it is no plea that the offender is liable to punishment in the state where the goods were taken, on an indictment in the state where the property was carried with a felonous intent. And the supreme court of Kentucky thereon quotes approvingly the language of Judge Sedgwick, in Massachusetts, uttered with reference to the argument that the offender, in such case, would then be liable to punishment in two states: "And wherefore should he not? For myself, I feel no such tenderness for thieves as to desire that they should not be punished whenever guilty. If they offend against the laws of two states, I am willing they should be punished in both."(*u*) And in Mississippi the matter is correspondingly placed upon the ground that every moment's continuance of the original trespass amounts to a new caption and asportation, which is certainly carrying the principle to its extreme limit. And it is so placed in order to bring the case within the general rule that the laws of the state can only be applied to crimes committed in the state.(*v*)

In New York it is held to be a defence that the prisoner was convicted or acquitted for the original larceny, but the court say, per *Savage*, C. J.: "The legislature have, indeed, been more tender of the offender than in my judgment was necessary, by permitting him to plead a conviction or acquittal for the same offence, meaning the original larceny."(*w*)

As to counties in that state, it has been held that in cases of misdemeanors, where the offence is made up of two mate-

(*t*) Wharton's Crim. Law, §§ 210*w*–210*x*.

(*u*) Ferrill *v.* Commonwealth, 1 Duv. 158.

(*v*) Watson *v.* State, 36 Miss. 608, and many cases cited.

(*w*) People *v.* Burke, 11 Wend. 131.

rial acts, or events, done, or happening, in different counties, the venue may be laid in either.(*x*) And as to states, it is held no answer to an indictment that the prisoner owes allegiance to another state or sovereignty.(*y*)

In Massachusetts it has been held that the accessory may be sentenced to pay treble damages to the owner of the goods, just as the principal could under the statute.(*z*) But the matter is confined to asportation from other states, and is held not to apply to goods stolen in a foreign territory, (as the British provinces,) under the jurisdiction of an independent government, between which and the state there is no other relation than that effected by the laws of nations.(*a*) And in a later case, *Thomas*, J., very elaborately and vigorously dissented from the doctrine as between the states themselves.(*b*)

In Iowa "it is held that when stolen property is brought into the state the crime of larceny is completed, in any county into which the property is brought by the thief, and he may be indicted in any such county."(*c*)

In Ohio the doctrine is established, but with an able dissent in one case, on the part of *Read*, J., who sharply inquires: "Upon what principle can it be held, in Ohio, that a person found in the possession of a thing stolen in a sister state should be construed to have stolen the thing in Ohio? Not upon the common-law principle; for the common law expressly forbids it. Not upon a statute of this state; for there is none. Shall it be upon usage? This would be a novelty in a state where no man can be punished for a crime unless the offence be specifically defined by a statute of the state, prescribing the exact punishment. Shall it be from the necessity of the case, lest a rogue escape? Necessity confers no criminal jurisdiction, and is the well-known plea of tyrants."(*d*) But does not necessity confer criminal jurisdiction—as in the case of pirates, crimes committed abroad on

(*x*) People *v.* Rathburn, 21 Wend. 536.

(*y*) Adams *v.* People, 1 Coms. (N. Y.) 177.

(*z*) Commonwealth *v.* Andrews, 2 Mass. 29.

(*a*) Commonwealth *v.* Uprichard, 3 Gray, 439.

(*b*) Commonwealth *v.* Holder, 9 Gray, 7.

(*c*) State *v.* Bennett, 14 Ia. 479.

(*d*) Hamilton *v.* State, 11 Ohio, 439.

the high seas, and crimes committed in deserts and waste places, without government? And, if necessity be once admitted to be a principle of jurisdiction at all, in any case, who will say where it shall stop short of providing everything necessary to prevent a complete failure of justice, and a breaking down of the barriers of protection to person and property?

In Missouri "the asportation is met with the full penalty of larceny,(*e*) and even if it be by a bailee, who obtains possession under pretence of hiring."(*f*)

In Pennsylvania it was held, in 1813, that one who carried goods into that state, which he had stolen in another, could only be treated as a fugitive from justice.(*g*)

§ 321. Foreigners committing a crime in time of peace, within a jurisdiction, are punishable the same as citizens. Nor does the adoption of the act by the country to which they belong oust the jurisdiction to punish the individual. The celebrated McLeod case, which so imminently threatened war between this country and Great Britain, developed this matter in a very elaborate decision of the New York supreme court, which held, in regard to this adoption of an act by the government to which the offender belonged, the following views, supported by authority:

"What is the utmost legal effect of a foreign sovereign approving of a crime which his subject has committed in a neighboring territory? The approval, as we have already in part seen, can take nothing from the criminality of the principal offender. Whatever obligation his nation may be under to save him harmless, this can be done only on the condition that he confine himself within her territory. Vattel, book 2, c. 6, § 74. Then, by refusing to make satisfaction, to punish or deliver him up on demand from the injured country, or by approving the offence, the nation, says Vattel, becomes an accomplice. Id. § 76. Blackstone says an accomplice or abettor. 4 Com. 68. And Rutherford, still more nearly in the language of the English law, an accessory after

(*e*) Hemmaker *v.* State, 12 Mo. 453.
(*f*) State *v.* Williams, 35 Mo. 229.
(*g*) Simmons *v.* Commonwealth, 5 Binn. 617.

the fact. Book 2, *c.* 9, § 12. No book holds that such an act merges the original offence, or renders it imputable to the nation alone. The only exception lies in the case of crime committed by an ambassador, not because *he* is guiltless, but by reason of the necessity that he should be privileged, and the extra-territorial character which the law of nations has therefore attached to his person. Hence, say the books, he can be proceeded against, not otherwise than by a complaint to his own nation, which will make itself a party to his crime if it refuse either to punish him by its authority, or to deliver him up to be punished by the offended nation. Ruth. book 2, *c.* 9. § 20. Independently of this exception, therefore, Rutherford insists, with entire accuracy, that 'as far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us, as well as upon him.' Ruth. book 1, *c.* 17, § 6. A nation is but a moral entity, and, in the nature of things, can no more wipe out the offence of another, by adopting it, than could a natural person. And the learned writer just cited accordingly treats both cases as standing on the same principle. Book 2, *c.* 9, § 12. 'Nothing is more usual,' says Puffendorf, 'than that every particular accomplice in a crime be made to suffer all that the law inflicts.' Book 3, *c.* 1, § 5. Vattel says of such a case, (book 2, *c.* 6, § 75:) 'If the offended state has the offender in her power she may, without scruple, punish him.' Again, if he have escaped and returned to his own country she may apply for justice to his sovereign, who ought, under some circumstances, to deliver him up. Id. § 76. Again, he says, she may take satisfaction for the offence herself, when she meets with the delinquent within her own territory. Book 4, *c.* 4, § 52. I before cited two instances in which positive orders by his sovereign, to commit a crime, are distinctly held to render both the nation and subject obnoxious to punishment. Vattel, book 3, *c.* 2, § 15. Same, book 1, *c.* 6, § 75. *Vide*, also, 1 Burrill, part 2, *c.* 1, § 10.

"Was it ever suggested by any one, before the case of McLeod arose, that approval by monarchs should oust civil jurisdiction, or even so much as mitigate the criminal offence?

Nay, that the coalition of great power with great crime does not render it more dangerous, and, therefore, more worthy of punishment under every law by which the perpetrator can be reached?"(*h*)

§ 322. As to the obligation of extradition of criminals there has been a decided conflict, even among the most eminent jurists. But the weight of authority is, doubtless, that it is a matter of comity and of treaty. Whatever obligations may be supposed to exist relate only to such crimes as are universally recognized by the law of nations, and which, therefore, are punishable in all. But it has been stoutly contended, by eminent men, that no obligations exist any where except by virtue of treaties specially providing for the extradition of accused persons. And especially is it held that, independent of treaty, a surrender cannot rightfully be made to a state where a fair trial cannot be had in the demanding country; as, where a surrender would expose the fugitive to a barbarous punishment, revolting to a civilized jurisprudence; and the surrendering country may even impose conditions as to the way in which the fugitive shall be tried. And further, even under treaty, a fugitive will not be surrendered where the demanding country proposes to subject him to a punishment in an oppressive trial, not within the contemplation of the parties when the treaty was adopted. Nor, in general, ought there ever to be any extradition, by treaty or otherwise, for mere political offences, on account of the usual want of moderation which characterizes the punishment of such offences, and especially on account of the fact that what constitutes treason is so variously defined in different countries.(*i*) And even between the different states of the Union it is held that, if there is not to be a fair trial in the demanding state, extradition may be properly refused. And on this ground, it seems, Judge Blatchford, in New York, in the year 1873, refused to grant a warrant to surrender Charles A. Dana to the authorities of the District of Columbia, because

(*h*) People *v.* McLeod, 25 Wend. (N. Y.) 595.

(*i*) Whart. Crim. Law, §§ 2956–7.

there he was to be tried before a police court, where juries were only allowed, after conviction, on appeal.(*j*)

Moreover, it is held that no extradition should be granted except on a pledge that the person surrendered shall not be tried on any other than the alleged offence;(*k*) although in the recent Winslow case, the United States government refused to give such a pledge, and the probable consequence is the abrogation of our existing treaties on this subject with Great Britain, or a remodeling of them, at least. [This result did not follow as I supposed it would when the passage above was written in the text. But the principle claimed by Great Britain is the true one, I think.] Where an extradited prisoner pleaded that, under the British act of 1870, he was exempt from trial for any other offence than the one specified in the demand, and that the president of the United States had, accordingly, directed the district attorney not to proceed against him for any other charges, the United States district court for the southern district of New York, wherein indictment was pending, held that there is nothing in the nature of extradition proceedings to give the immunity claimed; that the treaties of 1842 and 1848, and the act of congress of 1869, gave no such privileges; and that the British act of 1870 could not control those treaties; and that no order of the president could have any legal effect to restrict or enlarge the jurisdiction of the courts acting under the United States statutes. *U. S.* v. *Lawrence*, 13 Blatchf. 295. The Kentucky court has placed a different construction on the treaty of 1842, and has held that the prohibition is therein contained by reason of the language and general scope of the treaty, though not expressed in plain terms, and that, therefore, a prisoner cannot be tried for any other offence than that for which he was extradited; although, if, after a full discharge from custody, and reasonable time allowed, he returns or remains voluntarily within the jurisdiction, he may be proceeded against in the usual manner. *Commonwealth* v. *Hawes*, 13 Bush. 697.

Extraditions for military offences are not common, and when

(*j*) Whart. Crim. Law, § 2953*a*. (*k*) Ibid, §§ 2965*a*, 2958.

granted are subjected to very rigid limitations; and as to subjects of the asylum state it has been declared: "The true rule is that wherever, by the jurisprudence of a particular country, it is capable of trying one of its subjects for an offence alleged to have been committed by such subject abroad, the extradition in such case should be refused, and the asylum state should reserve to itself the right of trying its own subject by its own laws. When, however,—as is the case with England and the United States,—it does not assume jurisdiction of extra-territorial crimes, (with certain marked exceptions,) then extradition should be granted;" and where the asylum state has itself jurisdiction on other grounds, as where an offence was committed on the high seas, it is held that extradition should not be acceded to.(*l*)

These are some of the outlines of jurisdiction acquired by extradition under the law of nations, or under treaties. It is held that a treaty only embraces actually enumerated crimes, and that herein a greater crime does not include the less; as, for example, murder does not include manslaughter. *Kelley's Case*, 2 Low. 339. We notice further some of the adjudicated cases in order more fully to explain this highly important matter.

As to extradition between the states of the Union it is required by the U. S. St. of 1793, (1) that the demand be made by the executive of the demanding state; (2) that there be a copy of an indictment, or an affidavit before a magistrate charging the crime, furnished with the demand; and (3) that such copy be certified by the executive to be genuine. It is not needful to set out evidence of guilt; the legal accusation is a sufficient basis for the surrender.(*m*) It must, moreover, appear that the crime was committed in the state demanding, and that the offender fled from justice.(*n*) And all these facts must be stated distinctly, and cannot be merely inferred from the statements actually made.(*o*)

(*l*)Ibid, §§ 2959, 2960, 2961.

(*m*)Kingsbury's Case, 106 Mass. 228.

(*n*)Smith's (the Mormon prophet's) Case, 3 McLean (U. S.) 132.

(*o*)Heyward's Case, 1 Sand. (N. Y.) 707.

However, an arrest may be made in order to a surrender, before an actual requisition arrives, and it is not necessary, in order to warrant such arrest or surrender, that the crime charged should constitute an offence at common law.(*p*)

As to foreign powers, under the extradition treaty with Great Britain of 1842, and under the prior one of 1795, the matter of surrendering a fugitive from justice has been held not to rest alone in the discretion or judgment of the president; but if he was first satisfied that a proper case was made to justify an inquiry, the demandants were referred to the judiciary, and it seems that the judiciary might even go into an inquiry as to the truth of the charge, so far, at least, as a grand jury does in order to make a presentment; the treaty itself expressly providing that the surrender shall not be made until the crime is established according to the laws of the country wherein the fugitive is found.(*q*) In this matter, also, it has been held that states, if they please, may properly pass laws at discretion, to aid congress in fulfilling the requirements of the treaty, and if those laws are consistent with those passed by congress, they will be deemed valid and encouraged.(*r*) And so, state judges may act as well as national judges in the necessary preliminary examinations.(*s*) But all proceedings must be under statute, since a treaty cannot execute itself,

(*p*)Fetter's Case, 3 Zabr. 311.

And it is held that a legislature may authorize the arrest and detention of a person alleged to be a fugitive, in order to await a requisition, and, in so doing, may impose conditions at pleasure which must be complied with. *Rosenblat's Case*, 51 Cal. 285. And a suspected person, on proper complaint and evidence, may be held long enough to communicate with another executive in relation to a requisition not yet made. Romaine's Case, 1 Utah T. 23.

(*q*)Kaine's Case, 14 How. 140; The British Prisoners, 1 W. & M. 69, 72.

(*r*)Page 71.

(*s*)Heilbonn's Case, 1 Park Crim. R. (N. Y.) 429.

A judge of the United States can act on a complaint, and issue his warrant, without any previous application having been made to the president; but he is not, in such case, to consider whether the complaint has been authorized by a foreign government. He is merely to inquire into the evidences of criminality; and if he regards these as sufficient to sustain the charge made, his duty is to certify it to the secretary of state. And it is not necessary that the accused be confronted with the witnesses against him. Dugan's Case, 2 Low. 367.

and neither the president, nor the courts, can act under a treaty except in pursuance of a statute.(*t*) And the same rule, as a matter of course, applies to the executive authorities of a state in matters of foreign extradition.(*u*) In Illinois, Governor Cullom, in 1879, recalled his warrant on requisition even after the demanded persons had been arrested under the warrant, but before they had been taken out of the state, which would indicate that the power of revocation, in his opinion, exists so long as the prisoners are within the state, even though delivered. There seems to be no legal principle to authorize such a view of the matter. But a governor's error herein is practically remediless.

An application may be heard by a United States district judge, at chambers, and his decision thus is final and decisive, and cannot be appealed from.(*v*)

(*t*) Metzger's Case, 1 Barb. (N. Y. 248.

(*u*) Holmes *v.* Governor, 14 Pet. 558; Holmes' Case, 12 Vt. 635.

(*v*) Metzger's Case, 5 How. 191.

CHAPTER VI.

BANKRUPTCY.

§ 323. Original jurisdiction in bankruptcy.
324. Disability of district judge.
325. Exercise of jurisdiction as to terms.
326. Appearance.
327. Pending suits in other courts.
328. Assignee as party in other courts.
329. Effect of bankrupt laws on state insolvent laws.
330. Acts of bankruptcy.
331. Preference of creditors.
332. Minors.
333. Defence by debtor.
334. Discharge without jurisdiction.
335. Subsequent creditors.
336. Beginning of proceedings.
337. Prior liens.
338. Conflict of jurisdiction between federal and state courts.
339. Concurrent jurisdiction between district courts.
340. Accounting between members of a bankrupt firm.
341. Ousting jurisdiction by payments.
342. Protection of debtor from arrest by state court.
343. Extent of bankruptcy jurisdiction.
344. Bankruptcy by a corporation.

§ 323. The original jurisdiction in bankruptcy proceedings is, by act of congress, vested exclusively in the district courts of the United States, and extends to collecting and disposing of all the bankrupt's assets, ascertaining and liquidating liens with regard to their priorities, and making due distribution of the funds to all the creditors. However, there is, in the circuit courts, a kind of semi-appellate jurisdiction for revisory and perhaps advisory purposes. But this relates wholly to cases or questions previously arising in the district courts, and there is no mode of transferring the original jurisdiction from the district to the circuit courts, since the two courts have no concurrent jurisdiction therein, and the act of congress makes

that of the district court exclusive as to the original powers; and accordingly the circuit court has no power even to make orders in specific enforcement or execution of the orders or decrees of the district court. And in a case where a party sought such an exercise of jurisdiction, the court remarked that the claim could "only rest upon the ground that, by force of the language of the second section of the congressional act, it is competent for the parties to come into this court, and seek original orders and decrees in the due and ordinary course of such proceedings, either to facilitate the completion thereof, or to carry them into effect; that the proceedings having been duly instituted, the parties have an option to apply to either court to expedite, or consummate, the same; and, in short, that, so soon as such proceedings have been begun, they may be continued in either court, or partly in one and partly in the other. And yet, when this claim is thus broadly stated, no counsel will, we think, seriously insist that the section warrants so unprecedented and extraordinary a confusion of jurisdiction."(a)

§ 324. However, where a district judge is under any disability, the circuit judge may, according to the act of congress of June 30, 1870, make needful rules and orders, to prepare for a final hearing, and cause the same to be entered of record by the clerk of the district court, who may issue also, upon such orders or rules, any necessary notifications. And the supreme court of the District of Columbia has the jurisdiction of the district court generally, as also the supreme courts of the territories have.

§ 325. The exercise of bankruptcy jurisdiction does not depend upon time or place within the district, but the courts are considered always open, and business may be transacted in these matters either in vacation, or in term time, and, on notification, they may sit at any place within the district.

§ 326. Process may be waived, and appearance will confer jurisdiction, even if the party resides outside of the district. And a party proving his claim is thus in court by his voluntary act, and may be served with the copy of an order,

(a) Bininger's Case, 7 Blatch. C. C. 163, 166

although living out of the district. And jurisdiction thus attaching by a voluntary appearance cannot subsequently be withdrawn.(*b*)

§ 327. The jurisdiction is not only exclusive, but proceedings thereby transfer, on due notice, all pending suits in other courts to the supervision of the bankrupt court, insomuch that the assignee, when appointed, is to be substituted therein to conduct the suits as a party. The interference, however, only extends so far as is necessary for the efficient exercise of the bankruptcy jurisdiction, in the disposition of the bankrupt's assets.(*c*) And if the proceedings in other courts are directly in violation of the bankrupt law, there is the power of direct interference, according to most authorities, although the doctrine has not obtained universal acquiescence.(*d*)

§ 328. When an assignee has been appointed, he may sue and defend in courts, much as an ordinary party may. And so, an assignee may come into a state court to set aside a mortgage executed in fraud of the bankrupt law, since a state court may aid in carrying out the provisions of the bankrupt law. *Isett* v. *Stuart*, 80 Ill. 404; *Ward* v. *Jenkins*, 10 Met. 583; *Stevens* v. *Savings Bank*, 101 Mass. 109; *Forbes* v. *Howe*, 102 Mass. 428; *Hastings* v. *Fowler*, 2 Carter, (Ind.) 216; *Brown* v. *Hall*, 7 Bush, 66; *Mays* v. *Manuf. Nat. Bank*, 64 Pa. 74; *Cook* v. *Whipple*, 55 N. Y. 160; *Cogdell* v. *Exum*, 69 N. C. 465; *Whiteridge* v. *Taylor*, 66 N. C. 273; and circuit court of United States for North Carolina district, in *State of N. C.* v. *University*, 65 N. C. 714, (appendix.) *Contra*: *Brigham* v. *Claflin*, 31 Wis. 607; *Voorhes* v. *Frisbee*, 25 Mich. 476—on the ground that a state court cannot lawfully assume jurisdiction under the laws of the United States. The courts in the majority, however, sustain the jurisdiction merely on the ordinary basis of jurisdiction, with the assignee as a party.

§ 329. The effect of the bankrupt law upon the insolvent laws of the states is to suspend their operation while the bankrupt law continues in force.

(*b*) Bump on Bankruptcy, (5th Ed.) 172, 173.

(*c*) Ibid, 174.

(*d*) Ibid, 179.

§ 330. In involuntary bankruptcy, there must be an *act of bankruptcy* before a district court can entertain a petition of creditors. The leading act specified by the law is the failure of a banker, merchant, or trader, who has suspended payment of his commercial paper, to resume within fourteen days. This is held *prima facie* evidence of fraud; and unless such inference is rebutted, affirmatively, a creditor's petition to adjudge him a bankrupt will be entertained and granted.(*e*) The stoppage must be fraudulent, at least presumptively; but then there is no necessity that the failure to resume should, in itself, be fraudulent. Even if there be no fraud, yet if it continues fourteen days there is an act of bankruptcy, and that, too, if there were no actual fraud in the original stopping, as above stated. Such actual fraud is, of itself, an act of bankruptcy as to the stoppage, and a petition thereon may be immediately preferred without waiting for the fourteen days. The failing to resume is in itself presumptively fraudulent, but the presumption may be rebutted.(*f*) And a disproof of fraud in the original stoppage, and of the presumption of fraud arising from the fourteen days' suspension, will oust the jurisdiction of the bankrupt court.(*g*)

But, as a matter of course, a refusal to pay, based on the ground of a legal defence against the payment, is not such a stoppage, or suspension, as is contemplated by the bankrupt law.(*h*) And the legal defence may exist only in the *bona fide* belief of the debtor, and if it should turn out that he was mistaken therein, the refusal is not an act of bankruptcy.(*i*) In a case where a note was in suit, in New York, the plaintiff petitioned the district court for an adjudication of bankruptcy, on the ground that the debtor had suspended the payment of the note for fourteen days; but the petition was dismissed, with the remark: "It is not for this court to try the question of the actual liability of the debtor on the note, and adjudge that there was a suspension of payment of his

(*e*)Shea & Boyle's Case, 2 Biss. C. C. 156.

(*f*)Thompson & McClallen's Case, 2 Biss. 166.

(*g*)Davis' Case, 3 Ben. 482.

(*h*)Thompson & McClallen's Case, 2 Biss. 168.

(*i*)Westcott's Case, 6 Ben. 135.

commercial paper, if such liability existed. The proper forum for the determination of the question as to such liability is the court in which the suit on the note is pending."(*j*)

The matter is thus stated: "It is not a stoppage, or suspension, within the clause, when a sufficient excuse is shown why the paper was not paid; and even though the suspension may have continued for fourteen days, yet a *bona fide* denial of liability on the paper, in respect to which the suspension occurs, is such an adequate legal excuse that a person ought not to be adjudged a bankrupt solely for suspending for fourteen days on the paper, even though, on investigation, the bankruptcy court may be of opinion that, in fact, the debtor was liable on the paper. See *Davis* v. *Armstrong*, 3 Bank Reg. 6; *In re Thompson*, Id. 45; *In re Hollis*, Id. 82. The true view on this subject is, in my judgment, that laid down in *McLean* v. *Brown*, 4 Bank Reg. 188, by Judge Treat, that the suspension referred to in the act is a general suspension of commercial paper—not the refusal to pay paper in respect to which liability is denied; that a bankruptcy court will not sit to try the validity of the reasons alleged for the non-payment of the paper in respect to which the liability is denied; that it is not a court for the mere collection of debts; that each case must be considered by itself, in connection with the circumstances surrounding it; but that when a party fails to pay his paper for want of means, and continues unable to pay it, he has suspended within the meaning of the act.* It by no means follows that a debtor may not, under certain circumstances, be considered as having really suspended payment, generally, of his commercial paper, although but a single piece of paper is shown to have lain over unpaid for fourteen days. On the other hand, the court must guard against being imposed upon by a denial of liability, which is altogether sham, and not made in good faith. The denial of liability, may, however, be founded on reasons which are not valid, and which would fail as a defence in a direct action on the paper; and yet the denial may be made in good faith, in

(*j*) Mannheim's Case, 6 Ben. 271.

*But the act says "fraudulently," which seems to have been left out of sight by the court here.

such wise that the non-payment cannot be regarded as a stoppage or suspension within the act."(*k*)

Moreover, where one is restrained from applying his assets, it is not an act of bankruptcy not to pay a note presented while the restraint is in force. Thus, where one filed against another a petition in bankruptcy, on which an injunction was issued restraining the alleged bankrupt from disposing of or transferring his property, and then a subsequent petition was filed against him, setting out as an act of bankruptcy that he had refused, for fourteen days, to pay a note falling due after the injunction was served, it was held such refusal or failure was no act of bankruptcy, since it was under a legal prohibition against using his assets to pay the note.(*l*)

The obtaining renewals of commercial paper, or paying under certain circumstances a large discount, when similar commercial paper is selling at equal rates in the market, is not an act of bankruptcy.(*m*)

The making of a general assignment of his property by the debtor, even without preference, is an act of bankruptcy; and that, too, even if the debtor denies any intention to defeat the operation of the bankrupt act in any way, or to hinder his creditors; it being held that in such case fraud is a conclusive presumption, and not to be rebutted by proof of actual intention, since the consequences must necessarily follow, the intention of which is disavowed.(*n*)

§ 331. Any preference to creditors, when a trader is insolvent, is made void by the exercise of bankruptcy jurisdiction, provided the preferred creditor has reasonable grounds to believe that his debtor is insolvent. And, if one obtains a warrant of attorney to confess judgment on a *bona fide* debt, having no knowledge of the insolvency of the debtor, and no means of knowing, but, at the time judgment is actually confessed under the warrant, he has such knowledge, the judgment cannot be sustained.(*o*) And the fact of non-payment of a note against which there is no legal defence, is held

(*k*)Hercules Life Assurance Co.'s Case, 6 Ben. 40.

(*l*)Pratt's Case, 6 Ben. 165.

(*m*)Golson *v.* Nicholl, 2 Biss. 434.

(*n*)Smith's Case, 4 Ben. 1.

(*o*)Golson *v.* Nicholl, 2 Biss. 434.

sufficient to charge a creditor with notice.(*p*) And, also, if a creditor has reasonable cause to believe that the debtor is insolvent, even though he had not actually stopped payment of maturing obligations.(*q*)

The inquiry is not as to what the creditor actually did believe, in regard to the insolvency, but whether he had reasonable grounds to believe the debtor insolvent at the time of receiving a mortgage or other security. And the grounds are to be passed upon by the court when the security is sought to be avoided, and are to be judged according to custom in the place where the transaction occurred, since it is held that the strict definition that prevails in relation to insolvency in commercial centers should not be applied to country places, so that a party is only to be considered insolvent when he fails to meet his debts according to the usages and customs of the place of his business.(*r*)

To render a transaction between a creditor and debtor void, the following elements must co-exist: Insolvency of the debtor, an intention to give a preference to the creditor, and an actual doing or suffering that which works out a preference, on the one hand; and on the other, the receiving the benefit of such thing, the having reasonable cause to believe the debtor insolvent, and the having reasonable cause to believe that a preference was intended.(*s*)

§ 332. But a minor is incapable of committing an act of bankruptcy, and if an adjudication be had, it may be set aside on the application of a creditor, even after the minor comes of age, and even if he himself, after coming of age, files a petition to have the former proceedings confirmed;(*t*) for the fact that he comes into court and ratifies and confirms the proceedings is held to have no effect whatever to give the court authority or jurisdiction as of the time of adjudication.

§ 333. A debtor, in proceedings for an involuntary bankruptcy against him, has the right to dispute the right of the creditor to file a petition; and, for this purpose, to show that

(*p*)Dunning *v.* Perkins, 1bid, 422.
(*q*)Sedgwick *v.* Sheffield, 6 Ben. 22; Grant *v.* National Bank, 97 U. S. 80.
(*r*)Hall *v.* Wager, 3 Biss. 29.
(*s*)Kohlsaat *v.* Hoguet, 4 Ben. 565.
(*t*)Derby's Case, 6 Ben. 233.

the claim is barred by the statutes of limitation of the state where the debtor resides—for it is only valid and enforceable debts that can form a proper basis of adjudication in bankruptcy.(*u*)

§ 334. A discharge, without jurisdiction, is void, whether the discharge is resisted or not.(*v*) And a creditor, in voluntary bankruptcy, may oppose a discharge on the ground of the non-residence of the applying debtor within the district where the application is made, and that notwithstanding the debtor may have a desk in an office within the district, where he did his correspondence, and kept his books and papers, and was engaged in closing up the business of his firm, and did no other business, and had no other place of business.(*w*)

§ 335. A creditor, who became a creditor after the act of bankruptcy complained of, cannot properly be allowed to maintain a petition for adjudication. The debt must exist at the time, although it is not necessary that it should then be due.(*x*)

§ 336. The filing of a petition, and not the service of an order to show cause why one should not be adjudged a bankrupt, is the beginning of proceedings in involuntary bankruptcy; and then the jurisdiction of the court attaches to enjoin third parties from interfering with the debtor's goods, and to issue a warrant to take provisional possession of them to prevent a misapplication.(*y*) And no interest acquired subsequently to the filing of the petition, by proceedings in a state court, or otherwise, with notice, will be valid, or stand against the decree in bankruptcy.(*z*)

§ 337. And even in regard to prior liens it is held they must be submitted to the arbitrament of the bankruptcy court, on notice of the creditor.

Thus, where, under an order from a bankruptcy court, a steamship was delivered to the assignee appointed, and a libel was afterwards filed against the vessel to recover damages for

(*u*)Cornwall's Case, 9 Blatch. 115.
(*v*)Penn's Case, 4 Ben. 100.
(*w*)Little's Case, 3 Ben. 25.
(*x*)Muller and Brentan's Case, Deady, 513.
(*y*)Ibid.
(*z*)Smith *v.* Buchanan, 8 Blatch. 153.

a collision which had happened before the adjudication, the libellants were, on this ground, enjoined from interfering with the vessel in the hands of the assignee.(*a*)

§ 338. On this matter a conflict of jurisdiction may ensue between the federal and state courts; as, for example in relation to the foreclosure of a mortgage, concerning which it is held that, in general, mortgagees should not be permitted to pursue the estate of the bankrupt in the state courts, but should come to the tribunal which, under the federal laws, is charged with its administration, although "special circumstances may sometimes exist in which there is no reason for objection by the assignee; as, for example, where the mortgaged premises are confessedly of less value than the mortgaged debt, and where a foreclosure is pending and proceedings are nearly completed at the time the proceedings in bankruptcy are commenced, it may sometimes be convenient and economical to suffer the validity of the mortgage, and the amount due, to be settled in the state court; and, even then, whether to permit a sale by the decree of the state court or not, will be in the discretion of the court in bankruptcy."(*b*) However, jurisdiction to foreclose a mortgage is not included in the summary powers conferred upon the court by the statute,(*c*) but this must be by regular suit, under the dictation of the court.(*d*) The summary jurisdiction is adequate where, under a lien, it only remains to ascertain and liquidate it.(*e*)

The bankruptcy court may enjoin a foreclosure suit commenced in a state court after the adjudication is made and the assets assigned,(*f*) the injunction not resting directly on the state court, but on the parties.(*g*)

But this power is most vigorously denied in New York,(*h*) in direct opposition to the claim of the district courts, that their jurisdiction is exclusive over the bankrupt's estate,

(*a*)People's Steamship Co.'s Case, 3 Ben. 226.

(*b*)Sacchi's Case, 10 Blatch. 31.

(*c*)Casey's Case, Id. 382.

(*d*)Iron Mountain Co.'s Case, 9 Blatch. 320.

(*e*)Clark's Case, 9 Blatch. 376.

(*f*)Kerosene Oil Co.'s Case, 6 Blatch. 523.

(*g*)Kellogg *v.* Russell, 11 Blatch. 524, *foot note.*

(*h*)Clark *v.* Bininger, 38 How. Pr. 341.

wherever found, and whatever may be the proceedings of state courts in relation to them, and notwithstanding the jurisdiction of the state court may first have attached.(*i*)

Yet the state courts may properly entertain suits, either by or against the assignees, in the common order of proceedings,(*j*) and even for the collection of assets, etc.

§ 339. There may be such a thing as conflict of jurisdiction between two district courts; as, for example, where there is a bankrupt corporation in two districts, such as a railroad company operating its road through both. The rule in such cases, however, is the usual rule of concurrent jurisdiction, namely, the court whose action is first invoked should entertain the case.(*k*)

And it is held, in the northern district of Illinois, that where one has a maritime lien he may, even after the filing of a petition in voluntary bankruptcy by the owner, seize the vessel under a libel in another district; and that the court in the latter district can hear and determine the lien, and the bankruptcy court should accept the determination of the court as to the validity and amount of the lien.(*l*)

§ 340. A state court is the proper tribunal to have jurisdiction of an accounting between the members of a bankrupt firm; and their rights, as regards each other, will not be adjudicated as the out-branch of a proceeding in bankruptcy.(*m*) And where a receiver is previously appointed by a state court, the bankruptcy court will not remove him. And in a case where an application of the kind was made, the court refused it, and said: "Prior to the commencement of the proceedings in bankruptcy the action in the state court was brought, and one of the two receivers was appointed by that court, and such receiver had taken possession of the property in question. The property is still in his possession, and in that of his co-receiver, and the application to this court is that, under these circumstances, the court will sum-

(*i*)Merchants' Ins. Co.'s Case, 3 Biss. 165.

(*j*)Payson *v.* Dietz, 1 Dill. 506.

(*k*)Boston, etc., R. Co.'s Case, 9 Blatch. 109, 409.

(*l*)The Ironsides, 4 Biss. 519.

(*m*)Lathrop's Case, 5 Ben. 202.

marily declare such property to have so been the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and to have so passed to the assignee, by the assignment in bankruptcy to him, as to warrant this court in directing the marshal to forcibly dispossess the receivers, and take the property and put it into the hands of the assignee. The jurisdiction of the state court over the subject-matter of the suit therein, and over the parties thereto, when it was instituted, and the receiver was appointed, and its jurisdiction to appoint such receiver, are, in no manner, impeached or questioned. It is only claimed that, by reason of subsequently transpiring events, this court shall decide that the state court ought to, and shall, by compulsion from this court, be made to give up possession of the property without its being shown that such possession of the property by the state court can be properly adjudged by this court to be void, or invalid, by reason of provisions of the bankrupt act. It would seem to be only necessary to state these propositions to reach the conclusion that this court cannot grant the particular relief asked. The questions involved were considered by this court in the *Case of Vogel*, 7 Blatch. 18. When property is lawfully placed in the custody of a receiver, by the court which appoints such receiver, it is in the custody, and under the protection and control, of such court, for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Peck* v. *Jenness*, 7 How. 612, 625; *Williams* v. *Benedict*, 8 Id. 107, 112; *Wiswall* v. *Sampson*, 14 Id. 52, 66; *Peale* v. *Phipps*, Id. 368, 374; *Taylor* v. *Carryl*, 20 Id. 583, 594–597; *Freeman* v. *Howe*, 24 Id. 450; *Buck* v. *Colbath*, 3 Wall. 334. In the present posture of this case it does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the state court, in respect to the property in question, so as to authorize it to take away from the state court the possession of such property, or to enjoin the receivers from further interfering with such prop-

erty. This court will always be sedulous to enforce its just powers; but it will not demand from any other tribunal anything which it would not itself be willing to concede, under like circumstances. In the case referred to, of *In re Vogel*, it compelled the restitution to an assignee in bankruptcy of property which had been taken away by process of a state court from the custody of this court, and its decision was affirmed by the circuit court, on review. The principle on which restitution was enforced would authorize the state court in the present case to compel restitution to its receivers of such property as this court should take away, by force, from the custody of such state court, and this court might then retaliate; and the confusion and endless strife would ensue which are so forcibly characterized by the supreme court in the opinion delivered in the case of *Buck* v. *Colbath*, before cited."(*n*)

§ 341. If, at any time during the pendency of proceedings in involuntary bankruptcy, the petitioning creditors accept payments which bring the amount below the indebtedness required, namely, two hundred and fifty dollars, the suit will be dismissed for want of jurisdiction in the court, notwithstanding the amount was, at the institution of the proceedings, sufficient to sustain the jurisdiction.(*o*)

§ 342. It is held that a bankruptcy court has jurisdiction to protect the debtor from arrest, under process in a state court, on the ground of fraud, provided the debt is one from which a discharge would release him. But, on the application, the court must try the question of fact involved in the allegation of fraud, for, if the debt was really fraudulently contracted, the discharge will not release it.(*p*)

§ 343. The summary jurisdiction of the bankruptcy court over the bankrupt's person exists no longer than until the discharge is granted; and it cannot afterwards subject him, summarily, to an examination concerning property alleged to have been transferred, or concealed, fraudulently; but a plenary suit is necessary for such purpose, wherein, if the bank-

(*n*) Clark & Bininger's Case, 4 Ben. 97.

(*o*) Kelley's Case, 3 Biss. 262.

(*p*) Glaser's Case, 2 Ben. 185.

rupt be required to make discovery, or be examined as a witness, he will receive the same privileges accorded to parties and witnesses, ordinarily.(*q*)

§ 344. Where a corporation commits an act of bankruptcy, and continues to exist at the time the petition is filed, and the papers are served, it cannot oust the jurisdiction of the bankruptcy court by securing, before the return day, a decree of dissolution. For the purposes of the proceedings it will still be regarded as undissolved, and treated accordingly. A reason given for this is, that, if such a course deprived the court of jurisdiction, "this would be to concede that the legislature of a state might lawfully provide by a statute, to be carried into effect by proceedings in its courts, that the institution of proceedings in bankruptcy, and the service of an order to show cause upon its officers, should operate to dissolve the corporation, to be followed, as a consequence, by a defeat of the jurisdiction of the bankruptcy court."(*r*) And the appointment of a receiver for a corporation—for example, a fire insurance company—by a state court, is an act of bankruptcy.(*s*)*

(*q*) Dale's Case, 11 Blatch. 499.

(*r*) Platt *v.* Archer, 9 Blatch. 569.

(*s*) Merchants' Ins. Co.'s Case, 3 Biss. 163.

*It will be observed that although the bankruptcy act has been repealed, yet the *general principles* have been treated of, with regard to the late law, as if it were still in force.

CHAPTER VII.

CLAIMS AGAINST THE NATIONAL GOVERNMENT.

§ 345. Suing a state or nation in its own courts.
346. Definition of the jurisdiction by the statutes.
347. No equitable jurisdiction.
348. Character in which the United States are sued.
349. Not liable for torts of their officers.
350. Revenue laws not under this jurisdiction.
351. No jurisdiction where state a party.
352. Loyalty as a requisite of parties, and other requisites.
353. Patents not cognizable.
354. Jurisdiction only extends to judgments for money.
355. Where paymaster has had fund stolen.
356. Claims arising under treaty.
357. Reference of claim to commission—award.
358. Salvage services.
359. Equitable jurisdiction.
360. Reference of claim by officer.
361. Indian supplies—*quantum meruit.*
362. Loss by adoption of new rules of inspection—jurisdiction in cases of illegal imprisonment.
363, 364. Military damages during rebellion.
365. Abandoned or captured property.
366. Rebel cannot sue, although pardoned.
367. Liability for acts of executive officers.
368. Of prize court decisions.

§ 345. It has been heretofore stated, as a general principle, that a state or nation cannot, ordinarily, be sued in its own courts. But, by the establishment of the court of claims, this principle has been so far abrogated, that a new party defendant has been called into existence, and, when a petition is presented to the court, the United States occupy the position of an ordinary defendant in a suit at law.(*a*) The duties of the court are not merely advisory, or its decisions recommendatory, but its qualities are only those which properly belong

(*a*) Todd *v.* United States, Dev. Ct. Cl. 129.

to a court which can only adjudge whether its jurisdiction be final or not; for, in establishing the court, congress had no intention merely to constitute a council to advise what course it would be honest and right, or expedient, to pursue, in any given case, but intended to establish a court for the investigation of claims, to ascertain the facts in each case, and the legal rights and liabilities therefrom arising. Nor does the court occupy the position of a jury, although, to a certain extent, it unavoidably determines questions of fact, and thus exercises the functions of a jury measurably. It is held, however, that it posseses no portion of the wide discretion which, according to some of the cases at common law, juries may often exercise.

Nor is it the duty of the court to recommend to congress the passage of laws to supply any deficiency which may be supposed to exist.

If a claim be alleged to be founded upon any law of congress, the court will construe such law, and ascertain its meaning, by means of the well-established rules of construction; and so, if the claim is founded upon any regulation of an executive department, or upon a contract with the government; or if the claim be one referred to it by either house of congress.(*b*)

§ 346. The statute establishing the court, in 1855, thus defined its jurisdiction: "The said court shall hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied,* with the government of the United States, which may be suggested to it by a petition filed

(*b*)Ibid, 106, 107.

And where a special private act refers a particular claim, it should not be construed to re-open claims already passed upon, but as intended to supply a defect of previous jurisdiction. Harvey *v.* U. S. 12 C. of C. 141.

*As to implied contracts, there must have been some consideration moving to the United States, or they must have received money with a charge to pay it over, or the claimant must have a lawful right to it when it was received, as in the case of money paid by mistake. And, as to money paid into the treasury, as the proceeds of forfeited property under the confiscation act, there is no implied contract. Knote *v.* U. S. 95 U. S. 149.

therein: and, also, all claims which may be referred to said court by either house of congress. It shall be the duty of the claimants, in all cases, to set forth a full statement of the claim, and of the action thereon in congress, or by any of the departments, if such action has been had, specifying, also, what person or persons are owners thereof, or interested therein; and when, and upon what consideration, such person or persons became so interested."(*c*)

In 1863 another act enlarged this jurisdiction thus: "All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the house in which the same were presented or introduced, be transmitted by the secretary of the senate, or clerk of the house of representatives, with all the accompanying documents, to the court aforesaid. The said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government against any person making claim against the government in said court; and, upon the trial of any such cause, it shall hear and determine such claim or demand, both for and against the government and claimant; and if, upon the whole case, it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right to appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered on the records of the same, and shall *ipso facto* become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein."(*d*)

Also, in the act of 1864, the following restriction was imposed: "The jurisdiction of the court of claims shall not extend to, or include, any claim against the United States

(*c*) Brightly's Dig. 1789, 1857, p. 198. (*d*) Ibid, 1857, 1865, pp. 97, 98.

growing out of the destruction, or appropriation of, or damage to, property, by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof."(*e*)

In 1863 an act was passed concerning captured and abandoned property, excepting strictly warlike materials, providing for the sales of such property, and the payment of the proceeds into the national treasury, and then giving to the court of claims jurisdiction over these proceeds, namely: "Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof to the court of claims; and on proof, to the satisfaction of the said court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."(*f*)

Also the following restriction was imposed, in 1863: "The jurisdiction of the said court shall not extend to or include any claim against the government not pending in said court on the first day of December, A. D. 1862, growing out of, or dependent on, any treaty stipulation entered into with foreign nations, or with the Indian tribes."(*g*)

An extension of the jurisdiction was made in 1867, to cover quartermaster's stores furnished during the Morgan raid through Indiana and Ohio.(*h*)

§ 347. It is held that the jurisdiction of the court is strictly legal, and, therefore, it cannot enforce a trust against the United States, or exercise any equitable powers whatever: so that the holder of a military bounty land warrant cannot have a

(*e*)Ibid, p. 99.

(*f*)Ibid, (supp.) p. 1239.

(*g*)Ibid, (supp.) p. 1159.

And so, the court of claims has no jurisdiction to enforce an obligation assumed by the government, for Indian tribes, by treaty. Langford *v.* U. S. 12 C. of C. 328.

(*h*)United States Stat. at Large, (14,) p. 572.

legal right to claim, through that court, a compensation from the United States on the ground that the government has wrongfully appropriated the lands, ceded for his benefit, to other uses. The supreme court say, in a case of this kind: "This claim is based on the theory that the United States has violated the trust contained in the deed of cession of the north-western territory, and is bound, in good conscience, to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity; and, if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the court of claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity, set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them. Immunity from suit is an incident of sovereignty. But the government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it, which were founded on any law of congress, or regulation of an executive department, or upon any contract with it, express or implied, and gave the court of claims the power to hear and determine claims of this nature. * * * That court was authorized to enforce legal rights and obligations, but could not proceed further and judge of the equities between the citizen and his government. * * * It is only a contract authorized by law that the court of claims can consider; and, as there is no law of congress on this subject, there is nothing on which that court could base a judgment against the United States, if, in the opinion of that tribunal, it had not fulfilled its duties toward the beneficiaries under the Virginia deed of cession. The liability of the government, if at all, [existing,] arises out of the breach of an accepted trust, and that liability cannot be enforced at law. The claimant is in no better position because the government is the trustee than he would be if a private person occupied that relation, and it is very clear, if such were the

case, that a court of equity would alone have power to deal with him. As the government has not thought fit to allow itself to be sued in the court of claims, on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with congress."(*i*)

§ 348. It is, moreover, held that a distinction is to be carefully maintained between the United States as a sovereign, and the United States as a contractor. In the former capacity the government is not amenable to any court, and in the latter capacity it holds the relation simply of an ordinary private defendant. So the court says, in regard to this somewhat metaphysical distinction: "In the recent case of *Deming* v. *The United States* this court decided that a contract between the government and an individual cannot be affected, especially by a general law. That principle we now reiterate, and extend to the case before us. The 'obstructions and hindrances' complained of on the part of the United States were the withdrawal of the troops from the military posts in the Indian country, contrary to the terms of the Indian treaties, and it is insisted, 'as a matter of law,' that 'the United States could not change their attitude, or their policy, in a material degree, without incurring the responsibility of making the claimants just compensation for all additional expenses thereby incurred?' This position cannot be sustained. The two characters which the government possesses, as a contractor and as a sovereign, cannot be thus fused. Nor can the United States, while sued in the one character, be made liable in damages for acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they are public and general, cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts into which it enters with private persons. The laws of taxes and imposts affect pre-existent executory contracts between individuals, and affect those made with the government, but only to the same extent and in the same way. In this court the United States appear simply as a contractor, and are to be held liable only in the same limits that any

(*i*) Bonner *v.* United States, 9 Wall. 59–61, *passim*.

other defendant would be in any other court; though their sovereign acts, performed for the general good, may work injury to some private contractors, such parties gain nothing by having the United States as their defendant. Wherever the public and private acts of the government seem to commingle, a citizen or corporate body must, by supposition, be substituted in its place, and then the question be determined whether the action will lie against the supposed defendant. If the enactment of a law imposing duties will enable the claimant to increase the stipulated price of goods he has sold to a citizen, then it will when the United States are defendants, but not otherwise. If the removal of troops from a district liable to invasion will give the claimant damages for unforeseen expenses when the other party is a corporate body, then it will when the United States form a party, but not otherwise. This distinction between the public acts and private contracts of the government, not always strictly insisted on in the earlier days of this court, frequently misapprehended in public bodies, and constantly lost sight of by suitors who come before us, we now desire to make so broad and distinct that hereafter the two cannot be confounded. And we repeat, as a principle applicable to all cases, that the United States as a contractor cannot be held liable, directly or indirectly, for the public acts of the United States as a sovereign."(*j*)

§ 349. Nor can the government be held liable for the torts of its officers, even though resulting in the benefit of the government. Concerning this the supreme court say: "It is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer; those acts being in themselves torts. No government has ever held itself liable to individuals for the *misfeasance*, laches, or unauthorized exercise of power by any of its officers and agents." In the language of Judge Story, (on Agencies, § 319:) "It does not undertake to guaranty to any person the fidelity of any of the officers, or agents, whom it employs, since that

(*j*)Jones *v.* United States, Natt & Hunt. Ct. Cl. 384.

would involve it, in all its operations, in endless embarrassments, and difficuties, and losses, which would be subversive of the public interests." *U. S.* v. *Kirkpatrick*, 9 Wheat. 720; *Dox* v. *Postmaster General*, 1 Pet. 318; *Connell* v. *Voorhes*, 13 Ohio, 523.

"The creation, by act of congress, of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the act limits the suits to claims founded on contracts, express or implied, with certain important exceptions. But, in the exercise of this unaccustomed jurisdiction, the courts are embarrassed by the necessary absence of precedents and settled principles, by which the liability of the government may be determined. In a few adjudged cases, where the United States were plaintiff, the defendants have been permitted to assert demands of various kinds, by way of set-off, and these cases may afford useful guidance where they are in point. Cases of *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, and *Dox* v. *Postmaster General*, 1 Pet. 318, are of this class, and establish the principle that, even in regard to matters connected with the cause of action relied on by the United States, the government is not responsible for the laches, however gross, of its officers. *Nichols* v. *U. S.* 7 Wall. 122.

"The language of the statutes which conferred jurisdiction upon the court of claims excludes, by the strongest implication, demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. [Yet, where a court without jurisdiction has assessed a fine, and government has taken the money therefor, an action may be brought in the court of claims to recover it back. *Devlin* v. *U. S.* 12 C. of C. 266. And so, where money is deposited with a collector of internal revenue, to be applied to a proposed compromise of revenue demands, against the depositor, and the proposition of compromise is rejected by the govern-

ment, and the collector afterwards applies the money to an assessment for taxes and penalties against the depositor, and pays the money thereon into the treasury, an action may be brought in the court of claims to recover it back. *Broughton* v. *U. S.* 12 C. of C. 331. And where money is exacted by an agent or officer of the United States, which goes into the treasury, the money can be recovered back by an action in the court of claims—the owner having a right to follow it wherever it can be traced. *U. S.* v. *State Bank*, 96 U. S. 33. And so an excess of income tax may be recovered in like manner. *U. S.* v. *Kaufman*, 96 U. S. 567.]

"In the absence of adjudged cases determining how far the government may be responsible, on an implied *assumpsit*, for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States. These reflections admonish us to be cautious that we do not permit the decisions of this court to become an authority for the righting, in the court of claims, of all wrongs done to individuals by the officers of the general government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the court of claims."(*k*)

Accordingly, where a petitioner, not professing to seek relief under the "abandoned or captured property act," alleged that in 1862 "the United States illegally, violently, and forcibly took possession" of his plantation, in Louisiana, "and continued to hold possession thereof, until January, 1866, on the false and illegal pretext that the property was abandoned by the owner," it was held to fall within the principle of the common law, "that the government cannot be sued in actions sounding in tort, nor made liable for the tortious acts of its officers," since the allegations did not raise an implied con-

(*k*) Gibbons v. United States, 8 Wall. 274.

tract, but merely amounted to a declaration in trespass *quare clausum fregit* against the government. Nevertheless, in that case, two of the judges dissented, on the ground that the petition alleged that the owner had never been disloyal, and had never abandoned his property, and that the United States rented it and received the proceeds—the action being thus based on this use, and not merely on the tortious seizure by the agents of the government. And the dissenting judges held that the claimant was under no obligation to aver, or prove, that the rents ever were paid over into the national treasury; for, said they: "This is not the ground, but that the government, without any right or authority, took and used or sold his property; that the persons by whom it was done were the accredited officers and agents of the United States, over whom the claimant could exercise no influence or control; but who were amenable to the orders and responsible to the government alone." Again: "The law gives the action to the owner, because the United States, through its proper and legitimate officer, received the proceeds. The law gave the right to the treasury agent to receive these proceeds; and when they were received by him, they were as much received by the United States as if they had been paid over to the treasurer of the United States and by him placed in his vault. And when they were so received by him, they were received by the United States, and all their legal liabilities followed. His property was taken from him forcibly, not voluntarily handed over. He had no right, or means, to compel the agent to perform his duty, nor call him to account for the proceeds, in any way. He could not sue the agent in any form, nor could he bring suit against any other party than the United States, and that in the court of claims."(*l*)

§ 350. Cases arising under the revenue laws are not immediately within the jurisdiction of the court of claims. This is placed, by the supreme court, upon the ground that "the prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending, as the government does, on its revenue, to meet, not only its current ex-

(*l*)Pugh *v.* United States, 5 Ct. Cl. 114.

penses, but to pay the interest on its debts, it is of the utmost importance that it should be collected with dispatch, and that the officers of the treasury should be able to make a reliable estimate of means in order to meet liabilities. It would be difficult to do this, if receipts from duties and internal taxes paid into the treasury were liable to be taken out of it, or suits prosecuted in the court of claims, for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country; for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be that the treasury estimates for any current year would be unreliable."(*m*)

And, accordingly, even a set-off, by the United States, of an income tax on an officer's pay, for which the officer has sued, cannot be allowed; on the ground that congress has never assigned the collection of income taxes to the court of claims.(*n*) Thus, where claimants, on importing iron and

(*m*)Nichols *v.* United States, 7 Wall. 129.

The principle is, that when a controversy under the revenue laws is, by law, required to be determined by other officers, or other tribunals, there is no jurisdiction in the court of claims; but if the proper officer has acted upon a matter, and has filed a certificate, and thus exhausted his jurisdiction, and the treasurer has failed to carry out the award by making payment, the court of claims can enforce the payment. 11 C. of C. 659. And so, this court has jurisdiction in some cases arising under the revenue laws, namely: 1. Where the secretary of the treasury (under Rev. St. § 1063) transmits a claim which arose under the revenue laws, on a statement of facts, to have the court determine the questions of law involved. 2. Where the law declares a person entitled to money on doing a certain act, so that the right to it does not depend on the action of any executive officer, but is complete upon the performance of the conditions. 3. Where a claim is dependent on executive decision, and this has been rendered in the party's favor. But the court has *not* jurisdiction, under the revenue laws, as follows: Where the right of a party depends on an executive action which has not been taken, or has resulted against the party. Campbell *v.* U. S. C. of C. 470.

(*n*)Jones *v.* United States, 4 Ct. Cl. 207.

steel into the United States, had paid an illegal sum of duties, which was paid into the national treasury, without protest, it was held that the court of claims had no jurisdiction to cause the excess to be refunded, on the ground of an implied promise to repay money erroneously exacted, because, (1) there was no protest, as required by the act of February 26, 1845; (2) the payment was made and received under a mutual mistake, and was, therefore, a voluntary mistake, and as such irrecoverable.(*o*) And so, the court will not entertain jurisdiction of an action brought to recover a drawback under the internal revenue act of June 30, 1864, (13 U. S. Laws, 223, § 71,) on manufactured articles exported from the United States, on which an internal revenue tax has been paid.(*p*) The principle extends to cases where goods lay in bond three years, and are then sold for non-payment of duties, and the officer takes, not the duties imposed at the time of importation, but those imposed by subsequent statutes on similar goods.(*q*)

§ 351. The court of claims has no jurisdiction where a state is a necessary party to the proceedings, nor where the government has aided the state in the wrongful diversion of the proceeds of lands appropriated to a particular purpose.(*r*)

§ 352. As to the parties who may sue in the court of claims, we mention—(1) Loyal citizens. By the act of June 25, 1868, all claimants against the United States, who have voluntarily resided within the seceded states during the war, must prove their loyalty affirmatively, the presumption being against them, and thus throwing the burden of proof on them. And where one comes before the court whose neighbors speak doubtfully of him, and whose household servants are silent when adduced as witnesses, he is at best to be regarded as a neutral, and has no standing in the court of claims.(*s*) Where an administrator sues, the loyalty of the

(*o*)Schlesinger *v.* United States, 1 C. of C. 27.

(*p*)Portland Co. *v.* United States, 5 C. of C. 442.

(*q*)Doherty *v.* United States, 6 C. of C. 90.

(*r*)Milwaukee, etc., Canal Co. *v.* United States, 1 C. of C. 187.

(*s*)Zellner *v.* United States, 4 C. of C. 480.

intestate must in like manner be satisfactorily proved.(*t*) It seems, however, if one, at an early period of the war, deserted the rebel cause, and remained thereafter loyal, he has a standing in the court.(*u*) And where there are joint claims, and one of the owners became disloyal and the other remained loyal, the latter has a right to sue for his moiety, although the former lost all his rights by his disloyalty.(*v*) Where a citizen of Kansas, just before the war began, took horses to Mobile, and, failing to sell them before the war broke out, remained to dispose of them, and afterwards was restrained from returning by the confederate authorities, and sold his horses and invested the proceeds in cotton, continuing loyal throughout the war, it was held that he had not thus given aid and comfort to the rebellion, and that, as he and his father were residents of a loyal state, the legal presumption was in favor of their loyalty, and he was virtually a prisoner in the south, and carried on no illicit trade with the enemy; he had a right to invest the confederate money, which was all he could get for the horses, in something of permanent value, namely, the cotton afterwards taken by the government. But *Nott*, J., vigorously dissented, and said: "The claimant's intestate, on whose loyalty the case depends, went into a country threatening to rebel, and voluntarily remained after civil war had broken out. He made no attempt to return to his residence in the loyal states until July, 1861. The purpose for which he remained was merely to procure better prices for his horses. It does not excuse the act. The case comes within the decision in the case of *The William Bagaley*, 5 Wall. pp. 377, 408, where Mr. Justice Clifford well defines the duty of a citizen when a war breaks out: 'If it be a foreign war, and he is abroad, he is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the established government.'"(*w*)

(*t*) Deeson *v.* United States, 5 C. of C. 626.

(*u*) Culliton *v.* United States, 5 C. of C. 627.

(*v*) United States *v.* Burns, 12 Wall. 246.

(*w*) Foster *v.* United States, 5 C. of C. 416.

(2.) A naturalized citizen, if loyal, may sue in the court of claims, even if the claim arose before his naturalization, and his naturalization was not perfected before the commencement of his suit.(*x*)

(3.) Citizens of countries which allow our citizens to prosecute claims against their governments in their courts are allowed to prosecute, in the court of claims, actions against the United States; as Great Britain,(*y*) Prussia,(*z*) Switzerland,(*a*) France,(*b*) and Spain.(*c*) Cotton owned by a British subject, although he never came to this country, was, if found within the confederate territory during the rebellion, a legitimate subject of capture. But if he had not aided the rebellion he could sue (under act of March 12, 1863) in the court of claims to recover the proceeds thereof from the treasury. But if he aided the rebellion in any way he can have no standing in the court. *Young* v. *U. S.* 97 U. S. 39.

(4.) An officer formerly in the navy of the republic of Texas can sue for his compensation as such in the court of claims.(*d*)

§ 353. Infringements of patent rights by officers of the United States are not cognizable in the court of claims.(*e*) But the court has jurisdiction in a claim for royalty under a contract for the use of a patent.(*f*)

§ 354. The jurisdiction of the court extends only to judgments for money, and it has no jurisdiction to establish the right of a claimant to have a land-warrant issued to him.(*g*)

§ 355. The court may give relief where a paymaster has had his funds stolen from him when in the exercise of ordinary care, the ground of which is thus explained: "The law under which this court takes jurisdiction of cases like this presumes that disbursing officers may meet with losses without fault or neglect on their parts, and under circumstances

(*x*) Bulwinkle *v.* United States, 4 C. of C. 395.

(*y*) United States *v.* O'Keith, 11 Wall. 178.

(*z*) Brown *v.* United States, 5 C. of C. 571.

(*a*) Lobsiger's Case, 5 C. of C. 687.

(*b*) Rothschild's Case, 6 C. of C. 204.

(*c*) Molina's Case, 6 C. of C. 269.

(*d*) Moore's Case, 4 C. of C. 139.

(*e*) Pitcher's Case, 1 C. of C. 7.

(*f*) Burns' Case, 4 C. of C. 113.

(*g*) Alire's Case, 3 C. of C. 447.

which will excuse them from the increasing exercise of the utmost possible vigilance; for, with that, it would rarely happen that a loss would occur. The utmost possible vigilance might require of an officer that he should keep his hand upon his treasure at all times; then loss of treasure would only happen with loss of life, or overpowering force. But a person may be without fault or neglect without the use of this abundant care or caution. The necessity for such vigilance is not always apparent before the loss, and its exercise may not always be compatible with possible convenience and present appliances. After a loss excuses are listened to with reluctance. Expedients which might have been resorted to for its prevention are suggested with readiness, and in abundance; and indicate plainly that, although prevention is preferable to remedies, yet human nature is never superior, under all circumstances, to the vices and accidents of life. To require that disbursing officers shall be gifted with prescience, or endowed with power to use superhuman efforts, so as always to avoid or prevent losses, would be to exact from mortals the exalted excellencies of superior beings. From the latter class disbursing officers are rarely, if ever, appointed."(*h*) And, in this case, the statute is held to be prospective, as well as retrospective, in regard to such losses.

§ 356. Claims arising under treaty are not cognizable in the court of claims, either originally, or by way of review over the finding of a special tribunal appointed by the treaty.(*i*) And the statute expressly exempts claims under a treaty, whether with foreign nations or with Indians.

§ 357. Where a contractor refers a disagreement with the United States, as to the amount of a claim due him, and the United States consents to the reference, and the commission to which the matter is submitted awards a certain amount less than the claim, and the contractor receives payment of that amount, he cannot afterwards come into the court of claims for the remainder of his claim, even though he has not given a receipt in full.(*j*) It is, then, in the nature of *res adjudicata,* or, at any rate, of an award.

(*h*)Glenn's Case, 4 C. of C. 506.
(*i*)Meade's Case, 2 C. of C. 225.
(*j*)United States *v.* Justus, 14 Wall. 535.

§ 358. Where salvage services are rendered to a vessel belonging to the government, a suit for compensation may be brought by the salvor in the court of claims.(*k*)

§ 359. It seems that although the court has not, ordinarily, equity jurisdiction, yet congress may, where a legal defence fails through a defect in a written instrument, as a lease, refer back that particular case to the court of claims, with directions to grant such equitable relief as it appears the claimant is entitled to; but such a reference only confers a special jurisdiction *pro hac vice*, and does not extend to any subsequent case, however similar in its nature.(*l*) And, also, congress may, by private act, confer jurisdiction, subject to the same limitation, in a particular case arising under a treaty.(*m*)

§ 360. By the act of twenty-fifth June, 1868, the head of any executive office may refer any claim exceeding three thousand dollars to the court of claims; *provided* it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the court might, under existing laws, take jurisdiction, on a voluntary action by the claimant. Under this, it is held that such officer cannot accompany the reference with a prescription of what questions the court should consider. "His duty is performed when he sends the claim with the information that it involves disputed facts, or controverted questions of law. Thenceforth, the case is with the court, which will consider and determine such questions as legitimately arise in it."(*n*) Also, it has been held that the head of the war department may, after a claim has been allowed for the hire of a steamboat under a charty-party with the United States, by the auditor and comptroller, refuse to pay the claim so allowed, and refer the case to the court, even if the vouchers, etc., which are to be transmitted with the reference, are in the auditor's office;(*o*) a charter-party being within the range of the jurisdiction, and the finding of the auditor not being regarded as necessarily final, even upon the party, and although he ac-

(*k*)Bryan's Case, 6 C. of C. 128.
(*l*)Cross' Case, 5 C. of C. 88.
(*m*)Atocha's Case, 6 C. of C. 69.
(*n*)Bright's Case, 6 C. C. 121.
(*o*)Delaware Steamboat Case, 5 C. of C. 59.

cepts it.(*p*) But it is the reference that gives jurisdiction; for there is no power of appeal from executive decisions to the court of claims.(*q*)

It is held, however, that a presentation of a claim to an executive department is not a prerequisite to the bringing of a suit in the court,(*r*) except where it is ordinarily settled in an executive department.(*s*)

A regulation of an executive department, under which claims may arise for the adjudication of the court, is defined to be a rule made by the head of the department, under an empowering act of congress, and not a mere order; and so these regulations, as well as the jurisdiction thereon founded, are subject to the *laws* of the United States directly.(*t*)

§ 361. In a case where one enters into a contract with an Indian commissioner for supplies to the Indians, it appears congress may, by resolution, refer the case back to the court, with instructions to disregard the contract, and allow the claim on a *quantum meruit*.(*u*)

§ 362. A claimant made a contract to furnish two thousand nine hundred cavalry horses, to be examined and inspected before acceptance. Before delivery the government adopted a new and more stringent rule of inspection. The claimant then refused to supply the horses under the agreement, regarding the new rule as a breach of the contract by the government, and brought suit thereon, and connected with this suit a claim for damages by reason of an illegal arrest and imprisonment. Held, that the claimant had no cause of action from the adoption of a new rule of inspection, and that the court had no jurisdiction of an action to recover damages for an illegal arrest and imprisonment.(*v*)

§ 363. Military occupation and damages of the war during the rebellion are expressly excepted from the jurisdiction of the court of claims by the act of 1864. And it has been held that where suit was brought for such damage before the act

(*p*) Bogert's Case, 2 C. of C. 160.
(*q*) Tillou's Case, 3 C. of C. 454.
(*r*) Sweeney's Case, 5 C. of C. 291.
(*s*) Clyde's Case, Ibid, 140.
(*t*) Harvey's Case, 3 C. of C. 39.
(*u*) Norris' Case, 2 C. of C. 155.
(*v*) Spicer's Case, 1 C. of C. 316.

was passed, the jurisdiction was ousted by the passage of the act which declares that its provisions shall extend from the commencement to the close of the war.(*w*) But where a building in Washington was taken possession of during the rebellion by the military governor of the District of Columbia for the use of the quartermaster general, and was thus used by a bureau of one of the departments of the civil service, it was held that a claim for the rent was within the jurisdiction, notwithstanding the building was taken by a military governor.(*x*)

But where a contract was privately made for sand, by an officer of the military service connected with the quartermaster's department in the field, namely, at Nashville, Tennessee, it was held beyond the jurisdiction, as being a military appropriation.(*y*) So, where supplies were taken from a farm in Virginia, and afterwards the quartermaster gave the owner a certificate of the supplies, it was held that such after certificate, and the promise of payment thereon for the supplies, did not give jurisdiction to the court, it being, nevertheless, a military appropriation.(*z*) So, where a building was taken, in Memphis, for the use of the pay department, on the promise of a clerk, without authority, that rent should be paid, no lease of the building being given by the owner, but only his consent obtained upon the promise, it was held not within the jurisdiction.(*a*) And a claim for rent, accruing since the close of the rebellion, on property seized by the army during the war, is also excluded.(*b*) But where a building in the District of Columbia was taken by the military governor of Washington, as a military hospital, but was treated by the war department as held under an implied lease, the court held that it had jurisdiction, not being able to say that it was appropriated by the army.(*c*) And so, where a building in Memphis was held under a lease, with the knowledge and approval of the war department, and, when the lease expired,

(*w*) Corbett's Case, 1 C. of C. 139.
(*x*) Clark's Case, 1 C. of C. 145.
(*y*) Lindlay's Case, 4 C. of C. 359.
(*z*) Patterson's Case, 6 C. of C. 40.
(*a*) Ayer's Case, 3 C. of C. 1.
(*b*) Bishop's Case, 4 C. of C. 448.
(*c*) Waters' Case, 4 C. of C. 399.

the quartermaster having charge authorized the owner to make repairs of the injuries done during the lease, and the owner did so, the court of claims entertained jurisdiction of an action to recover the expenditure of the repairs.(*d*)

An impressed steamboat comes under the prohibition of jurisdiction in claims arising from military appropriation.(*e*) But in a case where the use of a steamboat, during an emergency, was attended by circumstances which implied a contract of reimbursement, the court maintained jurisdiction.(*f*)

§ 364. So, property accidentally destroyed in military operations, such as the burning or bombardment of a town, is excluded from the jurisdiction.(*g*) And the jurisdiction in such matters, taken away by the act of 1864, was not restored by the joint resolution of December 23, 1869, even in regard to steamboats: although the latter act related to the mode of settling for them when impressed into the service of the United States during the rebellion.(*h*)

§ 365. With regard to abandoned or captured property, the court of claims has not jurisdiction—except as to the proceeds of property captured after July 17, 1862, and before March 12, 1863, and actually paid into the treasury, without judicial condemnation, and cases arising under the acts of 1863 and 1864. *U. S.* v. *Pugh*, 99 U. S. 268. And where a steamer was used in the rebel service till the capture of Charleston, and then the owner placed her, under agreement with a navy engineer, in the government service—the approval of the quartermaster at Charleston being afterwards given to the agreement—and yet the vessel was eventually sold with captured vessels, and the proceeds paid into the abandoned and captured property fund, it was held the court had not jurisdiction,(*i*) although where a sale was made prior to the passage of the act of 1864, and the proceeds paid into the treasury, the jurisdiction thereby attaches.(*j*)

(*d*) Provine's Case, 5 C. of C. 456.
(*e*) Slawson's Case, 4 C. of C. 88.
(*f*) U. S. *v.* Russell, 13 Wall. 623.
(*g*) Perrin *v.* U. S 12 Wall. 315.: Pugh's Case, 13 Wall. 633.
(*h*) Kimball's Case, 13 Wall. 636.
(*i*) Shawson's Case, 6 C. of C. 370.
(*j*) Minor's Case, 6 C. of C. 393.

