A TREATISE

ON

THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

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IN TWO VOLUMES

VOLUME I

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PREFACE.

THE work now given to the public is one which has engaged the author's study and reflection, more or less constantly, for a considerable number of years. The magnitude and importance of the subject are such as to demand the most patient and exhaustive research, the most careful collation and weighing of authorities, and the most impartial and reasonable discussion of its disputed points, on the part of any one who attempts a comprehensive and systematic treatment of it. How far the author has fallen short of the fulfillment of these conditions, is for the judgment of those who shall use the book. But the fact that he has constantly kept this ideal in mind, and devoted his best energies to the realization of it, is his justification for the hope that the following pages may be found to possess some interest and value for his brethren of the bar.

The law of judgments, at the present day, aside from local variations in matters of practice, may be regarded as tolerably well settled. There are, however, certain branches of the law of estoppel by record which still present themselves to many a puzzled inquirer as a labyrinthine confusion of apparently irreconcilable decisions. This arises, not so much from any real contradiction or obscurity in the authorities, as from the infinite variety exhibited in the facts of the different cases and the necessity of making nice discriminations in the principles to be applied. At such places, the endeavor has been made to exhibit the result of the decisions in a clear and orderly form, by a methodical classification of the cases, and by a logical and systematic arrangement of topics. In illustration we refer to the discussion of the doctrine of merger as applied to inseverable claims founded in contract or tort, actions for continuing damages, for distinct trespasses, for causes of action distinct though founded on the same transaction, for permanent and recurring nuisances, for periodical liabilities, etc. (vol. ii. §§ 731–753). Nor is our general subject wholly free from vexed questions, upon which the authorities are hopelessly at war. In such cases it has been the author's task to weigh and balance the conflicting decisions,—not withholding criticism where he deemed it justified, nor refraining from the positive expression of

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individual opinion,—and to present what he considered the true rule, or the best rule, or the rule sustained by the preponderance of authorities, supporting his conclusions as well by the reasoning suggested by his own reflections on the subject, as by quotations from the opinions of the courts. Examples of such topics, so treated, may be seen in the discussion of "judgments as contracts" (vol. i. §§ 7–11), the definition of jurisdiction (§ 215), the question of the collateral impeachment of judgments for want of jurisdiction (§§ 270–276), the subject of the conclusiveness of foreign judgments *in personam* (vol. ii. §§ 825–834), and the matter of jurisdictional inquiries in actions on judgments from a sister state (§§ 894–915) and the plea of fraud (§§ 916–921).

Throughout the work an attempt has been made to preserve an orderly and scientific arrangement, both in the main divisions of the subject and in the sequence of parts and sections within each chapter. Such a plan, it is believed, if perfectly carried out, would greatly facilitate the use of a text-book so voluminous as the present. As to the method of using the authorities, it may be observed that quotations from the opinions of the courts have been quite freely introduced,—not, it is hoped, to the extent of incumbering the pages with needless repetitions, but for the purpose of illustrating and re-inforcing the legal propositions stated by the apt and convincing remarks of learned judges. For the rest, the citations will be found to cover the English and Canadian reports, as well as those of all the American states, with occasional illustrations from the Roman law and other foreign systems. The extent of the author's researches will be apparent from the fact that more than ten thousand cases are cited in these volumes. But he feels confident that to refer to a profusion of authorities is to err (if at all) on the side most easily pardonable by the profession.

In view of the wide circulation of the various periodicals constituting the National Reporter System, it was thought that convenience in the use of the book would be greatly promoted by introducing parallel references in the case of all decisions reported concurrently in an official series and in one of the Reporters. And this has accordingly been done. Where a case is cited from one of the Reporters alone, it is because it was omitted from the official series of reports or has not yet been reached by that series. For reasons similar to the foregoing, parallel references to the American Decisions and the American Reports have been introduced. The citations have been brought down to the time the work goes to press.

H. C. B.

WASHINGTON, D. C., January 1, 1891.

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THE LAW OF JUDGMENTS.

CHAPTER I.

THE NATURE AND CLASSIFICATION OF JUDGMENTS AND DECREES.

PART I. THE NATURE OF JUDGMENTS.

§ 1. Definitions of Judgments, Decrees, and Orders.
2. The Language of a Judgment.
3. Essentials of a Judgment.
4. Consequences of a Judgment.
5. Judgment is not an Assignment.
6. Judgment is not a Specialty.
7. Judgments sometimes called Contracts.
8. The opposite View.
9. Where the Cause of Action is in Tort.
10. Judgments are not Contracts.
11. Question of Statutory Construction.

PART II. THE CLASSIFICATION OF JUDGMENTS.

12. Methods of Classifying Judgments.
13. Judgments on an Issue of Law.
14. Judgments upon Verdict.
15. Judgments without Verdict.
16. Judgment against the Verdict.
17. Names of Judgments in certain Special Actions.
18. Cross-Classifications of Judgments.
19. Classification of Decrees.

PART I. THE NATURE OF JUDGMENTS.

§ 1. Definitions of Judgments, Decrees, and Orders.

As, in logic, judgment is an affirmation of a relation between a particular predicate and a particular subject, so, in law, it is the affirmation by the law of the legal consequences attending a proved or admitted state of facts. It is not, however, a mere assertion of

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the rules of law as applied to given conditions, nor of the legal relations of the persons concerned. It is always a declaration that a liability, recognized as within the jural sphere, does or does not exist. An action is instituted for the enforcement of a right or the redress of an injury. Hence a judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other. But as no right can exist without a correlative duty, nor any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms, or else denies, that such a duty or such a liability rests upon the person against whom the aid of the law is invoked. Further, a judgment is properly neither hortatory nor imperative. It does not advise or recommend, nor, on the other hand, does it prescribe any act or course of conduct. In respect to the latter particular the case is different, of course, with a decree in equity, but we are now using the term "judgment" in its narrowest sense. In general, therefore, it neither counsels nor commands, but simply asserts. Again, although it is the affirmation of the law, it is necessarily pronounced by the mouth of a court or judge. And the decision of any arbiter, self-constituted or chosen by the litigants, is no judgment. The law speaks only by its appointed organs. It is only when the deliverance comes from a true and competent court that it is entitled to be called a judgment. Finally it must be responsive to the state of facts laid before the tribunal. It is elementary law that no court can travel outside the controversy presented to it, to touch other rights or relations not involved. Hence the judgment must be an affirmation in regard to the matters submitted to the court for decision. We may therefore define a judgment as the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.[1]

[1] "A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it." Whitwell v. Emory, 8 Mich. 84, 59 Am. Dec. 220. "The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings

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This is the definition of a judgment in its narrow and technical sense; that is, as it is understood at common law, as distinguished from the modified significance of the term as used in the codes of procedure, and also as distinguished from the definitive sentences of courts of equity, admiralty, arbitration, and others.[2] The term which, in equity practice, corresponds to judgment at common law is *decree*. But there are important differences between judgments and decrees, such as to require a distinct definition of the latter; and these we now proceed to consider.

A decree, then, is the determination, sentence, or judgment of equity, pronounced by a competent court, upon the controversy submitted for its decision. Or more specifically, it is "a sentence or order of the court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties in the suit according to equity and good conscience."[3] But a decree differs from a judgment both in the process which precedes and determines it and in its contents. Aside from the differences in the courts,—in their organization, process, remedial machinery, rules and methods of investigation, principles of decision, and the scope of their competence,—it is to be noted that while a judgment at law is usually, at least in contested cases, determined by the verdict, the conclusion of law following inevitably as soon as the facts are found, a judge in equity is called upon to decide upon the whole merits of the controversy as it addresses itself to his conscience and sense of fairness, of course within the established rules of equity. Hence while a decree

instituted therein for the redress of an injury." Bouvier's Law Dict. *voc. Judgment.* "The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." 2 Tidd's Prac. 930. "A judgment is the determination of the law as the result of proceedings instituted in a court of justice. A final judgment is such as at once puts an end to the action, by determining that the plaintiff is or is not entitled to recover, and the amount in debt or damages to be recovered." Thompson, J., in Mahoning Bank's Appeal, 32 Pa. St. 160.

[2] A judicial sentence may be designated by a different term than judgment. In the case of Cooper v. Metzger, 74 Ind. 544, it was held that the words "final adjustment," as used in a statute, were equivalent in meaning to "final judgment."

[3] 2 Daniel, Ch. Prac. 986. "A decree in chancery is the judgment of the chancellor upon the facts ascertained and should be signed by him and entered on the minutes of the court." Code Ga. § 4212.

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is, equally with a judgment, the deliverance of the *law*, it is also, to a considerable degree, the decision of the *man* who frames it, as the interpreter of that moral standard which equity sets up. Another important particular in which they differ is that a decree is more pliable than a judgment. The latter proceeds upon the determination of a narrow issue, of law or fact, and merely decides upon the existence of an alleged liability as between two contending persons or groups of persons. A decree may be adjusted to meet all the exigencies of the litigation, and to settle all the conflicting rights and claims, however numerous and complicated may be the interests involved. Further, a judgment has in general nothing whatever to do with the means of enforcing the liability which it declares. Certain consequences do indeed flow from it,—as the right to issue execution, the attaching of a lien upon land,—but these are no part of the judgment, nor is it concerned with directions for making its sanction effective. It is, as already stated, a bare assertion. On the other hand, a decree may, and frequently does, contain more or less minute and specific directions for effectuating its object. Also it may prescribe or forbid a specific act or course of conduct, which a judgment never does. Hence it will be perceived that the *orbit* of a decree in chancery, so to speak, is much wider than that of a judgment at law.

This distinction between decrees and judgments has not always been strictly preserved in American practice. In some of the states there is a sort of border-land where equitable relief is administered through common law forms, the amalgamation having transpired through the lack of separate chancery courts. Thus in Pennsylvania, where an action of ejectment may be brought to enforce the specific performance of a contract for the sale of land, the sentence pronounced is not regarded as an ordinary judgment at law, but as containing the substance of a decree in equity, since it directs the payment of money by one party and the conveyance of the land by the other.[4]

In those states which have adopted codes of reformed procedure,

[4] Coughanour v. Bloodgood, 27 Pa. St. 285.

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all distinction between law and equity, so far as relates to pleading and practice, is abolished, and of course the difference between judgments and decrees is also swept away. There being but one form of civil action, the plaintiff may ask therein for any relief which either law or equity would accord him, and the decision in his favor may award him damages, specific performance, an injunction, foreclosure of a mortgage, or any other legal remedy. Hence the final determination of *any* suit, whether by the proceedings formerly known as equity, or at common law, is, under these codes, a judgment.[5] The most usual definition is "the final determination of the rights of the parties in an action or proceeding."[6] And the term "decree" is no longer used, except colloquially. It will be observed that the definition quoted, while it enlarges the scope of the word by making it include decisions which were not formerly called judgments but decrees, also restricts it by the exclusion of those determinations which are elsewhere known as interlocutory judgments.

It is also necessary to distinguish judgments and decrees from *orders*. An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings. It is defined by the supreme court of California as "a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect."[7] It will be observed that orders, under the codes, thus include the judgments formerly called interlocutory. An order is granted upon an application to the court called a motion.[8] The term seems to be practically synonymous (except for its including interlocutory judgments) with *rule*. But the latter is more commonly

[5] State v. McArthur, 5 Kans. 280; Hughes v. Shreve, 8 Met. (Ky.) 547; Kramer v. Rebman, 9 Iowa, 114.

[6] Code Civ. Proc. Cal. § 577; Code Civ. Proc. N. Y. § 1200; Code Kans. § 395; Code Oregon, § 240.

[7] Loring v. Illesley, 1 Cal. 27.

[8] Code Civ. Proc. Cal. § 1003; Code Civ. Proc. N. Y. § 767.

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used in those states adhering to the common law practice, while order is generally employed in those which have adopted codes.[9]

§ 2. The Language of a Judgment.

"A judgment, though pronounced or awarded by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it; and therefore the style of the judgment is not that 'it is ordered or resolved by the court,' for then the judgment might be their own, but 'it is considered'—'*consideratum est per curiam*,' which implies that the judgment is none of their own, but the act of the law, pronounced and declared by the court upon determination and inquiry."[10] At the same time there is no magic in this formula; nor is it a conclusive criterion whether a definitive judgment has been rendered that the entry employs or omits the usual phrase, *ideo consideratum est*. A judgment may be final and subject to review on writ of error, as well when entered without as with that clause.[11] The usual style of a decree is "it is ordered, adjudged, and decreed;" and of an order or rule, "it is ordered," etc.

§ 3. Essentials of a Judgment.

We are not at present concerned with the tests by which the *validity* of a judgment is to be determined, such as the question of jurisdiction, the status of the parties, the time, place, and manner of its rendition. But the object of this section is to indicate the essential

[9] The refusal of a court to issue the writ of *mandamus* is neither a judgment nor a decree. Craddock v. Croghan, 1 Sneed (Ky.) 100. Neither is a decision made by the court upon a matter addressed to its discretionary authority; as, an application to have a cause brought forward on the docket and to vacate a certain judgment therein rendered. Claggett v. Simes, 25 N. H. 402.

[10] Baker v. State, 8 Ark. 491, Dickinson, J.

[11] Whitaker v. Bramson, 2 Paine C. C. 209.

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characteristics which must appear on the face of the decision in order to entitle it to be called a judgment for any purpose, even as a preliminary to investigating its validity. And first, it must appear to be the sentence of a court. As already stated, the award of arbitrators or of any self-constituted tribunal is not a judgment. The decision must purport to emanate from some court of justice known to and organized under the laws of the particular sovereignty. At the same time, it is usual to recognize the determinations of certain bodies invested with minor administrative powers, and acting in a judicial capacity in reference to their exercise,[12] as equivalent to judgments of the courts. But it is only by analogy that these decisions can be called judgments. And in general, a paper purporting to be a judgment, but not stating by what court rendered, nor when, nor for what cause of action, is a nullity.[13] Again, unless in the case of purely *ex parte* proceedings, it must appear to have been rendered between adverse parties, or, in a certain class of actions, between a party plaintiff and some *res* which stands in place of a defendant. The case of a proceeding against "unknown owners" is no real exception to this rule, for there is always a thing or right claimed, which may be personified as the plaintiff's adversary. And the judgment must of course appear to be in favor of one party and against the other. Again, the judgment must be definitive. It must purport to be the actual and absolute sentence of the law, as distinguished from a mere finding that one of the parties is *entitled* to a judgment, or from a direction to the effect that a judgment may be entered. "An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record." [14] It

[12] Such as road commissioners, in adjudicating upon the necessity of a road, and in locating and making assessments for the same. Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525. Or a town council, in auditing and allowing a claim for a certain and ascertained amount. Kelly v. Wimberly, 61 Miss. 548.

[13] Bevington v. Buck, 18 Ind. 414.

[14] Whitwell v. Emory, 8 Mich. 84, 59 Am. Dec. 220. A written memorandum by the judge, of certain conclusions of fact, with a formal order for more evidence on certain points, is not a judgment. Putnam v. Crombie, 34 Barb. 232. An entry: "I find for the plaintiff and assess his damages at," stating the amount, is not a final judgment, but simply a finding under the statute regulating the practice before referees. Demens v. Poyntz (Fla.) 6 South. Rep. 261.

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has been held that an order of court allowing the plaintiff's attorney to enter up judgment for the plaintiff is in itself a sufficient judgment for the plaintiff for the amount sued for.[15] But it may well be doubted whether this would hold good for all the purposes of a judgment. Where an interlocutory judgment is rendered by default, upon a claim for unliquidated damages, its amount may be left for ascertainment by proper proceedings. But we may say in general that if a judgment purports to be final, and is given upon a money demand, the amount of the recovery must be stated in it with certainty and precision. If the amount remains to be determined by a future contingency, or ascertained by referees, or diminished by the allowance of an unliquidated credit, or is otherwise indefinite and uncertain, it is no proper judgment.[16] It remains to be stated that, in case of ambiguity, a judgment should be construed with reference to the pleadings, and when it admits of two constructions, that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case.[17]

§ 4. Consequences of a Judgment.

The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement. But this, it must be repeated, is it not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it. A decree may direct a particular act to be done; a judgment *in rem* may specify the property out of which satisfaction is to be made; a judgment in replevin may require a return of the goods; in certain cases

[15] Tift v. Keaton, 78 Ga. 235, 2 S. E. Rep. 690.

[16] Battell v. Lowery, 46 Iowa, 49; McIlwaine v. Batchelor, 3 Dev. & B. 52; Early v. Moore, 4 Munf. 262; Mudd v. Rogers, 10 La. Ann. 648; Nichols v. Stewart, 21 Ill. 106. See *infra*, § 118.

[17] Peniston v. Somers, 15 La. Ann. 679. In detinue for several slaves, a judgment in favor of the plaintiff for all of them except one, as to whom the judgment-entry is entirely silent, is a judgment in favor of the defendant for that one. Wittick v. Traun, 25 Ala. 317.

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a judgment may be entered for a sum payable in a particular kind of money.[18] But with these exceptions, the general principle holds good that the judgment, after performing its office of declaring the existence of a certain liability, leaves the party to pursue the remedies which the law provides.

Another important consequence of a judgment is that it creates a lien upon real estate owned by the debtor, which endures for a certain period, follows the land into the hands of purchasers or other lienors, and may be enforced by seizure and sale of the property subject to it. A separate chapter will be devoted to the consideration of this subject.

A further consequence of a judgment is that it creates an estoppel upon the litigants; so that a judgment rendered upon the merits will bar any further suit upon the same cause of action, between the same parties or their privies; and a point which was once actually and necessarily litigated and decided cannot again be drawn in question, by the same parties or their privies, in any future controversy upon the same or a different cause of action. These topics also will be discussed in later chapters of this work.

Another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title. This may be illustrated by the result of a real action, by the case of a purchaser at execution-sale under a judgment, by a decree quieting title to lands or enforcing specific performance of a contract for their conveyance. Also in relation to chattels, it is held that satisfaction of a judgment recovered in an action of trespass for their conversion passes property in such chattels to the defendant, and that his title thus acquired takes effect by relation from the time of the conversion.[19]

§ 5. Judgment is not an Assignment.

Thus far, in discussing the nature of judgments, we have spoken only of their essential characteristics. It now becomes necessary to distinguish them from certain other legal transactions to which they

[18] See *infra*, § 152.

[19] Smith v. Smith, 51 N. H. 571.

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bear a resemblance. And first, since the *result* of a judgment may be to deprive the debtor of his property and transfer it (or its proceeds) to the creditor, it has been thought that the judgment, especially where it was confessed, might be construed as an assignment. There is, however, no validity in this position. As has been said: "A judgment is not an assignment. One is the act of the party, the other the act of the law; in the one case the debtor surrenders the dominion to another, in the other he submits without opposition to the course prescribed by law." [20]

§ 6. Judgment is not a Specialty.

A judgment of a domestic court of record is not a specialty, within the meaning of a statute which provides for the limitation of "actions upon the case, covenant, and debt, founded upon a specialty, or any agreement, contract, or promise in writing, within fifteen years." [21]

§ 7. Judgments sometimes called Contracts.

The notion that a judgment is to be considered as a contract appears to have originated with Blackstone.[22] At any rate, the present writer has been unable to discover any authority for such a proposition in the earlier reports or text-books. But the statement of the learned commentator, to that effect, has been accepted without question or demur by many of the succeeding text-writers, and put for-

[20] Breading v. Boggs, 20 Pa. St. 33, Lewis, J.

[21] Tyler's Ex'rs v. Winslow, 15 Ohio St. 364.

[22] 3 Bl. Comm. 160. In speaking of such contracts as are implied by law, he says: "Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."

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ward as a recognized principle of law in numerous American cases.[23] Thus in New York it is said: "A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract. The cause or consideration of the judgment is of no possible importance; it is merged in the judgment. When recovered, the judgment stands as a conclusive declaration, that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto. This assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter any claim on the judgment is setting up a cause of action on contract."[24] So, in a Massachusetts decision, in holding that a judgment by default against a married woman, in the absence of an enabling statute, was void, the court said: "A judgment is in the nature of a contract; it is a specialty and creates a debt; and to have that effect, it must be taken against one capable of contracting a debt."[25] But in this country the question has chiefly arisen in the construction of statutory provisions requiring certain formalities, or prescribing limitations, in actions "founded on contract," and in the interpretation of that clause of the federal constitution which prohibits to the states any legislation impairing the obligation of contracts. In regard to the former class of cases, it has been held that a judgment is a contract within the meaning of a statute which provides that several causes of action may be united when they arise out of contract express or implied, and hence an action upon a judgment may be joined with an action for the breach of an express contract.[26]

[23] Sawyer v. Vilas, 19 Vt. 43; Morse v. Toppan, 3 Gray, 411; McGuire v. Gallagher, 2 Sandf. 402; Humphrey v. Persons, 23 Barb. 313; Taylor v. Root, 4 Keyes (N. Y.) 344; Johnson v. Butler, 2 Iowa, 535; Farmers' Bank v. Mather, 30 Iowa, 283; Reed v. Eldredge, 27 Cal. 348; Stuart v. Landers, 16 Cal. 372; 76 Am. Dec. 538; Childs v. Harris Manuf'g Co., 68 Wis. 231, 32 N. W. Rep. 43; Weaver v. Lapsley, 43 Ala. 224; 1 Pars. on Contr. 7.

[24] Taylor v. Root, 4 Keyes (N. Y.) 335, Woodruff, J.

[25] Morse v. Toppan, 3 Gray, 411, Shaw, C. J.

[26] Childs v. Harris Manuf'g Co., 68 Wis. 231, 32 N. W. Rep. 43. For other illustrations under this head, see Sawyer v. Vilas, 19 Vt. 43; McGuire v. Gallagher, 2 Sandf. 402.

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In regard to the latter class of cases, there are decisions to be found that judgments are covered by the prohibition against laws impairing the obligation of contracts.[27]

§ 8. The Opposite View.

On the other hand, a carefully considered English case, subsequent in date to Blackstone, holds that a judgment is not in any sense a contract; and this view is supported by numerous and respectable American authorities.[28] Thus a learned judge has remarked: "The obligation of a debt on a judgment does not arise from any express contract made by the party charged by it. *Judicium redditur in invitum.* Upon a refined and artificial view of the obligations imposed by law upon every individual, they may be resolved into a contract which he makes with society to obey the laws by which he is protected. And the force of legal obligation has, by some elementary writers, been attempted to be strengthened upon this principle. (3 Bl. Comm. 160.) But contracts of this description are not barred by this part of the statute [of limitations]."[29] So again: "A cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment whenever it becomes necessary to enforce the obligation by suit. The

[27] Scarborough v. Dugan, 10 Cal. 305; Weaver v. Lapsley, 43 Ala. 224. But in the latter case the question was upon the constitutionality of a certain statute entitled "an act to declare void certain judgments and to grant new trials in certain cases therein mentioned." And the original cause of action in this litigation (the judgment in which came under the act) was a contract. So that the true ground of the invalidity of the statute was, not that it impaired the obligation of the *judgment* obtained on such contract, but that, by vacating the judgment, it cancelled the remedy on the *original contract itself*, and so impaired its obligation. See Black, Const. Pro. § 197. And see Sprott v. Reid, 3 Iowa, 489, 56 Am. Dec. 549.

[28] Bidleson v. Whytel, 3 Burr. 1548; Wadsworth v. Henderson, 16 Fed. Rep. 447; Todd v. Crumb, 5 McLean, 172; Jordan v. Robinson, 15 Me. 168; Wyman v. Mitchell, 1 Cow. 316; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; McDonald v. Dickson, 87 N. Car. 404; Napier v. Gidiere, 1 Speer Eq. 215, 40 Am. Dec. 613; Keith v. Estill, 9 Port. 669; Smith v. Harrison, 33 Ala. 706; Masterson v. Gibson, 56 Ala. 56; Lovins v. Humphries, 67 Ala. 437; Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Williams v. Waldo, 3 Scam. 269; Rae v. Hulbert, 17 Ill. 572; Sprott v. Reid, 3 Iowa, 489, 56 Am. Dec. 549; Larrabee v. Baldwin, 35 Cal. 156; Freem. Judgm. § 4.

[29] Jordan v. Robinson, 15 Me. 168.

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liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed." [20] The last sentence is especially significant.

§ 9. Where the Cause of Action is in Tort.

Whatever may be said in regard to a judgment which is rendered upon the actual contract of the parties, it must be perfectly apparent that a judgment upon a cause of action sounding in *tort* cannot be considered as in any sense a contract. True, the judgment merges the cause of action. But that means that the plaintiff cannot afterwards sue upon the original claim or use it otherwise. It does not mean that it is metamorphosed into something diametrically opposite to what it was before. And it is held, upon the highest authority, that a judgment in an action for a tort is not a contract within the meaning of that provision of the federal constitution which forbids the states to pass any law impairing the obligation of contracts. [21] "A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." [22]

[20] McDonald v. Dickson, 87 N. Car. 404.

[21] Garrison v. City of New York, 21 Wall. 196; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 263; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 763.

[22] Field, J., in Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211. See State v. New Orleans, 32 La. Ann. 709, holding that claims arising from a t[illegible]—as a city's statutory obligation to make good damages done by a mob,—are not protected by this clause of the federal constitution, though reduced to judgment.

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§ 10. Judgments are not Contracts.

Upon the whole question, we are unable to concede that judgments can properly be considered contracts under any circumstances whatever. So far as concerns the authority of Blackstone, it is not difficult to perceive that in dividing contracts into three classes, beginning with "contracts by record," he was misled by that same love of a neat classification which more than once led him into error. The mistake lies in grouping under the same technical term things which properly belong there and things which belong there only by a remote analogy. Further, his whole argument upon this point rests upon the assumption of an original "social contract"—a theory long since exploded. Admit that society is a natural organism, not a compact, and we look in vain for the implied promises supposed to have been made by each person on entering into the social state.

Of the American decisions sharing this view (not very numerous or very well considered), some have been content to take the statement for granted, without probing the arguments advanced in its support. Others have followed the same specious reasoning which deceived the originator of the theory. And others, begging the question, have decided that a particular judgment could not be valid because it did not answer to the requirements of a contract, as in respect to the capacity of the person to make a contract or incur a debt.[33] But, as we have seen, there is a preponderance of authority in favor of the proposition that judgments are *not* contracts.

But in point of fact, the most distinctive mark of a contract is wanting, viz: the assent of both parties.[34] To this there are two apparent exceptions, the case of judgments by confession and judgments by default. But in the former instance, the agreement of the debtor is that the creditor may take a particular means of securing his claim. The judgment is not the agreement; it is the act of the

[33] As in Morse v. Toppan, 3 Gray, 411, a decision which is probably wrong, and which certainly furnishes an illustration of looking at a legal question upside down.

[34] "The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented." O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

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law, invoked by the parties, in *executing* the agreement. In the latter case, the defendant merely submits to what would, presumably, be done with or without his assent. Nor will the theory of an implied assent fill the gap. If we admit the assumption which lies at the base of this doctrine, it is not difficult to transform any imaginable right of action into a contract. For instance, it is the duty of every good citizen to pay his taxes; yet no one thinks that the entry on the assessor's book is a contract which he has made. If the *duty* of every member of society to pay the debts which are charged against him as the result of legal proceedings can be construed into his *agreement* to pay them, it is illogical to stop at causes of action which are strictly and properly *ex contractu*. It is just as true that he impliedly undertakes to make reparation for any delict which he may commit, as it is that he impliedly promises to pay judgments against him. But it would be rash to conclude that a tort is a contract.[34] Some of the cases speak of this implied assent as a "reluctant assent." But this is practically a contradiction in terms. The submission which is wrung from a party who has made his best defense and can no longer help himself is not the movement of will which goes to the making of a contract.

Another indispensable requisite to a contract is that the parties should be legally capable of forming a binding agreement. And yet the immense majority of the cases hold that judgments rendered against infants, lunatics, and other persons who are in law disabled from contracting, are valid and conclusively binding until vacated or reversed.[35] To push this argument one step further: "It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered. If a judgment is a contract, and can only be rendered against one who is then capable of

[34] "A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments which may be regularly rendered against him; and in the same sense does he impliedly agree to make amends for all torts which he may commit. No one will pretend that actions for torts are within the spirit and intent of the statute [in regard to actions upon 'any contract or agreement'], and yet they certainly are as much so as are actions upon judgments." Rae v. Hulbert, 17 Ill. 572, Caton, J.

[35] O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

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contracting by the laws of the forum, there could not be a judgment on a contract made in another state [nor on a judgment rendered in another state], unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicile of the contractor, as the case may be, and not upon the law of the forum."[37]

§ 11. The Question considered as one of Statutory Construction.

As already stated, the chief importance of this question arises in connection with the construction of constitutional and statutory provisions. And we are now prepared to formulate the rules which reason and principle seem to point out.

In the first place, a judgment is not a contract within the meaning of the prohibition against laws impairing the obligation of contracts. The cases which hold that it is,[38] proceed upon a misapprehension of the constitutional principle. It is true that statutes have been declared invalid, as obnoxious to this inhibition, which vacated judgments, granted new trials, enacted shorter statutes of limitation, exempted the debtor's property, gave stay of execution, and so on. But it was not because they attacked the judgment, but because they destroyed or desiccated the remedy on the *original contract*, which, on the authorities, is vital to the maintenance of its obligation.[39] If the cause of action was in tort, the constitutional clause does not apply.[40] But it is impossible to hold that view if every judgment is a contract.

In the next place, if a statute—for example, in prescribing limitations of actions—manifestly intends, on its face, to divide all

[37] Wadsworth v. Henderson, 16 Fed. Rep. 451, Barr, J.

[38] See Weaver v. Lapsley, 43 Ala. 224; Scarborough v. Dugan, 10 Cal. 305. But see Sprott v. Reid, 3 Iowa, 489, 66 Am. Dec. 549.

[39] Black on Const. Pro. §§ 152, 157, 163, 197, 199.

[40] Garrison v. City of New York, 21 Wall. 196; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 763.

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causes of action into two classes, actions on "contract" and actions on "tort," then a judgment must be considered as falling within the former class. Strictly it belongs to neither. But if the words are used in this extended sense, then "contract" must include "quasi-contract." And a judgment may reasonably be called a quasi-contract; for although it lacks some or all of the elements of a true contract, it is more nearly assimilated thereto than it is to a delict.[a] It is the conclusive evidence of a fixed and ascertained debt, and that is sufficient to distinguish it from a claim in tort.

Finally, if the statute relates only to "contracts express or implied," or intends to divide possible causes of action into a larger number of classes than those mentioned above, a judgment cannot be considered as coming under the denomination of a "contract." In such a case, it must stand in a class by itself, and if not specifically mentioned, it is not within the purview of the act.

Part II. The Classification of Judgments.

§ 12. Methods of Classifying Judgments.

Several methods of classifying judgments have been proposed, none of which, perhaps, is strictly scientific or perfectly accurate. The difficulty is that so many complications arise in pleading and practice that an entirely regular classification cannot well be made without extending the number of groups beyond convenient limits. However, as the chief thing is to obtain an orderly arrangement and enumeration of the different varieties of judgments, the scientific nature of the method pursued is not of prime importance. Abandoning the division commonly acquiesced in, as being too unwieldy, we propose to arrange judgments under the four following heads: 1. Judgments on an issue of law. 2. Judgments upon a verdict. 3. Judgments without a verdict. 4. Judgments against a verdict.

[a] Moore v. Nowell, 94 N. Car. 265; Johnson v. Butler, 3 Iowa, 545.

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§ 13. Judgments on an Issue of Law.

These judgments are given upon the decision of a demurrer. They are either for the plaintiff or defendant, as the case may be, and are of the following sorts:

1. For the plaintiff, when the issue raised by a demurrer to any of the pleadings is decided in his favor. This judgment is final and definitive and concludes the right of action. Its style is *quod recuperet*, that is, "that the plaintiff do recover."[42]

2. For the plaintiff, when the issue raised by his demurrer to a dilatory plea or plea in abatement is found in his favor. This is called judgment of *respondeat ouster*, that is, that the defendant "do answer over" or further. It is not final, since the plea did not go to the merits, but requires the defendant, beaten on a preliminary point, to present a more substantial defense.[43]

3. For the defendant, when the issue raised by a demurrer is determined in his favor. This is a final judgment, and disposes of the case, unless leave be granted to amend the pleading or withdraw the demurrer, as the case may be.[44]

4. For the defendant, when the plaintiff's demurrer to a plea in abatement is overruled, and the plea consequently sustained. The language of this judgment is *quod cassetur breve*, or *billam*, that is, that the writ or declaration be quashed.

§ 14. Judgments upon Verdict.

We come next to such judgments as are rendered after the determination of an issue of fact by the verdict of a jury. They may be

[42] Hale v. Lawrence, 22 N. J. Law, 72; Silver v. Rhodes, 2 Harringt. 369; Pettys v. Marsh, (Fla.) 3 South. Rep. 577. But where defendant demurred for a variance between declaration and writ, and pending the demurrer leave was granted to amend, whereupon the demurrer was overruled, *held*, that the judgment should be *respondeat ouster*, and not *quod recuperet*. Walker v. Walker, 6 How. (Miss.) 500.

[43] Trow v. Messer, 32 N. H. 361; Massey v. Walker, 8 Ala. 167; Heyfron v. Bank, 7 Sm. & Mar. 434; Randolph v. Singleton, 20 Miss. 439; Cooke v. Crawford, 1 Tex. 9, 46 Am. Dec. 93.

[44] Hale v. Lawrence, 22 N. J. Law, 72; Scharff v. Lisso, 63 Miss. 213; Ross v. Sims, 27 Miss. 359; Memphis & Charleston R. Co. v. Orr, 52 Miss. 541; Comstock v. Davis, 51 Mo. 569.

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either for the plaintiff or defendant, and are in all cases final and conclusive, if entered according to the verdict.

1. For the plaintiff, the judgment is *quod recuperet.*[45]

2. For the defendant, if upon the merits, the judgment is *nil capiat per breve* or *per billam*, that is, that the plaintiff "take nothing" by his writ or declaration. If the plea was in abatement, the judgment is *cassetur breve*, as above.

§ 15. Judgments without Verdict.

This class of judgments includes numerous varieties. Those which may be rendered for the plaintiff are as follows:

1. Judgment by *default*. This is a judgment entered in consequence of the non-appearance of the defendant. Where the defendant omits to plead within the time required, the judgment taken against him for that cause is more properly called *nil dicit*, but the term "default" is usually extended to cover this case also. And in the code states, the judgment entered upon the defendant's failure to serve or file an answer within the prescribed period is called a judgment by default.

2. Judgment by *nil dicit*, which is rendered against a defendant for his failure to plead to the declaration.

3. Judgment by *non sum informatus*. This is a judgment which is rendered when, instead of pleading, the defendant's attorney declares that he "is not informed" of any answer or defense to be made.

4. Judgment by *confession*. This is a judgment which is entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.[46] This is called, in full, a judgment by confession *relicta verificatione*. A more usual form of judgment by confession is that which is entered where the debtor, without suit brought, gives a written instrument confessing that he is indebted to the creditor in a certain sum, and authorizing

[45] See Texas, S. F. & N. R. Co. v. Saxton (New Mex.) 6 Pac. Rep. 206.

[46] Bouvier, Law Dict. *voc. Judgment.*

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an attorney to appear for him and enter judgment against him in a court of record.

5. Judgment on *motion;* a judgment authorized by statute in certain kinds of summary proceedings, rendered *ex parte* and without trial. This remedy, being in derogation of the common law, must be strictly pursued, and the judgment must show on its face all facts necessary to give jurisdiction.[47]

6. Judgment *on the pleadings.* This is a form of judgment not infrequently used in the practice of the code states. It is rendered, on motion of the plaintiff, when the answer admits or leaves undenied all the material facts stated in the complaint.[48] It cannot be entered, in a suit for unliquidated damages, over an answer stating matters in mitigation.[49]

Of this class of judgments, those which may be rendered for the defendant are as follows:—

1. Judgment of *nonsuit.* This judgment, given against the plaintiff, is either voluntary or involuntary. It is the former, when the plaintiff throws up his case and consents to a judgment for defendant for costs. It is the latter, when the plaintiff, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to appear. Also, where the court decides that the plaintiff has given no evidence on which the jury could find a verdict in his favor, an involuntary nonsuit is entered against him.

2. Judgment of *nolle prosequi.* This is a judgment entered against the plaintiff where, after appearance and before judgment, he declares that "he will not further prosecute his suit." It is used as a means of abandoning one or more counts in a declaration or parts of a cause of action, or releasing one or more of the joint defendants, while holding to the rest.

[47] Garner v. Carrol, 7 Yerg. 365; Jones v. Read, 1 Humph. 335.

[48] Botto v. Vandament, 67 Cal. 332, 7 Pac. Rep. 753; Amador Co. v. Butterfield, 51 Cal. 526; Shattuc v. McArthur, 25 Fed. Rep. 133; Felch v. Beaudry, 40 Cal. 489. But where facts showing the illegality of a contract sued on are sufficiently alleged in the answer, the plaintiff cannot recover upon the pleadings, although such facts are not pleaded or insisted on as a defense. Prost v. More, 40 Cal. 347.

[49] Shattuc v. McArthur, 25 Fed. Rep. 133.

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3. Judgment of *non prosequitur*, or *non pros.* A judgment given against the plaintiff for his default or neglect to take any of those steps in the proceedings which he is required to take in due time; as, a failure to file a declaration or other pleading.

4. Judgment of *retraxit.* This is a judgment given against the plaintiff when, after appearance, he voluntarily goes into court and enters upon the record a statement that "he withdraws his suit." It is an open and voluntary renunciation of his claim in court; wherein it differs from a nonsuit, which is merely his neglect or default; and by a *retraxit* the plaintiff's cause of action is forever barred.[50]

In this class of judgments there is one which may be entered for either party, viz: judgment *by consent.* It is well known in practice. The attorneys of the respective parties to a suit, it is said, have undoubtedly the right to agree upon terms and what kind of judgment shall be entered; but the judgment must be one authorized by law.[51]

§ 16. Judgment against the Verdict.

Where the plea to the declaration confesses a cause of action in the plaintiff and sets up matter in avoidance, and such matter, though found true by the verdict of the jury, is insufficient in law to constitute a bar or defense to the action, the court will enter a judgment for the plaintiff *non obstante veredicto*, that is, notwithstanding the verdict.[52] For, "the plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of

[50] Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; 3 Bl. Comm. 296.

[51] Tuppery v. Hertung, 46 Mo. 135. See Jones v. Webb, 8 S. Car. 202; Summar v. Owen, 59 Tenn. 26.

[52] Pim v. Grazebrook, 2 C. B. 429; Atkinson v. Davies, 11 Mees. & W. 236; Berwick v. Duncan, 3 Exch. 644; Roberts v. Dame, 11 N. H. 226; Fitch v. Scott, 1 Root, 351; Bellows v. Shannon, 2 Hill, 86; Moye v. Petway, 76 N. Car. 327; Ward v. Phillips, 89 N. Car. 215; State v. Commercial Bank, 6 Sm. & Mar. 218, 45 Am. Dec. 280; Garrett v. Beaumont, 24 Miss. 377; Sullenberger v. Gest, 14 Ohio, 204; Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732; Berry v. Borden, 7 Blackf. 384; Pomeroy v. Burnett, 8 Blackf. 142; Jones v. Fennimore, 1 Iowa, 134; Oades v. Oades, 6 Nebr. 304; 2 Tidd's Prac. 920.

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the plaintiff's declaration, and shows that he was entitled to maintain his action." [53] For example, a plea of tender of rent after the day of its falling due is insufficient, and after a verdict on such plea in favor of the defendant, the plaintiff is entitled to judgment *non obstante veredicto*.[54] But in order that this judgment may be given, it is essential that the plea should distinctly imply an admission of the plaintiff's right or title.[55]

There are other cases beside the foregoing in which a judgment *non obstante veredicto* may be rendered, or an analogous species of judgment. Thus, in some of the states, in cases where the special findings of the jury are in direct conflict with the general verdict, it is the practice to grant a judgment notwithstanding the verdict.[56] But unless the special findings "are so irreconcilably in conflict with the general verdict as that both cannot stand, the motion must be overruled without regard to the evidence." [57] And the motion for this judgment can be made only by the party *against* whom the verdict goes; hence, if the general verdict is in his favor, but the special findings do not correspond with it, a motion in that behalf will not avail him.[58]

Another instance in which this form of judgment may be rendered, is where the decision on a "point reserved" negatives the verdict of the jury. If a point of law is ruled provisionally at the trial, but subject to the further consideration of the court, and if its ultimate decision shows that the party in whose favor the verdict goes is not entitled to judgment, the court may enter judgment notwithstanding the verdict. But the record must show the point of law reserved and the specific facts on which it arises.[59]

At common law, a *defendant* is not entitled in any circumstances

[53] Bouvier, Law Dict. *voc. Judgment.*

[54] Dewey v. Humphrey, 5 Pick. 187.

[55] Pim v. Grazebrook, 2 C. B. 429.

[56] Felton v. Chicago, R. I. & P. R. Co., 69 Iowa, 577, 29 N. W. Rep. 618.

[57] Porter v. Waltz, 108 Ind. 40, 8 N. E. Rep. 705, citing Cox v. Ratcliffe, 105 Ind. 374, 5 N. E. Rep. 5; Pennsylvania Co. v. Smith, 98 Ind. 42; Baltimore, etc., Co. v. Rowan, 104 Ind. 88, 3 N. E. Rep. 627.

[58] Brown v. Searle, 104 Ind. 218, 3 N. E. Rep. 871.

[59] Wilde v. Trainor, 59 Pa. St. 442; Fayette City Borough v. Huggins, 112 Pa. St. 1, 4 Atl. Rep. 927; Buckley v. Duff, 111 Pa. St. 223, 3 Atl. Rep. 823; Keifer v. Eldred Township, 110 Pa. St. 1.

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to move for judgment *non obstante veredicto;* if the verdict is for the plaintiff, and the state of the pleadings is such that the latter might have asked for this judgment had their positions been reversed, the only proper course for the defendant is to move that the judgment be arrested.[60] It appears, however, that this rule has been relaxed in a few of the states, so as to admit of the entry of this judgment in favor of the defendant in a proper case.[61]

A motion for judgment *non obstante veredicto* is founded on the record alone, and not on affidavits or extrinsic evidence.[62] And such motion, in the absence of an agreement by the parties that it may be filed and considered in vacation, cannot be considered by the court when so filed.[63]

There is one other form of judgment, entered in disregard of a verdict, which must be mentioned in this connection. It is the judgment *quod partes replacitent* (that the parties replead), or judgment of repleader. This is entered in a case where issue has been taken upon a point so immaterial that, notwithstanding the verdict, the court is unable to decide which party should recover upon the merits. It requires the parties to frame their pleadings anew, from the fault which first occasioned the immaterial issue, taking issue upon a substantial ground. A repleader differs from a judgment *non obstante veredicto* in this, that the latter is granted in a case where the plea is good in form though the matter pleaded is not available as a defense, while the former is only proper where the pleadings do not bring the merits within the issue. Hence the latter kind of judgment is always upon the merits, and never granted but in a very clear case; a repleader is upon the form and manner of pleading.[64]

[60] Quimby v. Boyd, 8 Colo. 194, 6 Pac. Rep. 462; Smith v. Powers, 15 N. H. 546; Smith v. Smith, 4 Wend. 468; Schermerhorn v. Schermerhorn, 5 Wend. 513; Bellows v. Shannon, 2 Hill, 86; Bowdre v. Hampton, 6 Rich. 208; Buckingham v. McCracken, 2 Ohio St. 287; Bradshaw v. Hedge, 10 Iowa, 402; Lough v. Thornton, 17 Minn. 253, (Gil. 230.)

[61] Martindale v. Price, 14 Ind. 115; Carl v. Granger Coal Co., 69 Iowa, 519, 29 N. W. Rep. 437.

[62] Snow v. Conant, 8 Vt. 309; Smith v. Smith, 2 Wend. 624.

[63] Scribner v. Rutherford, 65 Iowa, 551, 22 N. W. Rep. 670.

[64] 2 Tidd's Prac. 922.

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§ 17. Names of Judgments in certain Special Actions.

Before completing our enumeration of the different kinds of judgments, it is necessary to mention the special names given to the judgments in certain actions. In the action for partition, the interlocutory judgment whereby it is directed that partition be made, is called judgment *quod partitio fiat;* while the style of the final judgment in the same action, confirming the partition made, upon the return of the writ, is *quod partitio facta firma et stabilis in perpetuum.*[55] The interlocutory judgment in an action of account, whereby it is directed that "the defendant do account," is called judgment *quod computet.*

§ 18. Cross-Classifications of Judgments.

There are certain methods of classifying judgments and decrees, without regard to the mode of trial, stage of entry, or rendition of a verdict, and hence running across the division above adopted, which are important to be named. And first, they are either final or interlocutory. A final judgment or decree is one which puts an end to the whole action, leaving nothing further to be done or determined by the court. It is interlocutory, if it merely settles some preliminary or subordinate point, without reaching the merits, or if, though directed to the main controversy, it does not dispose of the whole case, but leaves something for the further action or consideration of the court before the rights of the parties are definitely fixed. This distinction will form the subject of the next chapter.

Judgments and decrees are also either domestic or foreign. A judgment is called domestic when it was rendered by a court organized by the same state or sovereignty within whose territory it is sought to be enforced or is invoked as a defense. It is called foreign when rendered by another or independent state or sovereignty.

In Louisiana, a judgment rendered by default is distinguished from a "contradictory judgment;" the latter being one which is given after the parties have been heard either in support of their claims or in their defense.

[55] 5 Bac. Abr. 292, cited Freem. Judgm. § 8.

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Judgments and orders may further be classed as absolute or *nisi*. At common law a judgment *nisi* was one entered on the return of the *nisi prius* record with the *postea* indorsed, which would become absolute according to the terms of the *postea*, unless the court out of which the *nisi prius* record proceeded should, within the first four days, otherwise order.[66] It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it."[67] A rule or order *nisi* is one which is to be confirmed or made absolute, unless cause be shown to the contrary, or something be done which has been required, within a specified time.

Adjudications are also classed as either *in rem* or *in personam*. This distinction is one of difficulty and importance, and the former kind of judgments will form the subject of a later chapter, to which the reader is referred for the definitions.

§ 19. Classification of Decrees.

In addition to the divisions indicated in the preceding section, decrees in equity are classed as "by default," "by consent," "on the hearing," and "*pro confesso*." The last named—a decree that the bill be taken as confessed—is entered where the defendant, by not appearing within the time prescribed, is understood to admit the case made by the bill. It is intended to prepare the case for final decree; and its effect is like that of a default at common law, by which the defendant is deemed to have admitted all that is well pleaded in the declaration.[68] A decree *nisi* is one entered upon the defendant's failure to appear when the case is called for hearing, granting the relief asked, but coupled with a condition that the defendant is to have a certain time within which to show cause against the decree.

[66] Bouvier, Law Dict. *sub voce*.

[67] United States v. Winstead, 12 Fed. Rep. 50. See Strickland v. Cox, (N. Car.) 9 S. E. Rep. 414.

[68] Russell v. Lathrop, 122 Mass. 302.

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CHAPTER II.

FINAL AND INTERLOCUTORY JUDGMENTS AND DECREES.

§ 20. Reasons for the Distinction.
21. Definition of Final Judgments.
22. Under the Codes.
23. Must be final as to all Parties.
24. Must settle all the Issues.
25. Uncertainty of the Amount.
26. Judgment of Nonsuit.
27. Dismissal of Suit.
28. Judgment by Default.
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30. Judgment on Plea in Abatement.
31. Judgment for Costs.
32. Granting or Refusing Extraordinary Remedies.
33. On Motion for New Trial.
34. Vacating or Reversing former Judgment.
35. Order of Interpleader.
36. Dissolving Attachments and Executions.
37. Order removing Cause.
38. Settling Accounts of Executors and Trustees.
39. Judgment in Partition.
40. In Condemnation Proceedings.
41. Finality of Decrees.
42. Further Action necessary to settle the Equities.
43. Further Action necessary to execute the Decree.
44. Decree ordering a Reference.
45. Directing an Account.
46. Decree suspending Rights until further Orders.
47. Decree dissolving Partnership.
48. Foreclosure of Mortgage.
49. Sending Issue out of Chancery.

§ 20. Reasons for the Distinction.

The distinction between final judgments and decrees and such as are merely interlocutory, is one of considerable importance, both as a matter of practice and in respect to the consequences which follow the entry of a final adjudication. As a general rule, it is only a final judgment which has the effect of creating a lien upon the debtor's

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realty. So also, with certain minor exceptions, it is only a final judgment or decree upon the merits which will sustain the plea of *res judicata*. At common law, a writ of error could not be brought until the last, or final, decision in the cause. In many of the states, it is provided by statute that appeals may be taken to their courts of last resort only from the final judgments of the trial courts or the final decrees of the courts of chancery. By the federal judiciary act[1] it is enacted that error may be brought to the final judgments at law or decrees in equity of the highest courts in the several states for the purpose of their re-examination by the supreme court of the United States in certain prescribed cases. Thus, for these various reasons, it is often necessary to distinguish final decisions from the interlocutory class of adjudications. The cases in which such a distinction is drawn are numerous, illustrating the wide range of instances in which the question may arise, and not always harmonious; for the practice, or the statute-law, in some jurisdictions, ascribes the character of finality to judgments or orders which elsewhere are considered as merely interlocutory.

§ 21. Definition of Final Judgments.

A final judgment is such a judgment as at once put an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.[2] It is sometimes said that it is the award of the judicial consequences which the law attaches to the facts, and which determines the subject-matter of the controversy between the parties.[3] It is evident, however, that this description is too narrow. For a final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to the particular suit.[4] In other words, it is not at all necessary that the judgment should be upon the merits, if it definitely puts

[1] 1 U. S. Stats. at L. 79, § 25.

[2] 3 Bl. Comm. 398.

[3] West v. Bagly, 12 Tex. 34, 62 Am. Dec. 512, following Hanks v. Thompson, 5 Tex. 6. And see Hobbs v. Staples, 19 Me. 219.

[4] Belt v. Davis, 1 Cal. 134; Weston v. Charleston, 2 Pet. 449; Klink v. Cusseta, 30 Ga. 504.

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the case out of court. A judgment of nonsuit or dismissal is final, though it does not reach the merits. It is the termination of the individual action which marks the finality of the judgment. But there must be an actual judgment. An order for judgment is not a final judgment; it is final only when it contains the decision or sentence of the law upon the matter contained in the record; the order must be followed by the sentence of the law declaring that the party may recover the sum adjudged.[5] On the other hand, a judgment is as final when pronounced by the court as when entered and recorded by the clerk.[6] Where a motion for new trial has been made and entertained by the court, the judgment in the case does not become final and effectual, for purposes of review, until the date of the overruling of such motion.[7]

A judgment which is not final is called interlocutory. That is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court. Thus a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, though it may finally dispose of that particular matter.[8]

Under the common law system, an *order*, made in the progress of a suit and before judgment, will be considered final if it determines the action and prevents a judgment.[9] But an order which does not settle and conclude the rights involved in the action, and does not deny to the party the means of further prosecuting or defending the suit, is not so far final as to be a proper subject of appeal.[10]

[5] Macnevin v. Macnevin, 63 Cal. 186; Eastham v. Sallis, 60 Tex. 576.

[6] Kehoe v. Blethen, 10 Nev. 445.

[7] Brown v. Evans, 18 Fed. Rep. 56; New York, C. & St. L. R. Co. v. Doane, 105 Ind. 92, 4 N. E. Rep. 419. So where judgment rendered against a party not personally served is liable, by statute, to be vacated within three years, it does not become final until after that time. Martin v. Gilmore, 72 Ill. 193.

[8] But it has been held that a decree allowing temporary alimony and counsel fees is, to all legal intents and purposes, a final judgment, from which an appeal may be taken. Daniels v. Daniels, 9 Colo. 133, 10 Pac. Rep. 657.

[9] Hobbs v. Beckwith, 6 Ohio St. 253; Maysville & Lexington R. Co. v. Punnett, 15 B. Monr. 47.

[10] Hazlehurst v. Morris, 28 Md. 67.

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§ 22. Under the Codes.

The codes of procedure adopted in several of the states define a judgment as "the *final* determination of the rights of the parties in an action or proceeding." Under this system, therefore, there is no such thing as an interlocutory judgment in a cause, the only judgment authorized being one which finally disposes of the rights of the parties.[11] And the office of an interlocutory judgment at common law is, under the code practice, filled by various orders. But as, among the various orders which may be made in the progress of a cause, there may be some which, without finally adjudicating "the rights" of the parties, may determine some claim or contention which, from its independence and meritorious nature, ought to be the subject of an appeal, therefore in these states the statutes usually allow appeals from "an order affecting a substantial right" of one of the parties.[12] The qualifying adjective is used to exclude rulings on merely formal or technical points. The code practice is, generally speaking, more liberal in allowing appeals than the common law. Thus in California, "an appeal may be taken . . . . . from an order granting or refusing a new trial, from an order granting or dissolving an injunction, from an order refusing to grant or dissolve an injunction, from an order dissolving or refusing to dissolve an attachment, from an order granting or refusing to grant a change of the place of trial."[13]

§ 23. Must be final as to all Parties.

As a general rule, a judgment must possess the character of finality in disposing of the rights of *all* the parties concerned, before it can be considered final with respect to *any* of them. Thus when suit is instituted against two or more defendants, and judgment is entered

[11] Sellers v. Union Lumber Co., 36 Wis. 398.

[12] For illustrations of orders affecting substantial rights, see Gilbert v. Thayer, 104 N. Y. 200, 10 N. E. Rep. 148; State Bank of Nebraska v. Green, 9 Nebr. 165, 1 N. W. Rep. 270; Starbuck v. Dunklee, 10 Minn. 168, 88 Am. Dec. 68; Kingsley v. Gilman, 12 Minn. 515, (Gil. 425;) Vermilye v. Vermilye, 82 Minn. 499, 18 N. W. Rep. 832.

[13] Code of Civil Proc. Cal. § 939.

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for or against all of them except one, who is not mentioned or referred to in the decision, there is no final judgment from which an appeal can be taken, no order appearing for the disposal of the cause as to the defendant omitted from the judgment.[14] It has been held that a decree against one of several defendants (whose interests are not connected), with a direction for the payment of costs as to such defendant, is final as to him, although the cause may still be pending as to the others.[15] But the weight of authority is to the effect that an adjudication of the right or liability of one party does not become final, even as to him, while the cause remains undisposed of as to others.[16]

§ 24. Must settle all the Issues.

It is also requisite that a judgment, in order to be final, should determine all the issues involved in the cause. The decision on an issue of law which does not put the case out of court is not of this character. So if there are several issues of fact in the same controversy, the decision of one of them, leaving the others undetermined, is not a final adjudication. For there cannot be two final judgments in the same action. Thus, in an action of ejectment, where the defendant, besides legal defenses, set up also an equitable defense and asked affirmative relief, viz: that the court should declare that the deed under which the plaintiff claimed was in effect a mortgage, and this equitable branch of the case was taken up, tried, and disposed of before coming to the legal defenses, and an order was made and entered up in the form of a decree, declaring that the instrument in question was not a mortgage but a valid deed conveying title to the plaintiff, it was held that this was not a final judgment from which the defendant could appeal.[17]

[14] Whitaker v. Gee, 61 Tex. 217; Masterson v. Williams (Tex.) 11 S. W. Rep. 581; Schultz v. McLean (Cal.) 18 Pac. Rep. 775.

[15] Royall v. Johnson, 1 Rand. 421, And see Nichol v. Dunn, 25 Ark. 129.

[16] Peck v. Vandenberg, 30 Cal. 11; Martin v. Crow, 28 Tex. 614; Delap v. Hunter, 1 Sneed, 101; Whitaker v. Gee, 61 Tex. 217.

[17] Low v. Crown Point Mining Co., 2 Nevad. 75.

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§ 25. Uncertainty of the Amount.

An uncertainty as to the amount of the recovery will often prevent a judgment from becoming final until such amount is liquidated and declared. The test in these cases seems to be, whether the judicial action of the court is necessary to be directed to the question before the amount of the judgment can be settled, or whether, though at present uncertain, it can be determined or computed without the intervention of the court. Thus a judgment by default is interlocutory if the damages remain to be ascertained by writ of inquiry or other judicial proceeding. So a decree which settles the rights of the parties, but does not find the amount to be paid, leaving that for future determination, is not final.[18] The same is true of a decree which, after finding the equities to be in one of the parties, sends the case to a referee or master to ascertain and report the sum which he is entitled to recover.[19] For the report must be examined and confirmed by the court, before there is a final judgment for such sum. On the other hand, where a judgment is entered against one of the parties, to be released on payment of such sum as a third person shall say is due, it is a final judgment; because, to make it absolute so far as regards the amount, no further action of the court is necessary, but only the certificate of the referee.[20] So a decree in chancery which adjudges a certain sum of money to be due from the defendant, and awards execution to collect it, is a final decree, notwithstanding it also allows as payment to be deducted from the amount therein adjudged any note held by the defendant against the complainant.[21] Also, a decree is final, although an order is added to it suspending the decree as to one item of the account, until the decision of another suit, in which that item is in litigation.[22]

[18] Hunter v. Hunter, 100 Ill. 519.

[19] Belmont v. Pouvert, 3 Rob. (N. Y.) 693; Price v. Nesbit, 1 Hill Ch. 445; Tuggle v. Gilbert, 1 Duvall, 340; Deickhart v. Rutgers, 45 Mo. 183. But see Ayer v. Termatt, 8 Minn. 96, (Gil. 71.)

[20] Turner v. Plowden, 5 Gill. & J. 52, 23 Am. Dec. 596; Young v. Mackall, 3 Md. Ch. Dec. 398.

[21] Stovall v. Banks, 10 Wall. 583.

[22] Fleming v. Bolling, 8 Gratt. 292.

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§ 26. Judgment of Nonsuit.

This species of judgment is clearly final, since it completely disposes of the action, though without passing upon the merits. "By a final judgment is to be understood not a final determination of the rights of the parties, but merely of the particular suit. Thus, for instance, a judgment of nonsuit, other than where the plaintiff submits to a voluntary nonsuit, is a final judgment, even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated of his right of action in that suit and of his costs in prosecuting it." [23]

§ 27. Dismissal of Suit.

The dismissal of a bill in chancery or of a suit at law, since it fully disposes of that action, is a final judgment; it is a final decision of the case as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.[24] Thus a judgment dismissing a suit for want of prosecution, in which a temporary injunction had been granted, amounts to a determination by the court that the injunction was improperly granted, and is in effect a final judgment in favor of the defendant.[25] So a judgment discharging a garnishee is a final and complete disposition of the cause, and the court has thereafter no jurisdiction over it; so that a judgment against the

[23] Belt v. Davis, 1 Cal. 184. A judgment of nonsuit may be reviewed on error. Box v. Bennett, H. Bl. 432. That a judgment of *non pros.* is a final judgment, see Hartford Fire Ins. Co. v. Green, 52 Miss. 382.

[24] Dowling v. Polack, 18 Cal. 625; Zoller v. McDonald, 23 Cal. 136; Leese v. Sherwood, 21 Cal. 151; Stoppenbach v. Zohrlaut, 21 Wis. 385; Bowie v. Kansas City, 51 Mo. 454; Gill v. Jones, 57 Miss. 367; Scriven v. Hursh, 39 Mich. 98; Snell v. Dwight, 121 Mass. 348; Bowler v. Palmer, 2 Gray, 553; Eddleman v. McGlathery (Tex.) 11 S. W. Rep. 1100; Rodgers v. Russell, 11 Nebr. 361, 9 N. W. Rep. 547. An order "that this board will proceed no further in the premises, and that the respondents be hence discharged and go thereof without day," is a final adjudication that the petitioner has sustained no damage. Smith v. Mayor of Boston, 1 Gray, 72. Where one of several defendants pleads to the action and the plaintiff replies, and on motion of a co-defendant the original writ of summons is quashed, and judgment "that he go hence," that is no final judgment in favor of the defendant pleading. State Bank v. Roddy, 15 Ark. 401.