§ 366. Where one has given aid and comfort to the rebellion he cannot come into the court; and a pardon does not restore the power of suing.(*k*) But paying to a confederate loan, under compulsion, and under protest, by one who persistently opposed the rebellion openly, is held not to be aid and comfort.(*l*)

§ 367. Although it is a principle firmly fixed that the government is not liable for the mere tortious acts of an officer, yet, where the act complained of is the mere withholding of money, the government is held liable for the acts of the executive officers, in the court of claims; which says, on this matter of its own jurisdiction: "The court of claims was established to give legal redress to the citizens as against the government, where he would have had legal redress as against another citizen. We cannot give legal redress except upon legal principles. We cannot sustain a defence upon the part of the government, where, if set up by an ordinary defendant, it would be held illegal, inequitable, unconscionable. What would be said of a bank that would come into court, while still withholding the funds of a depositor, and plead that the refusal to pay over was the tortious act of its cashier? What would be thought of a common carrier who, while retaining possession of goods, pretends that the conversion was merely the wrongful act of his agent? Such is the position of the government in this suit, withholding money that does not belong to it, insisting that the wrong was its agent's, though done on its behalf, and that the owner is without a remedy.(*m*)

§ 368. The jurisdiction of the court of claims does not, in any case, extend to reviewing or questioning the decisions of a prize court.(*n*)

(*k*)Pargond's Case, 4 C. of C. 337.
(*l*)Padelford's Case, 4 C. of C. 320.
(*m*)Brown's Case, 6 C. of C. 198.
(*n*)Root & Connell's Case, 5 C. of C. 408.

CHAPTER VIII.

ABANDONMENT OF HOMESTEAD CLAIMS.

§ 369. Duties of land officers usually ministerial but judicial as to abandonment—instruction of land commissioner.
370. Jurisdiction of an equitable rather than legal nature herein.
371. Effect of cancellation of claims.
372. Synopsis of decisions from Lester.
373. Unintentional lapses.
374. Soldiers and sailors.
375. Claim made while in the army—what absences do not work abandonment.
376. Only one entry allowed.
377. Double homesteads on marriage.
378. Homestead entries only on surveyed tracts.
379. Conflicting claims determined by bids.

§ 369. Under the homestead laws of congress, the duty of land officers is mainly ministerial. But they have a judicial power, in relation to abandonments for six months, and consequent forfeiture of the claim. Such contests are investigated by either the register or receiver of the land offices of the district wherein the land lies, and the decision is subject to a review by the secretary of the interior, in the nature of an appeal.

The following instruction was issued by the commissioner of the general office, in regard to this matter, December 14, 1865: "When a homestead entry is contested, and application is made for cancellation, the party so applying must file an affidavit setting forth the facts on which his allegations are grounded, describing the tract, and giving the name of the settler. You will then set apart a day for the hearing, giving all the parties in interest notice of the time and place of trial. On the day of hearing you will distinctly show, at the caption of the papers in the proceeding, the name of the settler, description of the tract, number and date of entry. You will

then proceed with the examination of the witnesses. Each deposition must be signed by the witness, and acknowledged before either the register or receiver; and, at the conclusion of the trial, you will briefly review the testimony, and thereafter will transmit to this office all the papers, with your joint decision thereon annexed thereto, for final determination. Notice to a settler that his claim is contested must be served by a disinterested party, and a copy must be filed, with an affidavit that the notice has been served upon the homestead party, or brought home to him so as to be legal notice—such copy of notice and affidavit to accompany the papers. The expenses incident to such contest must be defrayed by the contestant."(*a*)

§ 370. The judicial authority of the land officers in these matters is regarded as more equitable than legal; and so it has been held that persons who have made homestead applications, but have not fully complied with the acts in force, yet have made some reasonable effort to comply, are regarded as having an equity which is to be respected.(*b*) And thus, where one had made an entry, and improved the land to the extent of two thousand dollars or more, and, after living on the claim a short time, leased it to another, and meanwhile a preemptor settled upon it and brought proceedings to cancel the homestead entry, it was held that, considering the value of the improvements, and also the fact in evidence that the homestead applicant believed that residence or cultivation either would be sufficient, he should be allowed to make a new application and retain his claim.(*c*)

§ 371. The effect of an application is to withdraw the land from the public domain; and of a cancellation, to restore it again.(*d*) Only citizens can perfect claims, but it is sufficient if citizenship be proved at the end of the five years' settlement.

§ 372. I avail myself of the following synopsis of decisions collected by Lester, (vol. 2, p. 264, etc.:)

Proof must be made of actual settlement and cultivation

(*a*)2 Lester's Land Laws, 259.
(*b*)Zabriskie's Land Laws, 164.
(*c*)Ibid, 160.
(*d*)Ibid, 162.

up to the time of payment, so as to show a *bona fide* purpose, on the part of the settler, to make the land his permanent homestead. Wherever the proof may show an honest effort by the claimant to meet the requirements of the statute, the register and receiver are directed to deal with the matter in no narrow, but in a liberal, spirit, yet in subordination to the requirement of the statute. In cases where the settler is deceased, and his legal representatives thereafter discover that the homestead papers describe other land than the tract embraced by his actual settlement, it has been held that the widow or representatives may prove and thereafter certify, on application, to the correct description of the tract upon which the deceased actually settled, and when satisfactory the error in description may be corrected.

Cases have arisen where persons have been complained against as failing to comply with the law, and where these, although failing in residence, have yet made considerable improvements; and herein it has been held that, although their rights as homestead claimants have been forfeited, yet, in view of their improvements, they should be allowed to purchase the land at private entry, after the land was duly offered, and thereby made liable to such entry. And the same rule has been observed where the settler has died, and the heirs failed to continue the residence on the land.

§ 373. Cases of abandonment have also arisen, wherein it has been shown that, by reason of sickness, want of means, or other good causes, the parties, although they had cultivated the land, had failed to make residence for the prescribed period of five years. In such cases, the land officers have refused to cancel the homestead entries, the intention of the settler appearing to be *bona fide*, and allowed the five years' residence to take date from the day of actual residence, on the party filing an affidavit, within a reasonable period, that he has permanently renewed settlement on the claim.

§ 374. Soldiers, and those serving in the navy, are entitled to deduct their term of service from the period of settlement. And, sometimes, these have made application, through agents, under the impression that no settlement is required

until the expiration of their term of service, and that, should their service absorb five years, such service will be accepted in lieu of settlement and cultivation; but it is held the law recognizes no such arrangement, but that actual settlement and cultivation are required, so that title cannot be acquired unless the party, immediately upon discharge from service, enters upon the land, makes it his home, and cultivates it.

§ 375. At one time a case came up on an application to cancel a homestead entry, wherein the testimony showed it to have been made while the claimant was serving in the army of the United States, from which he was mustered out, in May, 1866. Soon after his discharge he built a small shanty, and began work on the homestead, continuing to occupy it, though with frequent short intervals of absence. It was held that he had not abandoned his tract, although the character of his improvement, and the manner of his residence, were not such as the law contemplates. The application for a cancelling was thereon refused; but a more complete compliance with the requirement of the law was enjoined. The settler was informed that he must put up a house which would answer the purpose of a permanent residence—not merely a place of temporary resort—to show his intention to comply with the law, and must make the land what the statute intends, his actual homestead: and he was allowed sixty days to complete the house and move into it—these facts being evidenced, at the termination of the sixty days, by affidavit and corroborative testimony.

§ 376. One homestead privilege exhausts the right, even on commutation, but does not set aside a pre-emption privilege.

§ 377. Where a widow with a homestead settlement marries a person who has made a homestead settlement on another tract, they are allowed to elect which tract they will retain for permanent residence, to complete the title, and then, as I understand from the decision, the other may be obtained by paying up under the homestead act of May, 1862, thereby perfecting the homestead; this payment being regarded as a commutation, or legal substitution, for the con-

tinuous labor of the five years' settlement, and therefore as not having any subsequent pre-emption rights.

§ 378. Homestead settlements can only be made on surveyed tracts, and the selection must be wholly in a single district.

§ 379. Where there are conflicting claims, in which the two stand on equal ground as to settlement and cultivation, the matter is to be determined by the highest bid made by either for the privilege. But if either has the priority of settlement, he is entitled to the privilege without bidding for it.

CHAPTER IX.

IMPEACHMENT.

§ 380. What articles of impeachment embrace.
381. Effect of resignation before articles are preferred.
382. Futility of impeachment proceedings at present.
383. Example—Hopkinson case.
384. Same—Peck case.
385. Same—case of Judge Chase of the United States supreme court.
386. Same—case of President Johnson.
387. Remark.

§ 380. A senate, whether of the United States, or of one of the states of the Union, sometimes becomes a court for the judicial decision of articles of impeachment, presented by the house of representatives, against an executive or judicial officer, for misdemeanors in office. Although such articles will lie for indictable crimes, yet they may embrace—and are particularly intended to embrace—offences not actionable at law. As at present constituted, such proceedings are very little better than a farcical absurdity, at least as regards executive officers, since the court is a political partisan body, and a two-thirds vote is requisite to conviction, in every case. Either the jurisdiction will have to be abandoned altogether, or else a court of impeachment will have to be established, similar to criminal courts; not, perhaps, a separate court, but a separate branch attached to the ordinary judicial courts.

§ 381. In the case lately pending before the senate of the United States, wherein Secretary Belknap was the accused party, a question of jurisdiction arose from the fact that he resigned his office before proceedings were instituted, but in contemplation of them. A majority—but not two-thirds—sustained the jurisdiction. It is manifest that if there were no penalty except removal from office, a resignation would completely circumvent it. But as it extends, also, to future

perpetual disqualification, there is a basis for the exercise of jurisdiction herein, even when the office has been vacated. And the impolicy of advertising that a man may escape impeachment by merely resigning when the crisis comes is certainly quite apparent.

§ 382. It is scarcely worth while to lay down any principles upon a matter which has lost nearly all its practical importance, although, in a work on the general subject of jurisdiction, it seemed needful to give this a passing notice. In the star chamber days impeachments were easy enough; but now, in our country, an acquittal is almost a foregone conclusion in any case, however flagrant.

§ 383. In 1780 articles of impeachment were presented to the senate of Pennsylvania against Francis Hopkinson, judge of admiralty. The articles contained the following charges:

I. "That having a power by law to appoint an agent for unrepresented shares belonging to absent seamen, and others, he offered and proposed to appoint Mr. Blair McClenachan agent for a number of such shares belonging to seamen who had sailed on board the privateer Holker, upon the condition that he, the said Blair McClenachan, would make a present of a suit of clothes, and, this condition not being complied with, he appointed others in his stead.

II. "Receiving presents from persons interested in the condemnation of prizes previous to their condemnation; particularly a cask of wine from on board the prize brigantine Gloucester, presented to him by the captors before any condemnation, sale or distribution.

III. "Conniving at, and encouraging, the sale of prizes before condemnation, contrary to law, and maliciously charging the marshal with the crime of such conduct before the honorable, the supreme executive council, in the instance of the prize ship Charlotte.

IV. "Issuing a writ of sale of the cargo of a prize, declaring in the same writ that it was testified to him that the same cargo was in danger of waste, spoil, and damage, when, in fact and in truth, no such testimony was ever given to him, in the instance of the cargo of the prize ship Albion."

The judge had a unanimous acquittal on all the four charges.

§ 384. In 1839, Judge Peck, judge of the district court of the United States for the district of Missouri, was impeached before the United States senate, for imprisoning an attorney of the court, and disbarring him for eighteen months, for contempt in criticising the action of the court in a St. Louis newspaper, by an article published subsequently to the proceedings whereon the criticism was based.

He was acquitted by a vote of twenty-one "guilty," and twenty-two "not guilty."

§ 385. In 1804 articles were preferred against one of the judges of the supreme court of the United States, and tried by the United States senate. The charges were:

I. "That the said Samuel Chase did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust," in the following particulars: (1) In delivering an opinion in writing on the question of law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, (on a charge of high treason against the United States,) before counsel had been heard in his defence; (2) in restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States which they deemed illustrative of the positions upon which they intended to rest the defence of their client; (3) in debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law as well as on the fact which was to determine his guilt or innocence, and, at the same time, endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give; in consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties as it is novel to our laws and usages, the said John Fries was deprived of the right secured to him by the eighth [sixth] article amendatory of the constitution,

and was condemned to death* without having been heard by counsel in his defence, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which untimately rest the liberty and safety of the American people.

II. "That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond in the month of May, etc., for the district of Virginia, before which a certain James Callender was arraigned for a libel on John Adams, then president of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Bassett, one of the jury, who wished to be excused from serving on the said trial because he had made up his mind as to the publication from which the words charged to be libellous in the indictment were extracts, and the said Bassett was accordingly sworn and did serve on the jury, by whose verdict the prisoner was subsequently convicted.

III. "That, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

IV. "That the conduct of the said Samuel Chase was marked during the whole course of the said trial by manifest injustice, partiality, and intemperance, viz.: (1) In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness; (2) in refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that, with the utmost diligence, the attendance of such witnesses could not have been procured at that time: (3) in the use of unusual, rude, and contempt-

*But pardoned.

nous expressions towards the prisoner's counsel, and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law to which the conduct of the judge did at the same time manifestly tend; (4) in repeated and vexatious interruptions of the said counsel on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment; (5) in an indecent solicitude manifested by the said Samuel Chase for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

V. "And whereas, it is provided by the act of congress, passed on the twenty-fourth day of September, 1789, entitled 'An act to establish the judicial courts of the United States,' that, for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found; and whereas, it is provided, by the laws of Virginia, that, upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a *capias* against the body of the said Callender, indicted for an offence not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

VI. "And whereas, it is provided by the thirty-fourth section of said act, entitled 'An act to establish the judicial courts of the United States,' that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decisions in trials at common law, in the courts of the United States, in cases where they apply; and whereas, by the laws of Virginia, it is provided, that, in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the court next succeeding

that at which such presentment shall have been made; yet the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

VII. "That, at a circuit court of the United States for the district of Delaware, held at New Castle, in the month of June, 1880, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge, and stoop to the level of an informer, by refusing to discharge the grand jury, although entreated by several of the said jury so to do, and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury that he, the said Samuel Chase, understood 'that a highly seditious temper had manifested itself in the state of Delaware, among a certain class of people, particularly in New Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order; that the name of this printer was'—but, checking himself, as if sensible of the indecorum he had committed, added, 'it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to inquire diligently into this matter;' and that, with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring the file of the papers to which he alluded, and which were understood to be those published under title of 'Mirror of the Times and General Advertiser,' and, by a strict examination of them, to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper, thereby degrading his high judicial functions, and tending to impair the public

confidence in, and respect for, the tribunals of justice, so essential to the general welfare.

VIII. "And whereas, mutual respect and confidence between the government of the United States and those of the individual states, and between the people and these governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the dignity and duty of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the people of Maryland, against their state government and constitution—a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States; and, moreover, that the said Samuel Chase, then and there, under the pretence of exercising his judicial right to address the said grand jury as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States, by delivering opinions which, even if the judicial authority were competent to their expression on a suitable occasion and in a proper manner, were, at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan."

The vote stood thus: Guilty, 16, 10, 18, 18, 0, 4, 10, 19; not guilty, 18, 24, 16, 16, 34, 30, 24, 15. So he was acquitted on all the charges, with a majority vote against him on some of them.

§ 386. In 1868 articles of impeachment were preferred against President Johnson, with the usual result—an acquit-

tal; the vote, however, standing within one of a two-thirds in favor of sustaining the impeachment.

§ 387. Without insinuating anything either way as to the guilt or innocence of the persons I have named, I judge it is not going too far to say it would be as impossible to convict Lord Jeffries on articles of impeachment, under the present arrangement, as it was in the very height of his tyranny as a judicial demon in England.

Let what has above been presented as examples, or illustrations, of the matters on which impeachment jurisdiction has been exercised, suffice for our present purpose.

CHAPTER X.

JURISDICTION OF JUSTICES OF THE PEACE.

388. Want of uniformity in the different states.
389. Law of presumptions.
390. Titles to lands.
391. Justices of the peace in the District of Columbia.
392. Immunities of a justice of the peace.
393. Process.
394. Venue.
395. Rules as to process and returns.
396. Disqualification.
397. Evidence.
398. Judgments by default not allowable.
399. Guardian *ad litem*.
400. Discretion of a justice.
401. Void and voidable acts.
402. Jurisdiction limited by amounts.
403. Jury trials.
404. Entry of judgment.
405. Relation of a justice to other justices.
406. Legislative power in conferring jurisdiction.

§ 388. The jurisdiction of justices of the peace is so completely and strictly statutory, and the statutes of the various states are so far from being uniform, that hardly any general principles are available. Thus, in some states, justices' courts are regarded as inferior courts of record: in others not. In some they are considered common-law courts; in others not—that is, to a certain degree. Thus, at common law, a justice of the peace had no power whatever to try offences. He was only an examining magistrate, to inquire into the grounds of holding an accused person to await the finding of an indictment in the proper court. And the power of trying petty offenders is wholly statutory, and it must be exercised in strict accordance with the statute. *Way's Case*, 41 Mich. 303.

§ 389. However, the law of presumptions, etc., which pre-

vails as to all inferior courts, is the governing rule or principle herein also. That is, jurisdiction must affirmatively appear. Nothing can be presumed to be within the jurisdiction, (*Downing* v. *Florer*, 4 Col. 209;) although a statute may give a justice *exclusive* jurisdiction, and, where this is done, a higher court cannot entertain a cause within its limits, even if the remedy before the justice is inadequate therein, and though the amount may be beyond the justice's jurisdiction, so that the cause cannot be entertained by him. *State* v. *McAllister*, 60 Ala. 106.

§ 390. And I suppose that almost, if not quite, universally, justices have no jurisdiction to try the titles to lands. And we may state the general principles governing this regulation. The rule is thus stated by the New Jersey court: The justice "has no jurisdiction to inquire into the title to lands or into the right of possession. He can only take cognizance of possession as a question of fact. Where the plaintiff can maintain his right to sue in trespass by proof of actual possession—which the justice may determine upon evidence of facts, without any inquiry into title—the action is cognizable in a justice's court; but if the possession be merely constructive, and can be shown only by proof of title, the justice has no jurisdiction. If documentary or other evidence relating to title be relied on, which the justice cannot adjudicate upon, another tribunal must be resorted to." *Jeffrey* v. *Owen*, 41 N. Y. 262. And see *Gregory* v. *Kanouse*, 6 Halst. 62; *Hill* v. *Carter*, 1 Harr. 87; *Campfield* v. *Johnson*, 1 Zab. 83; *Dickerson* v. *Wadsworth*, 4 Vroom, 357.

In Vermont it is held that the term "land," employed in the statute giving jurisdiction to justices of the peace, is sufficiently comprehensive to include within the exception of the statute a right of way over real estate held by the public, or an individual. But it is further held, thereunder, that a justice is not excluded by that statute from entertaining jurisdiction of an action, merely because, under the plea of the general issue, or a plea in bar, the title of land *may* be drawn into controversy, but only when the action *necessarily* involves such inquiry, as ejectment, and real actions, or when, by the

course of pleading, the title to land is actually contested.(*a*) And so, in New York, it has been held that, although by the plaintiff's own showing the title to lands is in question, and the justice improperly refuses to dismiss the cause, his judgment will not be void for want of jurisdiction, but only voidable, for error; on the ground that the justice may properly proceed to render judgment, even if evidence of title is given by the plaintiff, if the defendant does not expressly *dispute* such title, nor move to have the cause dismissed.(*b*) And, also, a justice has a right to try questions of possession of land in an action of trespass *quare clausum fregit*.(*c*)

In Pennsylvania, also, it is held that a merely incidental question of title to land does not oust the jurisdiction of a justice.(*d*) And, indeed, this is probably the prevailing rule.

In Missouri replevin may be brought for a frame building not attached to the realty, and a justice may retain jurisdiction to ascertain, from the evidence, whether it is so attached or not.(*e*) It is so in Illinois likewise, and I think is the general rule. *Salter* v. *Sample*, 71 Ill. 430; *Ogden* v. *Stock*, 34 Ill. 522.

(*a*) Whitman *v.* Pownal, 19 Vt. 223. Thus, in that state, recovering a penalty for tearing down gates on a pent road is out of jurisdiction, (French *v.* Holt, 51 Vt. 545;) and also an action on the case for obstructing a water course, (Haven *v.* Needham, 20 Vt. 183;) and for erecting a nuisance near plaintiff's residence, (Whitney *v.* Bowen, 11 Vt. 250;) and all cases wherein the plaintiff is bound to prove or disprove title to land, (Jakeway *v.* Barrett, 38 Vt. 316.)

In Mississippi it is held that while the statute of forcible entry and detainer does not confer upon justices of the peace the power to adjudicate real estate titles, yet it does give jurisdiction of cases where the *right of possession* is deduced from an exhibition of title, (Ragan *v.* Harrell, 52 Miss. 823;) which, it will be seen, is quite different from the Vermont rule.

In actions for rent, of course the relation of landlord and tenant must be shown, and then the tenant is not permitted to dispute the landlord's title. This is a universal rule. Randle *v.* Sutton, 43 Md. 65; Mathews *v.* Morris, 31 Ark. 225. And so a justice of the peace has jurisdiction in an action for damages to real estate, brought by a lessor against a lessee, since such action does not include any question of title. Taylor *v.* Koshetz, 88 Ill. 479.

(*b*) Koon *v.* Mazuzan, 6 Hill. 44.

(*c*) Ehle *v.* Quackenboss, Id. 537.

(*d*) Heritage *v.* Wilfory, 58 Pa. St. 137.

(*e*) Elliott *v.* Black, 45 Mo. 373.

But, in Wisconsin, title to land includes a title to a division fence, the fence being regarded a part of the realty.(*f*) Possession of land is there regarded as distinct from title, and it may, therefore, be passed upon by a justice, in an action of entry and detainer, where no question of title arises, the entry having been forcible, and not under a *bona fide* claim of colorable title. In other words, where the conflict is only one of possession, and not of title, a justice has jurisdiction, as a general rule.(*g*)

In Indiana it is held that a proceeding to assess damages for the construction of plank-roads, etc., does not involve a question of title to lands,(*h*) so as to exclude jurisdiction.

In Vermont it is even held that the giving of a quitclaim deed does not import title to land; and, therefore, that if the declaration in an action of covenant alleged that the giving of a quitclaim deed was the consideration of the covenant, the jurisdiction of a justice of the peace would not be ousted in such action.(*i*)

In New York a right to put in a plea of title may be waived by proceeding in the cause before a justice.(*j*) And even a plea of title put in properly does not oust the jurisdiction, in an action of debt for a penalty for not removing an obstruction in a highway, because it is the duty of the justice to decide whether the plea is appropriate to the action or not.(*k*)

In Maine an action of trespass *quare clausum fregit* cannot be maintained before a justice if title is pleaded;(*l*) but if the case thus goes to the court of common pleas, and thence, by demurrer, to the supreme judicial court, the defendant will not be allowed in the latter court to add any other plea which could have been tried by the justice.(*m*)

In Massachusetts it has been held that, where the plea was that the defendant entered into his own close, adjoining that of the plaintiff, and there built a fence, etc., the justice had

(*f*) Murray *v.* Van Derlyn, 24 Wis. 67.

(*g*) Winterfield *v.* Stauss, Id. 398.

(*h*) Norristown, etc., *v.* Burket, 26 Ind. 53.

(*i*) Judevine *v.* Holton, 41 Vt. 351.

(*j*) Quimby *v.* Hart, 15 Johns. *304.

(*k*) Fleet *v.* Youngs, 7 Wend. 291.

(*l*) Low *v.* Ross, 3 Greenl. 256.

(*m*) Copeland *v.* Bean, 9 Greenl. 19.

jurisdiction.(*n*) But a plea that the *locus in quo* was a highway ousts the jurisdiction.(*o*) Evidence of a right of way cannot be given under the general issue, however. The plea must be special.(*p*)

In Vermont it has been held that, where an action is brought for obstructing a part of the public road laid through the defendant's land, the title is not involved, essentially, so as to oust jurisdiction.(*q*) Again, held that manure lying upon the soil where first dropped is a part of the soil, but not so if it has been collected for use elsewhere. And, in the latter case, trover, before a justice of the peace, may be maintained by a vendor against a vendee.(*r*)

In Maryland a vendor may bring an action against the vendee of land for the purchase money, before a justice of the peace, if the contract is not still executory. But if a deed has not been given and accepted, such action cannot be brought, because then the plaintiff must prove that he has good title to the land. *Cole* v. *Hynes*, 46 Md. 185.

In Iowa a mere plea of title cannot oust the jurisdiction.(*s*) Moreover, where a petition claims damages for breaking down trees, it has been held that the plaintiff is not confined to the value of the trees destroyed, but can recover for the consequent injuries to the realty.(*t*)

In Ohio it is held that, under the liquor law, a justice of the peace has no jurisdiction of an action brought against the owner or lessee of the premises where liquor is sold; such an action drawing into question the title to real estate.(*u*)

In New Jersey the jurisdiction does not attach in case of obstruction to a private road. The court say: "To maintain the action the plaintiff must prove not only the obstruction, but his right to use the way without obstruction. He must prove his right of way. That is not a thing corporate, an object of the senses, but an incorporeal hereditament; a right

(*n*) Wood *v.* Prescott, 2 Mass. 174.

(*o*) Spear *v.* Bicknell, 5 Mass. 124.

(*p*) Strout *v.* Berry, 7 Mass. 385.

(*q*) Bell *v.* Prouty, 43 Vt. 279.

(*r*) French *v.* Freeman, Id. 93.

(*s*) Cox *v.* Graham, 3 Clarke, 347.

(*t*) Dugan *v.* Hunt, 29 Ia. 447.

(*u*) Bowers *v.* Pomeroy, 21 O. St. 184.

issuing out of a thing corporate; a thing lying not in livery, but only in grant; a right that may be enjoyed without the exclusive possession of the land. To prove this right the party must exhibit documents showing a grant, or give evidence of such continued enjoyment as implies a grant. This is title in its full sense. Such proof is not competent, in that court; and the cause requiring it is, by the statute, not within its jurisdiction."(*v*)

In New York, where a plank-road company sues for toll, the defendant cannot be allowed to raise the question of title unless he gives notice thereof in his answer.(*w*)

In Vermont an account between tenants in common of land is not within the jurisdiction, because therein the defendant might plead that he never was bailiff or receiver for the plaintiff, and thus bring in the question of title.(*x*)

In actions *quare*, etc., in that state, a justice may try title provided the claim is not more than twenty dollars.

In New Hampshire an action of debt under the statute was brought for cutting trees. The plea was that the defendant lawfully cut the trees while he was in possession under a lease from the plaintiff. The reply was that the lease had been cancelled before the trees were cut. It was held that this replication brought the title into question, and ousted the jurisdiction of the justice.(*y*) But in an action for cutting trees, real estate title is held not to be necessarily involved, in Indiana. *Deacon* v. *Powers*, 57 Ind. 489.

§ 391. In the District of Columbia justices of the peace are nominated by the president, and confirmed by the senate. They are, therefore, held to be officers of the United States government, in such a sense as to exempt them from the obligation to perform military duty, under statutes to that effect.(*z*) And where a magistrate is found acting as one, he is to be presumed properly qualified.(*a*)

(*v*)Osborne *v.* Butcher, 2 Dutch. 310.

(*w*)Fredonia, etc., *v.* Wait, 27 Barb. 214.

(*x*)Thayer *v.* Montgomery, 26 Vt. 491.

(*y*)Morse *v.* Davis, 4 Foster, 159.

(*z*)Wise *v.* Withers, 3 Cranch, 336.

(*a*)Bollman & Swartwout's Case, 4 Cranch, 75.

§ 392. It has been held that the same technical precision will not be required either as to pleadings, or evidence, in proceedings before a justice of the peace, that is necessary in a court of record.(*b*) And he is not answerable in a civil suit for error in judgment, however gross, if he has jurisdiction of the cause.(*c*) Nor is he, in any case, indictable for mal-administration, although he may be liable to impeachment.(*d*)

§ 393. As to process, he may proceed for offences committed in his presence without any complaint or warrant; as, for example, in profane swearing.(*e*) And in such case he may be authorized to require persons not officers to make arrest, if necessary; but, then, it has been held, in New Hampshire, a regular complaint and warrant must be made out and served by a proper officer.(*f*) But, probably, the general rule is otherwise, as these subsequent forms would seem to be quite superfluous. In Massachusetts he may, in cases of strict necessity only, direct a warrant to a private person, the necessity to be expressed in the warrant itself.(*g*) And in Vermont a justice may deputize an officer to serve a writ, where it appears that service may fail for want of an officer available in time. And in Illinois. But the person must be appointed by name, and the justice cannot leave a writ vacant, to be filled up by the plaintiff as to the deputy.(*h*) A justice cannot, of course, on general principles, issue a warrant for an offence commited in another state.(*i*)

§ 394. As to venue: a justice may be authorized to act judicially outside of the town for which he was elected. Thus, in 1813, the statute of New York provided that "justices of the peace must reside in the town for which they were chosen, and shall not try a civil cause in any other town, except in cases otherwise provided for by law." A case came up in the

(*b*) Unsier *v.* Trumpbour, 5 Wend. 274.

(*c*) Holcomb *v.* Cornish, 8 Conn. 375.

(*d*) State *v.* Campbell, 2 Tyler, (Vt.) 182.

(*e*) Holcomb *v.* Cornish, 8 Conn. 375.

(*f*) Bissell *v.* Bissell, 3 N. H. 521.

(*g*) Commonwealth *v.* Foster, 1 Mass. 493.

(*h*) Kellogg's Case, 6 Vt. 510.

(*i*) People *v.* Wright, 2 Caines, (N. Y.) 213.

supreme court wherein the court below had decided that a justice could not act judicially out of the town for which he was elected, and it was said: "He may act as conservator of the peace, and exercise his criminal jurisdiction, anywhere in the county; he may send his civil process into any part of the county, and I find nothing to prevent him from issuing his process at any place in the county; but he shall not hold a court for the trial of a civil cause out of his own town, and if he removes from the town in which he was elected he forfeits his office."(*j*) But at a later period, (1818,) a justice was authorized to act anywhere in the county in the trial of civil causes; again, in 1830, he was restricted anew to the town.(*k*) In Texas it has been decided that parties, by consent, cannot confer jurisdiction of their cause to a justice out of his precinct.(*l*) In the absence of an empowering statute, doubtless, the authority is strictly local; but is generally co-extensive with the county as to the issuing of writs, although not as to the place of trial. *Cain* v. *Simpson*, 53 Miss. 524; *Klingel* v. *Palmer*, 42 Ia. 167. Sometimes jurisdiction is strictly confined to residents of the county, (*Hamilton* v. *Millhouse*, 46 Ia. 74,) and even as to an action in attachment, (*Gates* v. *Wagner*, 46 Ia. 355,) and even although jurisdiction in actions of attachment and replevin is not limited to the *township* where the parties reside or the property is found. *Knowles* v. *Pickett*, 46 Ia. 503.

In Illinois it is held that a justice of the peace may take jurisdiction of an action for damages done to real property in another county, provided the parties reside in the magistrate's county. *Pilgrim* v. *Meller*, 1 Ill. Appel. 448.

In Colorado it is held that a statute requiring that suit must be brought in the township where the debtor resides, does not apply to debtors residing out of the state, and that such non-resident debtors may be sued wherever found in the state. *Waguer* v. *Hallock*, 3 Col. 176.

In Wisconsin jurisdiction is lost by calling a case for trial

(*j*)Guernsey *v.* Lovell, 9 Wend. 322.

(*k*)Schroepel *v.* Taylor, 10 Wend. 200.

(*l*)Foster *v.* McAdams, 9 Tex. 542.

at a place different from that specified in the summons; and, also, by trying it at the office of the plaintiff's attorney, although the place be designated in the summons.(*m*)

Venue may be changed in modes prescribed by statute, and where the justice to whom change is made refuses to act, and then the original justice takes back the case and tries it, the judgment is void for want of jurisdiction.(*n*)

It appears, moreover, that a change of venue may operate as an estoppel. Thus, where a suit of replevin was brought before one, as a justice of the peace, and a change of venue was taken to a justice, and afterwards the case was appealed to the circuit court, it was held that the party taking the change of venue could not be allowed to move a dismissal of the appeal, on the ground that the first person was not a justice at all, because he had waived all objection as to jurisdiction by going to trial before the second person, who was really a justice, to whom he had referred the matter on change of venue.(*o*)

§ 395. Where a statute forbids any sheriff from drawing up or filing any writ, etc., an alteration of the date, or return day, of a justice's summons, not made by the justice himself, or by another in his presence, and under his direction, renders the summons void,(*p*) although, of course, that or any defect may be waived by an appearance without objection,(*q*) unless there is no jurisdiction of the subject-matter; for in this, as in all such cases, in all courts, the rule prevails that appearance cannot confer jurisdiction. *Borger* v. *Moore*, 42 Ia. 645. The appearance must be personal, or else must be expressly authorized, for even attorneys are not officers of a justice's court, and so cannot therein bind a party by an unauthorized appearance. *Sperry* v. *Reynolds*, 65 N. Y. 183.

In Minnesota it is held that a summons issued in blank as to the return day is void; and if any one else fills up the blank, and the writ is then served, this service confers no jurisdiction. *Craighead* v. *Martin*, 25 Minn. 44.

(*m*)Newcomb *v.* Town, etc., 24 Wis. 459.

(*n*)Connell *v.* Wilson, 33 Ia. 147.

(*o*)Graves *v.* Shoefelt, 60 Ill. 462.

(*p*)Garrison *v.* Hoyt, 25 Mich. 509.

(*q*)Tyrrell *v.* Jones, 18 Minn. 312.

A summons may be signed by the initials of the first names, as well as by writing out the full name.(*r*)

After a judgment has been entered, the constable's return cannot be impeached, collaterally, in order to dispute the jurisdiction and defeat the judgment. If a return is really false, it must be impeached only in a direct proceeding, by prosecution of the officer, or on appeal.(*s*)

In New York, if a summons be served on two defendants, the name of one of them cannot be subsequently dropped in the proceedings—the justice having no power of amendment of this kind, and no power, therefore, to permit a plaintiff to declare against only one of two joint defendants who have been served.(*t*)

Where a justice deputizes one to serve a summons, he must do it in the same manner in which a regular officer does it, and therefore make a return in writing. And where such a one appeared on the return day, and made oath that he had served the writ, but there was no return indorsed on the summons, it was held the justice acquired no jurisdiction.(*u*)

§ 396. A justice may, of course, be disqualified, by relationship, or interest. In Maine it is held that a justice related to a party within the sixth degree is disqualified to take a deposition in the cause, and is, therefore, liable in trespass for committing a witness who refuses to testify therein. *Call* v. *Pike*, 66 Me. 350. If, however, the relationship is by affinity, the disqualification ceases on the dissolution of the marriage, even if there remains living issue. *Trout* v. *Drawhorn*, 57 Ind. 570. As to interest, a justice of the peace cannot issue a search warrant for his own property; and if he does so, the writ affords no protection to the officer who serves it. *Jordan* v. *Henry*, 22 Minn. 245. But, where a corporation sues, it is no valid objection that the justice is related to a stockholder therein;(*v*) nor is it an objection that a justice is a rated inhabitant of the town into the treasury

(*r*) Wood *v.* Fithian, 4 Zabris. 838.

(*s*) R. R. *v.* Purdy, 18 Barb. 574.

(*t*) Gilmore *v.* Jacobs, 48 Barb. 336.

(*u*) Jackson *v.* Sherwood, 50 Barb. 356.

(*v*) Searsburg Turnpike Co. *v.* Cutler, 6 Vt. 315.

of which fines are to be paid on conviction.(*w*) This, however, was formerly different in Massachusetts, (1816;) (*x*) but later, (1828,) it was said that the prohibition did not apply where the fine went to the state instead of the town.(*y*)

A singular disqualification was imposed in New York, in 1808, by statute, still continuing, with some modifications; namely, the keeping of a tavern. By an early decision, it appears that if a justice lived in a tavern, or removed into the end of a house, the other end of which was kept as a tavern, and there being free communication from one end to the other, he could not act.(*z*) In 1845 it was held that a justice was not deprived of jurisdiction by being a tavern keeper, provided he was such at his election, and did not become so afterwards(*a*)—a kind of semi-evasion of the statute, it would seem.

§ 397. A justice cannot properly render judgment on his own knowledge of previous facts. All facts serving as the basis of judgment must be adduced in evidence in the legal manner.(*b*) And even where a justice received a paper, together with a note purporting to have come from the defendants, authorizing him to enter judgment by confession, and he did according to the request, it was held that he could not legally enter judgment on his knowledge of the defendant's handwriting.(*c*) Such a communication, though genuine, I think cannot properly authorize the entry of judgment.

Nor can he be sworn in a cause he is trying as a witness; since a justice before whom a cause is tried must himself swear the witnesses, and an oath administered to him, therefore, by another justice, is extrajudicial and improper.(*d*) It seems, however, that it may be admitted by consent of the parties.(*e*)

§ 398. It is, perhaps, a general rule—at least, where justices' courts are not regarded as courts of record—that a jus-

(*w*) State *v.* Batchelder, Id. 479.
(*x*) Pearce *v.* Atwood, 13 Mass. 324.
(*y*) Hill *v.* Wells, 6 Pick. 109.
(*z*) Low *v.* Rice, 8 Johns. 409.
(*a*) Parmelee *v.* Thompson, 7 Hill, 77.
(*b*) Burlingham *v.* Deyer, 2 Johns. 188.
(*c*) Martin *v.* Moss, 6 Johns. 126.
(*d*) Perry *v.* Weyman, 1 Johns. 520.
(*e*) Cobb *v.* Curtis, 8 Johns. 470.

tice cannot enter a judgment by default against a defendant; but where a defendant does not appear the plaintiff must prove his cause precisely as if there were an actual defence put in.(*f*)

§ 399. In New York a justice may appoint a guardian *ad litem* for a minor party, this being held an incident to all courts.(*g*)

§ 400. A justice has no discretion—as higher courts have—to suspend proceedings in an action until the costs of a former suit for the same matter are paid. In courts of record this may be done, but on a rule to show cause, and in the exercise of a large discretion.(*h*) However, a justice is not wholly left without discretion as to a cause on trial. And where, in the progress of a trial, he may judge the presence of any one to be prejudicial to the interests of justice, it has been held he has the right to have him summarily removed from the room.(*i*)

§ 401. The usual distinction as to void and voidable acts prevails in regard to a justice of the peace; namely, where the justice has no jurisdiction whatever, and undertakes to act, his proceedings are *coram non judice*; but if he has jurisdiction, and errs in exercising it, the proceedings are only voidable,(*j*) and that by a direct proceeding.

§ 402. Jurisdiction is usually limited by amounts, as well as the nature of the subjects of controversy. But where there is a variance between the process and the declaration as to amount, it has been held in New York as a mere matter of form, and no variance fatal to the cause.(*k*) But in Illinois, where there are no paper pleadings, the amount indorsed on the summons governs, and a plaintiff cannot take judgment for anything beyond it;(*l*) whereas, in New York, the declaration defines the jurisdiction.

A plaintiff may remit any excess found by a verdict beyond

(*f*) Watkins *v.* Weaver, 10 Johns. 106.

(*g*) Mackey *v.* Gray, 2 Johns. 192.

(*h*) Youle *v.* Brotherton, 10 Johns. 364.

(*i*) State *v.* Copp, 15 N. H. 212.

(*j*) Jackson *v.* Wilkinson, 17 Johns. 146.

(*k*) Dennison *v.* Collins, 1 Cow. 111. And in Iowa. Moran *v.* Murphy, 49 Ia. 69.

(*l*) Badgley *v.* Heald, 1 Gil. 64.

the jurisdiction(*m*) or demand, and thus save his cause, and have judgment entered for the remainder. But if he retains his claim, the entering of judgment for the jurisdictional amount will not save the jurisdiction. *Gillett* v. *Richards*, 46 Ia. 652. Also, he may reduce the amount to within the limits of the jurisdiction, by *bona fide* credits; and, in Vermont, by credits entered in the manner of a *remittitur*, without anything having been paid—the credits being made purposely to save the jurisdiction.(*n*)

And where suit is brought upon a bond, of which the penalty is beyond the jurisdiction, but the demand is within it, a justice may entertain it.(*o*)

In Pennsylvania, interest, being an incident only, may be remitted, but not any portion of the principal, in order merely to confer jurisdiction.(*p*)

In North Carolina it has been held that if a claim containing but one item exceeds the jurisdiction, it cannot be divided in order to confer it; but if the claim consists of several items—each of the items being within the jurisdiction, but the aggregate exceeding it—suit thereon may be maintained.(*q*) In Mississippi costs, damages, and interest are excluded in estimating the jurisdiction as to amount. *Jackson* v. *Whitfield*, 51 Miss. 202. In Illinois it has been held that a recovery may be had on several fines for violations of an ordinance for the sale of liquors, provided the aggregate does not exceed the limits of jurisdiction.(*r*)

If the amount claimed is beyond the limits of a justice's cognizance, in general, a circuit court, on appeal thereto, cannot entertain the cause.(*s*)

But, in Minnesota, it is too late to object to the jurisdic-

(*m*)Clark *v.* Dennie, 3 Denio, (N. Y.) 319.

(*n*)Herren *v.* Campbell, 19 Vt. 23.

(*o*)Culbertson *v.* Tomlinson, 1 Morris, (Ia.) 404; State *v.* Lucky, 51 Miss. 528.

(*p*)Bower *v.* McCormick, 73 Pa. St. 427.

And in that state a plaintiff is not allowed to credit a distinct and independent debt in order to give jurisdiction. Peter *v.* Schlosser, 81 Pa. St. 439. In Mississippi, also, this is the rule, unless the debtor consents. Cox *v.* Stanton, 58 Ga. 406.

(*q*)Boyle *v.* Robbins, 71 N. C. 130

(*r*)Harsoldt *v.* Petersburg, 63 Ill. 111.

(*s*)Felt *v.* Felt, 19 Wis. 193.

tion of the court to which appeal is made, after judgment. *Lee* v. *Parrott*, 25 Minn. 128.

An offset by plaintiff against an offset by defendant is not to be counted in his claim, if distinct and independent, and only put in as an answer to the defendant's offset.(*t*)

Where, in a case of replevin, the value of the property was set forth as within the jurisdiction, and the general issue was joined, and it appeared by the plaintiff's own testimony that the value was beyond it, it was held, in Michigan, that the question was not an open one under the general issue.(*u*) But, in Mississippi, where an action was brought to recover damages for the maltreatment of a mule, and the plaintiff recovered to the full extent of the justice's jurisdiction, and the defendant appealed; and, on the trial in the circuit court on the appeal, it was shown that the value of the mule was more than had been recovered below, the circuit court dismissed the cause for want of jurisdiction in the justice, which dismissal was approved by the supreme court.(*v*)

§ 403. A jury may be demanded by parties, and where a *venire* has been issued and served, and the jury fail to appear, it has been held that the justice has no right to resume the

(*t*)Talbott *v.* Robinson, 42 Vt. 698.

(*u*)Henderson *v.* Desberough, 28 Mich. 170.

The plea must be special. And so, where suit is brought on a replevin bond, and the defence relied on is that the actual value of the property was beyond the jurisdiction of the justice, it is held, in Indiana, the plea must be special, because, in the absence of anything to show the contrary, it will be presumed that the amount was within jurisdiction, (Tyler *v.* Bowlus, 54 Ind. 333,) provided the affidavit in the original cause stated the value, and within the jurisdiction. Ibid; Darling *v.* Conklin, 42 Wis. 478.

(*v*)Askew *v.* Askew, 49 Miss. 307.

And so, in Illinois, where a jury finds the value of the property in a replevin suit to be more than the jurisdictional amount of $200, it ousts the jurisdiction, and judgment must be given for the defendant; and even on appeal to a superior court, where the trial is *de novo*. Kirkpatrick *v.* Cooper, 89 Ill. 210.

The rule is, in general, that where a justice has not jurisdiction an appeal cannot confer it on the superior court in the cause pending. Allen *v.* Belcher, 3 Gil. 594; People *v.* Skinner, 13 Ill. 287; Downing *v.* Florer, 4 Col. 210. But it is different in Alabama, where the trial in the appellate court is *de novo*, and the action is for the recovery of a chattel *in specie*. Glaze *v.* Blake, 56 Ala. 385; overruling former cases. This seems to me the better rule.

cause and try it himself, against objection,(*w*) unless the *venire* was delivered to the party demanding the jury, instead of to the officer, and the party fails to return the *venire*, in which case his fraud in suppressing the writ is held to operate as a waiver of the demand for a jury, so that the justice may proceed to hear the cause himself.(*x*) If a *venire* is handed to an officer, who fails to return it, another may issue, unless the demandant goes to trial, which will operate as a waiver of trial by jury.(*y*)

A justice cannot, however, challenge the panel, of his own motion, and issue a new *venire*, when no exception has been taken by either party.(*z*) Nor can he withdraw a case from a jury to which it has been submitted;(*a*) nor can he set aside a verdict as against the evidence;(*b*) nor arrest judgment, or grant a new trial.(*c*)

But, in New York, a justice may, on request of a jury, after they have retired, give them further instructions on the law of the case, provided the parties are present, or have an opportunity of being present.(*d*)

§ 404. A judgment, to be valid, must, in general, be immediately entered.(*e*) But, jurisdiction having been acquired, it will be presumed that judgment was entered directly on final submission, in the absence of an affirmative showing to the contrary. *Moore* v. *Reeves*, 47 Ia. 30. And it seems proper that, in a difficult case, a reasonable time should be allowed for consideration and advisement, and that a justice may enter his judgment at a subsequent day, giving the parties due notice of his action. *Reeves* v. *Davis*, 80 N. C. 212. But the same strictness does not apply to the proceedings while in progress, and it has been held that where a cause was adjourned until 1 o'clock P. M., of a day certain, and on that day the

(*w*) Sebring *v.* Wheedon, 8 Johns. 460.

(*x*) Coon *v.* Snyder, 19 Johns. 384.

(*y*) Blanchard *v.* Richly, 7 Johns. 195.

(*z*) Cross *v.* Moulton, 15 Johns. 469.

(*a*) Young *v.* Hubbell, 3 Johns. 430.

(*b*) Van Valkenburgh *v.* Evertson, 13 Wend. 76.

(*c*) Felter *v.* Mulliner, 2 Johns. 181; Helmick *v.* Johnson, 1 Morris, (Ia.) 89.

(*d*) Rogers *v.* Moulthrop, 13 Wend. 274.

(*e*) Sibley *v.* Howard, 3 Denio, (N. Y.) 172.

justice is detained by official duties until 5 o'clock P. M. of that day, he may, at the latter hour, proceed to try the cause, even although the defendant has left the place of trial.(*f*)

§ 405. One justice cannot take the recognizance of a prisoner under a *mittimus* of another justice, on the way to prison,(*g*) nor after he has been placed in the prison.(*h*) Nor can a justice issue an execution on the judgment of another who still remains in office and retains his docket.(*i*)

§ 406. I do not enter into any full investigation of the subjects of the jurisdiction of justices of the peace, since there is no well-defined limit as to what powers a legislature may bestow upon them. Once, in New York, a justice even had jurisdiction of an action on the case for enticing away the wife of the plaintiff;(*j*) and, also, admiralty jurisdiction—the law providing that he might entertain "all actions for assault and battery, or false imprisonment, done or committed by any master or commander of any ship or vessel, in any merchant service, upon any officer, seaman, or mariner, on the high seas, or in any foreign port or place where such ship or vessel may then be, of which the ordinary courts of law now have cognizance, notwithstanding the damages sustained or demanded by reason thereof shall exceed fifty dollars"—although he had not jurisdiction of such assault happening in any port of the United States.(*k*) A jurisdiction so capricious cannot be defined or explained. I suppose, however, it is safe to say that in no instance has a justice of the peace jurisdiction in a slander or libel case, or a case of breach of promise of marriage, or divorce, or for the final trial of felonies.

(*f*)Hunt *v.* Wickwire, 10 Wend. 102. However, it seems a justice loses jurisdiction by an adjournment unless his docket shows the day, and hour, and place to which the cause is adjourned. Brainmstead *v.* Ward, 44 Wis. 591.

(*g*)State *v.* Berry, 8 Greenl. 179.

(*h*)Commonw. *v.* Canada, 13 Pick. 86.

(*i*)Clifford *v.* Cabiness, 1 Dana, (Ky.) 334.

(*j*)Chase *v.* Hale, 8 Johns. 461.

(*k*)King *v.* Parks, 19 Johns. 375.

CHAPTER XI.

COMMISSIONERS OF HIGHWAYS; AND HEREIN OF EMINENT DOMAIN.

§ 407. Special judicial powers.
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410. Effect of exceeding jurisdiction.
411. Void and voidable acts.
412. No power over navigable streams.
413. Highway crossing railroad.
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416. Estoppel as to jurisdiction.
417. Terms.
418. Notice.
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420. Nature of eminent domain.
421. The taking of property.
422. The primary right is in the legislature.
423. Province of a jury as to the taking.
424. Public use—how decided.
425. What a public use is.
426. Delegation of power strictly construed.
427. Discretion of officers after power delegated.
428. Presumptions as to the exercise of jurisdiction.
429. Kinds of property subject to the right.

§ 407. Bodies may be constituted *ad libitum*, having special judicial powers, in regard to specific subjects. Perhaps the most important of these are commissioners of highways, whose powers, however, are sometimes assigned directly to county courts, and who, in such case, retain only ministerial functions. And, in Maryland, it has been held that courts exercising these powers do not hold them by virtue of their general authority, as courts of law, but by virtue of a special delegation, and, moreover, that a writ of error will not lie to a court vested with special jurisdiction, and not proceeding according to the forms of the common law, although courts

will incidentally inquire into the validity of the judgments of special jurisdictions whenever such inquiry becomes necessary in the ordinary exercise of their powers.(*a*) And it has been held, also, that the strictest technical exactness is not requisite, in the proceedings, as to terms and language employed, provided the intention is plain, and the commissioners have jurisdiction. And so, where the word "road" instead of "highway" is used in the record, or the petition, the jurisdiction does not, therefore, fail; nor if the description of the road located should be different from the language of the petition, if it is substantially the same.(*b*)

§ 408. However, the jurisdiction, and the facts conferring it, must be shown on all the records. And, otherwise, proceedings must be quashed. *Shue* v. *Com'r*, 41 Mich. 638; *Milton* v. *Com'r*, 40 Mich. 229. And one of the most important jurisdictional facts may be the presentation to the court, or commissioners, of an application made by a qualified person.(*c*) Yet sometimes proof may be admitted to show the jurisdiction, or the want of it,(*c*) but the rule is as just stated, that the records should show it; although, especially where commissioners are not required to keep a record, parol evidence of the action may be given, and proof that they met and conferred, and agreed upon a plan, and delegated power to one of their number to carry out the plan, is enough to sustain the defence of who acted under such commissioner.(*d*)

§ 409. But the mode prescribed by statute must always be pursued substantially, if not literally, or else the proceeding will be *coram non judice* and void; and where a board is not empowered to lay out a road of undefined width, an order establishing such a road is null, and of no effect.(*e*) However, when jurisdiction once attaches, subsequent error will not invalidate, except that the error may reverse in the proper manner. The principle is thus stated: "Unless the commissioners had jurisdiction to authorize the commencement

(*a*) Savage Mfg. Co. *v.* Owings, 3 Gil. 497.

(*b*) Windham *v.* Com'rs, 26 Me. 409.

(*c*) Harrington *v.* People, 6 Barb. 611; partly overruled in Gould *v.* Glass, 19 Barb. 179.

(*d*) Smith *v.* Helmer, 7 Barb. 422.

(*e*) White *v.* Conover, 5 Blackf. 462.

of their proceedings they would be void. A general jurisdiction merely, by law, over the subject-matter is not enough. They can only have it, in the particular case in which they are called upon to act, by the existence of those preliminary facts which confer it upon them. Their doings are ineffectual, unless they have power to commence them, and may, in such cases, be avoided collaterally. But having jurisdiction, if their subsequent acts are erroneous, they are valid until vacated by *certiorari*. *Baker* v. *Runnels*, 3 Fair. 235; *Goodwin* v. *Hallowell*, Id. 271; 12 Mete. 208; *Sumner* v. *Parker*, 7 Mass, 79: *Haskell* v. *Haven*, 3 Pick. 404; *Wales* v. *Willard*, 2 Mass. 120; *Loring* v. *Bridge*, 9 Mass. 124; *Davell* v. *Davell*, 13 Mass. 264; *Frumpton* v. *Pettis*, 3 Lev. 23; the case of *The Marshalsea*, 10 Co. 68."

§ 410. Exceeding jurisdiction, in any particular, may vitiate the whole proceedings: and must do so, if the excess is not separable. Where county commissioners laid out a turnpike, as a highway, and thereon required a town to tend the draw in a bridge over a navigable stream, and keep lights on the bridge, as the turnpike company had been required to do by their charter, the requirement was held to be fatal to the whole proceedings. The court remarked: "The commissioners surely had no authority to impose this burden on the town. Towns cannot be required to do any more in regard to roads than they are required by statute to do. Their duties in this respect are wholly statutory, and there certainly is no statute requiring them to tend a draw in a bridge over a navigable river. A town may be required to make a road, and every town is obliged to keep the highways within its bounds safe and convenient for travelers. All the duties of towns, in regard to roads, relate to the travel along the highway; but tending the draw in this bridge was not for the benefit of the travel on the road, but wholly for the convenience of the navigation of the river. The law imposes no such burden on a town for the benefit of navigation, and no such burden can be lawfully imposed by the commissioners. The laying out of the whole road being one entire act, and the part imposing on the town of Braintree the duty of tending the draw in the

bridge being unlawful, and being a material part, which cannot be separated from the rest, the whole laying out is invalid."(*f*) And thus the extraordinary spirit of enterprise in that board was unceremoniously squelched forever.

§ 411. Yet the distinction of void and voidable must always be borne in mind, and is strictly applicable herein to commissioners, as well as to the ordinary courts. Thus declared the the New Hampshire court: "We find it difficult to conceive that the character of proceedings, as judicial or otherwise, can depend upon the office or station of those who take part in them. If a power is judicial, when it is exercised by one set of men, it can hardly have a different character when similarly exerted by others. Wherever one or more persons are authorized, or required, to call parties before them, to hear allegations, and their proofs, and pronounce a determination between them—to make a decision by which the rights of parties are to be bound—that power seems to us to be judicial, and their proceedings are judicial. Such seems to us to be the power exercised under our statutes by the selection of towns in laying out highways. * * * * * * *

"Inferior courts of special jurisdiction may lack the power to issue the process, or to adopt the course of proceedings to which they have resorted. Their modes of proceeding may be precisely prescribed, and if they deviate from those modes their proceedings may be invalid, void or voidable on this account. But they are void, if so, only to those who have cause to complain on account of them. They are voidable only by those who are injured, and the exceptions may be waived and the proceedings confirmed by those who alone have cause of complaint. Those persons as to whom the process and proceedings have been regular can take no exception because others have not been notified, or that they have not been notified in a legal and proper manner. Irregularities, which is but another word for illegalities, in the proceedings in an action, furnish, everywhere, ground of exception to the party whose rights are affected by them; and the irregular proceedings are at once set aside on motion of the proper

(*f*) Inhabitants, etc., *v.* County Com'rs of Norfolk, 8 Cush. 546.

parties. But it is a general rule that if a party who has ground to move the court to set aside any process or proceeding of any kind, neglects to make his application in a reasonable time after the facts have come to his knowledge, he is deemed to waive the exceptions by the delay, and will be forever precluded to make the objection afterwards. There are exceptions to this rule, as where a statute declares a proceeding void, or authorizes particular process on certain conditions, which are not complied with, in which cases there is no waiver by delay. * * * * * * No objection being suggested to the general jurisdiction of the selectmen to lay out highways within their town, the illegalities charged in this case all fall within the last two classes of exceptions—one of jurisdiction over the parties from neglect to give them notice, and defects in the course of proceedings afterwards, in the improper assessment of damages as to some parties, and neglect to assess any damages in the case of others. These exceptions, we think, do not render the laying out absolutely void, though they render them liable to be avoided. Until they are so avoided they remain valid as to some persons, and for some purposes, and are capable of confirmation. They are not impeachable by everybody, nor open to be assailed by those who have no interest in the matter, nor by those as to whom the proceedings have been regular; nor by those who have waived their exceptions, and thus confirmed the laying out, either directly or incidentally. In such cases we have, therefore, to inquire whether the party who raises the question is one who has a right to complain—whether the cause of objection which he assigns affects him or his interests; and, if it did once affect him, whether he has waived the exception by the part he took in the proceedings, or has since otherwise waived or released it, and has thus disabled himself to raise the objection. * * * * * We do not understand that any writing is ever necessary to constitute or prove a waiver of exceptions of this kind."(*g*)

§ 412. In Maine it is held, and no doubt this is the general rule, that without a special statute commissioners have no

(*g*) State *v.* Richmond, 6 Foster, 235–247, *passim*, and cases cited.

jurisdiction to locate highways over navigable streams, or arms of the sea, and construct bridges over them, so as to obstruct navigation; and that, if they do so, any person impeded thereby may remove the bridges.(*h*) And where such a highway and bridge were located over a creek navigable by canal boats and gondolas the case was held to come within this principle, and the person removing the bridge, being indicted, was discharged by the supreme court. And, in a similar case, in Massachusetts, the court, deciding the same way, remarked: "There can be no doubt, therefore, that, by the principles of the common law, as well as by the immemorial usage of this government, all navigable waters are public property, for the use of all the citizens, and that there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them. The legislature may, without doubt, by a general law, delegate to the magistrates of a county, or to any other body, the power of determining when public convenience requires that a bridge shall be thrown over a creek or a cove; but, until they have made such delegation, in express terms, it is a branch of sovereign power to be exercised by the legislature alone. Upon this ground it was determined, in the case of *Commonwealth* v. *Coombs*, that the court of sessions, to which body was given, by a general law, the power of laying out public ways, had not power to lay out such a way over a navigable river so that the river might be obstructed by a bridge. The statute giving power to the court of sessions, it is there said, must have a reasonable construction. 'A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway already in the use of the public.' And in the case of the *Inhabitants of Arundell* v. *McCulloch* the same principle is recognized. The court say: 'It is an unquestionable principle of the common law that all navigable waters belong to the sovereign, or, in other words, the public; and that no individual or corporation can appropriate them to their own use, or confine or obstruct them so as to

(*h*) State v. Anthoine, 40 Me. 435.

impair the passage over them, without authority from the legislative power. It is upon this principle that so many acts of our legislature have been passed, authorizing the building of bridges over various streams and rivers within the commonwealth.' "(*i*)

And the special act must not only confer authority to build a bridge, but it must confer that authority directly on the commissioners, since the statute must be strictly pursued. So, where, by a special act, the city of Belfast was authorized to erect and maintain a free bridge across the Passaggassawakeag river—the bridge to be built of suitable materials, and to be so constructed as to be safe and convenient for public travel, and to be provided with a draw of sufficient width for vessels to pass and repass—and where the municipal officers of the city refused to act therein, a petition was presented to the county commissioners to lay out the way and bridge, which they did. It was held that the act, neither in terms nor by implication, gave them any authority to act in the matter, and they had no jurisdiction.(*j*)

The same principle is also extended to the location of a highway upon a beach forming one side of a harbor, and which, though not within the ebb and flow of ordinary tides, unaided by storm or wind, is yet almost always covered by spring-tides, and part of which is often useful to vessels drifting from anchorage in the harbor. Commissioners cannot make the location, if it probably, though not necessarily, would injure the harbor for the purpose of navigation, or interfere with public measures for its protection and improvement.(*k*)

§ 413. Where, under statute, in Massachusetts, an adjudication of commissioners laying out a highway across a railroad fails to state whether it is to be carried over or under, or on a line with, the railroad, or to show that special notice was given to the railroad company, it is erroneous, and will be quashed on *certiorari*, and that, too, even if the railroad corporation actually appeared and was heard before the commis-

(*i*) Commonwealth *v.* Charlestown, 1 Pick. 185.

(*j*) Inhabitants, etc., *v.* County Com'rs of Waldo Co. 52 Me. 529.

(*k*) Inhabitants, etc., *v.* Com'rs of Essex, 5 Gray, 451.

sioners.(*l*) The commissioners have final jurisdiction of the question, whether the highway shall be over, under, or on a level with the railroad.(*m*)

§ 414. In Wisconsin it is held that supervisors, in altering a highway, on proper application, have a discretion to change the route from the proposed line, if satisfied that the public interests would be subserved thereby.(*n*) And they may revoke an order for a highway if they find, on reconsideration, that the public interests would be thus better subserved, (*Nelson* v. *Goodykoontz*, 47 Ia. 32;) as, for instance, if the construction will be too costly from payment of damages or otherwise. *People* v. *Foos*, 88 Ill. 141. And so they may discontinue a road, (*Hatch* v. *Superv.* 56 Miss. 26;) or withdraw a special privilege granted by them to an individual. *Teague* v. *Same*, Id. 29.

§ 415. It is held in New York that, unless a highway has been laid out according to the statute, commissioners are not even authorized to make an order for the removal of encroachments therein.(*o*)

§ 416. A town may be estopped from disputing the jurisdiction, where, by default, it virtually confesses the jurisdictional allegations of a petition. On this the New Hampshire court say: "The jurisdiction of the court of common pleas over petitions for the laying out of highways is limited and special, depending upon particular exigencies described in the statute. In such cases a well-founded and established rule of pleading requires that the petition to the court should contain a statement of all the facts necessary to give jurisdiction to the court, and if it fail to do so the proceedings may be suppressed at any stage. These allegations, being material, must not only be stated, but, if not admitted, proved. Now, it is perfectly settled, by numerous authorities, that a default is, in effect, a confession, by the party suffering it, of all the

(*l*)R. R. *v.* Com'rs of Plymouth, 11 Gray, 512.

(*m*)R. R. *v.* Middlesex Co. 1 Allen, 324.

(*n*)Neis *v.* Frawzen, 18 Wis. 537.

(*o*)Chusty *v.* Newton, 60 Barb. 332.

material allegations in the bill, declaration, or petition by which the cause of action, or the plaintiff's case, is exposed upon the record, the denial of any one of which would render the proof of it necessary on the part of the plaintiff, or actor, to establish his claim to the interposition of the court, which he has invoked. In this case it is not disputed that enough was stated in the petition to show that the court of common pleas had jurisdiction. What was stated was admitted by the default. It would not be reasonable, nor would it be conformable to the well-established technicalities of the law, to suffer a cause which has proceeded regularly to the point of deciding the merits of the controversy, to be embarrassed or retarded by permitting allegations to be made inconsistent with what has been admitted, and which the defendants might have made at a stage of the proceedings when their proof might have prevented a great amount of trouble and expense which the parties have since incurred."(*p*)

§ 417. The omission to hold a regular term,—when the commissioners do business at terms,—and thereby passing over a petition until a second term, works a discontinuance of the proceedings pending thereon, and wholly deprives the board of jurisdiction.(*q*) And commissioners may lose jurisdiction by adjourning beyond the time limited by statute for acting on an application. *State* v. *Castle*, 44 Wis. 671. The court of Maine said, in such a case: "Nor is it any sufficient answer that the county commissioners neglected to hold the next regular term, as established by statute. No reason is assigned for not doing it. Their neglect of duty in this respect cannot render valid their violation of law in making their return at the wrong time. If they could, without reason, omit to hold one term, they might any number. This would leave it to their discretion to hold a term or not."(*r*) But, in Illinois, it is held that a failure to adjourn from day to day, during a session, as required, is not juris-

(*p*)Huntress *v.* Effingham, 17 N. Ill. 585.

(*q*)Inhabitants, etc., *v.* Com. of Aroostook Co. 59 Me. 392.

(*r*)Allison *v.* Com. 54 Ill. 172.

dictional, but only an irregularity, which is waived by an appeal to supervisors from the judgment rendered.(*s*)

§ 418. A notice to interested parties is jurisdictional,—in the same manner as process in ordinary actions,—and the notice is strictly construed, so that if it be given only to owners of lots and lands, over and through which a street will run, when opened, it will not bind a person off the line of the street.(*t*)

§ 419. Like any other judges, commissioners may be disqualified from acting by interest, and the principle here is more rigidly applied than usually with judges in the ordinary courts. It has been held that where a single commissioner of the board was a stockholder in a tax-paying corporation in the town he was disqualified; and, having acted, the report of the commissioners laying out the highway was therefore set aside.(*u*) And, also, where petitioners furnished liquors to the commissioners, of which the latter drank during the sittings, it was declared to be an abuse for which a report would be set aside, without inquiry as to how far the commissioners were affected by it.(*v*)

§ 420. The right of eminent domain being intimately connected with the laying out of highways, as well as other public improvements, I deem it not inappropriate to set out, briefly, the jurisdictional principles therein involved. I think the leading outlines of the feudal system are very strongly marked in it, although writers seem to refer it generally to "an authority existing in every sovereignty."(*w*) The feudal

(*s*)Kidder *v.* Peoria, 29 Ill. 77.

(*t*)Petition of New Boston, 49 N. H. 328; Frizell *v.* Rogers, 82 Ill. 109. Moreover, if a statute requires notice to be given that commissioners will meet at a certain time and place, to decide on an application, it is not a compliance with the statute to give notice that they will meet at a certain time and place to *consider* such application. State *v.* Castle, 44 Wis. 671. The party entitled to notice is the legal owner, and not a mere equitable owner. Hidden v. Davidson, 51 Cal. 138. And this is to be determined, usually, by the record title. Wilson *v.* Hathaway, 42 Ia. 173.

(*u*)Newport Highway, 48 N. H. 433.

(*v*)Cooley's Const. Lim. 524.

(*w*)Surocco *v.* Geary, 3 Cal. 69.

features, of course, are modified and somewhat softened, but yet this power includes—(1) The original fee in the sovereign; (2) the derivative nature of the subject's title; (3) the complete independence therein of the subject who is sovereign of his own domain; (4 the condition of assistance on which all the subordinate feudal tenures depended. One modification of these is the necessity of compensation for the property taken, to be judged usually by a jury. In Minnesota a jury is dispensed with. *Bruggerman* v. *True*, 25 Minn. 123.

§ 421. I select two topics as embracing the jurisdictional basis, namely: the necessity of the taking, and the purpose thereof. Occasionally a question may arise as to what a taking is. It does not always include an actual possession, but may take place merely by the vesting of a right to take immediate possession; as, for instance, where a municipal corporation, by ratifying an assessment of damages, has acquired a vested right, at will, to enter on land and use it as a street, it is regarded as a taking in the sense of the constitution. *Fink* v. *Newark*, 40 N. J. 11. As to compensation, and jury investigations thereon, I regard these as executory rather than jurisdictional, and therefore as outside the limits of this work.

First, as to the necessity of taking. Not all necessary taking or destruction of property falls within the range of this power, however. For example, that which is made necessary by public perils does not, as the destruction of buildings in order to arrest the progress of a fire. This has been held to be for individual benefit, or for the city, and not the sovereignty, and the private rights of the individual must yield to the general interests of safety to society,(*x*) and that without compensation. Also, this has been declared to be merely a regulation of the right, which even individuals have, to destroy private property in cases of inevitable necessity. In New Jersey, however, it was, in 1848, declared to be an exercise of eminent domain, to so destroy property, and that, therefore, the destruction ought to be compensated.(*y*) But,

(*x*)Russell *v.* Mayor, etc., of New York, 2 Denio, 461.

(*y*)Hale & Home *v.* Lawrence, 1 Zabr. 715.

in 1851, this decision was virtually overruled in cases arising out of the same calamity.(*z*)

The true principle, undoubtedly, is that the necessity in eminent domain is not a necessity of destruction, but of improvement; not of public safety merely, but of public use, for the benefit of the sovereignty at large, directly or indirectly.

"The right of eminent domain," say the Indiana court, "or that right by which the sovereign power, for public uses, takes and appropriates the property of the citizen, is one which should be watched with great vigilance. It should never be exercised except when the public interest clearly demands, and then cautiously and in accordance with law. The right is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise."(*a*)

§ 422. The legislature holds the primary right of eminent domain, but can, and usually does, delegate its power; and it may do this to municipal corporations, or even to private corporations, in a measure, limited by the extent to which the use to be made of the improvement is a public use, which we will presently define and explain. And the power may be, of course, given in the charter of such private corporation. *Hand Gold Mining Co.* v. *Parker*, 59 Ga. 419.

§ 423. But, in some states, a jury is to pass upon the *necessity of a taking* before a jurisdiction attaches, and where such a matter is referred to a jury they must find that the taking is for the public use and benefit; that the work itself is one of public importance, and that the particular land is needed for the construction of the work.(*b*) And a finding that "it was and is necessary to take and use said land for

(*z*)American Print Works *v.* Lawrence, 3 Zabr. 590.

(*a*)Allen *v.* Jones, 47 Ind. 442.

And accordingly the power should be strictly limited to necessity, and the proceedings should conform, in all particulars, with the statutory requirements. Dayton Mining Co. *v.* Seawell, 11 Nev. 394; R. R. Co. *v.* Meader, 59 Tex. 77; Detroit, etc., Association *v.* Com'rs, 34 Mich. 36; Whisler *v.* Com'rs, 40 Mich. 501; State *v.* Plainfield, 41 N. J. 138. It seems to be an anomaly, in New Jersey, that a railroad company can lend its charter-condemning power to another railroad company. Coe *v.* R. R. Co. 31 N. J. Eq. 147.

(*b*)Railroad *v.* Clark, 23 Mich. 519.

the purpose of operating and constructing said railway by said company," has been held insufficient.(*c*) And so, where proceedings are instituted to obtain water-power to operate a manufactory, a finding that the taking is to be for the public use is fatally defective.(*d*) And, where the matter is to be thus decided, I do not know how to justify the declaration of the New York court of appeals that the "necessity for appropriating private property for the use of the public, or of the government, is not a judicial question," notwithstanding "the power resides in the legislature, and may be exercised by means of a statute which shall at once designate the property to be appropriated, and the purpose of the appropriation," or delegated to public officers, or private corporations.(*e*) However, the court probably means no more than this: that "it is not necessary for the legislature, in the exercise of the right of eminent domain, either directly or indirectly, through public officers or agents, to invest the proceeding with the forms or substance of judicial process,"(*f*) without denying that this may, nevertheless, be done in the exercise of legislative discretion, so that *quoad hoc*, to the point of the decision on examination, the proceedings are judicial. And so notice to owners may be requisite in the commencement of proceedings,(*g*) so as to allow them to "intervene and participate in the discussion before the officer or board." In this view of the case, the New York decision rests on the ground, merely, that the legislature, being under no obligation to make the determination judicial, had not actually done so.

§ 424. It is imperative that the taking be for a public and not a merely private use. Thus the limit to the power granted to railroad corporations to take lands for railroad purposes,—tracks, buildings, etc.,—in regard to present and prospective need, is the reasonable necessity of the corporation in *discharging its duty to the public. In re N. Y. C., etc.*,

(*c*) Railroad *v.* Van Drelle, 24 Mich. 409.

(*d*) McClary *v.* Hartwell, 25 Mich. 139.

(*e*) People *v.* Smith, 21 N. Y. 595.

(*f*) Ibid, 599.

(*g*) Smith *v.* Railroad, 67 Ill. 194.

R. Co. 77 N. Y. 248. And the determination of this question is expressly held, in Vermont and Massachusetts, not to be exclusively legislative, but judicial, as to particular cases. In Vermont the court says: "The important question in this case relates to the validity of the several acts of the legislature, upon which these proceedings wholly rest. The legislature is limited in its powers by the constitution of the state, and whatever it does in excess of the limits is nugatory. The first article of the first part of the constitution declares acquiring, possessing, and protecting property to be among the natural, inherent, and inalienable rights of persons. The second article of the same part declares that private property ought to be subservient to public uses when necessity requires it; but that, whenever taken for the uses of the public, the owner ought to have an equivalent in money. These declarations together are equivalent to a declaration that private property ought, upon compensation made in money, to be subservient to public uses when necessity requires it, and to no other uses, even though necessity should require it, and compensation should be made. [Of course, it is always requisite that compensation be made, or at least secured, before possession be taken. *Sanborn* v. *Belden*, 51 Cal. 268; *Jersey City* v. *Fitzpatrick*, 30 N. J. Eq. 99. In Arkansas the existence of an adequate remedy to the land owner will permit the entry of a railroad company before the assessment and payment of compensation. *R. R.* v. *Turner*, 31 Ark. 495. A preliminary attempt to agree on the compensation with the owner, and a failure therein, may be required to be alleged as a jurisdictional fact in proceedings for condemnation. *In re Lockport, etc., R. Co.* 77 N. Y. 557. If an owner agrees to claim no damages, it is binding on him. *Coombs* v. *Com'rs*, 68 Me. 484. If an agreement provides for an exorbitant compensation for lands taken to build a railroad, and the corporation takes possession before payment, and the corporation becomes insolvent, and its affairs pass into the hands of a receiver, and afterwards the owner sues to recover the amount agreed on, it is held, in New Jersey, that the court has jurisdiction to reduce the amount to a reason-

able and just estimate. *Coe* v. *R. R.* 30 N. J. Eq. 21. In condemnation proceedings, compensation is to be estimated as of the time of taking possession, and cannot, therefore, include subsequent improvements made by the taker thereon. *Price* v. *Ferry Co.* 31 N. J. Eq. 31.] Whenever the use is public the legislature has full power to determine whether a necessity for taking for such use, in any classes of cases, exists or not, and the legislature has the sole prerogative of determining as to the propriety of exercising the power it has upon the necessity that does exist in any class of cases. But the legislature has not power to so determine that a use is a public use, as to make the determination conclusive. The attempt of the legislature to exercise the right of eminent domain does not, therefore, settle that it has the right. But the existence of the right in the legislature, in any class of cases, is left to be determined under the constitution by the courts."(*h*) And the Massachusetts court say, on the same subject: "We are met at the outset with the suggestion that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the constitution that no part of the property of an individual can be taken from him or applied to public uses without his consent, or that of the legislature, and that, when it is appropriated to public uses, he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should, by statute, take the property of A. and transfer it to B. it would

(*h*) Tyler v. Beecher, 44 Vt. 651.

transcend its constitutional power. In all cases, therefore, where this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law.

"But the legislature has no power to determine finally upon the extent of their authority over private rights. That is a power, in its nature, essentially judicial, which they are, by article thirtieth of the declaration of rights, expressly forbidden to exercise. The question whether a statute, in a particular instance, exceeds the just limits prescribed by the constitution, must be determined by the judiciary. In no other way can the rights of the citizen be protected, when they are invaded by legislative acts which go beyond the limitations imposed by the constitution. But it is to be borne in mind that, in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the law-making power has transcended its authority, or committed, under the form of law, a violation of individual rights. When an act has been passed, with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. * * * Besides, it is a well-settled rule of exposition that, in considering whether a statute is within the limits of legislative authority, if it may, or may not, be valid, according to circumstances, courts are bound to presume the existence of those circumstances which will give it validity."(*i*)

From these decisions, these deductions are to be drawn, namely: (1) From the Massachusetts case, that the courts are to decide whether a particular statute provides for a public use, in accordance with the constitution, or not; (2) from the Vermont case, that the legislature may define public uses in a general way, and in regard to classified cases, but it belongs to the courts to apply it, in any particular case, in the same manner that other judicial statutes are carried into

(*i*)Talbot *v.* Hudson, 16 Gray, 422

practical effect; so that hereby it is declared that the legislative discretion passes under judicial supervision and action.

For a discussion of the relative position of the legislature and courts herein, see *Brown* v. *Keener*, 74 N. C. 718; *R. R.* v. *Town of Lake*, 71 Ill. 333.

§ 425. As to what is a public use, there is room for a contrariety of opinions, because, although, "in many cases, there can be no difficulty in determining whether an appropriation of property is for a public or a private use—as, if land is taken for a fort, a canal, or a highway—it would clearly fall within the first class; if it is transferred from one person to another, or to several persons, solely for their peculiar benefit and advantage, it would as clearly come within the second class; yet there are intermediate cases, where public and private interests are blended together, in which it becomes more difficult to decide within which of the two cases they may be properly said to fall. There is no fixed rule, or standard, by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. * * * * "(*j*) And there can be no difficulty in deciding that land taken for a public school-house is taken for a public use. *Smith* v. *School District*, 40 Mich. 143.

"It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the prosperity and welfare of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns, or the creation of new sources for the employment of private cap-

(*j*) Talbot v. Hudson, 16 Gray, 423.

ital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community. It is on this principle that many of the statutes of this commonwealth, by which private property has been heretofore taken and appropriated to a supposed public use, are founded. Such legislation has the sanction of precedents coeval with the origin and adoption of the constitution, and the principle has been so often recognized and approved, as legitimate and constitutional, that it has become incorporated into our jurisprudence. One of the earliest and most familiar instances of the exercise of such power under the constitution is to be found in Stat. 1795, for the support and regulation of mills. By this statute, the owner of a mill had power, for the purpose of raising a head of water to operate his mill, to overflow the land of proprietors above, and thereby to take a permanent easement in the soil of another, to the entire destruction of its beneficial use by him, on paying a suitable compensation therefor. Under the right thus conferred, the mere direct benefit was to the owner of the mill only. Private property was, in effect, taken from one individual and transferred for the benefit of another, and the only public use which was thereby subserved was the indirect benefit received by the community by the erection of mills for the convenience of the neighborhood, and the general advantage which accrued to trade and agriculture by increasing the facilities for traffic and the consumption of the products of the soil. Such was the purpose of this statute, as appears from the preambles to the provincial acts of 8 and 13 Anne, from which the statute of 1795 was substantially copied. It is thereby declared that the building of mills has been 'serviceable for the public good and benefit of the town, or considerable neighborhood.'* In like manner, and for similar purposes, acts of incorporation have been granted to individuals, with authority to create large mill powers for manufacturing establishments by taking private property, even to the

*It is certain that, in the present advanced condition of facilities for conveying and manufacturing grain into breadstuffs, the erection of mills is not a public use, and condemnation cannot take place therefor.

extent of destroying other mills and water privileges on the same stream. *Boston & Roxbury Mill-dam* v. *Newman*, 12 Pick. 467; *Hazen* v. *Essex Co.* 12 Cush. 478; *Commonw.* v. *Essex Co.* 13 Gray, 249.

"The main and direct object of these acts is to confer a benefit on private stockholders who are willing to embark their skill and capital in the outlay necessary to carry forward enterprises which indirectly tend to the prosperity and welfare of the community. And it is because they thus lead, incidentally, to the promotion of 'one of the great industrial pursuits of the commo wealth,' that they have been heretofore sanctioned by this court, as well as the legislature, as being a legitimate exercise of the right of eminent domain, justifying the taking and appropriation of private property. *Hazen* v. *Essex Co.* 12 Cush. 475. It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interest of a section of the state, by allowing individuals acting primarily, for their own profit, to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed, it would seem to be most reasonable and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use, and subjected to a servitude, or easement, by which its value has been impaired, and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interests of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill owner to raise a dam, and flow the land of adjacent proprietors,

has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land, by taking down the dam and rendering the land available for agricultural purposes, would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam, on making suitable compensation to the owner. It would only be to apply to the mill-owner, for the benefit of agriculture, the same rule which had been previously applied to the land-owner for the promotion of manufacturing and mechanical pursuits."(*k*)

In New York it is held the legislature is the sole judge of what constitutes a public use, except that, to a limited extent, the constitutionality of a statute on the subject is a judicial question. And it is held that the supply of gas from a natural gas well is a public use, because the lighting of streets and public places is a public benefit, and the court insinuates that the supply of manufactured gas may come under the same principle;(*l*) as, also, does the construction of railroads everywhere.(*m*)

§ 426. The delegation of power, under the eminent domain law, is strictly construed; and so, where a contractor, under a contract with the state to construct a canal duly laid out, finds it necessary to blast rocks in the bed of the canal, he is liable if any of the fragments lodge upon adjacent premises, not taken for the purposes of the improvement by the competent authorities,(*n*) and the plea of necessity will not avail him.

§ 427. The delegation of power does not take away the discretion of officers, so as to prevent a discontinuance of proceedings—as in laying out a park—wherein no actual injury has been done to land, when it is discovered that the expense will be too great.(*o*)

(*k*)Talbot *v.* Hudson, 16 Gray, 423–428, *passim*.

(*l*) Bloomfield, etc., Gas-light Co. *v.* Richardson, 63 Barb. 437.

(*m*)R. R. *v.* City of Stockton, 41 Cal. 148. And of telegraph lines. R. R. Co. *v.* Tel. Co. 53 Ala. 211.

(*n*)St. Peter *v.* Denison, 58 N. Y. 421.

(*o*)Washington Park, 56 N. Y. 149.

§ 428. It is held that the usual presumptions prevail in regard to the rightful exercise of jurisdiction herein, so that, when land has been condemned for a railway, the determination can no more be impeached, collaterally, "than the judgment of any other court of exclusive jurisdiction, and all the elements legally entering into the adjudication will be presumed to have been assigned due consideration."(*p*)

§ 429. As to the kinds of property subject to the exercise of the right, "every species of property which may become necessary for the public use, and which the government cannot appropriate, under any other recognized right, is subject to be seized and appropriated under the right of eminent domain. Lands for the public ways; a building that stands in the way of a contemplated improvement, or which, for any other reason, it is necessary to take, remove, or destroy, for the public good; streams of water, corporate franchises, and, generally, it may be said, legal and equitable rights of every description, save money, which it cannot be needful to take under this power, and rights of action, which can only be available when made to produce money, are liable to be appropriated."(*q*) Land occupied by one railroad may be thus taken for a passenger station by another railroad company, even if the company whose land is taken is thereby deprived of a part of its business,(*r*) and particularly land which is not in actual use and indispensable for the use of the franchise previously conferred is liable; for these must stand on the same footing as the property of individuals;(*s*) and even if the property of an insolvent railroad company is in the hands of a receiver, this fact constitutes no exemption. *Central R. R.* v. *Penn. R. R.* 31 N. J. Eq. 475. And so with

(*p*) R. R. *v.* R. R. 67 Ill. 147–148.

(*q*) Cooley's Const. Lim. 526.

Even the rights of a mortgagee are in a measure subordinate, and a taker will be protected against a lien holder who is not made a party to the condemnation proceedings. But the money paid in compensation is subject to the payment of the lien. Platt *v.* Bright, 31 N. J. Eq. 81.

(*r*) R. R. *v.* R. R. 111 Mass. 125.

(*s*) R. R. *v.* R. R. 66 Ill. 176. And a right of way may be granted through public lands on which there is an inchoate homestead claim. R. R. *v.* Gordon, 41 Mich. 429.

the lands of a gas company. *N. Y., etc., R. Co.* v. *Gas Co.* 63 N. Y. 326. And one water company may appropriate the lands of another. *Rochester Water Commissioners' Case*, 66 N. Y. 413. A private way can be changed into a public highway on due compensation to the owner; although not without such compensation. *Ayres* v. *Richards*, 41 Mich. 680.

The general rule in such matters is that lands appropriated to public use are not thereby released from liability to a subjection, by legislative authority, to another public use; although a subsequent grant must not invade the former use, unless authorized in express terms, or by necessary implication.(*t*)

(*t*)R. R. *v.* City of Dayton, 23 Ohio St. 518; Evergreen Cemetery Association *v.* New Haven, 43 Conn. 234; Central, etc., R. Co. *v.* Fort Clark, etc., R. Co. 81 Ill. 523; R. R. *v.* Dayton, 23 Ohio St. 518; Water Co. *v.* R. R. Co. 23 Pick. 360; R. R. Co. *v.* R. R. Co. 87 Ill. 317; *In re* N. Y. C., etc., R. Co. 77 N. Y. 248.

CHAPTER XII.

ARBITRATION.

§ 430. Nature of arbitration.
431. The submission—parties.
432. Minors.
433. Guardians.
434. Executors and administrators.
435. Attorneys at law.
436. Agents.
437. Partners.
438. Joint owners.
439. Husband and wife.
440. Corporations.
441. United States district attorneys.
442. Effect of submission made while under arrest.
443. What may be arbitrated—what an award may embrace—submissions—revocation—disqualifications.

§ 430. A submission to arbitration may be regarded as a contract constituting the court; the judicial character of the proceedings more properly attaches afterwards. Nevertheless, it is a *basis of jurisdiction:* and when a court is to enter judgment on the award of arbitrators, under a statutory regulation, it is indispensable to the jurisdiction of the court that the submission contains, in substance, what the statute requires, and be executed with the prescribed formalities.(*a*) Of course, a private award does not need to follow a statute, (*Price* v. *Byne*, 57 Ga. 176,) although such award must be governed by the common law, (*Bremer* v. *Bain*, 60 Ala. 153,) and on such compliance with the common law is valid and binding, and that, too, even in a bastardy case. *Smith* v. *Kirkpatrick*, 58 Ind. 254. An arbitration under a rule of court may be as conclusive as a judgment, under a regular submission, (*Yeatman* v. *Mattison*, 59 Ala. 382;) and where it

(*a*) Moody *v.* Nelson, 60 Ill. 229.

is final, and entirely conclusive as to the rights of the parties. And so a finding may be *res adjudicata*, and not subject to collateral objection, (*Beam* v. *Macomber*, 35 Mich. 455;) as, for instance, in regard to a disputed boundary line. *Davis* v. *Henry*, 121 Mass. 150. When jurisdiction is obtained the proceedings are not to be held to critical exactness, or interfered with on merely technical grounds;(*b*) and, indeed, there is hardly any ground upon which an award within the submission will be set aside, except the single one of fraud. And, herein, the rule is the same as to strictly private arbitrations, to which the parties have, in due form, submitted the determination of matters in controversy;(*c*) unless, of course, the submission is revoked, by notice, before the award is made, and not waived by appearance and participation.(*d*) An award will not be set aside merely because it is erroneous, or against the weight of evidence, unless the error is so gross that it cannot be accounted for except by corruption or dishonesty in the arbitrators.(*e*) Thus, it is stated in Massachusetts: "Whenever a case is referred, with the consent of the parties, to arbitration, whether by rule of court, by mutual bonds in the county, or by agreement before a justice of the peace, under the statute, the decision of the arbitrator, upon the question submitted to him, is final both upon the law and facts, unless otherwise provided by the terms of the submission, or of his award, and can be set aside only for exceeding the terms of the submission, for fraud, or corruption, or for such mistake as shows that he did not apply the rules which he intended to apply to the decision of the case."(*f*) Going beyond the submission will, of course, vitiate the award by a want of jurisdiction, (*Sherfy* v. *Graham*, 72 Ill. 158,) although, if the matters are severable, the award will only be void to the extent of the excess, and what is within the submission will still be valid. *Bogan* v. *Doughdrill*, 51 Ala. 513. But that which will enable the court to sever the good from the bad

(*b*) R. R. *v.* Hughes, 28 Mich. 187.
(*c*) Smith *v.* R. R. 16 Gray, 523.
(*d*) Seeley *v.* Pelton, 63 Ill. 102.
(*e*) R. R. *v.* Thomas, 23 N. J. Eq. 433.
(*f*) Carter *v.* Carter, 109 Mass. 309.

must appear on the face of the award. *Bullock* v. *Bergman*, 46 Md. 270. Where there is a reference made in a case pending in a court, the consent of the parties must be entered of record, at least on the minutes of the court. *Stone* v. *Morrill*, 43 Wis. 72. And so a party complaining must be able to show from the award itself that but for the mistake a different award would have been rendered; and unless restricted by the submission, the arbitrators may disregard strict rules of law and evidence, and make an equitable decision. *Halstead* v. *Leaman*, 52 How. Pr. 415. And, moreover, an award cannot be set aside, on the ground of mistake, unless it is shown that the mistake was made by them on their own theory. If a party makes a mistaken concession, and on this the award is partly based, he is bound by the result. *Davis* v. *Henry*, 121 Mass. 150. And if an award is sought to be impeached on the ground that only a part of the matters submitted were passed upon, it must be shown that the matters omitted were brought to the notice of the arbitrators by the party complaining. *Young* v. *Kinney*, 48 Vt. 22. Of course, an award can be impeached for fraud on the same grounds on which a judgment may be. *Conway* v. *Duncan*, 28 O. St. 105. But as to mistake, it must, as above stated, be shown that the mistake injuriously affected the award. *Gorham* v. *Millard*, 50 Ia. 554. However, *apparent* errors, either of law or fact, may be ground for setting aside an award. *State* v. *Ward*, 9 Heisk. 100; *King* v. *Manuf'g Co.* 79 N. C. 360. A mere clerical error may be corrected. *Clement* v. *Foster*, 69 Me. 319; *Davis* v. *Cilley*, 44 N. H. 448. Every reasonable intendment will be made in favor of an award. *Darst* v. *Collier*, 86 Ill. 96.

§ 431. The submission, then, being the source of authority to the arbitrators, our inquiries will be mainly confined to this, since, unless it is sufficient in itself, there is no proper court appointed or constituted, and all proceedings must be nugatory, or, at least, dependent upon the discretion of the parties, and their satisfaction with the award.

And our first topic will be the parties. These are, in great degree, determined by the rules which apply to parties exe-

cuting contracts, since a submission is a contract, notwithstanding it is a jurisdictional authority to act.

It is essential that the parties are such as have power to obey any award that may be rendered within the submission. For instance, where a religious corporation has no power to sell real estate, except by authority of court, it cannot refer the question of selling it to any other tribunal; and if an arbiter is chosen who decides that the property shall be sold, the award is necessarily a nullity, having, in reality, nothing to stand upon.(*g*) For judicial power cannot be delegated; and, therefore, as the matter of sale, in such cases, rests in the discretion of the court itself, that discretion must be invoked from the court, and none can be substituted in its exercise. And it is a settled rule that public policy forbids that arbitrations should ever be allowed in such a manner as to oust the jurisdiction of the courts; as, for example, an agreement beforehand, to submit any disputes which might arise to arbitration, will not be enforced. *Pearl* v. *Harris*, 121 Mass. 390. But Kansas furnishes an exception to the rule. *Bevey* v. *Carter*, 19 Kan. 135. If a reference is actually made by consent of parties, and the reference fails from any cause, the parties still retain their standing in the court for a trial of the controversy. *Preston* v. *Morrow*, 66 N. Y. 452. The reference is not necessarily a discontinuance of the suit, unless the parties intend that it shall be so; and if the referee fails or refuses to act, the case still stands for trial. *Hearne* v. *Brown*, 67 Me. 156.

§ 432. A minor cannot be bound by a submission any more than by other contracts. The disability extends even to rights of action, so that it is held that if a minor releases a claim for damages, even in tort, he may avoid the release; and this upon the ground of his presumed incapacity to ascertain how much damages he was entitled to. So, if he submit his claims to abitration, he is not bound by the award, because of his presumed incompetency to choose suitable arbitrators.(*h*) And in a case of this kind, (not arbitrated, indeed, but settled by the minor himself, and wherein the court held the

(*g*) Wyatt *v.* Benson, 23 Barb. 336. (*h*) Baker *v.* Lovett, 6 Mass. 80.

same principle prevailed,) it was decided that the matter could be submitted to a jury, which would then be authorized to review the transaction, and the plea of accord and satisfaction, and allow the amount which had been paid, and, if this was found too small, to render verdict for the deficiency.(*h*)

§ 433. But a guardian may submit to arbitration the interests of his ward in such a way as to be conclusive as a bar to an action by the minor on coming of age. Thus, even in a submission for an assault and false imprisonment of the ward, it was held the guardian could bind his ward, and the court said thereon: "It is difficult to conceive how it should ever have been doubted whether guardians had this power, or whether they were not bound by their bond, or whether an award, under these circumstances, did not put an end to all controversies submitted between the infant and other party. That an infant should not bind himself in this way is right; but, for this very reason, a power should be lodged elsewhere; and where can it be so properly entrusted as to the very person who has the care of all his property? For the present plaintiff does not appear a guardian *ad litem* only, and must, therefore, be supposed competent to judge whether a suit or arbitration will be most likely to promote the interest of his ward. But this point is settled by *Roberts* v. *Newbold*, where it is allowed that a guardian may submit for an infant; and even if the latter gives a bond himself, it is not void, but only voidable. With this, also, agrees the civil law, by which, although an infant cannot bind himself by a submission, yet, if any one will become his surety, a remedy may be had against the latter for the infant's non-performance."(*i*)

In Connecticut, (in 1787,) where one minor committed a most cruel injury on another, the parents, on both sides, submitted the matter to arbitration, and the award was held to be conclusive, as to the minors, as well as the parents; although the submission and the award included the parents' right to damages, as well as the injured son's right, without discriminating between them; and this was placed upon the

(*h*) Ibid.

(*i*) Weed *v.* Ellis, 2 Caines, (N. Y.) 255.

ground of the natural guardianship of the father.(*j*) And much more reasonably may a guardian be permitted to submit matters pertaining directly to the estate of his ward.(*k*) And it has been held, in this, that where a submission is made of matters concerning the interest of the guardian individually, and also of his ward, and the submission does not require a separation in the award of the two interests, the award cannot be objected to on the ground of uncertainty in not showing what is awarded to the guardian, and what to the ward, distinctively; and if this should ever become a material question, in a future suit, parol evidence will be admissible to distinguish the two interests.(*l*) A guardian *ad litem*, however, cannot thus submit in behalf of his wards, because he must conduct the suit under the direction of the court—this being the purport of his appointment; and where such an one enters into a submission for himself and his wards, it will be binding upon himself as to his own interests, but will not be binding, in any way, upon the wards.(*m*) Says the Tennessee court, on this matter: "It is very clear that the power and duty of such guardian are limited, and strictly confined to the defence of the particular suit in which he is appointed. He is to defend the suit, in the court from which he derives his authority, according to the rule and principles of law applicable to the case, as administered in that tribunal, and in conformity with the ordinary mode of trial and practice of the court in similar cases. It is not within the scope of his authority, or duty, to consent to change the tribunal for the trial; or that the decision shall be upon principles other than those applicable to like cases in the forum in which the suit is pending. His special and restricted powers admit of the exercise of no such discretion."

§ 434. Executors and administrators are authorized to submit claims pertaining to the estate; and, in New York, a requirement of vouchers, and an affidavit thereto, is held not

(*j*)Beebe *v.* Trafford, Kirby, 217.

(*k*)Hutchins v. Johnson, 12 Conn. 381.

(*l*)Strong *v.* Beronjon, 18 Ala. 168.

(*m*)Fort *v.* Battle, 13 S. & M. (Miss.) 137.

to be a prerequisite to a reference under the statute;(*n*) although, of course, the claim submitted must be one over which the administrator has the legal control, and, in respect to personal property, choses in action, etc., he stands in place of the deceased, and has, therefore, the whole *legal* interest in them, for the purposes of settling the estate. So that, having the right to dispose thereof, release personal claims, compound, etc., he has, *per consequence*, the right to submit;(*o*) the award being—as would be a judgment in court—if adverse to the administrator, against the goods of the testator, or intestate *de bonis testatoris*, because of the representative character of the administrator.(*p*) And the right to submit is held to be not merely statutory, but to exist at common law.(*q*)

But, if a less sum should be awarded than the administrator might have recovered at law, it is held that, although the award might be binding, yet he might be held to account for the deficiency to the heirs and other persons interested in the estate;(*r*) so that a submission involves considerable personal risk in some cases.

In Maine a reference of "all demands," by an administrator, has been held not to include title to real estate,(*s*) which is not, indeed, within the scope of an administrator's relation to the estate which he represents, anywhere.

At common law, in all cases, an administrator was held responsible for a mistake of the arbitrators injurious to the estate;(*t*) but enabling statutes usually take away this peril. Yet, in Texas, it is held, however, that an administrator should never submit claims to arbitration without providing for an appeal, and that, if he does so, the submission is void, and because the operation is against the policy of the law, and likely to be "irretrievably iniquitous;" and so an award, under such defective submissions, may be set aside, on motion, or, if affirmed, it will be at the hazard of the adminis-

(*n*)Russell *v.* Lane, 1 Barb. 524.
(*o*)Alling *v.* Munson, 2 Conn. 695.
(*p*)Coffin *v.* Cottle, 4 Pick. 455.
(*q*)Chadbourn *v.* Chadbourn, 9 Allen, 173.
(*r*)Bean *v.* Farnam, 6 Pick. 271.
(*s*)Kendall *v.* Bates, 35 Me. 359.
(*t*)Overly's Ex'r *v.* Devisees, 1 Met. (Ky.) 120.

trator if the claim should, in fact, be unjust or legally invalid. The court say: "The administrator would be personally liable, at common law, if the award were not for the full amount of the debt really due, and, on the like principle, he should be liable for an unfounded claim, if established against the estate by an arbitration to which he has submitted by his voluntary act. But this, as before said, would be, at least, very severe upon an administrator, if arbitration be a legal mode by which claims for or against an estate may be recognized and established. If, according to this view, an administrator would not under our laws be held responsible for submission to an arbitration, to the extent of the liability incurred by the like submission at common law, the danger to which mistakes would be exposed by such submission would be most obvious and alarming. An arbitration might become an instrument of the greatest injustice to estates, without the possibility of relief from any quarter. And, such being the consequences naturally flowing from such submissions, it would seem that an arbitration is an improper, and must be regarded to some extent as an incompetent, tribunal for the adjustment of claims affecting estates, especially where the claims against the estate, and the stipulation, is, as it was in this case, that the award shall be final."(*u*)

In Louisiana it is held that the only persons who can dispute an award, under a submission, by an administrator, are heirs and creditors; and these can ratify such award so as to make it conclusively binding, even in the absence of a legal right in the administrator to submit; for, "as prohibition is intended to protect the right of parties interested, submissions thus made are not absolutely null, but their want of authority may be cured by the acquiescence and ratification of the parties represented by them."(*v*)

§ 435. As to the power of an attorney at law to submit the case of a client, it is perhaps universally recognized; at least, in a degree. But the award must not be virtually a compromise, in the form of an award; for this cannot bind

(*u*) Yarborough *v.* Leggett, 14 Tex. 680

(*v*) Lattier *v.* Rachal, 12 La. An. 696.

an injured party.(*w*) A proper reference may be "by oral consent, in open court, entered on the minutes."(*x*) And it is held that "an authority to prosecute or defend a suit implies a power to refer it, by rule of court, that being a legal mode of prosecuting or defending."(*y*) But he cannot bind his client by a submission by bond merely. It must be under a rule of court.(*z*) And, in that case, a formal consent of the client is not requisite, for, say the Georgia court, "Why should not this be so? An attorney may confess a judgment against his client; and this involves every thing,"(*a*) and in the progress of a cause an attorney's solemn admissions are binding upon his client.(*b*) But he has no power to change the terms of a submission, made by the parties before he was employed as counsel. There must be a pending suit before the submission, in order that the attorney may have authority to submit, and the submission must be made after he has undertaken the management of the cause, to give him control of it;(*c*) and then it is within the general powers of an attorney to submit. *Halker* v. *Parker*, 7 Cranch. 449. That is, in court, but not *in pais*. *McGinnis* v. *Curry*, 13 W. Va. 30. Nor can an attorney, without the client's assent, delegate an authority to submit to arbitration. *Wright* v. *Evans*, 53 Ala. 108.

In Pennsylvania, however, it has been held that a party has a right beforehand, if dissatisfied with an agreement of his attorney to refer, to apply to the court where the agreement is entered to have it set aside;(*d*) that is, a party has, nevertheless, the right of revoking a submission entered into by his attorney. But, as to the general right of an attorney to submit, it is declared that there is no force in an objection that an attorney cannot be allowed to deprive his client of the right of trial by jury, because no one disputes his authority to

(*w*) Holker *v.* Parker, 7 Cranch, 453.

(*x*) Bates *v.* Visher, 2 Cal. 357.

(*y*) Buckland *v.* Conway, 16 Mass. 396.

(*z*) Smith *v.* Bossard, 2 McCord, (Ch.) 408.

(*a*) Wade *v.* Powell, 31 Ga. 22.

(*b*) Beverly *v.* Stephens, 17 Ala. 705.

(*c*) Jenkins *v.* Gillespie, 10 S. & M. 34.

(*d*) Millar *v.* Criswell, 3 Barr. 449.

make an issue of law by putting in a general demurrer, and thus give the decision to the court without the intervention of a jury.(*e*) And it has been held in that state that where a rule of court was entered on the part of the plaintiffs to submit a cause to arbitration, and arbitrators were chosen accordingly, held a meeting and adjourned, and during the adjournment the attorneys entered into a written agreement, entitled of the cause pending, which provided for the submission of all matters of variance between the parties, of every nature and kind, without regard to the form of action or the pleadings, to the arbitrators then chosen or others appointed in their stead—the award to be final and conclusive, and the parties waiving the right of appeal and of inquisition upon real estate—the submission was within the authority of the attorneys, when not revoked by the party in due form;(*f*) this being the party's right, in all cases, if exercised in time.(*g*)

This submission must be made a rule of court, but this may be done by reciting the act under which it is made. If there is no agreement to make it a rule of court, the court cannot enter judgment on the award.(*h*)

§ 436. An agent may bind his principal in all submissions not requisite to be sealed. And the rule that an agent cannot bind a principal by a seal does not apply where the agent signed a submission under seal, when a seal was not required; for, in such a case, the seal is merely nugatory.(*i*) And, even if an agent transcends his authority in making a submission, the award may be ratified by a subsequent adoption of it, so that it will be as conclusive upon the principal as if he had himself executed the submission.(*j*) And, if the principal should appear at the hearing before the arbitrators, it would be also a waiver of all objection from want of authority in the submission.(*k*)

If, however, an agent enters into a submission in his own

(*e*) Wilson *v.* Young, 9 Pa. St. 102.

(*f*) Bingham's Trustees *v.* Guthrie, 19 Pa. St. 420.

(*g*) Coleman *v.* Grubb, 23 Pa. St. 410.

(*h*) Stokeley *v.* Robinson, 34 Pa. St. 316.

(*i*) White *v.* Fox, 29 Conn. 575.

(*j*) Lowenstein *v.* Lowenstein, 37 Barb. 256.

(*k*) Diedrick *v.* Richley, 2 Hill, 272.

name, he will be personally liable; and, so, if one enters into a submission on behalf of himself and others, without authority as to them.(*l*) And even if he signs as agent, but does not disclose the name of his principal, unless the name of the principal is otherwise known to the other party.(*m*)

Even the agent of a town, appointed to *compromise* a disputed claim for damages in laying out a road, may refer the question of amount to arbitrators, so as to bind the town by the submission and award.(*n*)

Where an agent, without a written submission, refers the question of an annuity of a widow in lieu of dower, she will be bound by the award if she afterwards receives payments according to its terms.(*o*)

Where a statute requires an acknowledgment of the submission before a justice of the peace, and an acknowledgment recites that an agent appeared, etc., the presumption is that the agent had authority, and a court may enter a binding judgment on the award under a submission so acknowledged, even without any proof of such authority. The Michigan court says, thereon: "The jurisdiction of the court must, of course, depend upon the voluntary submission of the parties, and one purporting to act as an agent must have due authority so to act, in order to bind his principal. But, in all cases of jurisdiction, the law establishes certain proceedings as prerequisites, and fixes the evidence of such proceedings. * * When it appears by the certificate [of the justice] that the party appeared, and that the appearance was by an agent duly authorized for that purpose, the statute having permitted appearance in this manner, the necessary inference is that the agent was duly authorized."(*p*)

(*l*) Smith *v.* Van Nostrand, 5 Hill, 419.

(*m*) Winsor *v.* Griggs, 5 Cush. 210.

(*n*) Schoff *v.* Bloomfield, 8 Vt. 472.

A city may submit to arbitration, and entrust the selection of arbitrators to the city attorney. Kane *v.* Fond du Lac, 40 Wis. 495. And a county court may submit the interests of the county, which are under its control and supervision, to arbitration. Remington *v.* County Court, 12 Bush. 148.

(*o*) Furber *v.* Chamberlain, 9 Foster, 405.

(*p*) City of Detroit *v.* Jackson, 1 Doug. (Mich.) 111.

A *general* agent must have a *special* authority to enable him to submit matters of his principal to arbitration.(*q*) And an agent appointed to submit a claim does not derive authority, even from this special appointment, to ratify and confirm an award when made.(*r*) And where an agent has authority to demand and sue for "all moneys," etc., and the principal, in the written grant, says, "subjecting myself to be sued through him, in the same manner as if I were personally present," it is held this does not authorize him to submit matters in dispute, at least until suit has been brought thereon. And, again, if a principal says to his agent, "If you can honorably and fairly settle with A. out of court for me, do so; if not, let the court and jury settle this"—it does not include the power of submitting the controversy to arbitration, nor will an authority to exercise *reasonable discretion*, or submit to a reasonable sacrifice;(*s*) nor an authority to "settle."(*t*)

§ 437. One partner, without special authority, cannot submit the interests of a firm so as to bind his copartner; although he may submit his own interests in the firm.(*u*) But while an award, as an award, may not bind other partners, yet it may sometimes operate as an extinguishment of a partnership claim, when complied with by the submitting partner, where it comes under the general power of a partner to receive payment, settle the affairs of the firm, and execute releases thereon.(*v*)

The above is a statement of the general rule; but the authorities are not uniform, and, in some states, the disability of a partner is held to be confined to submissions under

(*q*)Trout *v.* Emmons, 29 Ill. 433.

(*r*)Bullitt *v.* Musgrave, 3 Gill, 50.

(*s*)Scarborough *v.* Reynolds, 12 Ala. 257.

(*t*)Huber *v.* Zimmerman, 21 Ala. 488. And, in like manner, a power to "settle," on an assignment of a complainant's interest in a contract, does not authorize the assignee to include it in a general arbitration between him and the other party to the contract, and an award thereon, obtained against the complainant's protest, and by the assignee's deception, does not prevent a decree for specific performance. Lawrence *v.* Emson, 31 N. J. Eq. 67.

(*u*)Karthaus *v.* Ferrer, 1 Pet. (U. S.) 228.

(*v*)Buchanan *v.* Curry, 19 Johns. 143.

seal; as in Pennsylvania,(*w*) where this is held to rest on the ground that, "whatever is the nature of the contract, there is no doubt but that the acts of every single partner in transactions relating to the partnership bind the whole;" and, in Ohio, where the partners are joint parties to a pending suit;(*x*) and, in Kentucky, where also the disability is confined to sealed instruments of submission.(*y*)

It seems to me that, while the great weight of authority is doubtless on the other side, these dissenting authorities have the superior reasoning with them. It appears to be an irresistible deduction from the acknowledged right of a partner to act authoritatively in all matters of contract concerning the partnership business and interests, so as to bind the firm, that he has, therefore, a right to bind them by a contract of submission. Thus say the supreme court of Kentucky, in the case last cited, in the foot notes: "It will be seen, by examining a more modern and lucid author—Gow on Partnership—that he makes but a single exception from the power of one partner to bind another in all matters touching the partnership concerns, and that is, the case by deed; and he summarily and lucidly lays down, and by indubitable authority supports, principles which fully sustain the doctrine that one partner can bind another in a reference to arbitration by an instrument not sealed; and, what is more remarkable, he draws a different principle from the case of *Strangford* v. *Green* from that drawn by his predecessors, Watson and Kyd; and that is, that one partner who makes a submission to arbitration is bound to perform the award, although his copartner was no partner to the submission. This, we conceive, is the most correct deduction from that obscure authority. It has also been well observed in argument that both Kyd and Watson, in making the exception which they have made, have laid down a position incompatible with other principles maintained by them. It is clear, according to the position of Watson, that one partner may

(*w*)Taylor *v.* Coryell, 12 S. & R. 248.

(*x*)Wilcox *v.* Singletary, Wright, 421.

(*y*)Southard *v.* Steele, 3 Monroe, 435.

not only bind his copartner in all unsealed instruments, touching partnership concerns, but he can sell the stock in trade, transfer the company debts, and, even by a release under seal, may release a debt due the firm without the express assent of his copartner. And it is laid down, as a general rule, that any one who is capable of making a disposition of his property, or a release of his rights, may make a submission to an award. It is difficult, and perhaps impossible, to give a satisfactory reason for prohibiting one partner to bind the other by submission to an award, and allow him at the same time equal or greater powers in every other respect. The power given to one partner to bind his fellow is a matter of great convenience to the partners themselves, and enables them to transact business with equal facility, without a special authority for every act, when they reside in different countries; and it redounds greatly to their benefit, because they thereby enhance their credit by binding the funds of each to strangers, who, in their turn, are benefited by a security without the signature of each. Why, then, should they be prohibited from submitting their differences with strangers to this peaceable and oftentimes convenient mode of adjustment? Indeed, it is said that one partner may enter an appearance for another in court, and thus bind him by a legal proceeding. Could he not by the same rule take every step in a suit for his copartner, and assent to a rule or order of court submitting the suit to a reference. If so, it must be clear that he can do so without such rule by an instrument of writing in the partnership name."

I do not think this is adequately answered by the opinion in 13 Barbour, where it is indirectly reviewed. But I will give the language of the court, and the reader may here compare them together, in a connected view, and see which has the better reason, in his judgment. Says *Hubbard*, J., delivering the opinion of the court: "The rule of law, it seems to me, is that one of several partners in a trading firm has no implied power or authority, arising from the partnership relation, to refer to arbitration any partnership interest or controversy. The principle is universal in its application,

unaffected by the question whether the submission is by simple agreement or by specialty. The reasons on which the rule is grounded are stated, with fullness and great clearness, by Justice Story, in his Law of Partnership, § 114: 'It is not within the scope of the ordinary business, or powers, or authorities of the partnership,—and the reason that the award may call upon the partners to do acts which they might not otherwise be compellable to perform,*—but the soundest reason seems to be that it takes the subject-matter from the ordinary cognizance of the established courts of justice,† which have the best means to investigate the merits of the case by proper legal proofs and testimony; and as the means of arbitrators to accomplish the same result are narrow and wholly inadequate, it ought not to be presumed that the partners meant to waive their ordinary legal rights and remedies, unless there is some special delegation of authority to that effect, either formal or informal.' In illustration of the second reason above suggested, it may be observed that if the agency was once admitted, then, doubtless, a clause might be inserted in the submission, under the statute in relation to arbitrations between individuals, authorizing a judgment of a court of record. This would plainly contravene that well-settled rule of law that one partner cannot confess a voluntary judgment, even to bind the partnership interests and property, (1 Wend. 311; 9 Wend. 437;) and, of course, cannot indirectly, by means of a voluntary submission, accomplish the same result; and especially not, when the judgment, if sustained, would be a charge not only on the partnership effects, but upon the individual, real and personal estate of the members of the firm.‡

*Plainly, this reason has no force, because a submission by a partner would be a partnership submission, and therefore only authorize such an award as would fall strictly within the limits of the partnership business, wherein, also, the submission itself must wholly be confined. Whatever, in the submission or award, would be without the firm business would be *ipso facto* void.

†Which is an equally good reason for discouraging all arbitration —which, on the contrary, courts of justice are said to favor, as a peaceful and inexpensive mode of terminating controversies.

‡This might have force were it not that the interests of the sub-

"The precise question under review has not been settled, in this state, by any adjudication to which my attention has been directed. There are several decisions to the effect that a *sealed submission* is invalid, (9 Johns. 285; 19 Id. 137; 1 Wend. 326;) but these cases all rest upon the well-established doctrine that the partner cannot bind another by seal without special authority. The question of the validity of a submission by simple agreement was not raised, discussed, or necessarily assumed in the decisions; and hence the cases are, in no respect, authority on the point. Chief Justice Kent, in his Commentaries, (3 Kent, 49, § 43,) announces the general rule, without distinguishing as to the character of the submission. He says: 'Nor can one partner bind the firm by a submission to arbitration, even of matters arising out of the business of the firm. The principle is that there is no implied authority, except so far as it is necessary to carry on the business of the firm.' This is the well-established doctrine of the English courts. *Stead* v. *Lolb*, 3 Bing. 101, is a leading case, referred to with approval by both English and American publicists. The same doctrine is held in the supreme court of the United States. *Karthons* v. *Fener*, 1 Pet. 222. In several states of the Union—in Pennsylvania, 12 S. & R. 243; Kentucky, 3 Monroe, 436; and Ohio, Wright, 420—a contrary rule of law has been held, recognizing the distinction that a submission by simple agreement is binding, although one by specialty is not. But I cannot perceive any sound reason for the distinction. Having no common seal, one partner cannot bind his associates by specialty; and by the modern law a seal, being regarded as but a technicality, doubtless may be disregarded when affixed by one partner to partnership contracts or transactions where, from the nature of the business, or instrument, a seal was unnecessary."(*z*)

In Massachusetts it has been held that where a submission, entered into under the statute, is signed by all the partners of a firm, but acknowledged only by part, it operates to de-

mitting partner are also involved with those of the others, so that his personal interests are a safeguard against abuse.

(*z*)Harrington *v.* Higham, 13 Barb. 661.

prive the arbitrator of all jurisdiction, and an award cannot be enforced, even against the one acknowledging the submission; upon the ground that a strict conformity to the statute is necessary to the acquiring of any jurisdiction,(*a*) and the submission must show who are the members of the firm with exactness.(*b*)

Where one who was a Frenchman, and understood the English language quite imperfectly, was present at, and to an extent participated in, a conversation wherein his partner finally agreed to arbitrate the matter in dispute, he was held not bound by his presence, nor by his conversing about the affair, unless it further appeared that he intentionally assented to a reference by his partner.(*c*)

§ 438. The rule is the same in regard to joint owners who are not partners—one cannot bind another without special authority,(*d*) and herein the reason is very much stronger than in regard to partners, as I judge.

Where those having a joint interest agree to submit jointly, it has been held that the submission also includes a several award as to each, unless, of course, the terms of the submission expressly confine the award to joint interests. The rule is thus stated: "It is said, in *Baspole's Case*, 8 Coke, 93, that if two on the one part and one on the other part submit themselves, the arbitrator may make an arbitrament between one of the two of the one part and the other of the other part, and it will be good. And so the rule is laid down in *Chapman* v. *Dalton*, 1 Plowd. 289, citing 2 R. 3. The case in the Year Book, 2 R. 318, referred to by Plowden, is thus stated by Kyd on Awards, 157: Where the submission was between three on the one side, and one on the other, of all actions and demands between them, it was held that the arbitrators had an authority to make an award of all *joint* matters between the three and the one, and also of all matters *severally** be-

(*a*) Abbott *v.* Dexter, 6 Cush. 108.
(*b*) Wesson *v.* Newton, 10 Cush. 115.
(*c*) Martin *v.* Thrasher, 40 Vt. 464.
(*d*) Eastman *v.* Burleigh, 2 N. H. 487.

*And so it has been held that where there are two joint suits, and also individual suits, against a defendant, and the cases are referred, the whole may be included in a consolidated award. Vannah *v.* Carney, 69 Me. 221.

tween the one and *any one of the three;* and Brook, in abridging the case, says this is good law; but he denies that what follows is good law, viz., that the arbitrator has an authority to decide on any matter between any two of the other three. See, also, Vin. Ab., Arbitrament D, pl. 5, and note. In *Libtral* v. *Field*, 1 Keb. 885, p. 1, 47, it was held that an award between one of one side and one of another is sufficient on a submission by several. In *Athelstone* v. *Moon & Willis*, Comyn, 547, a motion was made for an attachment for not performing an award. The award was that Willis should pay a sum of money due *by him* to the plaintiff. The submission was of all matters between the parties, without saying between them or either of them; and objection was taken that this must be understood of *joint* demands of the plaintiff against both defendants, and so the award was not good. But the court disallowed the objection, and said a submission of several persons of all matters of difference between them imports a submission of all matters that either had against the other, *jointly* or *severally*. I do not find that this doctrine has been denied in any of the more modern cases."(*e*)

Some of those having a joint interest may, on the same principle, sever in the submission, and make an agreement binding them alone; and others may come in afterwards, and, by submitting, adopt the agreement.(*f*) And so adult heirs may submit, although there are minor heirs interested in the subject, and the award will bind the adults; and that, too, when the subject-matter is an equitable title to lands.(*g*)

§ 439. As to matters concerning husband and wife, in general, a husband may submit to arbitration his own rights, derived through the wife;(*h*) but not her rights as to her separate property.(*i*) Before the recent statutes, it was proper for the wife to join her husband in relation to title to her

(*e*) Fidler *v.* Cooper, 19 Wend. 289.
(*f*) Smith *v.* Virgin, 33 Me. 153.
(*g*) Boyd's Heirs *v.* Magruder's Heirs, 2 Robinson, (Va.) 761.
(*h*) McComb *v.* Turner, 14 S. & M. 119.
(*i*) Fort *v.* Battle, 13 S. & M. 137.

lands,(*j*) and also as to "claims and demands."(*k*) And an agent of a wife and of her husband may be authorized, at the same time, to submit for both; and if this be done, under the supposition that title was in the husband, which, by the award, is found in the wife, the award is yet binding on the wife.(*l*)

Separate property acts usually remove the common-law disability of a married woman to submit matters to arbitration,(*m*) and they may enter into a valid submission, even as to damages by flowage to their separate lands.(*n*)

But formerly a submission of a *femme covert* was void; that is, unless joined with her husband.(*o*)

§ 440. In regard to the power of a corporation to refer, it is held by the highest authority that, although the charter of a company does not, in terms, give the power to refer, yet a power to sue and be sued necessarily includes it, since this is one of the modes of prosecuting a suit to judgment, and a corporation may lawfully take any step that an individual may in bringing a controversy to final judgment;(*p*) and it may be by attorney(*q*) or even by subsequent ratification;(*r*) as, for instance, where officers of a railroad company, entrusted with authority to make purchases, were in the habit, without express authority, of agreeing upon prices by reference to arbitrators, and the awards in such cases were paid by the financial officers of the company under a general resolution to pay the amount they directed, it was held that the awards were binding, because the company had ratified the acts of the officers by treating them as if authority actually

(*j*) Weston *v.* Stuart, 1 Fairf. (Me.) 330.

(*k*) French and Wife *v.* Richardson, 5 Cush. 452.

(*l*) Smith *v.* Sweeney, 35 N. Y. 294.

(*m*) Palmer *v.* Davis, 28 N. Y. 248, 250.

(*n*) Duren *v.* Getchell, 55 Me. 241.

And a husband, as agent and general manager for his wife, may bind her by a submission. Coleman *v.* Semmes, 56 Miss. 321.

(*o*) Rumsey *v.* Leek, 5 Wend. 21.

In New Hampshire a libel for divorce may be referred, by statute. Moore *v.* Moore, 56 N. H. 512.

(*p*) Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 89.

(*q*) Isaacs *v.* Beth Hamedash Soc. 1 Hilton, 472.

(*r*) Ibid, 470.

existed.(*s*) A municipal corporation may submit to arbitrate, by resolution or ordinance, which needs not to be under the corporate seal.(*t*)

Selectmen, however, are not empowered, by virtue of their office, to submit for a town a question concerning the settlement of a pauper.(*u*) But they may submit any claims which they are authorized to audit and adjust; as, for example, a claim for building a bridge,(*v*) or matters concerning the widening of a street.(*w*)

An insurance company will be bound by the submission of a secretary, under the corporate seal.(*x*)

§ 441. District attorneys of the United States appear to be an exception to the general rule that attorneys may submit claims in behalf of their clients to arbitration; and it is held that, without a special act of congress, they cannot submit claims by the United States for damage by flowage, nor any other claims; and this has been placed on the constitutional grounds that all judicial power is vested in the courts; and it has been questioned whether even congress can vest it in any tribunals not organized by itself.(*y*)

§ 442. It is no objection to an award that a party was under arrest when he executed the submission; since this, in itself, does not constitute duress.(*z*)

§ 443. As to the subject-matter of an arbitration, it may embrace almost anything not of a criminal nature, concerning which there is a doubt; excepting, indeed, mere ministerial matters, such as appraisement, valuations, etc. It is not essential, even, that there should have been a previous controversy.(*a*) But there must be something to submit to the judgment and discretion of an arbitrator; and it must not be a mere calculation which can be performed by an accountant.(*b*) It has been stated, on principle, thus: "A dis-

(*s*) Wood *v.* R. R. 4 Selden, 167.
(*t*) Brady *v.* Brooklyn, 1 Barb. 584.
(*u*) Griswold *v.* Stonington, 5 Conn. 367.
(*v*) Dix *v.* Dummerston, 19 Vt. 265.
(*w*) Boston *v.* Brazer, 11 Mass. 448.
(*x*) Insurance Co. *v.* Griffin, 3 Ind. 277.
(*y*) U. S. *v.* Ames, Wood & M. 89.
(*z*) Shephard *v.* Watrous, 3 Caines, 168.
(*a*) Brown *v.* Wheeler, 17 Conn. 351.
(*b*) Kelly *v.* Crawford, 5 Wall. 790.

tinction is justly made between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is conclusive of nothing as to the rights of the parties, except the mere appraisal or statement, and a submission of matters in controversy for the purpose of final determination. A reference of a collateral fact, or the submission of a particular question, forming only a link in the chain of evidence, is not calculated to put an end to the controversy; it barely substitutes the judgment of the referee in the place of evidence on that incidental or collateral matter, leaving the controversy open. Such a decision is not an award, and a reference of such a matter is not a submission to arbitration."(*c*) This principle seems well founded; but it has not passed unchallenged, even in New York, and it has been held there that the distinction drawn is not really tenable.(*d*) But, as to authority, the case previously cited, (*Kelly* v. *Crawford*, 5 Wall. 790,) in the United States supreme court, will, I think, override the opposite decisions; and as to reason, this seems clearly on the side of only allowing that to be an arbitration which settles the substance of disputed matters, and determines controversies, or that which may become controversy, and not that kind of determination which requires no judgment or discretion, but only calculation or mechanical skill.

An award cannot properly embrace, with other matters, the costs of a criminal prosecution instituted by one party against the other; yet, if it does so, while the portion relating to such costs will be regarded null, the remainder may be upheld and enforced.(*e*) But Pennsylvania seems to furnish an exception to the rule that criminal matters cannot be submitted; for it has there been held that prosecutions for assault and battery can be submitted, on the ground that these "may easily be adjusted with the consent of the parties, and that the statute allows such settlements." And the

(*c*)Garr *v.* Gomez, 9 Wend. 661.

(*d*)Underhill *v.* Van Cortlandt, 17 Johns. 405.

(*e*)Harrington *v.* Brown, 9 Allen, 579. In a civil case an award may embrace costs of the arbitration, and even the fees of the arbitrators themselves. Burnell *v.* Everson, 50 Vt. 450.

court says: "Awards are to be favored, as they enable suitors to settle their disputes in the easiest, cheapest, most expeditious, and most equitable manner. Nothing more is required than that they should be so drawn as to make an end of the matters in dispute, and contain nothing contrary to law; and that they should not pass beyond the bounds of the subject submitted."(*f*) Yet, no doubt, there it would not be held that strictly criminal matters could be submitted —the ground above stated being that the statute allows parties to settle prosecutions for assault and battery; thus, in reality, bringing the case within the rule, so that it constitutes no exception further than in appearance only.

Real estate matters, and matters of boundary, may properly be submitted to arbitration, unless where specifically forbidden by statute—as in New York—and a general submission will embrace them;(*g*) and claims to the legal title may be included, if the submission is under seal;(*h*) that is, where a seal is required to a deed or instrument of conveyance. Parol submissions are upheld, in all cases, where the claim is not directly for the title.(*i*)

Submissions will always be construed liberally, according to the true intent of the parties, as to common-law references; although statutory authority is more strictly interpreted and limited.(*j*)

Referees cannot enter judgment of nonsuit or on default. *Ray* v. *Austin*, 56 N. H. 36. Yet they may find that there is no cause of action, and the court may affirm that decision; but even then it seems the court may refer the matter a second time, if the plaintiff makes it appear, by affidavits, that he can supply the proof lacking on the first reference. *Bannister* v. *Ex'rs*, 43 Wis. 427.

(*f*) Noble *v.* Peebles, 13 S. & R. 319.

(*g*) Penniman *v.* Redman, 13 Met. (Mass.) 382.

(*h*) Akely *v.* Akely, 16 Vt. 451

(*i*) See Morse on Arb. and cases cited, pp. 55, 56.

And where arbitrators were appointed to ascertain the deficiency in a tract of land, as to quantity and value, it was held sufficient that the arbitrators were verbally informed of the submission, though the articles of submission were not before them when they went to view the land. Bow *v.* Wilson, 48 Md. 365.

(*j*) Ibid, 57-66.

Submissions may be made conditional upon subsequent facts connected with the arbitration.(*k*)

In general, a submission of a cause pending in court, without a rule of court, and a stipulation that judgment may be entered on the award, works a discontinuance.(*l*) But where a submission was of matters, a part of which was in suit, and the award was that if a certain sum was not paid to the plaintiff the suit should go on, it was held that the submission and award were no discontinuance of the suit.(*m*)

A submission may always be revoked before an award is rendered, on notice given, unless there is an express stipulation to the contrary. But, where a party has taken and enjoyed the benefits of an award, he cannot then object to it, even on the ground that the submission was made by his his agent, without authority. *Perry* v. *Milligan*, 58 Ga. 479. A reference under a rule of court cannot be revoked except by obtaining a discharge of the rule. *Knapp* v. *Fisher*, 49 Vt. 94. Nor can a party, in some states, revoke a submission after hearing has commenced; and, even before, if the submission is in writing the revocation must likewise be in writing. *Shroyer* v. *Bash*, 57 Ind. 349.

An arbitrator may be disqualified—as a judge may—but only by such interest, relationship, or prejudice as was not known to the objecting party at the time of entering into the submission.(*n*)

(*k*)Merritt *v.* Thompson, 27 N. Y. 225.

(*l*)Larkin *v.* Robbins, 2 Wend. 505; Heslep *v.* San Francisco, 4 Cal. 1.

(*m*)Elliott *v* Quimby, 13 N. H. 181.

(*n*)See Morse on Arb. and authorities cited, *c.* 4, p. 99, etc.

It is no disqualification that an arbitrator was formerly counsel for one of the parties in another action, unless there has been an intentional concealment of that fact from the opposite party. Goodrich *v.* Hulbert, 123 Mass. 190. And if one of the parties furnishes liquor to the arbitrators, and the other party knows it, the latter cannot afterwards object to the award on that account. Noyes v. Gould, 57 N. H. 20. And a city, accepting as an arbitrator one who, as alderman, had been active in the council as to the matter, cannot object to the award on the ground of the disqualification of such arbitrator. Kane *v.* Fond du Lac, 40 Wis. 495. An award may be invalidated by the failure of one of the arbitrators to take the prescribed oath. Hepburn *v.* Jones, 4 Col. 98.

CHAPTER XIII.

NATURALIZATION.

§ 444. Duty of congress to provide for naturalization.
445. Naturalization a judicial act.
446. What courts may act.
447. Conflict of authority as to state jurisdiction.
448. Act of congress not authoritative so as to require state courts to act.
449. Record of naturalization conclusive.
450. Naturalization not retroactive.
451. Singular law and singular execution of it.
452. Naturalization as to infants.

§ 444. The constitution of the United States has devolved on congress the duty of providing for the naturalization of aliens, by which are conferred upon them the privileges of citizenship in all particulars, except eligibility to the presidency. Accordingly, laws have been enacted for the purpose, and adjudications had under these laws. It is only the latter that I purpose to notice, and these only so far as they relate to jurisdictional matters, which alone properly fall within the compass of the present work.

§ 445. That the naturalization of aliens is a judicial act is universally conceded, so far as I know,(*a*) and consequently it cannot be delegated to a clerk, but must be exercised by the court itself,(*b*) except as to the preliminary application and oath of an alien, which are regarded merely ministerial.(*c*)

§ 446. As to the kind of court which is competent to take jurisdiction, it has been held that under the act of congress of 1802 a court of record, not having a clerk or prothonotary distinct from the judge, is not competent even to receive an

(*a*) Spratt *v.* Spratt, 14 Pet. (U. S.) 406; Morgan *v.* Dudley, 18 B. Mon. 714.

(*b*) Clark's Case, 44 Barb. 444.

(*c*) Butterworth's Case, W. & M. (U. S.) 323.

alien's preliminary declaration of intention,(*d*) and the reason is stated to be that "it is generally true that a court of record, which is without a clerk or prothonotary, is not only a subordinate tribunal, but one to which a very narrow and comparatively unimportant jurisdiction is entrusted." In Illinois, prior to the constitution of 1870, it was held that the county courts had no jurisdiction in naturalization, and this reason for it was given: "It was said in *Mills* v. *McDade*, 44 Ill. 194, 'that a fair and reasonable construction of the act of congress requires us to hold that only a court of record for general, and not for special, purposes was intended to be embraced. That act has not declared that a court of record, for some purposes, shall be vested with such jurisdiction.' So, for the same reason, we must hold that where, although a court of record, if it only has common-law jurisdiction in three common-law actions, and two of them limited in amount, it is not such a court as was contemplated by the act of congress. Where it declared that it must have common-law jurisdiction, it cannot be that it was designed to confer the power on a court, having a seal and clerk, which could only exercise the smallest fragment of common-law jurisdiction. The court intended to be embraced was one that exercised a general jurisdiction, although it might be a common-law jurisdiction, limited as to the sum or amount in controversy; and it may be where some kinds of action are excluded."(*e*)

§ 447. There is an evident conflict of authorities upon the question as to the source of the jurisdiction exercised by the state courts in naturalization—some holding that it is conferred by act of congress, others that it is not, because congress cannot give jurisdiction to state courts. The middle ground on which the extremes meet and are reconciled is this: That prior to the adoption of the national constitution the states had the power of naturalization; that this power was superseded and held in abeyance by the constitution and

(*d*)Gregg's Case, 2 Curtiss, 98. 251; State *ex rel. v.* Webster, 7 Neb. See State *v.* Whittemore, 50 N. H. 469.

(*e*)Knox County *v.* Davis, 63 Ill. 421.

acts of congress, but that congress can, by virtue of this old power, employ the state courts to execute its acts,(*f*) which, altogether, resembles more a metaphysical refinement than anything else. The New York courts hold, however, that in the matter of naturalization the state courts act as agents of the government, and are, *pro hac vice*, tribunals of the United States;(*g*) and it is stated to be on this wise in regard to state-enabling statutes, which it is held cannot be competent to confer a power to naturalize: "The power of legislation upon this subject existed in the states prior to the constitution. The legislation would have been executed in the ordinary tribunals of justice. The power has been superseded by an act of congress, passed under the constitution. Congress adopted the state tribunals as the agents to exercise the power as they would have performed it before. The concurrence of the state legislatures expressed, or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy. That these acts are lawful, if they do so, seems undeniable."(*h*)

California seems to have gone far beyond any other state in denying that in any sense state courts are agents of congress. It holds that the constitution has given to congress nothing but the power to establish a uniform rule for the guidance of the states in the exercise of their original power to naturalize; that this original power never was surrendered nor superseded; that the authority of congress to lay down a rule of uniformity is conferred by the constitution, from the necessity of the case, under the requisition that "the citizens of each state shall be entitled to all privileges and immunities in the several states;" and that the rule is binding, if a state undertakes to naturalize at all from its inherent authority. As to this necessity the court say: "It might well have been apprehended that in the feeble

(*f*)State *v.* Penney, 5 Eng. 629.

(*g*)People *v.* Sweetman, 3 Park Crim. 371; Christern's Case, 43 N. Y. Superior Ct. 523. In this latter case the acts of congress are explained at length.