[25] Dowling v. Polack, 18 Cal. 625.

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garnishee for costs, at a subsequent term, is void.[26] This rule, however, is subject to certain exceptions. Thus it is said that while, in an ordinary case, a judgment dismissing a suit is final, yet an action of replevin is an extraordinary remedy, and in such action a judgment dismissing the suit is not final, and error cannot be assigned upon such an order until after final judgment.[27] Again, an order in equity dismissing a cross-bill is interlocutory merely, and such an order is not subject to review in the appellate court until the whole case is disposed of.[28]

§ 28. Judgment by Default.

The rule in regard to a judgment by default is, that if such a judgment is rendered for a fixed and liquidated sum, or if the amount can be ascertained by mere calculation from the pleadings, it is final; but if the amount of the recovery or damages remains to be ascertained by a writ of inquiry or other judicial method of computation, then the judgment is merely interlocutory, until such amount is settled and entered on the record.[29] "A judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final."[30] Where suit is brought against two defendants who

[26] Jackson v. St. Louis & San Francisco R. Co., 89 Mo. 104, 1 S. W. Rep. 224.

[27] Branch v. Branch, 5 Fla. 447.

[28] Fleece v. Russell, 13 Ill. 31. A decree sustaining a motion to strike out a reconventional demand presented by the defendant in his answer to a suit which has not yet gone to trial, is not final but interlocutory. State v. Judge, 35 La. Ann. 765.

[29] Sellers v. Burk, 47 Pa. St. 344; McClung v. Murphy, 2 Miles (Pa.) 177; Beitler v. Zeigler, 1 Pen. & W. 135; Martin v. Price, Minor (Ala.) 68; Maury v. Roberts, 27 Miss. 225; Hyde v. Pinkard, 25 Ark. 163. See Dorsey v. Thompson, 37 Md. 25. A judgment obtained for the want of a plea, in a *qui tam* action of debt, is interlocutory and not final. Daniel v. Cooper, 2 Houst. (Del.) 506. Judgment for want of appearance in an action on the case, without declaration filed or anything to indicate the amount, is interlocutory in the first instance, and becomes final when the amount is settled and entered on the record. Phillips v. Hellings, 5 Watts & S. 44.

[30] Clements v. Berry, 11 How. 398, McLean, J.

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are jointly and severally liable, and one suffers a default, and the other puts in a plea and goes to trial, the judgment entered against the former defendant, on his default, is merely interlocutory until the case is disposed of as to the other.[21]

"An order that a bill be taken *pro confesso* is interlocutory and intended to prepare the case for a final decree. Its effect is similar to that of a default in an action at common law, by which the defendant is deemed to have admitted all that is well pleaded in the decla ration. The defendant has lost his standing in court, and is not entitled to notice of its further proceedings, but the matters set forth in the bill do not pass *in rem judicatam* until the final decree."[22]

§ 29. Judgment on Demurrer.

When the issue of law raised by a demurrer is decided in favor of the plaintiff, and judgment is entered *quod recuperet*, such judgment is of course final if the amount of the recovery is fixed. Similarly, where such an issue is found for the defendant, and judgment for his discharge is given, it is final; for the decision has the effect of disposing of that particular suit. The case is otherwise where the plaintiff's demurrer to a dilatory plea is sustained. For here the judgment is *respondeat ouster*, which, as its name implies, does not terminate the action, but only requires the defendant to plead to the merits. And all the authorities agree that a decision or order of the court sustaining or overruling a demurrer, but not entering judgment thereon so as to dispose of the case, is merely interlocutory.[23] It is

[21] Commonwealth v. McCleary, 92 Pa. St. 188.

[22] Russell v. Lathrop, 122 Mass. 300, Devens, J.

[23] Warner v. Tomlinson, 1 Root, 201; Paddock v. Ins. Co., 12 N. Y. 591; Elwell v. Johnson, 74 N. Y. 80; Johnson v. Polk Co. (Fla.) 8 South. Rep. 414; Rose v. Gibson, 71 Ala. 35; Shields v. Taylor, 18 Sm. & Mar. 127; State v. Falconer (Ark.) 5 S. W. Rep. 193; Slagle v. Bodmer, 58 Ind. 465; Hays v. Caldwell, 5 Gilm. 33; Knapp v. Marshall, 26 Ill. 63; Gage v. Eich, 56 Ill. 297; Palmer v. Crane, 8 Mo. 619; Robinson v. County Court, 32 Mo. 428; State v. Justices, 58 Mo. 583; Kirchner v. Wood, 48 Mich. 199, 12 N. W. Rep. 44; Maraga v. Emeric, 4 Cal. 308; Miller v. Railroad, 7 Nebr. 227. A decision sustaining or overruling a demurrer is an order, not an interlocutory judgment, and as it is not enumerated in the specification of appealable orders (Code Civ. Proc. N. Y. § 1349), an appeal does not lie to the general term from such a decision. Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514.

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also to be noted that the general rule is subject to certain exceptions depending on the peculiar nature of the action or the local rules of practice. Thus, a final judgment, in an action to recover a penalty imposed by statute, to be recovered "on conviction," cannot be entered on demurrer, but only on a trial upon the merits.[34] So, in Mississippi, it is said that, under the statute, judgments on demurrers are not final until the end of the term, until which time, on proper showing, they may be set aside.[35]

§ 30. Judgment on Plea in Abatement.

Where issue is joined upon a matter of a plea in abatement and found against the defendant, the judgment for the plaintiff is final.[36] It is different in regard to the decision of a preliminary question of jurisdiction. Thus, in a litigation respecting the distribution of a testator's property, a question arose as to his domicil, and after hearing testimony the court decided that "his domicil was in the city of W.," and "this court has original jurisdiction in the matter of his estate." It was held that this was not a final judgment.[37]

§ 31. Judgment for Costs.

A judgment which merely awards costs to the defendant, without more, is not a final judgment.[38] In order to have that character, it must profess to terminate and completely dispose of the action. Hence, if for the defendant, the final judgment must state that he is dismissed without day, or that it is considered that the plaintiff take nothing by his suit, or otherwise refer to the disposition made of the subject-matter. "The form of the judgment," say the court in Texas, "is immaterial, but in substance it must show intrinsically and dis-

[34] Reagh v. Spann, 3 Stew. 100.

[35] Shields v. Taylor, 13 Sm. & Mar. 127.

[36] Jewett v. Davis, 6 N. H. 518; McCartee v. Chambers, 6 Wend. 649, 22 Am. Dec. 556; Haight v. Holley, 3 Wend. 258.

[37] Benjamin v. Dubois, 118 U. S. 46, 6 Sup. Ct. Rep. 925.

[38] Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782; Green v. Banks, 24 Tex. 522; Whitney Iron Works Co. v. Reuss (La.) 8 South. Rep. 500; Dusing v. Nelson, 7 Colo. 184, 2 Pac. Rep. 923; Higbee v.

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tinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated. The costs are regulated by statute, and are an incident or appendage of the judgment, and generally are recoverable by the victor in the contest. But, as an incident, they cannot be substituted for the principal; and a judgment for their recovery is not a decision of the matter at issue; and it is therefore no such final judgment as can, by law, come within the revisory power of this court." [39]

§ 32. Granting or Refusing Extraordinary Remedies.

According to the general consensus of judicial opinion, an order or decree granting a provisional or temporary injunction, with a reference to ascertain facts, or directing a trial at law, or otherwise reserving the merits; or a decree refusing to grant, or dissolving, a temporary injunction which is merely an incident of the relief sought, is interlocutory only, not final.[40] But a decree in favor of the complainant for a *perpetual* injunction, with costs, is final; for that completely adjudicates the relief asked and speaks the last word in the case.[41] And so, generally, is a decree dissolving an injunction, or refusing to dissolve it, where that is the sole or the main object of the bill.[42] It must be noted, however, that these rules may not apply in

Bowers, 9 Mo. 354. See Sprott v. Reid, 8 Iowa, 489, 56 Am. Dec. 549.

[39] Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782. Hemphill, C. J.

[40] Gibbons v. Ogden, 6 Wheat. 448; Barnard v. Gibson, 7 How. 650; Verden v. Coleman, 18 How. 86; Norton v. Hood, 12 Fed. Rep. 763; Humiston v. Stainthorp, 2 Wall. 106; Price v. Strange, 2 Hen. & M. 615; Green v. Banks, 24 Tex. 522; *Ex parte* Hawley, 24 Ark. 596; Moss v. Ashbrooks, 15 Ark. 169; Pentecost v. Magahee, 4 Scam. 326; Lucan v. Cadwallader (Ill.) 7 N. E. Rep. 286; Jefferson v. Bohemian Ass'n, 5 Ill. App. 230; Harrison v. Rush, 15 Mo. 175; Tanner v. Irwin, 1 Mo. 65; Wing v. Warner, 2 Dougl. (Mich.) 288; Choteau v. Rice, 1 Minn. 24, (Gil. 8;) School Distr. v. Brown, 10 Nebr. 440; Smith v. Sahler, 1 Nebr. 310; Scofield v. State Nat. Bank, 8 Nebr. 16.

[41] French v. Shoemaker, 12 Wall. 86; Merchants' Bank v. Kent, 43 Mich. 292, 5 N. W. Rep. 627; Rickards v. Coon, 13 Nebr. 419, 14 N. W. Rep. 162. But see Brown v. Swann, 9 Pet. 1.

[42] Salay v. Collins, 30 La. Ann. 63; Titus v. Mabee, 25 Ill. 257; Prout v. Lamer, 79 Ill. 331; Hedges v. Meyers, 5 Ill. App. 347; Oberkoetter v. Luelbering, 4 Mo. App. 481; McVickar v. Wolcott, 4 Johns. 510. But see Hiriart v. Ballon, 9 Pet. 156.

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some of the states where the code practice obtains. In those jurisdictions, orders granting or dissolving an injunction, or overruling a motion to that effect, are frequently found in the enumerated classes of appealable orders;[43] or they may be considered as orders "affecting a substantial right" and hence subject to the revisory power of the upper courts.

On analogous principles, it must be held that an order of the court granting or refusing the writ of *mandamus* in the alternative, is not a final judgment. But its action in allowing or denying a peremptory *mandamus*, or in making the interlocutory writ absolute, is final to all legal intents and purposes. And so where the parties to a proceeding for this writ dispense, by agreement, with a return or answer and other formal pleadings authorized by statute, and submit the case upon the petition and an agreed statement of facts in lieu of such pleading, and the case is heard as an application for a peremptory *mandamus*, and a judgment is rendered thereon dismissing the petition, this is a final judgment reviewable on error.[44]

A judgment or decree appointing a *receiver*, to take charge of the property in litigation, or to administer the revenues of the defendant, subject to the direction of the court, during the pendency of the suit, is not considered a final judgment.[45] And an order removing a receiver is likewise interlocutory.[46] In two states, nevertheless, it is held that orders appointing receivers are final and appealable.[47] This is a variance of local practice. But in the system of procedure under the codes, where proceedings of this character are classed as "special proceedings," and an order made in such proceedings which affects

[43] Code of Civ. Proc. Cal. § 939.

[44] State v. Ottinger, 43 Ohio St. 457, 3 N. E. Rep. 298.

[45] Fuller v. Adams, 12 Ind. 559; Produce Bank v. Morton, 40 N. Y. Superior Ct. 328; Eaton & Hamilton R. Co. v. Varnum, 10 Ohio St. 622; Hottenstein v. Conrad, 5 Kans. 249; Maysville & Lexington R. Co. v. Punnett, 15 B. Monr. 47; Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co., 31 Kans. 90, 1 Pac. Rep. 274; Lewis v. McCabe, 16 Mo. App. 398; Stebbins v. Savage, 5 Mont. 258, 5 Pac. Rep. 278.

[46] Farson v. Gorham, 117 Ill. 137, 7 N. E. Rep. 104.

[47] Lewis v. Campau, 14 Mich. 458, 90 Am. Dec. 245; Taylor v. Sweet, 40 Mich. 736; *In re* Graeff, 30 Minn. 358, 16 N. W. Rep. 395. A decree appointing a trustee to sue under a deed of trust is final as to that matter, and binding alike on parties to the decree and strangers. Griffin v. Doe, 12 Ala. 783.

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a substantial right is final and appealable, it seems reasonable that a decision granting or refusing a receiver should be considered as final for this purpose, since it does not turn upon a formal or technical point, but goes to the claim of the party to secure the property in litigation in the most efficacious manner.[48]

§ 33. On Motion for New Trial.

It is generally held that a judgment or order granting a new trial in an action at law is not a final judgment, and an appeal cannot be taken until the judgment is rendered which terminates the suit.[49] So also, an order overruling a motion to set aside the verdict of a jury and refusing to grant a new trial, is interlocutory only, and an appeal or writ of error must be addressed to the judgment entered on the verdict.[50] The same remark is true of an order denying an application for a rehearing.[51] And in a case where the report of a referee appointed by the special term to take proofs and determine as to rival claims to surplus money in foreclosure had been confirmed at special term, and that adjudication was reversed at general term, the latter court ordering a new hearing before another referee to be appointed by the special term, it was held that such order of the general term was not a final order, and therefore not appealable to the court of appeals.[52] In Iowa, however, it is held that an appeal may be maintained from an order refusing a new trial, although no judgment has been entered on the verdict.[53] And in California, and perhaps some other states, it is provided by statute that "an appeal

[48] Cincinnati, S. & C. R. Co. v. Sloan, 31 Ohio St. 1.

[49] Houston v. Starr, 12 Tex. 424; Stewart v. Jones, 9 Tex. 469; House v. Wright, 22 Ind. 383; White v. Harvey, 23 Ind. 55; Byers v. Butterfield, 33 Mo. 376; McDonough v. Nicholson, 46 Mo. 35; Lawson v. Moore, 44 Ala. 274.

[50] Kearney v. Snodgrass, 12 Oreg. 311, 7 Pac. Rep. 309; Whittaker v. West Boylston, 97 Mass. 273; Holdsworth v. Tucker (Mass.) 18 N. E. Rep. 430; Damron v. Ferguson (W. Va.) 9 S. E. Rep. 39; Conord v. Runnels, 23 Ohio St. 601. "Former decisions sustaining such appeals have long since been overruled." Roberts v. State, 3 Tex. App. 47, citing Mayfield v. State, 40 Tex. 289; Anschinck v. State, 43 Tex. 587; Young v. State, 1 Tex. App. 64.

[51] Mayor of New York v. Schermerhorn, 1 N. Y. 423.

[52] Mutual Life Ins. Co. v. Anthony, 105 N. Y. 57, 11 N. E. Rep. 281.

[53] Baldwin v. Foss, 71 Iowa, 389, 32 N. W. Rep. 389.

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may be taken from an order granting or refusing a new trial."[54] But where an order refusing a new trial and dismissing the motion therefor is itself appealable, no appeal will lie from an order refusing to revoke a prior order to that effect.[55]

§ 34. Vacating or Reversing former Judgment.

Where, under the code system of procedure, an independent action is brought for the purpose of vacating a former judgment between the same parties and procuring a new trial of the action, and the relief is granted as asked, it seems that the judgment to that effect must be considered as final and appealable. For the issues in the independent suit having been determined and the relief accorded, the decision puts an end to that controversy.[56] But where the application comes in the form of a motion made in the same cause, and the court grants an order opening or vacating the judgment already entered, it is clear that such an order is no final judgment; on the contrary, it merely suspends the finality of the original judgment until the case has been heard and decided anew.[57] Nor is the case otherwise where the court denies the application. A refusal to open a judgment is not a judgment, sentence, or decree; it concludes nothing, and is not assignable for error.[58] "It is settled that when a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside."[59] A writ of error cannot be taken from the supreme court

[54] Code of Civ. Proc. Cal. § 939.

[55] Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396.

[56] McCall v. Hitchcock, 7 Bush, 615; Belt v. Davis, 1 Cal. 134. A probate court rescinded an order formerly made by it appointing a certain person guardian of a minor; *held*, that the rescinding order was a final judgment and appealable. State v. Allen, 92 Mo. 20, 4 S. W. Rep. 414.

[57] McCulloch v. Dodge, 8 Kans. 476; Higgins v. Brown, 5 Colo. 345; Brown v. Edgerton, 14 Nebr. 453, 16 N. W. Rep. 474. An order of a court of equity suspending a sale and operating as a continuation and renewal of the former order of sale, is not a final decree. Dorsey v. Thompson, 37 Md. 25.

[58] Evans' Adm'r v. Clover, 1 Grant (Pa.) 164.

[59] Goyhinech v. Goyhinech, (Cal.) 23 Pac. Rep. 175, citing Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396; Tripp v. Railroad Co., 69 Cal. 632, 11 Pac. Rep. 219; Reay v. Butler, 69 Cal. 585, 586, 11 Pac. Rep. 463; Railroad Co. v. Railroad Co., 65 Cal. 295, 4 Pac. Rep. 13; Holmes

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of the United States to the appellate court of a state on a judgment of the latter court which merely reverses that of the trial court and awards a *venire facias de novo*, such judgment not being final.[60] But a judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final.[61]

§ 35. Order of Interpleader.

An order of court requiring parties to interplead is in general merely interlocutory, since it settles no rights, and merely serves to prepare the case for examination and decision.[62] So an order directing the payment into the registry of the court of a garnishee fund, claimed by a third person, pending the determination of the right to it, is not a final judgment or decree.[63]

§ 36. Dissolving Attachments and Executions.

It is held, by the almost universal agreement of the authorities, that judgments, orders, or decrees, quashing or dissolving attachments, or refusing to do so, are merely interlocutory.[64] For an attachment is, in general, only an incident of the suit, and a decision upon its validity or applicability is no more than the settlement of a preliminary and subordinate question, leaving untouched the ultimate rights of the parties and not disposing of the main controversy. Still, in

v. McCleary, 63 Cal. 497; Coombs v. Hibberd, 43 Cal. 452; Water Co. v. Parker, 16 Cal. 83; Stearns v. Marvin, 3 Cal. 376.

[60] Houston v. Moore, 3 Wheat. 433. "A judgment of a lower appellate court, which reverses the judgment of the court of original jurisdiction and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case." Field, J., in Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. Rep. 566.

[61] Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. Rep. 799.

[62] Barth v. Rosenfeld, 36 Md. 604.

[63] Louisiana Bank v. Whitney, 121 U. S. 284, 7 Sup. Ct. Rep. 897.

[64] Jacobi v. Schloss, 7 Cold. 385; Cutler v. Gumberts, 8 Ark. 449; Butcher v. Taylor, 18 Kans. 558; Abbott v. Zeigler, 9 Ind. 511; Woodruff v. Rose, 43 Ala. 382; Bray v. Laird, 44 Ala. 295; Wearen v. Smith, 80 Ky. 216; Baldwin v. Wright, 3 Gill, 241; Talbot v. Pierce, 14 B. Monr. 195; Hanson v. Bowyer, 4 Met. (Ky.) 108; Wickham v. Nalty, (La.) 6 South. Rep. 128.

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one state at least, a contrary view is maintained, and it is thought that a judgment dismissing an attachment is in its nature final, and error will lie on it, notwithstanding the cause may still be pending below on the declaration to have a recovery on the merits, as if the suit had been brought by ordinary process.[65] There is something to be said for this position. For, as the court observed, the whole attachment element is disposed of by the order for its dismissal. Any judgment which may be thereafter recovered will have no aid from the levy of the attachment. Its lien will rank only from the date of the judgment, and the security of the replevy bond will be lost. "To maintain his attachment, it was the right of the plaintiff to have the judgment dismissing it reviewed by a separate writ of error."[66] Similarly it has been held that a decision of the court upon a rule or motion to quash an execution is merely interlocutory, not a final judgment.[67] But this view also has been denied.[68]

§ 37. Order removing Cause.

An order for the removal of a cause from a state court to the circuit court of the United States, for trial, under the various acts of Congress in that behalf, is without question a final order.[69] "An order removing or refusing to remove a cause, civil or criminal, to another court for trial, finally adjudicates a constitutional right of the party affected by the order. And it is regarded as a judgment, from which, according to the nature of the case, an appeal or writ of error may be immediately prosecuted."[70] Conversely, the decision of the federal court upon a motion to *remand* the cause to the state court from which it came, on the ground of its irregular or improper removal, or for want of jurisdiction, is in its nature final and appealable. It must be remarked, however, that since the act of Congress of March 3, 1887, on this subject, it is only when the circuit court

[65] Bruce v. Conyers, 54 Ga. 678.

[66] Bruce v. Conyers, 54 Ga. 678. See Code of Civ. Proc. Cal. § 939.

[67] McCargo v. Chapman, 20 How. 555.

[68] Loomis v. Lane, 29 Pa. St. 242, 72 Am. Dec. 625.

[69] Home Life Ins. Co. v. Dunn, 20 Ohio St. 175, 5 Am. Rep. 642.

[70] McMillan v. State, 68 Md. 307, 12 Atl. Rep. 8.

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denies a motion to remand that an appeal can be taken to the United States supreme court; if it decides that the removal was wrongfully or improperly ordered, and remands the cause, an appeal or writ of error is expressly forbidden.[71]

§ 38. Settling Accounts of Executors and Trustees.

It is held that the allowance by a probate court of an annual account of an executor or administrator is not a final judgment from which an appeal can be taken.[72] But of course the case is otherwise when settlement is made of the final accounts of personal representatives, or of a guardian, committee, or conservator. So the accounts of a trustee, when filed in the proper court and confirmed, are definitive decrees of that court, and are not open to re-examination.[73]

§ 39. Judgment in Partition.

According to the usual practice in proceedings for partition of land, a preliminary judgment or decree is rendered, directing that partition be made, *quod partitio fiat*, and nominating certain persons to effect a division and report to the court. When the report is confirmed, or the method of apportionment otherwise fixed, and all the rights of the parties adjusted and settled, another judgment is entered declaring that the partition shall stand as approved. Now the first decree in these proceedings, establishing the existence of a co-tenancy, ordering that partition be made, and appointing commissioners, is generally interlocutory.[74] But the first decree in partition *may* be

[71] Dillon, Removal of Causes (5th Edn.) § 161. A certificate of division of opinion of the judges in the federal circuit court, accompanied by a statement of facts, to serve as a basis for an appeal to the supreme court of the United States, is not a final judgment which will support the plea of *res judicata*. Anderson v. Valentine, 15 La. Ann. 379.

[72] Baker v. Runkle, 41 Mo. 392.

[73] Moore's Appeal, 10 Pa. St. 435.

[74] Green v. Fisk, 103 U. S. 518; Beebe v. Griffing, 6 N. Y. 465; Gesell's Appeal, 84 Pa. St. 238; Templeman v. Steptoe, 1 Munf. 339; Young v. Skipwith, 2 Wash. (Va.) 300; Putnam v. Lewis, 1 Fla. 455; Medford v. Harrell, 3 Hawks, 41; Chester v. Gibson, 15 Ind. 10; Davis v. Davis, 36 Ind. 160; Kern v. Maginniss, 41 Ind. 398; Pipkin v. Allen, 29 Mo. 229; Durham v. Durham, 34 Mo. 447; Ivory v. Delore, 26 Mo. 505; Gates v. Salmon, 28 Cal. 320; Peck v. Vandenberg, 30 Cal. 11; Mills v. Miller, 2 Nebr. 299. Under the present statute, where land is ordered to be sold for purposes of parti-

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final, and it will have that character, if it settles all the rights of the parties and leaves nothing for the future consideration or judicial action of the court.[75] Thus a decree declaring that the plaintiff is entitled to one undivided third of the land in question, and appointing commissioners to make partition, is held to be a final decree and appealable before the subsequent proceedings are had.[76] And so, where a judgment was passed for the partition of realty among the heirs who were entitled to it, and commissioners were appointed to make the division without further orders of the court, it was considered to be a final determination of the rights of the parties and therefore appealable.[77] But an unauthorized declaration, in the order for partition, that the plaintiff's share of the rents and profits received by defendant as tenant in possession shall constitute a special lien, and that a special execution shall issue therefor, cannot have the effect to convert an otherwise interlocutory order into a final and appealable judgment.[78]

§ 40. In Condemnation Proceedings.

A judgment rendered in proceedings for the condemnation of land under the power of eminent domain, where adversary proceedings have been had between the petitioner and the parties whose interests are to be affected, and the court has confirmed a report of commissioners appointed to assess the value of the land taken, and it is adjudged that the petitioner has complied with the statutory requirements, is a final judgment.[79] On similar principles, a decree of confirmation of a report of viewers laying out a road is final until reversed on *certiorari*.[80]

tion, there is no final judgment till the sheriff's report of sale is filed and an order is entered approving the same and directing distribution of the proceeds. The order of partition and sale is not a final judgment. Murray v. Yates, 73 Mo. 13.

[75] Ansley v. Robinson, 16 Ala. 793; Banton v. Campbell, 2 Dana, 421; Damouth v. Klock, 28 Mich. 163.

[76] Williams v. Wells, 62 Iowa, 740, 16 N. W. Rep. 513. See Cannon v. Hemphill, 7 Tex. 184.

[77] Beatty v. Beatty's Adm'r. (Ky.) 5 S. W. Rep. 771.

[78] Holloway v. Holloway (Mo.) 11 S. W. Rep. 233.

[79] Railroad Co. v. Harlan, 24 Cal. 337.

[80] Hunter's Private Road, 46 Pa. St. 250.

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§ 41. Finality of Decrees.

In drawing the distinction between final and interlocutory adjudications, the greatest difficulty has been experienced in the case of decrees in equity, the confusion arising principally from the peculiar nature of these decisions and the wide range of means which chancery possesses both for informing the mind of the judge and for acting upon the parties concerned. Many tests of finality have been proposed, some proceeding upon opposite principles, some viewing the same principle in different aspects. Thus, several cases hold that a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.[81] This is perhaps a little too broad. For, as we shall see, it does not impair the finality of a decree that it has to pass through the hands of a master, for ministerial acts to be done in relation to it, before it is ready for execution. Other cases define a final decree as that which is made when all the material facts in the cause have been ascertained, so as to enable the court to understand and decide on the merits of the case.[82] According to another authority, any decree is final which renders the equities incapable of change in the further progress of the cause.[83] Or where nothing remains to be done which may be the subject of exception or appeal.[84] Or where the decree "completely and finally disposes of some branch or part of the cause which is separate and distinct from the other parts of the case."[85] Another case, coming much nearer to a satisfactory definition, holds that the final decree is not necessarily the last decree rendered, by which all proceedings in the case are terminated, and nothing is left open for the future judgment or action of the court; but it is a decree which determines the substantial merits of the controversy,—all the equities of the case,—though

[81] Railroad Co. v. Southern Ex. Co., 108 U. S. 24, 2 Sup. Ct. Rep. 6; Grant v. Ins. Co., 106 U. S. 429, 1 Sup. Ct. Rep. 414; Cook's Heirs v. Bay, 4 How. (Miss.) 485; Vanmeter v. Vanmeter, 8 Gratt. 148.

[82] Jaques v. Methodist Episcopal Church, 17 Johns. 548, 8 Am. Dec. 447.

[83] Jones v. Wilson, 54 Ala. 50.

[84] Bellamy v. Bellamy, 4 Fla. 242.

[85] Evans v. Dunn, 26 Ohio St. 439.

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there may remain a reference to be had, or the adjustment of some incidental or dependent matter.[86]

The difficulty appears to arise in relation to those decrees which, while settling the general equities of the cause, leave something for future action or determination. And the true rule seems to be, that if that which remains to be done or decided will require the action or consideration of the court before the *rights involved* in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in *execution* of the decree as it stands. This rule is well brought out in a decision of the supreme court of Ohio, from which, for its clearness and accuracy, we proceed to quote at some length. "A decree is final," says Reed, J., "which disposes of the whole merits of the cause, and leaves nothing for further consideration of the court. A decree is interlocutory which finds the general equities, and the cause is retained for reference, feigned issue, or consideration, to ascertain some matter of fact or law when again it comes under the consideration of the court for final disposition. When no further action of the court is required, it is final; when the cause is retained for further action, it is interlocutory. Further decrees and orders of the court sometimes become necessary to carry into effect the rights of parties fixed by final decree; and final decrees oftentimes direct an act to be done, as in case of specific performance, that on payment of the purchase-money as specified in the final decree the vendor shall execute a deed; or, in case of redemption, that on payment of the money due, the mortgage be cancelled; or even sometimes all the rights of the parties being found, and all the consequences to flow from a certain fact having been determined, a reference as to such fact may be had to a master, and still the decree be final. The confusion has sprung up from failing to observe the distinction between facts and things to be ascertained *preparatory* to final decree, and facts and things to be ascertained *in execution* of final decree. Because a final decree might

[86] Walker v. Crawford, 70 Ala. 567. See Travis v. Waters, 1 Johns. Ch. 85. A report in chancery has not the effect of a decree until confirmed. Champlin v. Railroad, 9 Heisk. 683.

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direct that certain facts should be ascertained in execution of such decree, it will not make it interlocutory; nor, on the other hand, because a decree finds the general equities of the cause, and reference is had to a master to ascertain facts preparatory to a final disposition, will it be regarded as final. It seldom happens that a first decree can be final to conclude the cause, and yet, in all cases, the general equity should be found, and the principles laid down for the government of the master, before reference had. But such decrees are never held to be final."[87]

§ 42. Further Action necessary to settle the Equities.

Adopting the rule set forth in the preceding section, it will now be desirable to give some illustrations of cases in which the decree has been held interlocutory merely, because some further act or decision was necessary before the equities could be completely settled and disposed of. And first, when the further action of the court in the cause is necessary to give completely the relief contemplated by the court, the decree upon which the question arises is not to be regarded as final.[88] Thus, a judgment of foreclosure, directing the sale of the mortgaged premises, and the payment by the defendant of any deficiency which may arise on such sale, is not such a final judgment as that an action will lie upon it, because, on such a judgment, further proceedings, such as the confirmation of the referee's report, etc., must be had before a personal judgment can be entered.[89] So a judgment dissolving a partnership, ascertaining the sum of money due by the copartners to the plaintiff, ordering a sale of the copartnership property and effects, and decreeing payment therefrom of the amount due plaintiff, but providing that in case the amount realized from such sale is not sufficient to pay the judgment, that the plaintiff shall be entitled to a personal judgment against the individual members of the firm for the deficiency, is not a final judgment, but merely an interlocutory decree.[90] So also, a reservation of the ques-

[87] Kelley v. Stanbery, 13 Ohio, 408, 421.

[88] Miller v. Cook, 77 Va. 806; Cocke v. Gilpin, 1 Rob. (Va.) 20.

[89] Hanover Fire Ins. Co. v. Tomlinson, 8 Hun, 630.

[90] White v. Conway, 66 Cal. 388, 5 Pac. Rep. 672.

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tion of *costs*, in a decree which in other respects disposes of the subject-matter of the suit, renders such decree interlocutory.[91] Again, a decree ordering an act to be done before the decree itself can be effectual is interlocutory.[92] And a decree which decides definitely in favor of the complainant in respect to one of the claims presented, but reserves the consideration of another claim, constituting an integral part of the case, is not final.[93] So if it directs an act to be done, but requires a report to be made of the manner of its performance; as where the decree authorizes an executor to sell the real estate of his testator for the payment of debts, and to report his proceedings in execution thereof to the court.[94] But it has been held, by a high authority, that when a decree passes for a certain sum of money, and the complainant is entitled to have it immediately carried into execution, it must be regarded as final to that extent, and appealable, although so much of the bill is retained in the court below as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.[95]

§ 43. Further Action necessary to execute the Decree.

The second branch of the rule above stated is, that although further acts or directions may be necessary to carry the decree into effect, it is still final if it settles the equities. Thus, a decree that defendants should assign a certificate of lands to the plaintiff, provided he should, before a given day and after a tender of the assignment, pay a certain sum of money to them, is a final decree.[96] So where certain of the stockholders in a corporation filed their bill in equity, praying that the proceedings of a meeting of stockholders, and of the directors in accordance therewith, might be set aside as void for fraud, and for the appointment of a receiver, and the court granted the relief prayed in the bill, but added a clause to the decree reserving such

[91] Dickenson v. Codwise, 11 Paige, 189. But compare McFarland v. Hall, 17 Tex. 691.

[92] Hays v. Mays, 1 J. J. Marsh. 497.

[93] Bond v. Marx, 53 Ala. 177.

[94] Goodwin v. Miller, 2 Munf. 42. And see Donaldson v. Bank, 4 S. Car. 106.

[95] Forgay v. Conrad, 6 How. 201.

[96] Turner v. Crebill, 1 Hamm. 368. And see Harmon v. Bynum, 40 Tex. 324.

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further directions, as to costs, etc., as might be necessary to carry the decree into execution, it was held that this was a final decree.[97] Again, a decree which ascertains the sum in the hands of a party to be accounted for, and those who are entitled to it, and orders it to be paid over to the parties entitled, and directs the costs of the suit to be paid first out of the fund, and makes no reference to a master, and seeks to ascertain no new fact, but assumes that the court is in full possession of all the facts, so as to adjudicate between the contestants according to equity and conscience, is a final decree, although it also requires the accountant to report to the court his distribution and dealing with the fund.[98] It must be remembered that it is not essential, for a judgment to be final, that it should settle all the rights existing between the parties to the suit; all that is required is that it should determine the issues involved in the action.[99]

§ 44. Decree ordering a Reference.

The most difficult cases in which to draw the line between final and interlocutory decrees, are those in which the decree, after finding the general equities, orders a reference to a master for some specific purpose. Yet there are not wanting principles upon which to base a reasonable and accurate distinction in these cases. As the condensed result of the numerous authorities on the subject, we may formulate the following specific rules. First, where a decree is made disposing of the general equities of the case, but ordering a reference to a master to ascertain damages, or to find certain facts, or to do anything else necessary to be done before a final adjustment of the rights of the parties can be had, if the functions of the master are to be *judicial*, and not merely ministerial, and the provisions depending on his report are not already incorporated in the decree, then the decree is interlocutory and not final.[100] Second, where a decree ascer-

[97] Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. Rep. 111.

[98] Ledyard v. Henderson, 46 Miss. 260.

[99] Perkins v. Sierra Nevada, etc., Co., 10 Nevad. 405.

[100] Chace v. Vasquez, 11 Wheat. 429; Perkins v. Fourniquet, 6 How. 206; Craighead v. Wilson, 18 How. 199; Humiston v. Stainthorp, 2 Wall. 106; Beebe v. Russell, 19 How. 283; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. Rep. 1153; Kane v. Whittick, 8 Wend. 219;

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tains and fixes all the rights of the parties, but a reference is ordered to a master to do or ascertain something that is necessary to carry the decree into effect, if the functions of the master are to be merely *ministerial* and not judicial, or if all the consequential directions depending on the result of the proceedings before him are given in the decree itself, then the decree is final and not interlocutory.[101] To take a single illustration,—the reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or refuse allowances affecting the rights of the parties, and to report his results to the court, is not a final decree. For his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can

Johnson v. Everett, 9 Paige, 636; Chittenden v. Society, 8 How. Pr. 327; Cruger v. Douglas, 2 N. Y. 571; Tompkins v. Hyatt, 19 N. Y. 534; Templeman v. Steptoe, 1 Munf. 339; Ryan v. McLeod, 32 Gratt. 367; Mackey v. Bell, 2 Munf. 523; Price v. Nesbit, 1 Hill Ch. 445; Putnam v. Lewis, 1 Fla. 455; Griffin v. Orman, 9 Fla. 22; Owens v. Love, 9 Fla. 325; Garrard v. Webb, 4 Port. 73; Garner v. Prewitt, 32 Ala. 13; Broughton v. Wimberly, 65 Ala. 549; Cook v. Bay, 4 How. (Miss.) 485; Pryor v. Smith, 4 Bush, 379; Berryhill v. McKee, 3 Yerg. 157; Porter v. Burton, 10 Heisk. 584; Gaines v. Patton, 8 Ark. 67; Morris v. Morris, 5 Mich. 171; Caswell v. Comstock, 6 Mich. 391; Enos v. Sutherland, 9 Mich. 148; Gates v. Salmon, 28 Cal. 320.

[101] Forgay v. Conrad, 6 How. 201; Beebe v. Russell, 19 How. 283; Thomson v. Dean, 7 Wall. 342; Mills v. Hoag, 7 Paige, 18, 31 Am. Dec. 271; Taylor v. Read, 4 Paige, 561; Dickenson v. Codwise, 11 Paige, 189; Coithe v. Crane, 1 Barb. Ch. 21; Harvey v. Branson, 1 Leigh, 108; Rawlings v. Rawlings, 75 Va. 76; Fleming v. Bolling, 8 Gratt. 292; Weatherford v. James, 2 Ala. 170; Bank v. Hall, 6 Ala. 141; McKinley v. Irvine, 13 Ala. 681; Hastie v. Aiken, 67 Ala. 313; Bradford v. Bradley, 87 Ala. 453; Cochran v. Miller, 74 Ala. 50; McFarland v. Hall, 17 Tex. 676; Merle v. Andrews, 4 Tex. 200; Meek v. Mathis, 1 Heisk. 534; *Ex parte* Crittenden, 10 Ark. 333; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Guardian Savings Bank v. Reiley, 8 Mo. App. 544; Damouth v. Klock, 28 Mich. 163; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. The distinction above formulated is well brought out in a decision of Chancellor Walworth, from which we quote as follows: "A decree never can be said to be final when it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master, to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief whatever to the complainant. But if the decree not only settles the rights of the parties, but gives all the consequential directions which will be necessary to a final disposition of the cause, upon the mere confirmation of the report of the master by a common order in the regis-

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only be made so by the court's overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment.[102]

§ 45. Directing an Account.

According to the rules just stated, a decree directing an account to be taken is generally interlocutory; that is, unless all the steps to be taken after the account is ascertained are specifically prescribed in the decree, with no equities or questions reserved and no further directions needed. Thus, where a judgment appointed a referee who was to take an account of rents and profits and improvements upon land, and ascertain the present value of dower, and upon payment by the plaintiff of a certain sum to be ascertained by the referee in the mode specified in the judgment, the referee was to admeasure her dower, and he was to report the evidence taken by him with his findings thereon to the court, and all other questions were reserved until the coming in of such report and the final hearing thereon, it was held that this was not a final but an interlocutory judgment.[103]

ter's office, it is a final decree and may be enrolled at the expiration of thirty days, although the amount to which the complainant may be entitled under such decree is still to be ascertained upon a reference to a master for that purpose. Thus, in the ordinary case of a bill for the foreclosure of a mortgage, if the decree merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him, reserving all further questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely, as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reversed and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. But if the decree, in addition to the reference to the master to compute the amount due upon the bond and mortgage, proceeds further and gives the usual directions in such cases, that upon the coming in and confirmation of the report of the master, the premises shall be sold, and that the master who makes such sale shall pay the amount so reported due, together with the interest and costs, out of the proceeds of such sale, and directing the mortgagor to pay the deficiency reported due upon such sale, the decree is final, although the mortgagor may have the right to except to the master's report of the amount due. For the questions arising upon the exceptions to the master's report, in such a case, are merely incidental to the carrying of the final decree in the cause into full effect." Johnson v. Everett, 9 Paige, 636.

[102] Beebe v. Russell, 19 How. 283.

[103] Raynor v. Raynor, 94 N. Y. 248. See also Jackson County v. Gullatt, 84

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§ 46. Decree suspending Rights until further Orders.

Another class of interlocutory decrees comprises those which prohibit a certain act to be done, or hold the rights of the parties *in statu quo*, until the court shall give further orders or directions. Thus an order that a party is not to pay a sum adjudged against him "until further ordered" is not final.[104] So a decree rendered by the probate court, upon the application of an executor, by which a certain amount is ascertained to be in his hands, a portion of which he is ordered to pay over to those entitled to it, and to retain the balance until the further order of the court, is not a final decree.[105]

§ 47. Decree dissolving Partnership.

Where a bill in equity is brought for an accounting between partners and for a termination of the partnership, the first decree, dissolving the partnership and directing accounts to be taken, is generally only interlocutory.[106] But a decree dissolving a partnership, which directs an accounting and a sale of the firm's assets, and specifically states the manner of their distribution, is final.[107] Where, upon a bill for the settlement of partnership accounts, the decree leaves unsettled the equities as to two items of account, as to which a reference is ordered, it cannot be considered a final decree.[108]

§ 48. Foreclosure of Mortgage.

Upon a bill for the foreclosure of a mortgage, if the decree ascertains the validity of the mortgage and the amount of the debt, orders a sale of the mortgaged premises, describing them, for satisfaction of such debt, directs that the sum due on the mortgage with in-

Ala. 243, 3 South. Rep. 906; Beebe v. Russell, 19 How. 283; Johnson v. Everett, 9 Paige, 636.

[104] Tinley v. Martin, 80 Ky. 463.

[105] Rhodes v. Turner, 21 Ala. 210.

[106] Gray v. Palmer, 9 Cal. 616; Kingsbury v. Kingsbury, 20 Mich. 212; Rhodes v. Williams, 12 Nevad. 20; Huntington v. Moore, 1 New Mex. 471; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20.

[107] Clark v. Dunnam, 46 Cal. 204; Evans v. Dunn, 26 Ohio St. 439.

[108] Garner v. Prewitt, 32 Ala. 13.

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terest and costs be paid over to the mortgagee out of the proceeds of the sale, and adjudges that the defendant make good any deficiency which may be found to exist after the sale, then the decree is final and complete; for it leaves nothing to be adjudicated or reviewed by the court.[109] But if the decree does not ascertain the amount due; or if it orders a sale but does not give any direction as to the disposition of the proceeds; or if it reserves the question of the distribution of the fund, in order to adjust conflicting claims or liens; or if, without ordering a sale, it directs the cause to stand continued for further order and decree upon the coming in of a master's report, then, and in any such case, it is merely interlocutory.[110] New ground is taken in an Alabama decision, where it is held that a decree of foreclosure and sale, under a bill filed by a mortgagee, is partly final and partly interlocutory; that is, it is so far final that an appeal will lie from it, and it is also interlocutory in a limited sense, inasmuch as further proceedings are contemplated and necessary to carry it into effect.[111] But since interlocutory simply means "not final," it is difficult to perceive how any decree can be both one and the other at the same time.

§ 49. Sending Issue out of Chancery.

An order in equity sending an issue of fact to be tried in the law court is of course interlocutory. In itself it determines nothing. It is merely preparatory to a final decree.[112] And the same is true of a judgment rendered on a feigned issue directed out of chancery.[113]

[109] Myers v. Manny, 63 Ill. 211; Morris v. Marange, 38 N. Y. 172; Baker v. Lehman, Wright, 522; Ray v. Law, 3 Cranch, 179; Whiting v. Bank of U. S., 13 Pet. 6; Bronson v. Railroad, 2 Black, 524; Johnson v. Everett, 9 Paige, 636. Compare Allen v. Belches, 2 Hen. & M. 595.

[110] Burlington, C. R. & N. R. Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. Rep. 58; Johnson v. Everett, 9 Paige, 636.

[111] Malone v. Marriott, 64 Ala. 486.

[112] Dabbs v. Dabbs, 27 Ala. 646; Eames v. Eames, 16 Pick. 141.

[113] Woodside v. Woodside, 21 Ill. 207.

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CHAPTER III.

JUDGMENTS BY CONFESSION.

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§ 50. Confession of Judgment in Pending Suit.

All judgments rendered upon the confession of the defendant may be divided into two classes: 1. Those entered in an action regularly commenced by the issuance and service of process; 2. Those entered upon the confession of the defendant, or his warrant of attorney, without the institution of an action. The former class of judgments

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are well known to the common law and must be tested and sustained by rules and principles existing independently of statutes, while judgments of the latter class derive all their efficacy from positive law and must conform, in order to be valid, to all the requirements and formalities set up by the legislature. It is frequently a matter of importance to determine whether a particular judgment belongs to one class or the other, because, if not covered by the statute, it is not impeachable for lack of an affidavit, statement of indebtedness, or other support required by the act. This distinction is recognized by the authorities. Thus a statute which provides that any person may, without process, appear in person or by attorney and confess judgment for any *bona fide* debt, but in such case a petition shall be filed, and other acts be done, does not apply to cases where the party is regularly cited, but only to cases of voluntary appearance without process.[1] So where a defendant accepts service of process and afterwards confesses judgment, the plaintiff's affidavit of the justness of the claim, required in the case of confession without action, is held to be unnecessary.[2] Now judgments entered for the plaintiff upon the defendant's admission of the facts and law, as the same are known to the common law and exist independently of statutes, are of two varieties; first, judgment by *cognovit actionem*, and second, by confession *relicta verificatione*. In the former case the defendant, after service, instead of entering a plea, acknowledges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial.[3] In order to sustain a judgment of either of these sorts, it is essential that process, regularly issued, should have been served upon the defendant (though he may *accept* service with the same effect as if the writ had been served as it usually is[4]); and an agreement in writing made out of court, authorizing the clerk to enter up such a judgment, will not sustain it, where there has been

[1] Schroeder v. Fromme, 31 Tex. 602. And see Crouse v. Derbyshire, 10 Mich. 479, 82 Am. Dec. 51.

[2] Gerald v. Burthee, 29 Tex. 202.

[3] Bouvier, Law Dict., voc. *Judgment*.

[4] Gerald v. Burthee, 29 Tex. 202.

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no appearance by the defendant.[5] A judgment by *cognovit*, after process has been served, may be entered in vacation, without a judge's or commissioner's order, and without affidavits.[6] The other species of judgment by confession, *relicta verificatione*, is also not unknown to modern practice. Thus, where a judgment recited that "the defendants, by leave of court, withdraw their pleas and say that they cannot deny the plaintiff's cause of action against them, for debt and interest in plaintiff's petition claimed," it was held that this was in effect a confession of judgment, and a jury was not required to ascertain the amount.[7] It is also said that where a party confesses judgment against himself under a mistake of fact as to what the pleadings contain, he may, upon discovering his error, retract the confession, provided it has not been recorded.[8]

§ 51. Confession of Judgment without Action.

One method of confessing a judgment without action or process is by a warrant of attorney. This is an authority given by the debtor to a named attorney, or to any attorney of a given court or in a given jurisdiction, empowering him to appear for the defendant and confess judgment for a designated amount. This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given, but not before the execution of a warrant of attorney.[9] In so far as this procedure may be regulated by statute in any jurisdiction, it must of course comply strictly with the requirements of the law. But in most of the states there are statutes which authorize a judgment to be entered upon the confession of the defendant, without action, upon the filing of a verified statement showing the facts out of which the indebtedness arose, and an affidavit that the debt is just and actual, and sometimes upon the observance of certain additional formalities. This is by far the most usual method of confessing judgments, and therefore will principally engage our attention in this chapter.

[5] Craig v. Glass, 1 Smith (Ind.) 27. But see Shadrack v. Woolfolk, 32 Gratt. 707.

[6] Stewart v. Walters, 38 N. J. L. 274.

[7] Burton v. Lawrence, 4 Tex. 373. And see Hicks v. Ayer, 5 Ga. 298.

[8] Smith v. Simms, 9 Ga. 418.

[9] Bouvier, Law Dict., voc. *Judgment.*

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§ 52. Authorized by Statutes.

Inasmuch as the proceeding last adverted to depends entirely upon statute for its validity, it is evident that a strict construction must be applied to the statute and that its provisions must be strictly complied with in using the authority it grants.[10] But on the other hand, the judgment must stand or fall by the statute alone, and formalities not therein required are not essential to its validity. For instance, it is not necessary to sustain such a judgment that a declaration should have been filed; the statement required by the statute is sufficient.[11] Again, neither a citation of the defendant nor a previous judgment of default is needed as a preliminary to the entry of judgment on his confession.[12] But in some states it is required that an office confession of judgment be confirmed by the court before it becomes a judgment; and under this rule its incidents as a judgment do not attach until the date of such confirmation.[13] So, again, a provision that the confession must be signed by the party and by witnesses does not admit of evasion.[14] And the same is true of a requirement that the debtor shall appear in person and confess the judgment.[15] Since a judgment upon confession is not in the nature of an adversary proceeding, it is theoretically immaterial whether it is entered during a session of the court or in vacation. And it may be stated as the rule, unless modified by the particular statute, that a judgment of this character may as well be entered in vacation as in term-time.[16] So a warrant of attorney attached to a note authorizing confession of judgment thereon at any time after its date, will support a judgment entered in vacation before the note was due.[17] And a judgment confessed in the clerk's office on the morning of the

[10] Edgar v. Greer, 7 Iowa, 136; Chapin v. Thompson, 20 Cal. 686.

[11] Johnston v. Glasgow, 5 Ark. 311; Choat v. Bennett, 11 Ark. 313; Gayle v. Foster, Minor, 125; Matthews v. Thompson, 3 Ohio, 272.

[12] Marbury v. Pace, 29 La. Ann. 557.

[13] Bass v. Estill, 50 Miss. 300.

[14] Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

[15] Rosebrough v. Ansley, 35 Ohio St. 107. See Reed v. Hamet, 4 Watts, 441.

[16] Pickett v. Thurston, 7 Ark. 397; Kellogg v. Keith, 4 Ill. App. 386.

[17] Towle v. Gonter, 5 Ill. App. 409. But it is said that a judgment cannot be confessed on the day a warrant of attorney and note bear date, although the note is payable on demand. Waterman v. Jones, 28 Ill. 54.

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first day of the term of court, before the court was opened, is a valid judgment.[18]

§ 53. Court must have Jurisdiction.

Although a judgment by confession is to a certain extent founded on the agreement of the parties, instead of a direct adjudication by the court, it is none the less, on that account, a judicial act. And since their consent cannot create a jurisdiction in excess or contravention of that conferred by law, it is equally essential to the validity of a judgment of this character as to any other that it be entered in a court having jurisdiction of the subject-matter. As it is to have all the incidents and consequences of any other judgment, and to have the sanction of the law and the authority of the court behind it, it will be invalid unless the court where it is entered might lawfully have rendered the same judgment in a contested action.[19] And where the authority of an inferior court, as that of a justice of the peace, to enter judgments upon confession, is limited by law or hedged round with prescribed formalities, it must clearly appear upon the face of his record that the particular confession came within the limitations and that the requirements of the statute were distinctly met and complied with.[20] Yet after a confession of judgment without exception to the jurisdiction of the particular court (the subject-matter being within its general competence), the judgment rendered is valid.[21] And a judgment entered in the district court, by virtue of a warrant of attorney authorizing the entry of such judgment in the court of common pleas, those courts having concurrent jurisdiction, cannot be set aside as erroneous at the instance of a subsequent judgment-creditor.[22] Such authority, however, will not run into another state. Thus a warrant

[18] Brown v. Hume, 16 Gratt. 456.

[19] Lanning v. Carpenter, 23 Barb. 402. So where it is required by law that the execution of a power of attorney to confess judgment be proved before the judgment is confessed, such proof must affirmatively appear of record; otherwise the court would have no jurisdiction of the person of the maker, and the judgment would be invalid. Rapley v. Price, 9 Ark. 428.

[20] Spear v. Carter, 1 Mich. 19, 48 Am. Dec. 688; Tenny v. Filer, 8 Wend. 569; Camp v. Wood, 10 Watts, 118.

[21] Lyons v. Kelly, (La.) 4 South. Rep. 480.

[22] Hauer's Appeal, 5 Watts & S. 478.

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of attorney to confess a judgment, executed in one state between parties residing there and by its terms to be rendered there, will not support a judgment entered in another state.[23] Authority to confess judgment under a power of attorney is not exhausted by a confession of a judgment which is subsequently reversed, but another may be confessed under the same power. "The intention of the power had not been carried out, consequently the object was not accomplished, and the authority was not exhausted by the first act."[24] A more difficult question arises in the case where a judgment by confession is entered upon a bond and warrant of attorney in one county, and afterwards, such judgment remaining in force and unsatisfied, a second judgment upon the same bond and warrant is entered in another county. Here it would seem that the authority conferred by the warrant was fully satisfied by the first confession and nothing remained to sustain the second. But since this would not appear upon the face of the proceedings, the second judgment would not be absolutely void, but at most irregular. It would be vacated or set aside upon application to the court in which it was entered, but the want of authority to enter the second judgment could not be taken advantage of on a writ of error. In the mean time, if a sheriff's sale was had under the second judgment, the purchaser would no doubt take a good title; but in that case the attorney who entered the judgment, or the obligee of the bond, if it was entered by him, would be answerable.[25]

§ 54. Who may confess Judgment.

As a general rule, any person may give a confession of judgment against whom the same judgment might lawfully have been pronounced by the court as the result of a suit regularly instituted and contested. The only difficulty occurs in the case of persons who are

[23] Bank v. Boyd, 3 Denio, 257. But a judgment upon the confession of the defendant which is valid in the state where it is entered is equally valid in every other state. Coleman v. Waters, 13 W. Va. 278.

[24] Huner v. Doolittle, 3 Greene (Iowa), 76, 54 Am. Dec. 489.

[25] Martin v. Rex, 6 Serg. & R. 296; Neff v. Barr, 14 Serg. & R. 166; and see also Livezly v. Pennock, 2 Browne, (Pa.) 321.

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under disabilities; and here it must be remarked that if the disability of infancy or coverture is merely a personal privilege which may be waived, then the confession of a judgment is as explicit a waiver as could well be imagined, but if, on the other hand, it is regarded as an absolute incapacity to contract debts, or certain kinds of debts, then a confession of judgment is merely a futile attempt to give validity to that which by law can have none. It has been said that a warrant of attorney to confess judgment executed by a minor is under all circumstances entirely void.[26] But this statement is probably too strong. The marked tendency of the authorities, as we shall see hereafter,[27] is to regard a judgment against an infant duly before the court as valid and effectual for all purposes, unless indeed time is given to him to show cause against it after his majority. And if his defense of infancy is taken away by his failure to duly plead it when sued, it is certain that it is equally waived by his voluntary confession of judgment. The case of confessions by married women we reserve for the succeeding section.

In regard to parties plaintiff in confessions of judgment the parallel rule applies. Thus a person may confess a judgment for a sum of money to the state as well as to an individual.[28] In cases where the debtor is an officer of the court in which the confession is entered, no difficulty has been experienced in sustaining the judgment. Thus, under a statute providing that judgments may be confessed in the clerk's office, and when recorded by him shall be valid, the clerk, acting as a ministerial officer, may enter a judgment by confession against himself.[29] And it is even held that a judge, in a suit in his own court to which he is a party, may confess a judgment against himself.[30] Of course any person who may himself give a valid confession of judgment may delegate his power to that intent to another. Such authorization of a third person is commonly seen in warrants of attorney, but may also be otherwise conferred. The authority of an attorney appearing in open court, it is said, will be presumed to be regular until the contrary is shown, but in vacation his authority to confess judgment

[26] Knox v. Flack, 22 Pa. St. 337.
[27] See *infra*, §§ 193, 196.
[28] State v. Love, 1 Ired. 264.
[29] Smith v. Mayo, 83 Va. 910, 5 S. E. Rep. 276.
[30] Thornton v. Lane, 11 Ga. 459.

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must affirmatively appear and no presumption will be indulged in favor of it.[31] On the same general principle, an agent, within the scope of his authority, may confess judgment against his principal.[32] If the agent transcends his authority and confesses judgment for a sum greater than is actually due, it may be a question whether the principal is bound at all. But it has been held that in such a case, the judgment is valid for the real debt and void only as to the excess.[33] It is also held that a trustee cannot bind the trust estate by a confession of judgment.[34]

§ 55. Confession by Married Woman.

In regard to the power of a married woman to bind herself by a confession of judgment, we find the greatest difference of opinion in the authorities. In fact it is impossible to formulate a general rule; the question must ultimately be referred to the statutes in the several states regulating her status and rights. In proportion as the *feme covert* is emancipated from the rigors of the common law, her power to confess judgment increases in respect to the variety of obligations upon which it may be exercised. The only safe generalization seems to be, that she cannot confess a judgment for any debt for which she could not be made liable by judgment rendered *in invitum*. In Pennsylvania, the bond of a married woman, though she join in it with her husband, is held to be absolutely void, and a judgment entered on such bond by virtue of a warrant of attorney annexed thereto, executed by the wife together with her husband, is also void as respects the wife and her estate.[35] According to the late authorities,

[31] Martin v. Judd, 60 Ill. 78. See Jarrett v. Andrews, 19 Ind. 403.

[32] Parker v. Poole, 12 Tex. 86. A municipal officer, liable to suit on a contract made by him on behalf of the public, may confess judgment for the amount due. Gere v. Supervisors, 7 How. Pr. 257. A judgment against a vessel as a substantive party and her owners, by confession of the master of the boat, is erroneous. Wassell v. English, 17 Ark. 480.

[33] Davenport v. Wright, 51 Pa. St. 293.

[34] Mallory v. Clark, 20 How. Pr. 418.

[35] Dorrance v. Scott, 3 Whart. 309, 31 Am. Dec. 509; Graham v. Long, 65 Pa. St. 383; Caldwell v. Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Keiper v. Helfricker, 42 Pa. St. 325; Keen v. Coleman, 39 Pa. St. 299, 80 Am. Dec. 524; Brunner's Appeal, 47 Pa. St. 67; Finley's Appeal, 67 Pa. St. 453; Swayne v. Lyon, 67 Pa. St. 436; Steinman v. Ewing, 43 Pa. St. 63; Glyde v. Keister, 32 Pa. St. 85;

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there is but one exception to this rule, viz, in the case where the note upon which the judgment is confessed is given for the purchase-money of land conveyed to her, and forms part of the transaction; the judgment will then be a valid lien against the land, though not a charge against the woman personally.[36] On the other hand, where a statute gives to married women the right to sue and be sued in the same manner as if sole, a married woman may confess a judgment to secure a debt contracted by her, and for her use and benefit, in carrying on her separate business.[37] In other jurisdictions, the statute, while enabling a married woman to enter into certain classes of engagements, forbids her to make agreements or contract debts of other kinds. Under this system, "if the contract of the married woman be such as a married woman is still incapacitated from entering into, her warrant of attorney to enter judgment upon it is a nullity, because the obligation to which the warrant of attorney is annexed is invalid, and judgment entered in pursuance of it will be vacated.[38] But if the contract be one that the married woman is enabled to make, and on which she may be sued at law, I think a different result must be reached. With respect to such contracts, any action, suit, or proceeding which is adopted for the enforcement of the obligation is within the reason and spirit of the statutes which confer the capacity

Shallcross v. Smith, 81 Pa. St. 133. But now in Pennsylvania by the Act of June 3, 1887, § 2 (P. Ls. p. 333), "a married woman shall be capable of entering into and rendering herself liable upon any contract relating to any trade or business in which she may engage, or for necessaries, and for the use, enjoyment, and improvement of her separate estate, and for suing and being sued, either upon such contracts or for torts done to or committed by her, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action, suit, or legal proceeding of any kind brought by or against her in her individual right." This statute is construed, with reference to confessions of judgment, in the late case of Roop's Appeal (Pa.), 19 Atl. Rep. 278.

[36] Christner v. Hochstetler, 109 Pa. St. 27; Quinn's Appeal, 86 Pa. St. 447; Brunner's Appeal, 47 Pa. St. 67. See also Thornhill v. State Nat. Bank, 34 La. Ann. 1171.

[37] First Nat. Bank v. Garlinghouse, 53 Barb. 615. See Code Civ. Proc. N. Y. § 1273. Compare Watkins v. Abrahams, 24 N. Y. 72. A judgment confessed by a married woman is not void but voidable merely, and her husband, if he assented to the sale of property under an execution thereon, is estopped from afterwards claiming it adversely. Roraback v. Stebbins, 4 Abb. App. Dec. 100, S. C. 33 How. Pr. 278.

[38] Swing v. Woodruff, 12 Vroom, 469.

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to contract and impose liability to actions at law thereon. The obligation being valid, the warrant of attorney is simply a part of the procedure to enforce it—as much so as a suit by summons or a *cognovit*." [39] A confession of judgment by a married woman, which condemns her to pay her husband's debt, is void. Such a confession is "but the complement or consummation of a contract which the law prohibits, and which was consequently null. [40]

It has been held that although a judgment entered upon the confession of a married woman may be invalid, yet it is too late to raise that objection to the judgment after the same has been duly revived by proper proceedings. For the defendant had an opportunity to show cause against the judgment at the time of its revival, and its validity was impliedly adjudicated in that proceeding; for there can be no judgment of revival until it is determined that there is a valid judgment.[41] This proposition, however, has been denied.[42] And indeed, if the particular judgment was one which the woman had absolutely no power to confess, so that it must be held to be a mere nullity, it is difficult to see how any vitality could be imparted to it by the mere fact of revival. No action will lie upon a void judgment. And a judgment of revival, passed upon a nugatory cause of action, is, equally with the judgment revived, merely void.