(*h*)Ramsden's Case, 13 How. Pr. 435.

and sparsely populated condition of the states a race would have been run for the acquisition of population, differing in its radicalism only according to the difference of opinion as to the danger of the sudden introduction of too large a foreign element; and, as when once admitted to citizenship in one state, the alien would have all privileges in the other states, it would be in effect allowing one state to modify or break down the policy of another. This is made apparent by the discussions which then took place upon the subject. Hence the necessity arose, not that congress should have power to naturalize, but that it should have power to prescribe to the states a rule, to be carried out by them, and which should be uniform in each. If this were not so it follows conclusively that there is no mode by which a foreigner can be made expressly a citizen of a state; for I have already shown that there is no such thing, technically, as a citizen of the United States; consequently one who is created a citizen of the United States is certainly not made a citizen of any particular state. It follows that, as it is only the citizens of the state who are entitled to the privileges and immunities of the several states, if the process is left alone to the action of congress, through the federal tribunals, and in the form which they have accepted, then a distinction, both in name and privileges, is made to exist between the citizens of the United States, *ex vi termini*, and citizens of the respective states. To the former no privileges or immunities are granted, and it will hardly be pretended that political *status* can be derived by implication against express legal enactments. I cannot concede that such a result was ever contemplated, and yet it would be inevitable upon any other hypothesis than that the 'uniform rule,' declared by the constitution, was intended to be prescribed for the action of the states, and that by this rule they were left to exercise, or not, their original power of naturalization."(*i*) Again, it says: "Congress having power, under the constitution, to make the rule, certainly had the right to make the exercise of it a judicial power, and fix upon the class of courts which might be invested with the jurisdic-

(*i*) Knowles' Case, 5 Cal. 304.

tion. This it could do as a part of the rule, although it might not directly confer the jurisdiction."

§ 448. It is universally agreed, I believe, that the act of congress cannot be made authoritative, so as to require the state courts to exercise the power to naturalize. *Shaw*, J., in a very able opinion, says of this whole matter: "We suppose it to be a position incontested, that, by the constitution of the United States, power is invested exclusively in the general government to grant letters of naturalization to foreigners, and that a similar power, formerly exercised by the respective state governments, has been superseded. *Chirac* v. *Chirac*, 2 Wheat. 269. If the state government, its courts or magistrates, have any authority on the subject, it must be derived from the general government. The theory of the general government is that a few great and leading subjects of control and administration, belonging to, and inherent in, all sovereign states, and which are of common interest to all the states, are singled out and placed in the exclusive jurisdiction of the general government; and this government, unlike the confederation of states, which acted mainly through the state governments, is constituted, with its legislative, judicial, and executive departments, to act directly upon the people, without the intervention of the state governments, and is organized in such manner as to make, administer, and execute all laws necessary or incidental to the full and complete exercise of the sovereign power upon the subjects placed within its administration. The general government has, therefore, full authority to appoint and commission all courts, magistrates, and officers to carry the laws of congress into effect, without necessary reliance on those of the states. But we think that in the earlier stages of the general government, before the line which defines the distinction between the jurisdiction of the United States and that of the several states had become as distinctly marked as it has since been, it was not unusual for congress, as a matter of convenience, perhaps, not regarding this distinction very strictly, to vest certain powers in the courts and magistrates of the several states not of their own constitution and appointment. We believe that justices of the

peace of the states were authorized to issue warrants and to arrest deserting seamen, and in many other cases state courts and magistrates had powers conferred by act of congress. But we are of opinion that the powers which the legislature, by the statute in question, has prohibited the courts and magistrates of the state from exercising, do not extend to any cases where duties are required by the constitution of the United States, or by any laws of congress made pursuant to the constitution. The power of naturalization, being vested exclusively in the government of the United States, congress has very properly provided for its exercise by the courts of the United States; and the superadded power, by the act giving the same jurisdiction to the courts of the states, is not necessary to the just rights of those entitled by law to the privilege of becoming citizens. These powers given to state courts are, therefore, naked powers, which impose no legal obligation on courts to assume and exercise them. And such exercise is not within their official duty, or their oath to support the constitution of the United States.

"But, whatever may be the authority of congress to require the performance of duties by state courts, magistrates, and officers, not affecting the organization of the national government, or not expressly provided for by the constitution, (respecting which there may be some doubt,) it is well established that such courts and magistrates may, if they choose, exercise the powers thus conferred by congress, unless prohibited by state legislation. *Prigg* v. *Pennsylvania*, 16 Pet. 622. The decision of this principle accounts for the fact that this jurisdiction on the subject of naturalization was so long exercised by the courts of the commonwealth, and that such jurisdiction was strictly legal. But, according to our view of the constitution of the United States, and the laws of congress made pursuant to it, expounded in reference to the powers reserved to the states since the government of this commonwealth has declared that the courts and magistrates appointed by it shall not exercise jurisdiction over the subject of naturalization, it is not competent for this court to grant the present petition.

"We must carefully distinguish this from a class of cases where, under the authority vested in the general government, and by laws passed by congress, within the scope of their authority, duties are imposed on the state government, or on the governor, judges, magistrates, or officers of the state. These, by force of the constitution of the United States, became the supreme law of the land, and therefore cannot be affected by any state legislation. On the contrary, all state officers, being sworn to support the constitution of the United States, would be bound to act in conformity with the laws of the United States, thus rightly made, if unhappily any conflict should arise between the laws of the United States and those of the commonwealth."(*j*)

§ 449. The record of naturalization is held to import absolute verity, and therefore not to be disputable. The leading case is one in the supreme court of the United States, wherein Chief Justice Marshall said: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, compare it with the law, and judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity."(*k*) And where a case was brought before the district court for the eastern district of Michigan, to impeach a naturalization proceeding, the court held that no such inquiry could be made collaterally, and that in any event the naturalization judgment, like any other judgment, could only be impeached by fraud or collusion, which was not before the court or involved in the issue whereon the judgment was rendered, and could not be impeached for any facts, even if involving fraud, or collusion, or perjury, which were of necessity passed on by the court;(*l*) for "this is contrary to all precedent, and all authority," say the court. "To allow it would tend to unsettle the sanctity of the final

(*j*)Stevens' Case, 4 Gray, 561.

(*k*)Spratt *v.* Spratt, 4 Pet. 393; (followed by McCarthy *v.* Marsh, 5 N. Y. 263, and State *v.* Hoeflinger, 35 Wis. 399.)

(*l*)The Acorn, 2 Abb. (U. S.) 444.

adjudication of judicial tribunals, and render them of no more binding or conclusive effect than a simple contract."

§ 450. It has been held that a judgment of naturalization cannot retroact so as to revert back to the filing of the declaration of intention, and thus save titles lost meanwhile in states which hold to the common-law disability of aliens to inherit lands. The court of Kentucky say of this: "Whatever may be the political effect of a declaration of intention to become a citizen of the United States, and whatever may be the extent to which an alien will thereby become entitled to the protection of the federal government, we think it is very obvious that, as to many civil rights, he still remains under the disability of alienage. He is, except so far as personal protection is concerned, still an alien, and is so regarded by the acts of congress until, in pursuance of the rule they prescribe, he has been made a naturalized citizen. By making a declaration of his intention he only takes a preliminary step to the attainment of the object he has in view, for the full accomplishment of which he is compelled to wait the prescribed time. He does not thereby remove the disability which he labors under as an alien, to take lands by inheritance, nor is such disability removed in this state until he has resided therein for a period of two years, or has become a naturalized citizen under the acts of congress."(*m*)

And thus, where a widow was naturalized after the death of her husband, who had been naturalized some time before his death, it was held not to revert back and take the portion of his real estate to which she would have been entitled had she not continued an alien until the husband died(*n*.) But it is different as to a devise, the principle being, by common law, that an alien can take lands by purchase—that is, by the act of the party; but not by descent—that is, by act of law(*o*.)

§ 451. In 1813 congress passed a very singular law, providing "that no person who shall arrive in the United States, from and after the time when this act shall take effect, shall

(*m*)White *v.* White, 1 Met. 188.

(*n*)Keenan *v.* Keenan, 7 Rich. (S. C.) 350.

(*o*)Fairfax's Devisee *v.* Lessee, 7 Cranch, 619.

be admitted to become a citizen of the United States, who shall not, for the continued term of five years next preceding his admission as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States." And a supreme court drew the lines on this so rigidly as to exclude one from naturalization who had gone from Rochester to Ogdensburgh during the five years, by lake, on a vessel which stopped ten minutes at Kingston, Canada, to take on passengers, and who there stepped on the dock or wharf for two or three minutes, and then returned on board! That is a specimen of "strict construction," without doubt, which illustrated the delicate conscientiousness of the court with remarkable clearness.(*p*)

§ 452. On the authority of *West* v. *West*, 8 Paige, 664, the Florida court holds that, "under the naturalization act of congress of 1802, infants, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization, and the provisions of that act on this subject are prospective, so as to embrace the children of aliens naturalized after the passage of the act, as well as the children of those who were naturalized before."(*q*)

(*p*)Paul's Case, 7 Hill, 57.

(*q*)O'Connor *v.* State, 9 Flor. 234.

CHAPTER XIV.

QUO WARRANTO.

§ 453. Ancient writ disused.
454. Nature of the action.
455. Nature of the jurisdiction.
456. Prosecution in the name of the people.
457. Legislative amendment pending proceedings.
458. Original jurisdiction of a supreme court.
459. Common-law rules.
460. How jurisdiction acquired in a particular case.
461. Change of venue of case transmitted by a supreme court to a particular circuit court.
462. Consent cannot give jurisdiction.
463. Who may be a relator.
464. What the proceeding embraces.
465. State not bound to show demand—prosecution not substituted for impeachments—constitutionality of a law—nugatory writs—forfeiture—discretion—private appointments—title to past office.
466. Legal organization of a town—right of a school district—military office—rule as to appointments—answer to be made to the sovereignty—escheats—private franchises.
467. Writ not confined to the subjects of the ancient writ.
468. Membership in a city council.
469. Contested elections.
470. Organization of new counties.
471. Exercise of an office while proceedings are pending.

§ 453. The ancient writ of *quo warranto* has, I believe, wholly fallen into disuse, the proceedings under it having been of the most cumbrous and tedious character. Substituted in its place is an information in the nature of a *quo warranto*, which, while it answers every purpose, is as expeditious as almost any other action. However, to avoid circuity of expression, these modern proceedings are usually styled simply *quo warranto*—a custom I shall follow in the present chapter.

§ 454. Originally, the action was regarded as of a criminal nature, instituted by the attorney general, in behalf of the

state, to inquire into and punish a party intruding into an office to which he was not entitled. But it is now regarded as a civil proceeding, essentially, although having the same purpose in view—so far, at least, as to inquire concerning the title to office;(*a*) and, also, the burden of proof, according to the general principles of evidence, is on the relator, since all presumptions are in favor of the incumbent in regard to the tenure by which he holds his office.(*b*) And, accordingly, it has been held that a statute conferring on courts a discretionary power in regard to criminal proceedings does not embrace *quo warranto*, that not being criminal.(*c*)

It is a proceeding at law, however, and the facts therein are triable by jury, as in other legal proceedings, so that "conviction of misdemeanor is entirely unnecessary, and not essential to give jurisdiction to the court" in declaring a forfeiture of the office by a councillor.(*d*)

§ 455. It is held that a constitutional grant of power to issue writs of *quo warranto* necessarily embraces the proceeding by information, in the nature of a *quo warranto*, this proceeding being civil in its essential incidents, and having the same object in view; and, moreover, that such a grant can be exercised by a court without legislative direction as to the manner thereof, so that in the absence of legislation the court will simply proceed according to the course of the common law.(*e*) And, even where an executive office is involved, the right to the office does not fall under the power of im-

(*a*)State *ex rel. v.* Lawrence, 38 Mo. 535. Thus, where a failure to qualify works a forfeiture of an office of an unlawful incumbent, *quo warranto* is the proper mode of procedure to oust the incumbent who holds without being qualified. Hyde *v.* State *ex rel.* 52 Miss. 665. The forfeiture can only be properly declared judicially. The inquiry may relate to an office held by appointment as well as to one held by election, (State *v.* Minton, 49 Ia. 591,) and also as to whether the office is authorized within a *particular district* or not, (State *v.* Parker, 25 Minn. 215.) But courts will not inquire into the right of a legislator to his seat; for this belongs to the legislative body itself. State *ex rel.* 20 Kan. 702.

(*b*)State *ex rel. v.* Knpferle, 44 Mo. 157.

(*c*)Ensminger *v.* People, 47 Ill. 385.

(*d*)Commonw. *v.* Allen, 70 Pa. St. 472.

(*e*)State *v.* Gleason, 12 Flor. 199.

peachment by the legislature, this being judicial in its character, and not political, and being therefore a matter solely within judicial cognizance by the ordinary courts.(*f*)

§ 456. Notwithstanding the civil nature of *quo warranto*, the prosecution runs in the name of the people, even where it is directed against the franchises of a railroad corporation,(*g*) or is an inquiry into the usurpation of ferry franchises.(*h*) or into the usurpation of a mayor's office.(*i*) And so the attorney general is, in general, the proper officer to institute proceedings to inquire into the title to a public office, this being a power properly incident to his office, so that on his demand the writ will issue, when information is filed, as in ordinary actions of debt by the state against its debtors, and in such case neither his motives, nor the motives of any one alleged to have influenced his action, can be inquired of,

(*f*)Ibid.

(*g*)People *v.* R. R. 13 Ill. 67. It must be carefully borne in mind that courts will always proceed with extreme caution in proceeding to annul a corporate franchise, and will not dissolve a corporation except upon a gross perversion or abuse of power, by which the corporation fails to fulfil the purpose of its organization. Any act of mis-user or non-user must be of the essence of the contract between the sovereign and the corporation, and be wilful and repeated. Harris, Att'y Gen., *v.* R. R. 51 Miss. 602. Merely neglecting to exercise the corporate powers is not sufficient to authorize a dissolution, (Baptist House *v.* Webb, 66 Me. 398,) although assuming franchises not granted will more readily be interfered with, (State *ex rel. v.* Relief Association, 29 Ohio St. 399;) as also failure to locate its business so as to afford access to the process and visitorial power of the state which creates it, (State *ex rel. v* R. R. 45 Wis. 580.) The matter of forfeiture must always be determined in a direct proceeding, and it will not be considered collaterally. Mackall *v.* Canal Co. 94 U. S. 308. And so, in an action by a corporation, the defendant cannot be allowed to answer that the corporation had forfeited its charter by *non-user*, without an averment also that such forfeiture has been judicially declared, (West *v.* Insurance Co. 31 Ark. 477;) although a franchise—such as taking tolls, or the like, which is distinct from the corporate franchise, and came into existence by grant of a local board, and not of the state—may be questioned as a mere defence. Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 405. This does not involve the question of forfeiture—which forfeiture belongs to the state to enforce by a direct proceeding. New Jersey, etc., R. Co. *v.* Comr's, 39 N. J. 28.

(*h*)Wright *v.* People, 15 Ill. 417.

(*i*)Hay *v.* People, 59 Ill. 94.

nor is it necessary to the jurisdiction and action of a court that there should be a contestant for the office held, since the matter may proceed upon the motion of the attorney general alone;(*j*) and, moreover, a writ may be issued, in term time, usually, and made returnable at the same time, on account of the necessity of prompt action in such matters; the efficacy of the remedy often depending upon a speedy administration, since a term of office might expire before the litigation could be terminated, if it were governed by ordinary rules of procedure. Moreover, in the exercise of its discretion, a court will not, in general, give leave to file an information where the term would inevitably expire before the controversy could be decided.(*k*)

Notwithstanding, as I have stated, this matter is not political, but judicial, and so is distinct from impeachment proceedings, yet there are cases where the legislature may direct proceedings, as where a prosecution is in the nature of an inquest of office, whereby the state claims to be re-seized of lands before granted. An information for dissolving a corporation may be filed under special direction of the legislature, or *ex officio* by the attorney general. But, in cases of usurpation of public offices by individuals, the attorney general may act at the relation of proper persons, or else *ex officio*, by virtue of the general powers of his office, without any interposition of the legislature. Yet, while it is held that a senate should not direct in any matter wherein the conduct of an officer may come before it, in the way of impeachment proceedings, the house of representatives, being regarded as the constitutional grand inquest of the state, and the natural and appointed guardian of the public morals and of public officers, may direct or request, even where such direction is not necessary to the validity of the action. And where an attorney general recites such a request, in a case wherein he has full power to proceed *ex officio*, it will be held that, while the request may have operated as an inducement to him to exercise the functions of his office therein, he does the act of

(*j*)State *v.* Gleason, 12 Flor. 199.

(*k*)Lindsey *v.* Attorney General, 33 Miss. 517.

himself, by virtue of his inherent official authority, on the principle that had he done the act on the relation of an individual, and had seen fit to recite his motive in the information, the proceedings would not be thereby vitiated.(*l*)

§ 457. It has been held that an amendatory act, relating to a charter, may be passed while *quo warranto* proceedings are in progress, and take effect upon the pending case. Thus, in Pennsylvania, where an act provided that no one should be eligible to the city council of Philadelphia who, when elected, held office or employment under the state, and a *quo warranto* was brought at the instance of private relators to oust one who, when elected, was a notary public, and during the pendency of the proceedings the legislature passed an act declaring that it was not the intention or meaning of the prior act to prohibit a member of council from acting as a notary public, and enacting that no member of the present councils should be disqualified or removed from the councils because of his being a notary public, the judgment of ouster was reversed; and the supreme court said: "In this [entering the judgment] we think the learned judge was clearly in error, for the act of twenty-ninth January, 1873, was a perfectly constitutional law, and if the attorney general had been the relator he would have discontinued the suit as soon as the act was brought to his notice, as would have been his duty. The act deals simply with a part of the charter of a municipal corporation, over which the legislature had entire control, and did not interfere with any vested right of any individual, and certainly not of the two relators. It was a matter concerning the public, and was strictly within the province of the legislature, and was not an interference with the proper functions of the court, and did not 'override the judiciary.'"(*m*)

§ 458. A supreme court, though having usually only appellate jurisdiction, may have original jurisdiction in *quo warranto* proceedings by statute.(*n*) But a single justice will not grant, at chambers, a judgment of ouster on account of a frivolous

(*l*)Commonw. *v.* Fowler, 10 Mass. 299.

(*m*)Hawkins *v.* Commonw. 76 Pa. St. 18.

(*n*)State *v.* R. R. 25 Vt. 441.

answer, especially as there is no means for reviewing such a judgment by the entire court.(*o*) It is, perhaps, however, usual for a supreme court to decline investigating *quo warranto* cases where other tribunals have the same power, subject to appeal, since the entertaining of jurisdiction is then within the discretion of the supreme court.(*p*)

§ 459. The occasions for *quo warranto* are determined by the rules of the common law, by which rules the writ is an appropriate method for trying any alleged usurpation of franchises, or franchises in violation of the state sovereignty.(*q*) And the proceeding must be in the name of the sovereignty so violated. And thus, where *quo warranto* was brought in one of the territories to test the right of a person to act as a supreme judge of the territory, and the information was in the name of the territory instead of the United States, it was held fatal error, because such judges are appointed by the president and senate of the United States.(*r*)

§ 460. In order that jurisdiction should be acquired over the person the writ must be served, and not merely notice of the intended application for leave to file the information; nor is it sufficient that the defendant receive an informal notice of the actual pendency of the suit, unless he waives process by a personal appearance.(*s*) But, in case of non-resident officers of a corporation, a notice of the pendency of the proceedings may be provided for in lieu of actual service,(*t*) as is the case with non-residents in ordinary legal and equitable actions.

§ 461. Where a supreme court orders the issues of fact to be tried in any specified county, it is improper to apply to the court of that county for a change of venue. The application

(*o*)Farrell *v.* Conklin, 33 Wis. 685.

(*p*)State *v.* Vail, 53 Mo. 107.

(*q*)State *v.* R. R. 25 Vt. 441. Thus, the franchise of a pilot may be inquired of by *quo warranto*. State *ex rel. v.* Jones, 16 Fla. 306.

(*r*)Territory *v.* Lockwood, 3 Wall. 239. And so, a state court cannot inquire by *quo warranto* into the claims of an elector of president and vice president, because the office is one under the United States constitution and laws. State *ex rel. v.* Bowen, 8 S. C. 400.

(*s*)Hambleton *v.* People, 44 Ill. 459.

(*t*)Commonw. *v.* Dillon, 61 Pa. St. 489.

must be made to the supreme court controlling the case.(*u*) Where proceedings are instituted in a circuit court, of course the application is to that court, and, if the affidavit on which the application is based contains all the facts requisite to the allowance of a change of venue, it is a matter of right in the party to have a change, and not of discretion in the court whether he shall have it or not.(*v*)

§ 462. Consent cannot give jurisdiction, and so, where parties agreed to try the title to an office, thus expressly waiving all questions of form and of jurisdiction, and the suit was not instituted in the name of the government, it was held not maintainable, whatever might be the right of the prosecutor or of the person claiming to exercise the office in question.(*w*)

§ 463. As to who may be a relator, it must be one who has an interest in the subject of the prosecution; not, for example, in the matter of an office, a non-resident, or a non-voter.(*x*) Where a statute allows a person claiming an interest in, or adverse to, any franchise to bring an action of *quo warranto* in his own name, this only relates to matters where the injury peculiarly affects him alone, for if it affects the whole community alike the action must be in the name of the state; so that private persons, having no interest other than as citizens or tax-payers, cannot bring an action in their own names against a municipal corporation, to try the validity of its existence;(*y*) or the question of a forfeiture of its charter, in which case it is held in Alabama a private citizen cannot even be a relator to move an action by the state;(*z*) and in Arkansas, where it is held, in connection with this, that *quo warranto* was not designed, originally, to determine a contest between two parties, concerning an office, but only to require an incumbent to show by what authority he was attempting to exercise, or actually exercising, the functions of an office created by sovereign power; so that the issue was

(*u*) State *v.* Tounsley, 56 Mo. 111.

(*v*) Ensminger *v.* People, 47 Ill. 387.

(*w*) Wallace *v.* Anderson, 5 Wheat. 292.

(*x*) State *v.* Boal, 46 Mo. 531.

(*y*) Miller *v.* Palermo, 12 Kan. 15; People *v.* R. R. 88 Ill. 539; Demarest *v.* Wickham, 63 N. Y. 320.

(*z*) State *v.* Cahaba, 30 Ala. 67.

only between the state and the person holding the office, and properly so remains at present.(*a*) In Pennsylvania it has been held that none but an authorized agent of the state can sue out a writ to enforce a forfeiture of the charter of a private corporation,(*b*) but a private relator may, after a rule to show cause only, prosecute a *quo warranto* against one holding the office of mayor in a municipal corporation; however, the rule is not granted as a matter of course, but is subject to the discretion of the court.(*c*)

§ 464. Hence, it is not within the legitimate province of *quo warranto* proceedings to determine, in a prosecution by the attorney general, the right of a claimant to an office. In such an adjudication, however, a private claimant may be allowed to institute proceedings at his relation, as in *quo warranto*,(*d*) although usually, as I suppose, and much more properly, especial legislative regulations are provided for cases of direct contest of a claim to office. Where the *quo warranto* mode is allowable, the relator must show affirmatively his own title, and the possession of requisite qualifications.(*e*) The primary and fundamental question, in all cases where the proceeding is instituted by the state, is whether the defendant is legally entitled to hold the office, and not as to the rights of any claimant, although, where there is no other mode provided of contesting an election, it may be that the court would incidentally determine the contestant's right and give him relief,(*f*) but otherwise the claim of the relator is not decided except so far as it may indirectly affect the right of the defendant.(*g*)

§ 465. We will consider the subject-matter to which *quo warranto* jurisdiction attaches, first; negatively premising that the state, in a proceeding, is not bound to show a preliminary demand upon an incumbent for the office, nor to establish any facts except such as are tendered by the pleadings and brought into issue.(*h*)

(*a*) Ramsey *v.* Carhart, 27 Ark. 13.

(*b*) Commonw. *v.* Bank, 2 Grant, 392.

(*c*) Commonw. *v.* Jones, 12 Pa. St. 369.

(*d*) Hunter *v.* Chandler, 45 Mo. 455.

(*e*) State *v.* Boal, 46 Mo. 531.

(*f*) State *v.* Tounsley, 56 Mo. 114.

(*g*) State *v.* Vail, 53 Mo. 110.

(*h*) State *v.* McDiarmid, 27 Ark. 179; Commonw. *ex rel.* *v.* Walter, 83 Pa. St. 105.

The prosecution by *quo warranto* cannot be substituted merely for an impeachment for misconduct in office.(*i*)

In Illinois it has been held that the question of the constitutionality of a law extending the limits of a city cannot be raised by *quo warranto* questioning the authority of the city officers to exercise their official functions within the extended boundary, nor in any case can the mere question of constitutionality be brought up for determination in such a mode.(*j*) But, as to an office, one whose title is derived from an unconstitutional law may be ousted on this ground by *quo warranto*. *Hinze* v. *People*, 92 Ill. 407. Nor can it be employed to annul a city ordinance irregularly enacted, even if the irregularity is sufficient on proper occasion to render the ordinance void. And hereon the court of Iowa say: "The proceeding by information is only authorized in cases where the office, franchise, or corporate authority is exercised in the absence of the vital element of power. If the power attaches, the manner of its exercise cannot be challenged by information or *quo warranto*. Nor is it within the legitimate scope of the relief afforded by such proceedings to declare null and void what may have been done, but only to affirm, or adjudge as unauthorized, the claim to the office, franchise, or power which may have been theretofore, with or without color of right, unlawfully exercised, and, in case of adverse claimants, to award the office or franchise to him having the legal right thereto."(*k*)

Nor can *quo warranto* be brought to test a person's right to an office in a corporation which has no legal existence, since it would be nugatory to call in question a harmless pretended claim where no civil right is in controversy. This would be, as Lord Ellenborough remarked, in *Rex* v. *Saunders*, 3 East, 119, "as if a stranger should come into town and claim to be

(*i*)State *v.* Gardner, 43 Ala. 250. But, where impeachment is not available, and a statute provides for a forfeiture of office by misconduct, the forfeiture is to be declared by means of *quo warranto* proceedings—as, for example, in the case of a probate judge, in North Carolina. People *v.* Heaton, 77 N. C. 18.

(*j*)People *v.* Whitcomb, 55 Ill. 176.

(*k*)State *v.* Lyons, 31 Ia. 434.

president or director." If there is no corporation there is no office, and therefore no disputable title is possible.(*l*)

Where a charter may be forfeited on the corporation exercising powers not conferred by law, this is held not to embrace, as a cause of forfeiture, the trespass of a railroad, or other road, being laid over lands without lawful authority, because such a provision merely signifies the exercise of corporate powers of a different character from those conferred by law, as if a railroad company should engage in banking, and a mere trespass by a corporation is never held to work a forfeiture.(*m*)

In Massachusetts it has been held that the court may refuse to entertain an information against an officer elected only for one year, upon the ground that "it would not be a discreet and proper exercise of authority."(*n*)

An action of *quo warranto* does not lie against the secretary and treasurer of a railroad company holding his office merely from the will of the directors, for while it will lie for usurping any office of a public nature, this must be a substantive office, and not merely the function of a deputy or servant, or employment held merely at the will of another.(*o*)

Where an election of managers of a corporation is not contested during their term of office, the legality of a subsequent election cannot be questioned for any vice or irregularity in the first, even where a writ of *quo warranto*, brought within the term of an office, may be tried after the expiration of the term; for title to a past and defunct office cannot be tried in a proceeding not instituted against the incumbents during its life-time, but against their successors.(*p*)

In Georgia it is held that the title to an office will not be tried in a proceeding of *quo warranto*, when, at the time of trial, the term of office has expired, and no judgment of *ouster* can be entered;(*q*) and this I take to be the general rule. But yet the jurisdiction may still be retained properly, where it is

(*l*)State *v.* Lehre, 7 Rich. 324.

(*m*)State *v.* Killbuck Turnpike Co. 38 Ind. 72.

(*n*)Commonw. *v.* Athearn, 3 Mass. 286.

(*o*)People *v.* Hills, 1 Lans. (N. Y.) 205.

(*p*)Commonw. *v.* Smith, 45 Pa. St. 60

(*q*)Morris *v.* Underwood, 19 Ga. 559

not the sole object of the proceeding to oust an incumbent, but to impose a fine, or costs, or damages to the relator.(*r*)

§ 466. Whether a town has been legally erected may be determined in New York in an action of *quo warranto* against one claiming to act as supervisor,(*s*) and the question as to whether the town has a legal existence is, indeed, the very point of the controversy. But this appears to be exceptional, according to the principle laid down in the preceding section. The legality of the existence of a school district may, in Iowa, be inquired into by a direct proceeding of *quo warranto*,(*t*) which does not seem exceptional.

The right to a military office may be tried by this proceeding, and it is held herein to rest upon the constitutional provision that "the military shall, in all cases and at all times, be in strict subordination to the civil government," it not being a department of the government, but only an instrument to execute, in some particulars, the will of the government, and no military officer having any authority except by the civil law or military customs thereby recognized.(*u*)

And a county school superintendent can, in Pennsylvania, only be removed by *quo warranto*, under a statute providing expressly that he may be removed for *neglect of duty, incompetency, or immorality*, by the general superintendent of schools. He must be summoned to answer any charge brought against him under the statute, although, if he was appointed so as to be removable at pleasure, it would be different, since, in such a case, the will of the appointing or removing power is wholly without control. No cause needs to be assigned for its exercise, and no reason can be asked.(*v*) The principle is that where appointments are made under powers, as of a statute, the appointment is not subject to revocation unless the act creating the power expressly declares it to be so. Otherwise, when an appointment is made, the incumbent holds in contemplation of law directly from the authority which created

(*r*) People *v.* Hartwell, 12 Mich. 508.

(*s*) People *v.* Carpenter, 24 N. Y. 88.

(*t*) State *v.* School District, 29 Ia. 265.

(*u*) Commonw. *v.* Small, 26 Pa. St. 33.

(*v*) Field *v.* Commonw. 32 Pa. St. 481.

the power, so that he is the creature of the law, and stands as if his name had been mentioned in the enabling statute.(*w*) It seem to be on this principle that, in California, *quo warranto* lies against a pilot appointed by the board of pilot commissioners, upon whom the duty of appointing devolves under the statute, which statute defines and limits the powers.(*x*) And, also, on this principle it is that the secretary or treasurer of a railroad company cannot be made to answer to a writ of *quo warranto*, as we noticed in the preceding section, his office being merely at the pleasure of the directors, and not under statute, so that it is not a public office. It is, accordingly, different with the officers of a railroad or other corporation, who are elected as prescribed in the charter, their offices being therefore statutory and public.(*y*)

It is also on the principle correlative to this, namely, that a corporation and its officers are only answerable to the sovereign authority by which it is created, that the officers of a bank organized under the national currency act cannot be made to answer a writ of *quo warranto* issued by state courts while they are so answerable to the United States.(*z*)

It is also on this principle that the trustees of an incorporated church, having a special legislative charter, are held answerable to the civil courts on *quo warranto*, as to their holding the office, although the legality of the holding also depends upon regulations made by the church authorities, which regulations must of necessity form a part of the investigation in the *quo warranto* proceedings.(*a*)

A proceeding to escheat property held by a corporation is by *quo warranto* appropriately, so provided by statute, sometimes.(*b*)

In Ohio, where the franchise of a private corporation is to be drawn into question, the proceeding should be under the

(*w*) Hennen's Case, 13 Pet. (U. S.) 236.

(*x*) People *v.* Woodbury, 14 Cal. 43.

(*y*) People *v.* Susquehanna R. R. 55 Barb. 354; People *v.* Albany, etc., R. R. (same case) 38 How. Pr. 237.

(*z*) State *v.* Curtis, 35 Conn. 378.

(*a*) State *v.* Ferris, 45 Mo. 189.

(*b*) West's Appeal, 64 Pa. St. 194. But *quo warranto* is not a proper remedy to recover real estate, except on escheat, or forfeiture to the state. State *ex rel. v.* Shields, 56 Ind. 521.

statute against the individuals usurping the franchise.(*c*) This is placed on the authority of *Rex* v. *City of London*, by the court quoting with approval a statement of the general rule, thus: "He says the rule is this: when it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment of *ouster* only shall be entered; but when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given. The reason is given: that which came from the king is returned there by seizure; but that which never came from him, but was usurped, shall be declared null and void. Judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation. It is rendered against corporations for exercising a franchise not authorized by their charter. In such case the corporation is ousted of such franchise, but not of being a corporation. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges." Also, *People* v. *Richardson*, 4 Cowen, 97, is cited: "If the information be for using a franchise by a corporation, it should be against the corporation. If for usurping to be a corporation, it should be against the particular persons."

§ 467. It has been sometimes contended that writs of *quo warranto* should be confined to the subjects to which the ancient writs were applied, which of course would render impossible the forfeiture of a railroad charter and the like, these being modern in their origin. But this ground has justly been held untenable.(*d*)

§ 468. The fact that a city council has admitted an ineligible member to a seat therein, and refused to expel him, does not prevent courts from investigating the matter on *quo warranto* and ousting the member.(*e*)

§ 469. As to election matters, it has been held that where a general municipal election was held on a wrong day by

(*c*)State *v.* Gas & Coke Co. 18 O. St. 262. And so of a municipal corporation in New York. People *v.* Clark, 70 N. Y. 518.

(*d*)State *v.* R. R. Co. 34 Wis. 205.

(*e*)Commonw. *v.* Allen, 70 Pa. St. 472.

mistake, not discovered till afterwards by officers, candidates, or voters, and where there was no pretence of fraud or corruption, the court has a discretion to refuse to allow an information to be filed against an alderman elected at that election.(*f*)

The determination of canvassers has no such conclusive validity as to prevent a court from inquiring into the result of an election on *quo warranto*.(*g*)

In Missouri a contested election is inquired of on a *quo warranto*.(*h*) But, where the attorney general files the information, the qualifications of electors cannot be inquired into, nor the qualifications of a party, other than the incumbent, to hold the office.(*i*) But it is different in Wisconsin, it seems, for there it is held the question is whether defendant received a majority of all the votes which the canvassers had a right to count, which implies an examination into the qualification of the electors.(*j*) And, accordingly, where it appears that there was no registry of the voters, and none of the voters gave the affidavit required in the absence of a registry of their names, the whole vote of the election precinct must be rejected.(*k*)

§ 470. In Kansas, if a new county has been organized through falsehood and fraud, by presenting to the governor a false memorial and false census returns, the supreme court

(*f*)State *v.* Tolan, 38 N. J. Law, 196. And so, where one was elected on a prudential committee of a school district, but, on a mistake, the election proceeded, and finally resulted in the choice of another, it was held that the general acquiescence of the voters and the candidates waived objection, and especially so where the candidate first elected and finally defeated had subsequently disqualified himself by taking an incompatible office. Cate *v.* Farber, 56 N. H. 224; and see, to similar effect, People *v.* Waite, 70 Ill. 25, and People *v.* Moore, 73 Ill. 132. A void election, however, can be inquired into by *quo warranto* proceedings against those claiming office under it, (Stephens *v.* People, 89 Ill. 338,) provided they have taken the oath of office—this being of itself a sufficient *user* to authorize the writ. People *ex rel. v.* Callaghan, 83 Ill. 129. And the court may go behind the returns: in New York, at least. People *v.* McCausland, 54 How. Pr. 151.

(*g*)State *v.* Clark, 1 Dutch. 355.

(*h*)Bowen *v.* Hixon, 45 Mo. 341.

(*i*)State *v.* Vail, 53 Mo. 103.

(*j*)State *v.* Tierney, 23 Wis. 433.

(*k*)Ibid, 631.

may proceed by *quo warranto* against the persons assuming to act as officers of such county, and inquire into the falsehoods and frauds whereby the organization was effected, and declare it illegal and void, even if the legislature has apparently recognized it as an existing corporation.(*l*)

§ 471. Upon the ground that the public interests require the functions of public offices to be exercised during pending litigation, as well as at other times, a court may properly dissolve a temporary injunction restraining officers *de facto* and claiming to be officers *de jure*, from exercising such functions during the pendency of proceedings in *quo warranto*.(*m*)

(*l*)State *v.* Ford Co. 12 Kan. 444. And so, the legality of a school district may be inquired into by *quo warranto*. Alderman *v.* Directors, 91 Ill. 179.

(*m*)State *v.* Dukee, 12 Kan. 314.

CHAPTER XV.

MANDAMUS.

§ 472. Nature of writ.
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498. Bids enforced by *mandamus*.
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502. But demand for room, keys, etc., may be enforced.
503. Location of highways.
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505. Compelling to correct a deed or sign a contract.
506. Compelling admission of a colored child to the public schools—enforcing right of a school committee.
507. Surveys.
508. Miscellaneous particulars.
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510. Relators

§ 472. The writ of *mandamus* has been defined to be "a high prerogative writ, to be awarded in the discretion of the court, and which ought not to issue in any case, unless the party applying for it shall show a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty also, to do the acts sought to be done. It is well settled that in a doubtful case this writ should not be awarded. It is never awarded unless the right of the relator is clear and undeniable, and the party sought to be coerced is bound to act."(*a*) The object of the present chapter is to

(*a*)People *v.* Hatch, 33 Ill. 140; Mabley *v.* Judge, 41 Mich. 32.

That is to say, that on the one part there must be a clear right, and on the other a clear legal duty. As to the *right* of the applicant, therefore, it must not be doubtful. Thus, if the writ is sought to enforce an apportionment and division of a school fund, the relator must show a vested right in the fund (People *ex rel. v.* Trustees, 86 Ill. 613;) and he must not only show that he has a right to have the thing he seeks to have done, but also that he has a right to have it done in the manner asked, and by the person or body sought to be coerced. People *ex rel.* Klokke, 92 Ill. 134. The writ will not issue if the right is dubious, (State *v.* Babcock, 51 Vt. 570,) and so the application must state specifically what is required. State *ex rel. v.* R. R. 59 Ala. 321. Thus, to have a right to compel the allowance of an appeal, he must have been an actual or at least virtual party to the suit. Cutting's Case, 94 U. S. 14. In such a matter, however, an *intervening* party may possess the same right as an original party. Jordan's Case, 94 U. S. 248. Also the right of a complainant must be specific, complete, and legal; and independent, usually, of what he merely holds in common with the public at large. Commonwealth *ex rel. v.* Mitchell, 82 Pa St. 343. He must have a direct personal interest, in some manner, to give him a *status* in court, (School Trustees *v.* People *ex rel.* 71 Ill. 559;) and so, if one brings *mandamus* to compel the opening of a highway, he must show a personal interest other than an excepted diversion of travel from his land to the proposed route, because his interest does not depend on the opening of the road merely, but on the use of it by the public. Moon *v.* Cort, 43 Ia. 503. If *part* of a claim is illegal, it will vitiate the whole, in an application for *mandamus*. Cook *v.* Treasurer, 50 Vt. 231.

Parties only incidentally or collaterally interested in a matter cannot properly be parties to a *mandamus* proceeding, either as petitioners or defendants. State *ex rel. v.* Smith, 7 S. C. 275.

However, there is not entire uniformity among the authorities on this matter. Some hold that when the question is one of public right, and the writ is asked for to enforce the performance of a public duty,

unfold and show the application of the jurisdictional features of this comprehensive definition.

§ 473. It is thus defined to be a prerogative writ, and, therefore, discretionary as to its being awarded on application—not absolutely so, as formerly with the English sovereign, but relatively so. The discretion to be exercised is not an arbitrary, but a sound judicial, discretion, so that in a proper case it should not be denied. But a court may properly refuse to issue a writ in all cases, where substantial interests are not involved, even though it would be just to grant it. And so, where suit was brought by petition for a *mandamus* to compel the auditor of public accounts to draw

the relator does not need to show any legal or special interest in the result, since he is interested as a citizen in having the laws executed and the right enforced. State *ex rel. v.* Gracey, 11 Nev. 223; Moses *et al. v.* Kearney, 31 Ark. 261. And, in Wisconsin, this has been carried so far as to hold a mere private person may bring an action by *mandamus*, in the name of the state, to compel the secretary of state to revoke, as required by statute, the license of a foreign corporation—as an insurance company—to do business in the state. State *ex rel. v.* Doyle, 40 Wis. 175. Probably the principle involved in these cases will finally prevail, so that any citizen will be allowed to enforce a common as well as a private or special right.

Again, there must be a present *legal duty* on the defendant to perform what is sought to be enforced. Thus, where a *mandamus* was sued out to compel payment to a contractor, out of a special assessment which had been declared invalid, the writ was, of course, denied. Gebhart *v.* East Saginaw, 40 Mich. 336. A *mandamus* is never granted to compel the performance of an act or duty, which, without such mandate, it would not be lawful to do. State *ex rel. v.* Commissioners, 57 Ala. 240. And so a relator must not only show that an officer has failed to perform a duty required, but that the performance is due at the time of the application. State *v.* Gracey, 11 Nev. 223. However, where there was a failure on the part of the *predecessor* of the officer, he may be held liable to the performance, if the right of the relator still remains. As, for example, if a comptroller of a city refuses to pay a just demand, and his term of office expires, the claimant may sue out a writ of *mandamus* to compel the successor to make the payment, on his refusal to do so. Where a city is liable, a court is not bound to regard a change of incumbents in office, the city itself being bound to save its officer from all personal harm therein. People *ex rel. v.* Dannatt, 77 N. Y. 46.

But, if a *performance* has in itself *become impossible*, no *mandamus* can properly be issued or sustained. If an officer has even put it out of his power to do the act required, he may be answerable in damages for

his warrant on the treasury for two dollars, in favor of relator, as pay for services as a member of the legislature for a certain day—the real object being to obtain a decision as to whether the governor had properly or improperly prorogued the legislature, on a disagreement of the two houses as to the time of adjournment—the court saw fit to blink the real purpose of the suit, it being covert, and to hold that the petition should not be entertained because there were no substantial interests involved in the awarding of the warrant, on the ground that to entertain the jurisdiction would encourage petty litigation at the expense of the state, and produce delay

it to the party interested, but a *mandamus* will not lie against him. Rice *v.* Walker, 44 Iowa, 458. And so, if a term of office has expired, a *mandamus* is not available to compel the late incumbent to perform a strictly official act, such as to vacate an order he had made illegally. Trice's Case, 53 Ala. 546. A defendant must still have it in his power to perform. People *ex rel. v.* Hayt, 66 N. Y. 606. Even if the act is not physically impossible, yet if it is legally impossible, no *mandamus* will lie. Thus, where a commissioner of state lands issued a patent to a wrong person, it was held that the true claimant must bring a suit in equity to set aside the patent, since thereby the state had parted with the legal title, and could not reconvey it. Smithee *v.* Mosely, 31 Ark. 425. And so *mandamus* will not lie to compel a justice of the peace to set aside a judgment he has rendered. O'Brien *v.* Tallman, 36 Mich. 13. And so, where performance depends on the co-operation of a third person, who is not within the coercive power of the court, a *mandamus* cannot be maintained. State *ex rel. v.* Jumel, 30 La. An. 237.

Again, the duty to be performed must be of a positive character, since *discretion*, where it properly exists, must not be coerced. Only abuses of discretion can be interfered with, and the proper boundaries of the discretion be maintained. Virginia *v.* Rives, 100 U. S. 314.

And so, where an attorney general has a discretion in the matter of a *quo warranto* to try the right to a public office, a claimant of the office cannot compel him to proceed with an action. People *ex rel. v.* Fairchild, 67 N. Y. 331; Yates *v.* Attorney General, 41 Mich. 728. And so a judge cannot be compelled by *mandamus* to issue a *mandamus;* and more particularly where an appeal is allowed from his refusal to grant the application. Grant & O'Barr's Case, 53 Ala. 17. And so an auditor who has a discretion to receive tax returns, sent in after the day designated by law, cannot be compelled by *mandamus* to receive them after the day. Houghton County *v.* Auditor, 36 Mich. 271. Nor will a court control a discretion as to removing officers. State *v.* Fire Com'rs, 26 Ohio St. 24. And so a court will not compel by *mandamus* the *allowance* of a claim on which a board of county commis-

of other more important interests; and yet the question of the governor's action was incidentally discussed by the opinion.(*b*) And, in its discretion, a court will refuse to grant a motion in *mandamus* which would have the effect of "placing a judge between two fires," because this "would be very indiscreet."(*c*) And the discretion may be exercised even if it appears that the applicant is otherwise remediless, as the court will grant or withhold the writ, as may seem to be best in the promotion of the ends of substantial justice.(*d*)

Nevertheless, it is held contrariwise by some of the state courts, and by the supreme court of the United States, that the writ of *mandamus* is a writ of right, and not a prerogative writ, and is nothing more than the ordinary process

sioners has acted, and which they have refused, (State *ex rel. v.* Board of Com'rs, 26 Ohio St. 365;) the claimant must appeal, or bring suit and obtain judgment, before a *mandamus* will lie to enforce his demand. Portwood *v.* Montgomery Co. 52 Miss. 523. And if a judgment is rendered against one by a county court, on application for a warrant on the treasury payable out of a particular fund, to satisfy a judgment he had previously obtained, a *mandamus* will not lie, because the act of refusal is a judicial act, and an appeal lies from the decision. State *ex rel. v.* County Court, 68 Mo. 29. And so a state officer can only be compelled by *mandamus* to the performance of a purely ministerial act. State *ex rel. v.* Johnson, 28 La. An. 932. And so of other officers. State *ex rel. v.* Police Jury, 29 La. An. 146. And so a city cannot be compelled by *mandamus* to pay an unliquidated demand, since this requires a judicial act to ascertain what is due, and the payment is not, therefore, a mere ministerial act. People *v.* Detroit, 34 Mich. 201. Creditors, however, may thus enforce the payment of fixed or positive claims on which judgment is entered. State *ex rel. v.* Pillsbury, Mayor, 30 La. An. 705.

If an official duty is to be performed, on the happening of a particular event, the officer cannot capriciously deny the happening of the event as an excuse for non-performance. If the event can be proved to have really happened, *mandamus* will lie on his refusal to perform. Stockton R. Co. *v.* Stockton, 51 Cal. 329.

The matters in this note are treated below in the text more at large. These are the general principles.

(*b*) People *v.* Hatch, 33 Ill. 134.

(*c*) Fleming's Case, 4 Hill, 584.

(*d*) McClelland *v.* Dowling, 37 How. Pr. 394. In Wisconsin it is held that courts have discretion only in matters of private right, and not where the writ is invoked in behalf of the state as a pure prerogative writ in matters of public right. State *ex rel. v.* Doyle, 40 Wis. 221.

of a court of justice, to which every one is entitled when it is the appropriate remedy.(*e*)

§ 474. On the ground of discretion it has been held that, even where parties have commenced other proceedings, a writ may be awarded if the court judges it proper, although only in extraordinary cases will the discretion be thus exercised, it being the ordinary rule that *mandamus* will be declined where there are other remedies.(*f*)

§ 475. When the power to issue has been granted in general terms to a court, its discretion therein is to be guided by common-law rules:(*g*) and in general the writ should be granted only to prevent a failure of justice, and for some important public purpose, although the value of the matter, or the degree of public importance attached to it, ought not to be too nicely or scrupulously estimated: and hence it has been held that to preserve the rights and secure the order, peace, and quietness of a church society may be regarded properly as of great public interest and importance.(*h*)

§ 476. As intimated above, inasmuch as the chief object and utility of a writ of *mandamus* is to prevent a failure of justice, it will not usually be allowed when there is an adequate remedy either at law or in equity, although it ought to be granted where the law has established no specific remedy, and when, in justice and good government, there ought to be one:(*i*) as, for example, where a law proves defective and insufficient to compel a public officer to perform a clearly-defined public duty.(*j*) So, in general, a *mandamus* will be refused where the state has suffered loss from the default of a public treasurer, unless the bond of the defaulting officer has been exhausted, or else it appears that a suit on the bond

(*e*) Commonw. of Ky. *v.* Dennison, Gov., 24 How. (U. S.) 98; Kendall *v.* U. S. 12 Pet. 615; Kendall *v.* Stokes, 3 How. 100. In Illinois it is now made a common remedy by statute, as construed by the supreme court. People *ex rel. v.* Weber, 86 Ill. 283.

(*f*) People *v.* Solomon, 51 Ill. 39.

(*g*) Fitch *v.* McDiarmid, 26 Ark. 486.

(*h*) Church in Chelsea *v.* Slack, 6 Cush. 239.

(*i*) District *v.* Perkins, 49 N. H. 540.

(*j*) People *v.* Martin, 62 Barb. 572.

would be unavailing;(*k*) or, where there has been a refusal to transfer shares in a corporation, if the petitioner can be indemnified, by judgment for damages, in an action at law;(*l*) the general rule being that, when a statute gives power to a particular person, or imposes an obligation to do some particular act, and provides no adequate specific remedy for a non-performance, a *mandamus* is properly allowable.(*m*)

It makes no difference whether the remedy be at law or in equity; so that a *mandamus* is not to be granted where there is a full and specific equity relief available;(*n*) as where a law authorizing a special election fails to provide for any mode of contesting the election and recanvassing the votes cast; but equity will, on the ground that this is a matter of public concern, entertain jurisdiction to relieve against fraud therein, and carry out the intention of the law in submitting the special question, such as the removal of a county seat to a vote of the people; in that case, an application for a *mandamus* will be refused.(*o*)

But the remedy provided must be sure and adequate, and, where there is material doubt concerning it, this doubt will justify the jurisdiction to be exercised in issuing the writ.(*p*) And so, if trover or replevin will lie to compel delivery of records to the proper officer, yet if *mandamus* is a more appropriate or effectual remedy, it will be awarded.(*q*) And so, if ministerial officers are liable to an action on the case for a neglect of duty, yet they may be compelled by *mandamus* to exercise their functions according to law.(*r*)

(*k*) State *v.* Board, etc., 25 Ind. 210.

(*l*) Murray *v.* Stevens, 110 Mass. 95.

(*m*) Winters *v.* Heirs, etc., 6 Cold. 330.

(*n*) Hardcastle *v.* R. R. 32 Md. 33.

(*o*) People *v.* Wiant, 48 Ill. 264.

(*p*) People *v.* Head, 25 Ill. 329.

(*q*) Sudbury Parish *v.* Stearns, 21 Pick. 151.

(*r*) People *v.* Loucks, 28 Cal. 71.

The object of a writ of *mandamus* is to enforce a plain, positive duty, on the relation of one who has a clear right to have it performed, and where there is no other adequate legal remedy. State *v.* New Haven, etc., Co. 45 Conn. 332. In New York it is held lately that the statute on *mandamus* was "intended to provide a cumulative, less expensive, and more speedy remedy, so that it is mandatory even where there is a cause of action existing which might be made available in another form of remedy. People *ex rel.* *v.* Supervisors, 70 N. Y. 229. But

§ 477. A *mandamus* is the appropriate remedy to enforce the performance of an official duty enjoined by the statute, provided the statute makes it clearly an official duty. In a case where the relator claimed to be an employe of a marine hospital, and applied for a *mandamus* to compel the commissioners of emigration to pay the rent of a building he had occupied, in consequence of the destruction of quarantine buildings by fire, it was held that the writ must be denied, because the relator could not, by his own act, by going outside the quarantine enclosure and renting another house, cre-

where a suit in equity is available, this fact will usually prevent a proceeding by *mandamus*. Ham *v.* R. R. Co. 29 Ohio St. 174. And so, where the proper remedy for an erroneous assessment of taxes is by application to a board of equalization, from whose decision an appeal may be taken, *mandamus* is not available in order to strike out an erroneous assessment. Meyer *v.* Dubuque Co. 43 Ia. 592. And so *mandamus* is not, properly, a revisory writ, and, where a *supersedeas* is the remedy to prevent the execution of an erroneous decree, *mandamus* cannot be resorted to for that purpose, (Bryant *v.* Stephens, 58 Ala. 637,) since herein is a specific and adequate remedy to enforce the rights. Murphy *v.* State *ex rel.* 59 Ala. 639. But where one holds a judgment against a municipal corporation he can bring a writ of *mandamus* to compel the levying of a tax to pay the judgment, because there is no other adequate remedy. City Council of Eufaula *v.* Hickman, 57 Ala. 339. And so one who applies for a writ of *mandamus* must show his right, and that he has no other adequate remedy. People *ex rel.* *v.* Comm'rs, 88 Ill. 141 So, where an indictment will lie for obstructing a public highway, a *mandamus* will not be granted. Comm'rs *v.* People *ex rel.* 73 Ill. 203. And, if a proper remedy is *quo warranto*, this must be pursued, and a re-canvass of votes cannot be compelled by *mandamus*. Swain *v.* McRae, 80 N. C. 111. And especially where an adequate remedy is available through the ordinary processes, *mandamus* does not lie. State *ex rel. v.* Police Jury, 29 La. An. 146; State *ex rel. v.* Herron, 29 La. An. 848. The writ cannot be made to have the preventive force of an injunction, and so it is never granted in anticipation of an omission of duty, however strong the presumption may be that when the proper time comes the officer, or person against whom the writ is desired, will refuse to perform the duty. State *ex rel. v.* School District, 8 Neb. 93.

And so it is not the proper office of a writ of *mandamus* to restrain a party claiming to be a public officer from exercising the functions of the office, nor to enjoin him from qualifying for the office. People *ex rel. v.* Ferris, 76 N. Y. 326. An obligation arising from contract is not enforceable by *mandamus*, even in behalf of a state itself, because the proper remedy for breaches of contract is an ordinary suit at law. State *v.* Bridge Co. 20 Kan. 404.

ate a statutory duty upon the part of the commissioners to provide suitable accommodations off the quarantine premises, nor even to erect new buildings within the enclosure, in the absence of any new legislative direction.(*s*) It is enough, however, that the statutory duty arises from a fair and reasonable implication, from the terms of the statute, and it needs not to be express, although the obligation thereon must be a complete legal obligation.(*t*) In Oregon it was held in a certain case that an ordinance passed in 1862, directing the city marshal of Portland "to procure, at the cost of the city, a small-pox hospital, *the selection to be subject to the approval* of the committee on health and police," did not devolve on the marshal a complete legal obligation or power to procure such hospital, so as to subject him to a *mandamus* commanding him to do so.(*u*)

The obligation may be an implication from a statute *empowering* a public body or officer to perform an act, on the principle that in matters which concern the public interest a power conferred by statute may be enforced as a duty, notwithstanding the permissive form of the statutory provision.(*v*)

§ 478. But there must be in general a refusal on demand, unless, indeed, a statute makes the duty obligatory as a matter of course, or of routine, or as an absolute duty. And where a demand is made for a specific performance of duty it must be absolute, and not trammelled by any condition which would make the refusal a qualified one. And so, where county authorities received a conditional demand of railroad bonds they were to issue to a railroad company, the condition being that the stock tendered to the county authorities should be at once transferred back to the company, it was held that the railroad company could not proceed by *mandamus* to compel the issuing of the bonds.(*w*) A demand and refusal are necessary in

(*s*)People *v.* Comm'rs, 22 How. Pr. 292.

(*t*)State *v.* R. R. 18 Minn. 41.

(*u*)Ball *v.* Lappins, 3 Oregon, 55.

(*v*)Mayor, etc., *v.* Furze, 3 Hill, (N. Y.) 614; R. R. *v.* Napa Co. 30 Cal. 437.

(*w*)Macoupin Co. *v.* People, 58 Ill. 193.

order to constitute an official breach of duty, and must, therefore, be certain as well as unconditional;(*x*) although, if a duty be imperatively commanded by law—as, for example, the levying of a specific tax—no demand is necessary.(*y*)

§ 479. But the obligation must be so full as to leave no reasonable discretion in the officer as to the performance. In matters of discretion a *mandamus* can reach no further than to compel the exercise of the discretion—the results cannot be guided or controlled thereby; in the particular mode of the exercise of the discretion the officer must be left entirely free from coercion or restraint.(*z*) In fact, discretion ceases to be discretion when it is compelled by an irresistible authority to a definite and prescribed conclusion.

The principle applies to executive officers, even to land-office registers and receivers.(*a*) Also to judicial discretion, as in issuing an injunction.(*b*) And to the board of selectmen of a city, who have the right to judge conclusively of their own election, and of that of their officers.(*c*) Where a court refuses to dismiss a bill, on the motion of a complainant, *mandamus* cannot be resorted to to compel the dismissal. This must be left to the ordinary course of proceedings on appeal.(*d*) Nor to vacate an order for a new trial where this has anything in it whereon the judge must exercise his discretion.(*e*) Even where school directors exercise a discretion unwisely there is no remedy by *mandamus*.(*f*)

§ 480. Nor in any case can a writ supply the place of an appeal or writ of error, and not even in regard to a matter which cannot be appealed because of the amount involved be-

(*x*)State *v.* Davis, 17 Minn. 432.

(*y*)Comm'rs *v.* King, 13 Flor. 460. Thus there must be a previous demand and refusal before the proper officer will be compelled by *mandamus* to execute a tax deed. Bryson *v.* Spalding, 20 Kan. 427. And so in regard to other duties relating to the interest of individuals, for in all cases such facts must be shown as impose the particular duty upon the officer. Kemerer *v.* State, 7 Neb. 130.

(*z*)Seymour *v.* Ely, 37 Conn. 106.

(*a*)Litchfield *v.* Register, etc., 9 Wall. 577.

(*b*)McMillan *v.* Smith, 26 Ark. 613.

(*c*)State *v.* Board, etc., 25 La. An. 310.

(*d*)Johnson's Case, 25 Ark. 614.

(*e*)People *v.* Judge, 17 Mich. 67.

(*f*)Clark *v.* Directors, 24 Ia. 266.

ing below the jurisdiction of the appellate court. On this the supreme court of the United States say: "Applications for a mandamus to a subordinate court are warranted by the principles and usages of law, in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render a judgment or enter a decree in the case; but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court, in any case; nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case; nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ, when issued to a subordinate court, is to direct the performance of a ministerial act, or to act in a case where the court has jurisdiction and refuses to act; but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy. * * * * * Confessedly, the petitioners are without remedy, by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought, on that account, to have the remedy sought by their petition. *Mandamus* will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given, save in patent and revenue cases, except when the sum or value exceeds two thousand dollars; but the writ of *mandamus* will not lie, in any case, to a subordinate court, unless it appears that the court of which complaint is made refused to act in respect to a matter within the jurisdiction of the court, and where it is the duty of the court to act in the premises."(*g*) So, however erroneous the proceedings of a court may be, they cannot be reviewed in proceedings for a

(*g*)Newman's Case, 14 Wall. 165, 168.

mandamus.(*h*) And where one is dispossessed of an office by a superior force, exercised under process irregularly issued by a court, *mandamus* will not be available to restore him to the possession.(*i*)

§ 481. An act to be commanded by the writ must be within the power of the defendant to perform, and therefore it must not embrace any element of illegality,(*j*) for it must not only be possible in a natural sense, but legally possible.(*k*) And so, where an official act is sought to be required of one who is no longer an officer, a *mandamus* must be refused, since "its issuance would be vain and fruitless, and could have no beneficial effect;"(*l*) and it is not the business of courts to send out a nugatory writ—a *brutum fulmen*. They always aim to act for the accomplishment of some just and useful purpose.(*m*)

§ 482. The courts vested with the power to issue writs of *mandamus* are usually only superior courts, of unlimited jurisdiction. The power is rarely, if ever, conferred upon inferior courts, whose jurisdiction is limited; and if it were given to such courts the authority they would hold therein could only be exercised as to their inferiors.(*n*)

§ 483. In California and New York, but I think in no other state, a writ of *mandamus* may be sued out to inquire whether a particular officer has the power to perform an act or not, so that if a board of supervisors refuse to act on a claim against the county, for the reason that they have not the power to approve of it, *mandamus* is the action to determine whether they do or do not possess such power.(*o*) The general rule is that that there must be a refusal to perform a plain duty.

§ 484. Most generally the issuing of a writ directly from an appellate court is in aid of its appellate jurisdiction.(*p*)

(*h*)Beghul *v.* Swan, 39 Cal. 411.

(*i*)Allen *v.* Robinson, 17 Minn. 113.

(*j*)Butler *v.* Supervisors, 26 Mich. 23.

(*k*)State *v.* Perrine, 34 N. J. 257.

(*l*)McGuire *v.* Waterman, 5 Nev. 328.

(*m*)Booze *v.* Humbird, 29 Md. 4.

(*n*)School Inspectors *v.* People, 20 Ill. 530.

(*o*)People *v.* Supervisors, 28 Cal. 430; People *v.* Supervisors, 24 How. Pr. 119.

(*p*)Westbrook *v.* Wicks, 36 Ia. 382; State *v.* Elmore, 6 Cold. 531.

Usually, I suppose, the decision of a lower court in relation to the granting of a *mandamus* is itself reviewable; but in no case will an appellate court issue a *mandamus* to reverse the judgment of a court refusing a *mandamus*.(*q*) The remedy is by appeal direct.

§ 485. A writ of *mandamus* is not available in reference to mere obligations arising from contract involving no office, trust, or station, partly for the reason that the legal remedies are adequate to such obligations.(*r*)

§ 486. As to the power of issuing a *mandamus* to state executive officers, this was partially discussed in the chapter on Constitutional Limitations, in the first part of this work, and we shall not long delay on it here. The general principle in regard to a governor is that in the exercise of the supreme executive power of the state he must have an official discretion, necessarily uncontrollable by judicial power; yet in regard to a mere ministerial act, which might have been enjoined upon any other officer, and which affects any specific private right, he may be held amenable to a *mandamus*, (*s*) although courts will but hesitatingly grant a writ against him, and that in a case, probably, of extraordinary emergency only. It is held that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."(*t*) A governor cannot be commanded even to exercise his political discretion, however. But, where he has no discretion as to performing a ministerial act, the act is, of course, compellable by *mandamus;* as where his duty is to sign a commission(*u*) or a patent(*v*) absolutely.

A writ will not lie against a governor to compel him to return a bill to the secretary of state, which, being passed by the legislature, was put into his hands for consideration, and which, as alleged, has not been returned to the proper house,

(*q*) De Groot's Case, 6 Wall. 497.

(*r*) State *v.* Turnpike, 16 O. St. 317.

(*s*) State *v.* Chase, 5 O. St. 535.

(*t*) Marbury *v.* Madison, 1 Cranch, 170.

(*u*) Magruder *v.* Swann, 25 Md. 207; Groome *v.* Gwinn, 43 Md. 574.

(*v*) Middleton *v.* Low, 30 Cal. 599.

within the time limited by the constitution, with his objections.(*w*)

It has been held that where a person charged with crime flees to another state, and a demand is made in due form for his extradition, there is no power in the United States government to coerce the surrender, notwithstanding it is a merely ministerial act, and the United States statute says expressly "it shall be the duty" of the executive, on a requisition, to make the surrender. The supreme court of the United States say hereon: "The demand being thus made, the act of congress declares that 'it shall be the duty of the executive authority of the state to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state.' The words 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and coerce obedience. But, looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion the words 'it shall be the duty,' were not used as mandatory or compulsory, but as declaratory of the moral duty which this compact created when congress had provided the mode for carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that that the federal government, under the constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it. For, if it possessed this power, it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity

(*w*)People *v.* Yates, 40 Ill. 126.

to which he was elevated by the state. It is true that congress may authorize a particular state officer to perform a particular duty, but if he declines to do so it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that in using this word 'duty' the statesmen who framed and passed the law, or the president who approved and signed it, intended to exercise a coercive power over state officers not warranted by the constitution. But the general government having, in that law, fulfilled the duty devolved upon it by prescribing the proof and mode of authentication upon which the state authorities were bound to deliver the fugitive, the word 'duty,' in the law, points to the obligation on the state to carry it into execution. * * * * * * It would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state; for every state had an equal interest in the execution of a compact absolutely essential to the peace and well-being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed, when an undoubted obligation is required to be performed, 'it shall be his duty.' But, if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him."(*x*)

§ 487. A state treasurer is, of course, liable to *mandamus* in the performance of his ministerial duties in paying out money, but the writ cannot be invoked, by a creditor of the state, to compel him to make a certain distribution of funds, not yet in his hands, but to be thereafter received.(*y*) He may be required to countersign warrants on state contracts, even where there is no money in the treasury; and the auditor to issue them.(*z*) But in Texas the executive officers are

(*x*) Kentucky *v.* Governor, 24 How. 103–110.

(*y*) State *v.* Dubuclet, 24 La. An. 16.

(*z*) People *v.* Sec'y of State, 58 Ill. 91.

held not to be subject to the judicial power, in any way, as to their management of the fiscal affairs of the state, etc.(*a*)

§ 488. In Kansas it is held that a secretary of state is compellable to issue a certificate of election to a candidate chosen, on a due authentication of his claim to the office.(*b*) And so, in Illinois, a clerk may be compelled to answer to a *mandamus* in regard to issuing a certificate of election, and it is no answer that he had already issued a certificate to the relator's competitor, who on the certificate had been regularly commissioned by the governor. A peremptory *mandamus* will issue, not to oust the incumbent from the office, but simply to compel the issuing of another contradictory certificate, leaving the clerk and the party to extricate themselves as best they may from the entanglement.(*c*)

§ 489. A writ of *mandamus* may be issued to an inferior court, and it is then the duty of the latter to render implicit obedience,(*d*) although, as before stated, its proper discretion cannot be interfered with; but in everything which parties have a right to demand, such as issuing process, hearing the cause, rendering judgment, etc., a *mandamus* may be brought to enforce duty. While a writ cannot be used to compel a judge to vacate an order (*e*) from which an appeal may be taken, and generally even where an appeal may not be taken, yet, on the other hand, it can be employed to compel him to make an order in the progress of a cause,(*f*) or a final decision,(*g*) or to receive and enter a verdict,(*h*) or to re-instate a cross-bill dismissed improperly before the final hearing of a chancery cause.(*i*) Where an appeal has, as alleged, been improperly dismissed by an inferior court, *mandamus* will not lie to compel its re-instatement and a hearing,(*j*) nor to correct an erroneous judgment,(*k*) nor to force the recall of

(*a*)R. R. Co *v.* Randolph, 24 Tex. 329.

(*b*)State *v.* Lawrence, 3 Kan. 95.

(*c*)People *v.* Ives, 27 Ill. 247.

(*d*)Morris and Johnson's Case, 9 Wall. 607.

(*e*)State *v.* Taylor, 19 Wis. 566.

(*f*)Ibid, 531.

(*g*)Cowan *v.* Doddridge, 22 Gratt. 459.

(*h*)Munkers *v.* Watson, 9 Kan. 671.

(*i*)Thornton's Case, 46 Ala. 385.

(*j*)People *v.* Weston, 28 Cal. 640.

(*k*)Cariaga *v.* Dryden, 29 Cal. 308.

an appealable order made after judgment,(*l*) nor to issue an injunction,(*m*) nor to require a judgment of acquittal in a criminal case,(*n*) or the setting aside of a judgment entered improperly at a subsequent term,(*o*) or rectify refusal in a pending case to discharge a garnishee.(*p*)

In Alabama an order granting a new trial may be set aside by means of a *mandamus*.(*q*) And in Michigan a judgment rendered without notice or appearance.(*r*) In California it is held to be the proper writ to compel the holding of courts at the county seat, where there is a contested removal of the county seat.(*s*)

It is held that the writ is also a proper mode of compelling a court to recognize one as an attorney.(*t*) The supreme court has the right to issue a *mandamus* to compel a judge to sign a bill of exceptions, although the judge must still be the exclusive judge of its correctness, and he cannot be compelled to sign it if he believes that it does not contain the truth, and affidavits to the contrary will not be received to justify the issuance of the writ. All that can be done is to receive a return on an alternative writ, or on a rule to show cause, and if the judge shows for cause that the particular bill in question is incorrect it ends the matter.(*u*)

§ 490. It is not proper to issue a writ of *mandamus* to compel a railroad company to condemn the land they occupy. In a certain case it was said by the court: "It is contended by the appellees that the rightful remedy in this case is by *mandamus*, to compel the corporation to condemn the land. They urge, in effect, that the owner of the land must take the initiative, when, by the statute, the corporation must, in such case, be the actor. The owner having no duty to perform, he is passive. It is not denied that *mandamus* will lie to compel railroad corporations to perform a duty en-

(*l*)People *v.* Moore, Id. 428.
(*m*)State *v.* Wilson, 49 Mo. 148.
(*n*)Cage's Case, 45 Cal. 248.
(*o*)Morris' Case, 46 Ala. 361.
(*p*)Ex parte R. R. 46 Ala. 654.
(*q*)Hatchett *v.* Milner, 44 Ala. 224, 274.
(*r*)People *v.* Bacon, 18 Mich. 247.
(*s*)Calaveras Co. *v.* Brockway, 30 Cal. 332.
(*t*)People *v.* Hallett, 1 Cal. 352.
(*u*)People *v.* Jameson, 40 Ill. 96.

joined upon them by statute, but it can hardly be said this is one of them. It is not the duty of a railroad corporation, after having obtained possession of land for their track, and using it for their purposes, to institute proceedings to condemn the land. It was their right and their duty, in the first instance, before constructing their road, to institute the proper proceedings. They were required and were bound to take the initiative. No burden is thrown upon the owner of the land by the law. Whilst *mandamus* is the proper remedy, in many cases, against such corporation, this is not one of them. Here the corporation had, without authority of law, taken possession of appellant's land, and the question is, shall they be allowed to rob appellant at defiance, and compel him to institute proceedings by which he is to be deprived of his land? Two remedies, it seems to us, were open to appellant —this action of ejectment, or an action to recover the value of the land taken. He has resorted to the first, and we are unable to see why he should not recover."(*v*)

§ 491. Where the legislature of Michigan passed an act establishing a homœopathic professorship of medicine in the state university at Ann Arbor, and the regents of the university evaded the law for eleven years, claiming the law to be unconstitutional, as tending to produce antagonism and confusion, as they had "provided professors for the medical department, under a system which had been in successful operation many years," the court, on a *mandamus* to compel the auditor to grant the warrant for the necessary funds to carry out the requirements of the law, were divided—a majority being in favor of refusing the writ, on the ground that "a *mandamus*, though a prerogative writ, is demandable of right in a proper case, yet it is only to be granted by the court in the exercise of a sound legal discretion, and hence ought only to be invoked in cases of the last necessity. This necessity we have been unable clearly to discover in this case. The board of regents have a sound discretion to exercise, and, until it is made apparent that they seek to evade the law by unnecessary and wilful delays, the exercise of our discretionary

(*v*)Smith *v.* R. R. 67 Ill. 195.

power cannot be called into action." The minority, however, of the court regarded the regents as not endowed with the discretion they had exercised—namely, of locating the homœopathic school outside of Ann Arbor,—and were favorable to the issuing of the writ to the auditor to compel the issuing of the warrant on the state treasury for the fund provided by the legislature for the establishment of such professorship.(*w*)

§ 492. In Illinois it is held that where a circuit judge has refused an application for the writ of injunction which runs throughout the state when issued, and indorsed his refusal upon the bill, it is merely a question of courtesy with another judge, to whom application is subsequently made, whether he will look into the case and allow the injunction. If he takes cognizance of it he is not to be controlled by the prior decision of the other judge, but is to judge it for himself; and if he grants it the former judge has no power to vacate the order awarding the writ. The judge awarding may punish the clerk, in the county where the application was first made, for contempt, if he refuses to issue the writ of injunction, but he cannot issue a *mandamus*, since a *mandamus* cannot be made to operate beyond the limits of the circuit wherein it is issued.(*x*)

§ 493. A school teacher, who has complied with the requirements of the school law, and is refused compensation out of the special fund provided for payment of such services, is entitled to a *mandamus* to compel the proper officers to perform their duty and make payment of what is justly due.(*y*)

§ 494. As to making public improvements, issuing public bonds therefor, and paying them, *mandamus* has a very appropriate and important sphere to fill. Thus it is the proper remedy to compel a municipal corporation to erect, maintain, and keep in repair bridges provided by statute; and where such bridges are over a navigable stream, or a canal, to compel the corporation to tend the necessary draw for the passage of boats and of passengers by land; at least, where the act prescribes no remedy for the refusal of the municipality

(*w*)People *v.* Auditor, 17 Mich. 161.

(*x*)Welch *v.* Byrns, 38 Ill. 22.

(*y*)Apgar *v.* Trustees, 34 N. J. 309.

to take care of the bridges, and it is of great public importance that they should be properly kept up.(*z*) And, also, it is the proper remedy whereby commissioners can compel the municipality to provide means for the erection, etc., of the bridges to be built.(*a*)

Also, to compel a mayor, or such like officer, to sign bonds under an act to supply a city or village with water;(*b*) or to compel a treasurer holding bonds, signed and ready to be delivered, to deliver them to a board of commissioners.(*c*)

And so *mandamus* lies to compel the issuing of county bonds in payment of a duly authorized subscription to the capital stock of a corporation, as a railroad company,(*d*) although it has been held that a mere public vote authorizing such subscription, upon conditions which are afterwards complied with by the company, does not, of itself, constitute such a contract as can be thus enforced, and that the county is not bound to issue the bonds, upon tender of the stock by the company, unless there has been an actual subscription made by the county authorities upon the vote, or at least an express contract to make such subscription.(*e*) And a *mandamus* may be directed to a city council to issue stock, or pass the necessary ordinance to create stock, for building a public market authorized by the legislature.(*f*) But in all such cases it is a proper return to a *mandamus* that the necessary consent of the tax payers had not been given for the issuing of the bonds.(*g*) And where a legislative act authorizes a town to issue bonds for the constructing of a railroad, the power to be exercised on the condition of a written consent of a majority of the tax payers owning more than half the taxable property, to be proved by the assessors' affidavit, and where it is expressly made the duty of the assessors to make the affidavit when the necessary consent has been obtained, and yet the assessors refuse, a

(*z*)City of Ottawa *v.* People, 58 Ill. 240.

(*a*)Comm'rs *v.* Philadelphia, 3 Brewst. 597.

(*b*)People *v.* White, 54 Barb. 623.

(*c*)Pearsons *v.* Ranlett, 110 Mass. 123.

(*d*)R. R. *v.* Comm'rs, 12 Kan. 135.

(*e*)R. R. *v.* Comm'rs, 6 Kan. 268.

(*f*)People *v.* New York, 45 Barb. 475.

(*g*)People *v.* Mead, 36 N. Y. 224.

mandamus will not lie to compel the affidavit to be made, however clearly it may appear to the court that the prescribed consent has been given, because this is to be the result of the assessors' judgment as to the consent, not only whether the number is a majority, but also whether it represents more than one-half of the taxable property; but it will lie to compel the assessors to proceed to examine the evidences of the consent and to determine the fact, and, if they decide that the requisite consent has been obtained, then to make affidavit in accordance with their decision. They will not, hereon, be required to determine in any particular manner, and then make affidavit upon such specific enforced decision.(*h*)

By *mandamus* the assessment of taxes may be compelled, either in the ordinary assessing, as of lands,(*i*) or to pay public debts, general or special. And the United States circuit courts have authority to issue a mandate requiring state or municipal officers to levy and collect a tax, although it seems that, if the officer then will not or cannot obey, the court will simply appoint its own marshal to perform the act.(*j*) And where a judgment has been rendered against a municipal corporation, and execution returned unsatisfied, *mandamus*, and not a bill in equity, is the proper remedy to compel the levy of a tax, which the corporation is bound to levy to pay the judgment.(*k*) Nor is it any answer to a *mandamus* that the respondents had been enjoined by a state court from rendering obedience to the command;(*l*) nor that the total revenue is expended in defraying current expenses, for this is not an excuse for making no provision for maturing debts.(*m*) The execution of a *mandamus* cannot be lawfully thwarted or interfered with by the state courts against a United States court, and the latter will appoint its marshal to execute the writ, whenever municipal officers will not, or because of public excitement, combinations, or suits in state

(*h*) Howland *v.* Eldridge, 43 N. Y. 459.

(*i*) People *v.* Shearer, 30 Cal. 645.

(*j*) U. S. *v.* Muscatine Co. 2 Abb. (U. S.) 54.

(*k*) Walkley *v.* City of Muscatine, 6 Wall. 481.

(*l*) U. S. *v.* Lee Co. 2 Biss. 77.

(*m*) U. S. *v.* City of Sterling, Id. 404.

courts, cannot, execute a command to collect taxes. And this is a duty imperatively binding on the court, whenever the necessity exists for its performance, from such circumstances;(*n*) and even where the municipality has no officers, but refuses to elect any, the necessity exists and the authority will be exercised.(*o*)

Where a statute creates a board of education, to estimate the sums necessary to carry on public schools in the municipal corporation, and requires the trustees to collect the sums by taxation, in the usual manner, when notified by the board, the trustees, on refusal, can be compelled to comply with the requisition by *mandamus*.(*p*)

A *mandamus* will lie to compel auditors, at their regular meeting, to audit a relator's claim to a military bounty, but not to compel them to meet expressly for this purpose.(*q*) Also the payment of authorized military bounties may be enforced by *mandamus*.(*r*) But in Alabama it has been held that an application will be denied for a writ to require county commissioners to provide a fund by taxation, or otherwise, in order to pay debts contracted during the rebellion, to feed and support the families of confederate soldiers, partly on the ground that these are war debts, and therefore void by ordinance 37 of the convention of 1867, and partly because they are void as contracted in violation of the laws and policy of the United States.(*s*)

In Florida it has been held that where an officer's salary has been provided by law *mandamus* will lie to compel its payment, this being a ministerial act merely, and the court may in such proceeding determine whether the officer's appointment is void, where there is no other incumbent exercising its functions by color of right.(*t*) But in New York it is held that an officer *de jure* cannot have a *mandamus* to com-

(*n*) Lansing *v.* Treasurer, 1 Dillon, 526.

(*o*) Welch *v.* St. Genevieve, Id. 133.

(*p*) People *v.* Bennett, 54 Barb. 481.

(*q*) People *v.* Auditors, 53 Barb. 557.

(*r*) Eichelberger *v.* Sifferd, 27 Md. 328.

(*s*) Bibb *v.* Comm'rs, 44 Ala. 121, (*Saffold*, J., dissenting.)

(*t*) State *v.* Gamble, 13 Flor. 13.

pel the payment of his salary, when it has been paid to a *de facto* officer in possession, on the grounds that the writ does not issue in matters of doubtful right, and that the relator has another legal remedy in such case.(*u*)

In Wisconsin it is held that where a county board, in settling with a treasurer, refuses to give him credit for money expended according to law, he cannot have a *mandamus* to compel the allowance of the credits, because he has a right to appeal, and it makes no difference that the time for appealing has passed. But one of the judges dissented in the case, on the ground that the treasurer has no right of appeal in such case.(*v*)

In California an auditor who refuses to issue a county warrant, when so ordered by the board of supervisors, can be compelled by a writ to do so, for the reason, as held, that an action on the auditor's official bond is not a "plain, speedy, and adequate remedy."(*w*)

Where the legislature has "authorized and empowered" a board of supervisors to cause the refunding of illegal taxes, paid into the treasury, on proper proofs by the claimants, and they decide that, in justice, the county and the towns which had received the taxes could not refund them, and therefore disallow claims thereto, they are compellable by *mandamus* to perform this duty, so enjoined by law.(*x*)

A *mandamus* only lies to enforce a present and not a future duty, and so, where warrants are made payable out of a particular fund, which is exhausted, an officer cannot be commanded to pay warrants out of money that may thereafter come into the fund.(*y*)

Where a state constitution provides that no money can be drawn from the treasury, except by warrant from the governor and pursuant to appropriations made by law, these conditions must be strictly fulfilled, under all circumstances,

(*u*)People *v.* Brennan, 45 Barb. 458.

(*v*)State *v.* Supervisors, 29 Wis. 81.

(*w*)Babcock *v.* Goodrich, 47 Cal. 508.

(*x*)People *v.* Supervisors, 53 Barb. 566.

(*y*)Day *v.* Callow, 39 Cal. 596.

before a *mandamus* can lie to order the payment of money; and a mere contract of the governor and council, under a resolve of the legislature, to establish the compensation of a state agent or commissioner, is not an appropriation.(*z*)

A court cannot interfere with the discretion of a municipal corporation in regard to public improvements; as, for instance, it cannot review, by *mandamus*, a refusal of the common council of a city to cause an improvement to be made in the streets, and paid for out of the general funds, against their judgment of its expediency.(*a*)

§ 495. Where a ferry company are entitled to collect such tolls as a mayor and aldermen may determine, according to certain regulations prescribed by statute, and are entitled to have new rates established when existing rates do not produce a certain sum, and where application is made by the company to the mayor and aldermen for new rates, accompanied by proofs of the insufficiency of the present, and the mayor and aldermen refuse to act thereon, *mandamus* lies to compel their action.(*b*)

§ 496. As to private corporations, a writ will lie to require a railroad company to grade their track within the limits of a city so as not to obstruct needlessly the streets and alleys.(*c*) Also to require the delivery of grain in bulk to a particular elevator to which the grain had been consigned along the route. And in such a case it is no answer that the company had so refused to deliver it because it could not do so without great additional expense, nor that it had entered into special contracts with owners of other elevators for exclusive delivery to them; nor that, under its charter, it had a right to establish its own rules and regulations, and so had never held itself out as a carrier of grain in bulk, except on the condition that it should choose the consignee, and that this had become a custom and usage of its business, so that it could not be required to go beyond this limit; these excuses

(*z*) Weston *v.* Dane, 51 Me. 463.

(*a*) Michigan City *v.* Roberts, 34 Ind. 472.

(*b*) Ferry Co. *v.* Boston, 101 Mass. 491.

(*c*) R. R. *v.* Lawrenceburg, 37 Ind. 489.

all being in contravention of its duties as a common carrier, which require it to avoid all contracts, and all rules and regulations, which make injurious and arbitrary discriminations between individuals.(*d*)

Where one subscribes to the stock of a corporation, on the condition in part that he should receive a life pass over the road for himself and family, he cannot bring a writ to compel the issuing of the pass while any part of the subscription remains unpaid, even if he can do so on a full payment. And it has been held, also, that in such a case, the subscription being in writing, parol evidence of the agreement to issue the pass is not admissible.(*e*)

Transfers of stock, when refused, are enforceable by *mandamus*, even if the demand is made by letter,(*f*) but not where there has already been a transfer to another than the relator, *prima facie* regular, even if there is reason to doubt whether the transfer was not made to defraud creditors.(*g*) And a gas company, as well as other corporations, can be compelled by writ to issue certificates of stock to the owners thereof, unless there is a dispute as to the ownership.(*h*) And not only so, but a writ will be granted to require a company to furnish gas to persons having a right to receive it on offering to comply with the usual terms. But it is a sufficient excuse that the applicant is already in debt to the company, or that he is unable to pay for the gas.(*i*)

§ 497. A *mandamus* will not be awarded to admit or restore a minister, wrongfully excluded from his pulpit by the corporate trustees and congregation, unless he has some temporal right annexed to his spiritual functions, such as an endowment, or fixed emolument, or salary. For, if he is to be supported only by voluntary contributions, his office is merely a spiritual or ecclesiastical office, and a wrongful exclusion violates, therefore, no legal right, so that a court of law has no basis of jurisdiction therein. But a *mandamus*

(*d*)R. R. *v.* People, 56 Ill. 372.
(*e*)Irwin v. Lee, 34 Ind. 320.
(*f*)State *v.* R. R. 25 La. An. 25.
(*g*)State *v.* Foundry, etc., Co. 32 N. J. 440.
(*h*)State *v.* Gas Co. 25 La. 413.
(*i*)People *v.* Gas Co. 45 Barb. 137.

lies where there is a temporal right attached to the functions of the office, for the violation of which the law affords no specific remedy, and there would be, otherwise, a failure of justice in respect to such legal right.(*j*)

And, as to a member expelled, the principle is much the same. And it is also the same as to a voluntary organization other than a church. A member may be restored by *mandamus* to any "substantial right" of which he has been deprived by the action of the society, wrongfully, according to its constitution.(*k*)

Courts will not interfere to force a person to receive a particular pastor, remain a member of a church organization, or attend worship at any place.

§ 498. A bid for the awarding of a contract, if refused, may be enforced, and its acceptance enjoined by *mandamus*, if it in all particulars conforms to the conditions imposed, so as to give a right to the contract,(*l*) but not where a discretion is left with the contractors to decline all bids which they thought excessive or disadvantageous; and the only imperative obligation on them is that, when they do contract, it shall be with the lowest bidders. This gives the lowest bidder no right to invoke the authority of the court to compel a board to make a contract with him.(*m*)

§ 499. As to elections, where an ordinance provided that the two branches of a city council should, in convention, annually appoint a street commissioner, and the usual time passed by without a meeting, it was held a meeting to elect could be properly commanded by writ.(*n*) And so with regard to an election for successors of the present municipal officers, whose duty it is to call an election and who refuse to do so.(*o*)

And canvassers, whether state or local, can be required by

(*j*) Union Church *v.* Sanders, 1 Houst. 128; Feizel *v.* M. E. Church, 9 Kan. 597.

(*k*) Roehler *v.* Mechanics' Aid Soc. 22 Mich. 91.

(*l*) People *v.* Contracting Board, 46 Barb. 256.

(*m*) People *v.* Contracting Board, 33 N. Y. 382.

(*n*) Attorney General *v.* Lawrence, 111 Mass. 91.

(*o*) People *v.* Fairbury, 51 Ill. 150.

mandamus to make the count of votes cast,(*p*) unless in a case where no legal right can be established thereby, as where an election is held when no vacancy exists in office.(*q*) And, also, a writ will be granted to compel canvassers to declare the results of an election, and so certify to the persons elected.(*r*)

§ 500. Where a writ of *mandamus* is served on an officer, who does not remain in office until judgment is entered, the judgment is void and cannot be executed as to the successor, usually.(*s*)

§ 501. A *mandamus* is not the proper proceeding to try the right to a public office.(*t*) Nor can an attorney general be properly commanded by writ to institute proceedings in *quo warranto*.(*u*) Sometimes, however, *mandamus* and *quo warranto* may be concurrent remedies as to an office—the latter to oust the incumbent, and the former to require the instalment of the relator in the vacated place.(*v*) And, if a person is the actual occupant, a *mandamus* is held to be the proper remedy to shield him from interference in the discharge of its duties.(*w*)

§ 502. Although the right to an office is not to be inquired into on a *mandamus*, yet a demand for room, keys, books, papers, etc., may be thereby enforced.(*x*) And, even where the secretary of a railroad company bought a set of books out of his own money and used them for the entries of the company, it was held that his possession in that way was the possession of the company; that he had no right to take the books with him on going out of office; that he had no lien on them either for his services or the purchase money, or for the occupation of his premises by the company; and that the com-

(*p*)State *v.* Gibbs, 13 Flor. 71.

(*q*)Leavenworth Co. *v.* State, 5 Kan. 688.

(*r*)Bradfield *v.* Wart, 36 Ia. 293.

(*s*)Secretary *v.* McGanahan, 9 Wall. 298.

(*t*)People *v.* Detroit, 18 Mich. 338; Warner *v.* Myers, 3 Oregon, 220.

(*u*)People *v.* Attorney General, 3 Abb. Pr. 132.

(*v*)Hughes *v.* Hughes, 44 Ala. 699.

(*w*)People *v.* Schurgham, 12 How. Pr. 126.

(*x*)State *v.* Lagarde, 21 La. An. 18.

pany had a right to a peremptory *mandamus* for the delivery of the books.(*y*) However, in Missouri, where one was employed by the county court to survey all the public courts of the county and plat them in a suitable book, and after receiving the contract price regained possession of the books and refused to deliver them, the court held a writ would not lie to recover the books, on the ground that he had not held any official or *quasi* official position in the employment.(*z*) The treasurer of a religious incorporation may be compelled to deliver up the books pertaining to his office when he retires from it.(*a*)

§ 503. A *mandamus* is not usually a proper remedy to try the question of the location of a public highway, as between the public and the land-holders over whose land it is to be laid, although it has been held that the court has herein a discretion as to the granting or withholding the writ.(*b*)

§ 504. Where the clerk of a board of supervisors issued, on the order of the board, a county warrant, but neglected to seal it with the county seal, it was held that his successor might be compelled, by *mandamus*, to seal it; and that it would be no defence that there is a speedy and adequate remedy at law, by an action on the bond of the former clerk, by whose negligence the warrant was left defective, on the ground that the county is a political corporation, having the attribute of perpetual succession, and the action of *mandamus* is not against the person, but against the officer of a corporation, whoever he may be.(*c*) And, therefore, such a proceeding does not abate by any changes in officers; as, for example, changes in a municipal board by resignations and re-appointments.(*d*)

§ 505. The clerk of a county court, or other officer whose duty it is, can be compelled to execute a deed to one who has a valid tax certificate, but to whom a deed fatally defective has been issued; the execution of a void tax deed being re-

(*y*) State *v.* Gall, 32 N. J. 289.
(*z*) State *v.* Trent, 58 Mo. 572.
(*a*) St. Luke's Church, etc., *v.* Slack, 7 Cush. 238.
(*b*) People *v.* Curyea, 16 Ill. 547.
(*c*) Prescott *v.* Gouser, 34 Ia. 176.
(*d*) County Comm'rs *v.* Bryson, 13 Flor. 282.

garded as equivalent to executing none at all.(*e*) Under the present statutes, however, the commissioner of the general land-office, and the secretary of the interior, cannot be compelled to issue a patent.(*f*)

A mayor, or other officer, may be commanded to sign a contract in a proper case.(*g*)

§ 506. In Michigan it is held that a *mandamus* will lie to compel the admission of a colored child into the public schools.(*h*) But it is held otherwise in California, provided separate schools are maintained for the education of colored children.(*i*)

In Massachusetts *mandamus* lies to enforce the right of a member of a school committee to act as a member of the board, to the exclusion of a person whom the other members recognize and permit to act in his stead;(*j*) which appears to be an exception to the general rule, that the right to an office is not determinable in this manner. However, when a party is aggrieved by the action of a board of school directors, and is entitled to an adequate appeal to the county superintendent and thence to the state superintendent, the courts will not interfere.(*k*)

§ 507. Nor will a court compel a survey, where there is a legal impediment only to be removed, by an adjudication of the locator's right to have the land selected, located, and surveyed.(*l*)

§ 508. In addition to what we have already considered in this chapter, relative to the amenability of inferior courts to writs of *mandamus*, we mention the following miscellaneous particulars:

A justice of the peace, in recording his judgments, is regarded as a ministerial officer, and a party aggrieved may have a writ to require him to make a true record of a judgment he has rendered, and to give a copy of it to the party when prop-

(*e*) Clippinger *v.* Fuller, 10 Kan. 381.

(*f*) Secretary *v.* McGanahan, 9 Wall. 298.

(*g*) State *v.* Mayor, 35 N. J. 396.

(*h*) People *v.* Bd. Education, 18 Mich. 401.

(*i*) Ward *v.* Flood, 48 Cal. 57.

(*j*) Conlin *v.* Aldrich, 98 Mass. 558.

(*k*) Marshall *v.* Sloan, 35 Ia. 145.

(*l*) Holloway *v.* Holloway, 30 Tex. 177.

erly demanded; and the superior court, it is held, has jurisdiction to determine whether the record or the copy is correct or not.(*m*)

In New York *mandamus* will lie to compel the commissioner of jurors, who is a mere ministerial officer, to strike off of the list of jurors the name of a person not liable to jury duty.(*n*) And also to cause the clerk of an inferior court to issue execution on a judgment.(*o*) And to require a county judge to admit a certified will to record and issue letters testamentary.(*p*)

A court will not, by *mandamus*, compel obedience to a writ of *habeas corpus* issued by a lower court,(*q*) because, if the lower court has authority to issue the writ, it has authority to compel obedience itself.

§ 509. Where respondents return a legally sufficient cause to the alternative writ, though it be false in fact, the court will proceed no further until, in an action on the case for a false return, or by criminal information, the return is falsified; and then it will issue a peremptory writ,(*r*) because a return, until thus falsified, is to be taken as true;(*s*) and the court cannot thereon inquire into disputed facts.(*t*)

An alternative writ, however, is amendable so as to preserve the symmetry of the proceedings throughout.(*u*)

§ 510. As to who may be a relator the rule is thus stated: This "depends on the object to be attained by the writ. Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator is considered as the real party, and his right to the relief demanded must clearly appear. But, when the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest as such in the result. It is enough that he is interested as a citizen in

(*m*) Smith *v.* Moore, 38 Conn. 105.
(*n*) People *v.* Taylor, 45 Barb. 129.
(*o*) People *v.* Clerk, 2 Abb. Pr. 309.
(*p*) Williams *v.* Saunders, 5 Cold. 60.
(*q*) People *v.* Edwards, 66 Ill. 59.
(*r*) Dane *v.* Derby, 54 Me. 97.
(*s*) Swan *v.* Gray, 44 Miss. 395.
(*t*) Beaman *v.* Police, 42 Miss. 242.
(*u*) State *v.* Charleston, 1 S. C. 30.

having the laws executed, and the right in question enforced."(*r*)

In California it is held that, if an action be brought in the name of the people, and it appears that the people are not interested, but only the relator, the writ will be dismissed at once;(*w*) but in some other states the name of the people is used even in cases intended to secure private interests. See *supra* in this chapter, and notes.

As to the nature of a relator's interest it is held that it must be, if the action is in his own behalf, an interest distinguishable from that of the community at large, so that a private person, whose only interest is that of a resident elector, cannot apply in his own name, as plaintiff, to compel an order for a vote on the question of removing the county seat.(*x*)

The rule that a person cannot bring an action at law against a partnership, board of trustees, or other boards of which he is a member, does not apply to an action of *mandamus*.(*y*)

A writ will lie in behalf of a non-resident, illegally assessed, to compel a correction of the assessment.(*z*)

When an alternative writ is prayed against two persons it must properly be allowable against both, or it cannot issue at all.(*a*)

(*r*)City of Ottawa *v.* People, 48 Ill. 240; People *v.* Halsey, 53 Barb. 547.

(*w*)People *v.* Pacheco, 29 Cal. 211.

(*x*)Linden *v.* Supervisors, 45 Cal. 6.

(*y*)Cooper *v.* Nelson, 38 Ia. 440.

(*z*)People *v.* Assessors, 44 Barb. 148.

(*a*)People *v.* Yates, 40 Ill. 128

CHAPTER XVI.

PROHIBITION—*NE EXEAT.*

§ 511. Distinctions.
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528. Power of a justice of the peace.
529. Enforcing specific performance—issuing in vacation.

§ 511. The writ of prohibition differs from an injunction mainly in this: that an injunction lies to restrain parties, and prohibition to restrain courts; and from *mandamus* in this: that its purpose is to restrain judicial proceedings, while a *mandamus* is used to command the performance of ministerial duties, imposed by express or plainly implied requirements of the law. It agrees with both injunction and *mandamus* in this: that, where there is an adequate remedy at law, it is not available.(*a*) And so, in an equity case, the petitioner must have sought all available relief, by moving to dismiss the cause for want of jurisdiction in the court itself, before he can obtain a prohibition. *Hamilton's Case*, 51 Ala. 62. A plea to the jurisdiction must be filed and overruled before a

(*a*) State *v.* Braun, 31 Wis. 606.

jurisdiction will lie. *State* v. *Judge*, 29 La. An. 806; *Barnes* v. *Gottschalk*, 3 Mo. App. 111. And where there is a statutory mode of testing contested elections the writ is not available. *Kemp* v. *Ventulett*, 58 Ga. 449. So, if the action of a court is subject to review in any ordinary mode of appeal, the writ will not be issued.(*b*) But it is held, in Alabama, that a prohibition will be awarded to vacate a final decree, or prevent its enforcement, which is a nullity, and from which, on account of the entire absence of adverse parties, no appeal can be taken. *Lyon's Case*, 60 Ala. 650.

§ 512. Moreover, it has application only in uncompleted acts, to prevent the doing of some act about to be done. So, if the court to which the writ should be issued has already disposed of the case, so that nothing remains which the court can do, either in the way of executing its judgment or otherwise, no prohibition will issue; and this is the case even though the final disposition was made after the judge had been served with a rule to show cause why a writ should not issue, and even though similar cases may still be pending in the same court.(*c*)

§ 513. The writ, as above intimated, is not available to restrain the performance of ministerial acts, such as collecting taxes, locating county seats, and the like, however erroneous such ministerial acts may be.(*d*) And yet there is an apparent exception to this rule in Massachusetts, where an authority to lay out and widen streets in a city is exclusively in a board of aldermen, and in another city this authority is exclusively in the common council. A statute in 1866 provided that the former board of aldermen should retain their authority in this respect, and should also have power to assess betterments on abutting lots. In 1867 a statute was passed which declared the provisions of the former act were "extended and made applicable" to the latter city. In this case it was held that the late act did not give the ALDERMEN of the second city authority to widen streets and assess a betterment,

(*b*)People *v.* Circuit Court, 11 Mich. 393.

(*c*)U. S. *v.* Hoffman, 4 Wall. 158.

(*d*)State *v.* Clark Co. Ct. 41 Mo. 44.

and that if they attempted so to do they might be restrained by prohibition.(*e*)

§ 514. It has been held that a mayor being the chief executive officer of a city, and as such authorized to have supervision over other officers in the discharge of their duties, he cannot be prohibited from proceeding with an investigation of charges against the chief of police, because in this matter he does not act as a court, but only as such chief executive officer, and is therefore subject to the supervision of the courts therein.(*f*)

§ 515. Prohibition does not lie against the levy of an illegal tax, perhaps partly because in a proper case a court of equity will grant an injunction upon such levy, and partly because it is rather a ministerial than a judicial act; although in Georgia parties seem to have no remedy in advance, and it is declared that they must pay their tax, and then pursue their remedy against the tax collector as an individual, (*g*) which is a very circuitous route in the way of justice.

§ 516. In the United States supreme court it is held that a writ of prohibition is not issuable therefrom in cases, such as criminal cases, where it has no appellate power given by law, nor any special authority to issue the writ.(*h*) And the same doctrine is held in Kentucky, and it is placed on the ground that "if a proceeding for prohibition may be instituted in the court of appeals, it could be done only in a case where, in the exercise of its appellate jurisdiction, it has the power of controlling the inferior court by a *direct* revision of its judicial acts. For, if the court has no appellate jurisdiction in the case, of which the court below is improperly taking cognizance, it has no jurisdiction at all over the case, and therefore cannot interfere by writ of prohibition."(*i*)

§ 517. The object of a writ is not to correct error either of law or fact, whether in admitting evidence(*j*) or anything

(*e*)Day *v.* Springfield, 102 Mass. 310.

(*f*)Busch *v.* Hardwicke, 23 Gratt. 52.

(*g*)Cody *v.* Lennard, 45 Ga. 85.

(*h*)Gordon's Case, 1 Black, 503.

(*i*)Sasseen *v.* Hammond, 18 B. Mon. 674.

(*j*)Leonard's Case, 3 Rich. 111.

else. Its object is to restrain inferior courts from exercising jurisdiction where they do not properly possess jurisdiction at all, or else to prevent their exceeding their limits in matters of which they have cognizance.(*k*) And, if the inferior court has *prima facie* jurisdiction, a superior court will not interfere by prohibition. *State* v. *Judge*, 29 La. An. 360. And the writ, as a prerogative writ, is always subject to a sound judicial discretion. *Supervisors, etc.*, v. *Wingfield, Judge*, 29 Gratt. 333.

In Indiana it has been held that it is sufficient that some collateral matter arising in the cause be beyond the jurisdiction in order to justify the writ.(*l*) In California, however, it has been decided that the action of a board of supervisors will not be arrested unless the proceedings themselves are absolutely without, or in excess of, their jurisdiction.(*m*)

In New York a prohibition from the supreme court lies to prevent the exercise of unauthorized power in a cause or proceeding of which the inferior tribunal has jurisdiction, no less than when the entire cause is without jurisdiction;(*n*) the original design of the writ being that it should prevent an encroachment of jurisdiction.(*o*)

But the transgression must be palpable in order to sustain the writ, for the awarding of the writ is largely discretionary; so that, although it will be issued where visitorial or other authority is plainly usurped, yet it will be refused where the general scope or purpose of the action is within the jurisdiction of the inferior court. A mere outstepping of its authority in a portion of its judgment, or any other error in its proceedings, is only a ground for review or appeal, and not of prohibition.(*p*) So, although a bill in chancery may be fatally defective in averments, may abound in imperfections, and may even be filed in a district where the defendants are not liable to be sued, yet these are mere matters of defence, and cannot be reached by a writ of this character.(*q*)

(*k*) People *v.* Marine Court, 36 Barb. 341.

(*l*) Comm'rs *v.* Spitler, 13 Ind. 236.

(*m*) People *v.* Supervisors, 47 Cal. 81.

(*n*) Appo *v.* People, 20 N. Y. 531; Sweet *v.* Hulbert, 51 Barb. 313.

(*o*) Thomas *v.* Mead, 36 Mo. 233.

(*p*) People *v.* Court, 43 Barb. 278.

(*q*) Greene's Case, 29 Ala. 52.

§ 518. A writ of prohibition in enforceable by contempt for disobedience.(*r*)

§ 519. Writs of *ne exeat* are doubtless waning, and will probably become obsolete in no great period of time. In civil actions, within the provisions of the civil code, it no longer exists, in Ohio. *Cable* v. *Alvord*, 27 Ohio St. 654. In New York it has been held that although the codifiers intended to abolish the writ, yet, failing to do so expressly, the remedy still continues to exist, for a repeal by implication is not favored; so that, unless a later act mentions the former in some way plainly indicating an intention to repeal it, the repeal, though designed, is not effected; and the court remark that, "if an incidental provision in an act be deemed a repeal of an express provision of a former act, it will make the confusion which we already have in our law 'worse confounded,' will mar any harmony that is left in it, and will open the door still wider to fraudulent legislation;"(*s*) a reason not very complimentary to average legislatures.

§ 520. Moreover, it is held by the court of New York that the writ is indispensable; which may, perhaps, account for the above sneer at the ineffectual attempt of the codifiers to extinguish it; and it says: "At what particular period this writ was introduced into the practice of the English court of chancery, and to what particular purposes it was originally applied, may be involved in some obscurity; but none will deny that the power to issue, and apply it to those uses sanctioned by immemorial practice, is an essential and indispensable attribute of the equity courts. Without its aid, or that of some other equivalent process, the equitable jurisdiction vested in this court by the constitution must fail, and its functions in regard to many subjects of equitable cognizance become useless, for decrees and orders are senseless and unmeaning ceremonies when the tribunal which makes them is shorn of the power to carry them into execution. Upon

(*r*)Howard v. Pierce, 38 Mo. 296. (*s*)Breck v. Smith, 54 Barb. 214

the facts before the court, in this action, (wherein the opinion was delivered,) the statute authorizes a decree for a separation from bed and board forever, or for a limited time, together with such order and decree for the suitable support and maintenance of the wife by the husband, or out of his property, as the nature of the case renders suitable and proper. But if the husband who owes, and has the ability to make, this just reparation to his injured wife, cannot be restrained within the jurisdiction of the court during the pendency of the litigation;* if he may withdraw himself to the distant shores of the Pacific, there to enjoy his property and ample salary at his leisure, while she remains to labor as a menial for subsistence,—the provisions of the statute are, in respect to her, a mass of unmeaning words, and any decree which the court might make will be a barren and fruitless proceeding. The argument *ab inconvenienti*, however, will be unavailable in the face of a legislative enactment; and, if the power to keep a defendant within the jurisdiction of the court, in a case like the present, until a decree can be made, is taken away by the code of procedure, then, whatever may be its value, the courts have no other duty but to submit."(*t*)

§ 521. As to the purpose of the writ the same opinion goes on to say: "The writ of *ne exeat* bears no resemblance to the mesne or final process of the common-law courts. Its primary purpose is not to arrest the defendant, nor to put him in safe custody during the pendency of the litigation. Such is not its mandate. It commands the sheriff to cause the defendant to come before him and give him sufficient security that he will not go without the state into foreign parts without leave of the court; and if he shall refuse to give such security then to commit him to the common jail of the county until he does so of his own accord. Until he refuses to give the requisite security he cannot be restrained of his liberty; and when he has given it he may go wherever he pleases,

*But auxiliary proceedings by attachment could be made to hold a party.

(*t*) Bushnell *v.* Bushnell, 15 Barb. 401.

provided he is within the jurisdiction of the court when its process to enforce the decree issues. In the meantime he is not deemed to be in the custody of any person. That the writ was formerly used as a means of enforcing equitable debts does not affect the argument, for the rule is that when the person of the defendant cannot be taken under the decree by execution or attachment the writ will not be issued."(*u*) With all due deference we must say that all the characteristics of an arrest seem to meet in the essential nature of the proceeding.

The Massachusetts court has thus defined it: "Upon the question, in what cases this writ is to be granted, according to the course of practice in chancery, the authorities are somewhat conflicting, and it is not easy, upon a hurried examination, to draw a precise and definite line between the cases in which it will and will not be granted. This difficulty may, and probably does, arise from the fact that the question is commonly decided upon a summary application to a judge, at chambers, upon an *ex parte* hearing, and without the time for deliberation usually taken for the decision of important questions. The general rule of practice to be gathered from the cases, we think, is that the writ is to be granted only in a case of equitable ascertained debt, to which affidavit can be made with a good degree of certainty, or when it can be shown, by reference to accounts or to other authorized documents, to the reasonable satisfaction of the court, that something in the nature of an ascertainment of a debt has taken place, whereupon a debt arises. But we think that the writ is not grantable when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due. Such an allegation, although in terms the statement of a fact—that is, of the defendant's actual indebtedness—must, nevertheless, be qualified by the subject-matter to which it relates; and where it relates to a long unliquidated account, or to facts which are future and contingent, it can amount to nothing more than a strong declaration of a confident expectation or belief, and is not a suf-

(*u*) Ibid. 404.

ficient ground for issuing the writ, unless it is accompanied and supported by proper accounts and documents.(*v*)

§ 522. The debt in general must be not a legal obligation, but an equitable debt, and then either be certain or capable of being reduced to certainty, *ex parte*.(*w*) However, in some states, as in Illinois and Indiana, the writ may be invoked on the ground of fraud, in case of a legal obligation. In Indiana if the maker of a promissory note is about to depart the state, and take his property, the payee may sue out a writ of *ne exeat*, even if there is security on the note—the affidavit alleging that the maker is about to take his property away, so as to defraud the payee and the surety. *Fitzgerald* v. *Gray*, 59 Ind. 254. And the necessity that it shall be equitable in its nature is not obviated merely by a code abolishing distinctions in the forms of action, but leaving the essential differences intact between legal demands and equitable claims.(*x*) However, there seems to be an exception in New York, although I do not think the language fully expresses the meaning of the court therein, as it seems self-contradictory in a measure. "The writ of *ne exeat*," say the court, "is in the nature of equitable bail, and to entitle the complainant to such bail there must be a present debt or duty, or some existing right to relief against the defendant or his property, either at law or in equity."(*y*) In Arkansas the statute has extended it to cases where there are contracts or covenants to be performed, and the period of performance or payment has not yet come, provided the complainant entered into the agreement *bona fide*, and without any notice of the intention of the defendant to depart the state.(*z*)

§ 523. Especially, the writ does not lie in regard to actions of tort, as trover for cotton.(*a*) And, in all cases where it is issued without jurisdiction and executed, it subjects the com-

(*v*)Rice *v.* Hale, 5 Cush. 240.

(*w*)Graham *v.* Stucken, 4 Blatch. C. C. 54.

(*x*)Bonesteel *v.* Bonesteel, 28 Wis 248

(*y*)De Rivafinoli *v.* Corsetti, 4 Paige Ch. 271.

(*z*)Gresham *v.* Peterson, 25 Ark 380.

(*a*)Ibid.

plainant suing it out to an action for trespass and false imprisonment.(*b*) And even where there is jurisdiction, if there be no affidavit as a basis, or if the writ be not properly attested by the clerk when issued, even by a judge at chambers, and though the suing out of the writ was without any express malice,(*c*) the liability is incurred.

§ 524. A writ may properly be granted to compel the settlement of a partnership account, where it appears that the defendant has converted his property into money or notes, and has threatened to leave the state.(*d*)

§ 525. And where a suit for partial divorce and alimony is pending,(*e*) or where the suit is for alimony alone;(*f*) and in such a case application may be made, when the defendant is not in the state, and is not even a resident of the state, in anticipation that the writ can be in readiness to be served on him on a casual visit within the jurisdiction. Says the chancellor of New Jersey: "It is true that the statute requires that there shall be satisfactory proof to the chancellor that the defendant designs quickly to depart out of the state. I think a person may have this design without actually being in the state at the time. He may design to come quickly and to depart quickly,"(*g*) and hence the necessity of setting a trap for him. And yet a writ issued in that state on Sunday is void, and a bond given thereon will be cancelled. *Jewett, Receiver*, v. *Bowman*, 27 N. J. Eq. 275.

§ 526. According to the usual rule of chancery proceedings, and of issuing any extraordinary writ, it must appear that there is no adequate remedy at law—that is, that the process at law is not available or not sufficient,(*h*) or, in Georgia, that the party cannot be held to bail at law.(*i*) In that state the writ seems to have a very wide range, and to be exceptional, since, by the statute of 1813, it was made available to

(*b*)Adams *v.* Whitcomb, 46 Vt. 712.

(*c*)Bonesteel *v.* Bonesteel, 28 Wis. 248.

(*d*)Dean *v.* Smith, 23 Wis. 483.

(*e*)McGee *v.* McGee, 8 Ga. 296.

(*f*)Yule *v.* Yule, 2 Stock. Ch. (N. J.) 139.

(*g*)Parker *v.* Parker, 1 Beasley, 107.

(*h*)Orme *v.* McPherson, 36 Ga. 573.

(*i*)Hannahan *v.* Nichols, 17 Ga. 77.

co-obligors, as securities, when a principal or other obligor is about to remove beyond the jurisdiction; and this is applied even to a bail bond in trover.(*j*) Where a judgment had been obtained and an execution returned *nulla bona*, the plaintiff attempted to sue out a writ of *ne exeat* on an allegation of fraud. But the court held that as the court of law could, by issuing a *capias ad satisfaciendum*, effect as much, at least, as a court of equity could effect by a *ne exeat*, the latter could not properly interfere in the matter. *Victor Scale Co.* v. *Shurtleff*, 81 Ill. 313. And even if a judgment debtor has sold his goods, and is about to depart from the state, an application for a writ of *ne exeat* must allege that the property sold was not exempt from execution. *Malcolm* v. *Andrews*, 68 Ill. 100; *Jones* v. *Kennicott*, 83 Ill. 485.

§ 527. The jurisdiction will be exercised only on a certain affidavit, and mere fears and apprehensions of the party applying are insufficient.(*k*) However, it is held that the affidavit need not state in so many words that the defendant is about to leave the state to avoid the jurisdiction of the court, but this must be a necessary inference from the facts, or at least it must be a necessary inference that the defendant's departure will defeat the complainant's action in effect. The affidavit must be positive as to the intention of departing, or as to declarations or threats of that nature; yet even, sometimes, an affidavit on information and belief may be allowed, as in cases of divorce and alimony.(*l*) In ordinary cases an affidavit, "to the best of the knowledge and belief" of the affiant, will not justify the writ.(*m*)

§ 528. In Indiana, contrary to the general rules regulating the writ, the statute of 1847 allowed it to be issued by a justice of the peace.(*n*)

§ 529. The writ may be a necessary incident in proceedings to enforce a specific performance;(*o*) and, owing to the necessity of promptitude, it may be issued in vacation as well as in term time.(*o*)

(*j*) Woods *v.* Symmes, 25 Ga. 71.
(*k*) Forest *v.* Forest, 10 Barb. 47.
(*l*) Yule *v.* Yule, 2 Stock. 139.
(*m*) Bryan *v.* Ponder, 23 Ga. 483.
(*n*) Louderback *v.* Rosengrant, 4 Ind. 564.
(*o*) Samuel *v.* Wiley, 50 N. H. 354

CHAPTER XVII.

ATTACHMENT.

530. Statutory basis.
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543. Property of decedents' estates.
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547. Kinds of property subject—supplementary note.

§ 530. I suppose the statutory basis for attachment jurisdiction is as full in Illinois as anywhere, and so I state this as an ensample or standard for the adjudications which it is the primary purpose of this work to set out and explain, so far as they relate directly to jurisdiction, and not merely to procedure, etc. In that state attachment lies—

"*First*, where the debor is not a resident of this state.

"*Second*, where the debtor conceals himself, or stands in defiance of an officer, so that process cannot be served on him.

"*Third*, where the debtor has departed from this state with the intention of having his effects removed from this state.

"*Fourth*, where the debtor is about to depart from this state with the intention of having his effects removed from this state.

"*Fifth*, where the debtor is about to remove his property from this state to the injury of a creditor.

"*Sixth*, where the debtor has, within two years preceding the filing of the affidavit required, fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder or delay his creditors.

"*Seventh*, where the dealer has, within two years prior to the filing of the affidavit, fraudulently concealed or disposed of his property so as to hinder or delay his creditors.

"*Eighth*, where the debtor is about fraudulently to conceal, assign, or otherwise dispose of his property or effects, so as to hinder or delay his creditors.

"*Ninth*, where the debt sued for was fraudulently contracted on the part of the debtor: *provided*, the statements of the debtor, his agent, or attorney, which constitute the fraud, shall have been reduced to writing, and his signature attached thereto, by himself, agent, or attorney."(*a*)

What I take to be exceptional provisions in other states are (1) where attachment proceedings are made to apply to removals from county to county, as well as from the state; (2,) where they are made an ordinary preliminary to all suits at law, without reference to residence. Statutory provisions, however, I have not space to notice, further than they come within the range of jurisdictional adjudications. However, we may remark that statutory provisions must be strictly pursued. *Halley* v. *Jackson*, 48 Md. 264. And, of course, the constitutionality of a statute authorizing an attachment may be set up in defence. *Murphy* v. *State ex rel.* 59 Ala. 639.

§ 531. We will first consider the parties subject to attachment process. Of these the leading class is that of non-residents and those about to become so.

As to non-residence, it is almost wholly dependent upon the intention, and if one changes his abode, *sine animo revertendi*, the intention of the change instantly stamps the character of non-residence upon it,(*b*) whereas a temporary absence

(*a*)Rev. St. 1874, p. 152.

(*b*)Drake on Att. (1866,) § 63.

abroad, with the mind to return, does not usually work a change of domicile. The consequence is that temporary absence never gives the right of attachment for non-residence; nor does the fact that one is temporarily within the jurisdiction suspend the right, even if he has an office for the transaction of business there, while his actual home is without the state.(*c*)

A singular case arose in New Jersey, which rested on the usual principle, that a wife's residence is determined by that of her husband. A resident of New York, in 1859, married, in New Jersey, a woman, resident of the latter state, who went with him, after the marriage, to Europe—she intending, on her return, to continue her residence in New Jersey, as formerly, until the fall of 1860. This was done, and her husband would visit her, from his business place in New York city, on Saturdays, and return to his business usually on Mondays. An attachment was levied on her property in New Jersey, as a non-resident, for a debt she had contracted before marriage, and it was held she was a non-resident, notwith-

(*c*)Id. § 69.

It has been held, in Illinois, that if one leaves the state with his goods, with only a conditional intention of locating elsewhere, provided he could find a place to suit him, his absence does not cause him to lose his residence, even if it continues for years—he having no settled intention of locating during that period—and even if he engaged in temporary business abroad. Wilkins *v.* Marshall, 80 Ill. 74.

On the other hand, the fact that one has a place of business within the state does not constitute him a resident, so as to prevent the issuing of an attachment. Wallace *v.* Castle, 68 N. Y. 370.

In Mississippi, however, there is held to be a distinction, as to the operation of the attachment law, between a domicile and a residence; as also in New York; so that one's domicile may be within the state and yet he may be a non-resident so as to be subject to attachment: and it is said hereon that "residence implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent in the future, at some time or other, to return to the original domicile." Morgan *v.* Nunes, 54 Miss. 310. See, also, Frost *v.* Brisbin, 19 Wend. 14; Thompson's Case, 1 Wend. 43; McCollem *v.* White, 23 Ind. 43; Nailor *v.* French, 4 Yeates, 241; Farrow *v.* Baker, 3 B. Mon. 217; Wells *v.* People, 44 Ill. 40.

In order to effect a non-residence, there must be not *merely* an *intention* to remove, but the actual fact of removal is likewise requisite. Adams *v.* Evans, 19 Kan. 174.

standing she had never domiciled with her husband in New York.(*d*)

In New York there is a limit placed to absence, and two or three years is regarded as constituting non-residence, even although a house is kept up within the state all the while. Thus, where one left the United States for China, to take charge of three trading vessels, in which he held an interest, and which performed several voyages to different ports in the Chinese and eastern seas, and he remained absent two years and a half, but his house in the city was kept up meanwhile, as before, he was held to be a non-resident, so far as to bring him within the statute of non-resident attachment; on the authority of *Haggart* v. *Morgan*, 1 Seld. 422, it being declared that "the object of the statute was to provide for cases where the party would probably not subject himself to the process of our courts, within a reasonable time after judgment, by voluntarily coming within its reach." It was also, however, decided that the nature of the business in which the party intends to be or is engaged may be looked at, to determine the probability of the duration of absence.(*e*)

(*d*) Hackettstown Bank *v.* Mitchell, 4 Dutch. 516.

(*e*) Burill *v.* Jewett, 2 Rob. 701.

"The idea involved is whether the absence is of such a character and so prolonged that the debtor cannot be served with ordinary process. Mere absence will not suffice; the debtor must have acquired a fixed residence, though it may not have been intended to be permanent; the *animus revertendi* needs not to be abandoned." McKiernan *v.* Massingill, 6 S. & M. 375; Alston *v.* Newcomer, 42 Miss. 192; Morgan *v.* Nunes, 54 Miss. 311.

In Louisiana, where one leased his dwelling-house and furniture, and went abroad to be absent two years or more, traveling for pleasure and health, and left no agent upon whom summons could be served, it was held, by a divided court, that an attachment was rightly issued, and that the fact of the debtor's returning sooner than he expected did not affect the previous attachment. Leathers *v.* Cannon, 27 La. An. 523; *Wyly*, J., *dissenting*.

In North Carolina it is held that if one voluntarily removes to another state for the purpose of discharging the duties of a United States officer for an indefinite period, such duties requiring his continued presence, he is to be regarded as a non-resident for the purposes of an attachment, notwithstanding he may visit the state, and may intend to return some time in the future. Wheeler v. Cobb, 75 N. C. 21.

Where a manufacturer and dealer in carriages for years occupied a store-room in New York city, over which he kept a furnished apartment, and ate and slept therein, but afterwards removed his family to Litchfield, Connecticut, into a rented house, called the latter his home, and went to it every week, but continued to do business as before in New York, it was held that an attachment would lie on the ground of non-residence.(*f*) And the court reiterated the definition in *Chaine* v. *Wilson*, 1 Bosw. 673, that "a defendant, whose family occupy a dwelling-house in another state, hired by him, and who habitually passes the night of each day and the Sabbath with his family, is a non-resident. Whether a man's absence from his family be for eight hours in each day or six days in each week, if he has a family living in a neighboring state, to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business upon his attention will permit, whenever sickness detains him from conducting that business, and when those days successively return on which business ceases and man rests from his labor he resides in such neighboring state, there (in every proper sense, as understood no less by those who are learned in the law than by the common intelligence of every-day life) is his home. Where one has a home, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business, and restoration to health, and there abides in the intervals, when business does not call, that is his residence, both in the common and legal meaning of the term."

It is held, in Mississippi, that it is actual residence, and not domicile, which the statute has in view, and so an absent debtor must keep moving about to avoid the effect of the attachment statute fixing him as a non-resident without any regard to his intentions. The court say in defence of the rule: "Of what consequence, looking to the object of the law, is it to the creditor that his debtor has a domicile in this state if he himself remains for years, perhaps, out of its jurisdiction,

(*f*) Murphy v. Baldwin, 41 How. Pr. 270.

residing actually and personally in another state, and upon whom process cannot be served in any of the modes prescribed by statute? But this reason, it may be said, would apply equally to the case of a debtor merely traveling abroad. A man, so far as this law is concerned, may travel without apprehension, but the moment he ceases to sustain the character of a traveler, and for purposes of education or business takes up a fixed though temporary abode, he becomes for the time being, in the eye of the law, a non-resident of the state, and liable as such non-resident to have his property which he has left behind him attached for the payment of his debts. There is nothing unreasonable in this rule. On the contrary, while extending all due indulgence to the love of travel, it shows no more than a proper regard for the claims of domestic justice."(*g*)

Where an attachment is begun against a non-resident it is not discharged by the defendant becoming a resident during the pendency of the suit.(*h*)

§ 532. Where a claim is a joint one, and one of the joint debtors is a non-resident, the writ of attachment lies against him provided the debt is a joint and several one, otherwise not; and it is sometimes provided by statute that all joint debts are also several, even if not so expressed in the note or other evidence of indebtedness.(*i*) But this does not apply to a partnership where one member of the firm is a non-resident, since partnership liabilities are always joint.(*j*) If a sheriff levies an attachment on the whole of the firm property, instead of upon the debtor's interest therein merely, he may be held as a trespasser. *Luddington* v. *Bell*, 77 N. Y. 138. And, if the firm is insolvent, the levy is ineffectual, even when the debtor's interest only is taken. *Sloane* v. *Lindsay*, 42 N. Y. Superior Ct. 399. And it is held that a firm credit cannot be attached for the individual debt of one of the partners. *Sweet* v. *Read*, 12 R. I. 121; *People's Bank* v. *Shryock*, 48 Md. 427.

(*g*) Alston *v.* Newcomer, 42 Miss. 193.

(*h*) Lainner *v.* Kelley, 10 Kan. 313.

(*i*) Comm'rs *v.* Swain, 5 Kan. 376.

(*j*) Remington *v.* Express Co. 8 R. I. 409.

§ 533. Mere absence, without non-residence, may be made a ground of attachment by statute where the absence is such as that "the ordinary process of the law cannot be served on him." Unless the length of time be prescribed by statute, as in Kentucky, where it has been fixed definitely at four months, there is always difficulty in defining the absence which will suffice to justify an attachment. Where there is a definite time, the leaving home, and not the crossing the boundary line of the state, is held, in Kentucky, to be the initial point of reckoning; so that, where one started to leave the state, but was detained within the state four days by a casualty, and attachments were issued exactly four months from the time he started, it was decided the attachment would lie.(*k*) The Missouri court say, in regard to absence, under a statute not prescribing a definite period: "While it is not admitted that every casual and temporary absence of the debtor from his place of abode, which, from the brief period of his absence may prevent the service of a summons, is a legal ground for issuing an attachment against his property, it is difficult to define the character and prescribe the duration of the absence which shall justify the use of this process. It may be asserted, however, that where the absence is such that if a summons, issued upon the day the attachment is sued out, will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights which he can have at the return term, the defendant has not so absented himself as that the ordinary process of law cannot be served upon him. * * * * * In construing the statute it is not allowable to extend its operation to cases which are not within the evil it was designed to remedy. It is a statute under which much oppression may be practiced, and the legislature have felt the necessity of throwing guards around those against whom it may be employed. If this court should sanction its use in a case not within the true scope and spirit of the act, upon the supposition that it may be brought within its letter to that extent, the precautions

(*k*)Spalding *v.* Simms, 4 Met. 285. See note (*e*), *supra.*

taken by the legislature to prevent the abuse of the process would be useless to the injured party."(*l*)

§ 534. But sometimes the jurisdiction is made to depend on the intention of the party to avoid service of process, and this, of course, renders the mere matter of duration altogether immaterial. And herein it is held that whether a debtor has withdrawn himself from his creditors with a view to elude process and evade their demands is a question of fact for the jury.(*m*) The intent is not to defraud creditors, but only to avoid process, which is considered. And the general principle on which it is to be determined is thus stated by the New York court: If the debtor, "finding himself irretrievably involved, so that his failure must soon happen, has desired to be out of the way of his creditors at the time it should happen, though he has left all his property behind him, and though he was aiming to get into other business, by means of which he might ultimately retrieve himself, the inference may very properly be drawn that he has departed the state with intent to avoid the service of a summons."(*n*)

§ 535. Yet in some states the intention is distinctly defined by statute to be a design to defraud creditors, in which case the intention merely to avoid process is immaterial, so long as it does not tend to show a positive design to defraud. This is so in Pennsylvania, where, however, suspicious circumstances are held sufficient to show the intention, even where it is disavowed, the absence explained, and a return actually made. Thus, in a case cited by Drake, in his work on Attachment, a writ was issued on an affidavit of design to defraud creditors. The defendant returned and defended against the suit, urging his declaration, prior to his departure and his return, as disproof of the allegation of fraudulent design. But this was met by proof that he had refused to be seen by his creditors just previous to his departure; that he had left clandestinely at night; had borrowed a small amount of money on the road, and had ordered letters sent to him under another name. On these facts the attachment was sustained

(*l*)Kingsland *v.* Worsham, 15 Mo. 661.

(*m*)Fitch *v.* Waite, 5 Conn. 121.

(*n*)Morgan *v.* Avery, 5 Barb. 664.

against him.(o) The Louisiana court, in a similar case, said: "It is true that the defendant has shown that he has been a resident of the city for about five years, and carried on business as a merchant; that during that time he has been in the habit of absenting himself every year during the sickly season, leaving an agent or clerk to attend to his business. We feel no hesitation in saying that if no suspicious circumstances existed we should concur in the opinion of the first judge in dissolving the attachment; but the case of the defendant is that of a person charged with having, by the aid of one of the tellers of the bank, actually defrauded it of the sum of upwards of sixty thousand dollars; a circumstance which, in our opinion, removes every suspicion of an intended deviation from the truth in the president of the bank, who made the affidavit required by law. Notwithstanding this, if the defendant had made his intention to return evident he would be entitled to relief; but the consequences he had to apprehend, from the gross fraud he is charged with having committed on the bank, rendered his intention to avoid them by flight so probable that the mere circumstance of his return does not totally destroy the presumption. Men often do that which they once intended not to do. By sustaining the attachment the bank may possibly obtain a portion of the large sum of which they had been defrauded. By discharging it the defendant will be enabled to defeat the aids of justice, so far as he is concerned."(p) It is manifest that this rather rests on the ground of necessity, than the attachment statute, and that substantial justice was awarded at the expense of the legal requirements in the case.

§ 536. Absconding and concealing himself are governed by similar rules as to a debtor's liability to attachment, and the intent must be to evade process or defraud creditors. In Maryland it is held that if one secretly removes from his usual place of business, with the intention to evade the payment of his just debts, or to injure or defraud his creditors, he will be regarded as absconding, although he may not have

(o) Drake on Att. (1866,) § 44.

(p) Canal & Banking Co. v. Comly, 1 Robinson, 231.

left the state.(*q*) In Illinois, where the court below refused to give the following instruction, it was held error, namely: "It is concealment to avoid service of process, no matter whether for an hour, a day, or a week; whether with a view to defraud creditors, or merely to have time to make a disposition, lawful or otherwise, of his property before his creditors get at him. It is placing himself designedly so that his creditors cannot reach him, which constitutes concealment under the statute."(*r*)

§ 537. If a married man has two places of residence at different seasons of the year, that one will be regarded as his domicile which he himself selects or describes, or considers to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen.(*s*)

§ 538. A non-resident creditor has the right to employ attachment process for any of the causes prescribed by statute, as well as a citizen.(*t*)

§ 539. Intending to remove or dispose of property fraudulently is a common ground of attachment proceedings. But a statute in regard to removing property must not be understood to apply to vessels, which, from the nature of their occupation, must necessarily be taken out of the state.(*u*) And, moreover, it is not to be applied to a case where only a portion of a debtor's property is removed, leaving visibly ample property of a permanent character to satisfy his debts;(*v*) but if the removal of a part only is designed to defraud or delay creditors an attachment will lie thereon.(*w*) Also, it is held that a concealment may be effected by concealing facts and circumstances, as well as by concealing the goods themselves;(*x*) any deception, I suppose, by which the ownership may be obscured, or the creditor baffled, falling thus within the explanation. But threats to make a law-

(*q*) Stouffa *v.* Niple, 40 Md. 477.
(*r*) Young *v.* Nelson, 25 Ill. 566.
(*s*) Chariton Co. *v.* Moberly, 59 Mo. 242.
(*t*) Ward *v.* McKenzie, 33 Tex. 297.
(*u*) Russell *v.* Wilson, 18 La. 367.
(*v*) Montague *v.* Gaddis, 37 Miss. 456; State *v.* Morris, 50 Ia. 206.
(*w*) Taylor *v.* Myers, 38 Mo. 82.
(*x*) Powell *v.* Matthews, 10 Mo. 52.

ful assignment is not a concealment within the meaning of the statutes,(*y*) although mere threats to make an assignment are construed to be fraudulent, unless it plainly appears that the intention of the debtor is to execute a proper assignment for the benefit of creditors. Moreover, whatever purpose would avoid a general assignment, if declared in writing and inserted in the assignment, ought, when verbally avowed by a debtor to be the design of an assignment contemplated, to be regarded equally fraudulent.(*z*) An unfair preference in a voluntary assignment may furnish the basis of an attachment, (*Stevens* v. *Helpman*, 29 La. An. 634,) although a fair assignment for the benefit of creditors may be sustained as against an attachment, (*Thorington* v. *Gould*, 59 Ala. 461.)

§ 540. As to the kind of title to concealed property which will justify attachment, the New York court has decided that the statutes mean any property in the defendant's possession to which he claims title, although his title may be imperfect, or clearly bad, as the design to defraud may be as clearly apparent in concealing embezzled property as in concealing property really belonging to the debtor.(*a*)

§ 541. The court in Tennessee seems to be quite liberal in construing affidavits for attachment. In one case where under the statute providing that "if a debtor or defendant in any suit or judgment is removing, or about to remove, himself or his property beyond the limits of the state" an attachment may issue, it was alleged that a certain debtor was owner and master of a steam-boat, and that he was about to remove said steam-boat beyond the limits, [permanently, I suppose,] the court held: "The first objection to this attachment is that the affidavit designates a particular piece of

(*y*) Wilson *v.* Britton, 6 Abb. Pr. 34.

(*z*) Gasheire *v.* Apple, 14 Abb. Pr. 65. A violation of the bankrupt law, by selling property, is not necessarily a ground of attachment under a state law, because a sale may be valid under the latter, although a violation of the former. Stanley *v.* Sutherland, 54 Ind. 340. A mere *misappropriation* of money, which lawfully came into the hands of a debtor, will not justify an attachment on the ground of having *fraudulently contracted* a debt. Goss *v.* Com'rs, 3 Col. 468.

(*a*) Treadwell *v.* Lawler, 15 How. Pr. 9.

property only as being about to be removed. We are inclined to think this statement, if it stood alone, would not be sufficient. The affidavit ought to use the words of the statute, or it should exclude the idea that other property might still be left by the defendant within the jurisdiction amply sufficient to satisfy the demand. But the affidavit, in effect, states that the defendant is about to remove himself, as well as his property. It states that Newcomb is owner and master of the steam-boat Belle of Nashville, and that he is about to remove said steam-boat beyond the limits of the state. The statement is equivalent to the assertion that he is about to remove himself. He is master, and if he removes his boat he also removes himself. His relation to the boat, as master, connects his own removal necessarily with the removal of the boat."(*b*) A fresh and vigorous implication, certainly. And in Georgia, likewise, it has been held that where a non-resident is removing his goods through a county, an attachment may be levied thereon, under the statute authorizing such issue, when one is "removing out of the county," on the ground that the law gives every non-resident, for the purposes of litigation, a *locus* in the county where he is found, and that the place for the return of the process is the test; and so, if one is going through and out of the county, he may fairly be said to be removing out of that county.(*c*) With all due deference, I may be permitted to say that this seems to me to strain a law about as far as it will go without breaking.

§ 542. As to corporations, an early case in New York held that they were not liable to the process of attachment, but the general, perhaps now the universal, doctrine is that they are liable(*d*) as any other debtors. A corporation is domestic where its charter is granted, and foreign everywhere else; and if chartered in two or more states it is domestic in each.(*e*) In Ohio a domestic corporation may be proceeded against in a county of the state where it has no office or place

(*b*)Runyan *v.* Morgan, 7 Humph. 219.

(*c*)Johnson *v.* Lowry, 47 Ga. 562.

(*d*)See Drake on Att. § 79, and note.

(*e*)Ibid, § 80.

of business, as a non-resident of such county.(*f*) And a non-resident lessee of a railroad liable to be sued, as was the company, is also liable to be proceeded against by attachment.(*g*)

A national bank is held to be a foreign corporation, even in the state where it is located, since it is incorporated by act of congress, and is, therefore, liable to attachment as a non-resident.(*h*) Unsound doctrine, I think. And in New York, where this decision was made, it has latterly been decided that even where a national bank is located in another state, and has property within the state of New York, no attachment can issue against it until a final judgment has been rendered against it. *Rhorer* v. *Nat. Bank*, 14 Hun. 126; *Cent. Nat. Bank* v. *Richland Nat. Bank*, 52 How. Pr. 136. And so with an insurance company created by the laws of Great Britain and doing business in the United States.(*i*)

Attachment is the only method of suing a foreign corporation; and so, where in Massachusetts an action was begun against a railroad company established in Michigan, and service was made on the treasurer of the corporation in Boston, it was held not maintainable.(*j*)

§ 543. Property of an estate in the hands of an executor or administrator may be made liable to attachment in Georgia.(*k*) But the general rule is, probably, that this cannot be done except where an executor or administrator has made himself personably liable; as, for example, if he has entered upon a leasehold held by his testator or intestate in his life-time, or received the rents or profits thereof.(*l*)

§ 544. Sometimes the affidavit is regarded as jurisdictional; at others, not. Wherever it is not jurisdictional it may be amended without ousting the jurisdiction, otherwise it is not amendable.*

(*f*)Champion Machine Co. *v.* Huston, 24 O. St. 503.