Another question not without difficulty, which arises in reference to this subject, is in relation to a judgment entered against both husband and wife upon a warrant of attorney executed by them jointly. It has been held that such a judgment, though void as to the wife, will stand valid as against the husband.[43] But there are numerous cases holding that a judgment is an entirety, and if void as to one defendant is void as to all;[44] and these decisions would seem to ap-

[39] Heywood v. Shreve, 44 N. J. Law, 94. See further Stevens v. Dubarry, Minor, 379; Baines v. Burbridge, 15 La. Ann. 628; Dancy v. Martin, 23 La. Ann. 323; Henchman v. Roberts, 2 Harringt. 74; Mendenhall's Exrs. v. Springer, 3 Harringt. 87; Patton v. Stewart, 19 Ind. 233; Harris v. Jenkins, 72 N. Car. 183; Wallace v. Rippon, 2 Bay, 112.

[40] Baines v. Burbridge, 15 La. Ann. 628; Edwards v. Edwards, 29 La. Ann. 597.

[41] Crenshaw v. Julian, 26 S. Car. 283, 2 S. E. Rep. 133.

[42] Dorrance v. Scott, 3 Whart. 309, 31 Am. Dec. 509.

[43] Shallcross v. Smith, 81 Pa. St. 132; Wallace v. Rippon, 2 Bay, 112.

[44] See *infra*, § 211. And see, as to judgments by confession, specifically,

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ply with equal weight whatever may be the ground of the invalidity. It seems certain, however, that a married woman may confess a judgment for a valid ante-nuptial debt, and such judgment will be conclusive and enforceable against her as if rendered by default or upon a verdict.[45] And a warrant of attorney to confess judgment, given by a *feme sole*, is not revoked by her subsequent marriage, and after such marriage judgment may be entered up on it against the husband and wife jointly, leave being obtained on motion.[46]

§ 56. Married Woman as Creditor.

A married woman may *take* a confession of judgment, as sole plaintiff, in any case where she could sue for the debt alone, or jointly with her husband in a case where they have a joint right of action. Thus, where a bond and warrant of attorney was given to a woman *dum sola*, and she afterwards married, the court, upon affidavit of the fact, allowed judgment to be entered in favor of husband and wife together.[47] The indebtedness of a husband to his wife, by note or for money or property, is a sufficient consideration to support a judgment confessed by him in the wife's favor as against his other creditors, when not impeached for fraud.[48] And such a judgment, admitted to be honest, will not be treated as void in law or equity because of the legal unity of the parties; and the relation not appearing in the record, the court will not, at the instance of creditors, inquire into the fact of coverture, when no fraud is alleged.[49]

§ 57. Confession by Partner.

A member of a firm has no authority, by virtue of his mere relation to the partnership or his general power to act as its agent, to

Mendenhall's Exrs. v. Springer, 3 Harringt. 87.

[45] Travis v. Willis, 55 Miss. 557.

[46] Baker v. Lukens, 35 Pa. St. 146; Eneu v. Clark, 2 Pa. St. 234, 44 Am. Dec. 191; Bering v. Burnet, 2 Clark (Pa.), 392.

[47] Sheble v. Cummins, 1 Browne (Pa.), 253.

[48] Thomas v. Mueller, 106 Ill. 36. *Per contra*, Countz v. Markling, 30 Ark. 17.

[49] Williams' Appeal, 47 Pa. St. 307.

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confess a judgment against the firm; and if judgment be entered on such a confession, it will be void as against his co-partners, though binding as a personal charge upon himself.[50] And a confession of judgment under seal, in the name of a partnership and of a member of the firm, is binding only upon such member.[51] So a confession of judgment by a former partner against the firm, while good as against the partner confessing it, will not bind property assigned by the firm to a remaining partner under terms of agreement to pay firm debts.[52]

§ 58. Joint Defendants.

In a pending action against two defendants, one of them cannot in the absence of the other, confess judgment against both; and a judgment rendered against both on the confession of one only, without evidence, will be set aside.[53] And where one of several joint defendants confesses judgment so far as concerns himself, such judgment is only interlocutory until the final decision of the cause as to the rest; and the confessing defendant must ultimately receive the same judgment as his co-defendants.[54] In the case of a confession of judgment without action, a question has sometimes arisen as to the effect of an authority for such judgment—whether a warrant of attorney or a statement of indebtedness—which is signed by only a part of the defendants against whom it directs the judgment to be entered. As against those not signing the authority, the judgment is certainly of no force whatever. But whether it may stand as a valid obligation against those who did sign, is not so clear. In one state it is held, on the principle that a judgment is an entirety, that if the warrant authorizes the entry of judgment against a certain number, no judg-

[50] Bitzer v. Shunk, 1 Watts & S. 340, 37 Am. Dec. 469; York Bank's Appeal, 36 Pa. St. 458; Soper v. Fry, 37 Mich. 236; Christy v. Sherman, 10 Iowa, 535; Hopper v. Lucas, 86 Ind. 43; Crane v. French, 1 Wend. 311; Mills v. Dickson, 6 Rich. 487; Richardson v. Fuller, 2 Oreg. 179; Stoutenburg v. Vandenburgh, 7 How. Pr. 229; Elliott v. Holbrook, 33 Ala. 659; 1 Lindley on Partn. 474.

[51] Appeal of Perth Amboy Terra-Cotta Co., (Pa.) 17 Atl. Rep. 4.

[52] Mair v. Beck (Pa.), 2 Atl. Rep. 218; McCleery v. Thompson, (Pa.) 18 Atl. Rep. 735.

[53] Wiggins v. Klienhans, 9 N. J. Law, 249; Ballinger v. Sherron, 14 N. J. Law, 144.

[54] Taylor v. Beck, 3 Rand. 316.

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ment can be entered against a less number, and it is void as to all.[55] But other cases hold, and we think with better reason, that the judgment entered will bind those who subscribed the warrant, though nugatory as to the others.[56]

§ 59. By Officers of a Corporation.

In regard to the confession of a judgment against a corporation, the rule appears to be, that such confession may be made by any officer or agent of the company upon whom a summons might have been served, in a contested action, with the effect to bind the corporation by the result of the subsequent proceedings.[57] Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question and not open to collateral attack.[58]

§ 60. Consent of Creditor is necessary.

A judgment based upon a confession made without any request on the part of the creditor, and without his knowledge and consent, or against his consent, and entered at the instance of the debtor alone, will have no effect in advance of the creditor's acceptance of it; it is voidable, it will not bar an action brought by the creditor, nor will it estop the debtor from denying the facts set forth.[59] This

[55] Chapin v. Thompson, 20 Cal. 681.

[56] North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441. See Knox v. Bank, 57 Ill. 330; York Bank's Appeal, 36 Pa. St. 458.

[57] Miller v. Bank, 2 Oreg. 291. But another case holds that a judgment confessed by the president of a corporation without service of process and without the order or knowledge of the directors or company, and not setting forth the cause of indebtedness, is void. McMurray v. St. Louis, etc., Co., 88 Mo. 377.

[58] White v. Crow, 17 Fed. Rep. 98.

[59] Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Farmers' & Mechanics' Bank v. Mather, 80 Iowa, 283; In-

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rule proceeds upon the very obvious consideration that if the assent of the creditor were not necessary to a confessed judgment, the debtor might, by confessing for only a part of the real debt, preclude his creditor from recovering the residue. For a judgment by confession is as conclusive as any other;[60] and if it include only a portion of an indivisible demand, no action will lie for the balance. A judgment so entered, unknown to the creditor or against his will, is therefore voidable at his option, and will be vacated on his motion.[61] But on the other hand, he may ratify the debtor's action and accept the judgment, and when he does this, it will have the effect to validate the judgment and place it on the same footing in all respects with one sanctioned by his previous knowledge and consent. The validation of the judgment, however, dates only from its acceptance by the creditor, and it will not affect the priority of other creditors who came in between the entry of the judgment and its ratification.[62] The creditor's assent to the entry of judgment may also be constructive. Thus it is sufficient if done with the knowledge and consent of his attorney in whose hands he has placed the matter.[63] So also, if an action is already pending. Where the creditor has brought suit for a specified sum of money upon a certain claim, and the debtor appears in court and confesses judgment for the amount claimed and costs, the assent of the plaintiff will be presumed; and to entitle him to have the judgment set aside, he must make it appear to the court that he has been prejudiced by such confession.[64] It is held that the confession of a judgment by the defendant in a pending suit, after the death of the plaintiff and before substitution of his representatives, is void, both as regards the representatives of the plaintiff and any third person who may be collaterally interested in the payment of the same.[65]

gersoll v. Dyatt, 1 Miles (Pa.) 245; Chapin v. McLaren, 105 Ind. 563, 5 N. E. Rep. 688.

[60] See *infra*, vol. 2, § 698.

[61] Farmers' & Mechanics' Bank v. Mather, 30 Iowa, 283.

[62] Wilcoxson v. Burton, 27 Cal. 228. 87 Am. Dec. 66.

[63] Chapin v. McLaren, 105 Ind. 563, 5 N. E. Rep. 688.

[64] Flanigan v. Continental Ins. Co., 22 Nebr. 235, 34 N. W. Rep. 367; McCalmont v. Peters, 13 Serg. & R. 196.

[65] Finney v. Ferguson, 3 Watts & S. 413. Compare Lewis v. Rappelyea, 1 Barb. 29.

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§ 61. Requisites of Warrant of Attorney.

As already stated, it is the practice in some states to enter confessed judgments upon a written authority, called a warrant or letter of attorney, by which the debtor empowers an attorney to enter an appearance for him, waive process, and confess judgment against him for a designated sum. This warrant should contain the grant of authority clearly and distinctly given, and a designation of the person by whom it is to be exercised, either by name or description.[66] It is usual, however, to confer the authority upon "any attorney" of a particular court or "any attorney of any court of record" in the particular state. Where the warrant authorizes A., or any other attorney of the court in which the judgment is to be confessed, to appear and make the confession, and A. and B., both attorneys of that court, appear together, the judgment will be valid.[67] The warrant should specifically state its purpose. But the words used are not of the least importance, and it is held that a warrant to "enter" judgment will be considered as equivalent to a warrant to "confess" judgment.[68] And in a case where the warrant was written upon a printed form of a judgment-note, and the blanks in that part of the note which related to the entry of judgment were not filled out, but the note was otherwise regular, it was held that the warrant was not void.[69] It also appears that a warrant of attorney to confess judgment need not be under seal.[70] Of course if the warrant is annexed to or incorporated in a note or bond, the debt on which it is based will be sufficiently disclosed. But in any other case the cause of action must be described either in a declaration, a sworn statement, or in the warrant of attorney itself.[71] This is required as an evidence of good faith and for the information of other creditors. A judgment so confessed is not necessarily void although the warrant of attorney be void; and such a judgment, it is held, after it has been revived against the debtor's administrator, cannot be set aside for that cause, although

[66] Rabe v. Heslip, 4 Pa. St. 139. See Grubbs v. Blum, 62 Tex. 426.
[67] Patton v. Stewart, 19 Ind. 233.
[68] Mason v. Smith, 8 Ind. 73.
[69] Sweezy v. Kitchen, 80 Pa. St. 160.
[70] Kneedler's Appeal, 92 Pa. St. 428.
[71] Gambia v. Howe, 8 Blackf. 133.

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the defect in the warrant might have been pleaded in avoidance or given in evidence under a plea of *nul tiel record*.[72] The warrant of attorney, as the basis of the judgment, must also be placed on file in the clerk's office, and no judgment can be entered on it before it is actually so filed.[73] In some of the states, it is necessary that proof should have been made of the execution of the warrant of attorney before the judgment is confessed, and in the case of a confession out of court, this must affirmatively appear of record, but where the confession is in open court, the evidence of that fact need not be presented in the record, but it will be presumed to have been done unless it appears to have been omitted.[74]

§ 62. Affidavit that Debt is due.

Under the various statutes regulating the practice in confessing judgments, it is almost invariably required that the debtor's confession be accompanied by an affidavit showing the *bona fides* of the transaction. In some jurisdictions this is directed to be incorporated in the statement which forms the basis of the judgment; in others it is to be a separate document. The statute usually prescribes the form of words, as that the debt is "justly due and owing," or is "justly due or to become due." A provision of this character, however, is satisfied by a substantial compliance with the meaning of the law, and if the affidavit details facts which show that the debt is really just and actually due, it is enough, though the words of the statute be not employed. Thus, the affidavit is sufficient in form in stating that the debt is "justly and honestly due," instead of "due and owing" in the words of the statute, when a present indebtedness is shown.[75] Nor is it required that the affidavit go beyond the statute. Hence it

[72] Wood v. Ellis, 10 Mo. 382.

[73] Chambers v. Denie, 2 Pa. St. 421.

[74] Iglehart v. Chicago Ins. Co., 35 Ill. 514; Anderson v. Field, 6 Ill. App. 307; Gambia v. Howe, 8 Blackf. 133. A judgment cannot be confessed on a warrant of attorney which had been executed more than a year and a day, unless an affidavit is filed, showing that the maker is alive, and that the debt or some portion of it is still due, and a rule of court or an order of a judge in vacation must be obtained granting leave. Hinds v. Hopkins, 28 Ill. 344.

[75] Mulford v. Stratton, 41 N. J. Law, 466; Reading v. Reading, 24 N. J. Law, 358.

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is not necessary for the debtor to deny, in specific terms, that the debt has been paid, released, barred, or discharged.[76] A judgment entered upon confession without the affidavit required by statute is voidable only, not void, and it cannot on that ground be collaterally attacked by a stranger to the record.[77]

§ 63. Statement of the Indebtedness.

The statutes require a person confessing a judgment to file a written statement, signed and sworn to, designating the amount for which the judgment is to be entered, and "stating concisely the facts out of which the indebtedness arose."[78] The designation of the *amount* of the debt is a vital part of a valid confession; it must be set forth explicitly and not be left to inference; and the omission of it is a fatal defect.[79] The requirement that the facts be stated is intended to enable other creditors to test the *bona fides* of the transaction by which a particular debt is preferred. In construing a provision of this character, a learned judge has said: "I do not think it can properly be said that the object of the statute was to compel the debtor to state sufficient of the transaction out of which the indebtedness arose to enable other creditors to form an opinion *from the facts stated* as to the integrity of the debtor in confessing the judgment. If the debt is questioned, it is not to be presumed that the creditor questioning will take the debtor's statement, however full. What the creditor wants, and what I think the statute intended he should have, is sufficient of the facts to enable him to inquire into the transaction, and to form his opinion of the honesty of the judgment from the facts *he shall ascertain.*"[80] To come to specific illustrations,—it is held that a recital in the statement that the indebtedness accrued for "borrowed money" or "money loaned" to the

[76] Lanning v. Carpenter, 20 N. Y. 447.

[77] Den dem. Vanderveere v. Gaston, 24 N. J. Law, 818.

[78] Winnebrenner v. Edgerton, 30 Barb. 185; Lanning v. Carpenter, 20 N. Y. 447.

[79] Clements v. Gerow, 30 Barb. 325.

[80] McDowell v. Daniels, 38 Barb. 143, Sutherland, J. Another way of stating the degree of certainty required is, that the confessed judgment may be pleadable in bar of a future demand for the same thing. Wight v. Mott, Kirby, 152.

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debtor, sufficiently states the facts out of which the indebtedness arose.[81] Another authority, drawing the line more strictly, holds that a statement that the indebtedness "is for a debt justly due from me to said plaintiff for moneys to that amount loaned and advanced to me by said plaintiff," is sufficient as between the parties, though it might be voidable at the intance of a junior judgment-creditor or *bona fide* purchaser.[82] Probably it is necessary to state the date of the loan. But if the whole sum is made up of various items advanced at different times, the cases rule that the statement is sufficiently explicit in describing the money as loaned to defendant at divers times after a specified day.[83] A confession of judgment for a certain sum for "goods, wares, and merchandises" of a specified value, is held by some of the authorities, to be too indefinite; it should state the nature and quantity of the goods sold, the time of sale, and the aggregate price, if not even the price of the several items.[84] But in New York a much looser rule obtains. It is there held to be well enough if the indebtedness is stated to be for goods, wares, and merchandise sold and delivered, with an approximate description of the period at or within which the sale took place.[85] A statement is not sufficient if it merely states and sets out a promissory note executed by the defendant to the plaintiff as the consideration of the indebtedness; for the facts out of which the indebtedness evidenced by the note arose should be clearly stated.[86] But a statement which sets out the execution and delivery "for value" of a negotiable note for $1500, "for money which" the creditor "then and there gave" the debtor "for said note, as a loan, which sum of $1500 is justly due and owing according to the tenor and effect of said note herein

[81] Kern v. Chalfant, 7 Minn. 487, (Gil. 393;) Kendig v. Marble, 58 Iowa, 529, 12 N. W. Rep. 584, citing Vanfleet v. Phillips, 11 Iowa, 558; Miller v. Clark, 37 Iowa, 325.

[82] Terrett v. Brooklyn Improvement Co., 18 Hun, 6. Compare Wood v. Mitchell (N. Y.) 22 N. E. Rep. 1125.

[83] Frost v. Koon, 30 N. Y. 428; Johnston v. McAusland, 9 Abb. Pr. 214. See Davis v. Morris, 21 Barb. 152.

[84] Nichols v. Cribs, 10 Wis. 76; Lawless v. Hackett, 16 Johns. 149; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107.

[85] Read v. French, 28 N. Y. 285; Neusbaum v. Keim, 24 N. Y. 325; Delaware v. Ensign, 21 Barb. 85.

[86] Chappel v. Chappel, 13 N. Y. 215, 64 Am. Dec. 496; Davidson v. Alexander, 84 N. Car. 621; Pond v. Davenport, 44 Cal. 481; McHenry v. Shephard, 2 Mo. App. 378.

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described," is sufficient to satisfy the statute.[87] But a statement that the note was "given for goods sold and delivered and money had and received" is not sufficient.[88] And an allegation that the consideration of the judgment is a promissory note given by the debtor for value received, but not specifying the amount or consideration of the note, is defective.[89] So if it is merely stated that the note was for "money due," the judgment entered upon it is *prima facie* fraudulent as to the creditors of the defendant, though not so fatally defective as to be void.[90] On the other hand, a statement, in effect, that the defendant had purchased of the plaintiff a certain indebtedness (describing it), due to the plaintiff, for which he had given to the plaintiff the promissory notes (describing them) upon which and for the amount of which he confessed the judgment, is a sufficient statement.[91] So the statement is sufficient if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due upon his indorsement, as the surety of the defendant and for his benefit, of bills and notes which are fully described as to names, dates, amounts, and times of payment.[92]

§ 64. Signature to Statement.

The statutes require the statement of indebtedness and confession of judgment to be "made and signed by the defendant." This is construed to mean a signature by the debtor in person. A signature by the defendant's attorney in the case is not sufficient. And where a judgment was entered upon a statement signed by two of the defendants in person and by the attorney of the third, it was held that the consent of those signing was only that judgment might be entered against all; and as there was no authority to enter judgment as to the third party, the judgment was unauthorized and void as to all.[93] In another case, where the defendant had signed the verification, but not the statement, which was written upon the same page, this

[87] Stern v. Mayer, 19 Mo. App. 511.
[88] Cordier v. Schloss, 18 Cal. 576.
[89] Norris v. Denton, 30 Barb. 117.
[90] Pond v. Davenport, 44 Cal. 481.
[91] Kirby v. Fitzgerald, 31 N. Y. 417.
[92] Dow v. Platner, 16 N. Y. 562.
[93] French v. Edwards, 5 Sawyer, 266.

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was considered sufficient, as being a substantial compliance with the law.[94]

§ 65. Verification of Statement.

The requirement of the statute, that the statement of facts accompanying a judgment by confession be properly verified by the oath of the party, intends that in so far as it relates to things within his own knowledge, he should affirm it to be *true* in unequivocal terms. In regard to other matters he may disclose his information and add a declaration of his belief in its truth. But where the party merely swears that he "believes the above statement of confession is true," the affidavit is insufficient, and the judgment, if entered thereon, will be vacated.[95] The jurat of the notary should also be in due form; but a formal defect in the jurat will not so far invalidate the judgment as to lay it open to collateral attack.[96] The verification of the statement, if faulty but not wholly void, is susceptible of amendment.[97]

§ 66. Amendment of Statement.

A motion by plaintiff to amend the statement of a confession of judgment is addressed to the discretion of the trial court. It is not an amendment which he has a legal right to demand, but is one which the court may in its discretion refuse or grant upon such terms as to it may seem to be just.[98]

§ 67. Judgment voidable for Failure to comply with Statute.

A judgment upon confession, though it does not conform exactly to the statutory requirements, is at most voidable, and not absolutely void as against creditors.[99] Thus, if it fails to set out all the facts

[94] Purdy v. Upton, 10 How. Pr. 494.

[95] Ingram v. Robbins, 33 N. Y. 409, 88 Am. Dec. 393.

[96] Grattan v. Matteson, 54 Iowa, 229, 6 N. W. Rep. 298.

[97] Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202.

[98] Symson v. Selheimer, 105 N. Y. 660, 12 N. E. Rep. 31.

[99] Sheldon v. Stryker, 34 Barb. 116. But in Edgar v. Greer, 10 Iowa, 279, it is said that a judgment confessed under a power which does not conform to the statute requirements is a nullity.

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required by the statute, it is for that reason irregular and *prima facie* fraudulent, but it is not a nullity; the presumption of fraud may be rebutted by proof that the judgment was fair and for a *bona fide* debt.[100] It has also been held that such a judgment is not void because it does not appear that an affidavit, as required by the statute, had been made.[101] But the true rule appears to be, that if there has been an attempt to fulfil all the requirements of the law, the judgment is at most only voidable, although the execution of such attempt be informal or defective; but, on the other hand, the total omission of any of the steps prescribed by the statute (as where no statement at all is filed) will render the judgment entirely inoperative and void.[102]

§ 68. Valid between Parties.

A judgment upon confession, founded on a statement of facts which is defective or insufficient to answer the requirements of the statute, will nevertheless be valid and effectual *as between the parties* to it, though voidable at the instance of other creditors.[103] The judgment-debtor himself cannot avoid it, nor can one do so who claims rights of property under him, but whose interests are not prejudiced thereby.[104] And such a judgment, upon proof of its honesty and good faith,

[100] Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521.

[101] Dean v. Thatcher, 32 N. J. Law, 470.

[102] Bacon v. Raybould (Utah), 10 Pac. Rep. 481. Boreman, J., observed: "The authorities go to the extent of holding that where there is an incomplete or insufficient statement of such facts [the facts out of which the indebtedness arose], the failure to make a complete statement will be only *prima facie* evidence of fraud as to creditors, and that it cannot be attacked collaterally. But no case has been called to our attention where a court has held that a confession of judgment is merely *prima facie* fraudulent as to creditors, and not liable to be attacked collaterally, where there was a total absence of the statement of any facts whatever. We know of no instance in which such a case has reached an appellate court. The statement of such facts is a prerequisite to the confession of judgment—it is not a confession of judgment without it."

[103] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. Rep. 869; Miller v. Earle, 24 N. Y. 110; Neusbaum v. Keim, 24 N. Y. 325; Kirby v. Fitzgerald, 31 N. Y. 417; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107; How. v. Dorscheimer, 31 Mo. 349; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271; Pond v. Davenport, 44 Cal. 481; Plummer v. Douglas, 14 Iowa, 69, 81 Am. Dec. 456. See also Shadrack v. Woolfolk, 32 Gratt. 707.

[104] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. Rep. 869.

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authorizes the creditor to impeach a fraudulent transfer made by the debtor, for the purpose of making the lien of the judgment effectual.[106] Where the property of the defendant has been sold under an execution upon a judgment confessed without a sufficient statement, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy.[106] At the same time, if another creditor attacks a confessed judgment founded upon a defective or insufficient statement, it devolves upon the plaintiff therein to negative the idea of fraud or collusion, and to show that the judgment is warranted by facts actually existing, although such facts were not included in the statement.[107] The same rule holds true of a judgment confessed without the affidavit to the justness of the debt required by statute; it is valid between the parties, though void or voidable as to other creditors.[108]

§ 69. For what Judgment may be confessed.

The statutes commonly provide that the debtor confessing judgment shall make oath that the debt is "justly due or to become due." It follows of course that if the judgment is for a purely fictitious debt, or is in excess of the real debt so far as to interfere with the rights of other creditors, it is fraudulent and cannot stand. Thus, where a judgment is confessed and execution levied for such an amount that subsequent judgment creditors find nothing to levy on, a combination between the parties having been proved, fraud will be established.[109] It is also essential that the debt be a *legal* debt,—that is, one which would not be rejected by a court on account of its illegal consideration. Yet it appears that the defendant in the judgment and those claiming under him (for instance, a subsequent mortgagee of his land) are estopped from denying the validity of

[106] Neusbaum v. Keim, 24 N. Y. 325.

[106] Miller v. Earle, 24 N. Y. 110.

[107] Cordier v. Schloss, 18 Cal. 576. See Bacon v. Raybould, 10 Pac. Rep. 481; Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521.

[108] Marity v. Eastridge, 67 Ind. 211; Chapin v. McLaren, 105 Ind. 563, 5 N. E. Rep. 688; Caley v. Morgan, 114 Ind. 350, 16 N. E. Rep. 790; Gardner v. Bunn (Ill.) 21 N. E. Rep. 614; Stone v. Williams, 40 Barb. 322.

[109] Nusbaum v. Louchheim (Pa.) 1 Atl. Rep. 391.

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the judgment, although the demand might not have been recoverable at law.[110] The word "due," as used in these statutes, must not be taken in too narrow a sense. It does not necessarily import a debt which might be recovered in an action at law against any defenses which the debtor might set up. There are certain defenses which the debtor has the option of waiving if he chooses, and he does waive them by confessing judgment. For example, such a judgment is not invalidated by the fact that a part of the claim for which it is given would be barred by the statute of limitations, provided the debt be an honest one.[111] So where a bankrupt, subsequent to his discharge, confesses judgment upon an old debt, the debt is a good consideration for the judgment, and the latter is not affected by the discharge.[112] It is further necessary that a confession of judgment be for a certain and specific sum. A judgment entered by a justice, on the confession of a defendant, for such sum as A. and B. shall award, before the award is declared, is invalid.[113] Where several powers of attorney are given to confess judgment on several debts in favor of and against the same parties, it is proper and competent for the court to consolidate them and enter but one judgment.[114] A judgment cannot be confessed for a claim arising *ex delicto*. A statute which allows confession of judgment "for money due or to become due" should not be construed as authorizing the confession of a judgment for damages growing out of a tort.[115]

§ 70. Debt not yet due.

Where the language of the statute is that judgment may be confessed for a debt "justly due and owing," it applies only to a debt payable at the time of the confession, for these terms import an immediate liability. But where it authorizes a confession "for money

[110] Shufelt v. Shufelt, 9 Paige, 137, 37 Am. Dec. 381.

[111] Keen v. Kleckner, 42 Pa. St. 529.

[112] Dewey v. Moyer, 72 N. Y. 70.

[113] Nichols v. Hewit, 4 Johns. 423. But a power of attorney to confess judgment "for an amount that may be found due" on the note therein described, and sufficient to give the court jurisdiction, is adequate. Patterson v. State, 2 Greene (Iowa), 492.

[114] Genestelle v. Waugh, 11 Mo. 367.

[115] Burkham v. Van Saun, 14 Abb. Pr. N. S. 163; Boutel v. Owens, 2 Sandf. 655.

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due or to become due," this may well include a claim founded upon an obligation now existing but not yet demandable. Thus the fact that a note upon which a confession of judgment was taken was not due when the judgment was rendered does not deprive the court of jurisdiction, and the judgment will not be vacated on that account.[116] "The fact that a note may not be due at the time of a confession upon it, might be a suspicious circumstance in a contest with other creditors of the debtor, but it would not render the judgment void in the proper sense of that term."[117] So a judgment is not void as to creditors because the action is commenced before the maturity of the note which was the cause of action, and the defendant confesses judgment without service of process.[118] Authority may be given by a warrant of attorney to confess judgment for a debt not yet due, but it must be given in clear and precise terms. Thus where the warrant, attached to a promissory note given in extension of others, authorized the attorney to appear for the maker at any time thereafter and confess judgment "for such amount as may appear to be unpaid thereon," it was held that the authority given was to confess judgment only for the amount actually due, not that accruing.[119] When a warrant of attorney confers authority, in a certain contingency, to confess judgment on a note before it is due, the record must show that the specified contingency had happened, otherwise the judgment is unwarranted.[120]

§ 71. For Future Advances.

A judgment by confession may be taken to secure future advances of notes or other commercial paper to be made by the creditor to the debtor;[121] or to secure both existing and future indorsements for his accommodation.[122] "A judgment or other security may be taken and held for future responsibilities and advances, to the extent of the

[116] Black v. Pattison, 61 Miss. 599; Mechanics' Bank v. Mayer, 93 Mo. 417, 6 S. W. Rep. 237; McClish v. Manning, 8 Iowa, 223.

[117] Calloway v. Byram, 95 Ind. 423.

[118] Pond v. Davenport, 45 Cal. 225.

[119] Reid v. Southworth, 71 Wis. 288, 36 N. W. Rep. 866. And see Smith v. Pringle, 100 Pa. St. 275.

[120] Roundy v. Hunt, 24 Ill. 598.

[121] Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202.

[122] Lansing v. Woodworth, 1 Sandf. Ch. 43.

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amount of the judgment or security. But to enable a creditor to hold a judgment or other security for future responsibilities and advances, it must be a part of the original agreement that the judgment, or security, should be a security for such responsibilities and advances. It cannot, as against third persons, be held to meet and cover new and distinct engagements subsequently entered into by the parties."[123] And it seems that advances made or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the confessed judgment.[124]

§ 72. For contingent Liabilities.

In those jurisdictions where the more liberal statute is in force, a judgment may be confessed to secure a future or contingent liability. Thus a judgment confessed as an indemnity for liabilities incurred by another is good at law against subsequent judgments, and may be enforced before the party assuming the liabilities has discharged them.[125] A judgment on confession may be enforced by execution, and is sustained by the same presumptions as other judgments, notwithstanding it was recovered on a contingent liability.[126] In those states, however, where a judgment can only be confessed for a debt that is "due and owing," the rule is different in this respect. Thus, in a New Jersey case the learned vice-chancellor said: "I think I am bound to consider the doctrine as settled, so far at least as this court is concerned, that a judgment on bond and warrant of attorney, under our statute, can only be entered for a debt actually existing at the time of its entry, and that a simple liability as indorser or surety does not constitute such a debt."[127]

[123] Averill v. Loucks, 6 Barb. 19; Truscott v. King, 6 Barb. 346. See Frye v. Jones, 78 Ill. 627.

[124] Brinkerhoff v. Marvin, 5 Johns. Ch. 320.

[125] Ford v. Elkin, 2 Speers 146. And see Ely v. Parkhurst, 25 N. J. Law, 188.

[126] Allen v. Norton, 6 Oreg. 344. A confession is valid though the judgment is not to be entered up except upon the happening of a contingency. Keep v. Leckie, 8 Rich. 164.

[127] Sayre v. Hewes, 32 N. J. Eq. 652. See Clapp v. Ely, 10 N. J. Eq. 178.

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§ 73. Amount of the Judgment.

Where a judgment is entered on a warrant of attorney and includes a greater sum than was actually confessed, it is held to be void only as to the excess, not *in toto*, unless the excess was fraudulently included.[128] Upon a confession of judgment in a pending action, if the plaintiff's demand is in the nature of a debt which may be ascertained by calculation, it is sufficient to enter judgment generally. The judgment is supposed to be for the amount of damages laid in the declaration and execution may issue accordingly. But if the plaintiff should indorse upon the declaration the actual amount of the debt, and if the defendant complains that injustice has been done, the court on motion, upon a proper case being made out, will grant immediate relief.[129] Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable by mere calculation, it must be liquidated by the court and not by the clerk.[130]

§ 74. Liquidation of Amount by Clerk.

In the case of a confession of judgment without action, the statutes sometimes authorize the prothonotary or clerk of the court to enter up judgment on a warrant, without the actual intervention of an attorney appearing for the defendant. But such a statute, it is held, does not give him all the powers of an attorney. He can enter judgment only when the amount due appears on the face of the instrument, or is ascertainable by calculation from its face.[131] Thus where judgment was confessed for the value of certain land at the rate of $10 per acre, the quantity to be ascertained by survey, it was

[128] Davenport v. Wright, 51 Pa. St. 292. But where there was a power of attorney to confess judgment on a note for $26,000, the note was described in the declaration, which claimed $50,000 damages, and the plea of confession admitted an indebtedness and confessed judgment for the latter sum, and the clerk rendered judgment for $26,000; *held* that the attorney confessing the judgment exceeded his power, that the clerk did not have power to deviate from the plea of confession, and the judgment was void. Tucker v. Gill, 61 Ill. 236.

[129] Lewis v. Smith, 2 Serg. & R. 142.

[130] Bonta v. Clay, 1 Litt. 27.

[131] Hope v. Everhart, 70 Pa. St. 231; Connay v. Halstead, 73 Pa. St. 354.

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held that the prothonotary had no power to enter a judgment.[122] Such a power must also be exercised by the officer without unnecessary delay. Where a judgment was confessed "amount to be ascertained by the prothonotary," and no amount was ascertained for fourteen years, and the plaintiff and principal defendant were dead, the court refused to make an order for ascertaining the amount against the surety.[123]

§ 75. Inclusion of Attorney's Fees.

A judgment entered by confession upon a warrant of attorney may include fees to the attorney appearing in the case (nominally for the debtor, really in behalf of the creditor), if that be authorized by the power.[124] And it is altogether usual to incorporate a stipulation for such fees in the warrant. Such a provision rests upon a valid consideration and is not fraudulent as to other creditors;[125] unless the amount designated as attorney's fees is grossly in excess of any reasonable amount, in which case the judgment, at least to the extent of such fees, is fraudulent and void as against the other creditors of the defendant.[126] And the attorney's commissions authorized in a judgment-note cannot be collected as part of the debt due when the debtor was ready to pay at the maturity of the note.[127] It is customary to specify in the warrant or note the sum which may be incorporated in the judgment as a fee for the attorney. But cases have sometimes come before the courts in which the provision, instead of being explicit, merely designated a "reasonable attorney's fee." This language, it is held, gives to the court in which the confession is made the right to determine what is a reasonable fee; it does not leave it to the option or the conscience of the attorney; it contemplates a judicial proceeding by the court for the purpose of ascertaining the amount which may reasonably be charged up. Hence if the attorney himself fixes the sum of his fees, under a power so

[122] Connay v. Halstead, 73 Pa. St. 354.
[123] Cook v. Cooper, 4 Harringt. 189.
[124] Ball v. Miller, 88 Ill. 110.
[125] Weigley v. Matson, 125 Ill. 64, 16 N. E. Rep. 881.
[126] Hulse v. Mershon (Ill.), 17 N. E. Rep. 50.
[127] Moore v. Kilgore, 110 Pa. St. 433, 1 Atl. Rep. 593.

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worded, and confesses judgment for the whole, he acts in excess of his authority, and the judgment so entered, without the intervention of the court, is void.[138]

§ 76. Recording the Judgment.

Under a statute relating to judgments by confession, which requires the plaintiff to file a sworn statement, and enacts that the clerk shall indorse the judgment upon the statement and enter it in the judgment-book, the two entries should be deemed to have the force of duplicate copies, each having the effect of an original.[139] The power of attorney confessing the judgment should be filed as a part of the record.[140]

§ 77. Reversing and Vacating Judgments by Confession.

In what circumstances a judgment entered upon the confession of the defendant may be reviewed in the appellate court, or opened or vacated in the court below, at the defendant's own instance, is a question involved in much doubt. The difficulty arises from the fact that the debtor, by his voluntary action in the matter, must be considered to have waived his strict technical rights to some extent, and yet he should be protected from injustice and from errors sufficient to vitiate the whole proceeding. In the first place, it is held in several states that a confession of judgment operates as a release of all errors in the record, and consequently it cannot be carried to the appellate court either by appeal or *certiorari*.[141] On the other hand, it is elsewhere held that a confession of judgment, although a waiver of formal errors, does not prevent the defendant from procuring the reversal of the judgment for errors of substance.[142] In regard to the

[138] Campbell v. Goddard, 123 Ill. 220, 14 N. E. Rep. 261; S. C. 117 Ill. 251, 7 N. E. Rep. 640.

[139] King v. Higgins, 8 Oreg. 406.

[140] Durham v. Brown, 24 Ill. 93.

[141] Garner v. Burleson, 26 Tex. 348; Mandeville v. Holey, 1 Pet. 136; Wilson v. Collins, 9 Ala. 127. See De Riemer v. Cantillon, 4 Johns. Ch. 85.

[142] Battelle v. Bridgman, 1 Morris (Iowa), 363; Portage Canal Co. v. Crittenden, 17 Ohio, 436. See Montgomery v. Barnett, 8 Tex. 143; Kennedy v. Lowe, 9 Iowa, 580; Hopkins v. Howard, 12 Tex. 7

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jurisdiction of the court below, it seems to be conceded that it has power to give equitable relief in cases calling for its interposition.[143] "The power of the courts to open judgments entered by confession, or in default of an appearance or plea, is not denied; and it is the duty of the courts to exercise such power wherever it is satisfactorily shown that in equity the judgment ought not to be collected." [144] In order to prevent any question of this kind, the parties sometimes incorporate a release of errors in the confession or warrant of attorney, the effect being, of course, to waive any formal objections or irregularities. But where this is not done, it is proper to examine with care any irregularity in the proceeding, and to vacate the judgment if substantial injustice may have been done to the defendant.[145] The opening of such a judgment is therefore a matter of sound discretion, and whether such a sound discretion has been exercised by the court below depends upon the whole evidence, in which the burden of proof is to show a defense.[146] The judgment should not be opened and the defendant let in to defend, except upon evidence of such weight and clearness as would be sufficient to warrant a chancellor in decreeing that the instrument upon which the confession was founded was void, or should be reformed for fraud or mistake.[147] Whether a judgment against two persons, entered by confession on a warrant of attorney, may be set aside as to one of them and stand good as to the other, is an unsettled point. It depends upon whether, in the particular state, a joint judgment is considered as an entirety or as severable.[148] When the application to set aside the judgment proceeds from another creditor of the defendant, there is less doubt as to the power of the court. It may clearly vacate the judgment for fraud or collusion between the

[143] McAllister's Appeal, 59 Pa. St. 204. Before vacating a judgment entered by confession upon a warrant of attorney, in a doubtful case, the defendant will be let in to defend, courts of law having an equitable jurisdiction in this regard. Walker v. Ensign, 1 Ill. App. 113.

[144] Earnest v. Hoskins, 100 Pa. St. 551.

[145] McCabe v. Sumner, 40 Wis. 386.

[146] Roenigk's Appeal (Pa.), 8 Atl. Rep. 99.

[147] English's Appeal, 119 Pa. St. 533, 13 Atl. Rep. 479.

[148] See Silvers v. Reynolds, 2 Harringt. 257; York Bank's Appeal, 86 Pa. St. 458; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Chapin v. Thompson, 20 Cal. 681. See *supra* §§ 58, 64.

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parties, or for a substantial failure to comply with the statutory requirements.[149]

§ 78. Effects of Confessed Judgment.

"In contemplation of law, a judgment on a warrant of attorney is as much an act of the court as if it were formally pronounced on *nil dicit* or a *cognovit*, and till it is reversed or set aside, it has all the qualities and effects of a judgment on a verdict."[150] A judgment upon confession is therefore just as conclusive, between the parties and their privies, of the facts and points necessarily involved in and determined by it, and as final a bar to the maintenance by the creditor of another suit for the same demand, as any other judgment.[151]

[149] As, on the ground that the statement of indebtedness was insufficient. Thompson v. Hintgen, 11 Wis. 112. But a judgment upon confession will not be vacated because the affidavit of plaintiff's agent, on which it was entered, fails to state his means of knowledge, unless the judgment is inequitable; for this is a mere irregularity. Pirie v. Hughes, 48 Wis. 531.

[150] Braddee v. Brownfield, 4 Watts, 474. A judgment confessed upon terms, duly entered, is in effect a conditional judgment, and the court will take notice of the terms and enforce them. Wood v. Bagley, 12 Ired. 83.

[151] Braddee v. Brownfield, 4 Watts, 474; Sheldon v. Stryker, 34 Barb. 116; Neusbaum v. Keim, 24 N. Y. 325; Dean v. Thatcher, 3 Vroom, 470; North v. Mudge, 18 Iowa, 496, 81 Am. Dec. 441; Twogood v. Pence, 22 Iowa, 543; Sherman v. Christy, 17 Iowa, 322; Secrist v. Zimmerman, 55 Pa. St. 446; Kirby v. Fitzgerald, 31 N. Y. 417; Weikel v. Long, 55 Pa. St. 288; Goff v. Dabbs, 4 Baxt. 300.

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CHAPTER IV.

JUDGMENTS BY DEFAULT.

§ 79. Judgment of *Nil Dicit.*
80. Judgment by Default.
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§ 79. Judgment of Nil Dicit.

When a defendant puts himself in default by failing to plead or file an answer within a time prescribed, although he may have entered an appearance in the action, the judgment given against him is technically called judgment of *nil dicit*, that is, that he "says nothing" in opposition to the plaintiff's claim, and therefore the latter is entitled to recover.[1] But if the defendant has put in his plea, and issue has been joined, and he then fails to appear when the case is called for trial, this species of judgment cannot properly be entered, for he is not in default for want of an answer.[2] However, the distinction between this judgment and the other varieties of judgment against the defendant for failure to take a required step in the action is no longer strictly observed, and when the judgment is *nil dicit* when it should

[1] Stewart v. Goode, 29 Ala. 476; Summerlin v. Dowdle, 24 Ala. 428. See *supra*, § 15.

[2] Taylor v. McLaughlin, 2 Colo. Ter. 375.

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have been by default, it is merely informal and will not be reversed on that account.[3] But in Texas it is said that while the proceeding to ascertain the amount of damages is the same on judgments by *nil dicit* as on judgments by default, "in other respects, a judgment by *nil dicit* is held by this court to possess a stronger implication in favor of the plaintiff's claim than an ordinary judgment by default; it is regarded as partaking of the nature of a judgment by confession as well as by default."[4] The distinction, however, is not of practical value, nor is it generally recognized.

§ 80. Judgment by Default.

Properly speaking, a judgment by default is one taken against a defendant when, having been duly summoned or cited in an action, he fails to enter an appearance. But the term is frequently (and indeed commonly) used in a much wider sense, in which it includes judgments given against the defendant for want of a plea, answer, affidavit of defense, etc., as well as for want of an appearance. The latter is the signification of the word as used in this chapter. The characteristic feature of a judgment by default is that it follows upon the negligence or omission of the defendant, passing over the steps that would otherwise be taken, trial and verdict, and adjudging against him immediately upon his failure to defend.[5] In respect to its effects and consequences,—as the foundation of a suit, as a lien, as a bar or estoppel,—a judgment by default does not differ from one rendered upon a verdict. There are, however, certain distinctive rules, particularly in reference to its rendition and entry, which require separate treatment and which will form the subject-matter of the following pages. The rendition of a judgment by default, it is held, is no violation or abridgement of the constitutional right of trial by jury.[6]

[3] Shields v. Barden, 6 Ark. 459.

[4] Storey v. Nichols, 22 Tex. 87.

[5] A judgment rendered by a justice of the peace when the defendant is present by attorney, who, however, takes no part in the trial, is not a judgment "by default." Borgwald v. Fleming, 69 Mo. 212.

[6] Cureton v. Stokes, 22 S. Car. 583; Lawrence v. Borm, 86 Pa. St. 226; Randall v. Weld, 86 Pa. St. 357; Hunt v. Lucas, 99 Mass. 409; Dartic v. Lockwood, 61 Ga. 293. The right of trial by jury is not impaired by a law giving to the court the right to assess damages without a jury in case of default. Hopkins

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The right is one which (at least in a civil action) may be waived by the party, and the defendant cannot claim that the privilege is denied to him if he presents no defense to be tried by a jury.

§ 81. Against Whom may be taken.

As a general rule, a default may be taken against any natural person against whom the same judgment might have passed as the result of contested proceedings. But there are certain exceptions to this statement. Thus, in California, a person summoned as a garnishee may be punished for contempt for disobeying an order whereby he is required to disclose his indebtedness if any, but a judgment by default cannot be taken against him, and such judgment is without jurisdiction and void.[7] In some other states, however, where the court has regularly obtained jurisdiction of the garnishee and there is no answer on his part, it is held that a judgment by default may be entered against him, and such judgment will be sufficient to protect the garnishee if no defense on the merits could have been made.[8] Judgments by default may be entered against non-residents and against persons under disabilities; but the *validity* of such judgments must be tested by rules which belong to later sections of this book.[9] A default judgment may also be rendered against a corporation; but in order to support it, it must appear of record that the person who, as shown by the return of the officer, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation.[10]

§ 82. Joint Defendants.

The rule of the common law, in regard to actions in which several persons were joined as defendants, was that judgment must be given

v. Ladd, 35 Ill. 178; Seeley v. Bridgeport, 53 Conn. 1; Raymond v. Railroad, 43 Conn. 596.

[7] Hibernia Savings Society v. Superior Court, 56 Cal. 265.

[8] Scamahorn v. Scott, 42 Iowa, 529; Abell v. Simon, 49 Md. 318; Gracy v. Coates, 2 McCord, 224; Jones v. Tracey, 75 Pa. St. 417; Laughlin v. January, 59 Mo. 383.

[9] See *infra*, §§ 227-232; 190, 196.

[10] Cloud v. Pierce City, 86 Mo. 357.

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against all or none of them. The plaintiff could not recover against a part of the defendants and be defeated of his claim against the rest, except in the single case where one of them set up and succeeded in establishing a defense entirely personal to himself, as his release or discharge or his personal disability to contract. Consequently, except in so far as the rule is changed by statute, where several persons are summoned as defendants, and one of them pleads and the other suffers a default, final judgment cannot be entered upon the default until the issue as to the other defendant is disposed of, and not even then unless the plaintiff had a verdict on the issue or the defendant pleading had set up a merely personal defense.[11] But this has been changed, in several of the states, by the statutes, which provide that in actions regularly commenced against several joint defendants the court may, in its discretion, and whenever a several judgment would be proper, render judgment against one or more of them, leaving the action to proceed against the others. Under a law of this character, it would be proper to render a judgment by default against the defendant not pleading, where the cause of action was joint and several. But if the claim were upon a joint contract, such a judgment would necessarily remain interlocutory until the issues raised were finally disposed of, for in that case the defendants must stand or fall together. We shall recur to this subject at a later point.[12] It is also held that where process is served on only one of two defendants, judgment cannot be rendered against both by default.[13] But it seems to be otherwise under the "joint debtor acts," existing in several of the states, in actions upon a joint contract.[14]

[11] Russell v. Hogan, 1 Scam. 552; Catlin v. Latson, 4 Abb. Pr. 248; Taylor v. Beck, 3 Rand. 316; Woodward v. Newhall, 1 Pick. 500; Hutchings v. Bank, 4 Ark. 517. See Curry v. Roundtree, 51 Cal. 184. If three defendants demur, and, after the demurrer is withdrawn, two of them plead, a judgment *nil dicit* should be entered against the party not pleading, and the jury should assess the damages against all. If but two plead and the other abide by his demurrer, he cannot be regarded as going to trial with the others. Freeland v. Supervisors, 27 Ill. 303.

[12] See *infra* §§ 208, 209.

[13] Rider v. Alleyne, 2 Scam. 474; Winslow v. Lambard, 57 Me. 356.

[14] See *infra* §§ 235, 236.

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§ 83. Jurisdiction of the Defendant.

In order to the validity of a judgment by default, as in the case of any other judgment, it is essential that the court should have acquired jurisdiction of the person of the defendant.[16] A judgment entered by default against a party who has not been served with process and who has not appeared in the action, is irregular and void.[18] And due and proper service must appear upon the record before the court is authorized to render a judgment by default;[17] though here it is necessary to recollect the presumptions of jurisdiction by which any judgment of a superior court is sustained when assailed collaterally or made the basis of a new suit. It being necessary, therefore, that the court should have jurisdiction in the case, it is evident that a defect or failure in this respect may arise either from some peculiarity in the process itself or from the manner of its service. Now, to be duly served with a summons is said to imply that the defendant has been duly served with a summons notifying him to appear and answer in the court where the judgment is sought to be taken.[18] Assuming these to be the essentials of a proper notice, it follows that the writ, although properly *served*, may be so defective in itself as to confer no jurisdiction over the defendant. Such would be the case if it omitted to apprise him of the court in which the action had been commenced or the day on which he was required to appear.[19] It is not true, however, that any irregularities in the process, short of this, may be entirely disregarded. The rule is, that if the notice is defective or irregular, but not to the extent of being substantially worthless, a judgment by default entered thereon will be irregular and lia-

[16] On the general subject of jurisdiction as essential to the validity of a judgment, see *infra* §§ 215–244.

[18] Moore v. Watkins, 1 Ark. 268; Townsand v. Townsand, 21 Ill. 540; Johnson v. Delbridge, 35 Mich. 436; Duncan v. Gerdine, 59 Miss. 550; Prentiss v. Mellen, 1 Sm. & Mar. 521; Stallings v. Gully, 3 Jones (N. Car.) 344; Winslow v. Anderson, 3 Dev. & B. 9, 32 Am. Dec. 651; Graham v. Graham, 4 Munf. 205; Warren Manuf. Co. v. Ætna Ins. Co., 2 Paine, 501; Bascom v. Young, 7 Mo. 1; State v. Weber, 23 La. Ann. 798.

[17] Wilkinson v. Bayley, 71 Wis. 131, 36 N. W. Rep. 836.

[18] Smith v. Ellendale Co., 4 Oreg. 70.

[19] Kitsmiller v. Kitchen, 24 Iowa, 163.

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ble to be corrected or set aside on motion, or reversed above, but not absolutely *void*, and hence not open to collateral attack.[20] In the next place, the process, sufficient in itself, must be duly served upon the party. But here also slight irregularities, not fatal in themselves, will not have the effect of depriving the court of jurisdiction. "If the court to which the process is returnable adjudges the service to be sufficient and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal."[21] A voluntary *appearance* by the defendant will of course be sufficient to confer jurisdiction, and will amount to a waiver of formal and technical defects in the process or its service. But a default obtained without proper service and on an unauthorized appearance, is an absolute nullity.[22] The defendant may also acknowledge service of the writ, and thereby forego his objections to the manner of service or the person executing it. But it is held in some states that an indorsement upon the process, of a written acknowledgment of service, purporting to be signed by the party, is not sufficient, without proof of the authenticity of such indorsement and signature, to authorize the entry of default for want of an appearance.[23] This rule, however, is probably too severe to find general acceptance. On similar principles, in a state where the law is that a judgment by default cannot be entered except upon proof of the *personal* service of the summons and complaint, an admission of "service," not stating the mode in which the service was made, is not sufficient.[24] To warrant entering a judgment against one who has been made a defendant upon his own motion, there must be notice and proof of no answer, the same as in

[20] De Tar v. Boone Co., 34 Iowa, 488; Betts v. Baxter, 58 Miss. 334; Christian v. O'Neal, 46 Miss. 669; Campbell v. Hays, 41 Miss. 561; Isaacs v. Price, 2 Dill. 351.

[21] Isaacs v. Price, 2 Dill. 351.

[22] Great West Min. Co. v. Woodmas Min. Co., (Colo.) 20 Pac. Rep. 771. An affidavit for continuance filed by defendant is not such an appearance as will warrant judgment by default. Hoyt v. Macon, 2 Col. Ter. 113. Nor is service of notice of a motion to dissolve an attachment on account of irregularity, made by defendant's attorney. Glidden v. Packard, 28 Cal. 649.

[23] Johnson v. Delbridge, 35 Mich. 436; Davis v. Jordan, 5 How. (Miss.) 295. Where a judgment by default recited that service of the writ in the case was acknowledged by the defendant, *held*, sufficient to sustain the judgment. Winston v. Miller, 20 Miss. 550.

[24] Read v. French, 28 N. Y. 285.

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the ordinary case of a defendant who has been served and has appeared.[25] In fact, the cardinal principle is that a defendant cannot be put in default without due notice of everything which requires him to take affirmative action. Thus in a case where judgment by default was rendered on a substituted petition, the substitution having been made without notice to the defendant or any one authorized to represent him, the judgment was held to be erroneous.[26]

Thus far we have not spoken of judgments by default rendered upon constructive service of process. This proceeding is authorized by statute in many of the states, in actions against non-resident defendants, and cases involving the validity of such judgments are by no means infrequent. The subject properly belongs to another part of this work, and in this connection it is only necessary to remark that the statutes authorizing the entry of such judgments are strictly construed and the prescribed procedure must be strictly followed, and that such judgments have no extraterritorial validity and are not binding on the defendant out of the state where rendered, except in actions *in rem* and *quasi in rem* (as in divorce), and in cases where the jurisdiction is based on attachment of the defendant's property found within the state, in which latter instance the judgment is universally valid in so far as it affects to dispose of such property.[27]

§ 84. Must be founded on good Declaration.

A judgment entered by default will be irregular and erroneous unless it rests upon a good and sufficient declaration or complaint duly filed in the action.[28] Hence if the plaintiff's pleading sets out no cause of action, a judgment by default thereon cannot stand.[29] "A default is an admission of the cause of action stated in the petition, and that something is due to the plaintiff. But where no cause of action is

[25] Fagan v. Barnes, 14 Fla. 53.

[26] Watson v. Miller, 69 Tex. 175, 5 S. W. Rep. 680.

[27] See *infra* §§ 227-232.

[28] Amason v. Nash, 19 Ala. 104; Wellborn v. Sheppard, 5 Ala. 674; Merritt v. White, 37 Miss. 438; Glenn v. Shelburne, 29 Tex. 125.

[29] Thighen v. Mundine, 24 Tex. 282; Abbe v. Marr, 14 Cal. 210; Barron v. Frink, 30 Cal. 486; Hallock v. Jaudin, 34 Cal. 167.

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stated in the petition a default can have no such effect. It is true that a defendant may be concluded by a default where the facts stated in the petition do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer. But where the petition omits the necessary averment to show liability against the defendant, the court may and should, even upon default, refuse to enter judgment." [30] A view opposite to that here stated has been taken in some of the New York cases,[31] on the ground that, if the complaint is defective in this particular, the remedy by demurrer is open to the defendant, and if he neglects to avail himself of it, he waives any objections which he might thus present, and cannot ask to have the judgment set aside or reversed. But the very obvious answer to this is, that an objection to the complaint, on the score of its failure to state a cause of action, like an exception to the jurisdiction of the court, is never waived; that a default admits nothing more than the plaintiff has chosen to allege, and the silence of the defendant should not be made to help him out; and that if the plaintiff has not stated a case sufficient to justify the intervention of the law in his behalf, he is not entitled to any judgment, whether the defendant answers or not. A petition, for instance, which does not allege an assignment of the claim sued on, when it is not in the plaintiff's name and no assignment is proved, will not sustain a judgment by default.[32] The question is different where the judgment is rendered on a declaration containing both good and bad counts. Here it is said that the insufficiency of one count to sustain a judgment will not impair the plaintiff's right to recover on the other, and hence the judgment will be allowed to rest on the cause of action well pleaded and will not be reversed.[33] There are cases, however, holding that the damages being general, and nothing appearing to show that they were in fact assessed upon the good count only, there is no authority to presume that they were so assessed, and hence (just as in the case of a verdict and gen-

[30] Bosch v. Kassing, 64 Iowa, 312, 20 N. W. Rep. 454. See Walker v. Massey, 10 Ala. 30.

[31] Adams v. Oaks, 20 Johns. 282; Dorr v. Birge, 8 Barb. 351; Pope v. Dinsmore, 8 Abb. Pr. 429. See also Frankfurth v. Anderson, 61 Wis. 107, 20 N. W. Rep. 662.

[32] Thompson v. Stetson, 15 Nebr. 112, 17 N. W. Rep. 368.

[33] Hunt v. San Francisco, 11 Cal. 250.

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eral damages, upon a declaration containing a count bad in substance) the judgment will be erroneous.[34]

§ 85. Premature Entry of Default.

A judgment rendered by default against a defendant before the expiration of the time allowed to him for filing a plea or answer, is irregular but not absolutely void; and if the defendant takes no steps to correct the error, he is presumed to have waived it.[35] That time is given for the benefit of the defendant, and he may waive it and *consent* that a judgment be entered against him before its expiration.[36] So if after due service of summons, judgment by default is entered one day sooner than the statute allows, but the defendant is informed of the date of the entry, both by an attachment served on him shortly thereafter and by a *scire facias*, duly served, to revive the judgment, several years later, but takes no action until after the judgment has been revived, the irregularity will be regarded as waived, and a motion to strike off the judgment will be denied.[37] A decree *pro confesso*, signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day with the signing of the decree.[38] In case of a default, judgment may be entered before the case is reached in its regular order on the docket.[39]

§ 86. Default when proper.

When an answer or other pleading of a defendant, raising an issue of law or fact, is properly on file in the case, no judgment by default

[34] Hemmenway v. Hickes, 4 Pick. 496; Dryden v. Dryden, 9 Pick. 546.

[35] White v. Crow, 110 U. S. 183, 4 Sup. Ct. Rep. 71; Burt v. Scranton, 1 Cal. 416; Mitchell v. Aten, 37 Kans. 33, 14 Pac. Rep. 497; West v. Williamson, 1 Swan, 277; Grover v. Holman, 3 Heisk. 519. See, as to judgment by default in a justice's court, rendered, in the absence of defendant and his counsel, prior to the hour set out in the citation, Yentzer v. Thayer, 10 Colo. 63, 14 Pac. Rep. 53. And see Dow v. Murch, 80 Me. 408, 15 Atl. Rep. 26.

[36] Hoguet v. Wallace, 28 N. J. Law, 523.

[37] Harper v. Biles, 115 Pa. St. 594, 8 Atl. Rep. 446.

[38] Emery v. Downing, 18 N. J. Eq. 59.

[39] Brenner v. Gundershiemer, 14 Iowa, 82.

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can be entered against him; to authorize a default, the answer or other pleading must be disposed of by motion, demurrer, or in some other manner.[40] The authorities do not go to the extent of holding that such a judgment would be absolutely void, but it would be set aside on motion of the defendant or reversed on appeal. There appears to be some doubt as to whether the plea should be actually *on file*, in order to prevent a default, or whether it is sufficient if duly brought to the notice of the plaintiff or his attorney.[41] The question will be governed to some extent by the local practice, and in those jurisdictions where the defendant's answer is to be served on the plaintiff's attorney within a specified time, an entry of default would probably be regarded as erroneous if made after such service, although the pleading were not filed in court. In a case where judgment by default was entered against a defendant, who filed an answer on the same day the judgment was rendered, but it did not appear affirmatively that the answer was filed before the judgment, or that the attention of the court was called to the answer before giving judgment, it was held to be the legal presumption that the judgment was first given.[42] Even though the plea filed by the defendant be *bad* in form or substance, yet, if it does not admit the plaintiff's case, the latter cannot have judgment for want of a plea; the proper practice is either to move to strike out the plea, or to answer it by demurrer or otherwise.[43] And especially after replying to a plea filed

[40] Taylor v. McNairy, 42 Miss. 276; Bedwell v. Thompson, 25 Tex. 245; Hicks v. Vaun, 4 Ark. 526; Boyer v. Robinson, 6 Ark. 552; Alexander v. Stewart, 23 Ark. 18; White v. Reagan, 25 Ark. 622; Harris v. Manuf. Co., 4 Blackf. 267, 29 Am. Dec. 372; Young v. Bank, 4 Ind. 301, 58 Am. Dec. 630; Terrell v. State, 68 Ind. 155; Wall v. Galvin, 80 Ind. 447; Lyon v. Barney, 1 Scam. 387; Miller v. Hardacre, 1 Greene (Iowa), 154; Levi v. Monroe, 11 Iowa, 453; Ruch v. Jones, 33 Mo. 393; Norman v. Hooker, 35 Mo. 366; McMurtry v. State, 19 Nebr. 147, 26 N. W. Rep. 915.

[41] In an early New York case, where a plea was delivered to the plaintiff's attorney, who searched the clerk's office, and, finding no plea on file, entered a default for want of a plea, the court considered the default as a nullity; the party is to be governed by the pleadings delivered to him, and not search the office to see whether the originals are filed. Smith v. Wells, 6 Johns. 286. But compare Wall v. Galvin, 80 Ind. 447.

[42] Wooldridge v. Brown, 1 Tex. 478. See, *per contra*, Lyon v. Barney, 1 Scam. 387.

[43] Briggs v. Sholes, 14 N. H. 262. Where the admissions in an answer negative its general denials, the latter

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in proper time the plaintiff cannot take judgment by *nil dicit;* if the plea is bad, he should withdraw his replication and demurrer.[44]

On similar principles, it is erroneous to render a judgment by default against a defendant who has filed a *demurrer* to the declaration, when the same remains unanswered and not disposed of in any way, and he has not taken any subsequent step in the cause amounting to a waiver of the demurrer.[45] And a judgment by default, entered while exceptions are pending and undetermined, is erroneous and irregular.[46] So, pending the question whether a suit can be maintained in the court where it is brought, by reason of the alleged non-residence of the defendant, there can be no judgment against him for want of a plea.[47] But of course, after the defendant's demurrer is overruled and judgment of *respondeat ouster* given, he may be put in default for failure to answer further within the proper time.

For the same reasons, a default cannot be entered while a *motion* is pending.[48] Thus, while an application for the removal of a cause from the state court to a federal court remains undetermined, it is irregular to enter a default against the party making the application, and a motion to set aside the default in such case should be allowed.[49] So of a motion to dismiss, for want of security for costs by a non-resident plaintiff, made in due time.[50] A motion to quash the return or the summons is no waiver of the right to plead, and in such case a refusal to allow the defendant to plead, and an entry of judgment as upon default, is error.[51] If the defendant's plea is *withdrawn*, the case then stands precisely as if no plea had been filed. An appearance is entered and a want or defect of service is waived by filing a plea in bar in the action, and if the plea is subsequently withdrawn,

may be disregarded, and if the complaint be verified, judgment may be asked on the former. Tremont v. Seals, 18 Cal. 433.

[44] Cox v. Capron, 10 Mo. 691.

[45] Steelman v. Watson. 5 Gilm. 249; McKinney v. May, 1 Scam. 534; Key v. Hayden, 13 Iowa, 602; Willamette, etc., Co. v. Smith, 1 Oreg. 181; Hirsh v. Clawson, 106 Ind. 329, 6 N. E. Rep. 919.

[46] Francis v. Steamer Black Hawk, 18 La. Ann. 629.

[47] State v. Gittings, 35 Md. 169.

[48] Atchison, T. & S. F. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. Rep. 512.

[49] Mattoon v. Hinckley, 33 Ill. 208.

[50] Osprey v. Jenkins, 9 Mo. 643.

[51] Story v. Ware, 35 Miss. 399, 72 Am. Dec. 125.

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that does not operate as a withdrawal of the appearance, and the plaintiff is entitled to judgment of *nil dicit* at any time before another plea is filed.[52] And in general, if the defendant abandons, or fails to establish, any preliminary motion or plea, he must seasonably avail himself of the opportunity accorded to answer to the merits, or he will be liable to be defaulted. Thus, where a defendant filed a motion to quash a summons, which was overruled, and refused to appear further in the action, it was held that a judgment against him, without showing an entry of default, would not be disturbed.[53] Leave to the plaintiff to amend his declaration, and to the defendant for time to plead, is an abandonment of all existing issues, and if the plaintiff amends his declaration, and no plea is filed to such amended declaration, the plaintiff is entitled to judgment by default.[54] Still it is irregular to enter judgment as for want of an answer, where the complaint is amended after answer but no amended answer filed, if the original answer states a defense to the cause of action shown by the amended complaint.[55] Judgment by default, without a rule to answer, should not be entered against a defendant where a motion to strike out a portion of the complaint has been allowed. "We think the defendant should be regarded as standing in the same position as though he had successfully attacked the complaint by demurrer. Even if the order of the court and the circumstances of the case required no formal amendment of the complaint, the necessity for a rule to answer would remain the same."[56]

§ 87. Conclusiveness of Judgment by Default.

A judgment taken by default is conclusive, by way of estoppel, in respect to all such matters and facts as were well pleaded and properly raised and material to the case made by the declaration, or other pleadings, and such issues cannot be relitigated in any subse-

[52] Dart v. Hercules, 34 Ill. 395; Grigg v. Gilmer, 54 Ala. 425.

[53] McPherson v. First Nat. Bank, 12 Nebr. 202, 10 N. W. Rep. 707. And see McKellar v. Lamkin, 22 Tex. 244.

[54] Robinson v. Keys, 9 Humph. 144.

[55] First Nat. Bank v. Prescott, 27 Wis. 616.

[56] Mullen v. Wine, 9 Colo. 167, 11 Pac. Rep. 54.

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quent action between the parties or their privies.[57] But while a default is conclusive of all that is properly alleged in the complaint, it is conclusive of nothing more, and as a general rule it binds the defendant only in the character in which he is sued.[58] "A judgment by default is as conclusive upon the judgment defendant, as to any matter admitted by the default and adjudicated by the judgment which ensued, as any other form of judgment. But just what or how much is admitted by the default often becomes a difficult question in particular cases. The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint. As applicable, however, to a suit to foreclose a mortgage, or other kindred suits in the nature of a proceeding *in rem*, where a party is made a defendant to answer as to his supposed or possible, but unknown or undefined, interest in the property, we think that, as against him, a default ought to be construed as an admission that, at the time he failed to appear as required, he had no interest in the property in question, and hence as conclusive of any prior claim of interest or title adverse to the plaintiff. Any less rigid rule of construction might, and in many cases doubtless would, defeat the very object properly had in view in making a party a defendant to answer as to his supposed or possible interest in the property involved, to the end that all claims to or against such property might be adjusted by the final judgment or decree, and further litigation thereby avoided."[59] Further, a judgment by default, regularly entered, is as binding as any other, as far as respects the power and jurisdiction of the court in declaring the plaintiff's right to recover, although the amount of the recovery, in some cases, may

[57] Leonard v. Simpson, 2 Bing. N. C. 176; Oregon Ry. Co. v. Oregon Ry. & Nav. Co., 28 Fed. Rep. 505; Derby v. Jacques, 1 Cliff. 425; Thatcher v. Gammond, 12 Mass. 268; Briggs v. Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Gaskill v. Dudley, 6 Met. 546, 39 Am. Dec. 750; Newton v. Hook, 48 N. Y. 676; Brown v. Mayor, 66 N. Y. 385; McCalley v. Wilburn, 77 Ala. 549; Ellis v. Mills, 28 Tex. 584; Dunn v. Pipes, 20 La. Ann. 276; Ligon v. Triplett, 12 B. Monr. 283; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. Rep. 93; Fletcher v. Holmes, 25 Ind. 458; Van Valkenburgh v. Milwaukee, 45 Wis. 574; Doyle v. Hallam, 21 Minn. 515; Kittridge v. Stevens, 16 Cal. 381. *Infra*, § 697.

[58] Unfried v. Heberer, 63 Ind. 67.

[59] Barton v. Anderson, 104 Ind 578, 4 N. E. Rep. 420, Niblack, C. J.

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remain to be ascertained by the assessment of damages.[60] A judgment by default will also operate as a merger of the cause of action or bar to another suit for the same demand. Thus, where the defendant offers to be defaulted for a given sum, and judgment is accordingly entered for the plaintiff for that amount, such judgment is a bar to a subsequent action between the same parties for the same claim.[61] But this effect is attributable only to the *final* judgment in the action. A judgment by default merely admits a cause of action; but while the precise character of the cause of action, and the extent of the defendant's liability, remains to be determined by a hearing in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby.[62]

§ 88. Entry by the Clerk.

The clerk of the court, in entering a judgment by default, acts merely in a ministerial capacity, no intendments can be made in support of the validity of his acts, and unless he conforms strictly to the provisions of the statute, his proceedings will be irregular and not binding.[63] For instance, under a statute providing that the clerk may enter in vacation a judgment by default upon proof of personal service of a summons on the defendant, a judgment entered out of term by the clerk, unless there *is* such proof, is void.[64] But where the jurisdiction of the clerk to enter the judgment is not denied, it may be made a question how far his mistakes, misprisions, or irregular actions will impair the validity of the judgment. The authorities would not warrant the statement that the judgment in

[60] Mailhouse v. Inloes, 18 Md. 328; Green v. Hamilton, 16 Md. 317, 77 Am. Dec. 295; Loney v. Bailey, 43 Md. 10; Clark v. Compton, 15 Tex. 32; Mississippi & Tennessee R. Co. v. Green, 9 Heisk. 588; Gatling v. House, 66 N. Car. 374.

[61] Hanscom v. Hewes, 13 Gray, 334.

[62] Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239.

[63] Kelly v. Van Austin, 17 Cal. 564; Files v. Robinson, 30 Ark. 487; Providence Tool Co. v. Prader, 32 Cal. 634, 91 Am. Dec. 598; Curry v. Roundtree, 51 Cal. 184.

[64] McConkey v. McCraney, 71 Wis. 576, 37 N. W. Rep. 822.

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such case would be entirely void. On the contrary, they hold that it would be merely erroneous, and that the error could be cured by motion in the court below or corrected on appeal. This is the position taken with reference to cases in which the clerk, by mistake, has entered judgment for an amount in excess of the real recovery.[66]

§ 89. Interlocutory Judgment, when necessary.

It is important to be noted that the entry of a default is not necessarily, or not always, the final judgment in the action. In the language of the supreme court of Vermont, "the mere entry of a default does not involve and amount to the rendering of a final judgment. The default is an incident, which entitles the plaintiff to a judgment, but does not determine either the kind or amount of such judgment. The rendering of the judgment is to supervene upon and succeed the entry of the default, and may require intervening proceedings in the case, in order to enable the court to render such a judgment as to law appertains."[66] And the general rule is that if the action is brought on a contract or promise for a liquidated sum of money, or if the amount to be recovered can be ascertained by a mere matter of calculation, then a final judgment may be at once entered for such amount; but if the action sounds in tort, or claims specific relief, or if the damages must be computed or liquidated otherwise than by simple calculation, or depend upon evidence, then an interlocutory judgment will first be entered, and the case proceed to the assessment of damages in some method known to the law, after which a final judgment will be rendered for the amount so assessed.[67] In a case of the latter kind, the prior entry of an interlocutory judgment is important to the regularity of the proceedings, though its omission would probably not be absolutely fatal. In a case where the record disclosed the fact that the court referred the matter to the clerk for the assessment of damages without first rendering an interlocutory judgment against the defendants for want of

[66] Lenoir v. Broadhead, 50 Ala. 58; Bond v. Pacheco, 30 Cal. 530.

[66] Sheldon v. Sheldon, 37 Vt. 152.

[67] See Holmes v. Lewis, 2 Wis. 88; Kenum v. Henderson, 6 Ala. 182.

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a plea, as the law required, the appellate court said: "In this we think there is manifest error."[68] An action upon an open account for goods sold and delivered, for services rendered, or the like, is not upon a liquidated demand such that final judgment may be entered for the amount claimed upon failure to answer.[69] A final judgment by default cannot be rendered in an action of detinue.[70] Nor is such judgment proper upon a note payable in Confederate money; "a jury should have assessed the value of the contract [note], upon a writ of inquiry, before the judgment was made final."[71] In some of the states, under statutes authorizing constructive service of process by publication in certain cases, it is provided that an interlocutory judgment by default shall be entered upon the defendant's failure to appear, which can only be made final at the succeeding term of court.[72] There is one other instance in which an interlocutory judgment should precede the entry of final judgment by default in an action, viz: upon the overruling of defendant's demurrer (in certain cases) or dilatory plea. Here the practice is to give judgment that he "answer over," after which, and on his failure to plead to the merits, he may be defaulted. But if the record shows that the defendant had an opportunity to answer over and refused to do so, judgment by *nil dicit* is good, without an entry of a formal judgment of *respondeat ouster*.[73]

§ 90. Assessment of Damages.

After the interlocutory judgment by default has been entered in an action for unliquidated damages or an unascertained sum, the next step is to assess the plaintiff's damages. This process, as followed at common law, has been described in the following language: "According to the common law, when there was an interlocutory

[68] Wilcox v. Field, 1 Colo. 3. But in a later case it is said that a default may be recited and entered against a defendant who does not plead, as well at the time of the rendition of the final judgment as before. Manville v. Parks, 7 Colo. 128, 2 Pac. Rep. 212.

[69] Wolf v. Hamberg, 8 S. Car. 82; Rogers v. Moore, 86 N. Car. 85.

[70] Studdert v. Hassell, 6 Humph. 137.

[71] Williams v. Rockwell, 64 N. Car. 325.

[72] Lombard v. Clark, 83 Mo. 308.

[73] Haldeman v. Starrett, 28 Ill. 393.

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judgment, whereby the right of the plaintiff was established but the *quantum* of damages sustained by him was not ascertained, the plaintiff was entitled to the intervention of a jury to ascertain his damages. This is the case where the defendant suffers judgment to go against him by default, or *nil dicit*, that is, where he puts in no plea at all to the plaintiff's declaration, or by *non sum informatus*, where the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff or in defense of his client. This is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete. But where damages are to be recovered, a jury must be called in to assess them, unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is 'that the plaintiff ought to recover his damages, but because the court knew not what damages the plaintiff hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men he inquire into said damages, and return such inquisition into court.' This process is called a writ of inquiry, in the execution of which the sheriff sits as judge and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff has really sustained; and when their verdict is given, which must assess some damages, the sheriff returns the inquisition, which is entered upon the roll in the manner of a *postea*, and thereupon it is considered that the plaintiff do recover the exact sum of damages so assessed."[74] Now this common law method is greatly modified, in the different states, by variations of local practice. In few, if any, is the writ of inquiry still executed by the sheriff as above described; in some, no such writ issues, but the order for assessing damages is executed in court, by the judge, with or without the aid of a jury, or by a referee or auditor. The important question is as to the constitutional right of trial by jury. Under the clause found in many of the state constitutions,

[74] Hickman v. Balt. & Ohio R. Co., 30 W. Va. 296, 4 S. E. Rep. 654, citing 3 Bl. Comm. 397, 398; Steph. Pl. 133, 134; Tidd, Pr. 595–597; Brill v. Neele, 1 Chit. 619; 4 Minor, Inst. pt. 1, 648.

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providing that in suits at common law, where the value in controversy exceeds a certain sum, the right of trial by jury shall be preserved, it has been held that the defendant has an absolute and indefeasible right, guarantied by the constitution, to demand that the question of damages be tried by a jury.[75] There is, however, reasonable ground for the theory that the defendant, by suffering a default in the first instance, has voluntarily renounced his right to have a jury called in *any* of the proceedings in the action.[76]

§ 91. Evidence on Assessment of Damages.

A default admits the cause of action and the material and traversable averments of the declaration, although not the amount of damages; and upon the proceeding for their assessment, the amount of damages is all that the plaintiff is required to prove or the defendant is permitted to controvert.[77] The former must produce whatever evidence is necessary to fix the amount of his claim with precision. Thus a judgment by default in *assumpsit*, where an account is filed in the declaration, is an admission of indebtedness for the articles charged, but the value of the articles and the amount of the items require to be proved.[78] As for the defendant, he may offer any evidence which is confined to the question of damages solely or which goes in mitigation or reduction of damages; but evidence tending to deny the cause of action, or to show that a right of action does not exist, or to avoid the alleged contract, is irrelevant and inadmissible.[79]

[75] Hickman v. Balt. & Ohio R. Co., 30 W. Va. 296, 4 S. E. Rep. 654.

[76] Hopkins v. Ladd, 35 Ill. 178; Seeley v. Bridgeport, 53 Conn. 1; Raymond v. Railroad, 43 Conn. 596.

[77] Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Russ v. Gilbert, 19 Fla. 54; Maund v. Loeb (Ala.), 6 South. Rep. 876.

[78] Patrick v. Ridgway, 4 Har. & J. 312; Durden v. Carhart, 41 Ga. 76.

[79] Lambert v. Sanford, 55 Conn. 437, 12 Atl. Rep. 519; Lee v. Knapp, 90 N. Car. 171. "We are clearly of opinion that the judgment by default precluded the defendant from using, for the purpose of reducing the damages, testimony which would have defeated the action had a plea in bar been put in. A default admits all the material averments properly set forth in the declaration, and of course everything essential to establish the right of the plaintiff to recover. Any testimony, therefore, tending to prove that no right of action existed, or denying the cause of action,

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§ 92. Amount of the Recovery.

A judgment by default for a sum greater than that prayed for in the complaint is irregular and erroneous.[80] And, generally speaking, where the prayer is for specific relief, the plaintiff is confined to a recovery in strict accordance with what he has asked for.[81] If a plea admits a part of the debt sued for, without a tender, the plaintiff may take judgment by *nil dicit* for such amount.[82] A judgment by default on a note, upon which is an indorsement of a credit by the plaintiff, ought to be entered subject to such credit.[83]

§ 93. Judgment by Default not aided by Presumptions.

On appeal from a judgment by default, nothing will be presumed in its favor; the record must show affirmatively the existence of every material fact to give the court jurisdiction, and that all the proceedings were in accordance with law.[84] "It is a well settled rule of practice that where a judgment is taken by default against a defendant in an action, the record must affirmatively show that process had been duly served the required length of time before the default was taken." [85]

is irrelevant and inadmissible." Garrard v. Dollar, 4 Jones (N. Car.), 175, 67 Am. Dec. 271 (Battle, J.), citing 2 Sell. Pr. 25; De Gaillon v. L'Aigle, 1 Bos. & P. 358; East India Co. v. Glover, 1 Stra. 612; Foster v. Smith, 10 Wend. 377.

[80] Gage v. Rogers, 20 Cal. 91; White v. Snow, 71 N. Car. 232; Johnson v. Mantz, 69 Iowa, 710, 27 N. W. Rep. 467.

[81] Burling v. Goodman, 1 Nevad. 314. But in Weaver v. Gardner, 14 Kans. 347, in an action on a note and mortgage in which the summons was indorsed with the amount due on the note, and for which a personal judgment was asked, but without any statement of a claim for other relief, it was held no error to enter on default a decree for the sale of the mortgaged premises as well as a judgment for the sum indorsed on the summons.

[82] Williams v. Harris, 2 How. (Miss.) 627. See Allen v. Watt, 69 Ill. 655.

[83] Rees v. Bank, 5 Rand. 326, 16 Am. Dec. 755.

[84] Hudson v. Breeding, 7 Ark. 445; Elligood v. Cannon, 4 Harringt. 176; Connoly v. Railroad, 29 Ala. 878; Schloss v. White, 16 Cal. 65.

[85] Eltzroth v. Voris, 74 Ind. 459.

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§ 94. Opening and Vacating Judgments by Default.

A judgment taken against a defendant by default will be opened or set aside, on his motion, in the court wherein it was entered, for a failure of jurisdiction or for certain classes of errors and irregularities; and also, by statute in some of the states, when it was given in consequence of his "mistake, inadvertence, surprise, or excusable neglect." But in respect to the exercise of this power, judgments by default are not differentiated from any other species of judgment, except in so far as certain special statutes are applicable to them, and except that practically they constitute by far the largest class of cases in which applications for such relief are made. And for this reason it is not proposed to examine the subject in detail in this connection, but the reader is referred to the later chapters of this work in which the vacating and opening of judgments in general will be fully discussed.[86]

§ 95. Review of Judgments by Default.

An appeal will lie from a judgment entered upon the default of the defendant, in a proper case, as well as from any other judgment. "There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury, and in the former, as well as in the latter case, the error may be corrected on appeal."[87] We have already seen that such a judgment will be reversed when founded upon a pleading which does not state a cause of action.[88] And it remains to be stated that the appellate court has power to deal with it and to correct or reverse it on account of a failure to comply with the statutory directions, or mistakes of the court or clerk, or any errors or irregularities which would vitiate a judgment otherwise rendered.

[86] See *infra* §§ 297–355. [87] Stevens v. Ross, 1 Cal. 94. [88] *Supra*, § 84.

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CHAPTER V.

ARREST OF JUDGMENT.

§ 96. Arrest of Judgment at Common Law.
97. When the Motion should be made.
98. Grounds for Arrest of Judgment.
99. Defect of Parties.
100. Insufficient or Faulty Pleadings.
101. Joinder of Good and Bad Counts.
102. Misjoinder of Causes of Action.
103. Objections to the Jury.
104. Irregular or Defective Verdict.
105. Grounds held insufficient.

§ 96. Arrest of Judgment at Common Law.

The arrest of judgment is defined as the withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record which vitiates the proceedings.[1] But the errors which will justify a motion in this behalf must be errors of substance, and not merely clerical or formal mistakes. If they belong to the latter class, they will be cured by the statutes of amendments and jeofails, which have introduced a much more liberal practice in this respect than had formerly obtained. According to Blackstone, "arrests of judgment arise from intrinsic causes, appearing upon the face of the record." And he enumerates the grounds which will be sufficient to prompt this action of the court, as follows:—where the declaration varies totally from the original writ; where the verdict materially differs from the pleadings and issue thereon; and where the case laid in the declaration is not sufficient in point of law to found an action upon.[2] In this country, motions in arrest of judgment, at least it civil cases, are not especially favored. The liberality of the statutes and the indulgence of the courts,

[1] Bouvier, Law Dict.; Brown, Law Dict., citing Steph. Plead. 106; Roscarla v. Thomas, 6 Jur. 929.

[2] 3 Bl. Comm. 393.

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in permitting amendments and in taking defects as cured by the verdict if not duly objected to, have taken away most of the grounds on which a motion of this character could be predicated, and this reduction is still further promoted by the facility of obtaining new trials. Indeed, a motion in arrest of judgment is now usually coupled with a motion for a new trial, the latter being the real and important object of the application. And in some of the states the practice of arresting judgments is entirely abolished. In Maine, for example, it is provided by law that no motion in arrest of judgment in any civil action shall be sustained in the courts of that state.[3] It is of course only the defendant who can move in arrest of judgment. If the defendant has obtained a verdict upon a plea which confesses the cause of action and does not sufficiently avoid it, the proper course for the plaintiff, as we have already seen, is to move for judgment *non obstante veredicto*.[4]

§ 97. When the Motion should be made.

By the English practice, a motion in arrest of judgment may be made at any time before judgment is actually entered up. In the absence of statutes, it is probable that a similar rule would be applied in our own courts. But at all events it seems clear that a motion of this kind cannot be granted after the rendition and entry of a final judgment in the cause; at that stage the only remedy is by motion to strike out.[5] But where the law provides that the motion may be made at any time before the adjournment of the term at which the case is finally disposed of, it is held that the defendant's right to so move will not be defeated by the entering up of a judgment by the plaintiff on the record before the adjournment of such term.[6] In some states it is provided that a motion in arrest shall be made within four days of the rendition of the judgment; and when this is the case, the motion is too late if filed after the final adjournment of the term at which the judgment is entered.[7] It is held to be the cor-

[3] Stetson v. Corinna, 44 Me. 29; Rev. Stat. Me. c. 82, § 31.

[4] *Supra*, § 16.

[5] Keller v. Stevens, 66 Md. 132, 6 Atl. Rep. 533; Colchin v. Ninde (Ind.), 23 N. E. Rep. 94.

[6] Hartridge v. Wesson, 4 Ga. 101.

[7] State v. Leathers, 61 Mo. 881.

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rect rule of practice, not to entertain a motion in arrest of judgment after the overruling of a demurrer to the declaration.[8] And clearly, matter objected to by demurrer and decided upon cannot be afterwards urged in arrest of judgment.[9] But a motion of this character may be received after a decision on a motion for a new trial.[10]

§ 98. Grounds for Arrest of Judgment.

As a general rule, a judgment can be arrested only for some matter appearing, or the omission of some matter which ought to appear, on the face of the record itself.[11] "A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, and as are not cured by the verdict or some statute of amendments, or waived by failing to demur."[12] This motion, in other words, "does not perform the office of calling the attention of the court to rulings which constitute matters of exception. It can not, therefore, be used as a substitute for a motion for a new trial. It reaches only those defects which are apparent on the face of the record proper, and does not reach such as require to be brought to the

[8] Rouse v. Peoria County, 2 Gilm. 99; Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 14 N. E. Rep. 42, (citing 2 Tidd's Prac. 918); Chicago & E. I. R. Co. v. Hines (Ill.), 23 N. E. Rep. 1021.

[9] Freeman v. Camden, 7 Mo. 298.

[10] Wilkinson v. Daniel, Wright, 368.

[11] Burnett v. Ballund, 2 Nott & M. 435; Watts's Case, 4 Leigh, 672; State v. George, 8 Ired. 324, 49 Am. Dec. 392; State v. Douglass, 63 N. Car. 500; State v. Allen, R. M. Charlt. 518; Brown v. Lee, 21 Ga. 159; Garner v. State, 42 Ga. 208; Frank v. State, 39 Miss. 705; State v. Addison, 15 La. Ann. 185; Case v. State, 5 Ind. 1.

[12] Balliett v. Humphreys, 78 Ind. 388. In a recent case, judgment having been rendered without the intervention of a jury on two notes, one of which was not due at the time the action was brought, defendant moved to arrest the judgment, on the ground that the plaintiff had not given evidence to establish his right to recover, and that the judge had no authority to render judgment; *held*, that as the defects alleged to exist in the judgment appeared on the face of the record, a motion in arrest was the proper remedy and should have been granted. Sanner v. Sayne, 78 Ga. 467, 3 S. E. Rep. 651. In the case of Court of Probate v. Sprague, 8 R. I. 205, it was said: "As a general rule, judgment cannot be arrested if it appears upon the whole record for which party judgment ought to be given. If, on the other hand, taking all the facts admitted by the pleadings, and such as are established by the verdict, the court cannot determine for which party judgment should be, judgment must be arrested." But at com-

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notice of the court by proof *aliunde*."[13] Much less, of course, can such a motion be supported by matter which becomes part of the record after the motion has been overruled.[14] It is stated to be an invariable rule, with regard to the arrest of judgment, that whatever is alleged for this purpose must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea.[15] That is, motions in arrest are governed in general by the principles applicable to demurrers, and no greater indulgence is shown to the defendant, in respect to his objections thus urged, than if they had taken the shape of a demurrer. In fact, as a consequence of the statutes of amendments and the doctrine of cure by verdict, much greater severity is shown to motions in arrest. So that it is by no means true that any thing which would have supported a demurrer will be good ground for arresting the judgment. "Exceptions that are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered, in the last stage of a cause, to unravel the whole proceedings."[16]

§ 99. Defect of Parties.

The objection that there is a defect of parties cannot be raised by motion in arrest of judgment, but only by demurrer or answer, and it is waived by going to trial without exception.[17] So a misjoinder of parties as plaintiffs is no ground for arresting the judgment.[18] Nei-

mon law, the practice in such a case would be to award a repleader. *Supra*, § 16.

[13] White v. Caldwell, 17 Mo. App. 691.

[14] Heward v. State, 21 Miss. 261.

[15] Washington Road v. State, 19 Md. 239; State v. James, 2 Bay, 215; Sedgwick v. Dawkins, 18 Fla. 335.

[16] 3 Bl. Comm. 394.

[17] Reugger v. Lindenberger, 53 Mo. 364; Yonley v. Thompson, 30 Ark. 399.

[18] Little Rock & Ft. Smith R. Co. v. Dyer, 35 Ark. 360; Demeritt v. Mills, 59 N. H. 18. But in an early Massachusetts case, in *case* by husband and wife against defendant for driving his horse and chaise against the plaintiff's chaise, by which the wife was thrown out and injured, it was alleged that the husband had lost the labor and comfort of his wife, and had been put to great expense in her cure, etc., and after verdict for the plaintiff, judgment was arrested, because injuries were charged in the action for which husband and wife could not be joined. Barnes v. Hurd, 11 Mass. 59.

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ther is an objection that some of the defendants are non-residents.[19] And where an action was pending in the name of a firm, as plaintiffs, in the style of L. & Co., and L. died before the trial, and the names of the other partners did not appear of record, it was considered that this furnished no ground for a motion in arrest of judgment, the death itself not being shown by the record.[20] Nor will judgment be arrested because of an ordinary mis-spelling of a party's name.[21] On the other hand, where an objection of this character is supported by the face of the record, it may in some instances be adequate ground for arresting the judgment. Thus, where the law requires that suits shall be brought in the name of the real party in interest, a motion to arrest a judgment in favor of the assignor of a note "to the use of" the assignee should prevail.[22]

§ 100. Insufficient or Faulty Pleadings.

A motion in arrest of judgment must be founded on matter of record; and if the declaration or complaint contains a substantial cause of action, the judgment will not be arrested on account of an irregularity or defect which is amendable, or which has been waived by appearance or going to trial.[23] In other words, if the plaintiff's *manner* of stating his title or setting out his cause of action be objectionable and defective, though the title itself appears to be good in law, advantage must be taken of the defect before a verdict is rendered. But if, giving him the benefit of all intendments and inferences, the title or cause of action *itself* appears from the declaration to be defective and bad in law, so that his averments do not make out a substantial ground of suit, then judgment will be arrested on the defendant's motion; because such a defect cannot be cured by verdict, and the court cannot presume that a cause of action was proved where none was stated.[24] An admirable illustration of this rule is furnished by a re-

[19] Washington etc. Tel. Co. v. Hobson, 15 Gratt. 122.

[20] Rountree v. Lathrop, 69 Ga. 539.

[21] Railroad v. Ingraham, 77 Ill. 309.

[22] Hutchings v. Weems, 35 Mo. 285.

[23] Parker v. Abrams, 50 Ala. 35; Lester v. Insurance Co., 55 Ga. 475; Spahr v. Nicklaus, 51 Ind. 221; Merritt v. Dearth, 48 Vt. 65.

[24] Bedell v. Stevens, 28 N. H. 118; Gould v. Kelley, 16 N. H. 551; Jaccard v. Anderson, 32 Mo. 188; Smith v. Cur-

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cent decision in Indiana, where an action was brought under a statute which provided that the personal representative of one killed by the wrongful act of another might maintain an action therefor in his own name for the benefit of the widow and children, or next of kin, of the deceased. The petition in this case failed to allege the existence of any widow, children, or next of kin, and it was held that a motion in arrest of judgment was properly sustained, because the existence of persons beneficially interested was essential to the plaintiff's suit, and without that allegation his petition did not disclose a cause of action.[25] But in stating that a judgment will be arrested if the petition fails to disclose a cause of action, reference is of course made to substantial and not formal omissions. The latter are supplied by intendment, and will be presumed after verdict to have been proved. If the defects are merely of omission, and if, when supplied, a complete case would be made out, the omission being of facts which the jury must have found, then the judgment is a legitimate sentence of the law.[26] Thus judgment will not be arrested, after verdict, for any defect in pleading which would not have been fatal on general demurrer; nor then, if the court can presume the defect to have been supplied by proof before the jury.[27] Further, upon a motion of this kind, the plaintiff is entitled to the benefit of any legitimate inference or intendment that can be brought to bear upon the allegations of his declaration. Hence the rule that judgment will not be arrested for

ry, 16 Ill. 147; Philson v. Bampfield, 1 Brevard, 202. In Walpole v. Marlow, 2 N. H. 385, the rule is thus stated by Chief Justice Richardson: If the title stated in the declaration be defective, the judgment must be arrested; but if the title be defectively stated, the defect is cured by verdict. The true distinction between the two is this: When any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated in the declaration, nor necessarily implied from the facts which are stated, the title must be considered as defective and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered as only defectively stated, and the defect is cured by verdict.

[25] Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. Rep. 208.

[26] Saulsbury v. Alexander, 50 Mo. 142; Sewall's Falls Bridge v. Fisk, 23 N. H. 171. An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment; it can only be objected to by special demurrer. Stearns v. Stearns, 32 Vt. 678.

[27] Higgins v. Bogan, 4 Harringt. 330; Woods v. State, 10 Mo. 698.

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lack of an essential averment in the declaration which is contained by implication in the averments used, or which may be considered to have been proved as a part of what is alleged.[28] On a motion in arrest the whole record is before the court, and where a defect in the petition is waived of record by the defendant, the motion will not be granted on account of such defect.[29] Aside from the question of omissions, the general rule also prescribes that irregularities or informalities in the manner of setting out the cause of action are not open to exception after verdict. As an illustration of this, it is held that an objection that the complaint, in an action for damages for breach of contract, treats each breach as a separate and independent cause of action, and sets forth the same in a distinct count, is not available upon a motion in arrest of judgment.[30] Nor need the plaintiff anticipate defenses; it is no cause for arresting judgment that the declaration on its face shows the cause of action to have been barred.[31] Nor that the complaint only warrants a recovery of nominal damages.[32] So again, a traverse by one party of matter not alleged by the other, in addition to the matter properly in issue, is mere surplusage and not a ground of arrest.[33] Nor can the question of the propriety of allowing an amendment to be made in the pleadings be reached on motion in arrest.[34]

§ 101. Joinder of Good and Bad Counts.

In regard to the misjoinder of counts in a declaration, or the joinder of good and bad counts, the English rule is stated to be as follows: Where general damages are found on a declaration consisting of several counts, which are good but cannot be joined, the proper course is to arrest the judgment; where some of the counts are good and others bad, a *venire de novo* issues; but in the

[28] Rea v. Harrington, 58 Vt. 181, 2 Atl. Rep. 457 (citing Morey v. Homan, 10 Vt. 565; Curtis v. Burdick, 48 Vt. 166); Bedell v. Stevens, 28 N. H. 118; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207.

[29] Auld v. Butcher, 2 Kans. 135.

[30] Pickering v. Miss. &c. Tel. Co., 47 Mo. 457. And see Baden v. Clarke, 1 Gill, 165.

[31] Allen v. Word, 6 Humph. 284.

[32] Reagan v. Fox, 45 Ind. 8.

[33] Robbins v. Wolcott, 19 Conn. 356.

[34] Le Strange v. State, 58 Md. 26.

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case of a single count containing good and bad causes of action, the court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good cause of action only.[35] And a similar rule obtains in some of the American states, viz., that if a general verdict for the plaintiff be taken upon several counts in a declaration, and one of the counts is fatally defective, judgment will be arrested on motion, though other counts, not liable to objection, were covered by the verdict.[36] As we have already seen, some of the American authorities manifest a decided reluctance (though this disposition is not universal) to presume in favor of the validity of a judgment which may, for aught that appears on the record, be composed in part of damages given in respect of a bad count.[37] Still, in several of the states, it is apparently settled law that where a general verdict is returned, the judgment will not be arrested unless *all* the counts of the declaration, or paragraphs of the complaint, are so defective as not to have been cured by the verdict or finding.[38] Thus in New Hampshire, judgment will not be arrested because the declaration may contain some claims that are illegal, if it also contains others upon which the plaintiff may properly recover.[39]

§ 102. Misjoinder of Causes of Action.

A misjoinder of counts and causes of action, apparent upon the declaration, with damages assessed entire, is good cause for arresting the judgment on motion after verdict, or for reversing the judgment by writ of error.[40] Thus a motion in arrest will be granted when the petition contains matters of equitable jurisdiction mixed and blended with matters of legal cognizance, in the states where the distinction is still observed.[41] And in Missouri, where several

[35] Kitchenman v. Skeel, 3 Exch. 49.

[36] Sylvester v. Downer, 18 Vt. 32; Needham v. McAuley, 13 Vt. 68; Bank of Carlisle v. Hopkins, 1 T. B. Mon. 245, 15 Am. Dec. 113.

[37] *Supra*, § 84.

[38] Hoag v. Hatch, 23 Conn. 585; Sims v. Dame, 113 Ind. 127, 15 N. E. Rep. 217.

[39] Conway v. Jefferson, 46 N. H. 521.

[40] Haskell v. Bowen, 44 Vt. 579. Judgment will be arrested on motion, if counts in *case* for false warranty and in *assumpsit* are joined. Joy v. Hill, 36 Vt. 333.

[41] Meyers v. Field, 37 Mo. 484.

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causes of action are united in the same petition, the verdict, if found for the plaintiff, must be rendered and the damages assessed upon each cause of action separately, otherwise judgment will be arrested.[42]

§ 103. Objections to the Jury.

An objection to the mode of drawing and impanelling the grand jury cannot be made the ground of a motion in arrest of judgment.[43] Nor will any objection to an individual juror, which would not be sufficient ground for a principal challenge, be good cause for arresting the judgment.[44] It appears, however, that when a cause is tried in a court of record before a less number of jurors than a party is entitled to, and his consent to such a trial does not expressly appear of record, he may take advantage of the objection by motion in arrest; and in such case no exceptions to the panel need be saved at the trial.[45] It is generally held—in accordance with the rule that judgment will be arrested only for matter of record—that misconduct of the jury, or improper influence brought to bear upon them, after they have retired to make up a verdict, is no ground for a motion in arrest, although it may furnish cause for granting a new trial.[46] So the fact that the jury, when out, were under the charge of an unsworn officer, is not technically ground for a motion in arrest of judgment, though it may be for a new trial.[47]

[42] Pitts v. Fugate, 41 Mo. 405.

[43] State v. Swift, 14 La. Ann. 827.

[44] Chapman v. Wells, Kirby, 133.

[45] Cox v. Moss, 53 Mo. 432; Brown v. Railroad, 87 Mo. 298.

[46] Brister v. State, 26 Ala. 107. Connecticut apparently stands alone in permitting a different practice. It is there held that on a motion in arrest of judgment for misconduct of a juror—as, conversing with one not of the jury upon the merits of the cause,—it must be averred that the party making the motion was ignorant of such misconduct until after the verdict was rendered, otherwise the motion will not prevail. Woodruff v. Richardson, 20 Conn. 238. And in another case, where the jury took with them a paper which had been used on the trial to refresh the memory of a witness, but which was not read or offered in evidence, nor were its contents communicated to the other side, and had the same before them in all their deliberations, and the paper was calculated to affect the verdict, it was *held*, that this was a sufficient ground for arresting the judgment. Clarke v. Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

[47] McCann v. State, 17 Miss. 465.

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§ 104. Irregular or Defective Verdict.

At common law, one of the principal grounds for arresting a judgment is the objection that the verdict is not responsive to the issues, or that it differs in a material respect from the pleadings and the issue formed thereon.[48] So if the verdict is upon an insufficient count, or finds a fact which disaffirms the plaintiff's right to recover, or omits to find a material issue joined in the cause, the judgment will be arrested.[49]

§ 105. Grounds held insufficient.

A motion in arrest of judgment on a verdict, based solely upon the ground that the evidence adduced at the trial was not sufficient to make out the plaintiff's case, will not be sustained;[50] nor, in general, a motion based on any matters which took place on the trial.[51] Nor can a motion in arrest of judgment reach a defect in the form of the judgment, for the obvious reason that the motion must precede the rendition of the judgment.[52] And the failure to serve the defendants in an action with copies of the declaration, as required by the rules and practice of the court, constitutes no ground for arresting the judgment.[53]

[48] Young v. Wickliffe, 7 Dana, 447; 3 Bl. Comm. 393. The illustration given by Blackstone is this: "If, in an action for words, it is laid in the declaration that the defendant said 'the plaintiff *is* a bankrupt,' and the verdict finds specially that he said 'the plaintiff *will be* a bankrupt.'"

[49] Keirle v. Shriver, 11 Gill & J. 405.

[50] Lovell v. Sabin, 15 N. H. 29; Bright v. State, 90 Ind. 343; Powe v. State, 48 N. J. L. 34, 2 Atl. Rep. 662. But in Allen v. Word, 6 Humph. 284, it is held that a judgment will be arrested on the ground of a variance between the pleadings and the proof.

[51] Walker v. Sargeant, 11 Vt. 327.

[52] Smith v. Dodds, 35 Ind. 452.

[53] Loney v. Bailey, 43 Md. 10.

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CHAPTER VI.

THE RENDITION AND ENTRY OF JUDGMENTS.

§ 106. Distinction between Rendition and Entry.
107. Power and Duty of the Court to render Judgment.
108. Application and Order for Judgment.
109. Signature of Judge.
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116. Designation of the Parties.
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121. Time of entering Judgment.
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124. The Judgment-Roll, or Record.
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§ 106. Distinction between Rendition and Entry.

The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and the verdict.[1] The entry of a judgment is a ministerial act, which consists in spreading upon the

[1] "The whole question, then, appears to resolve itself into this—whether the rendition of judgment is a judicial act, to which the direct agency of the court is indispensable, and to which the mind of the court is to be judicially applied, or whether, after verdict has been rendered, it is a ministerial act, which may be performed by the clerk without an order by the court. When presented in this elementary form, the question appears to me exceedingly clear and free from doubt. If there be any one thing done in the progress of a cause, from its commencement to its conclusion, that is peculiarly and emphatically a judicial act, it is the rendition of judgment." *Per* Ware, Dist. J., in Goddard v. Coffin, Davels, 881. And see Matthews v. Houghton, 11 Me. 377.

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record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things, a judgment must be rendered before it can be entered. And not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. The entry may be supplied, perhaps after the lapse of years, by an order *nunc pro tunc*. But it must not be supposed that this proceeding is required to give existence and force, by retrospection, to that which before had none. As is said by the supreme court of California: "The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, or of limiting the time within which the right may be exercised, or in which the judgment may be enforced; and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But neither is necessary for the issuance of an execution upon a judgment which has been duly rendered. Without docketing or entry, execution may be issued on the judgment and land levied upon and sold, and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."[2] And it follows, *a fortiori*, that if the entry, though attempted to be made in due form, does not correctly record the sentence of the court, or is defective or ambiguous or otherwise exceptionable, still this will not weaken the force of the judgment as a judgment. There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal. And so a judgment must commonly be docketed before it can create a lien upon land, and in some of the states (though not

[2] Los Angeles County Bank v. Raynor, 61 Cal. 145.

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all) the priority among different liens is determined by their respective dates of docketing.[3] And again, the record entry of a judgment is indispensable to furnish the *evidence* of it, when it is made the basis of a claim or defense in another court. But with these exceptions, a judgment is independent of the fact of its entry. And in all cases, the distinction between rendition and entry is substantial and important.

§ 107. Power and Duty of the Court to render Judgment.

It is the duty of the court, when the necessary facts have been lawfully determined by regular proceedings, to render the proper judgment, and to refrain from any re-opening of the issues.[4] So the failure of the trial court to enter judgment for the plaintiff for an amount admitted by the defendant to be due and tendered in court, is error for which the judgment will be reversed.[5] And a second final judgment or decree cannot be rendered between the same parties upon the same pleadings and subject-matter, until the first has been reversed, or opened and vacated.[6] The authority of the court to render a judgment does not always depend upon the fact that regular proceedings have taken place and culminated in a verdict; it may, in some cases, rest upon the consent or agreement of the parties. Thus a stipulation by the parties that when judgment is entered in a certain cause pending in another county, and a transcript thereof forwarded to the district court of defendant's county, where other causes involving the same question are pending, the judge of the latter court may order similar judgments in the other causes, is valid, and the judgments may be entered in vacation.[7] Where issues are sent from one court to another to be tried, it

[3] See *infra*, § 443.

[4] Isler v. Brown, 67 N. Car. 175.

[5] Mace v. Gaddis, 3 Wash. Ter. 125, 13 Pac. Rep. 545.

[6] State v. Railroad, 16 Fla. 708.

[7] Western Land Co. v. English, (Iowa), 39 N. W. Rep. 719. So of an agreement of parties that a case shall be heard before a judge at chambers in the same manner and with the same effect as though it were tried by him in court without a jury. Beach v. Beckwith, 13 Wis. 21. So of an agreement to refer a pending suit to an arbitrator, and that a judgment in the cause shall be entered according to his decision. Bank of Monroe v. Widner, 11 Paige, 529, 43 Am. Dec. 768.

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belongs to the court in which the main litigation is pending to enter any judgment that may be necessary in the case. Thus, where issues are sent by the probate court to a court of law, a judgment for costs should be entered by the former court upon receiving the certificate of the verdict, and not by the court in which the issues were tried.[8]

§ 108. Application and Order for Judgment.

Where judgment follows as the result of contested proceedings and the finding of a verdict, it is usually not necessary for the successful party, in modern practice, to take active measures to secure the rendition of judgment. But an application for judgment is in some instances required by statute, and is probably always necessary in case of default. It is held that a judgment which has been entered, and to which the judgment creditor was clearly entitled upon the pleadings, will not be disturbed for failure to give notice of the application for the judgment, or for failure of the clerk to enter in his minutes, as required by the court rules, a statement of the application.[9] When the court gives to the clerk an order for a judgment, that is his authority for entering the same, and by that alone he must be guided. Hence a judgment entered by the clerk in pursuance of an express order of the court, will not be void and a mere nullity, although the court, by a subsequent order not noticed by the clerk, have directed the case to be continued, although such a judgment would be irregular and voidable, and liable to be set aside upon seasonable application to the court.[10]

§ 109. Signature of Judge.

The impression not uncommonly prevails that at common law a judgment required the signature of the court in order to be valid. This notion—arising probably from an ambiguous use of the phrase "signing judgment"—is erroneous; and the ancient practice furnishes but

[8] Levy v. Levy, 28 Md. 25; Browne v. Browne, 22 Md. 103.

[9] Pormann v. Frede, 72 Wis. 226, 39 N. W. Rep. 385. See, as to defective notice of a motion for a judgment, White v. Sydenstricker, 6 W. Va. 46.

[10] Claggett v. Simes, 31 N. H. 56.

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slight aid in determining the same question in modern law.[11] Now in some of the states the statutes require that the judgment itself, or the record in which it is entered up, shall be signed by the judge; and in these states some of the decisions hold that unless this direction is complied with, the judgment will be entirely invalid and of no force or effect.[12] Still, these statutes require the signature only of final and definite judgments which pass upon the merits of a controversy and may constitute *res judicata;* interlocutory orders, made in the progress of a cause, have their effect without being signed by the judge.[13] And some of the authorities show a tendency to construe

[11] French v. Pease, 10 Kans. 51, 55, Valentine, J.: "It is claimed that at common law judgments were not valid unless they were signed, and authorities are cited to show the same. 'Signing judgment,' however, at common law, did not mean such a signing of judgments as we have been considering [i. e., signing them by the judge on the record]. None of the authorities cited by counsel for plaintiff in error show that a complete judgment-entry after it was made needed to be signed, or that it would be invalid if not signed. The words 'signing judgment' and other similar words, as used at common law, meant a very different thing from signing the completed judgment-entry. Such words simply meant the allowance or permission by the master, prothonotary, or other proper officer, to the plaintiff or defendant, to have judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor. Bouvier, Law Dict. tit. *Signing Judgment;* also, tit. *Postea;* 3 Bouvier's Inst. 531, No. 3313, § 6. And the common law authorities nearly always speak of one of the *parties*, generally the plaintiff, 'signing judgment,' and seldom speak of an officer 'signing judgment.' Jacob, Law Dict. tit. *Judgment;* 2 Tidd's Prac. 465, 469, 903. And the judgment here spoken of as thus 'signed' is in fact no judgment at all. It is not a completed judgment. It has not yet been entered in full. It has not yet become a part of the permanent rolls of the court. It is really only a right and a permission to take judgment, and although an execution may in some cases be issued on it, yet it cannot be used as evidence in any court of justice. Bouvier, Law Dict. tit. *Judgment;* 2 Phillips, Ev. 134. It has been held in Pennsylvania that the full or completed judgment may not be made up for years after it is allowed, and then that it may be made up from the skeleton entries on the docket and trial-list. Wilkins v. Anderson, 11 Pa. St. 399. Now if this is good law, it would not seem necessary that the judge should sign the completed judgment when it is made up."

[12] Succession of Ashbridge, 1 La. Ann. 206; Hatch v. Arnault, 3 La. Ann. 482; Saloy v. Collins, 30 La. Ann. 63; State v. Jumel, 30 La. Ann. 421; Sloan v. Cooper, 54 Ga. 486; Raymond v. Smith, 1 Met. (Ky.) 65; Galbraith v. Sidener, 28 Ind. 142. Until a judgment is signed by the judge, it cannot acquire a lien, although recorded. Marchal v. Hooker, 27 La. Ann. 454.

[13] Wickham v. Nalty (La.), 6 South. Rep. 123; State v. Judge of Fifth District, 12 La. Ann. 455.

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such statutes in a liberal manner, instead of requiring an exact compliance with their terms. Thus a judgment which the court was competent to render without the verdict of a jury will be upheld if found entered on the minutes of the day's proceedings, the minutes of the day being regularly signed by the judge, though the judgment itself bears only the signature of counsel. Such a judgment, it is said, is irregular but not void, and can be amended.[14] So the signature of the judge affixed by consent in vacation is a sufficient authentication of a decree in an ordinary action to authorize an execution.[15] Another group of cases goes much further than this, and holds that the requirement that a judge shall sign all judgments rendered in his court is merely *directory*, and consequently that his omission to do so will not avoid the judgment as to strangers, although it might, in connection with other evidence, be a proof that the judgment was fraudulent or had not been in fact rendered by him.[16] In several of the other states, there being no statutory requirement of this character, it is held to be entirely unnecessary to the validity of a judgment that it be signed by the judge; the presumption is, that if it is entered by the clerk, it was so directed and authorized by the court.[17] And a valid judgment will support an execution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time execution issued.[18] In New York it is said: "There is no provision of the present law requiring such signing. The judge is to make his 'decision in writing,' and this, it is presumed, he must sign by way of authentication. The judgment

[14] Tharpe v. Crumpler, 63 Ga. 273; Huckaby v. Sasser, 69 Ga. 603. A judgment signed "by the court, H., plaintiff's attorney," which was put on the minutes, signed by the judge, was held valid in Jones v. Word, 61 Ga. 26.

[15] Rust v. Faust, 15 La. Ann. 477.

[16] Rollins v. Henry, 78 N. Car. 342; Keener v. Goodson, 89 N. Car. 273; Bartlett v. Lang, 2 Ala. 161; Cannon v. Hemphill, 7 Tex. 184; Cathcart v. Peck, 11 Minn. 45, (Gil. 24;) Childs v. McChesney, 20 Iowa, 431, 89 Am. Dec. 545. The omission of the judge to sign the record at the close of the term will not invalidate judgments or decrees of the term, although such omission would be gross neglect. Matter of Slocomb, 9 Ark. 375.

[17] California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. Rep. 123; Cathcart v. Peck, 11 Minn. 45, (Gil. 24;) Fontaine v. Hudson, 93 Mo. 62, 5 S. W. Rep. 692; Platte County v. Marshall, 10 Mo. 845.

[18] Fontaine v. Hudson, *supra*. And see Los Angeles County Bank v. Raynor, 61 Cal. 145.

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itself is to be entered in the judgment-book, and is in theory entered by the clerk."[19] The practice in Kansas is thus described:—the clerk by order or permission of the court enters the judgment in all cases in full upon the journal, and this judgment (as well as every other proceeding) is valid, and has force and effect, as soon as it is entered on the journal, whether it is ever signed by the judge or not, and whether it is ever transcribed into the complete record or not.[20] And it is believed that a practice more or less closely analogous to this is in vogue in a majority of the states; so that only in a few jurisdictions can the judge's signature be regarded as an indispensable requisite to the validity of the judgment.

§ 110. Entry by the Clerk.

When a judgment has been rendered in a cause, it becomes the duty of the clerk, according to the usual practice, to make a record entry of it in an official book kept for that purpose. In some states, he is required, at this stage, to make up a complete record of the case from its inception to its close, or a "judgment-roll;" in others, he merely adds an entry of the judgment to the brief history of the case contained in his docket and which consists of consecutive statements of the steps taken in the cause from the issue of the writ on. The object of this entry is to furnish an enduring memorial and incontestable evidence of the judgment, and to fix its date for purposes of appeal or creating a lien. But, as was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the validity of the judgment itself. It is none the less the judgment of the court because not entered by the clerk. And, except for certain special purposes, it does not remain inchoate or unfinished until so entered. Hence the neglect or failure of the clerk to make a proper entry of record of the judgment, or his defective or inaccurate entry of it, will not, as between the parties, operate to invalidate the judgment.[21] "The fact that the clerk did not perform his entire duty

[19] De Laney v. Blizzard, 7 Hun, 66.
[20] French v. Pease, 10 Kans. 51.
[21] Craig v. Alcorn, 46 Iowa, 560; Bridges v. Thomas, 50 Ga. 378. Omission to properly record the verdict is a mere irregularity which does not de-

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in making up the record cannot deprive parties of their rights. Even although he should entirely fail to make up a record, such neglect would not affect those interested in the matter decided, if sufficient could be found upon the files and books of the court to show what had been done. What we call the complete record of a case is nothing but the history of what has been done in the case, copied by the clerk into a book called the book of records. It is not the writing of those things in this book that gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action, and if, in copying, the clerk makes a mistake, that mistake will be corrected by entries made from time to time of the action of the court, and which entries, made in other books of the court, lay the foundation for the complete records."[22] The *docket* of a judgment, it is held in New York, is no part of the record of the court; the entries upon the docket are directed to be made by the clerk, who, in making them, acts in a ministerial capacity, and his erroneous or false entries cannot conclude the parties, whatever might be the effect of an entry which he was authorized by law to make.[23] In some of the states it is required by law that, before a docket entry is made of a judgment, there shall be filed a "judgment-roll" containing all the papers necessary to be attached according to the provisions of the statute. It appears that unless this provision is complied with, the docketing of the judgment is an unauthorized and illegal act.[24] But it is also held that an order denying a motion to set aside a judgment because of the failure to file a proper judgment-roll is not reviewable in the appellate court. If what was done amounts to a legal nullity, no substantial rights of the defendant are impaired

stroy the validity of the judgment, at least until it be set aside. Gunn v. Plant, 94 U. S. 664. An entry by the prothonotary, on his docket, of a suit, and that a judgment-bond was filed of record therein, stating the particulars of it and the date of entry, was held a good entry of judgment under the Penna. Act of Feb. 24, 1806. Helvete v. Rapp, 7 Serg. & R. 306.

[22] Newnam's Lessee v. Cincinnati, 18 Ohio, 323, 331, Hitchcock, C. J.

[23] Booth v. Farmers' Bank, 4 Lans. 301. If the mistakes or defects in docketing the judgment do not impair the substantial accuracy and fulness of the record required, as notice to persons interested, they will not prevent the judgment from becoming a lien. Hesse v. Mann, 40 Wis. 560.

[24] Townshend v. Wesson, 4 Duer, 342.

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by the denial; and if the roll is not in due form, or the filing for any reason is irregular, the granting or refusing the application is discretionary.[25] According to the law and practice obtaining in other states, to constitute a judgment for the purpose of docketing, it must first be entered in the "judgment-book." And a docketing without such entry is of no avail, even though a judgment-roll be filed with what purports to be a copy of a judgment in it.[26]

The general principle pointed out in this chapter—that an unrecorded judgment is valid between the parties, though it may not be notice to strangers—is illustrated by an Alabama decision, in which it is held that a statute which requires decrees of the chancery court vesting the title to property in either of the parties to a suit, to be recorded in the office of the clerk of the county in which the land is situated, does not make the vesting of the title dependent on the recording of the decree, but the decree is affected by a failure to have it so recorded just as a deed would be under the registration laws.[27] That a judgment duly entered in the judgment-book was not *signed* by the clerk is an irregularity and a deviation from the ordinary practice, but it does not vitiate the judgment as to third persons in collateral proceedings.[28]

§ 111. Entry in wrong Book.

When the clerk is directed by law to keep certain books for the entry of judgments, or to record judgments in a book specially designated by statute for that purpose, and deviates from the course prescribed, then in either case, for reasons sufficiently stated in the preceding section, the validity of the judgment is not thereby impaired as between the parties.[29] As concerns third persons the case might

[25] Whitney v. Townsend, 67 N. Y. 40. And see Hardin v. Melton, 28 S. Car. 88, 4 S. E. Rep. 805.

[26] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. Rep. 377.

[27] Witter v. Dudley, 42 Ala. 616. There are some cases which seem to indicate that confessed judgments are regarded as an exception to the general principle above stated. But this is too much a matter of statutory regulation to be here discussed in detail. See King v. French, 2 Sawyer, 441; Johns v. Fritchey, 39 Md. 258.

[28] Artisans' Bank v. Treadwell, 34 Barb. 553; Hotchkiss v. Cutting, 14 Minn. 542, (Gil. 408;) Jorgensen v. Griffin, 14 Minn. 466, (Gil. 346.)

[29] In Minnesota, notwithstanding the adoption of a code of procedure merg-

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be different. Probably one would not be bound by notice of a judgment which did not appear in the book designated by law as the proper quarter in which to direct his inquiries, although it might be recorded in a book regularly kept by the clerk but not recognized by law.[30] Still, this would not impair the right to issue execution. So, under the laws of Maryland, the entry of judgment in the "permanent judgment-record" in the first instance, and without any previous entry thereof in the "trial-docket," as required by the ordinary practice of the trial courts, does not render the judgment illegal or so irregular as to require it to be stricken out.[31]

§ 112. Indexing the Judgment.

In some of the states, the *index* to the record of judgments is made, by the effect of the statute, a part of the record; and a judgment is not a lien on real property until properly indexed, as against a purchaser who has searched the index with due care; and third persons cannot be charged with constructive notice of a judgment unless the same is correctly indexed.[32] In Virginia, however, an exactly opposite doctrine prevails; the index is no part of the record and is not essential to the creation of a valid lien.[33] We shall return to this subject in a later chapter.[34]

§ 113. Remedy against Clerk for improper Entry.

There is no question that the owner of a judgment may maintain an action for damages against the clerk of the court for neglecting to

ing legal and equitable forms in one form of action and providing only for a "judgment" as the determination of issues, the clerk of a certain court kept two books, one labelled "judgment-book," the other "decree-book," and was accustomed to enter causes of legal cognizance in the former, and equity causes in the latter. *Held*, that a judgment of foreclosure was not impaired by the fact that it was entered in the "decree-book" only. The error in the label was a mere irregularity, which could not affect the rights of parties. Thompson v. Bickford, 19 Minn. 17, (Gil. 1.) See Lentilhon v. New York, 3 Sandf. 721.

[30] See Hesse v. Mann, 40 Wis. 560. See *infra*, §§ 404–406.

[31] Bond v. Citizens' Nat. Bank, 65 Md. 498, 4 Atl. Rep. 893.

[32] Metz v. State Bank, 7 Nebr. 165; Sterling Manuf. Co. v. Early, 69 Iowa, 94, 28 N. W. Rep. 458.

[33] Old Dominion Co. v. Clarke, 28 Gratt. 617.

[34] See *infra*, § 405.

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make a proper entry of it, provided he shows an absolute loss of his judgment in consequence of such neglect.[35] And the rule that it is the duty of the creditor to see that his judgment is properly entered applies only as between the parties and those affected by the want of constructive notice, but has no reference to the question of the liability of the clerk to the plaintiff whose judgment was wrongly entered.[36]

§ 114. Contents of the Judgment.

No particular form of words is usually considered necessary to show the rendition of a judgment. The record of the judgment is sufficient if the time, place, parties, matter in dispute, and the result, with the relief granted, are clearly stated.[37] So, under the ordinary practice, it is not required to set out in the judgment itself the facts on which it is founded; it is sufficient if they are stated in the pleadings and ascertained by the judgment.[38] And under those systems of practice which assimilate the legal and equitable jurisdiction, it is not necessary that the facts on which a decree in equity is based should be recited therein. The case is preserved in the same manner as in an action at law, and all the material evidence must be incorporated in the bill of exceptions.[39] But it is held that a judgment of conviction should contain the facts judicially ascertained, together with the manner of ascertaining them, and the recorded declaration of the court pronouncing the legal consequences of those facts.[40]

§ 115. Form of the Judgment.