(*g*)Breed *v.* Mitchell, 48 Ga. 533.

(*h*)Cooke *v.* National Bank, 50 Barb. 341.

(*i*)Myer *v.* Ins. Co. 40 Md. 599.

(*j*)Andrews *v.* R. R. 99 Mass. 534.

(*k*)Holloway *v.* Chiles, 40 Ga. 346.

(*l*)Drake on Att. § 82; Bryant *v.* Fussell, 11 R. I. 286.

*In Iowa "reasonable grounds of belief" will justify an affidavit. (Carey *v.* Gunnison, 51 Ia. 204;) while

§ 545. As a matter of course a levy is essential to jurisdiction which is *in rem*, and embraces so much property as the original levy includes, and no more.(*m*)

§ 546. An attachment may be authorized for a debt not yet due, on proper affidavit, where time only is wanting to fix an absolute indebtedness.(*n*)

§ 547. In regard to the species of property liable to attachment, the general rule is that whatever is liable to execution is liable to attachment, and, *vice versa*, whatever is exempt from execution is exempt from attachment; but this is so completely statutory in the different states that I do not think any attempt to enumerate the classes of real and personal property which may be attached would be at all a profitable outlay of time and labor. Sometimes even equitable rights are attachable: as, for instance, an equitable title to land, where another than the debtor holds the legal title, has been held subject to the process. The chief perplexities arise in garnishment proceedings, of which, in logical order, we will treat in the next chapter.

in Illinois and some other states the affidavit must be positive.

In Alabama the affidavit must be positive in its averments, and conform to the statute, and if it is defective it cannot be amended. Staggers *v.* Washington, 56 Ala. 225, Shield *v.* Dothard, 59 Ala. 595. But a relaxation seems to be allowed where a resident attorney makes the affidavit in behalf of a non-resident plaintiff, on the ground that "where both parties reside out of the state it is almost impossible that an attorney residing in it, and at a distance from the parties to the transaction, can absolutely know that the debt is still due and unpaid, since payment may have been made since the last communication with his client, so that it is proper to aver in the affidavit that the affiant "is informed and believes, *and therefore states*." Mitchell *v.* Pitts, 61 Ala. 222.

(*m*) Connecticut *v.* Caldwell, 1 Gil. 531.

(*n*) Brace *v.* Grady, 36 Ia. 353.

SUPPLEMENTARY NOTES.

As a kind of addenda, I add the following items, which tend to make the text more complete:

1. *On what indebtedness an attachment may be based.* An official bond is an obligation for the direct payment of money in an action upon which an attachment may be issued *in aid*. Monterey Co. *v.* McKee, 51 Cal. 255; San Francisco *v.* Brader, 50 Cal. 596; Hathaway *v.* Davis, 33 Cal. 161.

In Arkansas an attachment may issue in aid of an equitable suit, as

well as of a suit at law. American Land Co. *v.* Grady, 33 Ark. 550.

In Iowa an attachment will lie against a tenant for rent. Daniels *v.* Logan, 47 Ia. 395; Rotsler *v.* Rotsler, 46 Ia. 189. But usually an ordinary attachment cannot be issued in such a case, although a distress warrant may, which is somewhat in the nature of an attachment, or perhaps rather of a summary lien. Attachment lies for rent in Arkansas also, and may be specific or general, and be brought before the rent is due. Tignor *v.* Bradley, 32 Ark. 781. In Alabama this is subject to ordinary defences. Dryer *v.* Abercrombie, 57 Ala. 497. And by attachment mortgaged crops may be levied on in the possession of the mortgagee of the tenant, for rent due. Hudson *et al. v.* Exec'rs, 57 Ala. 609.

An attachment is no remedy for the recovery of specific property. Gates *v.* Bennett, 33 Ark. 475.

Also, one advancing money for raising a crop can enforce his claim by attachment, in a manner similar to that available on the part of a landlord. Grady *v.* Hall, 59 Ala. 341. The crop lien, for advances, begins at the time of the advance. Carter *v.* Wilson, 61 Ala. 434.

In Alabama any civil action, whether founded on contract or tort, as for an assault and battery, can be commenced by attachment under the statute. Hadley *v.* Bryers, 58 Ala. 139.

2. *What kinds of property are liable.* In addition to the statement of the general rule in the text we remark: In Kansas it is held that the interest of the owner of lots in a town site on the lands of the United States is liable to attachment, notwithstanding the town site has not been proved up by the probate judge in trust for the occupants, according to the law of congress. Fessler *v.* Haas, 19 Kan. 216.

An officer is not bound to levy on property, the title to which is in doubt: although, if he does so, he cannot voluntarily recall the levy without a liability to show sufficient cause for the release. Wadsworth *v.* Walliker, 51 Ia. 605.

In California it is held that an officer seizing property in the hands of a third person, must be prepared to prove not only the attachment, but the proceedings on which it was based. Horn *v.* Corvarubias, 51 Cal. 524.

In a personal suit against a captain or owners of a vessel it is held that an attachment of the vessel in aid may be issued, in Louisiana. Haeberle *v.* Barringer, 29 La. An. 410.

An attachment cannot be levied, in Alabama, on a landlord's lien for his debt, since it is not liable to execution. Starnes *v.* Allen, 58 Ala. 317. And so, where *equitable interests* are not subject to execution, they cannot be attached at law. Hillman *v.* Werner, 9 Heisk. 586. And, accordingly, it is held that an unassigned dower interest is not subject to attachment in an action at law. Rausch *v.* Moore, 48 Ia. 611; *Seevers*, J., *dissenting*. And it is so as to curtesy initiate. Greenwich Nat. Bank *v.* Hall, 11 R. I. 124.

3. *As to parties.* A county may be a plaintiff. (State, use, etc., v. Fortinberry, 54 Miss. 316;) and a state, after making a demand of the debtor. State *v.* Morris, 50 Ia. 203.

In Missouri, a receiver cannot bring attachment against the *sureties* on an official bond, their liability not being a "debt" within the meaning of the statute allowing re-

ceivers to bring attachment suits. State *ex rel. v.* Gambs, 68 Mo. 289.

As to the relation of a plaintiff in attachment to other lien creditors, such plaintiff, claiming a lien on a mortgage debt by reason of an attachment, is a necessary party defendant to a bill to foreclose such mortgage. Pine *v.* Shannon, 30 N. J. Eq. 501.

4. *Notice.* Where an attachment suit is commenced, the fact that afterwards a personal summons may be served, and actually is served, does not annul the attachment. Grubbs *v.* Cotter, 7 Bax. (Tenn.) 432. And, where personal service is thus had, a dissolution of the attachment will not oust the jurisdiction of the court, as otherwise it would do. Hills *v.* Moore, 40 Mich. 211. And so if defendants personally appeal, without service, (Bryant *v.* Hendee, 40 Mich. 543,) the appearance being general, and not special merely. Talpey *v.* Doane, 3 Col. 24.

5. *Death of party.* Unless where changed by statute, the common-law rule that an execution cannot issue after the decease of the judgment debtor prevails in attachment. Welch *v.* Battan, 47 Ia. 147. In Alabama the death of the debtor in attachment does not have this effect unless he has left an insolvent estate. Woolfolk *v.* Ingram, 53 Ala. 11.

6. *Effect of bankruptcy or insolvency.* An attachment lien is not divested except in a manner provided by the bankrupt law itself, and so a composition in bankruptcy, without a conveyance of the property to an assignee, does not divest it. Peck *v.* Jenness, 7 How. (U. S.) 612; Morgan *v.* Campbell, 22 Wall. 381; Sage *v.* Heller, 124 Mass. 213; Cunningham *v.* Hall, 69 Me. 354; *contra*, Miller *v.* McKenzie, 43 Md. 354. But an assignment in bankruptcy, under the late law, within four months, dissolved the attachment. Linder *v.* Brock, 40 Mich. 618. But this period was essential. Gillett *v.* McCarthy, 23 Kan. 668.

7. *Nature of the lien.* An attachment creates a lien superior to any that may be subsequently created, either by the act of the defendant or the operation of law, although the debtor may sell his interest in land attached, subject to the attachment lien, (Griggs *v.* Banks, 59 Ala. 311,) since the levying of an attachment on lands does not divest the owner's title, nor dispossess him. Smith *v.* Collins, 41 Mich. 173.

8. *Disqualification.* If a judge is a stockholder in a bank, he is disqualified to act in attachment proceedings wherein the bank is interested. King *v.* Thompson, 59 Ga. 380.

CHAPTER XVIII.

GARNISHMENT.

§ 548. General statement.
549. Rights subject to garnishment.
550. Singular Louisiana case.
551. Cases of fraudulent sales.
552. Assignee of promissory note.
553. Joint debts.
554. Money in the hands of an officer, or in court—attorneys—treasurers—judgment debtors—juror fees.
555. Agents.
556. Executors and administrators.
557. Partnerships.
558. Municipal corporations.
559. Private corporations.
560. Railroad agents—bank officers, etc.
561. Money deposited with specific directions.
562. Specific money in the hands of an attorney.
563. Husband and wife.
564. Salaries and wages.
565. Contractors and employers.
566. Indemnity money.
567. Claims under insurance policies.
568. Guests.
569. Lands fraudulently mortgaged—fraudulent assignments.
570. Consignees.
571. Guardian of spendthrift.
572. Set-off.
573. Military bounties.
574. Double garnishment.
575. Effect of service of writ.
576. Exemptions—wages.

§ 548. This subject is very closely connected with that of attachment. In some states one branch of it is called trustee process, while in other states mere trust funds are not liable to be taken, unless in the nature of a deposit in bank or something of that sort. In Vermont and Connecticut this is sometimes called the factorizing process. But garnishment is the most common term, and will be most generally employed

herein. Of course only the jurisdictional aspects of the topic will be in order here for consideration. As to procedure and rules of liability, they must be sought elsewhere, in works of a scope embracing practice as well as the principles which govern and guide the entertaining of suits. And so the staple of this chapter will consist chiefly of the property subject to the process of garnishment, by whatever name it may be called, and of the parties.

§ 549. It has been held that legal rights only can be reached by garnishment; that is, such moneyed demands as might be recovered in an action of debt or *indebitatus assumpsit*, and also such property as would be liable to seizure on execution.(*a*)

(*a*)Gadden *v.* Pierson, 42 Ala. 371.

In addition to what is stated in the text, I present here a partial summary, as follows:

1. *General Rule.* The principle of garnishment is stated thus by the Maryland court: "The general rule is that the right of the attaching creditor to recover against the garnishee depends upon the subsisting rights between the garnishee and the debtor in the attachment, and the test of the garnishee's liability is that he has funds, property, or credits in his hands belonging to the debtor for which the latter would have a right to sue," (Odend'Hal v. Devlin,48 Md. 441;) to which should properly have been added the qualifying clause intimated in the text, that the liability should be enforceable by execution. The Rhode Island court say: "By the decisions in most of the states the right to attach by trustee process is subject to the following general rules: That the plaintiff can have no greater rights against the garnishee than the defendant has; that he can be in no better condition as to the garnishee than the defendant would be in, if suing, (Drake on Attachment, §§ 458, 460; Harris *v.* Phœnix Ins. Co. 35 Conn. 313; see, also, Haven *v.* Wentworth, Trustee, 2 N. H. 93;) that the debt must be such as could be enforced in an action at law; that the process is limited to legal debts; that it must be such a debt due now, or at a future time, as the defendant could himself prosecute at law; and that a mere equitable claim cannot be attached. Freeman on Executions, § 162, citing Goddar *v.* Pierson, 42 Ala. 370; May *v.* Baker, 15 Ill. 89; and see the opinion by the late Judge Collamer in Hoyt *v.* Smith, 13 Vt. 133; Drake on Attachment, § 557. It is also laid down that the property trusteed must be—with some few exceptions, as, for example, hides while tanning: Drake on Attachment, § 464—such as could, after judgment against the defendant, be turned over by the garnishee to be taken in execution; or, if a debt, must be such as that the garnishee could, after judgment against the defendant, protect himself by paying it, without waiting to be sued, (6 Danc. Abridgment, 505; Drake on Attachment, § 463; Maine, etc., Ins. Co. *v.* Weeks, 7 Mass. 438;) and, as to the burden of proof, the garnishee stands in the

§ 550. A singular claim arose in Louisiana, to this effect: In 1863 a transportation company sold to A. a steam-boat

same situation as if the defendant had sued him. Potter *v.* Stevens, 9 Cush. 530; criticising opinion of *Parsons*, C. J., in Webster *v.* Gage, 2 Mass. 503; see Drake on Attachment, § 461." Smith *v.* Millett, 11 R. I. 535. Equitable interests may be reached, sometimes, by a creditor's bill in equity, notwithstanding such may not be subject to attachment or execution. Bresnihan *v.* Sheehan, 125 Mass. 11. However, in states such as Illinois, where by statute equitable interests may be sold on execution, these may certainly be attached or be taken in garnishment.

2. *Property in the hands of officers or agents.* Where a judgment is rendered against a county the county treasurer cannot be garnished on account of the funds in his hands belonging to the county, it being a general rule that a municipalty can only be reached by *mandamus* to compel the payment of a judgment against it. Edmondson *v.* De Kalb Co. 51 Ala. 103. And it is so as to the states, so that a state treasurer cannot be garnished for money owing by the state to a non-resident debtor. Loder *v.* Baker, 30 N. J. 49.

As to a sheriff, he may be garnished for a surplus remaining in his hands after having satisfied the creditor's claim: and this principle applies to a case of sale under a chattel mortgage where there is a surplus left in the officer's hands after paying the mortgaged debt. Hoffman *v.* Wetherell, 42 Ia. 89. In Mississippi a constable may be garnished for money he has collected on execution which he has not paid over to the plaintiff, (Burleson *v.* Milan, 56 Miss. 399;) but the general rule, I am sure, is the opposite, as the court acknowledges. However, the usual policy is condemned by it, on the forcible ground that the officer's relation to the plaintiff in execution is precisely the same before the return day of the execution as it is to the defendant for whom he holds a surplus of money after satisfying an execution against him. The doctrine of Mississippi is sustained by Woodbridge *v.* Morse, 5 N. H. 519; Hurlburt *v.* Hicks, 17 Vt. 193; Gray *v.* Maxwell, 50 Ga. 108; New Haven, etc., Co. *v.* Fowler, 28 Conn. 103.

Where money and valuables were taken from a prisoner, they were held liable to garnishment in the hands of the officer, in a civil action brought against the prisoner by the party who had lost the property. Reifsnyder *v.* Lee, 44 Ia. 101.

An *agent* who has money entrusted to him by his principal, to pay a debt due to a particular person, may be garnished thereon at the instance of other creditors, ignorant of the instructions of the principal, in Kansas. Center *v.* McQuesten, 18 Kan. 476.

As to *bailees*, it has been held in Minnesota that the owners of a private boom, who have exclusive possession and control thereof, may be garnished, as to logs placed in their boom for safe-keeping, for pay. Farmers', etc., Bank *v.* Wells, 23 Minn. 476.

3. *Municipalities.* Besides what was stated above, we remark, further, that where a town has been divided into school districts, neither the town nor district treasurer can usually be garnished for a teacher's wages, and never until the school committee have given an order in

outside the military lines of the United States, the price of fifty thousand dollars being paid in confederate notes. After-

favor of the teacher. Spencer *v.* School Dist. 9 R. I. 537. And in general a municipal corporation is not subject to the process of garnishment, (Merwin *v.* Chicago, 45 Ill. 134; Burnham *v.* Fond du Lac, 15 Wis. 193; McDougal *v.* Supervisors, 4 Minn. 134; Mayor *v.* Root, 8 Md. 102; Chaisley *v.* Brewer, 7 Mass. 260; Bulkley *v.* Ekhart, 3 Barr, 398; Mayor *v.* Rowland, 26 Ala. 503; Hawthorne *v.* St. Louis, 11 Mo. 59; Memphis *v.* Laski, 9 Heisk. 513;) and the principle is declared to be of universal application, and not to be limited to cases where garnishment would interfere with corporate duties, (Jenks *v.* Osceola Tp. 45 Iowa, 554;) although it is held that the exemption may be waived by appearance and submission to liability. Drake on Att. § 516*a;* Com'rs *v.* Bond, 3 Col. 412.

4. *Private corporations.* In Wisconsin, by statute, the cashier or other officer of a private corporation, as a railroad company, is subject to garnishment for the debts of the company. Everdell *v.* R. R. 45 Wis. 395. But, in the absence of a statute, the rule is doubtless otherwise, because funds in the hands of an officer are to be regarded as in the possession of the corporation itself. Wilder *v.* Shea, 13 Bush, 137.

As to an outside debt, a foreign corporation doing business in the state may be garnished in the same manner as a domestic corporation. Penn., etc., R. R. Co. *v.* Peoples, 31 Ohio St. 537. Where, however, in either case a receiver is appointed, this receiver cannot usually be garnished without consent of the court from which he received his appointment. Voorhees *v.* Sessions, 34 Mich. 99; Tremper *v.* Brooks, 31 Ohio St. 335; Columbian Book Co. *v.* De Golyer, 115 Mass. 67; People *ex rel. v.* Brooks, 40 Mich. 333. The reason is that property held by a receiver is regarded as in the custody of the court; and more fully does this reason prevail where money is actually paid into court and deposited in a bank to the credit of the pending cause. Mattingly *v.* Grimes, 48 Md. 105. And so, where money has been deposited by a receiver in the hands of a register in chancery, it cannot be garnished, even if the proceedings under which the deposit was made have been determined or dismissed, because the money would still be in the custody of the court and subject to its control, and the register's possession would still be as an officer of the court. Voorhees *v.* Sessions, 34 Mich. 99.

The earnings of a railway may be reached by garnishment, even if these are covered by a mortgage not yet due, which mortgage provides that until default the company may use the road and receive the rents, profits, and increase thereof. R. R. *v.* Express Co. 81 Ill. 535.

It has been held that a railroad corporation cannot be garnished where it has issued certificates of indebtedness to its employes, and those certificates have been sold, even if such certificates are not negotiable in law. R. R. *v.* Killenberg, 82 Ill. 295.

A corporation may be garnished in regard to shares of stock, held by a debtor therein, unless a statute exempts such shares. R. R. *v.* Paine, 29 Gratt, 502; Montidonico *v.* Page, 10 Heisk. 443.

5. *Salaries and wages.* It is generally provided that the salaries of

wards he sold her to a packet company within the lines of occupation for three thousand two hundred dollars, United

municipal or public officers cannot be garnished, and sometimes this is extended by statute to the wages of employes of private persons or private corporations. Keyser *v.* Rice, 47 Md. 203.

The general rule is that the salaries of officers in the hands of disbursing officers cannot be reached by garnishment. Pruitt *v.* Armstrong, 56 Ala. 306.

But in Kentucky, while the salary of a state officer cannot be garnished, the salaries of municipal officers may be, because a municipality may be sued, while a state cannot without special consent. Rodman *v.* Musselman, 12 Bush. 354.

A debt due for wages is usually subject to garnishment, with the exemptions, however, provided by law. McKelvay *v.* R. R. 6 Rich. 446.

6. *Estates.* An administrator or executor cannot be garnished, usually, for a debt due from a legatee or distributee, he being neither "attorney, agent, factor, trustee, nor debtor," in the sense of a garnishment statute. Conway *v.* Armington, 11 R. I. 117.

But in Maine it is held that the words "effects and credits," in a statute, will justify the garnishment of a legacy in the hands of an executor or administrator. Cummings *v.* Garvin, 65 Me. 301.

In Massachusetts, it seems, a legacy may be garnished in the hands of an administrator or executor, provided the legatee is not in debt to the estate, in which case the debt thus due the estate has the precedence. Nickerson *v.* Chase, 122 Mass. 296. Possibly a garnishment would generally lie, where there is a decree of distribution, and the funds are still in the administrator's hands.

In Rhode Island the creditor of a decedent cannot garnish one owing the estate, but must pursue the course marked out by the statute for the settlement of estates. Bryant *v.* Fussell, 11 R. I. 286.

7. *Promissory notes, etc.* In Massachusetts, where a certain sum was due defendant under a contract providing that payment should be made to him by the other party to the contract in negotiable promissory notes, of which the dates and amounts were fixed by the contract, but *not the times of payment*: and the contract further provided that the interest should be paid on each note which should run beyond a certain day; and at the service of the writ the time when the last note should bear date had expired, but it did not appear that any of the notes had become payable, or that any debt was due thereon to the defendant,—it was held that a garnishment would not lie against the other party to the contract. Fuller *v.* O'Brien, 121 Mass. 422.

But positive promissory notes are subject to garnishment, although not subject to attachment in the hands of the holder. Pront *v.* Grout, 72 Ill. 456.

A *bank check*, given in payment of a balance on accounting, is not subject to garnishment in Massachusetts, the writ being served after such payment by check, but before presentation at the bank. Getchell *v.* Chase, 124 Mass. 366.

It is evident that *a settlement*, by which the prior indebtedness is extinguished, whether by actual payment or a bank check, must so discharge a liability as to prevent

States currency. After the war the former company owners attempted, by an indirect means of garnishment, to compel

garnishment. Huntington *v.* Risdon, 43 Ia. 517.

A *balance* due on *subscription* to the stock of a corporation can be garnished. Peterson *v.* Sinclair, 83 Pa. St. 250. And a creditor of the corporation may join two or more stockholders in the same writ, for unpaid subscriptions. Curry *v.* Woodward, 83 Pa. St. 371.

8. *Mortgages.* A *second mortgagee* cannot garnish the first mortgagee as the debtor of the mortgagor, for a surplus of rents and profits remainning in his hands after the satisfaction of his debt. Toomer *v.* Randolph, 60 Ala. 356. And so, where a mortgagee of chattels takes possession of the property, he cannot be held for any excess in value over the amount of his claim. Dieter *v.* Smith, 70 Ill. 168.

Where a savings bank held a note, secured by mortgage, and released a portion of the lands in consideration of a certain amount of money by the mortgagor, it was held the *bank* was not chargeable as trustee for the money so received. Flagg *v.* Bates, 65 Me. 364.

9. *Judgment debts.* A judgment debt is held subject to garnishment, at least on a writ issued from the same court which rendered the judgment. Calhoun *v.* Whittle, 56 Ala. 138. But where judgment *in solido* is entered against joint defendants, one of them cannot be regarded as a third person, so as to be subject to garnishment in the matter, as to his co-debtors in the judgment. Bailey *v.* Lacey, 27 La. An. 39; Richardson *v.* Lacey, Id. 62.

In Georgia a count for *mesne* profits, in an action of ejectment, may be garnished, under a statute subjecting "suits pending" to garnishment process. Walkes *v.* Zorn, 56 Ga. 35.

10. *Future liabilities; and contingent.* It is held to be a rule that in a garnishment suit the garnishee stands in as favorable a situation as if he were sued by his own creditor; unless, indeed, there is a provision by statute that claims not yet due may be subject to garnishment. Where something remains to be done in order to fix an indebtedness, a writ of garnishment will not lie. Curtis *v.* Alvord, 45 Conn. 569. See, also, 87 Ill. 107. The validity of a writ must be settled by the state of facts existing at the time of service. O'Brien *v.* Collins, 124 Mass. 98; Hancock *v.* Colyer 99 Mass. 187. And so, if there is a sum due to the principal defendant, yet if by a prior agreement it is to be appropriated to the payment of a specific debt, a garnishment writ must be ineffectual; nor does it matter if, after the service of the writ, the specific debt is paid in another manner than the manner contemplated and agreed upon at the time of the service. O'Brien *v.* Collins, *supra.* It is not always necessary, however, that there should be a specific agreement to pay money, if a legal obligation exists. A singular case arose in Missouri, thus: The lands of a debtor were sold successively by two of his creditors—by one under an execution; by the other under a deed of trust afterwards. The judgment creditor sold for less than his claim; the other for more than his claim. *Held*, that the surplus in the hands of the trust creditor could be garnished in favor of the judgment creditor for the balance due him. Casebott *v.* Donaldson, 67 Mo. 309. But there must be an actually exist-

A. to pay them the money he had received for the boat, under the plea that as the first sale—the sale to him—was in contra-

ing debt. Osborne *v.* Schutt, 67 Mo. 712.

As to contingent claims, they are not subject to garnishment. But the question may arise whether a particular claim is contingent or otherwise. Thus, earnings actually made are not contingent merely because they are to be paid in the future, on the estimate and certificate of a third person. Ware *v.* Gowen, 65 Me. 534. The debt must be absolutely due, but this may be so although the *ascertainment* of the *amount* may be future. Madnel *v.* Mousseaux, 20 La. An. 228. But, where *conditions* are to be performed by a third person, the conditions must be fulfilled before the writ will lie. Williams *v.* Young, 46 Ia. 140.

Where one makes a contract to build a house, and on its completion a definite sum will be owing, less any damages the owner may be entitled to, a plaintiff may, as the assignee of the contractor, complete the building, and garnish the owner for the just amount. Zimmer *v.* Davis, 35 Mich. 40.

11. *Partnerships, etc.* It is settled that an indebtedness due to a firm cannot be garnished in the hands of the debtor to pay the separate debt of one of the partners, (Myers *v.* Smith, 29 Ohio St. 120.) notwithstanding the tangible effects of a partnership may be *attached* for the debt of a partner. In such case the attaching creditor or other vendee only takes the place of the debtor in the effects of the firm, to be determined by a proper subsequent adjustment. People's Bank *v.* Shryock, 48 Md. 433; Winston *v.* Ewing, 1 Ala. 129; Sheedy *v.* Bank, 62 Mo. 18. This is the almost universal rule. See, also, to the same effect, Sweet *v.* Read, 12 R. I. 121. And the rule applies to unsettled partnership accounts between the partners themselves. Ives *v.* Vanscoyoc, 81 Ill. 120. But in Louisiana, while it is acknowledged to be the general rule that the property of *one firm* cannot be made to answer to the debt of another firm, yet it is held that the attachment of the interest of a non-resident in the property of a foreign commercial firm is allowable, as a matter of remedial justice, in favor of a citizen creditor. Taylor *v.* Kehler, 28 La. An. 530. But the interest itself must be within the jurisdiction, and especially lands in another state are not subject to garnishment in such manner. Bancker *v.* Harrington, 30 La. An. 136. But a garnishee may be a *non-resident*, and be proceeded against by attachment as such. Squair *v.* Shea, 26 Ohio St. 649. And where a statute allows a summons to be sent into another *county*, and there served on one of two or more *joint defendants*, a garnishee may likewise be reached in another county. R. R. *v.* Reynolds, 72 Ill. 487.

12. *Husband and wife.* Where a husband becomes his wife's debtor he may be garnished by her creditor. Odend'Hal *v.* Devlin, 48 Md. 440. Where property passes to the wife by gift, of course neither she nor her vendee can be held as garnishee therefor by the husband's creditor. Hayward *v.* Clark, 50 Vt. 612.

13. *Assignments.* An important question sometimes arises as to the rights of a creditor where an assignment has been made of property or claims concerning which a garnishment is attempted. Where

vention of the United States laws it was void, and therefore the money he held was theirs, the steam-boat being still

property is held by a valid assignment for the benefit of creditors, it cannot be reached by garnishment for the debts of the assignor. Schlueter *v.* Raymond, 7 Neb. 281. But the utmost good faith must be observed in all assignments or transfers by one indebted. Fearey *v.* Cummings, 41 Mich. 376. And this is held to apply even to the assignment of a promissory note before maturity. Clough *v.* Buck, 6 Neb. 343. And, especially after service of the writ, a garnishee parts with a promissory note at his peril, unless he is prepared to show that the note was not subject to the payment of the debt by reason of some pre-existing circumstance. Stevens *v.* Dillman, 86 Ill. 233. Where the facts of a transfer of a promissory note are to be investigated in a garnishee process, the assignee is a necessary party. Simmons *v.* Guyon, 57 Ala. 11. The fact that a note assigned to a creditor in payment of a debt is of greater value than the debt, does not of itself make a case of bad faith as to other creditors. Nathan *v.* King, 51 Cal. 521. Where an assignment has been made so that there is a surplus so resulting to the assignor as that he could maintain an action for it, this may be subjected to garnishment, but not otherwise. Smith *v.* Millett, 11 R. I. 535.

If property in the hands of a trustee, or a debt owing by him, has been assigned, and he has notice of it before the service of the writ, he must disclose it, or he will be still liable to the assignee, notwithstanding he is charged in the garnishee process. Larrabee *v.* Knight, 69 Me. 320.

An assignment of a partnership for the benefit of its creditors will be protected from garnishment, if made in good faith. Bancker *v.* Harrington, 30 La. An. 136.

In New Hampshire the *assignment of wages*, to be earned in the future, will be protected if in writing. Thompson *v.* Smith, 57 N. H. 306. But whether the right can be protected further than the wages are actually earned at the time of the service of the writ seems to be uncertain. See Kane *v.* Clough, 36 Mich. 436. And, where wages are assigned as security for goods furnished, it is held that if the assignee, at the time a writ is served, is fully paid for the goods delivered, and there is no particular time during which the arrangement is continued, any surplus of wages earned may be reached in the hands of the assignee by garnishment. Warren *v.* Sullivan, 123 Mass. 285; see, also, Giles *v.* Ash, 123 Mass. 353.

Where one was employed by a firm on wages, and was to purchase of one of the partners a lot of ground, and did so, to be paid for by instalments of the wages due from the firm, it was held, the wages could not be reached by garnishment until after the lot should be paid for in the manner stipulated, or otherwise. Wait *v.* Mann, 124 Mass. 586.

In Massachusetts an assignment of wages is required to be in writing. Onimet *v.* Sirois, 124 Mass. 162.

And a mere equitable right in regard to assignments cannot, on the ordinary principle, be subjected to garnishment. Bank *v.* Bullock, 120 Mass. 86.

14. *Plaintiff as garnishee.* A plain-

theirs, as the title could not pass by a void sale. But their plausible pretexts failed to reach the money.(*b*)

§ 551. If a party *bona fide* purchases goods from one selling goods to defraud his creditors, but without any knowledge of the fraudulent intent, and pays for the goods by giving his

tiff cannot properly make himself a garnishee, because a plaintiff and garnishee "are not only contemplated as occupying adverse relations, but the garnishee is regarded as representing the defendant, and is allowed to act for him, which would be repugnant to the first principles of jurisprudence, if he might himself be the plaintiff." Knight *v.* Clyde, 12 R. I. 120.

15. *Exemptions.* The matter of exemptions may be regarded as partly jurisdictional, at least, as well as a matter of pleading or practice. There may be a statutory exemption in favor of the garnishee himself; but it is held that a garnishee must likewise claim the benefit of exemption laws for the principal debtor, and especially so in the case of a railroad corporation and an employe. R. R. *v.* Ragland, 84 Ill. 375. It is held otherwise, however, in Missouri, on the ground that an exemption is merely a debtor's personal privilege, which he can only exercise for himself. Osborne *v.* Schutt, 67 Mo 712. In Maine it is held that under a statute exempting one month's labor a trustee must disclose the fact that the debt is for labor, or otherwise he will be liable to the principal debtor for that amount. Lock *v.* Johnson, 36 Me. 464. In Wisconsin the exemption of the debtor should be set up by the garnishee, (Winterfield v. R. R. 29 Wis. 589;) as, for instance, money due a judgment debtor from a purchaser of his homestead, which money the debtor intends to apply to the purchase of another homestead, (Watkins *v.* Blatschinski, 40 Wis. 347:) or cases in action exempt by statute. Probst *v.* Scott, 31 Ark. 652.

16. *Res adjudicata.* The ordinary rules of *res adjudicata* apply to a garnishment proceeding, (Wilson *v.* Burney, 8 Neb. 39;) and especially so, as it would be manifestly improper to subject a garnishee to a double liability, (Gas-light Co. *v.* Merrick, 61 Ala. 534,) on the proper disclosures being made and contested on a full and fair trial of the issues, (Fearney *v.* Cummings, 41 Mich. 376.) and due payment made, (Dane *v.* Holmes, 41 Mich. 661;) unless, indeed, the original attachment was void, (Greene *v.* Tripp, 11 R. I. 425,) or there was a fatal defect in the notice to the garnishee, as to who was the original defendant, so that after service funds were paid to the original debtor by the garnishee under mistake of the fact. Terry *v.* Sisson, 125 Mass. 560.

Garnishment in aid of an execution can only be maintained when the execution is valid. Keutzler *v.* R. R. 47 Wis. 641.

17. *Venue.* A debtor cannot be required, as garnishee, to pay his debt to his creditor's creditor at a different time and place at which it could be recovered from him by his own creditor. Bank *v.* R. R. 45 Wis. 173. And a demand must be shown if the debt is payable on demand, and at the place designated. Ibid.

(*b*) Thompson *v.* Trans. Co. (Brown, garnishee,) 24 La. An. 384.

notes to a third person, it is held that he is thereafter not indebted to the vendor, whose creditors, therefore, cannot garnish him, even though the notes are unpaid, and in the hands of one who took them with notice of the fraudulent intent of the vendor.(*c*.)

§ 552. And on the other hand a *bona fide* purchaser, for value, of a promissory note before it is due has a right to collect it, even where the maker has been served with a garnishment summons requiring him to answer what he was indebted to the payee, who was the owner of it at the time of the summons; the right of the purchaser in such a case being regarded as superior to that of the garnishing creditor.(*d*) And a party on a negotiable promissory note, originally given to the defendant, cannot be held liable unless it is shown that the note remains in the defendant's hands, since a payment of the judgment in garnishment would not protect him from liability to pay the note to the holder afterwards.(*e*)

§ 553. In a trustee process a joint debt cannot be subject in a suit against one of the parties alone to whom the debt is due, and a claimant whose claim is not valid may be allowed to raise the objection against the trustees being held liable.(*f*) But where two or more are summoned as trustees, with nothing in the writ to indicate in which capacity they are to answer, whether as to their joint or several liability, it is held they are before the court generally in their joint and several character, and are therefore chargeable for all their indebtedness to the principal debtor, joint as well as several, provided all the joint debtors are before the court.(*g*)

§ 554. In Iowa money in the hands of a court or officer may be reached and made to answer in the suit.(*h*) And in Georgia, as money collected by a sheriff on execution.(*i*) And in Illinois, as money in the hands of a special master in chancery,(*j*) but not money collected by a regular sheriff on execution sale; it being held that public policy requires

(*c*)Diefendorf *v.* Oliver, 8 Kan. 365.

(*d*)Mims *v.* West, 38 Ga. 20.

(*e*)Denham *v.* Pogue, 20 La. An. 195.

(*f*)Fairchild *v.* Lampson, 37 Vt. 165.

(*g*)Lamson *v.* Bradley, 42 Vt. 166.

(*h*)Patterson *v.* Pratt, 19 Ia. 358.

(*i*)Gray *v.* Maxwell, 50 Ga. 108.

(*j*)Weaver *v.* Davis, 47 Ill. 235.

that a sheriff should not be charged on garnishment process, in respect of any money held by him in virtue of that authority, because it is in the custody of the law. But a surplus remaining in the hands of the sheriff, after satisfying the plaintiff's execution, may be subjected to garnishment; because, when the amount due on the judgment is paid into court, or paid over to the plaintiff, the execution has accomplished its purpose, and the duty of the officer is to pay the surplus over to the defendant. It is not strictly in the custody of the law, but the officer holds it as so much money had and received for the use of the defendant. And this is the general rule.(*k*)

Money in the hands of an attorney, not as fees, for services in a case wherein he is actually retained, but nominally for fees which he might earn in any future litigation in which the client may be engaged, can be taken in garnishment.(*l*) And it has been held no violation of professional privilege to compel an attorney to answer as to the situation of affairs between him and his client as to any of the client's property in his hands.(*m*)

Under the general rule, that money or property in the custody of the law cannot be garnished, it has been held that money in the hands of a school treasurer, to be paid a teacher whose wages are due, cannot be reached in this way,(*n*) nor in the hands of school directors.(*o*)

In Maryland it is held, where a trustee is appointed by a court of chancery, and holds money belonging to a non-resident, the money may be attached by creditors if the final audit has been ratified by the court, the amount due the debtor ascertained, and an order passed to direct the trustee to pay it over.(*p*)

A judgment debtor may be held as garnishee of the judgment creditor, in favor of a creditor of the judgment creditor, provided the two actions are in the same court; and in such a case an injunction will lie in favor of the judgment debtor,

(*k*) Lightner *v.* Steinagel, 33 Ill. 516, and cases cited.

(*l*) Crain *v.* Gould, 46 Ill. 295.

(*m*) White *v.* Bird, 20 La. An. 188.

(*n*) Millison *v.* Fisk, 43 Ill. 113.

(*o*) Bivens *v.* Harper, 59 Ill. 21.

(*p*) Williams *v.* Jones, 38 Md. 555.

to restrain the collection of the judgment, pending the garnishment proceedings.(*q*)

But in Massachusetts it is held that fees due a juror, and ordered to be paid to him out of the county treasury, cannot be intercepted, thus agreeing with the decisions in Illinois, but on a different ground, namely: that there is no privity of contract, express or implied.(*r*)

§ 555. In Massachusetts an agent is held not chargeable as trustee in a foreign attachment for wages due from his principal to the defendant; and, moreover, if he is erroneously charged, and pays the amount to the officer on execution, neither the payment, nor the ratification by the principal in allowing it to him on settlement, nor the fact that when the execution was levied the defendant himself told the officer that he might apply those wages towards satisfying the execution, is a defence to an action brought in the defendant's name against the principal by an assignee whose transfer occurred before the agent paid the officer, of which transfer the agent had notice before paying.(*s*)

And where one, as agent, collected rents for the trustee of another, and was thereon garnished as the debtor of the beneficiary, it was held that the rents were a trust fund in the hands of the trustee until paid over to the beneficiary, and the agent could not be held as the debtor of the beneficiary for rents thus received as the agent of the trustee.(*t*)

One cannot, in Vermont, be charged as trustee, under the statute, as to trustee process on account of *choses in action* which he holds for, or in the right of, the principal debtor, even if he holds them in his own name,(*u*) as this does not constitute him a debtor in the meaning of the statute.

§ 556. As to executors and administrators, the rule in New Hampshire is that "under the provisions of our statute, relating to the process of foreign attachment, an executor or administrator may be charged as the trustee of an heir or legatee for any sum of money found to be in his hands upon

(*q*)Keith *v.* Harris, 9 Kan. 388.
(*r*)Williams *v.* Boardman, 9 Gray, 570.
(*s*)Casey *v.* Davis, 100 Mass. 124.
(*t*)McIlvaine *v.* Lancaster, 42 Mo. 96.
(*u*)Fuller *v.* Jewett, 37 Vt. 474.

the settlement of the estate belonging to such heir or legatee. And where process is served upon the executor as trustee, before the settlement of the estate, or before it is rendered certain that there will be anything in the hands of the trustee belonging to the principal defendant, the action will ordinarily be continued until the settlement of the estate, or until the liability of the trustee can be definitely settled and determined, when he will disclose, and be charged or discharged according to the facts as they exist at the time of the judgment."(*v*) In California it is held that after the decree of distribution money in the hands of an administrator to be distributed to an heir or devisee may be garnished.(*w*) In Mississippi it is held not only that executors and administrators may be garnished for a debt due their intestate or testator, but also that assets in the hands of others, which they are bound to pay over to the executor or administrator, may be reached by process of garnishment against the debtors of the testator or intestate.(*x*) In Georgia the effects of an estate may be tied up by an advance garnishment process until it can be ascertained how affairs stand with regard to them.(*y*) In North Carolina it has been held that the administrator of one summoned as garnishee, but dying before the return day, cannot be compelled to answer instead of the intestate.(*z*)

§ 557. As to partnerships, it is the general rule (with Pennsylvania, Maryland, and South Carolina dissenting) that partnership credits can in no case be garnished to pay the individual debt of one of the partners;(*a*) and not even after dissolution; and the reason given for it in Georgia is that "the copartnership property, after the dissolution of the partnership, is first liable to pay the partnership debts before it can be made liable for the debts of one of the individual partners. The copartnership property is assets for the payment of the copartnership debts as well after the dissolution as before."(*b*)

(*v*)Palmer *v.* Noyes, 45 N. H. 174.

(*w*)Nerac's Estate, 35 Cal. 392.

(*x*)Thrasher *v.* Buckingham, 40 Miss. 67.

(*y*)Sapp *v.* Adm'r, 41 Ga. 628.

(*z*)State *v.* Morehead, 65 N. C. 683.

(*a*)Drake on Att. §§ 569, 570, and cases cited.

(*b*)Anderson *v.* Chenney, 51 Ga. 373.

§ 558. In some states, as Massachusetts(*c*) and Vermont,(*d*) a municipal corporation can be garnished; in others, as Illinois,(*e*) it cannot; in others still an exemption may be waived,(*f*) but it cannot properly be waived if the reasoning of the court in Illinois is to be taken as conclusive: "It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings who are more dependent for the security of life and property on the municipal than on either the state or federal government. To permit the great public duties of such corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation." The general rule, undoubtedly, is that municipal corporations are not subject to garnishment in regard to any kind of indebtedness.

§ 559. But of course the matter is entirely different as to private corporations, which may, doubtless, be held as individuals are in similar circumstances. However, a railroad corporation, having an agreement with connecting lines, and in a monthly settlement paying accounts to the road immediately adjoining, but including in the settlement the amount due the companies whose roads lie beyond, is held not liable as trustee in foreign attachment of that corporation for a sum so found due to it, and for which it is in turn liable, under the agreement, to the other companies.(*g*) And, again, a railroad company cannot be garnished when, at the time of issuing and serving the writ, the property of which the creditor is in quest has left for its destination and is *en route* consigned to the debtor.(*h*) And this is placed upon this ground in the case where the decision was made: "Any other rule would make railway companies collecting agents of creditors, and that, too, at the risk of the companies. They are com-

(*c*) Williams *v.* Kenney, 98 Mass. 143.
(*d*) Johnson *v.* Howard, 41 Vt. 122.
(*e*) Merwin *v.* Chicago, 45 Ill. 134.
(*f*) Clapp *v.* Walker, 25 Ia. 315.
(*g*) Chapin *v.* R. R. 16 Gray, 69.
(*h*) R. R. *v.* Cobb, 48 Ill. 403.

mon carriers of all kinds of manufactured and agricultural products, having a lien upon the articles delivered for their freightage. They are obliged, under ordinary circumstances, to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property entrusted to them should be adjusted through controversies, the burden, annoyance, and expense of which they must bear. When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such a process merely because it had received to be carried that which the law compelled it to receive and carry."

Foreign corporations may be held liable to garnishment in a state where they own property, or where the cause of action as to them arose.(*i*)

§ 560. Money in the hands of a station agent of a railroad company, received from the sale of tickets and payment of freights, cannot be garnished in a suit against the company.(*j*) The grounds of this are (1) that whatever can be attached by the ordinary process is not subject to garnishment; (2,) that garnishment usually lies only where the holder of property is personally liable, so as to be a debtor to the defendant; and (3) that in the contemplation of law money in the hands of an agent of a corporation is in the hands of the company itself, and the process is intended for cases where the goods are out of the personal possession of the defendant. And the New Hampshire court say: "The corporation, as such, has no personality except in the persons of its agents. It can only act by agents. By them alone can it possess its property, and exercise its corporate functions. In doing this their acts and possession are its own—not constructively, as in the case of agents of *persons*, but actually. In this

(*i*)Brauser *v.* Ins. Co. 21 Wis. 512; R. R. *v.* Tyson, 48 Ga. 351.

(*j*)Pettingill *v.* R. R. 51 Me. 371.

respect corporations differ from persons. In one, the act or possession of the agent is *constructively* that of his principal; in the other, it is actually so. There may be a limit to the application of this principle. A corporation may employ an agent who is not invested with its personality. A railroad company does employ a large number of such agents in carrying on its business. Such agents, having the property of the corporation in their possession, may be held as its trustees. But some of the agents of a corporation must, in this respect, be considered as the corporation, and they cannot be charged as trustees for the reason that, *quoad hoc*, they are the same. It may not be easy to draw the line between these two classes of agents. But we cannot doubt that those who are appointed to exercise the corporate functions as its regular agents, in doing business for which the corporation was organized, must be considered as identical with the corporation in such business. A railroad corporation sells passage tickets, and receives and delivers freight, by station agents appointed for that purpose. It can do it in no other way. This is the very business for which such companies are incorporated. In doing this business the acts of such agents, and their possession of the corporate property, must be considered as the acts and possession of the company; and they cannot be held as its trustees."

The court again lay down a limitation thus, on the doctrine herein advanced: "This principle, however, does not apply when the person having such possession does anything to prevent the goods from being attached as the property of the debtor; by concealing them, or refusing, on request, to expose them, or by asserting any claim to them himself, or in any other manner, he would then be liable to the trustee process." *Sweet* v. *Brown*, 5 Pick. 178; *Hooper* v. *Day*, 19 Me. 56. "Nor has this doctrine ever been applied to a depository of money. Though coin and bank notes are now attachable, and may be taken on execution, practically they can very seldom 'be come at to be attached,' and they differ from all other property in this respect; and there are cases in which one holding a particular fund merely on deposit, claim-

ing no interest in it, may be chargeable as trustee. *Bell* v. *Gilbert*, 12 Met. 397; *Ins. Co.* v. *Holbrook*, 4 Gray, 235." The owner of the fund can have no reason to complain, and any other rule would encourage fraud.

On the principles above stated, the cashier of a bank, in which are deposited the funds of a corporation, cannot be garnished in a suit against such corporation, although he is its treasurer, and, as such treasurer, deposited the funds in the bank;(*k*) for, said the court quaintly, "A corporation could hardly be summoned as trustee of itself. But to charge its officer, while holding its funds as such, would be to charge it as trustee of itself. It would be to determine that the trustee held the funds as an individual, and not as an officer, which is not the fact." And the court goes on to remark: "The supposed trustee, individually, has no goods, effects, or credits of the defendant corporation entrusted to or deposited with him. As its treasurer he holds the funds as an officer of the corporation. They are funds held by the corporation through its treasurer. It is the only mode by which a corporation can hold its funds. Such funds so held are not goods, effects, or credits of the principal debtor, entrusted to or deposited with the supposed trustee, but are the funds of the corporation in its own custody, and in charge of its appropriate officer."

But it is held differently in Kansas, in regard to a foreign corporation, so that the treasurer of the corporation, having its assets in his hands, subject to the order and control of the directors, can be garnished.(*l*)

§ 561. Money deposited with a mercantile firm cannot, without any specific direction as to the application of it, apply it to the payment of a note of the holder, indorsed to the firm for collection; but the money so deposited is liable to garnishment, in an attachment suit against the depositor.(*m*)

§ 562. Where an attorney at law had, when a garnishment summons was served on him, a check drawn by the defendant in the suit, to satisfy an execution in another action,

(*k*) Sprague *v.* Navigation Co. 52 Me. 593.

(*l*) Wheat *v.* R. R. 4 Kan. 376.

(*m*) Vance *v.* Geib, 27 Tex. 273.

the check being not indorsed, and not presented for payment till after service, and on subsequent presentation paid, and the proceeds held when he answered to the summons, it was held he was not liable as garnishee.(*n*)

§ 563. In a case where a husband traded a manufacturing establishment, with the machinery, for a tract of land, and, to defraud his creditors, took the conveyance to his wife and subsequently sold the land, and for the payment took a note for a part of the price, payable to his wife, which she held until after it matured, and until the maker was garnished by a creditor of the firm of which the husband had been a member, in the manufacturing business, it was held that, as no rights of innocent assignees were involved, the note was subject to the garnishment.(*o*)

§ 564. In states where municipal corporations are subject to garnishment, a summons may issue to make available the salary or wages of a policeman still unpaid, to satisfy a judgment against him,(*p*) but not wages to be earned by future services or not yet due.(*q*)

§ 565. An amount due from an employer to a contractor, who has so broken his contract as to give the employer a right to divert the payment to workmen under the contractor, is not subject to garnishment; as, for instance, where the contract in writing was that if the contractor failed to pay the workmen the employer might do so out of the contract money, and the contractor did so fail, it was held that, notwithstanding the service of the writ, the employer had a right to apply the contract money to the payment of the workmen for labor previously performed.(*r*) Where, however, the employer is liable under the garnishment, and a part of the amount due is for the individual services of the contractor, and a part for the profits resulting from labor hired by the contractor, so that the employer has the right of appropriating payments to either account, or in his default of making the appropriation, the employe may do so, and in

(*n*)Hancock *v.* Colyer, 99 Mass. 187.
(*o*)Patton *v.* Gates, 67 Ill. 165.
(*p*)City of Montgomery *v.* Van Dorn, 41 Ala. 505.
(*q*)City of Newark *v.* Funk, 15 O. St. 464.
(*r*)Doyle *v.* Gray, 110 Mass. 206.

default of both the law will appropriate, the attaching creditor succeeds to all the contractor's rights, and he may elect as to the appropriation, or leave it to the law, which will make it in a manner that will most benefit him.(*s*)

§ 566. It is held that money held by one as a security or indemnity against danger of loss in becoming bail for another may be garnished.(*t*)

§ 567. Claims arising under an insurance policy are not subject to garnishment until adjustment, since, until then, they are unliquidated.(*u*)

§ 568. In Iowa it is held that a guest may be garnished by a creditor, in an action against the innkeeper, unless the innkeeper requires his guest to pay, or pledge payment, in advance, when no indebtedness arises on which a garnishment can lie.(*v*)

§ 569. A creditor of a fraudulent mortgagor may, in Iowa, instead of proceeding in equity to set aside the mortage, or levying upon the property and claiming the right to sell it, reach the property mortgaged by garnishing the mortgagee.(*w*) But the rule is different in New Hampshire, and there the income of lands fraudulently conveyed cannot be charged when there is no attempt to avoid the conveyance.(*x*) And, in Vermont, while it is not expressly decided, it seems clearly intimated, that a fraudulent grantee of real estate, who has sold the property, cannot be garnished for the avails in his hands.(*y*)

In Wisconsin a debtor's fraudulent assignment of an interest in a contract may be treated by the creditor as a nullity, and parties may be garnished for his debt, who, by the terms of the assignment, would be indebted to the assignee.(*z*)

Under a valid trust deed, wherefrom not enough has been realized to meet the full claims and demands of the trustees, these cannot be charged as to money in their hands proceeding from it, since as mortgagees they have a right to hold the

(*s*)Smith *v.* Brooke, 49 Pa. St. 147.
(*t*)Ellis *v.* Goodnow, 40 Vt. 240.
(*u*)McKean *v.* Turner, 45 N.H. 203.
(*v*)Caldwell *v.* Stewart, 30 Ia. 379.
(*w*)Brainard *v.* Van Kuran, 22 Ia. 266.
(*x*)Heywood *v.* Brooks, 47 N.H. 234.
(*y*)Stevens *v.* Kirk, 37 Vt. 208.
(*z*)Prentiss *v.* Danaher, 20 Wis. 311.

security till their debt is paid, so that if the creditor claims that there is a surplus of property he must redeem it by paying the lien of the trustees.(*a*)

§ 570. A consignee of goods who has agreed to make advances thereon, to half the value or more, by promissory notes, and has been authorized, in case of danger of garnishment, in an action against the consignor to appoint another person as the consignor's agent, has been held not liable for the amount of notes given just before service to his own clerk, as agent of the consignor, on purpose to avoid being charged.(*b*)

§ 571. Where a spendthrift has been placed under guardianship it has been held that a garnishment lies as to effects in his guardian's hands, and a creditor is therefore not confined to suit on the guardian's bond, on refusal to pay his claim.(*c*)

§ 572. Where a town is garnished, which is owing defendant for professional services, it is held that it cannot in the garnishment suit claim a set-off on account of taxes due it from defendant; on the ground that a tax is neither an express nor implied contract.(*d*)

§ 573. Where military bounties are voted by a municipal corporation they cannot, while in the hands of the municipal officers, be garnished, in New Hampshire. But, of course, after a bounty has been paid over to a third person, by the order of the volunteer, it is liable like any other funds.(*e*)

§ 574. One who is twice garnished for the same debt may obtain a stay of proceedings in the second action, on affidavits, by motion; but, if he neglects this remedy, equity will not interfere to save him from the consequences of his neglect.(*f*)

§ 575. If, after service of process, a garnishee delivers property of the principal debtor to a receiver, afterwards appointed, in another action, to take charge of all the debtor's property—

(*a*)McGregor *v.* Chase, 37 Vt. 230.
(*b*)Collins *v.* Smith, 12 Gray, 431.
(*c*)Hicks *v.* Chapman, 10 Allen, 463.
(*d*)Johnson *v.* Howard, 41 Vt. 125.
(*e*)Manchester *v.* Burns, 45 N. H. 482; Morse *v.* Towns, Id. 185.
(*f*)Danaher *v.* Prentiss, 22 Wis. 311.

as of a railroad corporation's property—he does so at his peril, but will have the right to show that the receiver was entitled to take the property as against the garnishment plaintiff.(*g*)

§ 576. Where property is delivered by a garnishee to an officer, under execution, the owner may claim exemptions the same as if the property had been taken from him; and so a deposit in a bank may be held exempt, under a statute exempting one hundred dollars' worth of property, specifically, suitable to condition in life,(*h*) when the bank is summoned as garnishee.

Under a statute which provides "that any negotiable paper which shall be actually assigned, negotiated, and transferred to any bank before it becomes due, shall be exempt from garnishment," the meaning is held to be that the fact of such transfer has the effect to work an exemption of the paper, and that herein it makes no difference whether previously process of garnishment had been served that would hold the debt if no such transfer had taken place, where the bank discounted the paper in good faith, in the ordinary course of business, and without notice of the garnishment.(*i*)

But it is held that the United States statute of 1866, providing that no sum due, or to become due, to any pensioner shall be liable to attachment while in course of transmission to him, does not apply to a sum which, at the time the act took effect, had already been paid to a pensioner's agent at his request, so that the agent was liable to garnishment.(*j*)

Where an employer is garnished he may, notwithstanding the service of the process, continue to pay the employe wages by instalments, so as to keep the payments each below the amount exempted by statute.(*k*) And, even if a contract be terminated after a writ is served, and a new one entered into at the same salary, payable weekly or monthly in advance, but still keeping payments within the exempt amount, it will make no difference as to the liability.(*l*)

(*g*)Crerar *v.* R. R. 35 Wis. 68.
(*h*)Fanning *v.* Bank, 76 Ill. 53.
(*i*)Hall *v.* Bowker, 44 Vt. 77.
(*j*)Kellogg *v.* Waite, 12 Allen, 529.
(*k*)Davis *v.* Meredith, 48 Mo. 263.
(*l*)Hoffman *v.* Fitzwilliam, (unreported,) 8 Chi. L. N. No. 44.

CHAPTER XIX.

HABEAS CORPUS.

§ 577. Nature of the writ.
578. Power to issue it.
579. Inquiry into jurisdiction.
580. Imprisonment for obeying United States laws, etc.
581. Power of appellate court.
582. Sentence by *de facto* judge.
583. Fugitives from justice.
584. Whether constitutionality of laws may be examined.
585. Proof as to legality of detention.
586. Commitments for contempt.
587. Inquiry as to the nature and validity of process.
588. Unlawful enlistments of minors.
589. Custody of children.
590. Criminal cases where indictment is found—sentence.
591. Arrests on civil process.
592. Bail.
593. Joint indictments when only one is tried.
594. Inquiries as to the legality of a sentence.
595. Recognizance of appeal.
596. Lunacy.
597. Vacation—parties—appeals—jury.
598. Suspension of writ.

§ 577. This great writ of personal right has for its object the liberation of those who are imprisoned without sufficient cause, and it is, therefore, in the nature of a writ of error to examine the legality of the commitment; yet it does not issue as a matter of course on application, and, hence, if the defect or illegality does not appear on the face of the proceedings, an affidavit is necessary, setting forth the circumstances under which the person imprisoned is entitled to its benefits.(*a*) One committed on a criminal charge is entitled to

(*a*)Keeler's Case, 1 Hemp. C. C. 307.

The general rule is that an *illegal imprisonment* must be shown in order to invoke the jurisdiction, and when this appears the writ will be

the writ as a matter of right, unless he was committed or detained by virtue of the final judgment of a competent court,(*b*) when the court will not inquire into the sufficiency of the cause of commitment.(*c*) It is a privilege secured to every citizen by the national and state constitutions, which can only be suspended or withheld when in cases of rebellion or invasion the public safety may require it.(*d*) The power to protect personal liberty is essential to the sovereignty which claims the allegiance of the citizen.(*e*)

§ 578. The power to issue the writ belongs essentially to courts alone, and cannot properly be delegated to a mere court commissioner.(*f*) And, as to the courts which may exercise the power, the true doctrine is that the state courts, in their sphere, and the United States courts, in their sphere, have exclusive jurisdiction, and therefore the state courts have no authority to issue the writ in any case where a prisoner is detained under the authority of the United States.(*g*) However, a United States court may issue a writ of *habeas corpus* where one has been arrested by state authority within waters contiguous to a United States navy yard, and necessary to float vessels there stationed, because such waters are a part of the navy yard, and are, therefore, within the exclusive jurisdiction of the United States. *Tatem's Case*, 1 Hugh, 588. But a state court or judge, duly authorized, may issue the

granted, except upon the most weighty considerations to the contrary. Pierce's Case, 44 Wis. 411. And on a legal process, holding a prisoner, a writ of *habeas corpus* raises only the question of jurisdiction. Eldred's Case; Ford's Case, 46 Wis. 530. And so the court issuing the writ cannot inquire whether an indictment, regular on its face, was ever found by the grand jury, (Twohig & Fitgerald's Case, 13 Nev. 302;) nor test the legality of the grand jury. State *v.* Fenderson, 28 La. An. 82; State *v.* Thompson, Id. 187. And a court will exercise a sound discretion as to issuing the writ. O'Malia *v.* Wentworth, 65 Md. 130. And the statement of facts showing illegality in the imprisonment is imperatively necessary in all cases. Allan's Case, 12 Nev. 87. And the discretion of a court will not be interfered with unless it has been manifestly abused. Bentley *v.* Terry, 59 Ga. 555.

(*b*) People *v.* Mayer, 6 Barb. 362.

(*c*) Kearney's Case, 7 Wheat. 39.

(*d*) Collier's Case, 6 O. St. 55.

(*e*) Booth's Case, 3 Wis. 157.

(*f*) Buddington's Case, 29 Mich. 474.

(*g*) Tarble's Case, 13 Wall. 397.

writ in any case where a party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States.(*h*)

§ 579. The chief inquiry, under a writ of *habeas corpus*, is into the jurisdiction of the court which authorized the commitment. For instance, the courts of the United States have no authority in this way to inquire into the merits of a decision made by a committing magistrate, and to determine that he erred in his construction of the law or the evidence, but it will only inquire whether the prisoner stood charged, before the magistrate, with a criminal offence, subjecting him to imprisonment, and whether the magistrate had competent authority to inquire into and adjudge upon the charge.(*i*) And, in such proceedings, the United States courts are not governed by state laws on the subject of *habeas corpus*, but by the common law of England, as it stood when the national constitution was adopted, subject to alterations by acts of congress; and under that system a decision under one writ, refusing to discharge a prisoner, is no bar to the issuing of any number of other successive writs by any court of competent jurisdiction. And so, where one was arrested under an extradition treaty between the United States and Great Britain, and was committed under the arrest, a circuit court of the United States refused a discharge in a *habeas corpus* proceeding, and it was held that this was no bar to the issuing of a writ, subsequently, by a justice of the supreme court, to inquire into the legality of the detention.(*j*) I presume, however, the rule would not work well the other way, so as to authorize a second writ, by an inferior court, when the superior has refused a discharge. Nor does it apply to a writ refused by a state court to one imprisoned under state authority, in which case a United States court or judge has no right to interfere at all.

An inquiry into the jurisdiction is not barred by an actual

(*h*) Hill's Case, 5 Nev. 154; Barrett's Case, 42 Barb. 479; Hopson's Case, 40 Barb. 35.

(*i*) Van Aernam's Case, 3 Blatchf. C. C. 161.

(*j*) Kaine's Case, 3 Blatch. C. C. 1.

conviction and partial execution of a sentence for felony; but the writ cannot reach the cell of a state prison, and annul a sentence, pronounced by a court without jurisdiction.(*k*)

§ 580. If an officer of the United States is imprisoned by state authority, for executing a process of the United States courts, these courts have the power to release the officer on *habeas corpus*.(*l*)

§ 581. It is held that an appellate court cannot inflict a higher penalty for an offence than the court appealed from could have imposed; so that, if the original court could only punish by fine or imprisonment, the appellate court cannot, in a case appealed, punish by fine and imprisonment, notwithstanding its own original jurisdiction is not transcended by such sentence: And where such sentence is passed, and the fine is paid, a still higher court may discharge the prisoner, although a writ of error is the ordinary remedy for an error in the lower or intermediate court. So held in Massachusetts.(*m*) But it is quite doubtful whether such a transcending of jurisdiction would justify a writ in most other states. In Ohio it has been decided expressly that errors or irregularities occurring in the sentence of a court of competent jurisdiction, cannot be corrected except on writ of error, unless the sentence is an absolute nullity.(*n*) And a *habeas corpus* is not a writ of error, nor can it be used to authorize the exercise of appellate jurisdiction.(*o*)

(*k*) Miller *v.* Snyder, 6 Ind. 1.

(*l*) Robinson's Case, 6 McLean, C. C. 355; and so a private person imprisoned for obeying an act of congress, (Bull's Case, 4 Dill. 323.) See an electoral college case, of the electoral college of South Carolina, (1 Hugh. 570.) And see Engle's Case, Id. 592.

(*m*) Feeley's Case, 12 Cush. 598.

(*n*) Shaw's Case, 7 O. St. 81.

(*o*) Winston's Case, 9 Nev. 71.

A writ of *habeas corpus* cannot be allowed to have the force or effect of an appeal, writ of error, or *certiorari*. It does not reach such irregularities as make a judgment merely voidable, but only such as render it void (McGill's Case, 6 Tex. Ct. App. 498) for want of jurisdiction or other cause. Parks' Case, 93 U. S. 18. Error is not to be inquired into on *habeas corpus* proceedings. Granice's Case, 51 Cal. 375; Farnham's Case, 3 Cal. 545; Bond's Case, 9 S. C. 80. The object of a writ of *habeas corpus* is not intended to regulate the criminal business of an inferior court, (Larkin's Case, 11 Nev. 90;) nor to revise the proceedings of even a court martial, (People *ex rel.* *v.* Fullerton, 10 Hun. 63;) or for re-

But, if a court passes sentence for a longer period than the law allows, the Missouri court holds that the sentence is void, and a *habeas corpus* will lie; but this is under a statute authorizing expressly a writ where jurisdiction has been merely exceeded.(*p*) In Alabama it has been held, but with considerable hesitation, and with the dissent of one of the judges, that *habeas corpus* will lie where a sentence has not been strictly pursued by the officer; as, for instance, where a prisoner, sentenced to perform hard labor for the county for a specified period, is, instead, imprisoned in the jail. *Pearsen's Case*, 59 Ala. 655.

§ 582. Where sentence is passed by a *de facto* judge, exercising the judicial office without any real right to do so, it cannot properly be examined on *habeas corpus*.(*q*)

§ 583. Where an alleged fugitive from justice is charged with crime, merely by affidavit, from which it evidently appears that no crime has been committed, it seems that a court may properly interfere to discharge him by *habeas corpus*, notwithstanding the executive, upon whom the requisition has been made, has granted a warrant upon which the refugee has been arrested; provided no indictment has been, as yet, found in the demanding state.(*r*) This seems in part

viewing any orders or judgments of a court of competent jurisdiction, (Semler's Case, 41 Wis. 518;) nor can a writ be made to serve in the place of a plea in abatement or a motion to quash, (O'Malia *v.* Wentworth, 65 Me. 130;) nor does it matter how gross are the irregularities in a final judgment, they cannot be rectified by a writ of *habeas corpus*, (Sam's Case, 51 Ala. 34;) nor does it matter what the consequence is, even if it be imprisonment in the penitentiary, (Schenck's Case, 74 N. C. 607;) nor will the court, on *habeas corpus*, examine the decisions of law made in the case, any more than questions of fact. *Fisher's Case*, 6 Neb. 309. See, also, People *ex rel. v.* Phelps, 14 Hun. 21; State *ex rel.* Fagin, 28 La. An. 837; Darap *v.* Westerlage, 44 Tex. 388.

However, a prisoner may in this way assert the right to *give bail*, even if it could be done by motion in the court below. Walker's Case, 3 Tex. Ct. App. 669.

It is held in Nevada that, where there has been a *legal jeopardy*, it is equivalent to an aquittal, so that the prisoner is entitled to his discharge on motion; but *habeas corpus* will not lie in such a case. Maxwell's Case, 11 Nev. 428.

(*p*) Page's Case, 49 Mo. 292, 294.

(*q*) Griffin's Case, 25 Tex. (Sup.) 642; Call's Case, 2 Tex. Ct. of App. 497.

(*r*) Greenough's Case, 31 Vt. 279; People *v.* Reilley, 11 Hun. 89.

to be on the ground that while the courts have no power to control executive discretion in surrendering fugitives from justice, or to compel a surrender in such case, yet when the executive has acted, the discretion may be examined in every case where the liberty of the citizen is involved; and, also, while an affidavit need not set out a crime with all the legal exactness required in an indictment, yet it must distinctly charge an offence.(s)

An executive, however, is not warranted in interfering with courts in the exercise of their duty under *habeas corpus* proceedings. On this the supreme court of the United States remark, in a historical view of the matter: "The people of this country could hardly be brought to allow an interference of the president with the judges in any degree. The experiment was made during Mr. Adams' administration, in 1799, and signally failed. Jonathan (or Nathan) Robbins had been arrested as a fugitive, under the twenty-seventh article of Jay's treaty, for murder in the British fleet. He was imprisoned at Charleston, under a warrant of the district judge of South Carolina, and had been confined six months, when the secretary of state addressed a letter to the judge, mentioning that application had been made by the British minister to the president for the delivery of Robbins according to the treaty. The letter said: 'The president advises and requests you to deliver him up.' On this authority the prisoner was brought before the district court on *habeas corpus*, and his case fairly enough heard, to all appearance, from the accounts we now have of it, and the judge ordered the surrender in the following terms: 'I do therefore order and command the marshal, in whose custody the prisoner now is, to deliver the body of the said Nathan Robbins, *alias* Thomas Nash, to the British consul, or such person or persons as he shall appoint to receive him.' The prisoner was accordingly delivered to a detachment of federal troops stationed there to aid in the surrender, and they delivered him to an officer of the British navy, who was

(s) Manchester's Case, 5 Cal. 237. If it does so no formal defect in an indictment will be considered by the courts of the surrendering state. Davis' Case, 122 Mass. 324.

ready to receive him on board of a vessel of war, in which he was carried away. That the judge acted by order of the president, and in aid of the executive department, was never disputed, and the then administration was defended on the ground that the treaty was a compact between nations, and might be executed by the president throughout, and must be thus executed by him until congress vested the courts or judges with power to act in the matter, which had not been done in that instance. 5 Pet. Ap. 19; 7 Am. Law Jour. 13.