"The judgment is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the style of the judgment

[35] Blossom v. Barry, 1 Lans. 190.

[36] Saylor v. Commonwealth (Pa.), 5 Atl. Rep. 227; Coyne v. Souther, 61 Pa. St. 455.

[37] Barrett v. Garragan, 16 Iowa, 47; Church v. Crossman, 41 Iowa, 378; Ordinary v. McClure, 1 Bailey, 7.

[38] Hamilton v. Ward, 4 Tex. 356.

[39] Judge v. Booge, 47 Mo. 544. But in Illinois it is considered the proper practice to preserve the evidence by recitals in the decree. Walker v. Carey, 53 Ill. 470.

[40] Mayfield v. State, 40 Tex. 289.

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is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own, but 'it is considered,' *consideratum est per curiam*, that the plaintiff do recover his debt, his damages, his possession, and the like; which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court, after due deliberation and inquiry."[41] This being the theory and practice of the common law, there was at one time a disposition on the part of some of our courts to be very strict in requiring the use of this exact formula, and to hold that nothing could be substituted for the word "considered" without fatal consequences.[42] But a more liberal view now obtains, and the cases hold that the terms "decreed," "resolved," "ordered," "judgment rendered," etc., are fully equivalent to the original technical term, provided the entry shows an actual giving of judgment and exhibits what it is required to specify with clearness and precision.[43] It may therefore be stated as the modern rule that the *form* of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in favor of one of the litigants, or that the rights of the parties in litigation had been adjudicated.[44] In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.[45] But while this is so, there are certain requisites of a judgment which cannot be dispensed with. In the first place, the entry must purport to be an actual judgment, conveying the sentence of the law, as distinguished from a mere memorandum, note, or recital that a judgment had been or would be rendered. In a case where the

[41] 3 Bl. Comm. 396.

[42] Baker v. State, 3 Ark. 491.

[43] Johnson v. Gillett, 52 Ill. 360; Deadrick v. Harrington, 1 Hemp. 50; Minkhart v. Hankler, 19 Ill. 47; Taylor v. Runyan, 3 Clarke (Iowa), 474. On a verdict for the defendant in the county court, judgment was rendered as follows: "I hereby render judgment against plaintiffs for costs herein. Judgment rendered against plaintiffs for costs;" *held*, that the judgment, though informal and incomplete, was not void. Marsh v. Snyder, 14 Nebr. 8, 14 N. W. Rep. 804. In Pennsylvania, the entry "judgment on verdict" may, in a *sci. fa.* upon it, be considered as the judgment which the plaintiff was entitled to have. Shirtz v. Shirtz, 5 Watts, 255.

[44] Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782; Hamman v. Lewis, 34 Tex. 474.

[45] Humboldt Mill Co. v. Terry, 11 Nevada, 237.

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record stated as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant and against the plaintiff for the costs of this action taxed at $11.20," it was held that this was no judgment, but a mere recital that one had been rendered for costs.[46] In the next place, a true judgment must be distinguished from a mere order, or direction, or permission to the clerk to enter a judgment. A document of the latter kind has not the force or the characteristics of a judgment, and will not support an execution.[47] It is further to be noted, in connection with matters of form in judgments, that a much less degree of technicality and formality is required in the judgments of justices of the peace and other inferior courts, than is exacted in respect to the judgments of courts of record. In the case of judgments of the former order, it is generally held sufficient if the books and papers disclose with reasonable certainty that a judgment was in fact rendered for one of the parties, and for what amount, or even that a verdict was returned on which no judgment was actually entered.[48] It is also to be remarked that irregularities and defects of form, in judicial proceedings, can be taken advantage of by parties and privies only; third persons have no right to interfere.[49]

[46] Miller v. B. & M. R. Co., 7 Nebr. 227. An entry thus:—"Judgment accordingly taxing all costs against def't," is not a judgment. Roberts v. State, 3 Tex. App. 47. An entry of judgment as follows: "Whereupon the court enters judgment upon the finding," is insufficient. Faulk v. Kellums, 54 Ill. 188.

[47] The following entry in the minutes of a court, "verdict for plaintiff, let writ issue," is not a judgment, and execution thereon is void. Stark v. Billings, 15 Fla. 318. But where the record in a cause, after reciting the trial and verdict, proceeded: "Therefore it is considered and adjudged by the court that the plaintiff in this action have judgment" etc., *held*, that this was a judgment and not merely an order for judgment, and the court did not err in refusing to set aside the docketing thereof, and subsequent proceedings thereon, on the ground that there was no judgment. Potter v. Eaton, 26 Wis. 382.

[48] Elliott v. Jordan, 7 Baxt. 376; Gaines v. Betts, 2 Dougl. (Mich.) 98; Overall v. Pero, 7 Mich. 315; Lynch v. Kelly, 41 Cal. 232; Felter v. Mulliner, 2 Johns. 181.

[49] Breading v. Boggs, 20 Pa. St. 33.

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§ 116. Designation of the Parties.

"To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries." In the case from which this quotation is taken, the judgment was against "the Captain and Master of the Steamboat Mollie Hamilton," and there was nothing in the record to disclose the *name* of the captain or master. It was accordingly held that the judgment was void.[50] The decision was undoubtedly correct on the facts of the case, but the general rule announced must not be understood as declaring that the judgment itself cannot be aided in this respect by reference to other parts of the *same record*. For numerous authorities hold that a judgment expressed to be merely for or against the "plaintiff" or the "defendant" will be sufficient, if the names of the parties thus designated can be ascertained without ambiguity from other parts of the record.[51] So in a case where, although the complaint states no cause of action against any but the defendant, a third person is permitted on his own petition to appear and answer, and a verdict is found against "the defendant," the use of the plural "defendants" in the judgment will be treated as a merely clerical error, and the judgment be held as one against the original defendant only.[52] So a judgment for a definite amount should not be set aside because it fails to state that it is for the plaintiff against the defendant, where the declaration sets forth a cause of action and the parties thereto.[53] Nevertheless, a *patent ambiguity* on the face of the judgment cannot be thus cured or aided. In an Ohio decision the court said: "The order of the court was that these instalments should be paid by the parties in partition 'or their representatives or assigns,' and in default that execution should issue therefor. This order is void for

[50] Captain of Steamer Mollie Hamilton v. Paschal, 9 Heisk. 203.

[51] Aldrich v. Maitland, 4 Mich. 205; Smith v. Chenault, 48 Tex. 455; Little v. Birdwell, 27 Tex. 688; Collins v. Hyslop, 11 Ala. 508; Wilson v. Nance, 11 Humph. 189.

[52] Taylor v. Taylor, 64 Ind. 356. See also Holcomb v. Tift, 54 Mich. 647, 20 N. W. Rep. 627; Finnagan v. Manchester, 12 Iowa, 521.

[53] Adams v. Walker, 59 Ga. 506.

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uncertainty. A judgment against A. *or* B. is no valid judgment against either A. or B., and is simply void."[54] On the other hand, in a suit to enforce a resulting trust on payment of money due the holders of the legal title, a decree requiring such holders to convey to "the heirs at law of W. B." is proper, without requiring that the persons intended be individually named.[55] So a judgment rendered against a defendant omitting his Christian name cannot be considered void, but an action may be maintained against him on such judgment, averring his identity, and the plaintiff may prove by parol that he is the person against whom the judgment was rendered.[56] It is sufficient if the memorandum of the style of a cause, made by the clerk, indicate with reasonable certainty to what suit it relates. The description of the parties by the name of their firm is sufficient, and a judgment in favor of the plaintiffs against the defendants is sufficient, as the pleadings show who they are.[57] In Ohio it is required by statute that the judgment shall certify which of the defendants is principal and which surety; but this, it is held, only applies where they are sued jointly, and if judgment is recovered in an action against the surety alone, it is not necessary to its validity that it should specify the fact of his suretyship.[58] The *title* of a case is matter of form only, and a clerical error therein will not vitiate.[59]

§ 117. Designation of the Property.

When a judgment has to do with specific property, it is essential that the property be designated in the judgment with such a degree of certainty that it can be identified without reasonable opportunity for mistake. Thus a decree for the distribution of an estate should

[54] Miller v. Peters, 25 Ohio St. 270.

[55] Low v. Graff, 80 Ill. 360.

[56] Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Root v. Fellowes, 6 Cush. 29. The mere entry upon the judgment docket of a judgment against E. A. Swift, when defendant's name was A. E. Swift, would not invalidate the whole proceeding, if the judgment upon the court's record was duly entered against A. E. Swift, and in the absence of proof to the contrary, it will be presumed that it was so duly entered. Preston v. Wright, 60 Iowa, 351, 14 N. W. Rep. 352.

[57] Collins v. Hyslop, 11 Ala. 508.

[58] Wilkins v. Ohio Nat. Bank, 31 Ohio St. 565.

[59] Ewing v. Hatfield, 17 Ind. 513.

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set out specifically the property to be distributed.[60] So a judgment of recovery in trespass to try title is void if it does not describe the land with sufficient certainty to identify it.[61] But because there is a want of certainty in the description of land ordered to be sold to satisfy a judgment, it does not follow that the judgment is otherwise bad. Though such want of certainty renders void what it refers to, unless the plaintiff in the execution be dissatisfied no other person has cause of complaint.[62] But here also, as in respect to the designation of the parties, the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the record. Thus a decree is not void, nor incompetent as evidence, because it contains no description of the land thereby decreed to be conveyed, if it refers to the petition in the action, for such description, in apt and sufficient words.[63] Indeed the authorities go even further than this. For it has been held that a judgment that plaintiff recover "the property in controversy," or in default thereof a sum fixed as its value, will not be reversed for uncertainty in the recovery, where, although the petition claims several articles, the record shows that the controversy was reduced to two of them.[64]

§ 118. Designation of Amount of Recovery.

The amount of a judgment must be stated in it with certainty and precision. All judgments must be specific and certain; they must determine the rights recovered or the penalties imposed, and be such as the defendant may readily understand and be capable of performing.[65] A judgment, it is said, must be so certain that the clerk can issue an execution by inspection of it, without reference to other entries.[66] Hence a judgment which is uncertain as to the amount which it awards is invalid.[67] For example, a judgment against a garnishee "for the amount of his answer or so much thereof as will

[60] Jones v. Minogue, 29 Ark. 637.
[61] Hearne v. Erhard, 33 Tex. 60.
[62] Gear v. Hart, 31 Tex. 135.
[63] Foster v. Bowman, 55 Iowa, 237, 7 N. W. Rep. 513. See also Jones v. Belt, 2 Gill, 106.
[64] Coleman v. Reel (Iowa), 39 N. W. Rep. 510.
[65] People v. Pirfenbrink, 96 Ill. 68.
[66] Boyken v. State, 3 Yerg. 426.
[67] Jones v. Acre, Minor, 5.

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satisfy the plaintiff's debt and costs" has been held void for uncertainty.[68] And a finding that a garnishee was liable for one of two amounts, which are to be determined by a future contingency, was not considered a judgment at all.[69]

Nevertheless, *id certum est quod certum reddi potest;* and we are unable to discover any good reason why this maxim should not apply to the amount of a judgment as well as in any other case. An obscure or ambiguous designation of the parties or the subject-matter involved may be construed, as we have seen, with reference to the other parts of the record. And if the pleadings, or the verdict, show the actual amount of the recovery, without any doubt or room for mistake, it would seem that the judgment should not be considered invalid, at least as between the parties, for its failure to specify the sum awarded with precision. It must be admitted that the authorities hardly go to the length of sanctioning the rule here suggested, although the general principle of construing a judgment by the record is not disputed. But the cases certainly justify the statement that if the judgment-entry itself, without naming the amount of recovery, contains data which permit its calculation, a sufficient degree of certainty is attained. Thus a judgment for interest from a day mentioned is sufficiently certain without fixing the amount.[70] So also, if a verdict be found for a fixed and definite amount, and the judgment refers to the verdict in explicit terms (as if it is expressed to be "for the said sum assessed as aforesaid"), it is considered to be sufficiently precise.[71] But it is error to render judgment on a verdict for the plaintiff which fails to state how much

[68] Berry v. Anderson, 2 How. (Miss.) 649.

[69] Battell v. Lowery, 46 Iowa, 49. See Early v. Moore, 4 Munf. 262. An entry, upon the rendition of a verdict for plaintiff, that "defendant is entitled to a credit to be ascertained by A. and B., and the clerk is then authorized to enter a *remittitur*, judgment of the court accordingly and for costs," is not a judgment then rendered, but an agreement for a judgment to be rendered subsequently, upon the ascertainment by the referees of the credit to which the defendant is entitled. McIlvaine v. Batchelor, 3 Dev. & B. 52.

[70] Dinsmore v. Austill, Minor, 89.

[71] Ellis v. Dunn, 3 Ala. 632. A justice's judgment "that the plaintiff recover the sum as claimed in the above case," will be sustained, notwithstanding its informality, when the record shows that the action was *assumpsit* for $81, and defendant appeared and contested the claim. Ladnier v. Ladnier, 64 Miss. 368, 1 South. Rep. 492. On

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he should recover, when all debt is denied by the defendant. In such case the jury should have been requested to retire and find how much the plaintiff ought to recover.[73]

If there are *blanks* in the judgment, instead of a statement of its amount, this will destroy its force and effect for most purposes, or at least leave it incomplete until the blanks are filled. For instance, a judgment that the party recover "costs of suit taxed at ——," the amount of costs not being inserted in the record, will not support a declaration upon the judgment as for a fixed sum, nor can the defect in the record be supplied by resorting to an entry upon the clerk's docket.[74] So a confession of judgment for "—— dollars," and so entered, creates no lien on the property of the judgment debtor while it remains in that condition.[75] In Pennsylvania, however, it appears to be the rule that a judgment entered for an unliquidated sum will sustain an execution and a sheriff's sale thereon, if the actual amount of the judgment-debt be indorsed on the execution.[76] When the clerk enters a judgment, leaving blanks for the amount of damages and costs, the case being one where such amount can be ascertained by mere calculation, the court has power to order the blanks to be filled up at the next term, the clerk having died during the session;[76] or if the clerk himself fills up the blanks, after the lapse of more than a year from the judgment, his doing so will not invalidate the judgment so far as to expose it to collateral impeachment, although it may be ground for a writ of error.[77] Another question arises in the case of a judgment where a blank is left for the *costs* alone. Undoubtedly the judgment is not perfect until this blank is filled. But it is held that the record of a judgment which is regular in all respects,

overruling a frivolous demurrer to a complaint for a specific sum for goods sold and delivered, and no answer over, judgment for the sum claimed is proper, without taking proof of the amount of damages. Adrian v. Jackson, 75 N. Car. 536.

[73] Bartle v. Plane, 68 Iowa, 227, 26 N. W. Rep. 88.

[74] Noyes v. Newmarch, 1 Allen, 51.

[75] Lea v. Yeates, 40 Ga. 56. The judgment record in a case left the amount of the judgment blank, except as to $4.95 costs. In the docket it was entered as $265 damages and $16.95 costs with 10 per cent. interest. *Held*, good as a judgment for $4.95 only. Case v. Plato, 54 Iowa, 64, 6 N. W. Rep. 128.

[76] See Ulshafer v. Stewart, 71 Pa. St. 170; Gray v. Coulter, 4 Pa. St. 168.

[76] Hagler v. Mercer, 6 Fla. 721.

[77] Lind v. Adams, 10 Iowa, 398.

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except that the costs are left blank until they are taxed by the court, and then inserted, is admissible in evidence in an action of debt on that judgment.[78] A distinction is taken, in one of the recent cases, which we believe to be well founded. It is held that as respects the lien or the validity of a judgment informally entered and docketed without the taxation and insertion of costs therein, the omission is to be treated as a mere irregularity; but for the purposes of an appeal, the prevailing party, seeking to limit the rights of his adversary, is to be held to strict practice, and the judgment is not to be deemed perfected until the costs to which he is entitled are duly taxed and inserted in the judgment.[79]

All judgments rendered in this country should be expressed in the American denominations of money. A judgment given by the court for a certain amount in francs is therefore erroneous, and will be amended on appeal so as to express the amount in dollars and cents.[80] It has sometimes been made a question whether the statement of the amount of a judgment in figures merely, instead of the sum being written out, would impair its validity. There are cases which hold a judgment so expressed to be defective to the point of invalidity.[81] Other authorities seem reluctant to admit that this alone would absolutely avoid the judgment so as to render it open to collateral attack.[82] While the practice is undoubtedly loose and irregular, it is difficult to see in it any sufficient ground for considering the judgment entirely void. If the amount of recovery stated in figures in a judgment differs from that stated in writing, but the recitals in the judgment itself show the former to be the true amount, the error is not sufficient cause for the reversal of the judgment.[83] If the amount of the judgment is written out, the designation "dollars" (or "cents," or both, as the case may be) must be appended to it.

[78] Calhoun v. Terry Porter Co., 21 Conn. 526. In California, the clerk has no right to insert costs after the judgment is entered and the record completed. The remedy in such case is by a motion to the court for amendment. Chapin v. Broder, 16 Cal. 403.

[79] Richardson v. Rogers, 37 Minn. 461, 35 N. W. Rep. 270.

[80] Erlange v. Avegno, 24 La. Ann. 77.

[81] Smith v. Miller, 8 N. J. Law, 175, 14 Am. Dec. 418; Linder v. Monroe, 33 Ill. 390.

[82] Fullerton v. Kelliher, 48 Mo. 542.

[83] Cave v. Houston, 65 Tex. 619.

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Thus a judgment for "four hundred and sixty-one and 53-100 damages" is not for any sum of money and is therefore a nullity.[84] But it has also been held, and by a very high authority, that the omission of the word "dollars" in a verdict for the plaintiff in an action of *assumpsit* does not affect the validity of a judgment entered thereon according to the manifest intent of the jury.[85] If the amount of the judgment is expressed in figures, the dollar-mark, or some other appropriate sign must be used to show the sum intended. The necessity for a statement of this kind arises from the loose manner of keeping the records of tax-judgments which formerly prevailed in some of the states, and was often brought to the notice of the courts. The rule is that a judgment for taxes is fatally defective if it does not show the amount of the tax for which it was rendered; and the use of numerals simply, without any words, marks, or signs to indicate that they stand for money, and for what denominations of money, is not sufficient.[86] This rule governs also in case of a judgment for a special assessment.[87] It may be conceded, however, that the use of the dollar-mark is not indispensable, if the amount can be indicated *with certainty* by any other device or contrivance.[88]

An entry of judgment for the right sum, but inaccurately named "damages" instead of "debt,"—or so much debt and so much dam-

[84] Carpenter v. Sherfy, 71 Ill. 427. The court said: "We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money."

[85] Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. Rep. 590.

[86] Woods v. Freeman, 1 Wall. 398; Lawrence v. Fast, 20 Ill. 338, 71 Am. Dec. 274; Lane v. Bommelmann, 21 Ill. 143; Gibson v. Chicago, 23 Ill. 572; Eppinger v. Kirby, 23 Ill. 521; Dukes v. Rowley, 24 Ill. 210; Bailey v. Doolittle, 24 Ill. 577; Potwin v. Oades, 45 Ill. 367; People v. Savings Union, 31 Cal. 135; Randolph v. Metcalf, 6 Coldw. 400; Tidd v. Rines, 26 Minn. 201, 2 N. W. Rep. 137; Black, Tax Titles, § 60.

[87] Pittsburgh, F. W. & C. R. Co. v. Chicago, 53 Ill. 80.

[88] In the case of Gutzwiller v. Crowe, 32 Minn. 70, 19 N. W. Rep. 344, it appeared that, in the entry of a tax-judgment on the official books, there was a column headed "Total amount of judgment," and in this column appeared three Arabic numerals, the first separated from the others by a short perpendicular line; it was *held* that, in reasonable intendment, this must denote money, and that it was a sufficient designation of the amount of the judgment. This decision was declared to be consistent with Tidd v. Rines, 26 Minn. 201, 2 N. W. Rep. 137; because one of the grounds on which that case was ruled was that the figures were not separated by any line or decimal mark.

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ages,—is not reversible error.[88] And where the record of a judgment does not show of what the judgment was made up, it is competent to show that fact by extraneous evidence.[89]

§ 119. Conditions in Judgment.

"When a judgment is recovered according to the terms and conditions of a written obligation for the payment of money, and those terms and conditions expressly either limit the lien of any judgment which may be recovered upon it, or waive the benefit of all laws exempting property from levy and sale on any execution, or waive the right of inquisition upon the delinquent's real estate, and in the entry of the judgment this is set forth upon the docket, it must be held to be a part of the record of the judgment," and therefore will affect subsequent purchasers.[91] But a judgment on an ordinary promissory note, though given for the purchase-money of real estate, should not contain provisions declaring it a lien on such real estate and ordering that the same be sold to satisfy it. It should be an ordinary personal judgment against the defendant, authorizing an ordinary execution to be issued against the property in general of the debtor.[92] In an action of replevin, where the plaintiff obtains possession of the property and retains the same, and is in possession of the property at the time the judgment is rendered, it is neither necessary nor proper to render a judgment in favor of the plaintiff for the value of the property in case a return thereof cannot be had.[93] As a general rule, a judgment has properly nothing to do with the means of its enforcement; it merely pronounces the sentence of the law upon the facts ascertained in the case.

[88] Carver v. Adams, 40 Vt. 552. In a suit for the recovery of land and damages for detention, the judgments for the land and for the rents are as distinct as if separate judgments were rendered in different suits. Shean v. Cunningham, 6 Bush, 128.

[89] Gilbert v. Earl, 47 Vt. 9.

[91] Hageman v. Salisberry, 74 Pa. St. 280. And see Little v. White, 8 Ind. 544.

[92] Greeno v. Barnard, 18 Kans. 518.

[93] Mills v. Kansas Lumber Co., 26 Kans. 574.

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§ 120. Joint Defendants.

At the common law, it was an inflexible rule that if an action was brought against two or more defendants jointly, the plaintiff could have judgment only against *all* of them or *none* of them; the single exception being in the case where one of the defendants succeeded in establishing a defense, such as his personal disability, peculiar to himself. If one defendant suffered default, no final judgment could be given against him, as we have already stated,[94] until the case was disposed of as to the others, and not even then unless the verdict was in the plaintiff's favor. Under this practice, therefore, it was error to give judgment against one of the defendants sued without disposing of the suit as to the other defendant; a final conclusion must be reached as to all of them, one way or the other, at the same time.[95] But now it is provided by statute in some of the states that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." [96] In a case where this law was to be applied, the court said: "As no order was made as to the other defendant, the action is still pending against him, and the court had a right to render a judgment against one, and continue the action as to the other; although no order of continuance seems to have been entered, yet the action stood continued by operation of law." [97]

§ 121. Time of entering Judgment.

By the rule of the common law, if a judgment was not stayed by a motion in arrest, or for a new trial, or other appropriate proceeding, within the first four days of the next term after the trial, it was

[94] *Supra*, § 82. In an action of trover against two, one of whom is defaulted and the other found guilty by the jury, there is but one assessment of damages and a joint judgment. Gerrish v. Cummings, 4 Cush. 391.

[95] Johnson v. Vaughan, 9 B. Mon. 217. See Creigh v. Hedrick, 5 W. Va. 140.

[96] Code N. Y. § 274; Code Wis. § 184; Code of Civ. Prac. Ky. § 370; Code Civ. Proc. Cal. § 578.

[97] Patton v. Shanklin, 14 B. Mon. 15.

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then to be entered upon the roll or record. Statutes fixing the time of entering a judgment upon verdict exist in some of the states, and require notice in this connection. Thus the New York Code prescribes the lapse of four days after the verdict before the rendition of judgment; but it is held that judgment may be entered upon the verdict immediately, and relief may be had against the verdict within four days afterward, if there be ground for it, notwithstanding the judgment.[98] But the case is different under a statute which declares that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision and the service upon the attorney of the adverse party of a copy thereof, but not before." Here, it is held, four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered; and here the rule of interpretation which, in computing time, excludes the first and includes the last day, has no application, the provision being clear and explicit.[99] In Pennsylvania, a law requires[100] that judgment shall not be entered on the report of a referee until after the expiration of thirty days. But in a case where the prothonotary entered a judgment on the same day on which the report was filed, it was considered that this should not, on error, be treated as material, where it appeared that exceptions to the report were subsequently filed and acted upon, and no attention paid to the mistake.[101] On the other hand, the California Code provides that "when trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."[102] But the failure of the clerk to enter judgment within the prescribed time does not, according to the authori-

[98] Droz v. Lakey, 2 Sandf. 681.

[99] Marvin v. Marvin, 75 N. Y. 240, construing Code Civ. Proc. N. Y. § 1228. Where a justice of the peace decided a cause before him, and made upon the papers in the suit a memorandum of his judgment within four days after the final submission to him, *held*, that the judgment was regular and valid, although no entry thereof was made in his docket until after the lapse of four days. Walrod v. Shuler, 2 N. Y. 134.

[100] Act Penna. May 14, 1874.

[101] Pittsburgh & C. R. Co. v. Shaw (Pa.) 14 Atl. Rep. 323.

[102] Code Civil Proc. Cal. § 664.

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ties, affect the validity of the judgment afterwards entered; for the injunction of the statute is merely directory and not mandatory.[103] And reading this statute in connection with another law, which provides, as a penalty, that the action shall be dismissed when the judgment is not entered within six months after verdict, it is held that the court does not lose jurisdiction of the cause if judgment is entered within six months after the verdict is rendered.[104] In other states it appears to be required that the judgment be entered at the same term at which the verdict is returned. But the cases rule that if this is omitted, it is competent for the court to enter the judgment at a subsequent term, both parties appearing and being heard.[105]

Rules of the former class—those requiring a certain time to intervene between verdict and judgment—probably obtain in a majority of the states, either by statute or as the settled practice of the courts. Their design is to afford the parties an opportunity of proceeding against the verdict, either by a motion for judgment *non obstante veredicto*, motion in arrest, or motion for new trial, as the case may be. But since the right of a party to so move will not be prejudiced by a premature entry of judgment,[106] and since the judgment itself can be stayed or set aside as well as the verdict, while, on the other hand, it is the right of the prevailing party to have his rights fixed by a judgment as soon as he is entitled to it, it is conducive to justice not to regard a judgment entered in advance of the time as entirely invalid, but to consider the rule as merely directory.

In some jurisdictions, while judgment may be entered immediately upon the verdict, the court may stay the proceedings for a certain number of days, for the purpose of giving time for a motion for new trial. Where this is done, and judgment is entered up before the expiration of the stay, still it is not void. The judgment is only provisional, and it does not deprive the losing party of the right to so move.[107] And even where it appeared that judgment was entered up

[103] First Nat. Bank of Oakland v. Wolff (Cal.), 21 Pac. Rep. 551; Bundy v. Maginess (Cal.), 18 Pac. Rep. 668.

[104] Waters v. Dumas, 75 Cal. 563, 17 Pac. Rep. 685.

[105] Shephard v. Brenton, 20 Iowa, 41. And see Murdock v. Ganahl, 47 Mo. 135.

[106] Hartridge v. Wesson, 4 Ga. 101.

[107] Harvey v. McAdams, 32 Mich. 472.

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while a motion for a new trial was actually on file, which motion was afterwards overruled, and all the proceedings occurred at the same term of court, it was held that the fact that judgment was so entered was no ground for reversing the decision on the motion.[108]

§ 122. Date of the Judgment.

The rule of the common law was, that all judgments were presumed to have been rendered on the first day of the term, unless the contrary appeared. And it is also a part of the English practice to consider all judicial proceedings as taking place at the earliest period of the day on which they are done.[109] It is still the rule, in some of the American states, that all judgments docketed during the term shall be deemed to be docketed on the first day of the term; and this, it is held, makes them relate to the first day even where the judge fails to open court on that day.[110] But in some other states, principally in New England, an exactly opposite rule is in force, and a judgment is regarded as rendered on the *last* day of the term, unless the contrary is shown.[111] But in a majority of the states, a judgment takes effect from the day it is actually rendered or entered. "The term of the court is not with us regarded as one day, and though until the term expires the orders made and judgments rendered are largely under the control of the court, and may be altered, modified, or vacated, yet they have been generally regarded as taking effect from the day on which they were made or rendered, subject to the power of the court, and not from the day the term closes."[112]

[108] Hasted v. Dodge (Iowa), 35 N. W. Rep. 462.

[109] Wright v. Mills, 4 Hurl. & N. 488. In this case, judgment was signed at the opening of the office at its usual hour, eleven a. m., and the defendant died at half past nine a. m. on the same morning. It was *held* that the judgment was regular.

[110] Norwood v. Thorp, 64 N. Car. 682.

[111] Bradish v. State, 35 Vt. 452; Herring v. Polley, 8 Mass. 113; Chase v. Gilman, 15 Me. 64; Goodall v. Harris, 20 N. H. 368. Accordingly, the time within which a motion for new trial must be made (which is limited to two years) must be computed from the last day of the term. Bradish v. State, 35 Vt. 452. Taxation of additional costs incident to a suit, with award of execution therefor, at a term subsequent to that of the recording of the judgment, cannot be considered as making the judgment a judgment of the later term. Rider v. Alexander, 1 D. Chip. 274.

[112] *Ex parte* Dillard, 68 Ala. 594; Ala-

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And the date of a judgment may be fixed by reference to the record of the proceedings in the case.[113] We shall have occasion to discuss this topic more fully in connection with the subject of priority among judgment-liens.[114]

§ 123. Construction of Ambiguous Judgments.

The rule for the construction of ambiguous judgments is clearly stated by the supreme court of Kansas in the following language: "Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms."[115] This rule also applies to decrees in equity. The meaning and effect of a decree may, in case of doubt, be ascertained by reference to the bill and other proceedings, particularly when these are referred to in the decree itself.[116] And for this purpose, recourse may be had to duly attested stipulations between the parties.[117] But where a judgment refers to the findings for certain data, and the findings do not contain the data, but refer again to the pleadings, which are also uncertain, the judgment will be reversed for uncertainty.[118] A mistake apparent on the face of a judgment, amounting to an impossibility, will not destroy the judgment, if enough remains, after it is corrected or eliminated, to disclose the actual judgment rendered. Thus, where a judgment entry recites a demurrer (sustained) as having been interposed by the defendant to his own plea, the appellate court will intend the

bama C. & N. Co. v. State, 54 Ala. 86; Quinn v. Wiswall, 7 Ala. 645; Powe v. McLeod, 76 Ala. 418; Pope v. Brandon, 2 Stew. (Ala.) 401; Dyson v. Simmons, 48 Md. 207; Stannis v. Nicholson, 2 Oreg. 332.

[113] Cooper v. Cooper, 14 La. Ann. 665.

[114] See *infra*, §§ 441–444.

[115] Clay v. Hildebrand, 34 Kans. 694, 9 Pac. Rep. 466, Valentine, J. See, to the same effect, Fleenor v. Driskill, 97 Ind. 27; Hoffertbert v. Klinkhardt, 58 Ill. 450; Succession of Durnford, 1 La. Ann. 92; Fowler v. Doyle, 16 Iowa, 534.

[116] Walker v. Page, 21 Gratt. 636.

[117] Thayer v. McGee, 20 Mich. 195.

[118] Kelly v. McKibben, 53 Cal. 18.

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recital to have been a clerical mistake and that it was the plaintiff who demurred.[119] But a judgment must follow the verdict; and in a case where the jury returned two verdicts, as follows: "We the jury find for the plaintiff and assess his damages in the sum of $800," and, "We the jury find for the defendant on the counter-claim and set-off and assess the damages in the sum of $300," it was held to be error in the court to overrule a motion for a *venire de novo*, and render judgment for the plaintiff for $500.[120] The presumption in support of the judgment extends to inferring the presence of the plaintiff in court, for the purpose of an act which he only could perform, although the entry only recites the presence of his attorney.[121]

§ 124. The Judgment-Roll, or Record.

It seems appropriate, in this connection, to give some account of the judgment-roll or record of the judgment. At common law the judgment-roll was a roll of parchment upon which all the proceedings in the cause, up to the issue, and the award of *venire* inclusive, together with the judgment which the court awarded in the cause, were entered. It included as well the pleadings and process as the signing of judgment.[122] In our modern practice, the proceedings are not thus transcribed, although in some states they are required to be copied with more or less detail into books kept for that purpose, and in others a "judgment roll," consisting of the writ, pleadings, and other papers in the cause, must be on file when the clerk enters judgment. And for the purpose of an appeal, or other similar use, the "record" comprises a full copy of all the papers and proceedings in the cause. The following account of the practice obtaining in

[119] Evans v. McMahan, 1 Ala. 45.

[120] Baughn v. Baughn, 114 Ind. 73, 17 N. E. Rep. 181. See Jarboe v. Brown, 89 Ind. 549.

[121] Thomason v. Odum, 31 Ala. 108.

[122] Brown, Law Dict.; Vail v. Iglehart, 69 Ill. 332. Brown says that in modern English practice "the making up and depositing the judgment-roll is generally neglected, unless in cases where it becomes absolutely necessary to do so, as when, for instance, it is required to give the proceedings in the cause in evidence in some other action, for in such case the judgment-roll or an examined copy thereof, is the only evidence of them that will be admitted." And see Steph. Plead. 24.

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Illinois will be found applicable in many of the states. "Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, nor in the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of the judgment is required, for the purpose of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of *nul tiel record*, or to establish a former adjudication of the same subject-matter between the same parties, and indeed in all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it. And the general rule is, that where the copy of a record of a judgment is required, it must be of the whole record, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part."[123] In Massachusetts, the clerk's docket is the record of the court, until the record is fully extended, and every entry upon it is the statement of an act of the court, which is presumed to be made by its direction, in pursuance either of an order for the particular entry, or of a general order, or of a general usage pre-supposing such an order.[124] A record, it will be remembered, imports absolute verity, must be tried by itself, and cannot be contradicted.[125]

§ 125. Supplying Lost Records.

The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation, and if the statute also confers a power, and prescribes a practice, in that behalf, it does not merge

[123] Vail v. Iglehart, 69 Ill. 332; Stevison v. Earnest, 80 Ill. 513.

[124] Read v. Sutton, 2 Cush. 115. A judgment recovered before a magistrate may be proved by his memoranda upon his docket and upon the original writ, and by the production of the original papers in the case, verified by the testimony of the magistrate, if these, taken together, show clearly all the essential particulars of a valid judgment, and no extended record has been made. McGrath v. Seagrave, 2 Allen, 443, 79 Am. Dec. 797.

[125] Adams v. Betz, 1 Watts, 425, 26 Am. Dec. 79.

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the inherent authority of the courts.[126] Hence if, for example, the notice of a motion for leave to substitute a new record is explicit in describing a judgment and papers alleged to be lost, it is sufficient, although it does not conform to a statute which provides for such a proceeding.[127] The destruction of the record book in which judgments are written, does not destroy the judgment-debts, and though the judgments are wrongfully restored by the court without notice to the debtors, yet when the judgments are revived by *scire facias* with notice to the debtors, they should make their objection by plea of *nul tiel record*.[128] On a motion to supply a lost record, the proper practice is as follows. The notice of the motion must specify when the motion will be made, and must contain a copy of that which the plaintiff will move the court to enroll as the substance of the lost record, and the defendant must have reasonable personal service of the notice, and also of the affidavits by which it will be supported, which affidavits may be controverted by counter-affidavits. If the court, on hearing the affidavits, is fully satisfied of the loss or destruction of the original record and of the correctness of the proposed substitute, it will order the substitute to stand enrolled as and for the original.[129] The application must be made to the court in which the record originally remained. The courts of chancery will not entertain jurisdiction of a bill to restore to the judgment-creditor the benefit of his judgment, for the reason that there is an adequate remedy at law, by motion in the court in which the judgment was rendered.[130] "The inherent power of courts to control their own records, and to supply losses therein, is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of, and to supply to another court of general jurisdiction, a record, in lieu of one which has been destroyed. This power, once admitted will place the records of the courts of common law at the mercy of the court of chan-

[126] Doswell v. Stewart, 11 Ala. 629; Gammon v. Knudson, 46 Iowa, 455; George v. Middough, 62 Mo. 549; Keen v. Jordan, 13 Fla. 327; Garibaldi v. Carroll, 33 Ark. 568.

[127] Doswell v. Stewart, 11 Ala. 629.

[128] George v. Middough, 62 Mo. 549. And see Gibson v. Vaughan, 61 Mo. 418.

[129] Adkinson v. Keel, 25 Ala. 551.

[130] Fisher v. Sievres, 65 Ill. 99.

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cery, and might lead to absurd conflict between the law and equity side of the court over the records of the common law. . . . . There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding, according to the course of the common law, and therefore chancery has no office to perform." [121]

[121] Keen v. Jordan, 13 Fla. 327. On a motion to substitute the record of a destroyed judgment, the defendant cannot contest the truth of the recitals of the proposed record, though he may show that the lost record contained no such recitals. Peddy v. Street (Ala.), 6 South. Rep. 8.

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CHAPTER VII.

THE ENTRY OF JUDGMENTS NUNC PRO TUNC.

§ 126. Origin and Nature of the Power.
127. Delay by Act of the Court.
128. Delay by Motions or Appeal.
129. Laches of Party.
130. Supplying Entry of Judgment.
131. Correction of Clerical Errors.
132. Not a proper Means of changing or revising the Judgment.
133. Only proper when Final Judgment could be entered.
134. Notice of Application.
135. Evidence.
136. Relation back of Order.
137. Effect upon Third Persons.

§ 126. Origin and Nature of the Power.

The phrase *nunc pro tunc*, "now for then," is used to indicate that something which was omitted to be done at the proper time is afterwards performed with a retroactive effect, that is, it is to have the same force and virtue, and be attended by the same consequences *as if* it had been regularly done. In relation to judicial proceedings, the performance of acts *nunc pro tunc* may take place in the various stages of the progress of a suit, and instances are not uncommon of affidavits or other papers filed in this manner. But in this connection we are only concerned with the entry and the amendment of judgments *nunc pro tunc*, and in this chapter only with the former. The power of the courts, whether of law or equity, to make entries of judgments or decrees *nunc pro tunc*, in proper cases and in furtherance of the interests of justice, is one which has been recognized and exercised from ancient times, and as a part of their common law jurisdiction.[1] This power therefore does not depend upon statute; it

[1] Lord Mohun's Case, 6 Mod. 59; Hodges v. Templer, 6 Mod. 191; Mayor of Norwick v. Berry, 4 Burr. 2277; Evans v. Rees, 12 Ad. & El. 167, 175; Mitchell v. Overman, 103 U. S. 62; Wood v. Keyes, 6 Paige, 478; Hess v. Cole, 23 N. J. Law, 116; Dial v. Holter, 6 Ohio St. 228; Swain v. Naglee, 19 Cal. 127; Reid v. Morton, 119 Ill. 118, 6 N. E. Rep. 414; Shephard v. Brenton, 20 Iowa, 41.

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is inherent.[2] It rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and authority to make them speak the truth. When a judgment is allowed to be thus entered in order that the party may not suffer for what has transpired during a delay caused by the court, it exhibits a practical application of the maxim *actus curiæ neminem gravabit.* But the authority is much wider than this, and the power must not be confounded with the illustration of it. The cases calling for the exercise of this power of the courts are chiefly of two kinds; first, where no judgment was actually rendered, although one might or ought to have been; second, where a judgment was actually rendered, but never entered or put upon the records. We shall first consider the former class of cases.

§ 127. Delay by Act of the Court.

In any instance where a party has brought his case to trial and proceeded to present it on the merits and submit the decision, and before any judgment is rendered one of the parties dies, the court, in order that the time consumed by it in deliberation, without laches of the party who was successful in the suit, may not operate to his disadvantage, will not allow the action to abate, but instead will enter judgment *nunc pro tunc*, as of the time of the submission.[3] Or,

[2] Chissom v. Barbour, 100 Ind. 1.

[3] Mayor of Norwick v. Berry, 4 Burr. 2277; Toulmin v. Anderson, 1 Taunt. 385; Bridges v. Smyth, 8 Bing. 29; Blewett v. Tregonning, 4 Ad. &. El. 1002; Green v. Cobden, 4 Scott's Cas. 486; Key v. Goodwin, 1 Moo. & S. 620; Harrison v. Heathorn, 1 Dowl. & L. 529; Evans v. Rees, 12 Ad. & El. 167; Moor v. Roberts, 3 C. B. N. S. 844; Seymour v. Greenwood, 30 L. J. Ex. 189; Abington v. Lipscomb, 11 L. J. Q. B. N. S. 15. Davies v. Davies, 9 Ves. Jr. 461; Neil v. McMillan, 27 U. C. Q. B. 257; Mitchell v. Overman, 103 U. S. 62; Griswold v. Hill, 1 Paine, 483; Goddard v. Bolster, 6 Me. 427, 20 Am Dec. 320; Blaisdell v. Harris, 52 N. H. 191; Collins v. Prentice, 15 Conn. 423; Brown v. Wheeler, 18 Conn. 199; Perry v. Wilson, 7 Mass. 393; Tapley v. Goodsell, 122 Mass. 176; Ryghtmyer v. Dunham, 12 Wend. 245; Spalding v. Congdon, 18 Wend. 543; Holmes v. Honie, 8 How. Pr. 383; De Agreda v. Mantel, 1 Abb. Pr. 130; Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570; Wood v. Keyes, 6 Paige, 478; Kissan v. Hamilton, 20 How. Pr. 369; Fulton v. Fulton, 8 Abb. N. C. 210; Long v. Stafford, 103 N. Y. 275, 8 N. E. Rep. 522; Hess v. Cole, 23 N. J. Law, 116; Wilson v. Myers, 4 Hawks, 78. 15 Am. Dec. 510; Isler v. Brown, 66 N. Car. 556; Beard v. Hall, 79 N. Car. 506;

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if justice so require, the judgment may be entered as of the day in the term when the last of the evidence was submitted.[4] And a judgment may be entered *nunc pro tunc* against one of several defendants, as well as against a sole defendant, when death takes place after verdict and before judgment.[5] The same practice obtains, under the same conditions, in chancery. Thus, a party in interest having died since the argument and before the signing of a decree, the decree and orders in the cause should be signed and filed as of the date of the argument.[6] The case may also be put in an irregular position by reason of the death of the *plaintiff* after a verdict. And here also the salutary power of giving judgment retrospectively may be invoked. By the common law practice, since the delay of the court must not be allowed to prejudice the parties, if the plaintiff die during the time the case is under advisement, judgment will be entered for him *nunc pro tunc* as of the time of the return of the *postea*.[7] But in English practice (and probably the rule is general) the power to so enter judgment does not extend to suits in tort. Thus, in an action for libel, where the plaintiff died after the signing of interlocutory judgment and the execution of the writ of inquiry, but before the next day in banc, it was held that final judgment could not be entered for him for the damages assessed, the suit having abated by his death, and the case not being provided for by the statute 17 Car. II, c. 8, § 1, regulating the procedure where plaintiff dies between verdict and judgment.[8] But it is not only the death of a party that will justify the exercise of this power. It may be employed to overreach *any* event transpiring while the case is in the hands of the court, and which would otherwise rob the successful suitor of his judgment. Thus, in a case in Massachusetts, where the action was upon a statute which was afterwards repealed, but before the repeal-

Allston v. Sing, Riley, 199; Powe v. McLeod, 76 Ala. 418; McLean v. State, 8 Heisk. 22; Pool v. Loomis, 5 Ark. 110; Dial v. Holter, 6 Ohio St. 228; *In re* Estate of Jarrett, 42 Ohio St. 199; Estate of Page, 50 Cal. 40.

[4] Citizens' Bank v. Brooks, 23 Fed. Rep. 21.

[5] Harrison v. Heathorn, 1 Dowl. & L. 529.

[6] Burnham v. Dalling, 16 N. J. Eq. 310.

[7] Jackson v. Mayor of Berwick, 1 Mod. 86.

[8] Ireland v. Champneys, 4 Taunt. 884. But see Brown v. Wheeler, 18 Conn. 199.

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ing statute went into operation the action was tried and verdict rendered for the plaintiff, and questions of law were reserved, which, after the repeal took effect, were decided in favor of the plaintiff, the court ordered judgment to be entered on the verdict as of a day previous to the going into operation of the repealing act.[9]

§ 128. Delay by Motions or Appeal.

The principle that a party shall not be prejudiced by the act of the court, or the delay incident to legal proceedings, applies equally where the successful litigant finds his progress obstructed, after verdict, by the pendency of a motion or appeal, during which his adversary dies. Hence, where the defendant, after a verdict is given against him, moves for a new trial, and dies before the decision of the motion, and the motion is subsequently overruled, the judgment may be entered up for the plaintiff, *nunc pro tunc*, as of the term when the verdict was returned.[10] And conversely, if a verdict be found for the plaintiff, and a motion is made in arrest of judgment, during the pendency of which the *plaintiff* dies, the judgment will be entered, the motion being denied, as of the day of the verdict, or as of a term after the verdict when the plaintiff was still alive; and in such a case, it is held, it makes no difference whether the cause of action would or would not survive.[11] So also if the plaintiff dies during the pendency of a motion, and the motion is subsequently decided in favor of the defendant, the latter may enter up his judgment as of a term before the decease of the plaintiff.[12] Where an appeal has been taken, and one of the parties dies before hearing in the appellate court, the proper practice is to affirm or reverse the judgment below *nunc pro tunc*.[13] So in a case where the cause was transferred for consideration by the court in banc, upon exceptions taken by the defendant, and while it was there pending the defendant died, and

[9] Springfield v. Worcester, 2 Cush. 52.

[10] Den v. Tomlin, 18 N. J. Law, 14, 35 Am. Dec. 525; Terry v. Briggs, 12 Cush. 319; Dial v. Holter, 6 Ohio St. 228; Fitzgerald v. Stewart, 53 Pa. St. 343; Brown v. Wheeler, 18 Conn. 199; Collins v. Prentice, 15 Conn. 423.

[11] Griffith v. Ogle, 1 Binn. 172; Brown v. Wheeler, 18 Conn. 199.

[12] Spalding v. Congdon, 18 Wend. 543.

[13] Snow v. Carpenter, 54 Vt. 17.

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afterwards the exceptions were overruled, it was held that the plaintiff should have judgment as of the term when the verdict was rendered.[14] Where an appeal is taken and final judgment not entered, and the appeal is afterwards withdrawn or set aside for irregularity, the judgment may be entered *nunc pro tunc* on the verdict.[15] And in a case in the supreme court of the United States, where the appellee died after the argument of a motion to dismiss the appeal, the order on the motion was entered *nunc pro tunc* as of the day of the argument.[16]

§ 129. Laches of Party.

If a delay in the entering of a judgment, after verdict or submission, is not attributable to the act of the court in holding the case under advisement, or the pendency of a motion or other interruption, but is caused by the laches of the party entitled to judgment, and during the interval a party dies, judgment *nunc pro tunc* will not be allowed.[17] There is, of course, no room here for the application of the maxim above quoted, and the ends of justice do not require that the law should restore to a party an advantage which he may have lost through his own negligence or hesitation.

§ 130. Supplying Entry of Judgment.

We come now to the second class of cases mentioned above—those where a judgment was actually rendered by the court, but was never put upon the records. And the rule is, that in any case where the court did actually render a formal judgment, but the same has not been entered on the record, in consequence of any accident or mistake, or through the neglect or misprision of the clerk, the court

[14] Blaisdell v. Harris, 52 N. H. 191. Where the defendant in a criminal cause has been found guilty by the verdict of a jury, and appeals before an entry of final judgment against him, the district court may enter final judgment *nunc pro tunc* after a term has intervened since the verdict. *Ex parte* Beard, 41 Tex. 234.

[15] Kane v. Hills, R. M. Charlt. 103; Hardee v. Stovall, 1 Ga. 92.

[16] Richardson v. Green, 130 U. S. 104, 9 Sup. Ct. Rep. 443.

[17] Fishmongers' Co. v. Robertson, 3 C. B. 970; Wilkes v. Perks, 5 Man. & G. 376.

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has power to order that the judgment once pronounced be entered *nunc pro tunc*, upon the production of proper evidence to establish the fact of the judgment and to show its terms and character and the relief granted; and this may be done after the expiration of the term at which the judgment was originally given.[18] Thus, where, on a plea of *nul tiel record*, the court decided that there was such a record, but in consequence of the mistake of the prothonotary judgment was omitted to be entered, after which the defendant died, it was held that the court might, in order to do justice, enter judgment as of the time when it ought to have been entered, although nearly eight years had elapsed, provided third persons were not injured thereby.[19] The rule has also been extended to the case of a judgment confessed in a pending action. Where a confession of judgment is entered on the declaration on file, but not on the minutes of the court, in the absence of proof of any fraud in the entry, it may, at a subsequent term, be entered on the minutes *nunc pro tunc*, without notice to the defendant.[20] Every court has a right to judge of its own records and minutes, and if it should appear satisfactorily to it that an *order* was actually made at a former term and omitted to be entered by the clerk, it may, at any term, direct such order to be entered on the records as of the term when it was made.[21]

§ 131. Correction of Clerical Errors.

"That a court has a right, at a term subsequent to one at which a judgment is rendered, to correct, by an order *nunc pro tunc*, a clerical

[18] Chichester v. Cande, 3 Cow. 39, 15 Am. Dec. 238; Hagler v. Mercer, 6 Fla. 721; Wilkerson v. Goldthwaite, 1 Stew. & P. 159; Wharley v. Railroad, 72 Ala. 20; Cotten v. McGehee, 54 Miss. 621; Forbes v. Navra, 63 Miss. 1; Hammer v. McConnell, 2 Ohio, 81; Howell v. Marlan, 78 Ill. 162; Ives v. Hulce, 17 Ill. App. 80; Shephard v. Brenton, 20 Iowa, 41; Gibson v. Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Groner v. Smith, 49 Mo. 318; Belkin v. Rhodes, 76 Mo. 648; Swain v. Naglee, 19 Cal. 127; Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. Rep. 782.

[19] Murray v. Cooper, 6 Serg. & R. 126.

[20] Davis v. Barker, 1 Ga. 559. Where an action is dismissed during vacation, under a statute authorizing plaintiffs to dismiss actions, and no entry is made, an entry *nunc pro tunc* may be made at the next term. Mountain v. Rowland, 30 Ga. 929.

[21] Burnett v. State, 14 Tex. 455, 65 Am. Dec. 131; Ferguson v. Millaudon, 12 La. Ann. 848.

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error or omission in the original entry, is indisputable. The error, whether of commission or omission, must appear from the record of the proceedings in which the entry of judgment is made."[22] Thus a judgment is not rendered void by an omission to sign it, but may be amended, even after the lapse of ten years, by an order to supply the proper signature *nunc pro tunc*.[23] And even during the pendency of an appeal a judgment may be amended *nunc pro tunc*, in respect, for example, to proof of acknowledgment of service of process and to the waiver of exemptions, at a subsequent term of the trial court, and when properly certified to the appellate court, the amendment is before such court for consideration, and will relate back and sustain the judgment.[24] When the clerk is ordered by the court at a subsequent term to supply a clerical omission in the record of a judgment by an entry *nunc pro tunc*, the proper course for him to pursue would be to enter anew in the proceedings of that term the entire judgment as corrected; and the action of the clerk in supplying the omitted part of the judgment, by an interlineation in the record of the preceding term, is considered as loose, irregular, and reprehensible. Nevertheless such improprieties of the clerk would probably not have the effect of rendering the judgment a nullity.[25]

§ 132. Not a proper Means of changing or revising the Judgment.

The power of courts to order the entry of judgments *nunc pro tunc* is not to be used for the purpose of correcting errors, omissions, or mistakes *of the court;* it cannot direct a proper judgment to be thus entered when the fault is that the first judgment is one which should not have been entered in the case, or is imperfect or improper.[26] The object and effect of an amendment *nunc pro tunc*

[22] Allen v. Sales, 56 Mo. 28.

[23] Pollard v King, 62 Ga. 108. As to the necessity of signing a judgment, see § 109 *supra*.

[24] Seymour v. Thomas Harrow Co., 81 Ala. 250, 1 South. Rep. 45.

[25] Allen v. Sales, 56 Mo. 28.

[26] Gray v. Brignardello, 1 Wall. 627; *In re* Limerick Petitioners, 18 Me. 183; Smith v. Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Perkins v. Dunlavy, 61 Tex. 241; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Evans v. Fisher, 26 Mo. App. 541; Whitwell v. Emory, 8 Mich. 84, 59 Am. Dec. 220.

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of a judgment is to furnish proper evidence of acts properly done by the court, but not properly exhibited by its record; and such evidence is furnished in this manner, for the purpose of supporting those acts which, although the proper consequences of a judgment, would seem to be irregular and void because there was no proper evidence of a judgment.[27] Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render;[28] nor supply an order which it might or ought to have made, but wholly omitted to make.[29] Nor can such an entry be made by the court for the purpose of reversing its action in respect to what it formerly refused to do or assent to.[30] Yet the cases hold that if, in an action by two or more plaintiffs, or against two or more defendants, judgment has been mistakenly entered for one plaintiff only, or against one defendant only, as the case may be, a proper judgment *nunc pro tunc* may be subsequently entered, without notice, if the record furnishes sufficient ground.[31]

§ 133. Only proper when Final Judgment could be entered.

The rule that a judgment may be entered *nunc pro tunc*, when such action is necessary in order to save a party from being unjustly prejudiced by a delay caused by the act of the court or the

[27] Adams v. Higgins, (Fla.), 1 South. Rep. 321. "The entire purpose of entering orders or judgments as of some prior date, is to supply matters of evidence. The failure of a court to act does not authorize the entry of a *nunc pro tunc* order or judgment. If no order or judgment was in fact rendered, the court cannot treat such defect as a clerical error. But when it is clear that an order or judgment was in fact rendered, but was not entered upon the journal through the inadvertence or negligence of the clerk, the court has authority to order it to be supplied. In such a case, the record is merely amended by inserting in the memorial of the proceedings of the court that which has been omitted therefrom." Maxwell, J., in Garrison v. People, 6 Nebr. 274, 281.

[28] Ross v. Ross, 83 Mo. 100.

[29] Hyde v. Curling, 10 Mo. 359.

[30] Moore v. State, 63 Ga. 165.

[31] Allen v. Bradford, 3 Ala. 281, 37 Am. Dec. 689. It is held in Arkansas that if, on appeal from a justice of the peace, judgment is recovered against the appellant and his sureties in the appeal bond, and the clerk omits to include the sureties in the entry of judgment, a *nunc pro tunc* judgment may be entered against them at a subsequent term without notice to them. Freeman v. Mears, 35 Ark. 278; Shaul v. Duprey, 48 Ark. 331, 3 S. W. Rep. 366.

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course of legal procedure, must be taken with an important restriction, viz., that such an entry is not proper unless the case was in such a condition, at the date to which the judgment is to relate back, that a final judgment could then have been entered immediately. If it were otherwise, the death of one's adversary, for example, might operate to one's positive advantage. But this is not the object of the practice. It is intended merely to secure that one shall not suffer for an event which he could not avoid. As it has been said, "a judgment *nunc pro tunc* in case of death is proper only when a party dies after hearing, while the case is under advisement, or after the case has proceeded so far that judgment can be entered, if not as a merely formal act, at least without the need of further inquiry or evidence into matters of fact involved in the controversy."[32] Hence if there is no verdict in the record, the court cannot at a subsequent term order a verdict and judgment to be entered *nunc pro tunc;* if the record does not show that a verdict was rendered, it cannot be supplied at a subsequent term of the court.[33]

§ 134. Notice of Application.

In Alabama it is the settled practice of the courts that a judgment *nunc pro tunc* may be entered at a subsequent term without notice to the opposite party, if there is any order or memorandum of record to warrant the entry.[34] In New York, also, it is held that an entry of judgment *nunc pro tunc* may be ordered without notice, and an improper notice is a mere irregularity, not a fatal defect.[35] But in some other states the view holds, that although a judgment may be entered on a verdict without notice, yet an application to amend a judgment after the term at which it was rendered, must be made upon notice to the adverse party.[36] In general, we may say that the neces-

[32] Hazard v. Durant, 14 R. I. 25.

[33] Gray v. Thomas, 12 Sm. & Mar. 111; Jennings v. Ashley, 5 Ark. 128. And see North v. Pepper, 20 Wend. 677; Kissam v. Hamilton, 20 How. Pr. 375.

[34] Mays v. Hassell, 4 Stew. & Port. 222, 24 Am. Dec. 750; Bentley v. Wright, 3 Ala. 607; Allen v. Bradford, 3 Ala. 281; Glass v. Glass, 24 Ala. 468; Nabers v. Meredith, 67 Ala. 333. Compare Womack v. Sanford, 37 Ala. 445.

[35] Long v. Stafford, 103 N.Y. 274, 8 N. E. Rep. 522.

[36] Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 386; Weed v. Weed, 25 Conn. 337; King v. Burnham, 129 Mass. 598. See *infra*, § 164.

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sity of notice of such an application must depend upon the sources which are to furnish the evidence of the judgment to be entered. If the examination is to be confined to the records, the presence of the defendant could not affect the result, nor would he have room to contest it. But if it is to be based on extraneous proof, it is but just that he should have the opportunity to prepare countervailing testimony.

§ 135. Evidence.

It is held in several of the states that the evidence which will justify the court in entering a judgment *nunc pro tunc* must be *record* evidence; that is, that such entry can only be made upon the production of some note, entry, or memorandum from the records or *quasi* records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered, and what were its character and terms.[37] "We think," said the court in Alabama, "that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."[38] It is somewhat difficult to ascertain from the authorities what will be considered record evidence for this purpose. But it is held that the entry may be based on the judge's minutes or the clerk's entries, or some paper on file in the case, but cannot be made upon the judge's recollection of what took

[37] Adams v. ReQua, 22 Fla. 250; Draughan v. Bank, 1 Stew. (Ala.) 66, 18 Am. Dec. 38; Andrews v. Branch Bank, 10 Ala. 375; Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200; Metcalf v. Metcalf, 19 Ala. 319, 54 Am. Dec. 190; Yonge v. Broxson, 23 Ala. 684; *Ex parte* Jones, 61 Ala. 399; *Ex parte* Gilmer, 64 Ala. 234; Lilly v. Larkin, 66 Ala. 122; Herring v. Cherry, 75 Ala. 376; Kemp v. Lyon, 76 Ala. 212; Shackelford v. Levy, 63 Miss. 125; Raymond v. Smith, 1 Met. (Ky.) 65, 71 Am. Dec. 458; Ludlow v. Johnson, 8 Ohio, 553, 17 Am. Dec. 609; Coughran v. Gutcheus. 18 Ill. 390; Cairo & C. R. Co. v. Holbrook, 72 Ill. 419; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau, 45 Mo. 171, 100 Am. Dec. 366; Fletcher v. Coombs, 58 Mo. 430; Atkinson v. Railroad, 81 Mo. 50; Blize v. Castlio, 8 Mo. App. 290; Swain v. Naglee, 19 Cal. 127; Hegeler v. Henckell, 27 Cal. 491.

[38] Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200.

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place at the trial or upon outside evidence.[39] So entries on the court and bar docket, which are *quasi* records, are admissible evidence; and a recital in the amending judgment that the court "is of opinion" from an inspection of said docket, etc., is equivalent to an averment that the court deemed the evidence satisfactory, and is sufficient to sustain the amendment, unless the entries themselves are shown to be insufficient.[40] And where an order approving the report of commissioners in partition, although informal, taken in connection with the report itself, affords sufficient data, there is no error in the entry at a subsequent term of a judgment *nunc pro tunc* ratifying and giving effect to the report.[41] So a memorandum written by the presiding judge across a motion entered on the motion-docket will authorize a *nunc pro tunc* order.[42]

On the other hand there are numerous cases which hold that an entry *nunc pro tunc* may be ordered on *any* evidence that is sufficient and satisfactory, whether it be parol or otherwise.[43] But the general balance of authority seems to be with the cases holding that so far as concerns the question whether a judgment was ever rendered, that fact must be established by record evidence and cannot be proved by parol,—a rule which, if conservative, is also entirely safe. Thus, when a case stands on the docket as not disposed of, and no entry on the papers or elsewhere is produced indicating any disposition of it, a final judgment cannot be entered *nunc pro tunc* on parol testimony alone, unaided by the judge's recollection, especially where counsel for one of the parties denies on oath all knowledge of the alleged judgment, and there is no positive affirmative evidence but that of the adverse counsel.[44] But when the fact that a judgment

[39] Belkin v. Rhodes, 76 Mo. 643; Graham v. Lynn, 4 B. Mon. 17, 39 Am. Dec. 493; Short v. Kellogg, 10 Ga. 180.

[40] Farmer v. Wilson, 84 Ala. 75.

[41] Mead v. Brown, 65 Mo. 552. And see Wade v. Bryant (Ky.) 7 S. W. Rep. 397.

[42] Harris v. Bradford, 4 Ala. 214. Where the files of the court, the motion, the entry of its filing, its purpose, and the entry of similar orders in the same cause, show that the order was made, a *nunc pro tunc* entry may be made. Hansbrough v. Fudge, 80 Mo. 307.

[43] Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25 Conn. 337; Jacobs v. Burgwyn, 63 N. Car. 193; Aydelotte v. Brittain, 29 Kans. 98; Bobo v. State, 40 Ark. 224; Brownlee v. Commissioners, 101 Ind. 401.

[44] Robertson v. Pharr, 56 Ga. 245; Cadwell v. Dullaghan, 74 Iowa, 239, 37

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was formerly rendered is established by record evidence, it seems entirely reasonable to admit parol proof for the purpose of showing its date, character, and terms, and the relief granted. And it is so held by many respectable authorities.[45] In order to entitle a party to have a judgment entered on the minutes *nunc pro tunc*, he must show when it was rendered; certainly at what term of the court, if not on what day of the term.[46]

§ 136. Relation back of Order.

A *nunc pro tunc* entry of judgment is made as of the time the proceedings of the court actually took place, and becomes a part of the entry of that date the same as if entered then.[47] Hence the entry, by its relation back, will cure any variance between the judgment as originally (defectively) entered and the execution issued thereon.[48] "There can be no doubt that such an entry may operate so as to save proceedings which have been had before it is made. For instance, a judgment is actually made at one term, but through mistake or negligence is not entered of record. Subsequent to the term, the plaintiff, under the impression that the business had all been correctly transacted, prays out execution. The property of the judgment-debtor is levied upon and sold to a *bona fide* purchaser, who parts with his money in good faith. In such case the court may with propriety enter a judgment, to be considered of the term in which it was actually rendered and should have been entered. Such proceedings should be for the furtherance of justice. It would do no injury to the parties concerned, and would secure the rights of an innocent purchaser."[49] But it is held that for the purpose of a statute of lim-

N. W. Rep. 178. Such entry should not be ordered by a judge other than the one who is claimed to have made the original order, upon the mere statement of counsel, excepted to by opposing counsel, that such order was made. Carter v. McBroom, 85 Tenn. 377, 2 S. W. Rep. 803.

[45] Camoran v. Thurmond, 56 Tex. 22; Burnett v. State, 14 Tex. 455; Johnson v. Wright, 27 Ga. 555; Weed v. Weed, 25 Conn. 337; Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189; Rugg v. Parker, 7 Gray, 172; Clark v. Lamb, 8 Pick. 415, 19 Am. Dec. 332; Davis v. Shaver, 1 Phill. (N. Car.) 18.

[46] Robertson v. Pharr, 56 Ga. 245.

[47] Bush v. Bush, 46 Ind. 70.

[48] Jordan v. Petty, 5 Fla. 326.

[49] Ludlow v. Johnston, 3 Ohio, 553, 575.

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itations, the date of the entry of a judgment *nunc pro tunc* is the date of the order of such entry, and not the day as of which the judgment is ordered to take effect.[50]

§ 137. Effect upon Third Persons.

When a judgment is entered *nunc pro tunc*, its effect, so far as it operates by relation back to the earlier date, must be confined to the rights and interests of the original parties; at least it will not be allowed to work detriment to the rights of innocent third persons acquiring interests without notice of the rendition of any judgment.[51] Thus a purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a *nunc pro tunc* judgment against his grantor.[52] So an entry *nunc pro tunc* of a probate decree of insolvency of the estate of a decedent takes effect, as against claims filed by creditors thereof, from the date of actual entry.[53] In order that such an entry of judgment may bind a person who is not a party thereto (such as a surety in a supersedeas bond given on appeal from the judgment as first entered), it must appear that he had notice of the judgment really rendered at the time his rights were acquired or his liability fixed thereunder, or that he had notice of the application to have the *nunc pro tunc* entry made and an opportunity to appeal therefrom.[54]

[50] Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. Rep. 342.

[51] Bank of Newburgh v. Seymour, 14 Johns. 219; Vroom v. Ditmas, 5 Paige, 528; Smith v. Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Galpin v. Fishburne, 8 McCord, 22, 15 Am. Dec. 614; Acklen v. Acklen, 45 Ala. 609; Graham v. Lynn, 4 B. Mon. 18, 39 Am. Dec. 493; Small v. Douthitt, 1 Kans. 385; Shirley v. Phillips, 17 Ill. 471; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Koch v. Railroad, 77 Mo. 354; Hays v. Miller, 1 Wash. Ter. 143.

[52] Miller v. Wolf, 63 Iowa, 233, 18 N. W. Rep. 889.

[53] Acklen v. Acklen, 45 Ala. 609.

[54] Koch v. Atlantic & Pacific R. Co., 77 Mo. 354.

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CHAPTER VIII.

AMOUNT AND CHARACTER OF RELIEF GRANTED.

§ 138. Amount greater than Plaintiff's Demand.
139. Assessment of Damages on Default.
140. Amount indorsed on Summons.
141. Prayer for Relief as Measure of Recovery.
142. Judgment must follow the Verdict.
143. Allowance of Credits.
144. Tender, Counterclaim, Offer of Compromise.
145. Joint Parties.
146. Affirmative Relief to Defendant.
147. Interest.
148. Conditions as to Payment.
149. Statutory Damages.
150. Designation of Amount.
151. Judgment designating Medium of Payment.
152. Judgment for Coined Money.

§ 138. Amount greater than Plaintiff's Demand.

Since judgments are usually rendered for a definite sum of money, and are intended either to enforce the payment of a legal debt, or to establish the existence of a legal right and give compensation for its infraction by an award of damages, it becomes important in this connection to consider the amount and character of the relief which may be granted, the mode of its ascertainment, and the question of designating the medium of payment. These matters will constitute the subject of the present chapter. And first, it is an undisputed rule that if a judgment be rendered for a greater sum, whether by way of debt or damages, than is laid in the *ad damnum* clause, or claimed in the declaration, petition, or complaint, or notified to the defendant by the demand in the summons, then the judgment will be erroneous and liable to reversal.[1] Thus, where a complaint con-

[1] Chaffee v. Hooper, 54 Vt. 513; Andrews v. Monilaws, 15 N. Y. Supreme Ct. 65; Dennison v. Leech, 9 Pa. St. 164; Johnson v. Van Doren, 2 N. J. Law, 374; Lester v. Cloud, 67 Ga. 770; Hillebrant v. Barton, 39 Tex. 599; Janson v. Bank, 48 Tex. 599; Price v. Grand Rapids &c. R. Co., 18 Ind. 137; Oakes v.

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tains two paragraphs, and there is a special finding of facts by the court, and the facts found support all the material allegations of one of the paragraphs, but not of the other, judgment must be rendered as upon the paragraph that is supported by the findings, and it cannot be for an amount greater than is claimed therein to be due.[2] Nor is the application of this rule confined to contested actions. It is equally true, in cases where the defendant suffers a default, that a judgment for more than the plaintiff has claimed is erroneous, and may be set aside, modified on motion, or reversed on appeal.[3] And a judgment for a greater sum than that laid in the declaration cannot stand, even though the defendant confesses judgment for the larger amount.[4] Nor will the defendant's withdrawal of his pleas authorize or sustain a judgment for a sum in excess of that warranted by the cause of action stated in the petition.[5] But it must be observed that a judgment so rendered for an excessive amount is *not void*.[6] Relief may be had against it, or it may be corrected or set aside, in any appropriate mode; nevertheless it is not a mere nullity. Consequently it will stand as a valid adjudication until the proper steps are taken against it, and will be binding upon the parties and not open to collateral attack. And where this is the only error in the judgment it may be rectified without the necessity of entirely vacating it. Thus where a judgment is entered in an action on a bond for an amount greater than the penalty, it may be reformed by remitting the excess.[7] So where a complaint prays judgment for the exact amount due at the first term after suit, but judgment is not then rendered, but is rendered at a subsequent term for a sum exceeding that asked for by the amount of the subsequently accrued

Ward, 19 Ill. 46; Stiles v. Brown, 8 Iowa, 589; Hayton v. Hope, 8 Mo. 53; Beckwith v. Boyce, 12 Mo. 440; Lamping v. Hyatt, 27 Cal. 99; Bond v. Pacheco, 30 Cal. 530.

[2] Helms v. Kearns, 40 Ind. 124.

[3] Andrews v. Monilaws, 15 N. Y. Supreme Ct. 65; Bond v. Pacheco, 30 Cal. 530. But a judgment by default may be rendered against a defendant regularly served with process, for an amount greater than is stated in the summons, if within the damages claimed by the declaration. Thompson v. Turner, 22 Ill. 389.

[4] Lester v. Cloud, 67 Ga. 770.

[5] Janson v. Bank, 48 Tex. 599.

[6] Chaffee v. Hooper, 54 Vt. 513; Bond v. Pacheco, 30 Cal. 530.

[7] Anthony v. Estes (N. Car.), 8 S. E. Rep. 847.

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interest only, such judgment will not be erroneous, but the complaint will be deemed to have been amended so as to demand judgment for the proper sum.[8] It also appears that it is not error to render judgment for an amount of damages exceeding the *ad damnum* in the writ, after the action, together with other claims of the plaintiff against the defendant, has been referred to arbitrators under a rule of court.[9]

§ 139. Assessment of Damages on Default.

We have already seen, in the chapter on judgments by default, that if the amount which the plaintiff is entitled to recover is definitely fixed by the contract or other instrument on which he sues, a final judgment may at once be entered, upon the defendant's default, for such amount; and that the same is true if the amount can be ascertained by a matter of simple calculation. But in other cases, an interlocutory judgment must first be entered, fixing the plaintiff's right to recover, and then the damages assessed by a writ of inquiry or some other proper method.[10] It is therefore erroneous for the court, in an action on an unliquidated claim, to proceed to render final judgment for a specific sum, without the preliminary assessment of damages.[11] And in an action on an open account, in which the defendant was defaulted, the judgment will be set aside if the record does not disclose in what manner and upon what proofs the amount of the judgment was ascertained.[12]

§ 140. Amount indorsed on Summons.

In some of the states, where the code practice is established, it is required by law that in all civil actions for the recovery of money only, the amount for which judgment will be taken, if the defendant

[8] Carpenter v. Sheldon, 23 Ind. 259. That a judgment may be amended in respect to the amount of recovery, see *infra*, § 159.

[9] Day v. Berkshire Woollen Co., 1 Gray, 420.

[10] *Supra*, § 89.

[11] Beam v. Hayden, 5 Bush, 496; Evans v. Parks, 10 Ark. 306; Warren v. Kennedy, 1 Heisk. 487.

[12] Snell v. Irvine, 17 Fla. 284.

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fails to appear, shall be indorsed on the summons. When such indorsement is made, the defendant has a right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he chooses to make no appearance in the action, and it is error to exceed it.[13]

§ 141. Prayer for Relief as Measure of Recovery.

According to the settled practice in equity, the rule in regard to decrees is similar to that just stated as governing judgments at law, viz., that it is error to decree relief not sought in the bill. In other words, if the complainant has prayed for specific relief in the premises, or relief as to a specific subject-matter, no more extensive relief can properly be accorded to him.[14] But it is usual to join with the demand for specific relief a prayer for general relief also, and where this is done, the court is not limited, in its dealing with the matters in litigation, to the orders or decrees particularly asked for, but may take such other action as may be necessary to fully adjust the equities, provided it be not inconsistent with the allegations of the bill and the facts in evidence.[15] So where there are prayers for both specific and general relief, the court, if it refuses the specific relief asked, may still grant any other appropriate relief under the general prayer.[16] But it is the settled rule in equity that a party must recover according to the case made by his bill or not at all,—*secundum allegata* as well as *secundum probata*. Hence, even under a prayer for general relief, the court cannot go outside the case made by the pleadings, and decree in favor of the plaintiff on grounds not stated in his complaint, or grant relief for matters not charged, although they may appear from other parts of the pleadings and be improperly in evidence.[17] But the fact that more

[13] Cleveland Stove Co. v. Grimes, 9 Nebr. 123, 2 N. W. Rep. 345; Basset v. Mitchell (Kans.), 19 Pac. Rep. 671.

[14] Dodge v. Wright, 48 Ill. 382.

[15] Laverty v. Sexton, 41 Iowa, 435; Galloway v. Galloway, 58 Tenn. 328; Colton v. Ross, 2 Paige, 396; Wilkin v. Wilkin, 1 Johns. Ch. 111; Kelly v. Paine, 18 Ala. 371; Stone v. Anderson, 26 N. H. 506; Allen v. Coffman, 1 Bibb, 469; Barr v. Haseldon, 10 Rich. Eq. 58.

[16] Rogers v. Brooks, 30 Ark. 612.

[17] Rome Exchange Bank v. Eames, 4 Abb. App. Dec. 83; Rogers v. Brooks,

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extensive relief, of the same general nature, is prayed in the bill than is warranted by the proofs does not preclude giving so much as the evidence will sustain. Thus if the bill asks relief on an allegation of an abandonment of twenty-six acres of land, and the proof is that sixteen acres only were abandoned, the complainant may be relieved as to the sixteen.[18]

Under the code practice, where the forms of action are abolished, and either a legal or an equitable remedy, or both, may be prosecuted under the same method of procedure, the rules already stated will still hold good, though modified by certain statutory provisions, which we now proceed to notice. The codes generally provide that if there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint.[19] A recent decision in California, construing the phrase "cannot exceed," holds that, in case of default, it is improper to grant the plaintiff *any other* relief than that prayed for.[20] Whence it would appear that if the plaintiff has mistaken his remedy, or otherwise failed to demand the relief appropriate to his case, it would be beyond the power of the court to enter the proper judgment. But this view runs counter to that held in New York, where, the language of the statute being the same, the courts say: "The relief demanded by no means necessarily characterizes the action or limits the plaintiff in respect to the remedy which he may have. If there be no answer, the relief granted connot exceed that which the plaintiff shall have demanded in his complaint. But the fact that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the

30 Ark. 612. For example, if the owner executes two mortgages upon the same land, and the prior mortgagee enforces his mortgage in equity, without making the junior mortgagee a party defendant, and purchases the property at the sale and receives a sheriff's deed, the junior mortgagee may file a bill to redeem; but if his complaint contains only the usual averments in an action to enforce a mortgage, and makes no reference to the prior mortgage, sale, and purchase, the court cannot enter a decree authorizing him to redeem. Carpentier v. Brenham, 50 Cal. 549.

[18] Railroad v. Ragsdale, 54 Miss. 300.

[19] Code N. Y. § 275; Code Civil Proc. Cal. § 580.

[20] Mudge v. Steinhart (Cal.), 20 Pac. Rep. 147.

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two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may, even when no answer is put in, have any relief to which the facts entitled him consistent with that demanded in the complaint."[21] But under this clause, where a complaint contains no prayer for damages, a judgment on default awarding damages is erroneous, although the complaint states facts sufficient to sustain such a judgment.[22] However, under the codes, the extent of the relief to be granted by a judgment is restricted to that prayed for in the complaint *only* in cases where there is no answer; in all other cases any relief may be granted which is consistent with the case made by the pleadings.[23] Thus, for example, where the complaint in an action relating to land contains proper averments to entitle the plaintiffs to possession, and a general prayer for relief, and there are an appearance, trial, and finding that the plaintiffs are owners and entitled to possession, and defendant is in unlawful possession, judgment for possession is proper, though there is no specific prayer therefor.[24] So, in a case where the plaintiff, in an action to recover a street assessment, asked for a judgment against the defendant's lot but not for a personal judgment, and the court rendered judgment against the lot and also ordered that if the lot should not sell for the full amount of the plaintiff's claim, then a personal judgment for the balance should be docketed against the defendant, it was held that the action of the court was proper, it having jurisdiction of both the subject-matter and the person of the defendant.[25] Again, where the plaintiff alleges facts entitling him to both legal and equitable relief, and demands both, the court may award either that is appropriate to the case made by the proof.[26] Nevertheless this equitable power in the courts will not justify them in awarding to the plaintiff, upon a repli-

[21] Hale v. Omaha Nat. Bank, 49 N. Y. 626, Allen, J.

[22] Pittsburgh Mining Co. v. Greenwood, 39 Cal. 71. See Miner v. Pearson, 16 Kans. 27; Olcott v. Kohlsaat, 8 N. Y. Supp. 117.

[23] Marder v. Wright, 70 Iowa, 42, 29 N. W. Rep. 799; Humphrey v. Thorn, 68 Ind. 296, citing 2 Rev. Stat. Ind. (1876) p. 188, § 380, a clause which appears, however, to have been omitted from the revision of 1888.

[24] Evans v. Schafer (Ind.), 21 N. E. Rep. 448. And see Eldridge v. Adams, 54 Barb. 417.

[25] Chase v. Christianson, 41 Cal. 253.

[26] Johnson v. Hathorn, 2 Abb. App. Dec. 465.

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cation, an entirely different judgment from that prayed for in his petition.[27]

§ 142. Judgment must follow the Verdict.

The judgment must follow the verdict, and if the jury have found a verdict for a specified sum of money, the court cannot render judgment for any greater amount; if the verdict is wrong, the remedy is by a new trial.[28] Or a judgment entered for a sum in excess of what the verdict authorized may be reformed so as to bring it within the verdict.[29] If, on the other hand, the verdict is excessive, being for a greater amount of damages than are laid in the declaration, it is said that judgment may be given only for the amount so laid.[30] But this would appear to be adequate ground for a motion in arrest and for new trial; although it would undoubtedly be good practice to enter a *remittitur* for the excess and take judgment for the balance.[31] According to the practice of the United States courts, the clerk has no authority to enter judgment for any other sum than the verdict and statute (the action being statutory) call for; hence where the statute requires interest to be added to the verdict, the clerk cannot enter a judgment for the amount of the verdict without interest, even though the plaintiff waives the interest.[32]

§ 143. Allowance of Credits.

In an action on an obligation for the payment of money, on which credits are indorsed, the judgment should be rendered for the real balance due, deducting the indorsements.[33] But where the judgment on a promissory note, on which there was a payment indorsed, was, by mistake, rendered for the amount of the note apparent on its face, without deducting the payment indorsed, it was held that this did

[27] Marder v. Wright, 70 Iowa, 42, 29 N. W. Rep. 799.

[28] Buck v. Little, 24 Miss. 463; Reid v. Dunklin, 5 Ala. 205; Mitchell v. Geisendorff, 44 Ind. 358.

[29] Stevens' Ex'rs v. Lee, 70 Tex. 279, 8 S. W. Rep. 40.

[30] Baltzell v. Hickman, 4 Litt. 265.

[31] Walker v. Fuller, 29 Ark. 448.

[32] Robostelli v. New York, N. H. & H. R. Co., 34 Fed. Rep. 507.

[33] Grays v. Hines, 4 Munf. 437.

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not invalidate the judgment and render void the proceedings under an execution issued thereon, but relief must be afforded to the party injured in some other mode, the court being inclined to think that his appropriate remedy was by application to a court of chancery.[34] A mistake of this kind, however, could probably be cured by amendment in the court rendering the judgment. It is also held that payments made pending the suit are to be deducted in making up the judgment.[35]

§ 144. Tender, Counterclaim, Offer of Compromise.

If a verdict is returned for a sum less than the amount tendered in court, it would be erroneous to render judgment on the verdict and order the residue to be refunded, inasmuch as the tender admits the whole to be due.[36] The proper practice in such a case would be to set aside the verdict and enter judgment for the amount tendered, the plaintiff being entitled to that much on the pleadings.[37] If the defendant succeeds in establishing a counterclaim, judgment should of course be given in his favor, either for the whole amount or for its excess over the claims proved by the plaintiff, according as the case may be. So a claim for damages for a breach of warranty, interposed by answer to a petition to recover the price of the goods, is in effect a counterclaim, and the court can render judgment for the undisputed portion of the price, and allow the action to proceed as to the sum in dispute.[38] An offer of settlement made by the plaintiff before the commencement of the action, will not preclude him from recovering a larger sum than that contemplated by his offer.[39]

§ 145. Joint Parties.

Embarrassing questions sometimes arise in regard to the amount and character of the judgment in cases where there are numerous

[34] Hathaway v. Hemingway, 20 Conn. 191.

[35] Joy v. Hull, 4 Vt. 455, 24 Am. Dec. 625.

[36] Sweetland v. Tuthill, 54 Ill. 215.

[37] Coffman v. Brown, 7 Colo. 147, 2 Pac. Rep. 905.

[38] Moore v. Woodside, 26 Ohio St. 537. And see Clarkson v. Manson, 60 How. Pr. 48.

[39] Brush v. Railroad, 43 Iowa, 554.

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parties on one side or the other. And first, in regard to joint plaintiffs, it is the rule that several persons having distinct claims against the same defendant cannot make one suit the vehicle for carrying all their demands into judgment. Their recovery is limited to what concerns them jointly. For instance, all persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may unite in an action to abate the nuisance; but in such action they cannot have judgment for the damages done to the property of each, but only such relief as is common to all the plaintiffs, *e. g.*, an injunction against the nuisance.[40] Conversely, one of a class of plaintiffs cannot, in suing alone, procure an adjudication which will be binding upon all, unless the others come in as joint plaintiffs or otherwise connect themselves with the action. Thus, where only one of ten distributees sued the administrator in the probate court, it was held irregular for that court in its judgment, without making the other persons interested parties, to do more than adjudicate the rights of the plaintiff and the administrator.[41] Where proceedings are taken concurrently by several persons against the same fund, it seems they stand on an equal footing. Thus, in a Massachusetts case, where two trustee processes were served at the same time, and judgment was recovered in each for an amount greater than the sum held by the garnishee, it was considered that each of the creditors was entitled to one-half of the fund, though their claims were unequal.[42] Where several defendants are sued jointly in an action on contract, the rule at common law was that the plaintiff could only recover judgment against all or none of them. But this has been changed by statute in many of the states, so that now, in such an action, a judgment may be rendered in favor of one of the defendants and against the other, if the facts warrant it.[43] In equity, a decree between co-defendants, grounded on the pleadings and proofs between the plaintiff and defendants, is regular, and in fact the court is bound to make such a decree in order to avoid a multiplicity of suits.[44] But at law one defendant to a suit cannot

[40] Grant v. Schmidt, 22 Minn. 1.
[41] Williams v. Williams, 74 N. Car. 1.
[42] Davis v. Davis, 2 Cush. 111.
[43] *Supra*, §§ 82, 120; Moffitt v. Bickle, 21 Gratt. 280.
[44] Chamley v. Dusany, 2 Sch. & Lef. 690, 718.

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ordinarily recover a judgment against a co-defendant without a cross-pleading and service of process or an appearance to the cross-pleading by the defendant thereto.[45] In New Hampshire, damages may be apportioned among several defendants by separate judgments, if justice will be promoted by such procedure.[46]

§ 146. Affirmative Relief to Defendant.

In some of the states the code provides that "if a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly."[47] And aside from statutes of this character, courts possessing equitable powers are disposed to complete the adjudication of controversies brought before them by awarding to defendants any relief justified by the facts. In equity, a decree may be rendered in favor of a defendant where he proves to be the creditor and the plaintiff the debtor.[48] So on the foreclosure of a deed of trust, the decree directing the surplus remaining after paying the plaintiff to be paid to the co-defendant, there being no cross-bill, need not find the precise amount due such co-defendant, but only that there is due him more than the surplus.[49]

§ 147. Interest.

Accrued interest on the demand in suit is of course a legal part of the plaintiff's claim and should be included in the judgment. But a judgment for the gross sum of principal and interest made up to a certain day, with interest on such gross sum, is erroneous.[50] The statutes sometimes require that the debt and the interest shall be separately specified. This being the case, it is erroneous to enter the judgment, in an action of debt, for an aggregate sum, including

[45] Cavin v. Williams, 8 Bush, 343.
[46] City Sav. Bank v. Whittle, 63 N. H. 587, 3 Atl. Rep. 645.
[47] Code Civil Proc. Cal. § 666. See Gaff v. Hutchinson, 38 Ind. 341.
[48] Kraker v. Shields, 20 Gratt. 377.
[49] Walker v. Abt, 83 Ill. 226.
[50] Boardman v. Patterson, 1 Gill, 372.

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the debt, interest, and damages, without distinguishing the amount of either.[51] Where, in rendering judgment by default on a demand ascertained by writing, too much interest is calculated and included in the judgment, the error will be corrected on motion, or it may be amended in the appellate court at the cost of the plaintiff in error.[52] It is immaterial that the judgment recites that the money recoverable bears interest from an erroneous date, where it appears that the amount, with interest, for which judgment is rendered does not exceed the amount for which the party complaining is legally liable.[53]

§ 148. Conditions as to Payment.

In certain classes of cases it is customary for the judgment to contain conditions or directions as to the time or manner of payment. Thus a judgment, directed by the court, in an action upon a contract for the sale and purchase of lands, which ascertains the amounts which will become due to the plaintiff, for principal and interest, at the several times stipulated in the contract, may further direct that, in case the same should at those periods remain unpaid, the plaintiff shall have judgments for their recovery and executions for their collection.[54] So a judgment on a bond for the payment of a debt by instalments should be for the debt in the declaration mentioned, to be discharged by payment of the sum due at the time of suit brought, reserving liberty to the plaintiff to resort to *scire facias* to recover such other damages as might thereafter arise upon the condition of the bond.[55] Again, in an action of covenant upon a guaranty by which the covenantor became surety for the punctual payment of the bond of another, and undertook that if the obligor made default, he would pay the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plain-

[51] Wilmans v. Bank, 1 Gilm. 667.

[52] Spence v. Rutledge, 11 Ala. 590. But it is held by the Supreme Court of the United States that the objection that too large an amount of interest has been included in a judgment cannot be raised for the first time in that court. Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. Rep. 739.

[53] Deen v. Blount (Tex.), 9 S. W. Rep. 168.

[54] Libby v. Rosecrans, 55 Barb. 202.

[55] Thatcher v. Taylor, 3 Munf. 249.

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tiff the amount due, but that he should pay or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay the amount to the plaintiff.[56]

§ 149. Statutory Damages.

Where a statute imposes a penalty for the commission or omission of a certain act, the judgment, if for the plaintiff, must be for the full amount of the penalty; the courts have no power to mitigate it, for in so doing they would contravene the expressed legislative will.[57] In cases where the statutes give double or treble damages for a certain kind of injury, the jury, if they find for the plaintiff, should increase the damages which they find by the statutory multiple; but if the verdict in terms finds only single damages, the court will perform the multiplication and direct judgment to be entered for the increased amount.[58] Under a declaration containing a count for a common law trespass and a count for the statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute, and proceed to render judgment for treble the damages returned.[59]

§ 150. Designation of Amount.

The amount of a judgment must be stated in it with certainty and precision; an incurable ambiguity in this respect will be sufficient to invalidate the judgment. But the judgment is to be construed with reference to the pleadings and other parts of the record, and if these furnish data from which the amount of the recovery can be ascertained with certainty, it is probably sufficient. All judgments ren-

[56] Farnham v. Mallory, 2 Abb. App. Dec. 100.

[57] Powell v. Redfield, 4 Blatchf. 47; United States v. Montell, Taney, 47; Clarke v. Barnard, 108 U. S. 436, 2 Sup. Ct. Rep. 878.

[58] Palmer v. York Bank, 18 Me. 166; Royse v. May, 93 Pa. St. 454; Shrewsbury v. Bawtlitz, 57 Mo. 414; Osborn v. Lovell, 36 Mich. 246; Chipman v. Emrick, 5 Cal. 239; Sedgwick on Damages, 588.

[59] Osborn v. Lovell, 36 Mich. 246.

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dered in this country should also be expressed in the American denominations of money; and the amount should be written out, or at least, if expressed in figures, should be accompanied by some appropriate mark or sign to indicate what denominations of money are meant.[60]

§ 151. Judgment designating Medium of Payment.

As a general rule, a judgment, being merely the sentence of the law upon the facts shown by the pleadings and proof, has nothing to do with the means or the medium of satisfying the debt which it establishes. Hence, where a suit is for a money demand, the court has no power (with exceptions to be noted in the next section), after giving judgment for the amount claimed, to specify in what kind of money it shall be paid; when the plaintiff is entitled to a judgment, the law determines how it shall be satisfied.[61] But where a promissory note was made payable "in the currency of the country but not in Confederate notes," it was held that the recovery should be for such notes as were actually in circulation at the maturity of the note, although greatly depreciated in value.[62]

§ 152. Judgment for Coined Money.

When the Legal Tender Act (Act Congr. Feb. 25, 1862) first came before the supreme federal tribunal for interpretation, it was held to be unconstitutional. The court ruled that in respect to contracts which were expressed to be payable in gold or silver coin or in "specie," the act could have no application, whether such contracts were made before or after its passage; that such contracts could not be satisfied by a tender in treasury notes; and that when a contract so worded was put in suit, the judgment rendered upon it should specify coined dollars and parts of dollars as the medium of its satisfaction.[63] Notwithstanding this decision, some of the cases, refusing to accept this construction of the act, or preferring to abide by the

[60] *Supra*, § 118.
[61] Swain v. Smith, 65 N. Car. 211.
[62] Coffin v. Hill, 1 Heisk. 385.
[63] Bronson v. Rhodes, 7 Wall. 245; Butler v. Horwitz, 7 Wall. 259; Dewing v. Sears, 11 Wall. 379; Trebilsck v. Wilson, 12 Wall. 687; Hepburn v. Griswold, 8 Wall. 604.

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rule that the courts have nothing to do with the manner in which a judgment or execution shall be satisfied, held that it would be entirely erroneous to enter judgment for a particular kind of money.[64] But in a majority of the states the courts followed the lead of the federal decisions, and maintained the rule that if the contract specified gold or silver as its medium of payment, the judgment upon it must do likewise.[65] It was also held that if the contract was only solvable in coin it would be improper to render judgment for the market value of that amount of coin calculated in terms of the treasury notes; the judgment must simply be for so much gold or silver.[66] Also it was considered that interest on the debt could only be paid in coined money.[67] But the costs of the action might be paid in legal tender notes.[68] However, it was only in respect to contracts expressly stipulating for payment in coin that judgments for coin could be entered. In suits for unliquidated damages, such judgments were not permissible.[69] Nor could they be rendered in actions of tort.[70] So a person who deposited gold with a banker was only

[64] Davis v. Field, 43 Vt. 231; Munter v. Rogers, 50 Ala. 283; Windisch v. Gussett, 30 Tex. 744; Flournoy v. Healy, 31 Tex. 590; Olanyer v. Blanchard, 18 La. Ann. 616; Whetstone v. Colley, 36 Ill. 328; Burling v. Goodman, 1 Nev. 314; Buchegger v. Schultz, 13 Mich. 420; Wood v. Bullens, 6 Allen, 518; Killough v. Alford, 32 Tex. 457; Reed v. Eldredge, 27 Cal. 346.

[65] Independent Ins. Co. v. Thomas, 104 Mass. 192; Paddock v. Ins. Co., 104 Mass. 521; Chrysler v. Renois, 43 N. Y. 209; Kellogg v. Sweeney, 46 N. Y. 291; Ransford v. Marvin, 8 Abb. Pr. N. S. 432; McCalla v. Ely, 64 Pa. St. 254; Chesapeake Bank v. Swain, 29 Md. 483; Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; Foster v. Railroad, 1 Mo. App. 390; Harding v. Cowing, 28 Cal. 212; Reese v. Stearns, 29 Cal. 273; Wimans v. Hassey, 48 Cal. 634; McGoon v. Shirk, 54 Ill. 406; Hittson v. Davenport, 4 Colo. 169; Smith v. Wood, 37 Tex. 620.

[66] Dewing v. Sears, 11 Wall. 379; Davis v. Mason, 3 Oreg. 154; Foster v. Railroad, 1 Mo. App. 390; Phillips v. Dugan, 21 Ohio St. 466. In an action on a promissory note made payable in gold, a judgment was rendered for the face of the note and interest thereon, together with 40 per cent. on account of the depreciation of the currency. It was *held*, that this was error, whether the act making treasury notes a legal tender is constitutional or not. In the first case, the currency and gold are of equal value before the law. In the second case, the plaintiff has the right to refuse the notes, no matter in what quantity offered, and to demand payment of his debt in gold. Henderson v. McPike, 35 Mo. 255.

[67] Chesapeake Bank v. Swain, 29 Md. 483; Chrysler v. Renois, 43 N. Y. 209.

[68] Phillipps v. Dugan, 21 Ohio St. 466; Chrysler v. Renois, 43 N. Y. 209.

[69] Calhoun v. Pace, 37 Tex. 454.

[70] Livingston v. Morgan, 53 Cal. 23. Where there is no allegation in the complaint that there was an agreement to

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entitled to recover the amount in dollars and cents in the circulating medium of the country.[71] But a judgment on a promissory note expressed to be payable "in gold coin or its equivalent in United States legal tender notes," rendered simply for gold coin, would be erroneous. The judgment should follow the contract, fixing the amount to be paid if paid in gold, and the amount to be paid if paid in legal tender notes.[72] A condition in a note expressed to be payable in gold coin, that "if it is paid at maturity or before suit brought, it shall be payable in lawful money," does not impair the right, in case it is necessary to bring suit, to recover judgment in gold coin.[73]

At a later period, the United States Supreme Court reversed their former rulings on the legal tender acts, and pronounced those statutes valid and constitutional and applicable to all species of contracts.[74] This reconsideration of the former decisions does not affect existing judgments of the state courts or require a modification or change of their records.[75] But it renders it useless, for the future, to specify in any judgment how it shall be paid; since, whatever the judgment may declare, it is solvable in legal tender notes. Hence if a jury should now assess the damages for the plaintiff in gold coin, the court may disregard so much of the verdict as relates to coin and enter a judgment which does not specify any particular kind of money.[76]

pay in gold coin, the court cannot render a judgment payable in gold coin, even if the verdict of the jury is for gold. The verdict cannot go beyond the issues in the case. Watson v. Railroad, 50 Cal. 523.

[71] Gumbel v. Abrahms, 20 La. Ann. 568, 96 Am. Dec. 426.

[72] Wells v. Van Sickle, 6 Nev. 45.

[73] Churchman v. Martin, 54 Ind. 380.

[74] Legal Tender Cases, 12 Wall. 457; Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. Rep. 122.

[75] Miller v. Tyler, 58 N. Y. 477.

[76] Chamberlin v. Vance, 51 Cal. 75.

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CHAPTER IX.

THE AMENDMENT OF JUDGMENTS.

§ 153. Amendment during the Term.
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155. Correction of Clerical Errors.
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§ 153. Amendment during the Term.

A judgment may be incorrect, imperfect, or erroneous, and therefore stand in need of revision or amendment, from either of two causes; that is, either because the entry fails to correspond with the judgment actually intended to be given, in consequence of some omission, mistake, or inadvertence; or because the judgment actually rendered was one that ought not to have been given, the error being due to misinformation or a wrong apprehension of the law. The principles of justice obviously require that what has been done amiss should be set right. But in order to secure stability to the formal and solemn records of the courts, the rules of practice have established important limitations upon the power of a court to correct or revise its own sentences. These limitations rest mainly upon a distinction which originated in the common law, and was there considered of the greatest consequence. During the whole of the term

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in which any judicial act was done the proceedings were considered to continue *in fieri*, and even after a judgment was rendered, the record was said to remain "in the breast of the judges of the court and in their remembrance," and therefore the judgment was subject to such amendment or alteration as they might direct. But after the term had passed, the record no longer remained in this nebulous condition. It was then spread at large upon the judgment-roll, and thereupon acquired an inalterable and indisputable character, passed beyond the control of the court, and admitted of no alteration, modification, or contradiction.[1] The distinction between power to act during the term and power to act after the term has survived in many points of modern practice. And in regard to the *first* part of the common law rule, as above stated, there can be no doubt that it still stands as sound law. The authorities all hold that a court has plenary control of its judgments, orders, and decrees during the term at which they are rendered, and may amend, correct, modify, or supplement them, for cause appearing, or may, to promote justice, revise, supersede, revoke, or vacate them, as may in its discretion seem necessary.[2] Thus an order of record setting aside a verdict may be corrected by the court at any time during the term at which it was rendered.[3] And the court may allow a judgment to be amended as to the name of a member of a firm, so as to correctly describe the firm against which the judgment is given.[4] Nor is it only in respect to clerical misprisions or omissions that this power of amendment during the term may be exercised; it also extends to the errors of the court. Thus, where a court makes an erroneous order under a mistaken view of the law, it may, during the term, of its own motion, correct the mistake by expunging such order and entering an order in accordance with the law of

[1] Co. Litt. 260a; 3 Bl. Comm. 407.

[2] Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. Rep. 332; Alabama Ins. Co. v. Nichols, 109 U. S. 232, 3 Sup. Ct. Rep. 120; Memphis v. Brown, 94 U. S. 715; Tilton v. Barrell, 17 Fed. Rep. 59; Burch v. Scott, 1 Bland Ch. 112; Lemacks v. Glover, 1 Rich. Ch. 141; Worthington v. Campbell (Ky.), 1 S. W. Rep. 714; Lane v. Ellinger, 32 Tex. 369; Richardson v. Howk, 45 Ind. 451; Stahl v. Webster, 11 Ill. 511; Becker v. Sauter, 89 Ill. 596; Harris v. State (Nebr.), 40 N. W. Rep. 317; De Castro v. Richardson, 25 Cal. 49.

[3] Dawson v. Wisner, 11 Iowa, 6.

[4] Sugg v. Thornton (Tex.), 9 S. W. Rep. 145.

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the case.[5] So a final decree which is incorrect in regard to an item of costs, which error was caused by the court's not being correctly informed, will be corrected in that particular on motion made during the term.[6] Again, where a receiver has been ordered, by mistake, before a final settlement, to pay out more money than is liable to come into his hands as such receiver, the order may be amended and modified, either upon direct and summary proceedings, or by the court upon its own motion.[7] It is even held that the court, in a criminal action, may set aside a judgment made in regular course, imposing on the defendant a fine and the costs of the proceedings, during the same term in which the judgment was rendered, and before any part of it has been performed, and may impose a greater fine than was imposed by the first judgment.[8]

§ 154. Amendment after the Term.

That part of the common law rule which declares that no judgment can be amended after the term at which it was rendered, can scarcely be said to survive, in this country, in all its original inflexibility. Divided between the policy of administering justice liberally and equitably and the habit of ascribing the utmost sanctity to a record once completed, the courts have suffered exceptions to be introduced which are of such importance as to require the rule to be much modified before it will apply to contemporary practice. A conservative statement of the rule as at present observed, and one fully supported by the authorities, would be as follows: After the expiration of the term at which a judgment or decree was rendered, it is out of the power of the court to amend it in any matter of *substance* or in any matter affecting the *merits*.[9] It is said by the

[5] Wolmerstadt v. Jacobs, 61 Iowa, 372, 16 N. W. Rep. 217.

[6] Bishop v. Aborn (R. I.), 18 Atl. Rep. 203.

[7] Ryon v. Thomas, 104 Ind. 59, 3 N. E. Rep. 653.

[8] State v. Daugherty, 70 Iowa, 439, 30 N. W. Rep. 685.

[9] Harrison v. State, 10 Mo. 686; Botkin v. Commissioners, 1 Ohio, 375, 13 Am. Dec. 630; Bramblet v. Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350; Becker v. Sauter, 89 Ill. 596; Humphreyville v. Culver, 73 Ill. 485; Smith v. Armstrong, 25 Wis. 517; Clark v. Lary, 3 Sneed, 77; Cook v. Wood, 24 Ill. 295; Balis v. Wilson, 12 Mart. (La.) 358, 13 Am. Dec. 376; McLean v. Stewart, 21

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supreme court of Illinois, "The general rule is that courts, while a cause is pending and the parties before them, have control over the record and proceedings in the cause, and that they have jurisdiction over their judgments and final orders of a pending term, and may, during the term or while the cause is depending, and the parties in court, for cause appearing, amend or set them aside. But after the expiration of the term, unless the cause is still depending and the parties are in court, their power over the record is confined to errors and mistakes of their officers; and these may at any time, upon notice to the parties in interest, and saving such rights as in the interval of time may have accrued to third persons, be corrected so as to make the record conform to the action or judgment of the court."[10] In the following sections we shall endeavor to show that, beside the correction of clerical errors, the courts have power, after the term, to supply omissions in a judgment, and to reform and perfect it, so as to make it conform exactly to the judgment intended to be given in the case; but that they cannot use the power of amendment to correct *judicial* errors or to enter a judgment which was neither in fact rendered nor intended to be rendered. Taken with these corollaries, the rule as above stated will be found to express the common opinion of the authorities on this point at the present time.

In illustration of the rule, the following decisions may be cited. Where the court had fully disposed of a cause upon the pleadings and evidence and rendered judgment thereon, it was held that the judge had no power, after the adjournment of the term, to render another and different judgment upon the same record, without further pleadings, suggestions, or evidence; any such second judgment was a mere nullity.[11] So after a judgment was rendered and the court had adjourned, it was considered that an error therein could not be cured by the entry of a *remittitur* of an excess of damages.[12] A recent Virginia case holds that a decree for alimony, affirmed on appeal as to

N. Y. Superior Ct. 472; Daviess County Court v. Howard, 13 Bush, 101; Ocoee Bank v. Hughes, 2 Cold. 52; Killpatrick v. Rose, 9 Johns. 78; Coughran v. Gutcheus, 18 Ill. 390.

[10] Coughran v. Gutcheus, 18 Ill. 390, Skinner, J.

[11] Bethel v. Bethel, 6 Bush, 65, 99 Am. Dec. 655.

[12] Buckles v. Bank, 63 Ill. 268.

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the date at which payments should commence, is final, and when, in subsequent proceedings in the trial court to ascertain its amount, payment is fixed as beginning at a different date, such action is erroneous and will be reversed.[13] In California, the court has no power to amend an order made at a previous term, unless a motion was made or some proceedings instituted at such term to procure the amendment to be made and the motions or proceedings were continued, or unless the record discloses that the order as entered was not the one made by the court.[14] It follows also that a judgment cannot be *expunged* at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. In such case the record of the judgment imports absolute verity and cannot be assailed for the lack of such vouchers.[15] But the rule that the court has no power over its judgments after the expiration of the term, applies only to *final* judgments, not to judgments which are still *in fieri*, as an order for a partition.[16]

§ 155. Correction of Clerical Errors.

As regards mere clerical errors, mistakes arising from inadvertence, or formal misprisions of clerks or other officers, it is always in the power of the court, even after the adjournment of the term, to make such corrections or amendments as truth requires.[17] Hence a mistake in entering a decree, which is manifestly a clerical error, which cannot mislead, and which does not prejudice the appellant, is no ground for reversal.[18] A court may, upon motion of one party and

[13] Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12.

[14] De Castro v. Richardson, 25 Cal. 49.

[15] Jones v. Hart, 60 Mo. 351.

[16] Hastings v. Cunningham, 35 Cal. 549.

[17] Balch v. Shaw, 7 Cush. 282; Fay v. Wenzell, 8 Cush. 315; Wilson v. Myers, 4 Hawks, 73, 15 Am. Dec. 510; Speed's Exrs. v. Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78; Smith v. Mullins, 3 Met. (Ky.) 182; Brady v. Beason, 6 Ired. 425; Portis v. Talbot, 33 Ark. 218; Russell v. Irwin, 41 Ala. 292; Johnson v. Bank, 2 Duvall, 521; Hammer v. McConnell, 2 Ohio, 31; Ohio v. Beam, 8 Ohio St. 508; Silner v. Butterfield, 2 Ind. 24; Sherman v. Nixon, 37 Ind. 153; Jenkins v. Long, 23 Ind. 460; Smith v. Wilson, 26 Ill. 186; Hickman v. Barnes, 1 Mo. 156; State v. Primm, 61 Mo. 166; Swain v. Naglee, 19 Cal. 127; Will v. Sinkwitz, 41 Cal. 588; Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. Rep. 732.

[18] Eau Claire Lumber Co. v. Anderson, 13 Mo. App. 429.

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due notice to the other, amend a docket entry by inserting the true date of the rendition of the judgment, where a wrong date appears of record.[19] So a misnomer of the term of the court in the entry of a judgment is a clerical error and amendable.[20] A judgment entered against the defendant as executor or administrator, instead of against the goods of the estate, may be amended by another part of the record upon motion, as the mistake plainly arises from the misprision of the clerk.[21] So where it is shown, on a motion to correct the entry of a judgment of dismissal of an action as to a party thereto, that the order of dismissal was not intended or understood by either party to include a dismissal of the cause of action against such party, the error being a clerical misprision, the entry may be corrected.[22] In Alabama the circuit courts have authority, under the laws of the state, to amend a judgment at any time within three years after its rendition, by the correction of any clerical error or mistake, where there is sufficient matter apparent on the record to amend by.[23]

§ 156. Supplying Omissions.

In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Hence if anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then

[19] Grimes v. Grosjean (Nebr.), 40 N. W. Rep. 137; Carlton v. Patterson, 29 N. H. 580.

[20] Burnham v. Chicago, 24 Ill. 496.

[21] Atkins v. Sawyer, 1 Pick. 351, 11 Am. Dec. 188; Yarborough v. Scott, 5 Ala. 221; Speed's Exrs. v. Hann, 1 T. B. Mon. 16, 15 Am. Dec. 78. "The change of the judgment, by amendment, from a judgment against the plaintiff personally to one against her *de bonis testatoris*, was one which it was competent for the court to make. The object was to correct a mistake in the original entry, so as to conform the record to the judgment which was in fact pronounced, and not to change such judgment. Such corrections may always be made." Wyman v. Buckstaff, 24 Wis. 477.

[22] Stuart v. Logansport, 87 Ind. 584.

[23] Lee v. Houston, 20 Ala. 801; Code of Ala. 1886, § 2836.

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the omission may be supplied by an amendment after the term.[24] If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment. For example, in the entry of a final judgment against a garnishee, it is the duty of the clerk to recite the fact and the amount of the original judgment against the defendant, but his failure to do so is a clerical error which may be corrected *nunc pro tunc* at a subsequent term.[25] So a judgment in favor of A. "administrator" may be amended so as to show that it was recovered by A. as administrator of B., deceased.[26] The omission of the clerk's signature to a judgment filed and docketed, where that is required, may be supplied in like manner.[27] And the power of ordering amendments of this character extends as well to other parts of the record as to the judgment itself. Thus, when the court had in fact jurisdiction of the defendant, but the return of the constable failed to show that fact, the record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.[28] So where the Christian name of an appraiser was omitted in drawing up a decree for the appraisement and sale of trust property, the court directed it to be inserted in the original decree in the register's minutes, it being a merely formal matter.[29] Again, where a guardian *ad litem* was appointed at the proper term, but no entry made on the docket, the entry may be subsequently supplied.[30] And in another case, where the omission occurred through the inadvertence of the plaintiff's attorney, and it was necessary that it should be supplied in order to perfect the record, although it would not vary the judgment, the

[24] Lewis v. Ross, 87 Me. 280, 59 Am. Dec. 49; State v. Moran, 24 Nebr. 103, 38 N. W. Rep. 29; Galloway v. McKeithen, 5 Ired. 12, 13 Am. Dec. 153; Gaines v. Wedgeworth, 19 Ga. 31; Reid v. Morton, 119 Ill. 118, 6 N. E. Rep. 414; Thorp v. Platt, 34 Iowa, 314; Trammell v. Trammell, 25 Tex. Supp. 261; Rogers v. Rogers, 1 Paige, 188; Bank v. Seymour, 14 Johns. 219; Gardner v. Dering, 2 Edw. Ch. 131; Ray v. Connor, 3 Edw. Ch. 478.

[25] Whorley v. Memphis & Charleston R. Co., 72 Ala. 20.

[26] Crane v. Crane (Ark.), 11 S. W. Rep. 1.

[27] Seaman v. Drake, 1 Caines, 9.

[28] Allison v. Thomas, 72 Cal. 562, 14 Pac. Rep. 309. And see Fawcett v. Vary, 59 N. Y. 597.

[29] De Caters v. De Chaumont, 3 Paige, 178.

[30] Johnson v. Wright, 27 Ga. 555.

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learned judge, in allowing the amendment, said: "I cannot discover any difference, as to the allowing of an amendment, whether the mistake has happened through the omission of an attorney or by that of the clerk. Both are equally officers of the court."[31] But on the other hand, as already stated, the power of amendment cannot be made the means of adding to a judgment or decree something not originally contemplated by it or which is foreign to its intended scope and purpose. Thus, in an Illinois case, it appeared that a decree had been drawn up by the plaintiff's solicitor and accepted and signed by the judge as the decree of the court; afterwards it was discovered that the solicitor had omitted from the decree a clause which he had intended to make a part of it, and application was made to have it added. But it was considered to be no proper case for an amendment, inasmuch as it did not appear that *the court* had intended to insert the clause in question, and consequently to add it by amendment would be to change the sentence pronounced and revise its own decree.[32]

§ 157. Reforming and Perfecting the Judgment.

A judgment entry may be amended at any time to make it correspond with the judgment actually rendered.[33] And for this purpose either additions or elisions may be made. In a case where the judgment pronounced by the court upon motion of the defendant was "that the complaint be dismissed with costs," and the judgment entered by the clerk was that the complaint be dismissed "upon the merits" with costs to the defendant, it was held that the insertion of the words quoted was a material addition to the judgment which the clerk had no authority to make, and was properly stricken out on motion.[34] This power may also be used to clear up ambiguities. Thus it is

[31] Close v. Gillespey, 3 Johns. 526.

[32] Forquer v. Forquer, 19 Ill. 68.

[33] Gilmer v. Grand Rapids, 16 Fed. Rep. 708; Capen v. Stoughton, 16 Gray, 364; Portis v. Talbot, 33 Ark. 218. Where the record stated that the continuance was set aside, but from other expressions in the order, and other proceedings in the cause, it was manifest that it was a judgment by default that was set aside, it was held to be amendable. Sharpe v. Fowler, 6 Litt. 446.

[34] Williams v. Hayes, 68 Wis. 248, 32 N. W. Rep. 44.

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held that the court has power to amend a judgment for a specified quantity of water, "miners' measurement," so as to relieve it of the uncertainty of that term, the amendment being made on the uncontradicted testimony in the case, made a part of the motion papers. The court remarked: "We do not doubt the soundness of the rule that the trial court cannot at a subsequent time so modify a judgment that the modification is in effect a reversal. That is the province of the appellate court. But the trial court has the power to modify or correct the judgment or record to such an extent that the relief granted may be such as was intended to be granted."[35] On similar principles, the court may amend its record by transferring the proceedings to the proper suit when by mistake they have been filed in a suit to which they do not belong.[36] In this connection, the following observations of the court in North Carolina will be found instructive. "As a general rule, it is unquestionably true that no act of the court, as contradistinguished from the act of its officers or of the parties, can be allowed to be amended, but during the term at which it was done. During the term the record is said to be in the breast of the judge; after it is over it is upon the roll. But this rule applies to such amendments as call into action the judgment or discretion of the court, and not to such as are a matter of course. In such cases, the reasons of the rule no longer operate; for, as much as the law confides in the integrity of the court, it admits a possibility of its being corrupt, and therefore guards it from temptation."[37] It is held that a judgment by *consent* cannot be corrected by the court without the consent of all parties to it. It is not the judgment of the court except in the sense that it is recorded and has the effect of a judgment. In such case, the court can only correct its own errors in making the entries, as, for instance, the misprision of its clerk.[38]

[35] Welch v. Keene (Mont.), 21 Pac. Rep. 25.

[36] Sweeny v. Delany, 1 Pa. St. 320, 44 Am. Dec. 136.

[37] Wilson v. Myers, 4 Hawks, 73, 15 Am. Dec. 510.

[38] McEachern v. Kerchner, 90 N. Car. 177. And see Knox v. Moser, 72 Iowa, 154, 33 N. W. Rep. 617.

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§ 158. Judicial Errors not to be thus Corrected.

The allowance of an amendment should never be used by the court as a means of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered nor intended to render.[39] "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court, and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record, or by striking out a statement of a fact improperly introduced, and when the record affords sufficient evidence. But when the defect consists in the failure of the court to render the proper judgment, or arises from a want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer *sub judice*. The purpose of amendment is to make the judgment conform to what the court intended it should be, to set right the record and make it speak the truth, so that omissions or clerical errors shall not prejudice parties litigant. The power to amend *nunc pro tunc* is not revisory in its nature, and is not intended to correct *judicial* errors. Such amendments 'ought never to be the means of modifying or enlarging the judgment, or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been pronounced.' However erroneous, the express judgment of the court cannot be corrected at a subsequent term."[40] A judgment granting a divorce and making distribution of property is final; and a modification thereof, by incumbering land given to plaintiff with a lien for the payment of a sum to defendant, and providing for a sale of the land unless the plaintiff mortgages it to a trustee to secure the sum, made more than a year after its rendition, is without jurisdiction and void.[41]

[39] Durning v. Burkhardt, 84 Wis. 585; Pinger v. Vanclick, 86 Wis. 141; Duffey v. Houtz, 105 Pa. St. 96; Turner v. Christy, 50 Mo. 145; Milam Co. v. Robertson, 47 Tex. 222.

[40] Browder v. Faulkner, 82 Ala. 257, 3 South. Rep. 30, citing Whorley v. Railroad, 72 Ala. 20; Emerson v. Head, 81 Ala. 443, 1 South. Rep. 197; Freem. Judgm. § 70.

[41] Thompson v. Thompson (Wis.), 40 N. W. Rep. 671.

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§ 159. Amendment as to Amount of Judgment.

If there has been obvious error on the part of the clerk of the court in the entry of the amount recovered by a judgment, the entry may be amended to conform to the truth.[42] Thus if, through an error of the clerk, a judgment by default has been entered for a sum too small, as appears on the face of the papers, the judgment may be corrected on motion at a subsequent term, even although the amount for which it was erroneously entered has been paid.[43] Relief of this kind was administered in an early New York case, where the power seems to have been pushed to its extreme limit. It appeared that after interlocutory judgment in an action against an indorser, the clerk of the court made a mistake in the assessment of the damages, by calculating the interest for one year less than the actual time, and the plaintiff's attorney, without observing the mistake, filed the report of the assessment and entered final judgment thereon, and on receiving payment of the amount of damages and costs, according to such assessment, acknowledged satisfaction of the judgment, which was entered of record; but afterwards, on paying over the money to the plaintiff, the mistake was discovered, but the defendant refused to rectify it. On this state of facts, the court, on motion for that purpose, ordered the entry of satisfaction of the judgment and all proceedings in the cause subsequent to the interlocutory judgment to be vacated, and the report of the clerk of the assessment of damages, the record of the judgment, and the satisfaction thereof, to be taken off the files of the court and cancelled, and the damages to be reassessed by the clerk, allowing the defendant credit for the amount paid by him.[44]

If the clerk, without authority, enters judgment in excess of the verdict, with interest from the time the entry was made, in this case also the judgment should be modified, so that the amount may cor-

[42] Arrington v. Conrey, 17 Ark. 100; Smith v. Hood, 25 Pa. St. 218, 64 Am. Dec. 692; Wall v. Covington, 83 N. Car. 144; Daniels v. McGinnis, 97 Ind. 549; Sherry v. Priest, 57 Ala. 410; Modawell v. Hudson, 57 Ala. 75; Miller v. Royce, 60 Ind. 189.

[43] Sherman v. Nixon, 87 Ind. 153.

[44] Mechanic's Bank v. Minthorne, 19 Johns. 244.

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respond with the verdict and the interest run from the date of the verdict.[45] So if a judgment is rendered for a sum greater than the amount of the plaintiff's claim, it may be corrected on motion.[46] The same rule applies also if there is a manifest fault in the verdict itself. Thus if the jury bring in a verdict for a sum which is less than that admitted to be due on the face of the pleadings, the judgment, if entered according to the verdict, may afterwards be reformed.[47] Again, in an action of debt, where the judgment was erroneously entered for damages alone, it was held that the defendant in error might, on application to the court in which the judgment was rendered, amend the entry so as to make it a judgment for the debt in the declaration mentioned, to be discharged on payment of the damages found by the jury.[48] And in an English case, the record in a penal action, where the jury by mistake gave damages, being carried by writ of error to the King's Bench, it was held that the plaintiff might enter a *remittitur* of the damages on the record, and the transcript might be made conformable thereto.[49]

§ 160. Amendment in Respect of Parties.

If the entry of a judgment is open to objection because the parties are incorrectly named or erroneously described in it, it may be amended on motion so as to conform to the other parts of the record.[50] This is also true if the entry, in this respect, is not sufficiently definite or precise. Thus, where a judgment as first entered was defective in not designating the defendants who were personally liable for the debt, but the record showed who they were, it was held that the court had power to amend the judgment at any time by adding a clause specifying the defendants so liable.[51] Also, if the judgment is irregular, as embracing more parties than the record justifies, it is proper practice to correct the judgment in the trial

[45] Alpers v. Schammel, 75 Cal. 590, 17 Pac. Rep. 708.

[46] Dunn v. Tillotson, 9 Port. 272; Smith v. Robinson, 11 Ala. 270.

[47] Brown v. Lawler, 21 Minn. 327.

[48] O'Conner v. Mullen, 11 Ill. 57.

[49] Hardy v. Cathcart, 1 Marsh. 180.

[50] Wright v. McBride, 42 Ga. 234; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; Shelly v. Dobbins, 31 La. Ann. 530.

[51] Leviston v. Swan, 33 Cal. 480.

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court.[52] Thus if process issues against two defendants, and one only is served, and the pleadings are against that one, but verdict and judgment against both, the entry may be amended at a subsequent term by striking out the name of the defendant not served.[53] So where a firm consisting of three partners was sued, and one accepted service and appeared for all, and judgment went against the three individually, and the two defendants not served then moved for a new trial on the ground that the other had no authority to appear or plead for them, it was held to be in the discretion of the court to reform the judgment, so as to award execution against the firm and against the individual property of the partner served, instead of granting a new trial.[54] Again, where a judgment is rendered against several defendants, one of whom dies previous to its rendition, it may be amended, on motion, by vacating it as to the deceased defendant and continuing its vitality as against the others.[55] If a judgment may be corrected by striking out the name of a party improperly inserted in it, so also may it be amended, after the term, by inserting the name of one of the parties, omitted through mistake, when there is sufficient record evidence by which to make the correction.[56] But if a suit is brought in the name of A. "and others," it is held that the record cannot be amended by striking out the word "others" and inserting the name of another party, more especially when the cause had previously been referred to arbitrators, from whose award there had been an appeal.[57] Nor has the court power to modify its own judgment, rendered at a former term, by changing it from a judgment against the plaintiff (who brought the suit, in his official capacity, upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought.[58] But in another case, where, by mis-

[52] Mulliken v. Hull, 5 Cal. 245.

[53] Hammer v. McConnel, 2 Ohio, 32; Leman v. Young, 14 Ind. 3; People's Bank v. McArthur, 82 N. Car. 107.

[54] Henderson v. Banks, 70 Tex. 398, 7 S. W. Rep. 815.

[55] Hood v. Bank, 9 Ala. 335.

[56] Whitaker v. Gee, 63 Tex. 435; Russell v. Erwin, 41 Ala. 292. But it seems the court cannot allow the amendment of a judgment confessed severally on a joint bond, by adding the name of the co-obligor. Brown v. Smyth, 4 Harringt. 204. And see Sprague v. Jones, 9 Paige, 395.