"The subject was brought to the notice of the house of representatives in congress by resolutions impeaching the president's conduct in Robbins' case, and where Mr. Marshall (afterwards chief justice of this court) made a speech in defence of the president's course, having much celebrity then and since for its ability and astuteness. But a great majority of the people of this country were opposed to the doctrine that the president could arrest, imprison, and surrender a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary in cases of extradition, and which example might be made a precedent for similar invasions in other cases; and from that day to this the judicial power has acted in cases of extradition and all others independent of executive control. That the eventful history of Robbins' case had a controlling influence on our distinguished negotiator when the treaty of 1842 was made, and especially on congress, when it passed the act of 1848, is, as I suppose, free from doubt. The assumption of the power to arrest, imprison, and extrude on executive warrants, and the employment of a judicial magistrate to act in obedience to the president's commands, where no independence existed or could exist, had most materially aided to overthrow the administration of a distinguished revolutionary patriot, whose honnesty of purpose no fair-minded man at this day doubts. Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that so dangerous an engine of oppression as secret proceedings before the executive, and the

issuing of secret warrants of arrest founded on them, and long imprisonments inflicted under such warrants, and then an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country. Congress obviously proceeded on this public opinion when the act of 1848 was passed, and therefore referred foreign powers to the judiciary, when seeking to obtain the warrant and secure the commitment of the fugitive, and which judicial proceeding was intended to be independent of executive control, and in advance of executive action on the case; and such has been the construction and consequent practice under the act of congress and treaty by our executive department, as we are informed, on application to that department. What aid the executive will afford to a foreign government through its prosecuting attorneys, in cases arising under treaties, rests with itself, and not with us, as acts altogether independent of the judiciary."(*t*)

On the other hand, after a commitment of the accused for surrender, and even after a refusal to discharge him on *habeas corpus*, the president may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or the evidence is not sufficient to establish the charge of criminality.(*u*)

Where the governor of Illinois had issued a warrant on a requisition from the governor of Missouri whereby Joseph Smith, the Mormon impostor, was to be delivered to the Missouri authorities for a crime which, as it turned out, was, if committed at all, committed in the state of Illinois, the United States circuit court released him on *habeas corpus*.(*v*) In Delaware, however, it has been held that the courts are powerless to examine into facts and circumstances connected with the alleged offence after the governor's warrant has been issued.(*w*)

§ 584. As to whether, on *habeas corpus*, the constitutionality of a law under which the commitment took place can be examined, has been variantly decided. The Texas court

(*t*) Kain's Case, 14 How. (U. S.) 111.
(*u*) Stupp's Case, 12 Blatchf. 501.
(*v*) Smith's Case, 3 McLean, 121.
(*w*) State *v.* Schlemm, 4 Harr. 579.

affirms the power, when it is necessary to the determination of the question of the legality of the commitment.(*x*) But in Missouri the power is denied, and it is declared, even without the statute on which the decision is based, that the authority would be impolitic; for, "admit this proceeding, and then every person charged with committing an offence of any kind or description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned. Such a precedent cannot be established, and the legislature clearly saw the impolicy of the proceeding, and placed a prohibition upon it."(*y*)

§ 585. On a return to a writ, after commitment and before indictment, additional proof may be received, in order to enable a judge to decide upon the legality of a detention.(*z*)

§ 586. On a *habeas corpus*, in a case of commitment for contempt, only two questions can be examined, namely: Had the court jurisdiction to commit? and, Is the commitment in legal form? If these are answered in the affirmative, the court issuing the writ can go no further into an inquiry as to the propriety or justice thereof.(*a*) Thus, if it be claimed that the contempt consists merely of disobedience to an erroneous order, it will not be inquired of whether the order was erroneous or not.(*b*)

(*x*) Rodriguez's Case, 39 Tex. 748.

(*y*) Harris' Case, 47 Mo. 165. And so in New York. Donahue's Case, 52 How. Pr. 251.

(*z*) People *v.* Richardson, 4 Park. Cr. 656.

(*a*) People *v.* Mitchell, 29 Barb. 622.

(*b*) Cohen's Case, 5 Cal. 494.

Where an attorney had failed to comply with a rule requiring him to pay over money to his client, and was imprisoned *for contempt*, it was held that this was not on imprisonment for debt, as prohibited by the constitution, and that the voluntary bankruptcy of the attorney, and assignment, nor his testimony that he is utterly unable to pay any part of the amount he had collected for his client, and thus to comply with the rule, could be regarded on his application for release by *habeas corpus*. Smith *v.* McLenden, 59 Ga. 523.

But where a court ordered an executor to pay a widow a definite amount monthly, during the settlement of the estate, and on failing to comply was imprisoned for contempt, he was discharged on *habeas corpus*, on the ground that the order merely created a judgment debt, and there was no contempt in the case,

§ 587. Yet it has been held that the writ will justify an inquiry into the nature and validity of process, if any, by which the detention of a prisoner is sought to be justified; and, in Wisconsin, by whatsoever authority it may have been issued, even that of the United States—a very bold claim, but, in the present case, decidedly in the interests of right and political justice.(*c*)

§ 588. *Habeas corpus* is the proper writ to annul an unlawful enlistment of minors into the army, whether citizens or foreigners, and at the instance of a master, or parent, or of the minor himself;(*d*) also of a guardian.(*e*) But no one has a right to sue out a writ on behalf of a minor unless he has a right to the custody of the minor, or else appears by the request of the minor and in his behalf, or in behalf of a guardian or other person having the legal right to the custody. *Poole's Case*, 2 McArthur, 583.

and a probate court had no power, more than any other court, to imprison for debt. Leach's Case, 51 Vt. 630.

In Wisconsin, where, in a divorce case, a child was awarded to the father, and the mother abducted it and took it out of the jurisdiction, it was held that, as the father could not recover damages for the abduction and detention, the mother could not, under the statute, be committed as for a continuing contempt, although she might be proceeded against criminally; and, being so imprisoned, she was entitled to a release on *habeas corpus*. Louisa Pierce's Case, 44 Wis. 412.

But if, in commitment for contempt, a court has regularly pursued its authority, having due jurisdiction of the subject-matter, *habeas corpus* will not lie in the case. Phillips *v.* Welch, 12 Nev. 159. And so the *regularity* of a commitment for contempt, in refusing to pay alimony, will not be reviewed by *habeas corpus*, where the commitment is regular on its face. Bissell's Case, 40 Mich. 63.

Where one was attached for contempt in refusing to obey an order to pay over money to an administrator, and appeared, and was discharged from the attachment, and yet was afterwards imprisoned for the same contempt, the commitment was held wholly void, so that a writ of *habeas corpus* would lie, (Brown's Case, 4 Col. 438,) for the principle of *res adjudicata* applies strictly in such cases. Any discharge, whether on *habeas corpus* or not, must bar a re-arrest on the same matter, (Jilz's Case, 64 Mo. 205;) as also a refusal to discharge may prevent the issuance of another writ of *habeas corpus* in the case, except on subsequently occurring events. Pattison's Case, 56 Miss. 161.

(*c*) Booth's Case, 3 Wis. 2.

(*d*) Commonw. *v.* Harrison, 11 Mass. 63; Commonw. *v.* Cushing, Id. 67; McDonald's Case, 1 Low. Dec. 100

(*e*) Commonw. *v.* Downes, 24 Pick. 227.

§ 589. *Habeas corpus* also lies to recover the custody of a child. If the petitioner, however, left the child in the custody of the respondent, a demand and refusal are indispensable to the jurisdiction of the case.(*f*)

Whether a writ of *habeas corpus* will issue from the supreme court to a person within the state to bring into the state a minor child, under guardianship therein, but detained in another state, is doubtful; as in Michigan, where the question arose, the court was equally divided on it, thereby rendering no decision.(*g*)

In a case of children the court can only determine the single question, whether they are unlawfully restrained of liberty, and order accordingly; but not questions of guardianship, appointment of trustees, disposition of property, making provision for the children's support, etc.(*h*)

Where a guardian makes application for the custody of his ward he must make his letters of guardianship a part of his petition.(*i*)

In Alabama it is held that, on *habeas corpus* sued out by the mother, a probate court cannot take an infant from the custody of the father and give it to her, when no improper restraint of the child is shown.(*j*) And, in its discretion, the court may award an infant to the father, even where the child is of an age to choose.(*k*)

And it is the general doctrine that the father's right to the custody of his children is paramount to that of the mother, although he may by misconduct forfeit that right, or lose it by disqualification, and also it may be suspended by the child's tender age. But a strong case must exist to warrant a deprivation of the father's right, even for a short time; and, especially where the wife has separated from her husband

(*f*)Speer *v.* Davis, 38 Ind. 272.

(*g*)Jackson's Case, 15 Mich. 417.

(*h*)Ferguson *v.* Ferguson, 36 Mo. 197.

(*i*)Gregg *v.* Wynn, 22 Ind. 373.

(*j*)Boaz's Case, 31 Ala. 425.

In Mississippi it is held that a widowed mother, though poor and dependent, is entitled to the custody of a thirteen-year-old son, even when he prefers to stay with a kind man, of good character and means, to whose care the father had consigned the boy. Moore *v.* Christian, 56 Miss. 408.

(*k*)Williams' Case, 11 Rich. 459.

without any sufficient excuse, she ought not to have the custody of a child unless the child's health and present condition imperatively require it.(*l*) But, if the father be dead, the mother is the most suitable person in general to have the custody of a child; yet in a contest between the surviving mother and the grandparents, respecting such custody, it is held that the interest of the child should be the governing motive of the court, and, whenever this is determined, judgment should be pronounced accordingly, irrespective of all other considerations.(*m*)

And if the father is living, but by reason of immoral or vicious habits he is unfit to have the custody and training of his child, the court will not only refuse to award it to him, but will also direct it to be taken from him and awarded to the mother;(*n*) and sometimes, in rare cases, I have known a child to be taken from both parents and entrusted judiciously to a third person, where both were unfit to care for it; and, as against the mother of a bastard child, the putative father has no legal right to its custody. The mother, as the natural guardian, is bound for its maintenance, and is entitled, therefore, to control it.(*o*)

Where a wife has been compelled to leave her husband by his ill-usage and goes to live with her father, taking her child along, the court will not take the child from her when it is well cared for, and is not likely to be so by the father, since

(*l*) People *v.* Humphreys, 24 Barb. 521.

While, as a matter of abstract law, the father, as head of the family and bound to provide for them, is entitled to the custody of the children, yet the right depends somewhat on the circumstances of the case; and so, where a mother had been deserted by her husband, without means and among strangers, and had found with her father a pleasant and permanent home, where her two infant girls were well cared for, it was held that the father could not claim the children by means of *habeas corpus*, although he had repented breaking up the family, and the mother had refused his proposals to cohabit again, and declared the separation should be perpetual. While the children could be consulted, if of the age of discretion, yet, when very young, the court must be guided by a consideration of their best interests, in view of all the circumstances. McShan *v.* McShan, 56 Miss. 413.

(*m*) People *v.* Wilcox, 22 Barb. 178.

(*n*) State *v.* Banks, 25 Ind. 495.

(*o*) People *v.* Kling, 6 Barb. 367.

a court will always, in its discretion, provide for the interests of the child.(*p*)

A child will usually be allowed to have an election where it is old enough. And it has been held that *habeas corpus* is not the proper mode for a guardian to obtain the custody of a ward under fourteen years of age, who chooses to remain with his mother, even if the guardian's right to the person of the child is perfect, and can be enforced against all others.(*q*) And where a female child, eleven or twelve years old, whose father was dead, was committed to the respondent, a Shaker, by her mother, on a verbal contract for her support and education, and afterwards a guardian was appointed for the child, who claimed her custody, the court refused to determine the rights of the guardian and the mother, respectively, on *habeas corpus*, and instead thereof gave the child the choice to go with the respondent, to whom her mother had committed her, or with the guardian.(*r*) And where a child had been bound as an apprentice in Canada, and the master had removed with her into the United States, the mother having married a second husband, the court refused to deliver her to the mother, as she expressed her inclination to remain with the master.(*s*) Notwithstanding, the mother does not lose the right of custody after the death of the father, by a second marriage. Yet, as the court always has the discretion to determine, under all the circumstances, what is for the benefit of the child, on the general principle that the proper office of a writ is to release from illegal restraint, where the party is of years of discretion nothing more is done than to discharge him; and, if otherwise, the court or judge must decide for him, and make an order to place him in the proper custody, when this has been judicially determined.(*t*) So, where a child was permitted by her parents to reside with others for a certain time, at the expiration of which these

(*p*)Nickols *v.* Giles, 2 Root, 461.

(*q*)State *v.* Cheeseman, 2 South, (N. J.) 447.

(*r*)Commonw. *v.* Hammond, 10 Pick. 274.

(*s*)Commonw. *v.* Hamilton, 6 Mass. 273.

(*t*)Armstrong *v.* Stone, 9 Gratt. 102; Rust *v.* Vanvacter, 9 W. Va. 600.

sought to detain her, and she desired to remain, it was held that, while the wishes of the child should not be disregarded, yet the controlling consideration was the best interests of the child, with a due regard to the natural rights of the father. *Shaw* v. *Nachtwey*, 43 Ia. 653. However, a father may, by voluntary contract, release his parental power over his child to another person. *Bentley* v. *Terry*, 59 Ga. 555. In making an election for the child its welfare is chiefly, if not exclusively, sought, so that parental rights are no further regarded than is for the child's good, and the court is to do what it supposes the child, were it capable of proper judgment, would do in the matter, although the discretion is not to be arbitrarily exercised, nor the rights of the parents disregarded.(*u*) The court will interfere so far, simply, as to permit them to go where they please when they can judge for themselves, and their wishes will lead them into no improper custody. And so, where the contest is between a father and a master, to whom he has bound them by valid indentures as apprentices, the court will award them to the master, if they wish to remain with him; otherwise, if they desire to go with the father the court will so order.(*v*)

An infant daughter was recovered on *habeas corpus* by a father from the custody of the respondent, although he had verbally committed her to him until she was of age, and the respondent had accordingly adopted her to be brought up as his own child.(*w*)

Where there was apparently an unjustifiable separation of husband and wife, and the father was not clearly shown to be unfit to have the custody of their child, on *habeas corpus*, brought by the father against the mother, its custody was awarded to him.(*x*) And in a case where a wife had voluntarily deserted her husband, and, returning to her father, withheld one of the children from him, with her father's countenance and consent, it was held that her father was a proper party to an action

(*u*) People *v.* Kling, 6 Barb. 368, 369.

(*v*) People *v.* Pillow, 1 Sand. 672.

(*w*) State *v.* Baldwin, 1 Halst. Chan. 454.

(*x*) Commonw. *v.* Briggs, 16 Pick. 203

by *habeas corpus*, he being a party to the wrong, and the principle herein being that, in respect to a civil injury, the law regards all who participate in it and promote it as principal wrong-doers, and severally responsible to the party injured in respect to his rights.(*y*)

An action at law otherwise than *habeas corpus* does not lie where a child is illegally restrained of its liberty; but a father who would obtain due possession of his child must do so by means of this writ.(*z*) But the original jurisdiction of the supreme court of the United States does not extend to cases of this kind.(*a*)

§ 590. In criminal cases, where an indictment has been found, the examination cannot go behind the indictment, but on a commitment before indictment the whole question of guilt or innocence is held to be open for examination.(*b*) In Iowa it has been held that the *waiver* of a preliminary examination before a magistrate does not deprive an accused person of the right to show, in a *habeas corpus* proceeding, that there is not sufficient evidence to sustain the charge against him. *Cowell* v. *Patterson*, 46 Ia. 514.

In California a person held to answer upon a criminal charge is entitled to be released, if not indicted by the grand jury at the term next after his commitment, unless good cause be shown for further detention. But this question of good cause is almost wholly subject to the discretion of the court; so that the supreme court cannot examine the sufficiency or insufficiency of the cause on *habeas corpus*.(*c*)

A prisoner will not be discharged on a merely voidable sentence, but only on one absolutely void, and the test is usually that an illegality which renders a judgment in a criminal case void, is such an illegality as is contrary to the principles of law, as distinguished from rules of procedure;(*d*) as, for instance, where a sentence is so uncertain as to be unintelligible, it is absolutely void.(*e*) In Missouri, however, no

(*y*) People *v.* Mercein, 5 Hill, 399.
(*z*) Dowling *v.* Todd, 26 Mo. 267.
(*a*) Barry's Case, 2 How. (U. S.) 65.
(*b*) People *v.* Martin, 1 Park. Cr. 187.
(*c*) Bull's Case, 42 Cal. 197.
(*d*) Gibson's Case, 31 Cal. 621.
(*e*) Roberts' Case, 9 Nev. 44.

one can be released on *habeas corpus* who is confined under an indictment. If the indictment is defective, or if it has not been tried in the time required by law, application for release must be made to the court where the matter is pending.(*f*)

In no case, under a regular indictment, can a prisoner be released on *habeas corpus* by merely proving his innocence, but he must abide his trial by jury.(*g*) Nor can one in this way take advantage of an error in granting an order by which one is held in custody,(*h*) for no writ of *habeas corpus* lies where an appeal can be taken,(*i*) and no mere errors, therefore, committed on a trial will be regarded on a hearing under *habeas corpus*.(*j*)

However, by act of congress, the authority of judges of the United States courts to grant the writ extends to cases where a prisoner is in custody under a valid conviction and sentence, but claims his release on the ground of a pardon.(*k*)

And a *habeas corpus* is always available, even where a prisoner is imprisoned under a sentence, to ascertain whether the sentence is void or not.(*l*) See § 594, *infra*.

§ 591. It is not needful to justify a writ that the proceedings should be criminal, but in arrest under civil process the legality of the imprisonment may be thus inquired into.(*m*) And yet there seems to be an exception to this in the case of

(*f*)Spradlend's Case, 38 Mo. 547. And still less can a prisoner claim a discharge on the ground of not having had a speedy trial, when he has not been refused a trial on his demand for it. Hernandez *v.* State, 4 Tex. Ct. App. 426.

(*g*)People *v.* McLeod, 1 Hill, 392.

(*h*)Hartman's Case, 44 Cal. 33.

(*i*)Platt *v.* Harrison, 6 Clarke, 79.

(*j*)O'Connor's Case, 6 Wis. 288; Max's Case, 44 Cal. 579; Eaton's Case, 27 Mich. 1; Winston's Case, 9 Nev. 75, and cases cited.

(*k*)Greathouse's Case, 2 Abb. (U. S.) 383.

(*l*)People *v.* Heffernan, 38 How. Pr. 404.

(*m*)Gilliam *v.* McJunkin, 2 S. C. (N. S.) 443.

As, for example, where a pardoned convict is imprisoned *for costs*, adjudged against him,(Gregory's Case, 56 Miss. 164;) or one in jail, under *ca. sa.* issued on a *judgment founded on contract*, may be discharged on *habeas corpus*, (David *v.* Blundell, 39 N. J. 612;) or one arrested in *breach of privilege*. Thus, in Massachusetts, where a non-resident came into the state voluntarily, to appear before a legislative committee as a witness to testify to a claim he held against the state, and was arrested on a civil execution, he was released on *habeas corpus*. Thomson's Case, 122 Mass. 428.

a bankrupt arrested on an execution in an action for deceit, since it has been held that he is not entitled to the writ on the ground that the action is founded on fraud;(*n*) and also that a debtor arrested on civil process, at the time his petition in bankruptcy is filed, cannot thereon be released by *habeas corpus*.(*o*)

§ 592. Where one is committed to jail merely for want of bail, but can be admitted to bail by an inferior court, a superior court will not issue a writ of *habeas corpus*.(*p*)

§ 593. That the wife alone was arrested, tried, and convicted on a complaint charging her and her husband jointly with selling intoxicating liquors in violation of law, and on a warrant issued against both, is not sufficient ground to release her from commitment on a writ.(*q*)

§ 594. If it appear that sentence was passed by a court of competent jurisdiction, the only inquiry on a writ that will then remain is whether the sentence is, on its face, certain and definite in its terms.(*r*) It is not necessary that the record or the commitment should state the grounds on which the charge was made, and the court, on a writ, will not inquire into those grounds.(*s*)

§ 595. In Rhode Island it is held that, where a justice of the peace committed one convicted before him of illegally selling liquors, who had prayed for an appeal, but refused to give the proper recognizance of appeal, "until discharged by due order of law the court will not, on *habeas corpus*, discharge him, but will consider itself bound to dispose of him "as law and justice shall require;" and, therefore, when the term of the appellate court is still future, will correct the error of the justice by recommitting him, by a proper form of commit-

(*n*)Whitehouse's Case, 1 Lowell, (U. S.) 429.

(*o*)Minon *v.* Van Nostrand, Id. 459.

A United States court will not release by *habeas corpus* a bankrupt imprisoned for debt under a state law, if the debt is one which will not be affected by the bankruptcy discharge; and, on application for such release, this is a fact to be inquired of. Alsberg's Case, Bank. Reg. 116.

(*p*)Belgard *v.* Morse, 2 Gray, 406.

(*q*)Dougherty's Case, 1 Williams, (Vt.) 325.

(*r*)Murray's Case, 43 Cal. 455.

(*s*)People *v.* Gray, 4 Park. Cr. 616.

ment, so that he may gain his liberty, on the statute conditions as to recognizance of appeal.(*t*)

§ 596. A person who has been confined as a lunatic, without a finding of lunacy in due form of law, will be released on *habeas corpus*, unless, in extreme cases, where the public peace or morals, or the interest of the patient, justifies and requires the confinement—even in a hospital.(*u*)

§ 597. Usually, a writ may be allowed and heard in vacation, as well as in term time.(*v*) A writ may issue from a court and be made returnable before a single judge thereof in vacation. *People ex rel.* v. *Booker*, 51 Cal. 317. And the officer who has made arrest under process is a proper party to the proceedings.(*w*) And an appeal may lie, also, in vacation, and without filing a bond.(*w*) Unless provided by statute, expressly, the state has no appeal in criminal cases, and, consequently, none from an order rendered in a criminal case on *habeas corpus*. In Alabama an appeal does not lie from an order on the hearing of a writ of *habeas corpus* for the custody of a child. *Matthews* v. *Hobbs*, 51 Ala. 210. In Texas a prisoner cannot appeal from an order dismissing his petition. *Coopwood's Case*, 44 Tex. 467. In Missouri, and in most of the states, a discharge, being in favor of personal liberty, is not subject to appeal. *Jilz's Case*, 64 Mo. 205. And the parties are not entitled to a jury, this not being a civil action within the meaning of the bill of rights.(*x*)

§ 598. It is a constitutional right to suspend the writ, when the public safety requires it, in cases of rebellion or invasion. The exercise of it during our late civil war gave rise to much bitter feeling and strife, and of course the measure, being an extreme one, should be very cautiously adopted, although it should be vigorously enforced whenever, in the discretion of the executive and legislative departments, no doubt exists as to the crisis imposing the necessity, within the meaning of the constitution. And the duty never devolves on subordinates. And so, where an order was issued in 1862 from the war

(*t*)Sullivan's Case, 5 R. I. 27.

(*u*)Commonw. v. Kirkbridge, 2 Brewst. 401, 420.

(*v*)Booth's Case, 3 Wis. 1.

(*w*)Nichols *v.* Cornelius, 7 Ind. 611.

(*x*)Baker *v.* Gordon, 23 Ind. 205.

department, professedly "by direction of the United States," directing all marshals and military officers and police authorities to arrest persons discouraging enlistments and assuming to suspend the writ of *habeas corpus* in relation to all persons arrested for disloyal practices, even within loyal states, whereas neither the president nor congress had as yet declared that the public safety required the writ to be suspended within the limits of loyal states, the order was held void by the United States circuit court, and the consequences of allowing such an unauthorized order to take effect are thus set forth by the court: "It will not be pretended that Vermont is not a loyal state. She has been and is among the first and most earnest to aid and sustain the government in putting down the causeless and atrocious rebellion which is now distracting and desolating our hitherto happy country. She has furnished more men to fight the battles of the Union than any other state of equal population, and thousands of the best and bravest of her sons now sleep the sleep of death in the swamps and on the battle fields of Virginia, Maryland, and Louisiana. The petitioner is a citizen not subject to military law, his age being over sixty, not only excusing but excluding him from military service, unless by that order every citizen is subjected to martial law. If that order is to receive the construction the marshal claims for it, then more than thirty thousand men in the states of New England and in New York —many of them of very limited intelligence and of low moral character—were authorized to arrest any citizen within these states, from the lowest to the highest, without complaint, without warrant, and without even informing their prisoner by whom, or of what, he was accused. This order assumes to authorize each of the officers or agents to determine who are guilty of disloyal practices—a phrase hitherto unknown, and, as yet, undefined in this country—and each to give his own construction to the term; and if any one of these inquisitors pretends to think that a citizen has done or said anything which he chooses to consider disloyal, the poor unfortunate—though he may be the most worthy, loyal, and patriotic person in the community—may be thrown into

prison and deprived of all opportunity of being heard before a court or a jury to establish his innocence, or of being confronted with the witnesses against him, or of even ascertaining the offence with which he is charged. Those who claim to exercise this extraordinary power may be governed by whim or caprice, personal ill-feeling, political or religious prejudice, the hope of pecuniary gain, or any other of the many unworthy motives which influence human action; and yet all classes of citizens, from the day laborer in the field to the senator in the legislative halls of the country, are subject to this despotic power: none is exempt. If one person argues that General McClellan is the most suitable person to command the army, and another insists that General McClellan ought to be removed and some other general appointed, both persons are liable to arrest, according to the peculiar views of the different agents who hear or are informed of the discussion, because each will say that such expression of opinion tends to discourage enlistments and is a disloyal practice. One argues that the Quakers ought to be subject to draft, while another insists that they ought not. Yet both are in the same danger. One claims that the principles and policy advocated by the New York *Tribune* for the prosecution of the war should be adopted and followed, while another denies it, and avers as his opinion that the policy indicated by the New York *Herald* should be pursued. Yet both are liable to arrest by a partisan of the other for discouraging enlistments. These illustrations might be extended *ad infinitum*."(*y*)

In the celebrated Milligan case, the United States supreme court was divided five to four on the questions involved therein, as to the suspension of the writ in the state of Indiana, wherein the petitioner was convicted by a military court of belonging to, and taking a prominent part in, a formidable secret conspiracy against the government.

The majority of the court held, with the minority also, that "it is essential to the safety of every government that in a great crisis like the one we have just passed through there should be a power somewhere of suspending the writ of *habeas corpus*.

(*y*)Field's Case, 5 Blatch. C. C. 67.

In every war there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies, and their influence may lead to dangerous combinations. In the emergency of the times an immediate public investigation according to law may not be possible, and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably there is, then, an exigency which demands that the government, if it should see fit, in the exercise of proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The constitution goes no further."(*z*)

The purport of the decision is that a citizen of a state where the courts are not closed by war, although the state is within an assigned military district and the citizen is charged with secret plottings to overthrow the government, has a right to the writ of *habeas corpus;* and the dangers of an opposite theory are thus set forth. The proposition is this: "That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*, and in the exercise of his lawful authority cannot be restrained except by his superior officer or the president of the United States. If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons as he thinks right and proper, without fixed or certain rules. * * * This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have humane and wise rulers, sincerely attached to the principles of the constitution. Wicked men,

(*z*) Milligan's Case, 4 Wall. 125.

ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."(*a*)

Chief Justice Chase, with Justices Swayne, Wayne, and Miller, apprehensive that this decision tended to give aid and comfort to "fire in the rear" foes, responded in a separate dissenting opinion: "We think that the power of congress, in such times and such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies, and to declare war, if not from its constitutional authority to provide for governing the national forces. We have no apprehension that this power, under an American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent, by silence, to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion or rebellion."(*b*)*

(*a*) Id. 124, 125, *passim*.
(*b*) Id. 142.

*See my late work, "Magna Charta," for an examination of this subject.

CHAPTER XX.

JURISDICTION OF MILITARY COURTS.

§ 599. Jurisdiction, ordinary and extraordinary.
600. Resistance to drafts or enrollment—enticing away out of the state—enticing a minor into the army.
601. Desertion.
602. Officer whose commission is revoked—nature of courts martial.
603. Spies.
604. Mutiny and other offences.
605. Distinction of offences at law and under military rule—distinction between martial and military law, (in foot note.)

§ 599. Courts martial may be regarded as possessing an ordinary and extraordinary jurisdiction—the first exercised over soldiers alone; the second exercised, even over civilians, when the usual courts of law are suspended by the pressure of war. We will consider the second branch first in order, since it is cognate to the topic with which the last chapter closed, namely, the suspension of the writ of *habeas corpus*.

In the Milligan case, cited in the last chapter, General B. F. Butler, for the United States, made a powerful argument, in which he maintained that it is not necessary for martial law to be justifiable that the courts should be closed for all purposes, but closed as to the peculiar questions arising in connection with the safety of the country. He said: "It is much insisted on that the determining question as to the exercise of martial law is whether the civil courts are in session. But civil courts were in session in this city (Washington) during the whole of the rebellion, and yet this city has been nearly the whole time under martial law. There was martial law in this city when, in 1864, the rebel chief, Jubal Early, was assaulting it, and when, if this court had been sitting here, it would have been disturbed by the enemies' cannon. Yet courts

—ordinary courts—were in session. It does not follow, because the ordinary police machinery is in motion for the repression of ordinary crimes, because the rights between party and party are determined without the active interference of the military in cases where their safety and rights are not involved, that therefore martial law must have lost its power. This exercise of civil power is, however, wholly permissive, and is subordinated to the military power; and whether it is to be exercised or not is a matter within the discretion of the commander. That is laid down by Wellington, and the same thing is to be found in nearly every instance of the exercise of martial law. Commanders of armies, in such exercise, have been glad, if by possibility they could do so, to have the courts carry on the ordinary operation of justice: but they rarely permit to them jurisdiction over crimes affecting the well-being of the army or the safety of the state. The determining test is, in the phrase of the old law books, that 'the king's courts are open;' but the king's court—using that phrase for the highest court in the land—should not be open under the permission of martial law. In a constitutional government like ours the supreme court should sit within its own jurisdiction as one of the three great co-ordinate powers of the government—supreme, untrammelled, uncontrolled, unawed, unswayed—and its decrees should be executed by its own high fiat. The supreme court has no superior and therefore it is beneath the office of a judge of that court, inconsistent with the tribunal whose robes he wears, that he should sit in any district of country where martial law is the supreme law of the state, and where armed guards protect public tranquillity, where the bayonet has the place of the constable's baton, where the press is restrained by military power, and where a general order constitutes a statute. On the contrary, we submit that all crimes and misdemeanors, of however high a character, which have occurred during the progress and as a part of the war, however great the criminals, either civil or military, should be tried upon the scene of the offence and within the theatre of operations: that justice should be meted out in such cases by military commissions, through the strong

arm of the military law which the offenders have invoked, and to which they have appealed to settled their rights. We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one for the mild and healthy restraints of the other. Far otherwise. We demand only that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes, that league and wait and watch without to unite with domestic foes within who had seized almost half the territory and more than half of the resources of the government at the beginning; when the capital is imperilled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of the law, is powerless; when the bayonet is called in as the final arbiter; when, on its armed forces, the government must rely for all it has of power, authority, and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future,— then we ask that martial law may prevail, so that the civil law may again live, to the end that this may be a government of laws and not of men."

But the supreme court held that although the petitioner belonged to a secret organization on the soil of Indiana, in part, and extending its ramifications throughout the north-western states, with the design of wresting the north-west from the Union, and annexing it to the Southern Confederacy, and boasting of having one hundred thousand armed men, sworn in a secret band, and actively working thus to dismember the Union, the ordinary courts were competent to cope with this formidable, undermining conspiracy!! Wherein was this different from the open operations of the rebel forces in the field, except that it was more dangerous in that it could more defiantly evade the power of the government, struggling with all its energies to maintain its existence? It does seem to me that Mr. Butler's doctrine is the only reasonable doctrine; or, at least, that the due authority of martial law is not so much a matter of mere locality as of judicial power;

and not only, therefore, where this is wholly superseded, but so far as it is superseded by overthrowing peace and safety to the government and to community, and is, therefore, powerless to arrest perilous evils immediately threatening to destroy or enervate the efforts of the government to subdue a terrible rebellion, martial law must prevail, or else we are, in such a case, helpless in the extreme. It would have been as impossible to try those one hundred thousand secret conspirators in Indiana and the north-west by the ordinary courts, as to try the whole army of the Southern Confederacy for treason. And even the court define the matter thus: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." Yes, unobstructed exercise; and, also, so far as that exercise is unobstructed.

But how, then, with a secret and formidable conspiracy concerning which the exercise of jurisdiction is obstructed, nay, wholly powerless? What, then! must that conspiracy be allowed to ply its secret arts and accomplish its designs because it is shrewd enough to organize away from "the locality of actual war," even when there is no power whatever but the martial power that can touch it at all, and that, too, when it is directly and avowedly aiming to subvert the government? And how tame does the reasoning of the majority of the court appear, when in the very midst of it they are compelled to pause and remark: "It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and an impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government and have not the excuse even of prejudice of section to plead in their favor, is wicked. But that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, and there to light the torch of civil war and thus over-

throw the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous, and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law as an example te deter others from similar criminal conduct. It is said the severity of the laws caused them; but congress was obliged to enact severe laws to meet the crisis, and so our highest civil duty is to serve our country when in danger. The late war has proved that vigorous laws, when necessary, will be cheerfully obeyed by a patriotic people struggling to preserve the rich blessings of a free government."

This case can never become a lasting precedent, partly because the court was as nearly equally divided as it could be, and partly because the dissenting minority of the court has the reason of the case so completely on their side. The true doctrine is precisely what they have stated it, namely: "Where peace exists the laws of peace must prevail. What we do maintain is that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of congress to determine in what states or districts such great and imminent public danger exists as justifies the organization of military tribunals for the trial of crimes and offences against the discipline or security of the army, or against the public safety. In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record that the state was a military district; was the theater of military operations; had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret organization, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of prisoners of war at various depots, the seizure of the state and national arsenals, armed co-operation with the enemy, and war against the national government. We cannot doubt that in such a time of public danger congress had power under the constitution to provide for the organization of a military commission, and for trial by that commission of

persons engaged in this conspiracy. The fact that the federal courts were open was regarded by congress as a sufficient reason for not exercising the power, but that fact could not deprive congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty conspirators. In Indiana the judges and officers of the courts were loyal to the government, but it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies. * * * There are, under the constitution, three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised, in time of foreign war, without the boundaries of the United States; or, in time of rebellion and civil war, within states or districts occupied by rebels treated as belligerents; and the third to be exercised, in time of invasion or insurrection, within the limits of the United States, or during the rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under *military law*, and is found in acts of congress prescribing rules and articles of war, or otherwise providing for the government of the national forces. The second may be distinguished as *military government*, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the president, with the express or implied sanction of congress; while the third may be denominated *martial law* proper, and is called into action by congress, or temporarily, when the action of congress cannot be invited, and in the case of justifying or excusing peril, by the president, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

§ 600. Under the acts of congress resistance to an enrollment, or resistance to the enforcement of a draft, and espe-

cially where the homicide of the enrolling or drafting officer or agent is involved in the resistance, is cognizable by the civil tribunals only.(*a*) Also, in Massachusetts, soliciting one to leave the state to enlist elsewhere; and the indictment is maintainable even if the person solicited was unfit to be a soldier.(*b*) Also enticing away a minor into the army.(*c*)

§ 601. But desertion is within the cognizance of a court martial, and when a sentence is confirmed it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, provided the court kept within the limits of its jurisdiction.(*d*)

§ 602. An officer whose commission has been revoked has a right to demand a trial by a court martial as to the cause of his discharge.(*e*) Such a court, however, is always *extempore*, and has but a special as well as limited jurisdiction. It is called into existence for special and temporary purposes, and when those purposes are answered it dissolves and disappears. No general duty or authority as to the collection of fines imposed is conferred upon the president of the court, who can exercise only such power as is given him specifically, and within the time prescribed.

§ 603. While a spy is triable only by a military court, yet, if peace transpires again before he is tried, he cannot be tried afterwards by any court, for the return of peace takes away such jurisdiction.(*f*)

§ 604. Mutiny and kindred offences, disrespect or disobedience to an officer, and insubordination of all kinds, are cognizable by military tribunals. And in regard to mutinous and seditious words the law is so strict that even if the words are directed against an order unwarranted by military law they are punishable; and if it is a time of war they are punished capitally. An English authority remarks: "So

(*a*) U. S. *v.* Scott, 3 Wall. 646; U. S. *v.* Murphy, Id. 652.

(*b*) Commonw. *v.* Jacobs, 9 Allen, 274.

(*c*) Bundy *v.* Dodson, 28 Ind. 295.

(*d*) Dynes *v.* Hoover, 20 How. (U. S.) 81.

(*e*) Gould's Case, 5 R. I. 598.

(*f*) Martin's Case, 45 Barb. 142. Although he may be delivered to a civil court for trial, on a charge of arson, or other civil offence. Id.

large is the scope of military law, even in ordinary and regular military law in times of peace and in this country, that it has been held, and by a court of error, that a person under military law may be liable to be put upon his trial before a court martial for insubordinate conduct, or mutinous and seditious words, even directed against an order made without authority; and that, even although on that ground the person is acquitted, he has no legal remedy, because the seditious words or conduct would be probable ground for putting him upon his trial."

§ 605. "Under martial law those acts or offences which, under common law, are only misdemeanors, and liable to the regular, deliberate legal procedure—as, for instance, seditious publications, tending to stir up sedition and rebellion—become, on account of that tendency, grievous and dangerous offences, punishable, according to military usage, by death; because, although at common law, in time of peace, they are of no great mischief, the result being trivial, in times of danger and of universal insurrection they are the most formidable and fatal offences."

However, there is a distinction, strictly speaking, between martial and military law. "The former depends largely upon the discretion of the chieftain who proclaims it; the latter is as clearly defined as is any system of statute, common, or civil law. The former may apply both to soldiers and citizens; the latter applies only to the army. In time of war all offences committed by soldiers are cognizable by courts and martial or military commissions. If the civil courts, in time of war, try and punish such offenders, it is because they are permitted to do so as a matter of comity or expediency. In time of peace a soldier of the national army can be demanded by, and surrendered to, the civil authorities, to be tried and punished by them, only when he is charged with an offence 'such as is punishable by the known laws of the land;' that is, by the laws of the United States, or of a state or territory. A city by-law or ordinance is not, in this sense, 'a known law of the land;' but a soldier who, when off duty, violates it, may be arrested in the act and restrained by the civil authorities,

but may not be tried and punished by them. It would be their duty to deliver him, on demand, to the military authorities, and the duty of the latter to enforce the law military against him. If the civil authorities refuse so to deliver up the soldier, the military authorities may take him by force; but if, instead of resorting to force, the military authorities apply to a federal court or judge, the prisoner must be discharged from the custody of the city authorities by the writ of *habeas corpus*." *Bright's Case*, 1 Utah T. 145. In time of war the authority of military tribunals may, in all things, be exclusive. *Coleman* v. *Tennessee*, 97 U. S. 509. However, it is held that the adjudications of military courts, under the reconstruction laws, are only decisive of the cases, and are not precedents. *Taylor* v. *Murphy*, 50 Tex. 291.

CHAPTER XXI.

TAXATION.

§ 606. Nature of the tax-taking power.
607. Compelling the levy of a tax.
608. *Mandamus* by the United States courts.
609. Compelling the extension of a tax.
610. Enforcing tax against delinquents.
611. Nature of proceedings against delinquents.
612. Right of court to make rules.
613. Who may apply for judgment.
614. Terms of court.
615. Personal judgments.
616. Injunction—when it will lie—general rule.
617. When courts will not grant injunction.
618. Where there is a remedy at law.
619. One who seeks equity must do equity.
620. How far courts will grant relief.
621. Parties in a proceeding to enjoin.
622. Legal remedies available—actions against officers and municipal corporations—set-offs.
623. Protection of officers.
624. Recovering back taxes involuntarily paid.

§ 606. The legislative power of taxation, either as exercised directly by the legislative body itself, or as delegated to municipalities as portions of the body politic, does not appropriately fall within the province of this work except incidentally, our subject being the jurisdiction of courts, superior and inferior, and therefore embracing only judicial action in some mode of exercise. Judicial power in this matter is limited; and, in Illinois, it is held that under a provision of the constitution that "the general assembly shall provide such revenue as may be needed, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; such value to be ascertained by some person or persons to be elected or ap-

pointed in such manner as the general assembly shall direct, and not otherwise." The courts have no jurisdiction to relieve against excessive valuation; but when a board of equalization, elected or appointed, in pursuance of such constitutional provision, have fixed a valuation, this is conclusive and final, and the courts cannot review the mode of reasoning, or the basis on which the valuation rests—fraud in the matter being alone cognizable.(*a*)

However, in the absence of a constitutional provision thus withdrawing the matter of valuation wholly from judicial consideration, and lodging it within the province of legislative discretion, exercised through a designated agency, assessors may be regarded as acting judicially, in a degree, so that their action may be properly regarded as within the compass of the present treatise. Thus, in New York, assessors are held to be *quasi* judicial officers, their assessments being in the nature of judgments, so that they are not subject to an action to review, modify, or reverse their proceedings, or to hold them to a personal liability when acting within their jurisdiction,(*b*) although, like other judges, they may, if they exceed their authority, and contravene the statute under which they act, be made responsible, in a civil action, to injured parties,(*c*) for they are subordinate officers, and must confine themselves to the legitimate use of their power, and they cannot acquire jurisdiction merely by determining that they have it. Thus, it is the province of the legislature alone to determine *what property is taxable*, or *who are taxable inhabitants*, and their decisions on such points are void.(*d*) But, with regard to particular persons, or particular property, they may be considered as acting judicially in deciding whether these fall within the legislative rule or not.(*e*) And so they act judicially in deciding upon the matter of exemptions in behalf of particular individuals; and may reject an

(*a*)Insurance Co. *v.* Pollak, 75 Ill. 292. And so in Indiana. Rhodes *v.* Cushman, 45 Ind. 85; R. R. *v.* McQueen, 49 Ind. 64.

(*b*)R. R. *v.* Nolan, 48 N. Y. 514.

(*c*)Clark *v.* Norton, 49 N. Y. 243.

(*d*)Nat. Bk. of Chemung *v.* Elmira, 53 N. Y. 49.

(*e*)Barhyte *v.* Shepherd, 35 N. Y. 238.

application for a reduction if it is not sustained by evidence satisfactory to them—unless, indeed, the exemption is *specifically* pointed out by statute, in which case there is, of course, no room for discretion;(*f*) but, for example, in deciding a matter of personal indebtedness, for exemption, they have plenary power to weigh the merits on the evidence.(*g*) And as to domicile, they may decide, and are not properly liable for any error in the conclusion. Thus, where a tax payer had a summer residence in a small town, and a winter residence in the city of Buffalo, where he resided from autumn until June, remaining with his family at the country residence during summer, all the time carrying on his principal business in the city, to which he attended personally, going to his family at night and returning to the city mornings, and the assessors of the town where he had his summer residence, not knowing he had any other residence, assessed him for personal property, and the assessment was collected, it was held that no action would lie thereon.(*h*)

In Massachusetts it is held that where tax commissioners have made an estimate of the value of the capital stock of a corporation, the judgment cannot be revised or modified by any other tribunal.(*i*) These statements may suffice for the general principle involved, and we will leave particular applications thereof to be presented below, in the present chapter.

§ 607. We proceed, now, in the first place, to notice the power of courts to *compel the levy of a tax;* after which we will treat of other judicial interferences in their due order. The general principle is that *mandamus* lies to compel a city, or other municipality, to levy a tax to pay its bond debts which have passed into judgment; and, in so doing, it is held that in order to do justice to an individual relator the court may issue a preliminary order separating his portion of the debt from that held by the others.(*j*) Where money is already collected, and is in the treasury, available for the pay-

(*f*) Prosser *v.* Secor, 5 Barb. 607.

(*g*) Vose *v.* Willard, 47 Barb. 321.

(*h*) Bell *v.* Pierce, 48 Barb. 51; but we note an exception to this below.

(*i*) Commonwealth *v.* Cary Improvement Co. 98 Mass. 21.

(*j*) *Ex parte* Parsons, 1 Hugh, 282.

ment of a judgment against a city, *mandamus* will lie against the treasurer.(*k*) A *mandamus* to compel a levy of taxes must, however, conform to the law fixing a time and mode for making levies and collecting taxes, since taxes cannot be levied or collected in any other manner than specifically prescribed by statute.(*l*) And *mandamus* does not lie to compel the payment of an unliquidated claim,(*m*) nor to compel the *allowance* of a claim, although the higher officers may be thus required to *consider* a claim,(*n*) as in the case of any other inferior tribunal. But where a *judgment* exists against a city, it is the duty of the city to pay it, and this duty can be enforced by *mandamus*, and at the instance of an assignee of the judgment.(*o*) And so, where the validity and amount of coupons annexed to bonds issued by a county in aid of a railroad corporation are definitely fixed by the statute under which the bonds were issued, so that their presentment for allowance is rendered unnecessary thereby, a *mandamus* will lie immediately to compel the levy of a tax,(*p*) by the officers whose duty it is, and on whom the official obligation lies, to provide for payment of the bonded indebtedness.(*q*)

§ 608. Where the United States courts issue a *mandamus* to compel the levy of taxes by a city to pay a decree or judgment, the effect of the writ is only limited by the state revenue law; and it may, therefore, require the levy to rest on the *entire* taxable property of the city, including all classes of property liable to general taxation by the state law; and if a city, professedly, in obedience to a *mandamus*, levies a special tax, but leaves out a part of the taxable property,—as, for instance, merchants' capital,—and the relator finds

(*k*)State *v.* Calhoun, 27 La. An. 167.

(*l*)Supervisors *v.* Klein, 51 Miss. 808. And so it has been held that as the United States courts cannot impart a taxing power to a municipal corporation, they cannot compel the levy of a tax not authorized by state law. Vance *v.* Little Rock, 30 Ark. 436.

(*m*)People *v.* Detroit, 34 Mich. 201.

(*n*)Portwood *v.* Supervisors, 52 Miss. 523; State *v.* Hamilton Co. 26 Ohio St. 364.

(*o*)Chicago *v.* Sansum, 87 Ill. 182.

(*p*)Shinborne *v.* County, 56 Ala. 183.

(*q*)City Council of Eufaula *v.* Hickman, 57 Ala. 338.

that the assessment will not be sufficient, he may apply for a further peremptory *mandamus*, commanding the levy to be extended over the omitted class of property.(*r*) And the repeal of the act, under which the creditor's right became vested, will not affect the matter.(*s*) But where territory is annexed to the city after the obligation is incurred, and a legislative act exempts the property of this portion from all liability for *previous debts*, a *mandamus* must give effect to this exemption.(*t*) Where a debt may, under a statute, be regarded as primarily payable out of special assessments, yet these being insufficient, and the bond being a positive and unconditional promise to pay, a *mandamus* will lie to compel a levy on all the taxable property of the municipality.(*u*) But where an act authorizing a county to subscribe to the capital stock of a railroad company limits the power of the county to provide for the payment of the bonds to an *annual special* tax, a *mandamus* will be restricted accordingly.(*v*)

§ 609. Not only may a court, by *mandamus*, compel the levying of a tax to *pay debts*, but also it may, likewise, compel the *extension* of a tax for definite purposes; as, for example, school purposes. And it has been held that where a county court, by an order, has prohibited the county clerk to extend a school tax upon the tax books, according to an estimate furnished him by the district directors, he may be required, by *mandamus*, to do so; the county court having no control over the clerk in regard to the assessment and extension of school taxes.(*w*)

§ 610. The aid of the courts must be called in when necessary to enforce a tax assessment against delinquents. And herein the steps required by statute must be strictly pursued, in order that the proceedings be valid. And a notice is imperatively necessary; so that a legislature itself cannot dispense with this in some form; because the constitutions all

(*r*) Memphis *v.* Brown, 97 U.S. 300.
(*s*) Memphis *v.* United States, 97 U. S. 293.
(*t*) United States *v.* Memphis, 97 U. S. 284.
(*u*) United States *v.* Fort Scott, 99 U. S. 152.
(*v*) United States *v.* Macon Co. 99 U. S. 582.
(*w*) State *ex rel.* *v.* Byers *et al.* 67 Mo. 706.

require "due process of law."(*x*) Hence, an owner may, without conferring jurisdiction, appear for the special purpose of objecting to the insufficiency of the notice, and the consequent want of jurisdiction.(*y*)

Where the statutory notice is in fact given, as required by statute, however, a mere defect in the *affidavit* of publication may be amendable.(*z*) But nothing can be allowed to dispense with a *substantial compliance* with the statute, because the proceedings are summary. Thus, since it is the report of the collector that gives the court jurisdiction to act on an application for judgment against delinquent lands, the law must be substantially complied with by such report, or the court will be without authority.(*a*) And the finding of a court, as to its jurisdiction, is held not conclusive.(*b*) In Nevada, the *publication* of a *delinquent list* is directory only, so that an omission in this respect does not avail a delinquent in a tax suit.(*c*) Where a law, however, requires it *imperatively*, yet the omission of any particular tract from it cannot be allowed to vitiate the entire assessment, or release those whose property is included in the list.(*d*)

§ 611. But, although notice cannot be dispensed with, yet the proceedings to collect delinquent taxes are of a summary character, as above stated, so that a trial by jury cannot be demanded,(*e*) as this might involve injurious delays.

§ 612. In such proceedings a court has a right, as in other cases, to make rules and orders to expedite results, and may, therefore, make a rule allowing a reasonable time to file objections to the application for judgment, and may, on noncompliance therewith, refuse to consider any default.(*f*)

§ 613. Where a constitution provides that, in all cases of

(*x*)Stewart *v.* Palmer, 74 N. Y. 183.

(*y*)Stearns Co. *v.* Smith, 25 Minn. 131.

(*z*)Mille Lacs Co. *v.* Morrison, 22 Minn. 178; Dunham *v.* Chicago, 55 Ill. 358.

(*a*)People *ex rel.* *v.* Otis, 74 Ill. 384.

(*b*)Senichka *v.* Lowe, 74 Ill. 274.

(*c*)State *v.* C. P. R. Co. 10 Nev. 78.

(*d*)C. & N. W. R. Co. *v.* People *ex rel.* 83 Ill. 467.

(*e*)New Orleans *v.* Cassidy, 27 La. An. 704; Ross *v.* Commissioners, 16 Kan. 411.

(*f*)Hess *v.* People *ex rel.* 84 Ill. 247.

sale of real estate for taxes, returns shall be made to a general officer, to be designated by the legislature, having authority to receive state and county taxes, and that there shall be no sale of such real estate for taxes but by said officer, upon the order or judgment of some court of record, such provision prohibits a court from rendering judgment for the sale of real estate for taxes on the application of any other person than the officer so authorized to make the sale.(*g*)

§ 614. And it seems that, as to terms of court, a notice of application given by such officer does not need to designate the first day of the term at which such application will be made.(*h*)

§ 615. In regard to the judgment, it is a general rule that there should be no *personal judgment* for taxes levied on real estate, but that the judgment should be against the property alone: and this applies to special assessments for municipal improvements.(*i*) In regard to a tax levied on personal property—as, for instance, a steam-boat—a personal judgment may be obtained, even where the law provides for a seizure by the collecting officer, and a sale on notice. The California court say: "We can perceive no foundation for the argument that this was intended to be the exclusive remedy. Instead of abridging the ordinary remedy by suit for the collection of the delinquent tax, it was clearly intended to afford a new, summary, effectual, and additional method for collecting it, in order to prevent the owner from evading the payment of it by a removal of the property. If a tax has been duly assessed, the owner of the property becomes personally liable for it, and the remedy is not confined to a seizure and sale of it, nor to the enforcement of a lien upon it by action."(*j*) The obligation creates a *debt* in the sense of the term when applied to a liability for the payment of money recoverable by the proper municipality.(*k*) And the United States may

(*g*) Hills *v.* Chicago, 60 Ill. 86.

(*h*) Parks *v.* Miller, 48 Ill. 360.

(*i*) Srassheim *v.* Jerman, 56 Mo. 105; Carlin *v.* Cavender, 56 Mo. 286.

(*j*) City of Oakland *v.* Whipple, 39 Cal. 115; People *v.* Seymour, 16 Cal. 332.

(*k*) Dubuque *v.* R. R. 39 Ia. 61; Dugan *v.* Mayor, 1 Gil. & Johns. 499; Mayor *v.* Howard, 6 Har. &

be a party plaintiff in the collection of a tax by action at law or suit in equity; and in such a case no set-off, however just, can be allowed.(*l*)

In Michigan the general rule is modified, so that no suit for personal property taxes can be maintained, except where the taxes have been returned unpaid, for want of property to levy on, as may be the case where the property is disposed of after the assessment, or where the assessment rests on a business or occupation. The court say: "The tax roll is itself as complete and adequate as an execution on a judgment would be if there are goods and chattels within the treasurer's jurisdiction. It would be a foolish ceremony to sue for land taxes when the land itself can be sold to pay them. But where personal taxes are unpaid, the debtor may have property subject to execution not open to seizure and sale by the treasurer, and a suit in such case is proper and necessary to secure payment. The statutory provisions are based on plain policy, and preclude the idea of suit in any case not named."(*m*) In that state, as also in others, real estate taxes may be collected by distress on goods and chattels. In case of suit there is no trial by jury, nor change of venue allowed, the proceeding being, as before remarked, summary.(*n*)

§ 616. We now take up the consideration of proceedings adverse to the assessment or collection of taxes. And first we will treat of *injunction*, as the prevalent mode of resistance; and then of other particulars, such as the responsibility of the officers, and the like.

There will be no judicial interference, on the ground of mere irregularities, or even hardships; since imperfections are unavoidable in the almost infinite range of subjects to which the taxing system must necessarily apply. The United States supreme court thus state the general rule of judicial inter-

Johns. 383; Gordon's Ex'r *v.* Mayor, 5 Gil. 231; Ryan *v.* Gallatin Co. 14 Ill. 78; Dunlap *v.* Gallatin Co. 15 Ill. 7; Mayor, etc., *v.* McKee, 2 Yerg. 167; State *v.* Poultner, 16 Cal. 514; Ins. Co. *v.* Portland, 12 B. Mon. 77.

(*l*) United States *v.* Pacific R. Co. 4 Dill. 71.

(*m*) Staley *v.* Columbus, 36 Mich. 38.

(*n*) Mix *v.* People *ex rel.* 86 Ill. 312.

ference: "We do not propose to lay down, in these cases, any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law either before or after the payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transactions between individuals, is that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the states and by the theory of our English origin, is exclusively legislative. *Heine* v. *The Levee Commissioners*, 19 Wall. 660. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner. These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax which is part of the revenue of a state. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities, we need not here inquire; but there are both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by

many of the evils that belong to it when affecting the revenue of the state."(*o*)

The particular point of inquiry, in this connection, is whether the "substantial justice" of the tax has been affected or not by an irregularity complained of.(*p*) It is not the business of a court of equity to further any scheme for the mere evasion of a tax, even if such scheme is technically legal; as, for example, where, for the purpose of evading the payment of a tax on money on deposit, which the state law required to be listed for taxation March 1st in each year, the depositor withdrew it from the bank February 28th, converted it into United States bonds, and deposited these to his general credit March 3d, a decree dismissing a bill in equity, which he brought to restrain the collection of a tax levied thereon, was held to be correct, notwithstanding such securities were exempt from taxation, since a court of equity will not employ its extraordinary powers to promote such a scheme, evidently intended to evade the party's proportionate share of the burden of taxation.(*q*) Where one appeals to a court of equity he must rely upon some substantial equity, and cannot avail himself of naked irregularities, or the neglect of mere forms, to shield himself from a past liability.(*r*)

§ 617. A court of equity will not interfere by injunction to restrain an entire tax, because, in determining the aggregate value, certain exempt property is included as a factor, not-

(*o*)State Railroad Tax Cases, 92 U. S. 614; Hannewinkle *v.* Georgetown, 15 Wall. 548; Dow *v.* Chicago, 11 Wall. 108; Tappan *v.* Bank, 19 Wall. 504; Weber *v.* Renhard, 73 Pa. St. 373; Commonwealth *v.* Savings Bank, 5 Allen, 247; Allen *v.* Drew, 44 Vt. 174; Mooers *v.* Smedley, 6 Johns. Ch. 27; Messert *v.* Supervisors, 50 Barb. 190; Dodd *v.* Hartford, 26 Conn. 239; Green *v.* Munford, 5 R. I. 478; Finnegan *v.* Fernandina, 15 Fla. 379; Burke *v.* Speer, 59 Ga. 353; Decker *v.* McGowan, 59 Ga. 805; Du Page Co. *v.* Jenks, 65 Ill. 277.

(*p*)Hart *v.* Smith, 44 Wis. 214; sometimes this is expressly provided by statute; Chiniquy *v.* People, 78 Ill. 572; Beers *v.* People, 83 Ill. 488; and no forced or unnatural construction will be placed on the words of a law in order to defeat the taxing power; Fisher *v.* People, 84 Ill. 491.

(*q*)Mitchell *v.* Commissioners, 91 U. S. 206; Ogden v. Walker, 59 Ind. 460.

(*r*)Jones *v.* Sumner, 27 Ind. 511.

withstanding jurisdiction might be entertained to enjoin the collection of a tax wholly against exempt property—the error, in such a case, being considered a mere irregularity.(*s*) Nor will jurisdiction be taken merely to test whether a complainant is in fact liable to the tax asssesed or not.(*t*) Nor to decide whether a tax is technically levied for a *corporate purpose* or not.(*u*) Nor in order to decree the *sale* of land on which taxes are assessed, even in a suit for injunction brought by the owner.(*v*) Nor can an injunction be granted in an action at law; as, for example, in a replevin suit.(*w*) Nor can a tax payer enjoin the collection of a county tax on the ground that he had paid in former years into the county treasury taxes illegally assessed and collected.(*x*) Nor in order to revise a decision of the tax officers on the matter of an exemption.(*y*) Nor in order to prevent the sale of personal property, even the property of a railroad corporation; since this would be merely interfering to prevent a trespass.(*z*) Nor can one appeal to equity on the ground of an error which is harmless or beneficial to him. Thus, where one complained of the violation of a constitutional rule of uniformity, but it appeared that his taxes would have been more if the rule had been observed, his bill was dismissed.(*a*) And so, if there is a defect in the proceedings, which, by the strict rules of law, would render them invalid, but the amount is in justice no more than the complainant ought to pay, equity will not relieve him.(*b*) And an *individual* seeking relief, either on his own behalf, or on behalf of himself and others, must be able to show a personal grievance, distinct from those of the public at large, in order to give him a standing in court,(*c*) and he cannot be allowed to complain merely that other property,

(*s*)Huck *v.* R. R. 86 Ill. 360.

(*t*)Mutual Loan, etc., *v.* McGowan, 59 Ga. 811..

(*u*)Taylor *v.* Thompson, 42 Ill. 9.

(*v*)Weber *v.* San Francisco, 1 Cal. 456.

(*w*)Spencer *v.* Wheaton, 14 Ia. 38.

(*x*)Fremont *v.* Mariposa Co. 11 Cal. 361.

(*y*)Clinton School District's Appeal, 56 Pa. St. 315.

(*z*)C. & N. R. R. Co. *v.* Ft. Howard, 21 Wis. 45.

(*a*)Miltimore *v.* Supervisors, 15 Wis. 9.

(*b*)Dean *v.* Gleason, 16 Wis. 19; and cases cited.

(*c*)Miller *v.* Grandy, 13 Mich.. 541.

alike subject to taxation, has been omitted, in order to restrain taxes properly assessed upon him.(*d*)

Again, it has been held that a bill will not lie to restrain a *misappropriation* in the disbursement of a tax(*e*) raised for general purposes;(*f*) although it is otherwise as to a special purpose; as, for instance, a donation to a railroad corporation without legislative authority, which may be enjoined at the instance of any tax payer, it seems.(*g*) Although it is a ground for the interference of equity to enjoin a sale of land for taxes that the tax is illegal and the sale will produce a cloud on the title of the owner, yet when it is manifest that the sale will be void on the face of the proceedings on which a purchaser must necessarily rely for a *prima facie* evidence of title, it is held that equity will not interfere, since a proceeding which appears on inspection to be void cannot create a cloud.(*h*) Equity will not enjoin a tax because it is levied by a *de facto* officer merely, although it may do so where the levy is made without any pretence of authority or color of office, to which the right of levying taxes is an incident.(*i*)

§ 618. If there is a complete and adequate remedy at law, equity will refuse to interfere—this being, as previously explained, a fundamental principle of equity jurisdiction. Thus, where a board has been provided, whose duty it is to hear objections, and who can be compelled by *mandamus* to exercise their discretion herein, an objector must resort to the board, and to the right to sue out a *mandamus*, before he can assert any equitable claims in the matter;(*j*) and, indeed, the findings of such board are usually final, except in way of appeal. And the right of *abating taxes* may be vested in a court,(*k*) and then will not be interfered with by equity. In Massachusetts the right to recover back illegal taxes is re-

(*d*)Muscatine *v.* R. R. 1 Dill. 536.

(*e*)Kilbourne *v.* St. John, 59 N. Y. 21; *Church*, Ch. J. and *Rapallo*, J., *dissenting;* Truesdall's Appeal, 58 Pa. St. 149.

(*f*)Commissioners *v.* Brown, 28 Ind. 128; Commissioners *v.* McCarty, 27 Ind. 475.

(*g*)Harney *v.* R. R. 32 Ind. 244.

(*h*)Bucknall *v.* Story, 36 Cal. 70.

(*i*)Munson *v.* Minor, 22 Ill. 595; Stackle *v.* Silsbee, 41 Mich. 615.

(*j*)People *v.* Otsego Co. 51 N. Y. 401.

(*k*)Cocheco Manuf'g Co. *v.* Strafford, 51 N. H. 455.

garded as an adequate remedy at law, so that the collection of taxes cannot at all be restrained in that state.(*l*) And so, formerly at least, in New York.(*m*) But in most of the states, as I judge, a bill in equity will lie to restrain the collection of an illegal tax,(*n*) in the absence of an adequate remedy at law. Where such remedy exists it must be employed. Thus, if one would restrain the sale of personal property seized for tax assessed on lands, he must show that the property possesses a peculiar value, not capable of compensation in damages.(*o*) A merely illegal and void assessment, sought to be enforced against personalty, presents no ground for equitable interference, where neither irreparable mischief nor a multiplicity of suits may be apprehended.(*p*) Where the proper forum for correcting errors is provided by a revenue law, equity will not undertake the work of revision.(*q*) It will never interfere without imperative reasons. And where the complaint was that a large sum was irregularly and illegally, and without notice, added to the complainant's list, as money at interest, the bill was dismissed because he could rectify it at law.(*r*) When there is a remedy by appeal, or by final reference to officers appointed for the purpose, equity jurisdiction is thereby excluded.(*s*) To justify it, also, there must be some act done in violation of a complainant's legal rights, or threatening him with irreparable injury.(*t*) If trespass will lie for the act, this prevents equitable interference.(*u*) Where a legal method of correction exists, a tax payer cannot loiter until it is too late to avail himself of it, and then come into equity for relief;(*v*) for equity will not aid one in default.(*w*) But it is, of course, requisite that he

(*l*)Loud *v.* Charlestown, 99 Mass. 208; Brewer *v.* Springfield, 97 Mass. 154.

(*m*)Wilson *v.* The Mayor, 4 E. D. Smith, 675.

(*n*)Zorger *v.* Rapids Tp. 36 Ia. 176.

(*o*)Henry *v.* Gregory, 29 Mich. 68; Quinney *v.* Stockbridge, 33 Wis. 505.

(*p*)Mayor, etc., *v.* Baldwin, 57 Ala. 62.

(*q*)Brooks *v.* Shelton, 47 Miss. 243

(*r*)Arnold *v.* Middletown, 39 Conn. 401.

(*s*)Stewart *v.* Maple, 70 Pa. St. 221.

(*t*)Judd *v.* Fox Lake, 28 Wis. 583.

(*u*)McPike *v.* Pew, 48 Mo. 525.

(*v*)State *v.* Ins. Co. 19 La. An. 474.

(*w*)Harrison *v.* Vines, 46 Tex. 15.

have due notice.(x) A bill must contain some peculiar ground of equitable jurisdiction in tax matters as well as in others.(y)

§ 619. The equitable maxim likewise prevails that he who seeks equity must do equity; that is to say, where a definite portion of a tax is legal, and the remainder illegal, the legal part must first be paid before equity will interfere as to the remainder.(z) And so a bill for relief must give such facts as will enable a court to separate the legal from the illegal portion, and must offer to pay the part the complainant does not dispute;(a) as, for example, if the complaint is that the authorities have charged more interest than the law allows on unpaid taxes, the legal rate must be tendered.(b) And thus as to any portion of the principal assessment.(c) And the principle extends to a proceeding instituted to set aside a tax sale of land, and enjoin the purchaser from attaining a tax deed, where there are irregularities which would avoid the deed, but do not enter into the groundwork of the assessment.(d) And it is held, in Wisconsin, that where the court, in an action to avoid taxes, is of opinion that the tax is vitiated by defects in the groundwork of the assessment, the court may stay proceedings until a re-assessment shall be made; and may thereon require the plaintiff, as a condition of relief, to pay the just amount, to be ascertained by re-assessment.(e)

A rather novel application of the general principle of doing equity occurred in an Indiana case. The stockholder of a defunct bank, on which taxes had been levied, replevied property which had been seized by the treasurer, and it was adjudged that the property belonged to him, except an iron safe, which was the property of the bank. He gave a deliv-

(x) R. R. v. Russell, 8 Kan. 558.

(y) Hoagland v. Delaware Tp. 17 N. J. Eq. 106; Price v. Kramer, 4 Col. 546; Woodward v. Ellsworth, Id. 580.

(z) City of Lawrence v. Killam, 11 Kan. 499.

(a) Palmer v. Napoleon Tp. 16 Mich. 176; Conway v. Waverly Tp. 15 Mich 262.

(b) Smith v. Auditor General, 20 Mich. 398; Roseberry v. Huff, 27 Ind. 14.