[57] Carskadden v. McGhee, 7 Watts & S. 140.

[58] Boland v. Benson, 54 Wis. 387, 11 N. W. Rep. 911.

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take, a judgment had been entered up in favor of a former administratrix, whose letters had abated by marriage, it was considered proper for the court to amend the judgment so as to make it read in favor of the administrator *de bonis non*, if he had been duly made a party and was the real plaintiff when the judgment to be corrected was entered.[59]

§ 161. What Courts have Power of Amendment.

All courts, from the highest to the lowest, whose proceedings are preserved in any species of record or memorial, have the power and authority to make such corrections therein as truth and justice require and the rules of law permit. And this power, being inherent, belongs to a court merely as such, and does not depend upon a statutory grant of jurisdiction. An appellate court may modify and change its orders and decrees before they become final, and may, even at a subsequent term, amend its records in respect of clerical errors and mistakes.[60] And its power extends even further than this. For if, on an appeal, the only error assigned is a clerical misprision in regard to the amount of the judgment, such mistake, being amendable on motion in the court below, will be amended by the appellate court at the cost of the appellant, and the amended judgment affirmed.[61] A court of probate jurisdiction may amend its proceedings in a proper case; *e. g.*, after a sale by an administrator under its order, by adding to the administrator's account exhibited his affidavit that the same was just and true, formerly taken in court but not filed.[62] So also a justice of the peace may correct a judgment rendered by his predecessor in office, by a *nunc pro tunc* order, to make it conform to the truth.[63] And an arbitrator, it is held, after the delivery of his award, may correct a mere clerical error not affecting the merits.[64] The clerk of the court, however, has no *ex officio* right, without an express order of the court to that effect, to complete, alter,

[59] Gay v. Cheney, 58 Ga. 304.

[60] Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; McCoy v. Porter, 17 Serg. & R. 59; Hopkins v. Flynn, 7 Cow. 526.

[61] Smith v. Kennedy, 63 Ala. 334.

[62] Kennedy v. Wachsmuth, 12 Serg. & R. 171, 14 Am. Dec. 676.

[63] Gates v. Bennett, 33 Ark. 475.

[64] Goodell v. Raymond, 1 Williams (Vt.), 241.

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or amend the record kept by a predecessor in that office whose term has expired.[65]

§ 162. Time of making Application.

An application for the amendment of a judgment should be made, by the party in whose interest the correction is required, within a reasonable time after he has discovered the error. If he suffers an undue period to elapse, the court may refuse, on account of his laches, to accord the relief asked, and especially if rights have become vested under the judgment which would be disturbed by its alteration.[66] The amendment is generally discretionary with the court, but the circumstances are sometimes such that justice and right rather demand the refusal of the correction than its allowance. Thus, after money has been paid under an erroneous decree, it cannot be so altered or amended as to make a party to it liable to pay the money a second time;[67] although if, in satisfying the face of the judgment, he has paid only a part of that which was really awarded against him, the judgment may afterwards be amended so as to make him liable for the true balance.[68] So long as the record remains with the court which rendered the judgment, it is of course under its control for proper purposes and in proper cases. But it may be otherwise when the record has been removed to an appellate court. "Although there is some conflict of opinion as to whether an inferior court can amend the record whilst a case is pending upon writ of error in a higher court, we are inclined to think that the weight of authority is in favor of the proposition that the pending of such writ does not prove an impediment to the action of the court below."[69] And in California it is held that the amendment may be made even after the judgment has been affirmed on appeal.[70] But in Alabama, on the other hand, it

[65] Rockland Water Co. v. Pillsbury, 60 Me. 425.

[66] Rogers v. Rogers, 1 Paige, 188.

[67] Hassler's Appeal, 5 Watts, 176.

[68] Mechanics' Bank v. Minthorne, 19 Johns. 244.

[69] Sparrow v. Strong, 2 Nevad. 362; Richardson v. Mellish, 3 Bing. 346; Freel v. State, 21 Ark. 226; Exchange Bank v. Allen, 68 Mo. 474; Dow v. Whitman, 36 Ala. 604. But compare Haydel v. Roussel, 1 La. Ann. 35.

[70] Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. Rep. 732; Roussett v. Boyle, 45 Cal. 64.

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is considered that when a judgment or decree is affirmed on appeal, the decree or judgment of the court below is merged in the judgment of affirmance, and that court cannot afterwards make any order modifying or altering it.[71] And this seems the more reasonable view, unless in cases where the error was not discovered until after the appellate proceedings were had.

§ 163. Method of applying for Amendment.

A judgment once entered must be corrected, if irregular or erroneous, by some proper proceeding for that purpose; it cannot be merely disregarded and the proper judgment entered anew.[72] During the term at which the judgment was rendered, the correction may be made by an order of the court upon a mere suggestion of the error.[73] But after the term is ended, according to the practice in many of the states, the amendment can only be made upon the presentation of a formal petition and motion, setting forth the mistake and the alteration prayed for, and after proper notice to the adverse party to appear and show reasons why the correction should not be made.[74] In Indiana, an application to correct a mistake in a judgment should be made by motion, and though made in the form of a complaint it will be treated as a mere motion and not demurrable.[75] It is also to be observed that a motion to amend a judgment cannot be allowed in an action of *scire facias* upon the judgment, but must be made in the original cause.[76] If a judgment is other than that resulting from the conclusions of law arrived at by the court, it cannot be corrected by an appeal from an order granting or denying a new trial, but must be reached by an appeal from the judgment.[77]

[71] Werborn v. Pinney, 76 Ala. 291.
[72] Nuckolls v. Irwin, 2 Nebr. 60.
[73] Weed v. Weed, 25 Conn. 337.
[74] *In re* Limerick Petitioners, 18 Me. 183; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25 Conn. 337; State v. King, 5 Ired. 203; Forquer v. Forquer, 19 Ill. 68; Stockdale v. Johnson, 14 Iowa, 178; Arrington v. Conrey, 17 Ark. 100.
[75] Latta v. Griffith, 57 Ind. 329; Goodwine v. Hedrick, 29 Ind. 883.
[76] Clark v. Digges, 5 Gill, 109.
[77] Martin v. Matfield, 49 Cal. 43.

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§ 164. Notice of Application.

The general rule is well established that a judgment cannot be amended, after the term at which it was rendered, upon an *ex parte* application. Due and proper notice must be given to the opposite party of the application and the relief asked, that he may have an opportunity to appear and show cause against the proposed correction.[78] Nevertheless if the amendment is to be based upon matter of record only, the necessity of giving notice to the adverse party is not so evident. In that case, any evidence against the amendment which he might produce, if drawn from extraneous sources, would be inadmissible and unavailing. And it is not at once apparent how his rights could be prejudiced by his ignorance of the proceedings. It seems that the same rule should here obtain as in the case of *nunc pro tunc* entries,—that notice is requisite only when evidence *dehors* the record will be consulted.[79] And indeed it has been held that if the amendment relates only to a matter of form, the notice may be dispensed with.[80] And the court in Michigan considered the omission of notice as immaterial, in a case where the amendment was not calculated to change the effect of the judgment, but merely to bring its terms into more perfect expression of the meaning which would have been ascribed to it by a proper construction of its language before the amendment.[81] For, as the court observed, any person who was interested in the judgment, or acted on the faith of it, was chargeable with knowledge of all that a proper construction of

[78] Wallis v. Thomas, 7 Ves. 292; Rockland Water Co. v. Pillsbury, 66 Me. 427; Weed v. Weed, 25 Conn. 337; Wooster v. Glover, 37 Conn. 315; Poole v. McLeod, 1 Sm. & Mar. 391; McNairy v. Castleberry, 6 Tex. 286; Wheeler v. Goffe, 24 Tex. 660; Martin v. Bank, 20 Ark. 636; Alexander v. Stewart, 23 Ark. 18; Cook v. Wood, 24 Ill. 295; Means v. Means, 42 Ill. 50; Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 386. Where a final decree dismissing a bill in equity was at a subsequent term amended so as to purport to be a dismissal without prejudice, but the amendment was made upon a verbal notice to the solicitor of one defendant only and a notice posted upon the court-house door, *held*, that as there was no sufficient notice, the amendment was absolutely void for want of jurisdiction, and could be assailed in a collateral proceeding. Swift v. Allen, 55 Ill. 303.

[79] *Supra*, § 134.

[80] Balch v. Shaw, 7 Cush. 282.

[81] Emery v. Whitwell, 6 Mich. 491.

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it would have taught him, and the amendment did not change its meaning.

§ 165. Evidence.

In the matter of amending records, the rule of English practice forbids the correction of any judgment or decree unless there is sufficient record evidence, or evidence *quasi* of record, to amend by, and strictly excludes all parol testimony offered for that purpose. And this rule has been adopted, either expressly or tacitly, in many of the United States, and has become too firmly settled in their jurisprudence to admit of contradiction.[83] It has been concisely stated in the following language: "We think that no judgment can be amended, or one rendered *nunc pro tunc*, unless such amendment or rendition of judgment be authorized by matter of record, or by some entry made by or under the authority of the court, which entry must be shown by the record of the cause, or at the least by some book belonging to the office of the court and required to be there kept by law."[83] Where this rule obtains it is held that a judgment cannot be amended by the notes or minutes of the judge made upon the docket; they are not considered a part of the record nor evidence for any purpose.[84] Nor can the amendment be made from the judge's memory or knowledge of the fact omitted.[85] Nor by his affidavit in regard to the error to be corrected.[86] And certainly amendments cannot be

[83] Pitman v. Lowe, 24 Ga. 429; Gay v. Cheney, 58 Ga. 304; Armstrong v. Robertson, 2 Ala. 164; Brown v. Bartlett, 2 Ala. 29; Rains v. Ware, 10 Ala. 623; Metcalf v. Metcalf, 19 Ala. 319, 54 Am. Dec. 190; Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200; West v. Galloway, 33 Ala. 306; Harris v. Martin, 39 Ala. 556; Summersett v. Summersett, 40 Ala. 596, 91 Am. Dec. 494; Pettus v. McClannahan, 52 Ala. 55; Lilly v. Larkin, 66 Ala. 122; Guise v. Middleton, 1 Sm. & Mar. Ch. 89; Moody v. Grant, 41 Miss. 565; Russell v. McDougall, 8 Sm. & Mar. 234; Shackelford v. Levy, 63 Miss. 125; Hendrix v. Clay, 2 A. K. Marsh. 462; Norton v. Sanders, 7 J. J. Marsh. 12; Stephens v. Wilson, 14 B. Mon. 88; Finnell v. Jones, 7 Bush, 359; Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Hansen v. Schlesinger (Ill.), 17 N. E. Rep. 718; State v. Clark, 18 Mo. 432; Saxton v. Smith, 50 Mo. 490; DeCastro v. Richardson, 25 Cal. 49; Morrison v. Dapman, 8 Cal. 255; Swain v. Naglee, 19 Cal. 127; Solomon v. Fuller, 14 Nevad. 63.

[83] Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200.

[84] Dickson v. Hoff, 3 How. (Miss.) 165; Boon v. Boon, 8 Sm. & Mar. 318; Shackelford v. Levy, 63 Miss. 125.

[85] State v. Smith, 1 Nott & M. 16.

[86] Smith v. Brannon, 13 Cal. 107.

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made from the recollections of witnesses testifying *ex parte*.[87] It is also the rule, in the states mentioned, that a decree in chancery, equally as a judgment at law, cannot be amended at a subsequent term upon parol testimony, but only upon evidence which is matter of record or *quasi* record.[88] Further, it is held that where the judgment is sought to be amended, after the term, for clerical errors or formal defects, it is necessary that the error or defect should be apparent on the record; it cannot be pointed out by affidavit.[89]

On the other hand, in contravention of the rule that a judgment can only be amended by matter of record, in several of the states it is decisively held that it may be amended on *any* evidence, properly admissible, and satisfactory in its weight and character, showing it to differ from the judgment really rendered by the court.[90] In the language of the supreme court of New Hampshire: "We think it clear upon the authorities that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court, or the actual proceeding before it, what was the proper entry to be made on the docket, and how the record should be extended. . . . . Where there is nothing more to rely on than mere memory, the court will act, if at all, with great caution."[91] In a recent Indiana decision it was held that parol evidence was sufficient as a foundation for the correction of a clerical error in the amount of a judgment, the court observing that this was a different matter from making a *nunc pro tunc* entry of something that had been entirely omitted, in which case it might well be that parol evidence would not be admissible, but only the record

[87] Coughran v. Gutcheus, 18 Ill. 390.

[88] Kemp v. Lyon, 76 Ala. 212.

[89] Bramblett v. Pickett, 2 A. K. Marsh. 10, 12 Am. Dec. 350; Solomon v. Fuller, 14 Nevad. 63; State v. Primm, 61 Mo. 166; Portis v. Talbot, 33 Ark. 218.

[90] Matheson's Admr. v. Grant's Admr., 2 How. 263; Frink v. Frink, 43 N. H. 506, 80 Am. Dec. 189; Clark v. Lamb, 8 Pick. 415, 19 Am. Dec. 332; Rugg v. Parker, 7 Gray, 172; Weed v. Weed, 25 Conn. 337; Arrington v. Conrey, 17 Ark. 100; Hollister v. Judges, 8 Ohio St. 201, 70 Am. Dec. 100; Forquer v. Forquer, 19 Ill. 68; Stockdale v. Johnson, 14 Iowa, 178; Doane v. Glenn, 1 Colo. 454. See also the recent case of *In re* Wight, 134 U. S. 136, 10 Sup. Ct. Rep. 487.

[91] Frink v. Frink, 43 N. H. 506, 80 Am. Dec. 189.

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itself.[92] The distinction, however, does not appear to rest upon any plausible basis. And the decision cited is a departure from the earlier rulings in the same state.[93] If parol evidence is to be admitted, the notes and minutes made by the judge upon the trial docket will of course be proper sources from which to obtain information as to the action really taken by the court.[94] And indeed they will naturally be consulted in the first instance. But since such memoranda are not a part of the record, and therefore not of controlling authority, it will be possible that they may be overborne by other evidence; and the court cannot be compelled to correct its journal from such minutes.[95]

The rule that "a record can only be amended by matter of record" seems to rest, in the last analysis, upon the rule that "a record imports absolute verity." Without losing sight of the extreme importance of securing stability and authority to the solemn memorials of the courts, we may still conceive that this rule, if applied with full rigor and severity, might in many cases produce the greatest hardship and injustice. But it is evident to a student of American case-law, that we are gradually working away from the old standards in this respect. The courts are more and more disposed to a liberal practice and to look to the full and perfect administration of justice, rather than to buttress up the sanctity of records by forbidding inquiry into their truth. Hence it is not improbable that the policy of permitting judgments to be amended upon cause shown by any proper and satisfactory evidence, will ultimately prevail. Certainly it is a policy that is commended by reason and justice, and still more by the loose way in which the records of our courts are but too frequently made up. To shut out any light which could help to make the records accurate, complete, and right in themselves, appears to show a too superstitious reverence for the *litera scripta*.

[92] Mitchell v. Lincoln, 78 Ind. 531.

[93] See Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Boyd v. Blaisdell, 15 Ind. 73.

[94] Gillett v. Booth, 95 Ill. 188.

[95] Sullivan's Sav. Inst. v. Clark, 12 Nebr. 578, 12 N. W. Rep. 103.

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§ 166. Method of making Corrections.

"An amendment should not be made by simply noting the order to amend, but it should be actually made by turning back to the minutes of the former term, and making the proper correction and entry there, so that the entry will stand and be read as if no amendment or correction had ever been necessary."[96] If the correction consists merely in adding a word or phrase, or adding or substituting a name or date, or altering an amount, or the like, it may be well enough to simply make the change upon the face of the original entry. But in general, interlineations are to be avoided; and the more regular mode of making amendments, after the term, is by an order of court reversing the defective entry, followed by a new order *nunc pro tunc*.[97] Where a decree already made in a cause is tacitly revoked, during the same term, and a second decree is made on the same subject-matter, it would be more orderly and convenient, in making the second decree, to refer to the first one, and state in what particulars the latter is intended to modify, supplement, or supersede the former; but this is not essential if a comparison of the two decrees discloses the changes or modifications made. On the contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it, either in length or breadth.[98]

§ 167. Allowance of Amendment is discretionary.

An application to amend a judgment or decree is addressed to the discretion of the court, and its denial is not the subject of exception or review.[99] Hence an appellate court will not issue its writ of *man-*

[96] McDowell v. McDowell, 92 N. Car. 227, 229. The court has power at any time to amend its records *nunc pro tunc*, and the clerk is bound not only to record the amendment, but also actually to alter the original record. Jones v. Lewis, 8 Ired. 70, 47 Am. Dec. 338.

[97] King v. State Bank, 9 Ark. 185, 47 Am. Dec. 739. Interlineal corrections of clerical omissions in a record, although irregular and reprehensible, do not necessarily invalidate the judgment. Allen v. Sales, 56 Mo. 28.

[98] Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. Rep. 382.

[99] Brown v. McCune, 5 Sandf. 224; Austin v. Jordan, 5 Tex. 180.

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damus to compel an amendment of the record of an inferior court. The question of amending is wholly a matter for the judicial discretion of the court having the custody of the record. And while *mandamus* is a proper means of compelling a judge to proceed to his duty, yet it cannot be used as a means of deciding for him what that duty is.[100] It is also true that the regularity of an amendment made by a court of competent jurisdiction cannot be inquired into collaterally.[101]

§ 168. Jurisdiction of Equity.

It is held in some of the states that the judgments of courts of record are of such high verity that their existence cannot be impeached, nor their contents contradicted, falsified, or corrected by parol proof, and consequently that a bill will not lie in equity to correct a judgment, purporting to be rendered upon the verdict of a jury, by showing by parol that the judgment was in reality by *nil dicit* without a jury, and should have been rendered for a larger sum than that specified on its face.[102] On the other hand, in Iowa[103] and Missouri,[104] it is held that if judgment is by mistake entered for a sum less than the amount actually recovered, so that the creditor, without fault, loses a part of his judgment, equity will assist him, if he cannot obtain relief otherwise. But since the cases must be of very infrequent occurrence in which the law court could not correct a mistake of this kind on motion, there will seldom be an opportunity for chancery to exercise this power. Besides, its well known reluctance to interfere with the records of other courts will preclude action of this kind, unless in a case of very palpable hardship and entire inadequacy of any remedy at law.

§ 169. Effect of Amendments on Third Persons.

An amendment of a judgment or decree will never be allowed to prejudice the rights of third persons—such as subsequent judgment-

[100] Commonwealth v. Hultz, 6 Pa. St. 469; *Ex parte* Morgan, 114 U. S. 174, 5 Sup. Ct. Rep. 825.

[101] Hamilton v. Seitz, 25 Pa. St. 226, 64 Am. Dec. 694.

[102] Bank of Tennessee v. Patterson, 8 Humph. 362, 47 Am. Dec. 618; Smith v. Bowes, 38 Md. 463.

[103] Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 648.

[104] Wilson v. Boughton, 50 Mo. 17.

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creditors, purchasers, or mortgagees—who have acquired interests for value and without notice.[105] And in the order allowing an amendment it is proper to insert a saving of the intervening rights of third persons, but the law will make the reservation whether it is expressed or not.[106] "Assuming the general power of the courts, upon a proper application and due proof, to correct their records, the question arises, who are bound by such amendments? Ordinarily they affect the parties only to the proceedings; but in some cases, in the first instance, and in others subsequently, such amendments affect the rights and interests of many third persons. Are such persons bound by amendments of which they have no notice? We are of opinion that they are not bound, nor in any wise affected, by amendments made behind their backs, but as to them the records are to be regarded as remaining in their original state. In the case of judgments rendered by courts in cases where they have jurisdiction, the judgment is conclusive only against the parties to the proceeding and those who are deemed in law their privies, and with few exceptions they are not conclusive nor binding upon strangers. And it does not seem to us consistent with sound principles to give to the discretionary orders of the courts any more extensive effect than the law gives to their judgments. As a general rule, we think that every application for an amendment should show who are the parties having rights which may be affected by it, and due notice of the proceedings should be given them. Probably such notice as is required by law in the settlement of estates in the probate court would be sufficient, the proceedings being, like them, in the nature of proceedings *in rem*. But if notice is entirely omitted, or is given to a part only of those whose rights may be affected, the amendment will be made at the risk of being held ineffectual, and as if not made, as to those interested who had no notice." [107]

[105] Crutcher v. Commonwealth, 6 Whart. 340; Colman v. Watson, 54 Ind. 65; Ligon's Admr. v. Rogers, 12 Ga. 281; Perdue v. Bradshaw, 18 Ga. 287.

[106] McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

[107] Remick v. Butterfield, 31 N. H. 70, 85, S. C. 64 Am. Dec. 316.

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CHAPTER X.

THE VALIDITY OF JUDGMENTS.

§ 170. Voidable and Void Judgments.
171. Jurisdiction.
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§ 170. Voidable and Void Judgments.

Before proceeding to a detailed examination of the questions which may affect the validity of judgments, it is necessary to point out the important distinction between judgments which are void and such as are merely voidable. The differences, though real and fundamental, are not always marked with sufficient sharpness in juristic writing, and courts have been known to speak of a judgment as "void" when they meant no more than that it was liable to be overturned if properly attacked. Now a *void* judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied

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before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. On the other hand, a *voidable* judgment is one which, though not a mere nullity, is liable to be *made* void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. It always contains some defect which may become fatal. It carries within it the means of its own overthrow. But unless and until it is duly annulled, it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done, it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid sentence. If emanating from a court of general jurisdiction, it will be sustained by the ordinary presumptions of regularity, and it is not open to impeachment in any collateral action. When is a judgment void and when merely voidable? The answer to this question will form the subject of this and the two following chapters. It may be here stated, however, that it is very doubtful whether a judgment can ever be considered entirely void except in the single case where there was a total want of jurisdiction to render it. And even then, in the case of a domestic judgment, it is a serious question whether the lack of jurisdiction must not appear on the face of the record in order to entitle the courts to treat it as a nullity.[1] But there are many possible defects and irregularities which will render a judgment voidable.

Before leaving the subject it is necessary to advert to two words, often used in this connection, and which must be distinguished from those already explained. These are "irregular" and "erroneous."

[1] See *infra*, § 218.

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An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts. The meaning of the term is therefore not exactly coextensive with that of "voidable," although the two are often used interchangeably. For while every irregular judgment is also, and for that reason, voidable, there may be other causes besides irregularity sufficient to avoid it. An erroneous judgment is one which, though regularly rendered, is contrary to law, and therefore liable to be reversed by an appellate tribunal. Irregular and erroneous judgments cannot be attacked collaterally. But the former can be vacated by the court which rendered them or by a court of review, according to the nature of the irregularity; the latter only by an appellate court. These distinctions are noted in an opinion of the supreme court of New York, from which we quote as follows: "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle, I apprehend, has never been applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning, for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of the distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, which is his own act, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court."[2]

[2] Simpson v. Hornbeck, 3 Lans. 53. See also Gray v. Stuart, 33 Gratt. 358; Boggess v. Howard, 40 Tex. 153; *Ex parte* Lange, 18 Wall. 175; Wolfe v. Davis, 74 N. Car. 599.

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§ 171. Jurisdiction.

The first and fundamental requisite to the validity of a judgment is that it should have been rendered by a court having jurisdiction. Without jurisdiction the courts can do nothing, and a judgment given forth without jurisdiction is a mere nullity. The jurisdiction required is of three sorts: (1) jurisdiction of the parties; (2) jurisdiction of the general subject-matter; (3) jurisdiction of the particular matter which the judgment professes to decide. But the subject of jurisdiction is of such importance and intricacy as to require treatment in a separate chapter, and is mentioned here only for the sake of logical completeness.

§ 172. Character and Status of Parties.

The validity of a judgment may also depend in many instances on the character or status of the party against whom it is rendered. And in the case of persons who are under legal disabilities, judgments may be irregular and voidable for the failure to comply with statutory formalities, or to protect the defendants in the ways prescribed by law, or may even be considered void for the want of power of the courts over them. This subject will be examined in detail in the next chapter.

§ 173. Constitution of the Court.

In order that a judgment should be recognized as valid, it is of course necessary that it should have been rendered by a lawful and duly constituted court; otherwise it is not "the sentence of the law" and is not entitled to carry its sanction.[3] But on principles of public policy and for the security of rights, it is held that the regular judgments of a *de facto* court, whose existence has afterwards been pronounced unconstitutional and void, are nevertheless valid and conclusive.[4] Thus, in a case before the supreme federal tribunal, it was

[3] Rogers v. Wood, 2 B. & Ad. 245.

[4] State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Anone, 2 Nott & M. 27; Den dem. Gilliam v. Reddick, 4

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held that an adjudication made by a Spanish court in Louisiana was not void because made after the cession of that territory to the United States. "For we know historically," said Thompson, J., "that the actual possession of the territory was not surrendered until some time after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, although ceded, was *de facto* in the possession of Spain and subject to Spanish laws. Such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid."[5]

In regard to the validity of judgments rendered by the courts of the states which attempted to secede from the Union in 1861, there has been a great fluctuation of opinion, and it is only of late that the authorities have come to a substantial agreement. At first, and particularly in some of the reconstructed states, there was a strong disposition to treat all such judgments as mere nullities. This view was based on the theory that, the government of a state organized under the Confederacy being an usurpation and being erected in hostility to the lawful government of the country, all its acts were void; and the same objections which might be urged against its laws would be sufficient to overturn its judgments, both being parts of one whole.[6] But after a time, impressed with the idea that some sort of government existed in those states during the war, and that the courts created or recognized by it were at least considered lawful tribunals by that government, real or pretended, and that respect was paid to their adjudications by the persons who acknowledged that government as rightful, the authorities were inclined to put such judgments upon the footing of *quasi* foreign judgments. That is, they were not to receive the full faith and credit due to a domestic judgment, but neither were they to be treated as entirely void. They were considered as *prima facie* evidence, but cause might be shown against their being carried into effect.[7] The position was anomalous in the

Ired. 368; State v. Porter, 1 Ala. 688; Mayo v. Stoneum, 2 Ala. 390; Masterson v. Matthews, 60 Ala. 260; State v. Alling, 12 Ohio, 16.

[5] Keene v. McDonough, 8 Pet. 308.

[6] Penn v. Tollison, 26 Ark. 545; Thompson v. Mankin, Id. 586; Ray v. Thompson, 43 Ala. 454.

[7] Pepin v. Lachenmeyer, 45 N. Y. 27; Martin v. Hewitt, 44 Ala. 418; Mosely

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extreme, and the theory itself quite untenable. For, as pointed out by Dr. Wharton,[8] in suing upon such a judgment it would be necessary to declare as upon a judgment in a state not belonging to the United States, and therefore virtually foreign. But a foreign judgment, rendered in the courts of a state whose independence our own government has never acknowledged, cannot be recognized as a judgment on which suit can be brought. At a still later period, a view came to be recognized which was the exact opposite of that first adopted, viz., that the judgments rendered by the Confederate courts during the war were in all respects legal and conclusive. It was held that the state government, as organized and existing in all its departments in one of those states during the continuance of hostilities, was its rightful *de jure* government; and accordingly that judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the constitution and laws of the United States, nor infringing upon the state constitution, were valid and binding.[9] In the mean time the supreme court of the United States had been called upon to consider these questions, and had ruled that an act of the "Confederate Congress" creating a court was void, and that the court itself was a mere nullity and could exercise no rightful jurisdiction.[10] There is no difficulty in accepting this position if we deny to that body the rights and powers of a government. For of course a mere assemblage of private persons, acting in rebellion against the law of the land, cannot create a court of law, and the acts of such pretended court would be destitute of any authority. But on the other hand, if the insurrectionary authorities had no power to create, they had no power to destroy. By no act or proceeding could they strip a lawful pre-existing tribunal of its power and jurisdiction or terminate its existence. Their laws, being altogether void, had no effect whatever upon the courts which had been duly organized before the rebellion began. And still less could any

v. Tuthill, 45 Ala. 621, 6 Am. Rep. 710 Shaw v. Lindsay, 46 Ala. 290; Bush v. Glover, 47 Ala. 167; Barclay v. Plant, 50 Ala. 509; Bibb v. Avery, 45 Ala. 691.

[8] 1 Whart. on Ev. § 807.

[9] Parks v. Coffey, 52 Ala. 32; Hill v. Huckabee, 52 Ala. 155; McQueen v. McQueen, 55 Ala. 433; Steere v. Tenney, 50 N. H. 461; Hill v. Armistead, 56 Ala. 118; Hendry v. Cline, 29 Ark. 414. See Blackwell v. Willard, 65 N. Car. 555.

[10] Hickman v. Jones, 9 Wall. 197.

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change in the judicial system be effected by the mere declaration of secession. "The objection that the judgment of the supreme court of Louisiana is to be treated as void because rendered some days after the passage of the Ordinance of Secession of that state, is not tenable. That Ordinance was an absolute nullity, and of itself alone neither affected the jurisdiction of that court or its relation to the appellate power of this court."[11] These two decisions outline the view which has prevailed in the supreme federal court and which must now be regarded as the accepted doctrine. Courts organized by the Confederate authorities for distinctively national purposes, and as a part of what was intended to be a national judicial system, had no legal existence, and all their acts were mere nullities. But the courts of the several states, in their individual capacities, had a lawful existence, notwithstanding the usurpation of the state governments by the insurrectionary authorities, and even though they professed to derive their powers from those who, *de facto*, had possession of the state government. Accordingly, their judgments, so far as they did not tend to impair the supremacy of the federal authority or the just rights of citizens under the constitution, are to be treated as valid and binding.[12] But this is subject to an important qualification, viz., that such judgments could have no effect as against defendants who were residents of other states not sharing in the rebellion. This exception is established by a noteworthy decision in Ohio, where it was held that as between parties residing in the state of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in a Confederate court in Arkansas by which

[11] White v. Cannon, 6 Wall. 443.

[12] Horn v. Lockhart, 17 Wall. 570. In this case the court said: "The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crimes prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in times of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile, in their purpose or mode of enforcement, to the authority of the national government, and did not impair the rights of citizens under the constitution."

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the rights of non-residents could be injuriously affected. Neither could such jurisdiction be acquired by the consent or waiver of an attorney practicing in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case or over the defendants.[13] Questions have arisen as to the validity of judgments rendered by a tribunal created by a military commander in a district of insurrectionary territory held by him in belligerent occupation. But as these questions chiefly relate to the effect of such judgments as *res judicata*, the consideration of them is postponed to another place.[14]

§ 174. Disqualified Judge.

The validity of a judgment may often depend upon considerations personal to the judge who rendered it. He may be disqualified from acting in the particular case by reason of his being concerned as a party, or otherwise interested in the event of the suit, or on account of his relationship or affinity to one of the litigants, or because he is not qualified for the office in accordance with the statutory requirements. And first, in regard to his *interest* in the suit; it is a maxim of the common law that *nemo potest esse judex in propria causa*.[15] And indeed natural justice, as well as a regard for the integrity and impartiality of the judiciary, sanction the same rule. Accordingly it is held, under statutes forbidding a judge to act in a cause in which he is interested, that if he should assume to decide a case where his personal interest might come in conflict with his judicial indifference, the judgment so rendered would be entirely null and void.[16] So a judgment pronounced by a judge who was disqualified

[13] Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340. See also Botts v. Crenshaw, Chase's Dec. 227; Livingston v. Jordan, Id. 454; Brooks v. Feler, 35 Ind. 402; French v. Tomlin, 10 Am. L. Reg. 642.

[14] See *infra*, vol. 2, § 525.

[15] 12 Co. 113.

[16] *In re* Cottle, 5 Pick. 483; Coffin v. Cottle, 9 Pick. 287; Sigourney v. Sibley, 21 Pick. 101; Gay v. Minot, 3 Cush. 352; Washington Ins. Co. v. Price, 1 Hopk. Ch. 1; Place v. Manuf. Co., 28 Barb. 503; State v. Castleberry, 23 Ala. 85.

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on account of his having been of counsel in the case, is void and not conclusive on the parties.[17] It does not appear that this would have been so at common law, for the doctrine seems rather to have been that the acts of a disqualified judge were not merely nullities, but were liable to be avoided or reversed on a proper application, although the parties might admit their binding force by acquiescence.[18] In the next place, the *relationship* of the judge to any of the parties in the cause is made a ground of his disqualification, by statute in many of the states. And there are cases holding that a judgment attempted to be rendered by one who was disqualified by reason of his consanguinity with a litigant, is utterly void and incapable of being made good by any waiver or consent.[19] But the rule obtaining in a majority of the states is that such a judgment is voidable and liable to be set aside on proper proceedings for that purpose, but is not absolutely void; it is a sufficient protection to persons lawfully acting under it while it stands, and it cannot be attacked collaterally.[20] Some of these decisions were rendered under statutes providing that the parties interested might waive the disqualification by consenting to the action of the judge. And when this is the case, it is entirely reasonable to hold that, if no express objection appears, the judgment will be voidable at most, not void. "These disqualifications may be unknown, or so obscure as to require a judicial decision to determine their existence. It is a serious thing to annul the judgments of the courts, and it ought not to be done where the consent of the parties alone is requisite to their validity, and its entry on the record is the only admissible evidence that it was given."[21] The

[17] Newcome v. Light, 28 Tex. 141.

[18] Dimes v. Grand Junction Canal Co., 47 Jur. 73; Gorrill v. Whittier, 8 N. H. 268.

[19] Chambers v. Clearwater, 1 Keyes, 310; Oakley v. Aspinwall, 3 N. Y. 547; Hall v. Thayer, 105 Mass. 219. See Reams v. Kearns, 5 Cold. 217; Horton v. Howard (Mich.), 44 N. W. Rep. 1112; *In re* Depuy's Estate, 9 N. Y. Supp. 121.

[20] Fowler v. Brooks, 64 N. H. 423, 13 Atl. Rep. 417 (citing Phillips v. Eyre, L. R. 6 Q. B. 1, 22); Trawick v. Trawick, 67 Ala. 271 (citing Hine v. Hussey, 45 Ala. 496; Hayes v. Collier, 47 Ala. 726; Plowman v. Henderson, 59 Ala. 559; Heydenfeldt v. Towns, 27 Ala. 423); Rogers v. Felker, 77 Ga. 46.

[21] Hine v. Hussey, 45 Ala. 496, 513. A judgment is not void because the judge rendering it is related in equal degree to both the parties litigant, especially when no objection was made at the hearing on this ground. Beall v. Sinquefield, 73 Ga. 48.

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disqualification may also arise from omission of statutory requirements on the part of the person assuming to act as judge. Thus, a judgment rendered by an attorney orally appointed judge and acting by consent of parties, but without having taken the prescribed oath, is void for want of jurisdiction.[22]

§ 175. Acts of Judge de Facto.

This brings us to the consideration of acts done by a judge *de facto*. A person may be entitled to this designation who, although he is not a true and rightful incumbent of the office, yet is no mere usurper, but holds it under color of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person are valid and binding. If a contested election, for example, should result in the ouster of the person who, being entitled on the face of the returns, was commissioned and qualified as judge, this would not retrospectively invalidate the judgments he may have rendered while in actual possession of the office. So judges elected and duly qualified, and who exercise the functions of their office, are *de facto* officers, although the act under which they were elected was unconstitutional.[23] And a person who is ineligible to a judgeship, but who has nevertheless been duly appointed, and who exercises the powers and duties of the office, is a *de facto* judge, and his acts are valid until he is properly removed.[24] Again, one duly elected to a judgeship, and commissioned a judge by the governor, and discharging the functions of the office, is a judge *de facto*, although the supreme court afterwards decides that the term of his predecessor had not expired.[25] So also the acts of a *de facto* judge cannot be attacked collaterally, by showing that he has taken no oath of office, or that he has taken an oath to support a power in insurrectionary hostility to the federal government.[26] These rules are founded upon

[22] Herbster v. State, 80 Ind. 484.

[23] Campbell v. Commonwealth, 96 Pa. St. 344; Burt v. Winona & St. P. R. Co., 31 Minn. 472, 18 N. W. Rep. 285; *In re* Ah Lee, 6 Sawy. 410; Carland v. Custer, 5 Mont. 579, 6 Pac. Rep. 24; Taylor v. Skrine, 3 Brev. 516; Brown v. O'Connell, 36 Conn. 432.

[24] Ostrander v. People, 29 Hun, 513; Blackburn v. State, 3 Head, 690; Gregg v. Jamison, 55 Pa. St. 468.

[25] McCraw v. Williams, 33 Gratt. 510.

[26] Pepin v. Lachenmeyer, 45 N. Y. 27.

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sound principles of public policy and justice, and are generally wholesome in their practical operation.

§ 176. Judge out of Office.

It is generally held that a judgment or decree rendered, or order made, by a judge whose term of office has expired, but who continues in possession and exercise of the functions of the office, is valid and binding as the act of a *de facto* officer.[27] Thus, in a recent case, the action was tried on November 30th and a decree rendered December 6th, the term of court having begun on November 8th and continued till December 6th, on which day the decree was dated and filed. It transpired that the term of office of the judge who signed the decree expired on December 2d. But it was held that the judge was an officer *de facto* and his decree valid as a decree of the court.[28] So in another case, a judge whose office was vacated by his taking a seat in the legislature, but who continued to exercise the functions of a judge, was considered to be a *de facto* officer and his acts consequently valid.[29] If a judgment or decree was actually rendered before the judge's term expired, it is of course immaterial that it was not docketed or filed until afterwards. Thus, where a cause was submitted to a judge to be determined in vacation, and he made his decision and deposited it, with the papers, in the express office the day before his term of office expired, directed to the clerk of the proper county, it was held that the decision was then complete and it was not invalidated because it was not filed in the clerk's office before the expiration of the judge's term.[30]

§ 177. Time and Place of holding Court.

It is held in several of the cases, that it is indispensable to the validity of a judgment that it be rendered at the time and

[27] Read v. Buffalo, 4 Abb. App. Dec. 22; Carli v. Rhener, 27 Minn. 292, 7 N. W. Rep. 139; State v. Williams, 5 Wis. 308, 68 Am. Dec. 65; Cary v. State, 76 Ala. 78; Threadgill v. Carolina &c. R. Co., 73 N. Car. 178; Woodside v. Wagg, 71 Me. 207.

[28] Cromer v. Boinest, 27 S. Car. 436, 3 S. E. Rep. 849. But compare Mace v. O'Reilley, 70 Cal. 231, 11 Pac. Rep. 721.

[29] Woodside v. Wagg, 71 Me. 207.

[30] Babcock v. Wolf, 70 Iowa, 676, 28 N. W. Rep. 490; McDowell v. McDowell, 92 N. Car. 227.

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place prescribed by law.[31] And the holding of a court at a time or place other than that ordained or authorized by law, and all proceedings thereunder, are *coram non judice* and void.[32] Perhaps the rule is too broadly stated in these decisions. But it may be admitted that the fact that a term of court was not held at the time prescribed by law will constitute a ground for the reversal of a judgment rendered in such term.[33] But if there was reasonable mistake in regard to the time fixed by law, and color of authority for the time actually selected, there is authority for the view that a judgment so rendered is perfectly valid. Thus, in a case in Tennessee, it appeared that an act of the legislature had changed the times for the sitting of the circuit court for a certain county. This change was not known to the officers of the court, the act having been passed but a short time before a term was to be held. The court was held by the presiding judge at the time before fixed by law, but at a different time from that required by the law then in force. A judgment was rendered by the court thus sitting, the justice of which was not controverted. And it was held that the judgment was valid; that the acts of a judge regularly in office are valid, if he hold his court under color of law, although the law may be repealed or invalid.[34] On similar principles, and by an even stronger reason, a judgment is valid when rendered at a term which was commenced at the day fixed by law, although, in the middle of the term and before the judgment, a new statute changes the time for holding the court, because the later act will not affect a term already lawfully commenced.[35] And where, in the absence of the judge, the sheriff adjourned the court without authority, the adjournment was held to be a nullity, and a judgment entered by the court two days afterwards was held valid.[36] In regard to the *place* of holding a court, compliance with the law is of course important, and perhaps essential to the perfect validity of the judgments rendered. But

[31] State v. Roberts, 8 Nevad. 239; Dalton v. Libby, 9 Nevad. 192; Cooper v. American Central Ins. Co., 3 Colo. 318; Wicks v. Ludwig, 9 Cal. 173.

[32] Grimmett v. Askew, 48 Ark. 151, 2 S. W. Rep. 707.

[33] Smithson v. Dillon, 16 Ind. 169. See Coffinberry v. Horrill, 5 Cal. 493; Bowden v. Hatcher (Ga.), 9 S. E. Rep. 724.

[34] Venable v. Curd, 2 Head, 582.

[35] Clare v. Clare, 4 Greene (Iowa), 411.

[36] Thomas v. Fogarty, 19 Cal. 644.

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it does not appear, from the authorities, to be so indispensable that deviation from the law in this respect will of itself be sufficient to render such judgments absolutely void.[37] If it appears by the record of a judgment that the court which pronounced it had jurisdiction of the person of the defendant and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof being made that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered.[38]

§ 178. Place of Trial.

In California it is held that where a cause is transferred, because of the disqualification of the judge, to an adjoining judicial district, under authority of statute, the judgment therein is not void or subject to collateral attack because the county to which the cause was transferred was not the *nearest* one, as required by the statute. "We cannot see," said the court, "how it can be law that a judgment can be impeached collaterally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county-seat more readily accessible than the other in coming from L., and holding it to be really the nearer on that account. The judge had jurisdiction to make this order under the statute then in force. He must determine what is the nearest court in administering the law. This determination was undoubtedly within his power, and if he sent it to a county some distance further than another, by error of a miscalculation of distances, it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack."[39] This decision illustrates the difference between void judgments and such as are merely erroneous. In gen-

[37] LeGrange v. Ward, 11 Ohio, 257; Smith v. State, 9 Humph. 10.

[38] Herndon v. Hawkins, 65 Mo. 265.

[39] Gage v. Downey (Cal.), 21 Pac. Rep. 527.

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eral, as already stated, a judgment is not *void* except for a total failure of jurisdiction.

§ 179. Judgment rendered in Vacation.

When the law provides for the holding of regular terms of a court, it is only during term-time that the judges are invested with their full judicial character. Necessary rules and orders, ministerial acts, and some matters which go as of course, may fall within the powers of the court in vacation. But in general all judicial functions are suspended during that interval. Hence, unless under statutory authority, a judgment cannot be pronounced in vacation. The rendition of judgment, in a court of record, is essentially a judicial act, and if performed when the court is not in session, that is, out of term, it is open to a fatal jurisdictional objection; the judgment is absolutely void, creates or affects no rights, and will even be disregarded on appeal.[40] "The judge of the court below had no power to render any judgment or decree in vacation. The statute provides for regular terms of the court to be held for the trial of causes, and it does not provide for the rendering of judgments or decrees at any time except during the term."[41] And again: "With a few exceptions, all matters of a judicial character must be heard and determined by the court at a term fixed by and held in accordance with law. The motion under consideration [to discharge a garnishee] does not constitute one of the exceptions."[42] While this is the case, it is also held in several of the states that the parties may *consent* to the rendition of a judgment during the vacation of the court, which judgment is then to be entered as of the preceding term,[43] or the ensuing term,[44] and will be perfectly valid as between the parties,[45]

[40] Kimports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85; Dixon v. Judge of District Court, 26 La. Ann. 119; Culver v. Leovy, 21 La. Ann. 306; Dodge v. Coffin, 15 Kans. 277; Bruce v. Doolittle, 81 Ill. 103; Shepperd v. Wilson, 1 Morris (Iowa), 448; Peabody v. Phelps, 7 Cal. 53; Filley v. Cody, 4 Colo. 109; Champion v. Sessions, 1 Nevad. 478.

[41] Earls v. Earls, 27 Kans. 538.

[42] Laughlin v. Peckham, 66 Iowa, 121, 23 N. W. Rep. 294.

[43] King v. Green, 2 Stew. 133, 19 Am. Dec. 46.

[44] Hervey v. Edmunds, 68 N. Car. 243.

[45] New Orleans v. Gauthreaux, 32 La. Ann. 1126; Green v. Reagan, 32 La. Ann. 974; Hervey v. Edmunds, 68 N.

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and even against third persons in the absence of fraud or collusion.[46] Nor is the main rule of quite universal application. In some states, either in accordance with the established practice of the courts,[47] or by express statutory authority,[48] the courts are empowered to make decrees or orders or render judgments in vacation. And when this power is given, it of course includes the jurisdiction necessary to make a decision in vacation upon a cause proved and submitted in term-time. In this connection we must notice a certain class of statutes authorizing cases to be "taken under advisement" by the court. In Mississippi it is considered that a statute of this character does not authorize the rendition of a judgment in vacation, but the judgment must be given by the court upon the delivery of the judge's opinion in writing at the next term after the submission of the case.[49] In Illinois, however, under a similar statute, it is held that a decree may be rendered in vacation, but that it will remain *in fieri* and subject to modification, and not become final, until after the expiration of the succeeding term, and then only as approved at that term.[50]

The *rendition* of a judgment, it will be remembered, is an entirely distinct thing from the *entry* of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act. A judgment is none the less a sentence of the law because it is erroneously entered or not entered at all. Hence it follows that if a judgment is duly rendered during term-time, it is then complete, and its validity is in no wise affected by the fact that the clerk does not enter it until the vacation.[51] It is also to be here noted that the meaning of the word "vacation," as used, for example, in a statute which authorizes the confession of judgments dur-

Car. 243; King v. Green, 2 Stew. 133, 19 Am. Dec. 46; Hattenback v. Hoskins, 12 Iowa, 109; O'Hagen v. O'Hagen, 14 Iowa, 264.

[46] New Orleans v. Gauthreaux, 32 La. Ann. 1126.

[47] Beyerle v. Hain, 61 Pa. St. 226.

[48] *Ex parte* Bennett, 44 Cal. 85.

[49] Wilson v. Rodewald, 61 Miss. 228.

[50] Hook v. Richeson, 115 Ill. 431, 5 N. E. Rep. 98.

[51] Sieber v. Frink, 7 Colo. 148, 2 Pac. Rep. 901; Earls v. Earls, 27 Kans. 538. Supervisors of Manitowoc Co. v. Sullivan, 51 Wis. 115, 8 N. W. Rep. 12. But in Indiana it is held that a judgment duly pronounced in term, but entered in vacation, and the entry never seen

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ing vacation, may not be the same as that known to the common law, viz., "all the time between the end of one term and the beginning of another,"[52] but it may cover a recess caused by the adjournment over of the court for a number of days.[53]

§ 180. After Expiration of Term.

As a corollary of the rule stated in the preceding section, it is held that a judgment of a court holding regular terms, if rendered after the time fixed by law for its adjournment, is invalid and will be reversed on appeal.[54] But where the trial of a cause is commenced in a term with the *bona fide* expectation and belief that it will be concluded before the day shall arrive when the judge is directed, but not imperatively required, to hold court in another county, he may remain, conclude the trial of that case, receive the verdict, and pass judgment, even though this may happen to be done on a day, or at a time, when regularly he would be holding court in another county.[55] And if a judgment be ordered and its terms prescribed by the court during a term, it is a judgment rendered in term-time although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term.[56] On principles analogous to those obtaining in the case of courts of record, it is held that if a justice of the peace adjourns a cause without specifying the hour of the day or the place to which it is adjourned, he loses jurisdiction and his subsequent judgment is void.[57] But in several of the states it is held

by the judge nor signed by him, though his name was signed by an attorney, is invalid, and its execution will be enjoined. Mitchell v. St. John, 98 Ind. 598. And see also First Nat. Bank of McGregor v. Hostetter, 61 Iowa, 395, 16 N. W. Rep. 289.

[52] Jacobs, Law Dict.; Bouvier, Law Dict.

[53] Conkling v. Ridgely, 112 Ill. 86, 54 Am. Rep. 204, 1 N. E. Rep. 261.

[54] Smith v. Chichester, 1 Cal. 409; Passwater v. Edwards, 44 Ind. 343.

[55] State v. Knight, 19 Iowa, 94.

[56] Iliff v. Arnott, 31 Kans. 672, 3 Pac. Rep. 525.

[57] Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451. But in Nebraska, where a justice of the peace has jurisdiction of the subject-matter and of the parties, a judgment rendered by him after the expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone. Gould v. Loughran, 19 Nebr. 392, 27 N. W. Rep. 397.

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that while judgments should be signed and entered during the term, yet if the parties *consent* that the cause be taken under consideration by the judge, and a judgment rendered and signed after the term shall have expired, and entered as of the term, it will not be irregular.[58] And a party to the action who fails to interpose an objection to this procedure, at the proper time, waives his right, which amounts to an implied consent and concludes him.[59] The decision of a cause may be carried over the vacation by a proper entry; but if a judgment be continued by *curia advisari vult*, and be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term, not of the former term.[60]

§ 181. Premature Entry of Judgment.

The rendition of judgment at a term before that fixed by statute is considered not as a mere formal defect which may be remedied by an amendment in the court below, but as a radical error.[61] Thus, the entry of final judgment at the same term with a default, when the statute provides that the former shall be entered at the next term after the default, is an irregularity, although, in this instance, it appears that the error may be corrected on motion at a subsequent term.[62] So also an order of court which bears date as of a day not yet arrived is absolutely without effect, at least until that day shall arrive.[63] In this connection also must be mentioned the rule that final judgment cannot properly be rendered in any case while there are issues of law or fact remaining undisposed of or undetermined.[64]

[58] Shackelford v. Miller, 91 N. Car. 181; Hardin v. Ray, 89 N. Car. 364; Morrison v. Citizens' Bank, 27 La. Ann. 401.

[59] Molyneux v. Huey, 81 N. Car. 106.

[60] Thorpe v. Corwin, 20 N. J. Law, 311.

[61] Teat v. Cocke, 42 Ala. 336.

[62] Nave v. Todd, 83 Mo. 601. A judgment rendered by a justice of the peace before the return-day of the warrant, is not void but erroneous. Glover v. Holman, 3 Heisk. 519.

[63] Smith v. Coe, 7 Rob. (N. Y.) 477.

[64] Bosman v. Akeley, 39 Mich. 710, 33 Am. Rep. 447; Aymar v. Chace, 12 Barb. 301; Barrett v. Thompson, 5 Ind. 457; Miller v. Hoc, 1 Fla. 189; Clark v. People, 15 Ill. 213; Hammond v. Freeman, 9 Ark. 62.

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§ 182. Sundays and Holidays.

It is a maxim of the common law that *dies dominicus non est juridicus.*[65] Accordingly no valid judgment can be rendered upon Sunday. "That courts have no right to pronounce a judgment or do any other act strictly judicial on Sunday, unless expressly authorized by statute, seems to be too well settled to admit of a doubt by the decisions in England and in this country. The cases all show that a judgment entered of record on Sunday is not only erroneous, but is absolutely void."[66] In one state, however, a curious result has been attained by the concurrent operation of two statutes affecting this subject. One act provides that "no court can be opened, nor any judicial business transacted, on Sunday or any legal holiday, except (1) to give instructions to a jury then deliberating on its verdict, (2) to receive a verdict or discharge a jury, (3) to exercise the powers of a single magistrate in a criminal proceeding." The other enacts that "upon a verdict, the justice must immediately render judgment accordingly." Construing these two acts together, the courts have held that it is a justice's duty to render a judgment immediately upon a verdict returned upon Sunday, and he has no discretion in the matter.[67] Since the *entry* of a judgment, as distinguished from its rendition, is a merely ministerial act, there can be no doubt that it will not be invalidated by the fact that it was put upon the record or the docket by the clerk on a Sunday. But in that case it should not appear to have been *rendered* on Sunday. However, the court is not bound to accept as true a docket-entry that a judgment was rendered on that day when there is extraneous evidence that in fact it was not.[68]

[65] Co. Lit. 135a; Broom's Maxims, 21.

[66] Baxter v. People, 3 Gilm. 368, 384; Mackalley's Case, 5 Co. 66; Swann v. Broome, 3 Burr. 1595; Pearce v. Atwood, 13 Mass. 347; Chapman v. State, 5 Blackf. 111; Nabors v. State, 6 Ala. 200; Frost v. Hull, 4 N. H. 158; Arthur v. Mosly, 2 Bibb. 589; Story v. Elliot, 8 Cow. 27, 18 Am. Dec. 423; Davis v. Fish, 7 Greene (Iowa), 406, 48 Am. Dec. 387; Blood v. Bates, 31 Vt. 147; City of Parsons v. Lindsay (Kans.), 21 Pac. Rep. 227; Allen v. Godfrey, 44 N. Y. 433; Coleman v. Henderson, 6 Litt. 171; Houghtaling v. Osborn, 15 Johns. 115.

[67] Thompson v. Church, 13 Nebr. 287, 13 N. W. Rep. 626. See also Hurford v. Omaha, 4 Nebr. 336; Perkins v. Jones, 28 Wis. 243; Weame v. Smith, 32 Wis. 412.

[68] Ecker v. First Nat. Bank, 64 Md. 292, 1 Atl. Rep. 849.

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In regard to other legal holidays, the general rule is that unless the statutes recognizing or creating them expressly prohibit the exercise of judicial functions upon them, the courts may validly render judgments and transact their other usual business. And even if they are declared non-juridical days, this will not hinder the performance of ministerial acts. Thus the statute in Georgia, declaring the fourth of July a holiday, does not inhibit the courts from sitting on that day, or make a judgment rendered on that day void, except when the day falls on Sunday.[69] So it is held that a judgment rendered by a justice of the peace on Thanksgiving Day is not void.[70] And in another case it was considered that in the absence of an express statute, the ministerial act of a clerk in filing a transcript of a judgment is not void because done on Christmas Day, but is a valid docketing of the judgment and will confer a valid lien upon the real estate of the debtor in the county where it is filed.[71]

§ 183. Judgment must be supported by the Pleadings.

A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered. A judgment not supported by the pleadings is as fatally defective as one not sustained by the verdict or finding.[72] Hence the code, although it abolishes the forms of actions as they existed at common law, does not authorize a recovery, where the complaint alleges facts showing a cause of action in tort, by proving upon the trial a cause of action in contract.[73] So where the declaration is defective in substance to the extent of failing to show a cause of action, no judgment can be entered upon it.[74] This would be good ground for a motion in arrest, but if a judgment were nevertheless entered, it would be reversed for error. And if the complaint does not state facts sufficient to constitute a cause of action, a finding "that the allegations of the complaint are true," is not sufficient to support a judgment for the

[69] Hamer v. Sears (Ga.), 6 S. E. Rep. 810.
[70] Bear v. Youngman, 19 Mo. App. 41.
[71] *In re* Worthington, 7 Biss. 455.
[72] Bachman v. Sepulveda, 89 Cal. 688; Marshman v. Conklin, 21 N. J. Eq. 546; Parsley v. Nicholson, 65 N. Car. 207; Frevert v. Henry, 14 Nevad. 191.
[73] Degraw v. Elmore, 50 N. Y. 1.
[74] Harris v. Harris, 10 Wis. 467.

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plaintiff.[75] But where a verdict is returned for the plaintiff on two counts in a declaration, one of which contains no cause of action, the court will render judgment upon the other, if legally sufficient.[76] But the fact that the defendant, at the trial, makes no objection to the form of action (as that one joint action is improperly brought instead of two several suits), cannot enable the court to enter a judgment which the law does not warrant.[77] In any action, process and pleadings are generally necessary, but where the parties are voluntarily before the court, and by agreement, consent, or confession (which are the same in substance) a judgment is rendered, such judgment is valid, although not granted according to the regular course of procedure.[78] So a judgment rendered without any complaint having been filed, is valid if entered by agreement or if ratified by subsequent consent.[79] A judgment or decree based upon incompetent evidence is never, for that reason alone, void.[80] And in general, mere *error* in a judgment, though it may be ground for its reversal, will not have the effect to make it absolutely *void*, or lay it open to collateral impeachment, or impair its efficacy while it stands.

§ 184. Judgment in Action not at Issue.

It has been held, in several cases in Mississippi, that judgments rendered without issues to be determined by them are nullities.[81] And in some other states there are expressions to the effect that, before a cause is at issue, either expressly or tacitly, no final judgment can be validly rendered.[82] Undoubtedly a judgment so pronounced would be irregular and erroneous, as being contrary to the course of law and the usual practice of the courts, and would therefore be liable

[75] Knudson v. Curley, 30 Minn. 433, 15 N. W. Rep. 873. A judgment is not void or erroneous because the name of the plaintiff's attorney attached to the complaint is printed instead of being written. Hancock v. Bowman, 49 Cal. 413.

[76] Gordon v. Downey, 1 Gill, 41.

[77] Ellison v. Bank, 130 Mass. 48; Leonard v. Robbins, 13 Allen, 217.

[78] Peoples v. Norwood, 94 N. Car. 167.

[79] Gay v. Grant (N. Car.), 8 S. E. Rep. 99.

[80] Mann v. Martin, 14 Bush, 763.

[81] Steele v. Palmer, 41 Miss. 88; Armstrong v. Barton, 42 Miss. 506; Porterfield v. Butler, 47 Miss. 170.

[82] Braunsdorff v. Fay, 18 La. Ann. 187; DuBay v. Uline, 6 Wis. 588; Baltimore R. Co. v. Faulkner, 4 W. Va. 180.

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to reversal. But whether it should be regarded as entirely void, a mere nullity, is a question involved in more difficulty. That no such result could properly follow is contended by Mr. Freeman, on the general principle that "when jurisdiction over both the parties and subject-matter is once obtained, no error committed in the exercise of that jurisdiction can make the proceedings or judgment of the court void."[83] This may readily be conceded. And yet, in no proper sense can a court of law be said to have jurisdiction if there is no specific question or controversy submitted for its determination. It is not enough that the parties are properly in court. That does not give the tribunal power to adjudicate any and all matters of difference between them. When we speak of "jurisdiction of the subject-matter," we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle. And how can a court acquire jurisdiction of the particular contention, except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done, in any mode known to the law, save by the formation of a regular issue? There is therefore plausible ground for holding that if the record fails to show an issue to be determined, the judgment will be void on its face.

§ 185. Findings necessary to support the Judgment.

In some of the states there are statutes requiring a finding of facts and conclusions of law to be filed in the action, to serve as a basis for the judgment. But the disposition is to regard this requirement as not vitally necessary to the validity of the judgment. As to parties before the court, and respecting a matter within its jurisdiction, the cases hold that a judgment without a finding of facts to support it is not void, but at most merely erroneous and subject to

[83] Freem. Judgm. § 135a. And in Doyle v. Smith, 1 Cold. 15, it is held that the want of a plea or issue constitutes at most but an error in the judgment, but does not make it void, or affect the authority of the sheriff to execute writs which may be issued upon it.

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reversal by a suitable proceeding in a tribunal having authority to review it.[84] So where a court of record, having jurisdiction, renders a judgment upon a petition filed before it against a defendant upon default of answer, and the statute requires the court in the particular proceeding to take evidence and make special findings, and the court fails to comply with the statutory requirement, the judgment may be erroneous but is not void.[85] And where a court, at the conclusion of a trial, has ordered judgment, but omits to make and file findings of fact and conclusions of law, as prescribed by statute, such findings and conclusions may be made and filed by the court after judgment *nunc pro tunc*.[86] But in Michigan it is held that a judgment entered up before the findings are finally completed and filed is premature, and is to be regarded as provisional action merely, which only becomes perfected when the findings are completed and filed.[87] If the findings are required to be specific, a general finding for the plaintiff will not support a judgment in his favor.[88]

§ 186. Judgment must follow Verdict.

If the defendant in an action has recovered a verdict upon a plea which confesses the plaintiff's cause of action and does not sufficiently avoid it, judgment should be entered for the plaintiff notwithstanding the verdict.[89] Again, if the verdict is clearly wrong, this may furnish ground for arresting the judgment or granting a new trial.[90] But if no such reasons exist for disregarding or setting aside the verdict, the judgment, to be valid, must follow it and accord with it. We have already seen that this is an established rule in respect to the amount of the judgment.[91] And it is here stated as a general principle. The necessity for its application chiefly arises

[84] Connolly v. Edgerton, 22 Nebr. 82, 34 N. W. Rep. 76. But in Michigan it is considered that such a judgment has no greater validity than a judgment rendered upon a jury trial without a verdict. Stansell v. Corning, 21 Mich. 242.