(c) Connors v. Detroit, 41 Mich. 128.

(d) Hart v. Smith, 44 Wis. 218.

(e) Plumer v. Marathon Co. 46 Wis. 164.

ery bond for the safe, and brought suit for an injunction as to the whole of the property. It was held that, as he did not offer in his bill to return the safe, nor to pay its value to the treasurer on account of the taxes of the bank, he had no equitable standing in court. Said the court: "He has no standing in court to recover from the treasurer the property of the bank. He does not offer to do equity, and a court of equity will not lend him its aid to prevent the property of the bank from being subjected to the equitable lien for taxes."(*f*)

A bill, however, may designate specially the amount of the illegal taxes complained of; and, in such case, only this is before the court, and an offer to pay the undisputed portion may be thus rendered superfluous.(*g*)

In Arkansas it is held that an excessive levy vitiates the whole tax, and a court cannot apportion on a bill to enjoin, and treat as valid so much as is not in excess of the authorized rate.(*h*) I think this is not the general rule, and, in Illinois, it has been held that where a bill is brought to enjoin the collection of a tax levied to pay county orders issued for military bounties, a part of which are unauthorized and a part warranted by law, the court should ascertain the proportion which is authorized, and reduce the levy accordingly.(*i*) This amounts to nothing more than restraining the tax so far as the illegality extends, and no further. However, it may be different where, as in the Arkansas case, the rate per cent. is beyond what the law allows to be levied.

§ 620. We now consider positively what a court of equity *will* do, as we have been noticing negatively what such a court *will not* do, in the way of restraining a tax. And, first, where municipal assessments are unconstitutional they may be set aside, as also the sales of land under them;(*j*) and in order to ascertain the fact of unconstitutionality the court will look behind the printed statutes to the legislative records to see whether the forms of the constitution were observed in the

(*f*)Ewing *v.* Batzner, 24 Ind. 410.
(*g*)Clement *v.* Everett, 29 Mich. 496.
(*h*)Worthen *v.* Badgett, 32 Ark. 20.
(*i*)Birscoe *v.* Allison, 43 Ill. 291.
(*j*)McClane *v.* Newark, 31 N. J. Eq. 472.

passage of an act.(*k*) Also, equity will interfere in cases of total illegality—that is, where a tax is assessed without any authority of law.(*l*) The general rule is that interference may be invoked where the property upon which a tax is levied is exempt, or where the tax is levied in a case not authorized by law; or in the absence of all legal power *de jure* or *de facto;* or where the persons imposing a tax have no power under the law to levy such a tax.(*m*) As to exemptions, the *business of a national bank* is an example. A tax levied on it will be enjoined because, as it is conducted under United States law, it is not subject to municipal taxation.(*n*) And so as to the *stock* of such a bank, whether included in an aggregate of a tax payer's property, or listed *co nomine*. The reason given is that a state tax on the loans of the national government would be a restriction imposed on the constitutional power of the United States to borrow money; and if there were such a right it would be unlimited in its nature, and might be employed so as to defeat the entire power of the government.(*o*)

If a tax levy is *inherently unjust or inequitable*, it may be enjoined, in Wisconsin; and a statute attempting to deprive a tax payer of the remedy by injunction, in a case where the taxes are inherently unjust or inequitable, it is held would be unconstitutional and void.(*p*) Where a statute requires the assessment of lots belonging to different owners, separately, equity will interfere in a case where two lots, owned by different persons, are valued together; and the plaintiff does not need to offer to pay any portion of the tax assessed on such valuation.(*q*) It is a ground for relief that irreparable injury may result; but a tax on a *business* cannot be enjoined

(*k*)Worthen *v.* Badgett, 32 Ark. 496.

(*l*)Drake *v.* Phillips, 40 Ill. 388. Iowa seems to be an exception, since it is the doctrine there that mere illegality will suffice. Rood *v.* Mitchell Co. 39 Ia. 446.

(*m*)Munsen *v.* Miller, 66 Ill. 380; Du Page Co. *v.* Jenks, 65 Ill. 277; and see section 616, *supra*.

(*n*)Macon *v.* First Nat. Bk. 59 Ga. 648.

(*o*)Bank of Commerce *v.* New York, 2 Black, 620.

(*p*)Whittaker *v.* Janesville, 33 Wis. 77.

(*q*)Ibid.

on the ground of possible inability of the parties to pay it, whereby it may work irreparable injury by breaking up their business—this being a mere incidental consequence that may occur under any tax.(*r*)

In Connecticut, notwithstanding the general rule above stated, that equity will not interfere in a case of mere misappropriation of a tax, unless it be to a *special* illegal purpose, it is held that where money is misappropriated, even by a vote of the town in a town meeting, equity will interfere at the instance of a tax payer; as, for example, where money is voted to aid the government in obtaining troops, in the way of paying military bounties.(*s*) Where a purpose, however, is in itself fraudulent, and even where the fraud is manifested merely by a grossly excessive valuation, a court may interpose,(*t*) under the general rule of equity jurisdiction in matters of direct fraud. And so, if there is an arbitrary injustice done, by increasing an assessment on a tax payer without notice to him, and of which he has no knowledge until it is too late to take legal steps to correct it, he may have relief in equity;(*u*) although a mere excessive valuation, by persons appointed under a constitutional provision to make such valuation, will not constitute a ground of application.(*v*) And so, in cases of *oppression*, the remedy by injunction lies; as, for example, where an ordinance required return and payment to be made within an hour after the tax should accrue, and, in case of default, doubled the tax, and directed execution to issue, and denounced a penalty for non-payment, the tyrants were held amenable to equity.(*w*)

In Wisconsin it has been held that a *deficiency of valuation*, made under a statute requiring taxes to be levied on a full valuation, is a ground of injunction, and is not obviated by the testimony of the assessor, that, had the property been

(*r*) Youngblood *v.* Sexton, 32 Mich. 407. See section 616, *supra*.

(*s*) Webster *v.* Harwinton, 32 Conn. 131.

(*t*) Pacific Hotel Co. *v.* Lieb, 83 Ill. 603.

(*u*) Cleghorn *v.* Postlewaite, 43 Ill. 428.

(*v*) Insurance Co. *v.* Pollak, 75 Ill. 292.

(*w*) Gould *v.* Atlanta, 55 Ga. 678.

thrown on the market on the day of the assessment, he believed it would not have brought more than the assessed values, so that from that stand-point he had assessed the property at its full value.(*x*) In Kansas it has been held that where the owner of a tract held it liable to assessment as a single tract of so many acres, and portions of it were assessed as town lots, he could enjoin the collection of the taxes on such assessment.(*y*) In Missouri relief will be afforded in equity, where, through ignorance of law, partly caused by the action of a court, the time of redemption from a tax sale has expired.(*z*)

As to interference in matters of tax levy upon personal property, the rule is that it will be denied. But there are some exceptional cases where the rule is departed from. Thus, in a case where a tax collector placed a tax *fi. fa.* in a sheriff's hands, with instructions to satisfy it out of the first money that should come into his hands from the sale of the defendant's property under an execution he then held, and the sheriff sold defendant's property for more than enough to pay off the tax *fi. fa.* under other executions, and application was made to the tax collector to allow the money to be paid over to such executions, which he refused, and thereon the sheriff, without consent, paid over the money to the levying executions, and then levied the tax *fi. fa.*, without further orders, on other property of the defendant, it was held that a creditor of the defendant, who had attached the property last levied on, could enjoin its sale on the tax *fi. fa.*, by alleging the insolvency of the debtor, and his inevitable loss if the sheriff was allowed to proceed.(*a*) This rests upon the ground of irreparable injury, evidently.

A *tax sale* of lands will be *enjoined* where it would be void, and the validity does not appear on the face of the proceedings; since, in such a case, the deed would be a cloud on the title.(*b*) And so equity will *set aside* such sale when it is

(*x*)Salscheider *v.* Fort Howard, 45 Wis. 521.

(*y*)Stebbins *v.* Challiss, 15 Kan. 55.

(*z*)Harney *v.* Charles, 45 Mo. 157.

(*a*)Beatie *v.* Brown, 46 Ga. 458.

(*b*)Burr *v.* Hunt, 18 Cal 303.

illegal, essentially. In a case where the entire quarter section was assessed, and the owner of three forties of it offered to pay the taxes on his three forties, and demanded a receipt therefor, and the collector refused this, but gave a receipt for the taxes on the *undivided* three-fourths of the quarter, which was received under protest, and afterwards judgment was rendered against the undivided one-fourth of the tract, and it was sold to the state, it was held the tax payer could have the sale set aside as to the three forties he claimed as owner, since the judgment should have been against the forty as an entirety, instead of against the one undivided fourth part of the quarter section.(*c*) And so a sale will be set aside, although leaving the lands under the lien of the assessment, where a statute requires a demand on the owner for personal property for payment of the taxes on the lands, of which personal property, subject to levy and sale, the tax payer has sufficient. But, in granting relief by vacating the sale, the owner will be required to pay an amount sufficient to redeem.(*d*)

A *deed* will be restrained where it will be a cloud, on condition of the payment of the legal tax, if the land has been sold on a void assessment.(*e*) And the owner may be allowed a reasonable time to pay the taxes properly due, where the sale is illegal, but the levy legal.(*f*)

§ 621. As to the *parties* in an action for enjoining taxes, an undisputed owner of land may maintain such an action with regard to taxes levied on the land; but if there is an adverse claimant he must be brought in also as a party.(*g*) Sometimes a city may be a necessary party defendant, as where a tax is levied for special improvements;(*h*) and even a county court, as where the court has issued railroad bonds, and a tax is levied to pay the interest, which is resisted on an alleged illegality of the issue.(*i*) Of course, the same rules are applied to

(*c*)Lawrence *v.* Miller, 86 Ill. 502.
(*d*)McWhinney *v.* Brinker, 64 Ind. 360.
(*e*)Seigel *v.* Outagamie Co. 26 Wis. 70.
(*f*)Petitt *v.* Black, 8 Neb. 52.
(*g*)Litchfield *v.* Polk Co. 18 Ia. 70.
(*h*)Gilmore *v.* Fox, 10 Kan. 509.
(*i*)State *v.* Sanderson, 54 Mo. 203.

corporations, such as railroad companies, as are applied to individuals.(*j*) In a suit by a railroad corporation the various counties along its line may be joined as party defendants, where the questions involved are common to all, and the counties are agencies of the state as to that portion of the taxes payable into the state treasury.(*k*)

A township cannot maintain an action to enjoin the collection of taxes levied on the taxable property of individuals. Such an action can only be maintained by the owners themselves.(*l*) Neither can one municipality restrain by injunction the collection of a tax levied by another municipality. The tax payers themselves must be the complainants.(*m*) And so parties severally taxed, and having no common interest except in the question of law involved, cannot unite on the ground of preventing a multiplicity of suits when their cases severally present no ground for equitable interference.(*n*) And where a tax, considered in the abstract, is legal and valid, but, when applied to the separate property of two or more persons, becomes, as to such property, illegal and invalid, while each may have his *separate* action for an injunction, they cannot *join* in an application.(*o*) Where there is a common interest, however, there may be a joint action; or, sometimes, one tax payer may bring an action on behalf of himself and others in like condition;(*p*) as, for example, where a whole assessment for school purposes is unauthorized.(*q*)

The rule, however, does not prevail in Illinois, where it is held that no tax payer has the right to enjoin the collection of similar taxes imposed on other persons for whom he is not an agent or trustee; since each individual's tax is a separate and distinct burden, and it would be inexpedient to allow one person, at will, to sue in behalf of himself and others;

(*j*) R. R. *v.* Elizabethtown, 12 Bush. 233.

(*k*) R. R. *v.* McShane, 3 Dill. 304.

(*l*) Center Tp. *v.* Hunt, 16 Kan. 430.

(*m*) Nunda *v.* Chrystal Lake, 79 Ill. 311.

(*n*) Youngblood *v.* Sexton, 32 Mich. 407.

(*o*) Hudson *v.* Atchison Co. 12 Kan. 140.

(*p*) London *v.* Wilmington, 78 N. C. 109.

(*q*) Williams *v.* Peinny, 25 Ia. 436.

although various persons, having a like interest, may properly join as parties to the same record in applying for an injunction.(*r*) This I take to be the general rule;(*s*) so that the court can only restrain the collection as to the parties who are actually applying for the injunction.(*t*) And thus any number of persons may join whose property is affected in common, although their interests are several.(*u*) The interests must be, however, one as to the question involved, and the subject-matter of the suit.(*v*) But it is not *necessary* that all who are alike situated as to the tax should join.(*w*)

§ 622. We now consider the *legal remedies* which may be resorted to. And herein we do not speak of the liability of tax officers to the state on their official bonds, given to secure the faithful performance of their duties, since there is nothing peculiar in this—they and their sureties incurring, by default, merely the ordinary proceedings on official bonds; and the sureties, when made liable, being, as usual, entitled to contribution among themselves and from the principal. So, let this passing reference suffice for our present purpose.

And, in the first place, we remark that, although the tax officers may sometimes be held responsible in an action of tort, yet in no case of injury, whether such as the officers are liable to an action for, or otherwise, can a municipality, at whose instance a tax is levied, be sued in tort therefor.(*x*) Where there is an assessment illegally levied, for want of jurisdiction in the assessors, the tax payer may hold the assessors liable in an action of tort, or may usually recover the amount paid under pressure from the municipal corporation. But he cannot have both; and if he proceeds in *assumpsit* against the corporation he thereby waives all right to an action of tort against the officers.(*y*)

Assessors are liable for acts *mala fide*, even in matters of discretion.(*z*) If a tax be wholly wrongful, its legality may

(*r*) Du Page Co. *v.* Jenks, 65 Ill. 276.

(*s*) See Cooley on Taxation, § 545.

(*t*) Bridge Co. *v.* Wyandotte Co. 10 Kan. 326.

(*u*) Gilmore *v.* Norton, 10 Kan 491.

(*v*) Cutting *v.* Gilbert, 5 Blatch. 259.

(*w*) Gilmore *v.* Fox, 10 Kan. 509.

(*x*) Alger *v.* Easton, 119 Mass. 77.

(*y*) Ware *v.* Percival, 61 Me. 391.

(*z*) Stearns *v.* Miller, 25 Vt. 20.

be tested by action of *case* for the wrongful assessment, or in *trespass* for the seizure,(*a*)—under the control, however, of the principles of protection stated below. In regard to personal property, *replevin* will lie to recover it from the possession of the officer who has seized it on an illegal tax,(*b*) provided there was a want of authority to levy the tax; but otherwise, not;(*c*)—that is, the seizure must be on a *void* levy.(*d*) If a collector retains a distress without sale for a longer period than that prescribed by statute, he is held to be a trespasser *ab initio*.(*e*) But not so where the statute does not prescribe a period, and the collector keeps the property a little longer than is actually necessary to give notice and make sale.(*f*) Where an action of trover is brought against an officer for the value of property taken and sold for municipal taxes, only immediate questions will be considered, and the plaintiff will not be allowed to question the regularity of the organization of the municipal corporation; the assumption of corporate powers cannot thus collaterally be assailed by a private person.(*g*) If a collector sells more than property enough to pay a just tax he is liable for the excess, although he will not be held a trespasser *ab initio*.(*h*)

A court has no jurisdiction to allow a *set-off* in an action for the collection of taxes. A municipal corporation must be permitted to collect its local revenue on principles of public policy, without any interruption by the presentation of cross demands.(*i*)

A civil action, in Mississippi, lies against a collector for printer's fees for advertising sales, individually; or, if he goes out of office, the action lies against his successor; on the ground that the officer making such sales is, under the statute, a trustee to collect the money and "costs for the persons entitled thereto."(*j*)

(*a*)Perry *v.* Buss, 15 N. H. 222.
(*b*)Floyd *v.* Gilbreath, 27 Ark. 675.
(*c*)Buell *v.* Ball, 20 Ia. 282.
(*d*)R. R. *v.* Cleino, 2 Dill. 175.
(*e*)Farnsworth Co. *v.* Rand, 65 Me. 19.
(*f*)Bird *v.* Jenkins, 33 Mich. 28.
(*g*)Ibid.
(*h*)Seekins *v.* Goodale, 16 Me. 400.
(*i*)Hawkins *v.* Sumter Co. 57 Ga. 166; Finnegan *v.* Fernandina, 15 Fla. 379.
(*j*)Moore *v.* Magee, 48 Miss. 567.

There is a barbarous enactment in Vermont which allows the imprisonment of a tax debtor, not for fraud, but merely "for want of goods and chattels whereon to make distress." But the officer is liable, as for false imprisonment, for informality in housing an impecunious delinquent.(*k*)

A tax payer may estop himself from complaining, as where he has notice of an assessment for municipal improvements, and makes no objection, but, contrariwise, encourages the work to proceed under the assurance that it will be paid for.(*l*)

§ 623. The *protection* afforded to tax officers now claims our attention. The doctrine of presumption as to them is much the same as that relating to inferior courts.(*m*) In New York, however, an assessor is held not protected in a case where he makes an honest mistake as to the residence of one who proves to be a non-resident; and he is responsible personally for the mistake, although at the time of assessment the question, from the facts brought to the knowledge of the assessor, was fairly one of doubt.(*n*) I think this decision is not a good precedent: because an assessor ought not to be put to peril for a conclusion relating to a matter of fact merely, which is to be decided on evidence presented; and there seems to be no reason or justice in holding him responsible for a deficiency of evidence. This is a hardship which should not anywhere be imposed on a useful and necessary officer in the public service. The policy of the law is, protection to those who *bona fide* and diligently perform their functions. A collector ought not to be required to look beyond his warrant, if this is regular on its face.(*o*) It is sufficient that the municipality levying the tax had jurisdiction of the subject-mat-

(*k*) Beadnan *v.* Goldsmith, 48 Vt. 403.

(*l*) Sleeper *v.* Bullen, 6 Kan. 300.

(*m*) Bate *v.* Speed, 10 Bush. 644.

(*n*) Dorwin *v.* Strickland, 57 N. Y. 492.

(*o*) Sanders *v.* Simmons, 30 Ark. 275; Bird v. Perkins, 33 Mich. 28; Erskine *v.* Hahnbach, 14 Wall. 613; State *v.* Lutz, 65 N. C. 503; Gore *v.* Masten, 66 N. C. 503; Lott *v.* Hubbard, 44 Ala. 593; Le Roy *v.* R. R. 18 Mich. 233; Noland *v.* Busby, 28 Ind. 154; McLean *v.* Cook, 23 Wis. 364; Neth *v.* Crofut, 30 Conn. 580; Watson *v.* Watson, 9 Conn. 140; Loomis *v.* Spencer, 1 Ohio St. 153; State *v.* Jervey, 4 Strob. 304; Shaw

ter.(*p*) If the paper is not a *void* paper, manifestly he has a right to rely on it. The *irregularity* must appear on the face in order to render him liable.(*q*) If the property assessed is not wholly exempt, if it is liable to taxation in any form, the assessor has jurisdiction, and the collector is safe, in pursuing his warrant,(*r*) from responsibility for all irregularities except his own.(*s*) And so an assessor is only to be held responsible for bad faith, and is not to be held liable in damages for an erroneous interpretation or application of the law.(*t*) And a collector's protection is not dependent on the assessor's jurisdiction of the person of the tax payer complaining;(*u*) but it fails where there is no color of authority in the law; and it has been held, in Ohio, that, if taxes are assessed under an *unconstitutional law*, the collector is liable(*v*) —a principle which should not prevail, because it is not the business of a collector to decide upon the constitutionality of a law, and where a law compels him to perform an act he ought not to be held responsible for the act.(*w*)

§ 624. Where an illegal tax has been levied and collected, under compulsion, there lies, usually, an action at law to recover it back. A mere voluntary payment cannot be recovered; but the payment must be compulsory to avoid distress and costs, and, in general, it must be made under direct protest.(*x*) But where one can, by application for an abatement, secure the correction of an error, he must avail himself of it, or his payment will be regarded as voluntary.(*y*)

v. Dennis, 5 Gilm. 405; Hill *v.* Figley, 25 Ill. 156; Moore *v.* Allegheny, 18 Pa. St. 55; Billings *v.* Russell, 23 Pa. St. 189; Blanchard *v.* Goss, 2 N. H. 491; Kelley *v.* Noyes, 43 N. H. 209; Brainard *v.* Head, 15 La. An. 489; Holden *v.* Eaton, 8 Pick. 436; Underwood *v.* Robinson, 106 Mass. 296; Turner *v.* Franklin, 29 Mo. 285; Walden *v.* Dudley, 49 Mo. 419; Ford *v.* Clough, 8 Greenl. 334; Norvell *v.* Tripp, 61 Me. 426; Savacool *v.* Boughton, 5 Wend. 171; Chegaray *v.* Jenkins, 5 N. Y. 376.

(*p*) Jefferson City *v.* R. R. 49 Mo. 190.

(*q*) Savings Association *v.* Lightner, 47 Mo. 393.

(*r*) Insurance Co. *v.* Charles, 47 Mo. 462.

(*s*) Carville *v.* Addition, 62 Me. 459

(*t*) R. R. *v.* Horton, 38 Ia. 33.

(*u*) Norvell *v.* Tripp, 61 Me. 426.

(*v*) Loomis *v.* Spencer, 1 Ohio St. 153.

(*w*) Clark *v.* Axford, 5 Mich. 183.

(*x*) Turner *v.* Althaus, 6 Neb. 54.

(*y*) Waite *v.* Princeton, 66 Me. 225.

The general rule is stated by the United States supreme court to be, that taxes, illegally assessed and paid, may always be recovered back if the collector understands from the tax payer that the taxes are regarded as illegal, and that suit will be instituted to recover them.(*z*) The absence of a warrant will not necessarily render a payment voluntary.(*a*) But, where a tax is paid voluntarily, technical illegalities in the assessment will not afterwards avail anything.(*b*) And where a person, with full knowledge of the facts, voluntarily pays a demand, though attempted or threatened to be enforced by proceedings, it will not be considered as paid by compulsion, and the party thus paying is not entitled to recover back the money paid, though he may have protested against the unfounded claim at the time of payment made. Where money has been paid under a mistake of the facts, or under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld from the party paying the money, an action may be maintained for the money wrongfully exacted. But such action is not maintainable in the naked case of a party making payment of a demand rather than resort to litigation, and under the supposition that the claim, which subsequently turned out to be unauthorized by law, was enforceable against him or his property.(*c*)

In Massachusetts a payment is held to be voluntary, although the tax is illegal, if made before the issuing of process for its collection.(*d*) And so, in Pennsylvania, it is held that a payment of taxes is not compulsory because made under a threat, express or implied, that the legal remedies for it will be resorted to.(*e*)

In regard to a *protest*, this is regarded as an assertion of illegality.(*f*) But, where an officer makes demand *under process*, it is held, in Michigan, that no protest is necessary.(*g*)

(*z*) Erskine *v.* Van Arsdale, 15 Wall. 75.

(*a*) Babcock *v.* Granville, 44 Vt. 326; Allen *v.* Burlington, 45 Vt. 202.

(*b*) People *ex rel. v.* Miner, 46 Ill. 374.

(*c*) Lester *v.* Baltimore, 29 Md. 415.

(*d*) Barrett *v.* Cambridge, 10 Allen, 48.

(*e*) Taylor *v.* Board of Health, 31 Pa. St. 73.

(*f*) Louden *v.* East Saginaw, 41 Mich. 18.

(*g*) Atwell *v.* Zeluff, 26 Mich. 118.

In Iowa a party paying under protest must then make demand for the return of the money before resorting to an action.(*h*) The rule of protest, in California, is that if the officer has notice of the illegality no protest is necessary; if not, a protest is necessary; it being the object of the protest to give notice that the legality is disputed.(*i*) Thus, a tax collector is bound to know the limits of his district; and if he enforces a tax beyond these limits a general protest is sufficient to authorize an action to recover it back.(*j*) The *form* of protestation is held to be immaterial, although it must be a distinct and definite protest against paying the particular tax on the ground of its illegality;(*k*) and, in the absence of a present remedy, such as abatement by application,(*l*) or some mode of effective resistance.(*m*)

In Alabama, where one promised the collector that if he would postpone the sale until the following day he would pay the taxes and costs as charged, and did so, the payment was held voluntary, and precluded an action to recover it back, notwithstanding he professed to pay under protest,(*n*) and notwithstanding the general rule that payment made under the stress of a legal process is compulsory.(*o*) If one brings replevin, and then, without protest, pays the taxes, he waives his right to recover back the taxes, the payment being regarded as voluntary.(*p*) The same principles apply to an *occupation tax*.(*q*) And they seem to apply, also, to transactions between individuals. If one, without request, pays taxes for another, he cannot recover from the latter; and this likewise applies as between corporations.(*r*) However, if one pays taxes under a title which he supposes to be valid, but which proves to be defective, he can recover from the true

(*h*) Richards *v.* Wapello Co. 48 Ia. 507.

(*i*) Meek *v.* McClure, 49 Cal. 628.

(*j*) Mason *v.* Johnson. 51 Cal. 612.

(*k*) Rogers *v.* Greenbush, 58 Me. 390.

(*l*) Salmon *v.* Hanover, 13 Allen, 119.

(*m*) Walker *v.* St. Louis, 15 Mo. 563.

(*n*) Gatchett *v.* McCall, 50 Ala. 307.

(*o*) People *ex rel.* *v.* East Saginaw, 40 Mich. 336.

(*p*) Busby *v.* Noland, 39 Ind. 234.

(*q*) Galveston Co. *v.* Gorham, 49 Tex. 279.

(*r*) Homestead Co. *v.* R. R. 17 Wall. 153.

owner the amounts he has paid during his claim of ownership.(*s*) And where a purchaser at a tax sale paid taxes after the land was redeemed, under a deed issued by mistake, he was held entitled to recover the same.(*t*) But where one relied on a receipt of a collector, given on receiving a check, which was afterwards dishonored, so that the amount was collected from the property in the hands of the purchaser, it was held he could not sue the collector.(*u*) Where a county purchases lands for taxes illegally assessed thereon, and sells the land to a purchaser, the latter can recover what he paid under the void certificate, in Wisconsin.(*v*)

To recover back payments it must be shown that the tax was erroneous or illegal in the assessment. An action will not lie to recover from the county for taxes paid merely under a misapprehension in regard to the ownership of the taxed property, where the tax payer had full knowledge of the facts upon which his claim of title is based.(*w*) The illegality may exist in the *design;* and where an action is brought to recover back money paid for a tax illegal because levied in part for an illegal purpose, it is held not to be necessary to show that the money was actually applied to the purpose.(*x*) And the illegality may be in an *overvaluation* which the assessors refuse to correct.(*y*)

The appropriate action is *indebitatus assumpsit* for money had and received;(*z*) and may be available to a private corporation, as well as an individual.(*a*)

Of course, an action will not generally lie against the state;(*b*) and in an action against a town recovery can be had only for what had been paid as town taxes and has gone into the treasury.(*c*) And, in Massachusetts, it has been held

(*s*)Goodnow *v.* Moulton, 51 Ia. 555.

(*t*)Fenton *v.* Way, 40 Ia. 196.

(*u*)Kahl *v.* Love, 37 N. J. 5.

(*v*)Marsh *v.* St. Croix Co. 42 Wis. 356.

(*w*)R. R. *v.* Webster Co. 40 Ia. 16.

(*x*)Gillette *v.* Hartford, 31 Conn. 352.

(*y*)James *v.* New Orleans, 19 La. An. 109.

(*z*)Adam *v.* Litchfield, 10 Conn. 127; Preston *v.* Boston, 12 Pick. 7; Stephenson Co. *v.* Manny, 56 Ill. 160.

(*a*)Dunnell Manuf'g Co. *v.* Pawtucket, 7 Gray, 277.

(*b*)Shoemaker *v.* Grant Co. 36 Ind. 176.

(*c*)Slack *v.* Norwich, 32 Vt. 818.

that a town is not liable for taxes paid on an assessment in a school district; the money being received by the town treasurer merely as an agent for the district.(*d*) But it is different in Wisconsin, where it is held that the town is liable on account of school district taxes, although the statute makes no provision, as in other cases, for refunding what it is compelled to pay.(*e*) In Michigan it is held that a municipality cannot escape liability on the ground that the money exacted was not designed for municipal purposes, it having been received into its treasury. *Grand Rapids* v. *Blakeley*, 40 Mich. 367.

As to the effect of *subsequent legislation* on pending causes, it is held that a repeal takes away all right, unless the repealing act expressly saves all pending suits; since such right of action does not exist at common law, but is wholly statutory.(*f*) And so an *act legalizing* the assessment under which the tax was paid has been held to take away all rights, notwithstanding the pendency of suit.(*g*)

When a *part* only of a tax is illegal, there must be a tender of the legal portion, when ascertainable, before there can be a right of action, even on an involuntary payment.(*h*)

In Massachusetts a trustee under a will cannot maintain a bill in equity against two towns, to determine in which he is liable to be taxed. He must pay, and then sue to recover it back if it proves to be erroneous.(*i*)

In New York there is no liability for an illegal assessment and payment, on the part of a municipal corporation, where the assessors had jurisdiction of the subject-matter and the party.(*j*) Nor, in any case, as to the state taxes.(*k*) It is alleged that only fraud, imposition, or extortion will give a right of action.(*l*)

(*d*) Perry *v.* Dover, 12 Pick. 206.

(*e*) Matteson *v.* Rosendale, 57 Wis. 255.

(*f*) St. Joseph Co. *v.* Ruckman, 57 Ind. 96.

(*g*) Grim *v.* School District, 57 Pa. St. 433.

(*h*) Bank *v.* Chalfant, 51 Cal. 471. Formerly it was otherwise in Massachusetts. Manuf'g Co. *v.* Amesbury, 17 Mass. 463.

(*i*) Macy *v.* Nantucket, 121 Mass. 351.

(*j*) Swift *v.* Poughkeepsie, 37 N. Y. 511.

(*k*) Bank *v.* New York, 51 Barb. 159.

(*l*) Newman *v.* Livingston Co. 1 Lans. 479.

CHAPTER XXII.

POWER OF COURTS OF EQUITY TO SELL LANDS.

§ 625. General statement.
626. Equity—no inherent absolute right to sell lands.
627. The power is statutory.
628. Law of the place controls.
629. Proceedings in partition.
630. Kinds of property subject to partition.
631. Clear legal title necessary.
632. And a present right of possession.
633. Parties in general.
634. Infant parties.
635. Duplicity in partition proceedings.
636. Sale of lands in partition.
637. Partition should be entire and thorough.
638. Parties in equity to proceedings to sell land.
639. Sales at the instance of minors as plaintiffs.
640. Estates in remainder.
641. Remainder-men must be parties.
642. Confirmation of sales.
643. Resales.

§ 625. In addition to what has previously been said in regard to the general jurisdiction of equity, we may appropriately consider here, at the conclusion of the first volume of this work, the *peculiar* province of equity to sell real estate. It does not come within our purview to treat of the sale of lands under a mortgage, any more than to treat of sales under execution by courts of law—these relating merely to means of *collecting debts*, and therefore to be regarded rather as executory than as jurisdictional.

§ 626. In pursuance, then, of our special topic here, we remark, in the first place, that even equity has no *inherent absolute right* to make *arbitrary* sales, even in the collection of debts. It must constantly be borne in mind that courts of equity are as much bound by statutory regulations as courts

of law. In this particular there can be no difference whatever. Courts of equity cannot "go beyond the law and create a new right. Equity cannot construe a statute otherwise than a court of law can. Both courts are bound by the same rules of construction, insomuch that it is a maxim that '*Equitas sequitur legem.*' Equity will remove impediments which are in the way to legal rights, and will give redress where, according to the forms of procedure at law, the complainant might have a right without a remedy, or where that remedy would be incomplete. Equity will enforce a recognized right in a manner unattainable at law; but it cannot create a right unknown to the law."(*a*) "The same rules of decision govern both courts: equity cannot, any more than a court of law, decide in opposition to legal principles in a case to which those principles are applicable; to do so would be an assumption of an arbitrary discretion as pernicious to the best interest of the community as it is contrary to the fundamental principles of our government. Even those rules of law which, in their nature, are technical and positive, cannot be disregarded by a court of equity."(*b*)

§ 627. Moreover, the power of equity, or of courts of law, or, indeed, of individuals, to alienate real estate, is wholly statutory. For example, the whole power of a court of equity to sell the lands of infants is derived from statute, and there is no such inherent jurisdiction.(*c*) The rule in this particular was first laid down in *Taylor* v. *Phillips*, 2 Ves. 23, wherein Lord Chancellor Hardwicke declared that "there is no instance of this court binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance, for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." In following this, Lord Chancellor Hart afterwards said: "I have no authority to bind an infant's legal real estate. That was decided long ago, by Lord Hardwicke, in *Taylor* v. *Phillips*. The chancellor has

(*a*)Buford *v.* Buford, 1 Bibb, 307.
(*b*)Marshal *v.* Craig, 1 Bibb, 395.
(*c*)Onderdonk *v.* Mott, 34 Barb. 113.

never since attempted to deal with the legal inheritance of infants without the aid of an act of parliament."(*d*) So that, independent of a direct authority given by statute, chancery has no power to order a sale of lands belonging to an infant, under any circumstances whatever,(*e*) for re-investment, or for any other purpose. And so a statute conferring such power must be strictly pursued;(*f*) although, of course, whatever is necessary to carry into effect the provisions of a statute may be regarded as belonging, by fair implication, to the jurisdiction.(*g*) But it is not to be inferred from the general authority of a court of equity as guardian of infants, that it may sell their real estate whenever it is for their advantage to do so. The power must be expressly conferred, although, when conferred, it carries with it the incidental methods of giving it effect.(*h*) We shall have occasion to recur to this subject again. See sections 634, 638, 639, 641, *infra*.

The same principles apply to the sale of real estate belonging to insane persons.(*i*) And to all persons or corporations under disability; as, for example, religious corporations.(*j*)

§ 628. Moreover, it is the *law of the place* where land is situated which governs all alienations, whether by individuals or by courts; title can only be acquired and lost in the manner indicated by the local statutes;(*k*) and whether by deed or by devise.(*l*)

§ 629. We will now proceed to consider *proceedings in partition*, which often involve sales, and which, even on division, partake of the nature of judicial transfers. Essentially, a proceeding in partition is an equitable proceeding;(*m*) although it is held that the jurisdiction may be exclusively transferred to a court of law by statute;(*n*) and it may even be given to

(*d*) Russel *v.* Russel, 1 Malloy, 525.

(*e*) Rogers *v.* Dill, 6 Hill, 417.

(*f*) Vowless' Heirs *v.* Buckman, 6 Dana, 466.

(*g*) Williamson *v.* Perry, 8 How. 556.

(*h*) Faulkner *v.* Davis, 18 Gratt. 651.

(*i*) Wing *v.* Dodge, 80 Ill. 567.

(*j*) Burton's Appeal, 57 Pa. St. 213.

(*k*) U. S. *v.* Crossley, 7 Cranch, 115; Clarke *v.* Graham, 6 Wheat. 577.

(*l*) McCormick *v.* Sullivant, 10 Wheat. 192.

(*m*) Deery *v.* McClintock, 31 Wis. 195; Howey *v.* Goings, 13 Ill. 95.

(*n*) Wilbridge *v.* Case, 2 Carter, 36.

a probate court;(*o*) which may then order a sale of lands;(*p*) and the decision of a probate court herein, it is held, cannot be collaterally questioned.(*q*)

As in other cases, so in matters of partition, a court of equity will adjudicate all the equities arising out of the common tenancy, and adjust its decree to the full exigency of the case.(*r*) And it is not a necessary preliminary to the commencement of proceedings that an attempt should be made for a private partition.(*s*)

And, in general, mere *statutory regulations* do not take away the original jurisdiction of equity in matters of *partition.*(*t*) The jurisdiction existed at common law,(*u*) and therefore it can only be withdrawn by an express statute, and not by one giving concurrent authority to other courts.

§ 630. As to the *kinds of property* subject to the jurisdiction, it has been held, in New York, that *personal property* may be partitioned in equity, or sold, if necessary.(*v*) But this seems to me anomalous. Real property, to be the subject of partition, must be held jointly, in common, or in coparcenary. Premises belonging in severalty to two, and no portion of them belonging jointly to both, are not a proper subject of jurisdiction in this regard; as, for example, different portions of a building, held under separate deeds by different parties.(*w*) Nor is it all property which is jointly held that can be partitioned. Thus, association property, held in common by a community, under a *renunciation of individual rights* of property, cannot be divided among the members by partition proceedings.(*x*) But it is held that real property which constitutes a stock in trade of a partnership may be partitioned—there being no outstanding firm liabilities.(*y*) There can be no partition of a homestead held in common

(*o*)Cox *v.* Ingleston, 30 Vt. 258.
(*p*)Kann's Estate, 69 Pa. St. 219.
(*q*)Davis *v.* Wells, 37 Tex. 606.
(*r*)Packard *v.* King, 3 Col. 212.
(*s*)Lake *v.* Jarrett, 12 Ind. 395.
(*t*)Patton *v.* Wagner, 39 Ark. 233.
(*u*)Hopper *v.* Fisher, 2 Head, 253
(*v*)Tinney *v.* Stebbins, 28 Barb. 290.
(*w*)McConnel *v.* Kibbe, 43 Ill. 13.
(*x*)Goesele *v.* Bimeler, 14 How. 589.
(*y*)Patterson *v.* Blake, 12 Ind. 136.

by a family, for this would be to break up the homestead.(*z*) A water-power, mills, and machinery, held in common, may be partitioned all together.(*a*) And so it is with mining claims, even upon the public mineral lands of the United States; for here the claimants are owners against all other persons, and have vested rights founded on their possession and appropriation of the land containing the mine.(*b*)

Until the time of Henry VIII. partition was confined to coparceners, but during his reign a statute was enacted which extended the right to co-tenancy as well.(*c*)

§ 631. The matter of a *clear legal title* is of primary importance in partition proceedings, and in questions of jurisdiction. Equity will not make partition while the legal title is in dispute;(*d*) although, as lately in Illinois and Tennessee, a court of equity may, as an incident, be endowed with power to settle the title. In Connecticut, however, it is held that the law providing for the partition of real estate contemplates an equitable partition according to real ownership, rather than a partition according to the precise legal interests; yet where the legal interests are certain, and the facts render the equitable proportions entirely uncertain, it is held the safe rule is to follow the legal title.(*e*) In Iowa it is held that even equitable titles are a proper basis for partition.(*f*) The exact opposite is held in Illinois;(*g*) and this is, I think, in consonance with the general rule. Yet, where an exercise of equity jurisdiction in removing clouds on the title is a necessary preliminary to a partition, this may, no doubt, always be obtained.(*h*) But, where necessary, a title at law must be first established before equity will decree partition.(*i*) Equity

(*z*) Trotter *v.* Trotter, 31 Ark. 145; Nicholas *v.* Purczell, 21 Ia. 266; Burns *v.* Keas, 21 Ia. 312; Dodds *v.* Dodds, 36 Ia. 312.

(*a*) Cooper *v.* Water-power Co., 42 Ia. 398; De Witt *v.* Harvey, 4 Gray, 497; Hills *v.* Dey, 14 Wend. 206; Morrill *v.* Morrill, 5 N. H. 134; Hanson *v.* Willard, 12 Me. 142.

(*b*) Hughes *v.* Devlin, 23 Cal. 501.

(*c*) Coleman *v.* Coleman, 19 Pa. St. (7 Harris,) 100.

(*d*) Hardy *v.* Mills, 35 Wis. 141.

(*e*) Kelley *v.* Madden, 40 Conn. 274.

(*f*) Welch *v.* Anderson, 2 Clarke, 299.

(*g*) Williams *v.* Wiggand, 53 Ill. 233.

(*h*) Leverton *v.* Waters, 7 Cold. 20.

(*i*) Shearer *v.* Winston, 33 Miss. 149; Hassam *v.* Day, 39 Miss. 392.

will only settle equitable titles,(*j*) unless otherwise provided by express statute. And so, where a pure question of law is presented in the construction of a deed, it has been held that equity will require the title to be established at law as to the deed in question;(*k*) for, in general, a bill for partition will not lie where the title is denied, or where it depends on doubtful facts, or on questions of law.(*l*) If the title in dispute, however, is an equitable one, the court may, as above remarked, settle it; but otherwise, in the absence of an express statute, it can only retain the cause to afford the parties the opportunity of settling the matter of title at law, or else dismiss the petition, as the circumstances may seem to require.(*m*)

§ 632. A *present right of possession* is also a prerequisite to the exercise of the jurisdiction. A mere right of entry is not sufficient. Where lands are held adversely, so that the possession amounts to a disseizin of the petitioner, and the premises were never held by them together, the petition cannot be sustained.(*n*) And a tenant in common of a mere reversion in land expectant on a lease for years, cannot have a partition; and if he brings a petition when he has no present right of possession, and acquires such right pending the proceedings and before hearing, this subsequent right will not save the jurisdiction and entitle him to a decree.(*o*) Estates in remainder, or reversion, are always excluded,(*p*) except where they have become immediate, carrying a present right; when they are, of course, subject to the jurisdiction, as any other estate.(*q*) And the same principles apply to an estate held in trust.(*r*)

Actual occupancy is not required; partition may be made

(*j*)Carter *v.* Taylor, 3 Head, 30.

(*k*)Horton *v.* Sledge, 29 Ala. 478.

(*l*)Dewitt *v.* Ackerman, 17 N. J. Eq. 215; Manners *v.* Manners, 16 N. J. Eq. 384; Van Riper *v.* Berdan, 2 Green, N. J. 132; Wilkin *v.* Wilkin, 1 Johns. Ch. 111; Coxe *v.* Smith, 4 Johns. Ch. 271; Blymman *v.* Brown, 2 Vern. 232.

(*m*)Ducas *v.* King, 2 Stockt. 277.

(*n*)Brock *v.* Eastman, 28 Vt. 658.

(*o*)Hunnewell *v.* Taylor, 6 Cush. 472.

(*p*)Robertson *v.* Robertson, 2 Swan, 197.

(*q*)Tindal *v.* Drake, 51 Ala. 577.

(*r*)Ibid.

of unoccupied or vacant lands, the law itself annexing the *right of possession* to an undisputed title.(*s*) The requirement is that there should exist a *present* and *undisputed right* of possession. And this requirement extends so far that partition will not be granted until an estate is settled, for the lands may be needed to pay the debts of the estate, so that the right of the heirs is not absolute until it is ascertained that the lands will not be needed for this purpose.(*t*)

There seems to be an exception in Maine as to an adverse occupation. The court holds that unless the adverse possession has continued long enough to ripen into a title, partition may be made of the lands the disseizor occupies, and without making him a party.(*u*)

But the general rule is as I have stated above. On this, the Mississippi court remark: "The rule is that a court of equity will never grant relief when the complainant's title is denied, or suspicious, until he has established his title at law. Partition can only be made between those in the actual or constructive possession. Other claimants must establish their right by suit at law, and obtain actual seizin before they can demand partition. A mere right of entry will not sustain a proceeding for partition."(*v*) It is not necessary, however, that all should have the *same possession*. One may have an *actual*, and another—as, for example, a sole remainder-man—may have a *constructive* possession; and the latter can maintain a bill for partition.(*w*) The common-law rule still prevails that one must be in possession, *or seized*, in order to have a standing in court:(*x*) but *actual occupancy*, as above remarked, is not necessary. It must be a *present right* of possession, and not a mere *right of entry*, as for condition broken.(*y*) And a bill will not lie to compel

(*s*) Byers *v.* Danley, 27 Ark. 77.

(*t*) Beecher *v.* Beecher, 43 Conn. 557

(*u*) Tilton *v.* Palmer, 31 Me. 487.

(*v*) Spight *v.* Waldron, 51 Miss. 360; Shearer *v.* Winston, 33 Miss. 151; Price *v.* Crone, 44 Miss. 577; Clapp *v.* Bromagham, 9 Cow. 530; Wilkin *v.* Wilkin, 1 Johns. Ch. 111; Brock *v.* Eastman, 28 Vt. 658. A mere judgment *lien*, however, conferring no title, does not hinder a partition. Danton *v.* Woods, 19 La. An. 358.

(*w*) Sullivan *v.* Sullivan, 4 Hun. 200.

(*x*) Adams *v.* Iron Co. 24 Conn. 230.

(*y*) Whitten *v.* Whitten, 36 N. H. 326.

persons in adverse possession of lands to surrender them, in order that they may be partitioned, even though the bill alleges that all parties claim under the same will, and prays the construction of the will;(*z*) unless the matter involves mere equitable rights, in contradistinction to legal rights.(*a*) And so, where one tenant in common ousts another, the latter must establish his title at law, in the absence of a statute giving the equity court incidental jurisdiction to settle all titles, before he can maintain an action for partition;(*b*) and an *exclusive possession* may amount to an ouster; if it does not, it will not exclude partition.(*c*)

And where one holds an irrevocable power of attorney to sell lands for the benefit of the owners, none of the owners can maintain a suit for partition without the consent of all; because here is a barrier both to title and possession.(*d*)

In Massachusetts it is held that although a mortgagee in that state is regarded as the owner of the fee, and consequently has a present right of possession, even before condition broken, yet the right of the mortgagor, as against all others, will entitle him to maintain a suit for partition against others; although, in such case, the mortgagee is not a proper party,(*e*) which disability extends so far that if one tenant in common becomes assignee of a mortgage on the lands, his co-tenants, who derive their title as heirs at law of the mortgagor, cannot maintain a petition for partition against him, even if the mortgage and assignment are not recorded.(*f*) On the principle that a present right of possession is essential, one who has title only under a deed which reserves to the grantor, who is still living, the use and occupation of the premises during his life, cannot have partition.(*g*)

§ 633. As to *parties, in general*, these should be all parties in being having a present estate or right in the lands, or a future interest, and whether vested or contingent. While

(*z*) Albergottie *v.* Chaplin, 10 Rich. Eq. 428.

(*a*) Rozier *v.* Griffith, 31 Mo. 171.

(*b*) Rozier *v.* Johnson, 35 Mo. 326.

(*c*) Wommack *v.* Whitmore, 58 Mo. 448.

(*d*) Selden *v.* Vermilya, 2 Sandf. 568.

(*e*) Fuller *v.* Bradley, 25 Pick. 9.

(*f*) Blodgett *v.* Hildreth, 8 Allen, 186.

(*g*) Nichols *v.* Nichols, 28 Vt. 228.

a *complainant* must have a present right of possession, as above explained, yet *all interests* of persons in being should be brought before the court, in order that full equity may be established, in view of all equitable rights in the matter, and then the decree is conclusive of the rights of all, and a sale will bar the future contingent interests of persons not *in esse* at the time, even though no notice is published to bring in unknown parties, and although such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action.(*h*) There is a distinction in this matter, as above intimated, between plaintiffs and defendants, for, although remainder-men and reversioners may and should be made *defendants*, they cannot *institute proceedings*, at least against others not seized of a like estate in common with them. The right is only given, as we have already considered, to one having actual or constructive possession, which a remainder-man has not, during the continuance of the intervening estate.(*i*) A *purchaser* of a *homestead right*, surrendered by deed of a husband and wife to him, may maintain a suit for partition against others holding with him title in the tract of which the homestead was an undivided part before the sale to him. The homestead right, as to its peculiar nature, is, of course, annulled by the transfer, and the purchaser holds the fee.(*j*) And so heirs of one tenant in common may maintain a suit for partition jointly with the survivors, all deriving title from a common source.(*k*)

As in other cases, non-resident defendants may be brought before the court by means of statutory notice.(*l*)

Neither the *administrator* of an estate, nor a *creditor* thereof, is a necessary party, even in a state where partition is allowed before a settlement of the estate, and even if the personal property is insufficient to pay the debts. In such case the partition is made subject to the claims of the creditors of the estate, and to the right of the administrator to

(*h*) Brevoort *v.* Brevoort, 70 N. Y. 136; Kester *v.* Stark, 19 Ill. 328; Whitman *v.* Reese, 59 Ala. 532.

(*i*) Sullivan *v.* Sullivan, 66 N. Y. 37.

(*j*) Ferguson *v.* Reed, 45 Tex. 575.

(*k*) Tindal *v.* Drake, 51 Ala. 574.

(*l*) Platt *v.* Stewart, 10 Mich. 260.

apply for leave to sell the lands for the payment of the debts.(*m*)

Where a statute does not permit a disinheritance of any lawful heir, if a child be omitted from a will he may bring an action for partition, in order to have a proper share assigned him.(*n*)

In North Carolina it is held that a *widow* entitled to dower is a necessary party to partition proceedings.(*o*) But it is otherwise decided in Rhode Island, on the ground that dower before assignment is not an estate, but a mere right.(*p*) In Mississippi a widow may institute partition proceedings in order to have her dower assigned.(*q*)

Where parties holding a lien on any of the undivided interests, such as a mortgage, are made party defendants, they will be bound by the decree of partition, and will be limited in their claims to the share set off in severalty to the party under whom they claim.(*r*)

Where one of the parties *becomes a bankrupt*, during the proceedings, the partition is not thereby prevented; but the assignee merely takes subject to the right of the other parties.(*s*)

§ 634. In regard to *infant parties*, we remark that minors may be either plaintiffs(*t*) or defendants in partition proceedings. If defendants, they must be brought before the court in the manner prescribed by statute.(*u*) And they may be plaintiffs *jointly*, in an *ex parte* proceeding, either with adults or where all are minors;(*v*) and so plaintiffs and defendants may all be minors.(*w*) As to parties not *in esse* they are represented by those who take subject to their rights.(*x*)

An infant cannot be brought before the court by means of

(*m*)Speer *v.* Speer, 14 N. J. Eq. 240.

(*n*)Gage *v.* Gage, 9 Fost. 533.

(*o*)Gregory *v.* Gregory, 69 N. C. 522.

(*p*)Hoxsie *v.* Ellis, 4 R. I. 123.

(*q*)Hill *v.* Gregory, 56 Miss. 341.

(*r*)Milligan *v.* Poole, 35 Ind. 68.

(*s*)Baum *v.* Stern, 1 Rich. (S. C.) 415.

(*t*)Waugh *v.* Blumenthal, 28 Mo. 463; Thornton *v.* Thornton, 27 Mo. 302; Burks *v.* Burks, 7 Bax. (Tenn.) 353.

(*u*)Nichols *v.* Mitchell, 70 Ill. 258.

(*v*)Larned *v.* Renshaw, 37 Mo. 458.

(*w*)Wilson *v.* Duncan, 44 Miss. 648.

(*x*)Reinders *v.* Koppelmann, 68 Mo. 482.

the entering of an appearance for them by a guardian *ad litem* in a partition proceeding. There must be a statutory service; and if there is not, the whole proceeding is void as to them,(*y*) and they will have a right to disaffirm on arriving at full age, although they may estop themselves from doing so if they receive, on settlement with their guardian, the proceeds of the partition sale.(*z*)

§ 635. It is held that *duplicity*, or what is called in equity multifariousness, will not be allowed in partition suits any more than in other suits. Thus, where one is a tenant in common of two parcels of land in different proportions,—of one as co-tenant with one person, and of the other as co-tenant with the same persons and others,—he cannot have a decree for partition of both in one proceeding.(*a*) Division cannot be made of two tracts of land by means of one suit, unless they are owned throughout by the same persons.(*b*) But lands jointly owned in *two or more counties* may be partitioned in the same proceeding.(*c*)

§ 636. Where lands cannot be *equitably partitioned*, it is competent for the court to *order a sale* in order to make an equitable division of the proceeds.(*d*) However, in Louisiana, if some of the parties are minors, the statute requires the consent of the family to sell on *terms of credit*.(*e*) Usually, I suppose, the sale in partition should be for cash, where a decent price can be thus obtained. In Alabama, a sale cannot be made at all without consent of the parties. If the premises are not susceptible of an exact division, they may be divided into unequal shares, and compensation allotted from one to another(*f*)—a system which I think might impose much hardship in special cases. Yet a sale in partition is not to be considered in any instance as *in invitum*, like a sheriff's sale on execution:(*g*) nor as *divesting title*, but rather as

(*y*) Chambers *v.* Jones, 72 Ill. 275.

(*z*) Walker *v.* Mulveau, 76 Ill. 18; Corwin *v.* Shoup, 76 Ill. 246.

(*a*) Hunnewell *v.* Taylor, 3 Gray, 111.

(*b*) Kitchen *v.* Sheets, 1 Carter, (Ind.) 138.

(*c*) Daniels *v.* Moses, 12 S. C. 130.

(*d*) Higginbottom *v.* Short, 25 Miss. 160.

(*e*) Morgan's Succession, 12 La. An. 153.

(*f*) Oliver *v.* Jernigan, 46 Ala. 41.

(*g*) Packman *v.* Meatt, 49 Mo. 349.

defining it, and dissolving the tenancy in common.(*h*) The proceeding dissolves the unity before existing, so as to enable each owner to have, possess, and enjoy, in severalty, his own share of the estate under his original title.(*i*) And, so far as infants are concerned, the proceeds of a sale retain the character of real estate for the purpose of succession, until they vest in some one who has capacity to change the nature of the estate, and give it the character of personalty; unless, indeed, the law of the place prescribes differently; in which case they will be regarded elsewhere as personalty.(*j*)

Where necessary, the action of the court is to order a sale and distribution. And it is necessary where the estate cannot be divided without injury. A case came to the United States supreme court, from California, involving a hotel and the land on which the celebrated big trees of Calaveras stand. The court said therein: "These trees are ranked among the curiosities of the world. One of them, as the evidence shows, was twenty-five feet in diameter when it was cut down, and took five men twenty-two days to cut it down. Others still standing are thirty feet in diameter. The place is visited by people from all parts of the world, to see these trees; and the hotel did a profitable business for this reason. It is apparent that the joint ownership of this property must make it far more valuable than it would be if split up into small pieces, held by persons who would be rivals for the profits arising from visitors," and it was held, therefore, not susceptible of division.(*k*) Where a sale is made the court has jurisdiction for the distribution of the proceeds;(*l*) and will order a sale when this is advantageous to all the parties.(*m*)

Preliminary to a sale, it is, perhaps, generally requisite to appoint commissioners to report on the feasibility of making

(*h*) Harlan *v.* Langham, 69 Pa. St. 235.

(*i*) Tabler *v.* Wiseman, 2 Ohio St. 208.

(*j*) Oberle *v.* Lerch, 3 Green Ch. 346. To the same effect see Horton *v.* McCleary, 47 N. Y. 21.

(*k*) Bridges *v.* Sperry, 95 U. S. 406.

(*l*) Halstead *v.* Halstead, 55 N. Y. 442.

(*m*) Graham *v.* Graham, 8 Bush, 334; Metcalf *v.* Hoopingardner, 45 Ia. 510.

a division. In some states this is so imperative that a sale is void without it, and it cannot be done after the sale is made, so as to support the sale by showing its necessity.(*n*)

§ 637. The work of partition should be *thorough*, extending to the entire tract, and one tenant in common cannot properly be allowed to have partition of only a part of the common property, and have his entire interest located in that part.(*o*) Yet, if it appears during the proceeding that the parties are only tenants in common of a part of the tract described in the petition, the court may make partition of that part.(*p*) And, also, petitioners may elect to consider their share as an undivided part, and thus have partition from the other tenants in common made defendants, and thus continue joint tenants among themselves.(*q*)

§ 638. The foregoing may suffice as an outline explanation of jurisdiction in matters of partition. We proceed to consider other phases of the power of equity in making sales of land. And, throughout, the principle prevails that all persons with *vested rights* of any kind must be made parties to the proceedings, or otherwise the decree will not bind them. And, although equity—or perhaps it would be more proper to say *because* equity—is regarded as having especial charge of infants and their property, there is no inherent power to make sales of their lands for purposes of re-investment, merely on the judgment of the court that their interests will be thereby promoted. The power must be derived from statute, and must be strictly pursued, and the infants concerned must be made parties to all proceedings for the disposition of their interests.

It is true that, as intimated, a court of equity has a *protective jurisdiction*, which must, in the proper mode, "be brought into activity and life whenever non-action would result in the loss and destruction of the infant's estate. And if there be no guardian, the court must act without a guardian in all cases where the act required to be done is such that it can

(*n*)Denning *v.* Clark, 59 Ill. 218.
(*o*)Sutter *v.* San Francisco, 36 Cal. 113.
(*p*)Baldwin *v.* Aldrich, 34 Vt. 526.
(*q*)Ladd *v.* Perley, 18 N. H. 396.

be performed with fidelity and proper care by the ordinary machinery of the court. No one may be willing to qualify as guardian. The court has no power to enforce the acceptance of that trust by any one; but it has masters and commissioners amenable to it, and when the act to be done for the protection of the infants can be done by one of these officers, the court cannot refuse to act for the reason alone that there is no guardian." So remarked the Mississippi court, in a case where land held in trust for infants was sold for taxes, and they, having no guardian, applied to the court for the right to redeem, by having a part of the land itself sold and the proceeds applied to this purpose—they having no other property with which to redeem. And the court went on to say further: "The facts stated in the bill present a strong claim for the interposition of a court of equity. Under the statutes as they existed at the time the sale for taxes was made, the appellants were entitled to redeem their land at any time before the expiration of one year after they attained their majority. In the meantime—that is, during the period intervening the lapse of two years from the date of the sale and the time they should redeem, or validly offer to redeem—they were not entitled to any rents or profits of the land, and were liable, when they came to redeem, for any valuable improvements made on the land by the purchaser. They were without any other property, and were consequently unable, as they allege, to redeem, except through the means to be derived from the land. As the case stood at the filing of the bill, they could derive nothing from the land in the way of rents; and, necessarily, a resort must be had to a sale of a portion of it in order to save the remainder. If they had been adults, they could have sold the land, or any portion of it, during the time they were allowed to redeem, and applied the proceeds to that purpose. Being incapable, from their infancy, of making a sale, and having no guardian who could make application to the court for a sale, it must result that they could apply themselves, through their next friend; or we must conclude that, being entitled to a valuable estate, they are com-

pelled, by some inexorable rule of law, to suffer in want and poverty, and allow the whole of their estate, by lapse of time, to be lost to them forever from an incapacity on the part of any court to permit their parting with their claim to a portion of it as a necessary means of saving the remainder. The control of infants and their property constituted one of the original subjects of the jurisdiction of the chancery court;"(*r*) that is, protective jurisdiction.

And the Arkansas court remark: "The general jurisdiction over the persons and property of minors belongs to the chancery courts. It is a very high trust, involving the most delicate and important interests of a helpless class, which is peculiarly the subject of the jealous and watchful care of chancery, and which is peculiarly liable to injury from the greed of crafty men and the carelessness of relations."(*s*)

It is even intimated, by the New York supreme court, that a court has the power, and that it is the duty of the court, to exercise it and interpose in behalf of an infant party, *without his application*, in order to prevent a sacrifice of his property in a sale which has taken place, and to direct a resale;(*t*) which is certainly correct in principle. For, in all cases of the sale of real estate belonging to minors, for purposes of re-investment and the like, the court is bound to see that the minors' interests are thereby promoted.(*u*) And, for this purpose, all sales under decree are subject to the supervision of the court.(*v*) Indeed, the court is held to be the *vendor*, and so will confirm or reject the sale as the law or justice of the case may require.(*w*) The commissioner making the sale is merely the agent of the court.(*x*) In North Carolina it is held that, where a public sale results unsatisfactorily, the court has power to confirm a *private sale* after-

(*r*) Johns *v.* Smith, 56 Miss. 731, 732, *passim*.

(*s*) Myrick *v.* Jacks, 33 Ark. 428. And see Lee *v.* Lee, 55 Ala. 590, for a full explanation of this matter.

(*t*) Lefevre *v.* Laraway, 22 Barb. 176.

(*u*) *Ex parte* Jewett, 16 Ala. 410.

(*v*) Coffey *v.* Coffey, 16 Ill. 144, and cases cited.

(*w*) Thomason *v.* Craighead, 32 Ark.

(*x*) Parratt *v.* Neligh, 7 Neb. 456.

wards on an advantageous offer for infants' lands.(*y*) See § 626, *supra*, and §§ 639, 641, *infra*.

§ 639. Not only, as above stated, may sales be ordered *at the instance* of infants, for their benefit, but they may be made *defendants* in proceedings to sell lands, in which they are interested. This is the power which, I have already remarked, is subject to close restriction, and only exists by statutory regulations, which must be strictly pursued. And so, in Maine, though a suit may proceed against an infant defending by his guardian, yet no decree for the conveyance of real estate will be made against him till he comes of age(*z*) And an infant trustee, holding the legal title and having also an interest in the trust estate, is entitled to a day after attaining his majority to answer.(*a*) It is held, in Kentucky, that where real estate is sold, and the proceeds are to be placed in the hands of guardians, a more rigid compliance with the statutory requirements will be exacted than when a sale is made for the purpose of re-investing the proceeds in other real estate; that is, where the infants are remaindermen.(*b*) And such sale may be had of the land when held in trust, at the instance of the trustee;(*c*) and without any report from commissioners;(*d*) and the entire proceeding being conformable, substantially, to all the statutory requirements, the trust estate may be re-invested on the same trusts, so as to be binding on the living and the unborn heirs.(*e*) It is the duty of the chancellor, before he can adjudge a sale, to be satisfied that the interest of the parties requires a sale to be made, and then to see that the re-investment is properly effected.(*f*) And the notice must be in pursuance to the power to sell, substantially.(*g*) See § 638, *supra*, and reference.

(*y*)Rowland *v.* Thompson, 73 N. C. 504.

(*z*)Perry *v.* Perry, 65 Me. 399.

(*a*)McLellan *v.* McLellan, 65 Me. 500.

(*b*)Paul *v.* Paul, 3 Bush, 483.

(*c*)Allen *v.* Graves, 3 Bush, 492.

(*d*)Griffith *v.* Burton, 5 Bush, 358.

(*e*)Ormsby *v.* Terry, 6 Bush, 554. In North Carolina it has been held that persons not *in esse* are not bound when the estate in remainder is limited to them. Watson *v.* Watson, 3 Jones' Eq. 400.

(*f*)Ewing *v.* Riddle, 8 Bush, 573.

(*g*)Cofer *v.* Miller, 7 Bush, 546.

§ 640. In New York it has been held that expectant estates and estates in remainder cannot be sold under the statute; a sale can only be ordered in those cases in which the infant is in the actual possession of the land, or entitled to the immediate possession of it. The supreme court say: "The word 'seizin' was used designedly by the legislature for the purpose of preventing such applications. The statute was only intended to be used in a case where the infant was either in the actual possession of the land, or entitled to immediate possession, so that possession could be given to the purchaser at once, on the sale being made. If the expectant estates of infants could be sold under the statute, the practice would be liable to very great abuse, and their property would be liable to be sacrificed to the interests of life tenants, who, in many instances, have them under absolute control."(*h*) Usually, however, an infant's reversionary estate may be sold, but only where it is for the interest of the infant to have the sale made.(*i*) And the reason is that an estate in remainder is considered as vested when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate particular estate; and it is never to be held contingent when it can consistently be held vested.(*j*) A remainder is vested where there is a present, fixed right of future enjoyment;(*k*) so that the interests of a remainder-man may be brought before the court to be passed upon; as, for example, a remainder-man may bring an action to clear title.(*l*) See § 638, *supra*, and reference.

§ 641. In all proceedings involving the interests of remainder-men, whether infants or adults, these must be made parties to the action, or they cannot be bound thereby, although it is held that the interests of *unborn contingent* remainder-men, or of *non-resident unknown* contingent remainder-men, may be barred without their being made parties.(*m*) And where an

(*h*) Jenkins *v.* Fahey, 11 Hun. 354.

(*i*) Heaton's Case, 21 N. J. Eq. 221.

(*j*) Croxall *v.* Sherard, 5 Wall. 269.

(*k*) Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475.

(*l*) Schori *v.* Stephens, 62 Ind. 441.

(*m*) Bofil *v.* Fisher, 3 Rich. Eq. (S. C.) 1.

estate is held in trust, both the trustee and the infant *cestui que trust* must be parties.(*n*) And if the trustee is a minor, he is still a necessary party, and the action cannot be maintained against his guardian alone.(*o*) And, especially, infants *must* be made parties to bills in equity affecting their *title to real estate;* and making their guardians parties is never sufficient.(*p*) Nor can a guardian *ad litem* enter an appearance for an infant;(*q*) although it is the duty of a court to appoint a guardian *ad litem* for infant defendants, whether the plaintiff does or does not apply for it to be done.(*r*) See § 638, *supra*, and reference. A tenant for life is not a sufficient party to represent the estate, except in cases of partition merely, or where the object of the suit is to collect debts, or enforce a charge on the land.(*s*)

§ 642. Until *confirmation* by the court, a purchaser is usually regarded merely as a preferred bidder; and whether his bid will be accepted or not depends on the sound, equitable discretion of the court which has control of the cause.(*t*) He buys subject to the final order of the court.(*u*) He may himself have relief from his bid on proper grounds, as the discovery of a defect of title;(*v*) although a sale will not be vacated for causes resulting from a party's own default.(*w*)

Where confirmation has taken place, the sale will not be set aside merely because there has been a higher price offered since the sale, because, by the confirmation, the bargain is closed;(*x*) although it does not *ipso facto* vest the legal title. This is done by the deed, and the deed may be withheld until all deferred payments are made.(*y*)

(*n*) O'Hara *v.* MacConnell, 93 U. S. 150; Parks *v.* Fry, 2 Bush, 438.

(*o*) Wakefield *v.* Marr, 65 Me. 341.

(*p*) Tucker *v.* Bean, 65 Me. 352.

(*q*) Chambers *v.* Jones, 72 Ill. 275.

(*r*) R. R. *v.* Bowler's Heirs, 9 Bush, 470.

(*s*) Downin *v.* Sprecher, 35 Md. 481.

(*t*) Taylor *v.* Gilpin, 3 Met. (Ky.) 544.

(*u*) Lupton *v.* Almy, 4 Wis. 261; Coffey *v.* Coffey, 16 Ill. 144, and cases cited.

(*v*) Bolgiano *v.* Cooke, 19 Md. 375.

(*w*) Bank *v.* Clarke, 28 Md. 145.

(*x*) Houston *v.* Aycock, 5 Sneed, 413.

(*y*) Webster *v.* Hill, 3 Sneed, 333.

§ 643. A *resale* will be ordered on account of fraud, or misconduct in the purchaser; or negligence or misconduct of other persons connected with the sale; or surprise or misapprehension created by the conduct of the purchaser, or officer, or other person interested in the sale; or, in the case of infants, where their property has been sacrificed at the sale wilfully, negligently, or mistakenly.(*z*) The court acts for *all parties*, however, and will use its power to prevent injustice towards purchasers or owners,(*a*) where sufficient grounds exist for its interposition.

(*z*)Lefevre *v.* Laraway, 22 Barb. 168.

(*a*)Kauffman *v.* Walker, 9 Md. 229.

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