[85] Garner v. State, 28 Kans. 790.

[86] Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. Rep. 455.

[87] People v. Judge of Circuit, 34 Mich. 62.

[88] Ladd v. Tully, 51 Cal. 277.

[89] *Supra*, § 16.

[90] *Supra*, § 104.

[91] *Supra*, § 142.

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in cases where special verdicts are returned. In Kentucky the code provides that "if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter." But it is held that the judgment should be rendered pursuant to the general verdict in all cases when the facts constituting the special finding are not inconsistent with the general verdict.[92]

[92] Quaid v. Cornwall, 18 Bush, 601.

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CHAPTER XI.

THE VALIDITY OF JUDGMENTS AS AFFECTED BY THE CHARACTER OR STATUS OF THE PARTIES.

§ 187. Against what Parties Judgments may be Rendered.
188. Judgments against Married Women at Common Law.
189. For Debt contracted *Dum Sola*.
190. Effect of Omission to plead Coverture.
191. Under partially enabling Statutes.
192. Statutes removing Disability of Coverture.
193. Judgments against Infants.
194. Service of Process on Infants.
195. Appearance by Attorney or Guardian.
196 Effect of Failure to plead Infancy.
197. Decrees in Equity against Infants.
198. Infant Plaintiffs.
199. Judgments against Deceased Parties.
200. Judgment against Decedent Voidable only.
201. Death of One of Several Defendants.
202. Entry of Judgment against Decedent *Nunc pro Tunc*.
203. Jurisdiction must be acquired before Party's Death.
204. Judgment for Deceased Plaintiff.
205. Judgments against Insane Persons.
206. Joint Defendants at Common Law.
207. In Actions of Tort.
208. Joint Debtor Acts.
209. One Defendant suffering Default.
210. Judgment, when Several, when Joint.
211. Joint Judgment as an Entirety.
212. Confession of Judgment by Joint Defendants.
213. Misnomer of Parties.
214. *Descriptio Personæ*.

§ 187. Against what Parties Judgments may be Rendered.

Normally, all persons, natural or artificial, may be made defendants in a judgment. In theory of law, all persons who live under the protection of a particular sovereignty are subject to its laws and are within the power and authority of its courts, so far as their actions

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come within the jural sphere. But the theory is modified to a certain extent by the technical rules relating to abnormal conditions of status. Persons who are under the various legal disabilities, though not exempt from the jurisdiction of the courts, are protected by special provisions as to the cases and the manner in which proceedings may be had against them. Their full and free personality, and therefore their accountability, is thus abridged by the peculiarity of their condition. The same is true, in even greater degree, of those whose personality is suspended, for juristic purposes, by natural or civil death. In respect to the latter, it no longer occupies a prominent place in the law, though there are still circumstances in which a man may be considered, strictly or by analogy, as *civiliter mortuus*. And where this doctrine still survives, it will always incapacitate the man from suing or being sued, and of course from being a debtor by judgment. Thus a judgment obtained against a man after the filing of his petition in bankruptcy could not create a lien upon his estate. "The court will inquire whether in fact the judgment was not entered after the petition was filed, and if so, will treat the judgment as of no more validity than if entered against a deceased person. So far as regards the disposition of his property, or the control of suits pending against him, the bankrupt, from the time his petition is filed, may be considered as *civiliter mortuus*."[1] In some of the states, the same suspension of personality, or civil death, is predicated of a felon confined in the penitentiary. Being dead in law, he cannot be sued, and if his conviction takes place and his sentence begins while an action is pending against him, a judgment afterwards rendered therein is null.[2] And during the existence of slavery, the law denied any juristic personality to the beings so held in bondage. Consequently, a judgment entered against a slave was considered as entirely destitute of any legal efficacy or validity.[3]

[1] McLean v. Rockey, 8 McLean, 235. And see International Bank v. Sherman, 101 U. S. 406.

[2] Rice County Comm'rs v. Lawrence, 29 Kans. 158; Neale v. Utz, 75 Va. 480.

[3] Wood v. Ward (U. S. Circ. Ct. S. D. Ohio), 8 Cent. L. Journ. 188.

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§ 188. Judgments against Married Women at Common Law.

At common law, on account of the merger of the wife's personality in that of the husband, she was incapacitated for almost every species of juristic action. And therefore, being unable to bind herself by engagements, the breach of which would give rise to a cause of action, she could not, at law, be prosecuted to judgment. It is true that husband and wife might be sued jointly for the wife's tort. But this does not in reality change the rule, because the addition of the wife was (at common law) a matter of form only, the husband being the party who would be looked to for satisfaction of the judgment. Accordingly it is held, on common law principles, that a personal judgment against a married woman is void and a mere nullity.[4] A promissory note, for example, signed by a *feme covert* cannot be enforced against her by any proceeding at law, and a judgment by default against her on such note is a nullity, and equity will enjoin the enforcement of it against her separate estate.[5] The doctrine is stated, in its most strict and uncompromising form, in a West Virginia decision, as follows: A judgment rendered by a court of common law against a married woman, either in her own name or in the name of a company, under which she does business, upon a contract made during her coverture, is absolutely void, and an execution or suggestion sued out upon such judgment is invalid and ineffectual for any purpose, and the judgment may be attacked in any collateral proceeding.[6] It was otherwise in equity. For there the wife was considered to have a separate personality for some purposes, and consequently she might be sued in chancery in respect to her separate estate. But even in those courts she could not walk with perfectly free foot, and safeguards were provided for her analogous to those obtaining at common law.[7]

[4] Morse v. Toppan, 8 Gray, 411; Higgins v. Peltzer, 49 Mo. 152; Weil v. Simmons, 66 Mo. 617; Griffith v. Clarke, 18 Md. 457.

[5] Griffith v. Clarke, 18 Md. 457.

[6] White v. Foote Lumber Co., 29 W. Va. 885, 1 S. E. Rep. 572.

[7] See O'Hara v. McConnell, 93 U. S. 150.

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§ 189. For Debt contracted Dum Sola.

If a suit is begun against a woman while she is sole, she cannot deprive the plaintiff of his remedy or abate the action, even at common law, by marrying; but the suit will proceed without any regard to her coverture, and a personal judgment may be rendered against her.[8] The same is true if the suit, though not instituted until after marriage, is upon her debt contracted while single. That is, if the declaration shows that the contract was made while the defendant was a widow or sole, her coverture at the time of the suit is no obstacle to the recovery of such a judgment against her as might be rendered against any other defendant.[9] This case is also specifically covered, in several of the states, by statutes which provide for and authorize a personal judgment against a married woman upon her contract made before marriage, to be enforced, however, only against her separate property.[10] And in some others, the law provides that an action upon the wife's debt, contracted before the marriage, must be brought against the husband and wife jointly.[11] Dissolution of the marriage of course restores both parties to their former status. A judgment against a divorced wife for her debt, and also against the husband as to any property received by the marriage, if void as to him, cannot prejudice her and is not void as to her.[12]

§ 190. Effect of Omission to plead Coverture.

The most difficult question which has arisen in connection with this subject, and the one which has chiefly engaged the attention of

[8] Doyley v. White, Cro. Jac. 323; King v. Jones, 2 Ld. Raym. 1525; Evans v. Chester, 2 Mees. & W. 847; Cooper v. Hunchin, 4 East, 521; Roosevelt v. Dale, 2 Cow. 581; Phillips v. Stewart, 27 Ga. 402; Evans v. Lipscomb, 28 Ga. 71; Sackett v. Wilson, 2 Blackf. 85; Parker v. Steed, 1 Lea, 206.

[9] Travis v. Willis, 55 Miss. 557.

[10] Rev. Stat. Me. 1883, c. 61, § 4; Acts N. Y. 1853, c. 576, § 1; Acts Md. 1880, 253; Acts Va. 1875, c. 359, § 3; Rev. Stat. W. Va. 1878, c. 122, § 10; Code N. Car. § 1823; Genl. Stats. Colo. § 2275; Comp. Laws Wyom. c. 82, § 7; 2 Rev. Stat. Ind. § 5127, construed in Smith v. Beard, 73 Ind. 159.

[11] Pub. Stats. R. I. c. 166, § 16; 2 Rev. Stat. Ind. § 5127; Acts Md. 1880, 253; Acts Va. 1875, c. 359, § 3; Rev. Stat. W. Va. 1878, c. 122, § 10; Genl. Stats. Colo. § 2275; Comp. Laws Wyom. c. 82, § 7.

[12] Joyes v. Hamilton, 10 Bush, 544.

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the courts, is this: What effect is to be given to a personal judgment rendered against a married woman, by default, in an action to which her coverture, if pleaded, would have been a complete defense? Is it a mere nullity, or is it voidable on motion, or is it merely erroneous? In some of the states, the doctrine is firmly held that such a judgment is absolutely void and may be so treated whenever it is brought in question.[13] These decisions proceed upon the ground of the total disability of a *feme covert* to contract the species of debt assumed by the hypothesis, her incapacity to retain an attorney to appear and plead for her, and the consequent want of jurisdiction in the court for lack of a juristic person to act upon. Some of the decisions cited are ably considered and well reasoned.

On the other hand, it is held by a long line of authorities (including some English cases) that such a judgment against a married woman is *not void*, and even though erroneous or voidable, by reason of the absence of enabling statutes, is still valid and binding upon her in any collateral proceeding and until set aside or reversed in some proper manner.[14] The practical importance of the question, it will be observed, comes to light when we inquire whether such a judgment may be impeached collaterally, and what is its effect upon third persons. For this will depend entirely upon whether it is void or voidable. And the decisions which hold it to be merely voidable

[13] Morse v. Toppan, 3 Gray, 411; Norton v. Meader, 4 Sawy. 603; Hartman v. Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679; Graham v. Long, 65 Pa. St. 383; Swayne v. Lyon, 67 Pa. St. 439; Vandyke v. Wells, 108 Pa. St. 49; Griffith v. Clarke, 18 Md. 457; Davis v. Foy, 15 Miss. 64; Cary v. Dixon, 51 Miss. 593; Mallett v. Parham, 52 Miss. 921; White v. Bird, 20 La. Ann. 281; Parsons v. Spencer, 83 Ky. 305; Stevens v. Deering (Ky.), 9 S. W. Rep. 292; Higgins v. Peltzer, 49 Mo. 152; Weil v. Simmons, 66 Mo. 617; Corrigan v. Bell, 73 Mo. 53.

[14] Dick v. Tolhausen, 4 Hurl. & N. 695; Moses v. Richardson, 8 B. & C. 421; Frazier v. Felton, 1 Hawks, 231; Green v. Branton, 1 Dev. Eq. 504; Vick v. Pope, 81 N. Car. 22; Glover v. Moore, 60 Ga. 189; Mashburne v. Gouge, 61 Ga. 512; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Phelps v. Brackett, 24 Tex. 236; Spalding v. Walthen, 7 Bush, 659; Chatterton v. Young, 2 Tenn. Ch. 768; Howell v. Hale, 5 Lea, 405; Sheppard v. Kendle, 3 Humph. 81; Keith v. Keith, 26 Kans. 26; Callen v. Ellison, 13 Ohio St. 446; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. Rep. 93; Burk v. Hill, 55 Ind. 419; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. Rep. 285; Vantilburg v. Black, 3 Mont. 459; Gambette v. Brock, 41 Cal. 78; Guthrie v. Howard, 32 Iowa, 54; Farris v. Hayes, 9 Oreg. 81.

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generally support their conclusion by a species of argument *ab inconvenienti*, namely, the harm that might accrue to innocent strangers if such judgments were to be treated as mere nullities. Thus the supreme court of California says: "There would be no safety in purchasing at judicial sales, under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof, in a collateral action, that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was incapable in law of contracting the debt for which the judgment was rendered."[15] In order to reach this result it is necessary to agree that, no matter what the status of the woman may have been, if she was duly served with process, she was fully within the jurisdiction of the court, so that the judgment, though upon a contract which she had no power to make, would be at most erroneous as a matter of law. And this is the ground of the decision in the recent important case of *McCurdy* v. *Baughman*,[16] where the court, after a critical and exhaustive review of the authorities, announced the doctrine stated at the beginning of this paragraph, and added: "Indeed, this is but to reassert the doctrine constantly maintained in this court, that 'the judgment or final order of a court having jurisdiction of the subject-matter and parties, however erroneous, irregular, or informal such judgment or order may be, is valid until reversed or set aside.'" In Alabama it is held that in the absence of fraud in its procurement, or other special cause shown, a *consent* decree is as binding on a married woman as on a person who is *sui juris*.[17] In another state it is considered that as a judgment against a married woman *may* be valid (for it may be for her tort or for a debt contracted before marriage), in a proceeding to enforce such a judgment it should not be held conclusively to be void, but neither should the defendant be estopped from showing that it *is* void.[18] And in Pennsylvania the court has lately held—though without departing from its earlier rulings—that a judgment by default against a married woman, in an action to which she might have pleaded coverture, is impervious to collateral attack, and voidable at most, when the pro-

[15] Gambette v. Brock, 41 Cal. 78.
[16] 43 Ohio St. 78, 1 N. E. Rep. 93.
[17] Winter v. City Council, 79 Ala. 481.
[18] Parsons v. Spencer, 83 Ky. 305.

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ceeding was *in rem*, as, for the enforcement of a mechanic's lien.[19]

The solution of this vexed question must depend upon the view which we are to take of the common law status of a married woman. If it is merely a protection,—a barrier which she may raise in the path of one who pursues her at law, and which the courts are bound to erect in her behalf,—then it may readily be conceded that she may be brought within the jurisdiction by a proper service of process, so that the subsequent proceedings will at any rate not be void, although the court, to save itself from error, should not give a personal judgment against her on a debt she could defend against by coverture. This theory, however, is far from satisfactory as an account of the common law notion. The doctrine seems rather to have been that marriage, except for certain special purposes, put the *personality* of the wife entirely in abeyance. And therefore, in the generality of cases, her contracts and business transactions could have no validity whatever; for it is only a juristic person whose acts can have the effect of creating or transferring rights. For the same reason she would be beyond the authority of the courts,—as much so as the sovereign himself,—and no court could acquire jurisdiction of her (in the cases falling within our hypothesis), because process cannot issue except against a person known to the law as an individual. If, then, a suit was instituted against her, and she suffered a default, still no valid judgment could be given. The whole proceeding would be void *ab initio* and could result in nothing effectual. It seems to us that the vital point is clearly indicated in the following remark of the court of appeals of Kentucky: "If, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then it seems to us that it should be equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorizes a personal liability. In the one case the court has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence."[20]

[19] Shryock v. Buckman, 121 Pa. St. 248, 15 Atl. Rep. 480.

[20] Parsons v. Spencer, 83 Ky. 305. On another appeal in the same case (Spencer v. Parsons, 18 S. W. Rep. 72), the court sustained its ruling by the fol-

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§ 191. Under partially enabling Statutes.

Thus far we have considered the validity of judgments against married women at common law. It is now necessary to consider the enabling statutes which, both in England and in most of the states, have introduced the most important changes in their legal powers and relations. These statutes may be broadly divided into two classes, those which fully emancipate the wife, and those which release her only partially from the common law disabilities. Statutes of the latter class usually give the married woman power to make contracts with respect to her separate estate, to incur debts for its repair and improvement, to make herself liable for supplies for the maintenance of the family, and to sue and be sued in respect to such contracts and debts. It is generally held, under an enabling statute

lowing convincing line of argument. "Generally, a *feme covert* has no personality in law. She is not recognized by it save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are in general voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally; the reason being that she has no personal identity in law. It does not follow because, as an exceptional case, a personal judgment may go against her for tort, or upon a contract made by her when single, the reason being that her status at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal status in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally, or subjecting her to a judgment *in personam*. Her contract is void in law. In equity, it may be enforced against her separate estate, if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by *in rem* proceedings. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing, and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *sui juris*, and had no such legal existence as authorized a personal judgment. We are aware there is a conflict of authority in this country upon this question; but the views above advanced seem to us not only supported by reason, but we know they are sustained by such high authority as the supreme courts of Pennsylvania, Missouri, and other states."

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allowing a married woman to charge her separate estate by certain kinds of contracts beneficial to herself or the estate, that a judgment against her, founded on such a contract, will be erroneous (or *void*, according to the doctrine prevailing in the particular state), unless the record itself shows that the debt is one for which her separate estate is liable.[21] Thus, under a law in Pennsylvania, that a judgment against a wife in a joint action, so as to bind her separate estate, shall not be rendered unless it shall be proved that the debt sued for was contracted by the wife for necessaries for the family, a default judgment which does not show that any testimony was taken is void.[22] And in any case no *general* judgment can be given; it must be limited to the separate property of the wife in reference to which the contract was made.[23] In Alabama, the judgment must specify the property to be bound. "A general judgment, or a judgment which pretermits the ascertainment of the estate of the wife condemned to its satisfaction cannot be rendered. . . . . There can be no personal judgment against the wife; the only judgment that can be rendered is a judgment *in rem*, a judgment of condemnation of the statutory estate described in the complaint."[24] So where an enabling statute allows her to bind her separate real estate, a judgment against the *land* is valid, but not a personal judgment against the woman.[25] And in an action against a married woman to dispossess her of lands, no personal judgment, either for damages or costs, can be rendered against her.[26] But her coverture does not prevent the rendition of a decree against lands descended to her, for contribution to the other heirs on account of a debt of the ancestor which they have paid.[27] Where a married woman is allowed to mortgage

[21] Lewis v. Perkins, 36 N. J. Law, 133; Swayne v. Lyon, 67 Pa. St. 436; Hecker v. Haak, 88 Pa. St. 238; Magruder v. Buck, 56 Miss. 314; Cary v. Dixon, 51 Miss. 593; Albree v. Johnson, 1 Flipp. 341; White v. Baillio, 12 La. Ann. 663; Robson v. Shelton, 14 La. Ann. 712; Trimble v. Miller, 24 Tex. 214; Menard v. Sydnor, 29 Tex. 257; McGlaughlin v. O'Rourke, 12 Iowa, 459.

[22] Gould v. McFall, 111 Pa. St. 66, 2 Atl. Rep. 403; Brown v. McKinney (Pa.), 18 Atl. Rep. 642.

[23] Crockett v. Doriot (Va.), 3 S. E. Rep. 128.

[24] Lee v. Ryall, 68 Ala. 354.

[25] Sweeney v. Smith, 15 B. Mon. 325, 61 Am. Dec. 188.

[26] Steed v. Knowles, 84 Ala. 205, 3 South. Rep. 897.

[27] Winston v. McAlpine, 65 Ala. 377.

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her separate estate, but there is no statute allowing her to sue and be sued as a *feme sole*, the remedy is by charging the property in equity; but a personal judgment against her on the mortgage note is erroneous.[28] According to the law in Louisiana, a judgment against a married woman is void and of no effect when her husband has not been cited with her, and she is not authorized by him or by the judge to defend the suit.[29] As to confessions of judgment by married women, under these enabling statutes, the reader is referred to § 55 of this volume.

§ 192. Statutes removing Disability of Coverture.

In many of the states there are statutes which abolish all disabilities from coverture and allow a wife to sue and be sued in like manner as if she were sole.[30] In these states it is universally held that a personal judgment against a married woman, if otherwise regular, is as valid and binding as any other.[31] Thus, where the property of a married woman is levied upon by her husband's cred-

[28] Johnson County v. Rugg, 18 Iowa, 137; Wolff v. Van Metre, 19 Iowa, 134; Reed v. King, 28 Iowa, 500; Patton v. Stewart, 19 Ind. 233; Kirby v. Childs, 10 Kans. 639; Pemberton v. Johnson, 46 Mo. 342; Keating v. Korfhage, 88 Mo. 524. The same is true of actions on mechanics' liens. Burgwald v. Weippert, 49 Mo. 60; Seeman v. Weippert, 49 Mo. 61.

[29] Dirmeyer v. O'Hern, 39 La. Ann. 961, 3 South. Rep. 132; Washington v. Hackett, 19 La. Ann. 146.

[30] Pub. Stats. Mass. c. 147, § 7; Genl. Laws N. H. c. 183, § 12; Acts Vt. 1884, c. 140, § 1; Code Civil Proc. N.Y. § 450; Rev. Stats. N. J. "Married Women," 10, 11; Act Pa. June 3, 1887, § 2 (P. L. 333); Rev. Stats. Ohio, § 4996; Rev. Stats. Ill. c. 68, § 1; Rev. Code Iowa, § 2562; Genl. Stats. Minn. c. 66, § 29; Comp. Laws Kans. c. 62, § 3; Comp. Stats. Nebr. pt. 1, c. 52, § 3; Acts Md. 1882, c. 265; Laws Oreg. 1878, p. 93, § 7; Genl. Stats. Colo. § 2379; Code Wash. § 2396; Code Civil Proc. Dak. § 77; Comp. Laws Wyom. 1882, c. 68; Code Miss. § 1167; Comp. Laws Utah, § 1021.

[31] Labaree v. Colby, 99 Mass. 559; Goodnow v. Hill, 125 Mass. 587; Vosburgh v. Brown, 66 Barb. 421; Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437; First Nat. Bank v. Garlinghouse, 53 Barb. 615; Wilson v. Herbert, 41 N. J. Law, 454, 32 Am. Rep. 243; Huff v. Wright, 39 Ga. 41; Glover v. Moore, 60 Ga. 189; Hart v. Grigsby, 14 Bush. 542; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Van Metre v. Wolff, 27 Iowa, 341; Jones v. Glass, 48 Iowa, 345; Davis v. Bank, 5 Nebr. 242, 25 Am. Rep. 484; Rogers v. Weil, 12 Wis. 664; Platner v. Patchin, 19 Wis. 333; Leonard v. Townsend, 26 Cal. 435; Marlow v. Barlew, 53 Cal. 456; Alexander v. Bouton, 55 Cal. 15.

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itors as his property, and she interposes a claim, she is bound, just as any other suitor would be, by the judgment in the claim case.[32] So where she prefers a suit against her trustee to enforce the trust, or to charge the trustee with maladministration, she is concluded by a judgment against her.[33]

§ 193. Judgments against Infants.

In respect to their legal disabilities, infants occupy a position analogous to that of married women. But the courts have shown a much stronger disposition to sustain judgments given against the former than those rendered against the latter. Assuming that an infant defendant has been brought before the court by a proper service of process, it is regular and orderly to appoint a guardian *ad litem* for him, who then assumes the defense of the action and protects the interests of the minor. But if a judgment is rendered by a court having jurisdiction of the parties and subject, it is held, by the great preponderance of authorities, that it will not be *void* because the defendant was an infant and no guardian *ad litem* was appointed, although it will be irregular and liable to reversal, or voidable on a proper proceeding for that purpose.[34] The theory is, that the appointment of a guardian is not a prerequisite to the jurisdiction of the

[32] Lewis v. Gunn, 63 Ga. 542.

[33] Rammelsberg v. Mitchell, 29 Ohio St. 22.

[34] O'Hara v. McConnell, 93 U. S. 150; Tucker v. Bean, 65 Me. 352; Barber v. Graves, 18 Vt. 292; Crockett v. Drew, 5 Gray, 399; Austin v. Charleston Fem. Sem., 8 Met. 196; Swan v. Horton, 14 Gray, 179; Hill v. Keyes, 10 Allen, 258; Sims v. Dentistry College, 35 Hun, 344; Moore v. McEwen, 5 Serg. & R. 378; Kemp v. Cook, 18 Md. 180, 79 Am. Dec. 681; Roberts v. Stanton, 2 Munf. 129; Larkins v. Bullard, 88 N. Car. 35; Stancill v. Gay, 92 N. Car. 462; England v. Garner, 90 N. Car. 197; Finley v. Robertson, 17 S. Car. 435; Cook v. Rogers, 64 Ala. 406; Taylor v. Rowland, 26 Tex. 298; Montgomery v. Carlton, 56 Tex. 361; Martin v. Weyman, 26 Tex. 460; Simmons v. McKay, 5 Bush. 25; Allison v. Taylor, 6 Dana, 87; Walkenhorst v. Lewis, 24 Kans. 420; Trapnall v. Bank, 18 Ark. 53; Boyd v. Roane, 49 Ark. 397, 5 S. W. Rep. 704; St. Clair v. Smith, 3 Ohio, 355; Blake v. Douglas, 27 Ind. 416; Carver v. Carver, 64 Ind. 195; Peak v. Shasted, 21 Ill. 137, 74 Am. Dec. 83; Quigley v. Roberts, 44 Ill. 503; Bonnell v. Holt, 89 Ill. 71; Millard v. Marmon, 116 Ill. 649, 7 N. E. Rep. 468; Webster v. Page, 54 Iowa, 461, 6 N. W. Rep. 716; Drake v. Henshaw, 47 Iowa, 291; Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153; Stupp v. Holmes, 48 Mo. 89; Bailey v. McGinniss, 57 Mo. 362; Parker v. Starr, 21 Nebr. 680, 33 N. W. Rep. 424.

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court; it attaches upon due service of the process being made. Consequently, the omission to appoint a guardian does not impair the authority of the court to proceed in the case, but is at most an irregularity in the exercise of its lawful jurisdiction, which, on settled principles of law, may impregnate its judgment with error, but cannot render it absolutely null. Very important results follow from the placing of such sentences in the category of voidable judgments, as distinguished from those which are entirely void. For, first, the judgment will stand as a valid adjudication, against the infant and all others who may be interested, until it is set aside or reversed.[35] Again, the omission to appoint a guardian *ad litem* will not vitiate the judgment on a collateral attack; it is only voidable by a direct proceeding.[36] And if it is set aside, the interest of a *bona fide* purchaser under the judgment without notice will not be affected.[37] And further, the avoidance of the judgment is at the election of the defendant; upon attaining his majority, he may execute a written release of errors, which will have the effect to confirm the judgment.[38] And while the courts will always be careful of the rights of infants, they will not in all cases set aside irregular judgments against them as of course; they will refuse to do so where it appears from the record or otherwise that the infant suffered no substantial injustice.[39] As respects proceedings to probate a will, no appointment of a guardian *ad litem* for any minor interested in the testator's estate is necessary, and the probate is valid, notwithstanding the omission of such appointment.[40]

§ 194. Service of Process on Infants.

It is indispensable to the validity of a judgment against an infant that the record should show that he was made a party in some

[35] England v. Garner, 90 N. Car. 197; Bernecker v. Miller, 44 Mo. 102; Simmons v. McKay, 5 Bush, 25; Frierson v. Travis, 39 Ala. 150.

[36] Millard v. Marmon, 116 Ill. 649, 7 N. E. Rep. 468.

[37] England v. Garner, 90 N. Car. 197.

[38] Hill v. Keyes, 10 Allen, 258.

[39] Syme v. Trice, 96 N. Car. 248, 1 S. E. Rep. 480; McCroskey v. Parks, 13 S. Car. 90; Phillips v. Dusenberry, 8 Hun, 348; Bickel v. Erskine, 43 Iowa, 213; Fuller v. Smith, 49 Vt. 253; Rankin v. Kemp, 21 Ohio St. 651; Kemp v. Cook, 18 Md. 130.

[40] *In re* Mousseau's Will, 30 Minn. 202, 14 N. W. Rep. 887.

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legal and effectual mode.[41] Ordinarily the statute requires that personal service be made upon the infant, if over the age of fourteen years (and sometimes upon the guardian also), and upon a parent, guardian, or person having charge of the minor, if under that age. This requirement is jurisdictional; the law must be strictly followed; and neither the infant nor his guardian can accept service, or waive the due service of process.[42] The service, as stated, should be personal. But it is held in Kentucky, that a judgment against an infant constructively served, without the appointment of a guardian *ad litem*, is not void, but will stand good until set aside or reversed.[43] And where the statute provides for service on non-resident defendants by publication, service may be made in that manner upon non-resident infants.[44] It is clearly irregular to appoint a guardian *ad litem* until after the defendant has been duly brought before the court. Yet numerous cases hold that, although the infant was never personally served, or although the service was not in compliance with the statute, or was otherwise defective, still, if a guardian *ad litem* was appointed and an answer filed and the action defended, the judgment will not be *void*, though the defendant may have it reversed or set aside.[45] But some other authorities maintain the rule that where infant defendants are not served with process and do not appear,

[41] Shaefer v. Gates, 2 B. Mon. 453, 38 Am. Dec. 164; Abdil v. Abdil, 26 Ind. 287; Winston v. McLendon, 43 Miss. 254.

[42] Lenox v. Notrebe, 1 Hempst. 251. Genobles v. West, 23 S. Car. 154; Young v. Young, 91 N. Car. 359; Winston v. McLendon, 43 Miss. 254; Taylor v. Walker, 1 Heisk. 734; Armstrong v. Wyandotte Bridge Co., 1 McCahon, 166; Abdil v. Abdil, 26 Ind. 287; Clark v. Thompson, 47 Ill. 25; Good v. Norley, 28 Iowa, 188; Kansas City R. Co. v. Campbell, 62 Mo. 585. "The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed. An infant is incapable of making himself or herself a party to an action by accepting service, so as to be bound by a judgment therein. All the formalities prescribed by statute must be complied with." Finley v. Robertson, 17 S. Car. 435.

[43] Simmons v. McKay, 5 Bush, 25.

[44] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407; Walkenhorst v. Lewis, 24 Kans. 420.

[45] Heroman v. Louisiana Institute, 34 La. Ann. 805; Robb v. Irwin, 15 Ohio, 689; Preston v. Dunn, 25 Ala. 507; Nelson v. Moon, 3 McLean, 319; Larkins v. Bullard, 88 N. Car. 35; Gronfier v. Puymirol, 19 Cal. 629; Cox v. Story, 80 Ky. 64; Gibson v. Chouteau, 39 Mo. 536; Kremer v. Haynie, 67 Tex. 450, 3 S. W. Rep. 676.

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the court has no authority whatever to appoint a guardian *ad litem* for them, and no jurisdiction as to them, and a judgment against them is utterly void.[46] There is something to be said in favor of this position, but both the preponderance of the cases and the drift of judicial thinking appear to be against it. In Illinois, it is held that if service is made upon the infant personally, instead of upon his guardian, as required by the statute, and no guardian *ad litem* appointed, the court is without jurisdiction.[47] Similarly, when the infant is under the age of fourteen years, and the summons is not served on his father, mother, guardian, or other person having charge of him, as the statute prescribes, it has been held that a judgment against him is void, and a sale of his land thereunder should be set aside.[48]

Summarizing the conclusions reached in this and the preceding sections as sustained by the majority of the decisions, we may say that, in order that a judgment against an infant may be entirely regular and valid, *both* due service of process and the appointment of a guardian for the suit are necessary. But if (1) no service is had upon the defendant, but a guardian is appointed and defends, or if (2) the infant is within the jurisdiction of the court by personal citation, but no guardian is appointed for him,—in either of these cases, the judgment will be irregular and voidable, but not a mere nullity. If *neither* of these requisites is complied with, the judgment will ordinarily be utterly void. To the last statement, however, there may be exceptions in peculiar circumstances. In a case in North Carolina, where it appeared that there was no service of process upon infant defendants, and no guardian appointed to protect their rights, but they were brought in by an order directing them to be made parties with leave to answer, it was held that a judgment taken against them was irregular and might be set aside at any time, but it was not treated as a nullity.[49] But here we approach the

[46] Roy v. Rowe, 90 Ind. 54; Insurance Co. v. Bangs, 103 U. S. 435; Whitney v. Porter, 23 Ill. 445. See Galpin v. Page, 18 Wall. 350; Sprague v. Haines, 68 Tex. 215, 4 S. W. Rep. 371; McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. Rep. 943; Ingersoll v. Mangam, 84 N. Y. 622.

[47] Whitney v. Porter, 23 Ill. 445.

[48] Wornock v. Loar (Ky.), 11 S. W. Rep. 438; Civil Code Ky. § 52.

[49] Larkins v. Bullard, 88 N. Car. 35;

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great principle, applicable to all persons alike, that jurisdiction over them is only acquired by service of process in some regular and recognized mode.

§ 195. Appearance by Attorney or Guardian.

Although the law does not regularly permit an infant to defend his case in person or by attorney, yet a judgment against an infant for whom no guardian was appointed, but who appeared by attorney, is voidable only and not void; it may be set aside on motion after he attains majority, or may be reversed on error.[50] In a case in California, where, in a suit against infants, there was no personal service upon them, but their general guardian appeared and defended for them, it was held that such appearance gave the court jurisdiction of their persons.[51] And in many of the states a general guardian, already appointed, may appear for the minor,[52] though in others a guardian *ad litem* must in all cases be appointed.[53]

§ 196. Effect of Failure to plead Infancy.

The general disposition of the authorities is to regard the plea of infancy as a personal privilege, which may be waived, and if it is not pleaded, a judgment against the infant is binding upon him.[54] Still

Stancill v. Gay, 92 N. Car. 462. The Code, § 887, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. Id.; Perry v. Adams, 98 N. Car. 167, 3 S. E. Rep. 729.

[50] Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153; Beeler v. Bullitt, 3 A. K. Mar. 280, 13 Am. Dec. 161; Porter v. Robinson, 3 A. K. Mar. 253, 13 Am. Dec. 153; Bourne v. Simpson, 9 B. Mon. 454; Austin v. Charleston Fem. Sem. 8 Met. 196, 41 Am. Dec. 497; Bloom v. Burdick, 1 Hill (N. Y.), 130, 37 Am. Dec. 299; Barber v. Graves, 18 Vt. 290; Martin v. Weyman, 26 Tex. 460; Fullbright v. Camefox, 30 Mo. 425; Marshall v. Fisher, 1 Jones (N. Car.), 111; Whitney v. Porter, 23 Ill. 445.

[51] Smith v. McDonald, 42 Cal. 484.

[52] Weeks v. Smith, 44 Miss. 296; Mansur v. Pratt, 101 Mass. 60; Pierson v. Hitchner, 25 N. J. Eq. 130; Pucket v. Johnson, 45 Tex. 550; Gronfier v. Puymirol, 19 Cal. 629; Hinton v. Bland, 81 Va. 588.

[53] Roach v. Hix, 57 Ala. 576; Stammers v. McNaughton, 57 Ala. 277; Fitch v. Cornell, 1 Sawy. 157.

[54] Blake v. Douglass, 27 Ind. 416.

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there are some cases which hold,—on analogy to the rule obtaining in equity,—that a judgment by default cannot properly be rendered in any case against an infant.[55] But the better doctrine is that a judgment rendered upon default against an infant, after due and proper service of a summons upon him, though without the appointment of a guardian *ad litem*, is erroneous and voidable, but not void. And it is incumbent upon the infant, within a reasonable time after he attains his majority, having knowledge of the judgment, to take steps to avoid it, or he will be bound by his own acquiescence.[56]

§ 197. Decrees in Equity against Infants.

In the courts of equity the rights and privileges of an infant are generally governed by the same rules as at law, except that chancery possesses, and will employ, larger and more diversified means of ascertaining and protecting his interests. In order to make a decree against a minor, the court must acquire jurisdiction of his person in some legal and regular manner. Thus where a decree was rendered against an infant whose guardian was an individual party to the bill, but not in his capacity as guardian, it was considered that the infant was not bound by the decree.[57] So also, a guardian *ad litem* should be appointed, just as at law. But though infant defendants may not have a guardian to protect their interests, yet a decree made against them is not for that reason void, but it will stand as valid until reversed.[58] However, if the decree, under such circumstances, is *in favor* of the infants, it is valid and cannot be attacked collaterally.[59] An important and invariable rule, which must be here noticed, is that

[55] Rhoads v. Rhoads, 43 Ill. 239; Peak v. Pricer, 21 Ill. 164; Chalfant v. Monroe, 8 Dana, 85; Massie v. Donaldson, 8 Ohio, 377; Metcalfe v. Alter, 31 La. Ann. 389. A counterclaim to the suit of an infant prosecuted by next friend cannot be taken as confessed for want of a reply. A guardian *ad litem* must be appointed for him and a reply filed, denying every material allegation in the counterclaim, and the circuit court should see that this is done. Morris v. Edmonds, 43 Ark. 427.

[56] Eisenmenger v. Murphy (Minn.), 43 N. W. Rep. 784; Beckley v. Newcomb, 24 N. H. 359; *In re* Becker, 28 Hun, 207.

[57] Salter v. Salter (Ga.), 4 S. E. Rep. 891.

[58] Porter v. Robinson, 3 A. K. Mar. 253, 13 Am. Dec. 153; Beeler v. Bullitt, 3 A. K. Mar. 280, 13 Am. Dec. 161.

[59] Hanna v. Spotts, 5 B. Mon. 362, 43 Am. Dec. 132.

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equity will require an investigation of the merits in every case where infants are concerned; it will not rest satisfied with the fact that no defense is set up; neither will it suffer a guardian to admit away the rights of the ward. Hence a decree cannot pass *pro confesso* against an infant.[60] A similar rule governs the case of consent decrees. "Where infants are concerned, the court will not make a decree by consent, without first referring it to the master to ascertain whether it is for their benefit. But when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the master, and he had made a report thereupon that it would be for their benefit."[61] According to the practice followed in many jurisdictions, a decree against an infant is first entered *nisi;* and a day is given him, after he shall attain full age, to come in and show cause against making the decree absolute. If he omits to do so, the decree becomes final and he is conclusively bound by it.[62] But whether the omission of the court to secure this privilege to the infant will invalidate the decree, wholly or in part, is not so clear upon the authorities. The cases seem to agree that a decree made absolute in the first instance would not be void, although it might be voidable.[63] And there are decisions to the effect that

[60] Lane v. Hardwicke, 9 Beav. 148; Bank of U. S. v. Ritchie, 8 Pet. 128; Walton v. Coulson, 1 McLean, 120; Tucker v. Bean, 65 Me. 352; Dow v. Jewell, 21 N. H. 470; Mills v. Dennis, 3 Johns. Ch. 367; Wright v. Miller, 8 N. Y. 9; Thompson v. McDermott, 19 Fla. 892; Jones v. Jones, 56 Ala. 612; Daily v. Read, 74 Ala. 415; Hooper v. Hardie, 80 Ala. 114; Wells v. Smith, 44 Miss. 296; McIlvoy v. Alsop, 45 Miss. 365; Johnson v. McCabe, 42 Miss. 255; Greenwood v. New Orleans, 12 La. Ann. 426; Massie v. Donaldson, 8 Ohio, 377; Chaffin v. Kimball, 23 Ill. 36; Reddick v. Bank, 27 Ill. 145; Enos v. Capps, 12 Ill. 255; Hamilton v. Gilman, 12 Ill. 260; Turner v. Jenkins, 79 Ill. 228; Quigley v. Roberts, 44 Ill. 503; Rhoads v. Rhoads, 43 Ill. 239; Hanna v. Spotts, 5 B. Mon. 362; Cowan v. Anderson, 7 Coldw. 191; Heath v. Ashley, 15 Mo. 393; English v. Savage, 5 Oreg. 518; Burt v. McBain, 29 Mich. 260; Barker v. Hamilton, 3 Colo. 291.

[61] Dow v. Jewell, 21 N. H. 470, 487.

[62] Wright v. Miller, 1 Sandf. Ch. 103, 59 Am. Dec. 447; Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; Long v. Mulford, 17 Ohio St. 484; Cox v. Story, 80 Ky. 64; Kuchenbeiser v. Beckett, 41 Ill. 172; Seward v. Clark, 67 Ind. 289; Simpson v. Alexander, 6 Coldw. 619; Coffin v. Heath, 6 Met. 76; Dow v. Jewell, 21 N. H. 470.

[63] Lockwood v. Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97; Anderson v. Irvine, 11 B. Mon. 341; Creath v. Smith, 20 Mo. 113; Hanna v. Spotts, 5 B. Mon. 362, 43 Am. Dec. 132; Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172; Field v. Williamson, 4 Sandf. Ch. 613.

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such a decree would be set aside on the application of the infant, after his majority, as by bill of review; on the ground that the infant defendant has an absolute and indefeasible right to show cause against the decree.[64] But the weight of the authorities is against this contention. The general disposition is to regard such a decree as valid and conclusive. "An infant defendant is as much bound by a decree in equity against her as a person of full age; and therefore if there be an absolute decree against a defendant who is under age, she will not be permitted to dispute it, unless upon such grounds as an adult might have disputed it, as fraud, collusion, or error."[65]

§ 198. Infant Plaintiffs.

Regularly an infant can sue only by his guardian or by next friend. But it is held that a minor who has commenced and prosecuted an action to judgment is bound by the result.[66] And as a general rule infant plaintiffs are as much bound by a decree as persons of full age. But they are not so bound in a proceeding by an official plaintiff, though they are styled relators, without the intervention of a *prochein ami*.[67]

§ 199. Judgments against Deceased Parties.

At the common law an action was abated by the death of a sole plaintiff or defendant. And in some of the states the doctrine appears to be irrevocably settled that a judgment against a person who was dead at the time of its rendition is absolutely null and void.[68]

[64] Beeler v. Bullitt, 4 Bibb, 11; Wright v. Miller, 4 Barb. 600; Harris v. Youman, 1 Hoffm. Ch. 178; Townsend v. Cox, 45 Mo. 401; Coffin v. Heath, 6 Met. 76; Lloyd v. Malone, 23 Ill. 43.

[65] Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; English v. Savage, 5 Oreg. 518; *In re* Hogton, L. R. 18 Eq. 573; *In re* Livingston, 34 N. Y. 555; Rivers v. Durr, 46 Ala. 418; McLemore v. Railroad, 58 Miss. 514; Marshall v. Fisher, 1 Jones (N. Car.), 111; Smith v. McDonald, 42 Cal. 484; Wills v. Spraggin, 3 Gratt. 567; Martin v. Weyman, 26 Tex. 460; Allman v. Taylor, 101 Ill. 185; Lloyd v. Kirkwood, 112 Ill. 329; Simmons v. Goodell, 63 N. H. 458, 2 Atl. Rep. 897; Ashton v. Ashton, 35 Md. 496.

[66] Gray v. Widner (Cal.), 20 Pac. Rep. 47.

[67] Becton v. Becton, 3 Jones Eq. 419.

[68] New Orleans & C. R. Co. v. Bosworth, 8 La Ann. 80; Norton v. Jamison, 23 La. Ann. 102; Edwards v. Whit-

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It is said in a recent case in Illinois: "A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the party, makes no difference in this respect."[69] So in the practice of the appellate courts; an order or judgment rescinding an order of appeal previously obtained by a party to a suit will be annulled and set aside, as void, if it appears that the rescinding order was rendered after the death of the party who had obtained the appeal.[70] Nor is the judgment saved by the fact that the defendant's sole executor was also a defendant in the same action, if he was joined in his individual capacity.[71] In Pennsylvania the courts have not committed themselves to this extreme view. Still they hold that a judgment against a defendant who was dead at the time of its entry,—this fact appearing of record,—will be stricken off.[72] And so a judgment entered on a warrant of attorney after the death of the defendant should be stricken off.[73] The consequences of holding the doctrine of the absolute nullity of the judgment, in these circumstances, are most important. For in the first place, no one would be imperilled by entirely disregarding it. It would be unnecessary for the representatives of the decedent, or his creditors, or any other persons interested, to take any measures to have the judgment vacated or reversed. Whenever it came in question, directly or collaterally, for whatever purpose presented, it might be attacked and overturned by proof of the defendant's death before its rendition. Neither could it operate as a source or support of any title or right, nor as the means of divesting any interest. Neither would it be binding as an adjudi-

ed, 29 La. Ann. 647; Lee v. Gardiner, 26 Miss. 521; Parker v. Horne, 38 Miss. 215; Tarleton v. Cox, 45 Miss. 430; Colson v. Wade, 1 Murph. (N. Car.) 43; Burke v. Stokeley, 65 N. Car. 569; Carter v. Carriger, 3 Yerg. 411, 24 Am. Dec. 585; Morrison v. Deaderick, 10 Humph. 342; Collins v. Knight, 3 Tenn. Ch. 187; McCreery v. Everding, 44 Cal. 284; Lynch v. Tunnell, 4 Harringt. 284; Meyer v. Hearst, 75 Ala. 390.

[69] Life Association v. Fassett, 102 Ill. 315, 325.

[70] Succession of Hoggatt, 36 La. Ann. 337.

[71] Bragg v. Thompson, 19 S. Car. 572.

[72] Tobias v. Dorsey, 2 Week. Notes Cas. 15.

[73] Lanning v. Pawson, 38 Pa. St. 480.

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cation of rights. No person could be estopped or concluded by its findings. And this is logically the state of the law in those jurisdictions where this view is adopted. But, as will appear from the following section, it is by no means universal.

§ 200. Judgment against Decedent Voidable only.

The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons, during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, *not void* nor open to collateral attack.[74] A late important case declares that "the decided weight of authority seems to be to the effect that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after the death of such party, the judgment is not for that reason void. It may be erroneous, but until reversed by some appropriate proceeding, it is valid."[75] So in Minnesota: "While the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment rendered after the party's death, though erroneous, is not on that account to be attacked in a collateral action. In other words the judgment is voidable when properly assailed, but not void."[76] For illustration, where the accounts of an administrator are

[74] Loring v. Folger, 7 Gray, 505; Reid v. Holmes, 127 Mass. 326; West v. Jordan, 62 Me. 484; Holt v. Thacher, 52 Vt. 592; Yaple v. Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Carr v. Townsend, 63 Pa. St. 202; Livingston v. Rendall, 59 Barb. 493; Hooe v. Barber, 4 Hen. & M. 439; Neale v. Utz, 75 Va. 480; Collins v. Mitchell, 5 Fla. 364; Powell v. Washington, 15 Ala. 803; Milam Co. v. Robertson, 47 Tex. 222; McClelland v. Moore, 48 Tex. 355; Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336; Fleming v. Seeligson, 57 Tex. 524; Spalding v. Wathen, 7 Bush, 659; Case v. Ribelin, 1 J. J. Mar. 30; Swasey v. Antram, 24 Ohio St. 87; Stoetzell v. Fullerton, 44 Ill. 108; Claflin v. Dunne (Ill.), 21 N. E. Rep. 834; Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229; Webber v. Stanton, 1 Mich. N. P. 97; Jennings v. Simpson, 12 Nebr. 558; Hayes v. Shaw, 20 Minn. 405 (Gil. 355); Berkey v. Judd, 27 Minn. 475, 8 N. W. Rep. 383.

[75] Mitchell v. Schoonover, 16 Oreg. 211, 17 Pac. Rep. 867.

[76] Stocking v. Hanson, 23 Minn. 542; Hayes v. Shaw, 20 Minn. 405, (Gil. 355.)

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settled and filed in the proper court in his lifetime, showing a balance due the estate, the court thereby acquires personal jurisdiction, and a judgment rendered after his death, confirming the report and directing payment of the sum in his hands, is not void when attacked collaterally in a suit against the surety on his bond, though the judgment might have been reversed on appeal.[77] So a judgment rendered when both the plaintiff and defendant are dead is erroneous; but relief can only be had by petition in the nature of a bill of review, or for a new trial, or by motion to set aside the judgment.[78] A judgment may be entered up, after the defendant's death, on an agreement for judgment made by him in his lifetime, but execution cannot issue without a *scire facias* to his executors.[79] On similar principles, a judgment rendered against a corporation after its dissolution by an act of the legislature is erroneous but not void.[80] The English statute provides that judgment may be entered up on a verdict within two terms after the death of the party against whom the verdict was given. But it is held that a judgment is valid, although not entered within that time, if the verdict was returned during the life of the party, and the delay was occasioned by a motion touching an award.[81]

The *object* of setting aside a judgment rendered against a party who died before the verdict, is to give his representatives an opportunity to resist a recovery. For otherwise the plaintiff might profit by the accidental circumstance, and the consequent cessation of opposition, to secure a judgment to which he was not entitled.[82] The *method* of avoiding the effect of the judgment will depend somewhat upon the state of the record, and will also vary in the different jurisdictions. The rule established by the supreme court of Nebraska, however, commends itself as both reasonable and practical. There a judgment rendered against a person (and equally so of one rendered in his favor) after his death, is reversible if the fact and time of death appear on the record, or in error *coram nobis;* if the fact

[77] Beard v. Roth, 35 Fed. Rep. 397.
[78] McClelland v. Moore, 48 Tex. 355.
[79] Webb v. Wiltbank, 1 Clark (Pa.), 302.
[80] Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.
[81] Bridges v. Smyth, 8 Bing. 29.
[82] Lynn v. Lowe, 88 N. Car. 478.

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must be shown *aliunde*, it is voidable and not void and cannot be impeached collaterally.[83] The writ of error *coram nobis* has fallen into desuetude in most of the states. But probably a motion in the court where the record remains, with due notice, and supported by affidavits, would be everywhere recognized as a proper proceeding to procure the vacating of a judgment objectionable on this ground but not disclosing the fact of death.

It is also to be observed that the validity of judgments, in these circumstances, will sometimes be helped by the fiction of relation. In an English case, where a judgment was signed at the opening of the office at its usual hour, 11 A. M., and the defendant died at 9:30 on the same morning, the judgment was held regular, on the principle that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done.[84] And in an early Massachusetts decision it was said: "By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If either of them die before judgment, no judgment can be entered; if after judgment, no execution can issue. But to avoid the inconvenience of this principle, the doctrine of relation has been resorted to; so that if judgment be not actually entered in court, or signed in vacation, as is the practice in England, and either party die, the judgment shall be considered as entered on the first day of the term, and an execution may issue bearing *teste* of that day, so as to save the fruits of a judgment to the party entitled to it. But this practice proves the general principle as first stated, and that it was necessary to resort to fiction in order to avoid the effect of that principle."[85] It must be added that if the personal representatives of a deceased defendant were duly made parties to the proceeding previous to the judgment, it is not enough to vitiate the judgment that it is entered against the dead man by name, instead of against the representatives, for the error is merely clerical.[86]

[83] Jennings v. Simpson, 12 Nebr. 558, 11 N. W. Rep. 580; McCormick v. Paddock, 20 Nebr. 486, 30 N. W. Rep. 602.

[84] Wright v. Mills, 4 Hurl. & N. 488.

[85] Hildreth v. Thompson, 16 Mass. 191.

[86] Stackhouse v. Zunts (La.), 6 South. Rep. 666.

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§ 201. Death of One of Several Defendants.

By an extension of the principles stated in the preceding section, it is held that where, in a joint action, one defendant dies before judgment, and his death is not suggested on the record, and judgment is rendered against all the defendants, the judgment is voidable only, not void, and is not open to collateral attack, although it may be vacated on motion.[87] However, in some of the states, where the strict rule prevails in the case of a sole defendant, it is also held that a judgment against several, one of whom was dead at its rendition, is void and a nullity.[88] Whether the judgment is void or merely voidable in respect to the deceased defendant, an important and difficult question arises as to its effect upon the surviving defendants. If void as to one, is it void as to all? If voidable as to one, must it be vacated as to all? Some of the cases hold that although a judgment or decree taken against a person by name, then dead, jointly with others, may be void as to the decedent, it would *prima facie* be good as to the other defendants.[89] But there are also decisions to the effect that such a judgment cannot be permitted to stand even against the survivors.[90] The solution of this question must ultimately depend upon whether a joint judgment is to be considered an *entirety* or not,—a point which will be discussed in a subsequent section.[91] For obviously, if the judgment is an entire thing and not susceptible of division, the fact that one of the defendants is dead is error which must cause it to be entirely set aside.

[87] King v. Burdett, 28 W. Va. 601, 57 Am. Rep. 687; Boor v. Lowrey, 103 Ind. 468, 3 N. E. Rep. 151; Burke v. Stokely, 65 N. Car. 569. A judgment which passes by operation of law upon the return of a forfeited forthcoming bond is not vitiated by the fact that one of the obligors is dead and incapable of suffering a judgment, but is valid as to the surviving obligors. Moody v. Harper, 38 Miss. 599.

[88] McCloskey v. Wingfield, 29 La. Ann. 141.

[89] Collins v. Knight, 3 Tenn. Ch. 183.

[90] Lewis v. Ash, 2 Miles (Pa.), 110. Compare Hartman v. Hesserich, 8 Week. Notes Cas. 488.

[91] *Infra*, § 211.

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§ 202. Entry of Judgment against Decedent Nunc Pro Tunc.

There is one case in which a judgment against a dead man is of unquestionable validity, namely, where it is entered *nunc pro tunc* as of a time when he was alive. The power to make such entries is within the common law authority of the courts, and it may be exercised in cases where the defendant dies in the interval between the finding of a verdict and the entry of judgment upon it, provided that the delay was not caused by the laches of the other party, but was attributable to the act of the court, in advising or deliberating upon the case after its submission, or to its being tied up by a motion for a new trial or similar proceeding. Under these circumstances, in furtherance of justice, and to prevent the successful party from being deprived of the fruits of the judgment to which he is entitled, the court will order it to be entered as of the time when the verdict was returned or the cause submitted.[92] So where a garnishee has answered, and the cause is continued, and he dies before the entry of judgment, judgment may be rendered against him as of the term when he made his disclosure.[93] This subject has already been considered in detail.[94]

§ 203. Jurisdiction must be acquired before Party's Death.

If the court has jurisdiction of the parties and the subject-matter, and the defendant, after having appeared and pleaded, dies, the judgment subsequently entered against him will at most be voidable, and may in some cases be made entirely valid by retroactive entry. But it is essential that jurisdiction should have attached during the defendant's life; and if the action is commenced against one already dead, the judgment will be absolutely *void* for want of jurisdiction.[95]

[92] Where the death of either party is suggested after verdict, judgment may be entered as of the term when the verdict was rendered. Lewis v. Soper, 44 Me. 72.

[93] Hall v. Harvey, 8 N. H. 61.

[94] *Supra*, §§ 126–130.

[95] Reid v. Holmes, 127 Mass. 326; Lo-

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§ 204. Judgment for Deceased Plaintiff.

In regard to the validity of a judgment rendered in favor of a plaintiff, after his death, the books contain contradictory expressions. Some cases hold that such a judgment is not void, but voidable at most, cannot be collaterally impeached, and is valid until reversed or vacated.[96] Other decisions regard it as a mere nullity, invalid for every purpose, and liable to be overturned whenever and wherever brought in question.[97] In order to arrive at just conclusions on this point, it is necessary to take into account the time or stage of the cause at which the decease of the plaintiff occurs. And first, if an action is commenced in the name of a person already dead (as where the decedent is the nominal plaintiff, and the one for whose benefit the suit is prosecuted is the real party in interest), or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed.[98] But it may also happen that the plaintiff dies during the pendency of the suit and before verdict. In this case, supposing the cause of action to be one which survives, the regular practice is to revive the action in favor of his personal representatives. But if this is omitted, and the suit proceeds to judgment in the name of the decedent, it is more reasonable to hold it voidable only than to consider it entirely null. For the case cannot be distinguished in principle from that of a defendant dying while the action is pending, where, as already shown (§ 200), the great preponderance

ring v. Folger, 7 Gray, 505; Griswold v. Stewart, 4 Cow. 457; Crosley v. Hutton (Mo.), 11 S. W. Rep. 613; Claflin v. Dunne (Ill.), 21 N. E. Rep. 834.

[96] Hayes v. Shaw, 20 Minn. 405. (Gil. 355;) Kennedy v. Pickering, Minor, 187; Webber v. Stanton, 1 Mich. N. P. 97.

[97] Young v. Pickens, 45 Miss. 553; Tarleton v. Cox, 45 Miss. 430. Where a sole plaintiff dies during the pendency of the suit, a judgment rendered in his name is a nullity, and the court in which it was rendered may set it aside at a subsequent term and re-instate the cause on the docket. Moore v. Easley, 18 Ala. 619. An order of revivor upon the plaintiff's death must be served upon the defendant like an original summons, or the subsequent judgment will be void. Amyx v. Smith, 1 Met. (Ky.) 529.

[98] Baragwanath v. Wilson, 4 Ill. App. 80; Powell v. Washington, 15 Ala. 803.

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of authority sustains the rule that the judgment is at least impervious to collateral attack and must be vacated or reversed by proper proceedings. Both cases are equally governed by the principle that when once the jurisdiction of the court has attached, no subsequent error or irregularity in the exercise of that jurisdiction can make its judgment void. Yet it would be too much to predicate entire validity of the judgment in the case supposed. Undoubtedly it would be irregular, and the court would vacate it on a proper application.[99] If the plaintiff dies after a verdict, or after trial and submission to the court, it is proper to enter judgment *nunc pro tunc* as of the date of the verdict or submission. But if the judgment is entered as of the actual date when rendered, it is not void, and suit may be brought upon it by the personal representative of the deceased plaintiff.[100] "As to rendering judgment on a verdict found before the death of the plaintiff," says the court in Missouri, "our statute expressly authorizes it, notwithstanding his subsequent death, and the statute is merely a codification of the common law, which never allows a delay occasioned by the court to change the condition of a suit."[101] Still,

[99] In Broas v. Mersereau, 18 Wend. 653, it was held that a verdict may be taken after the death of a sole plaintiff, where the death happens on the first day of the circuit. This on the theory that "the whole time of the circuit relates to the first day, so that if the party die on any day during the circuit, though before the trial, this is regarded as a death after verdict."

[100] Webber v. Stanton, 1 Mich. N. P. 97. See Gilman v. Donovan, 53 Iowa, 362, 5 N. W. Rep. 560. After a verdict was found for the plaintiff in an action, certain questions of law were reserved, but upon a hearing judgment was rendered on the verdict. In the mean time the plaintiff had died, but this fact being unknown to his counsel, the execution was issued in his favor. The court, upon the execution being returned unexecuted and cancelled, vacated the judgment and permitted the administrator to come in and prosecute the action, it appearing that the rights of third persons would not be affected thereby. Stickney v. Davis, 17 Pick. 169.

[101] Horner v. Nicholson, 56 Mo. 226, citing Wagn. Mo. Stat. 1050, § 7. But this view does not go uncontradicted. In the case of West v. Jordan, 62 Me. 484, it appeared that plaintiff and her husband brought case for personal injuries to her, there was a verdict for plaintiff, the defendant moved to set aside the verdict, then the plaintiff died. The motion was overruled, and the clerk entered up judgment as of the then current term. Afterwards the husband took out administration on the plaintiff's estate, and moved the court to bring forward the action "that the proper judgment may be made up." The court then made an entry reciting the death of the plaintiff, withdrawal and discontinuance as to the husband, his appearance as administrator, and

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the better practice clearly is to enter the judgment as of the term in which the verdict was returned.[102] It is also to be remarked that a judgment may be *amended* so as to show that, instead of being rendered in favor of the deceased plaintiff, it was really rendered in favor of his personal representatives, and this may be done without notice to the defendant, or after his death.[103] Finally, if the court renders judgment during the lifetime of the plaintiff, the clerk may perform the ministerial act of entering and recording it after his death.[104]

§ 205. Judgments against Insane Persons.

An insane person may be sued and jurisdiction over him acquired by the like process as if he were of sound mind. But when it is made to appear to the court that a party to the suit is insane, it is the duty of the court to appoint a guardian *ad litem* for him, or to have his committee or conservator made a party. "And no doubt it is the duty of a plaintiff who sues an insane person, if he has knowledge of the insanity, to inform the court thereof. But the failure to perform any of these duties does not affect the jurisdiction of the court, but only the regularity of the proceedings. Therefore it is, that the judgment of a court having jurisdiction of the subject-matter of the suit, and of the person of such a party, notwithstanding such irregularity, is not absolutely void." [105] On this principle, it is held by all the courts that a judgment against a person who was *non compos mentis* at the time of its rendition, though without joining his legal guardian, is binding and conclusive upon him, is not to be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose.[106] "The only question presented in this case is, whether a

judgment on the verdict. The defendant objected that there was already one judgment standing against him, and he might be doubly liable. But it was held that the first judgment was absolutely invalid, and at any rate the old record was effectually vacated by the allowance of the motion to bring forward.

[102] Goddard v. Bolster, 6 Me. 427, 20 Am. Dec. 320.

[103] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484; Dawson v. Hardy, 33 Tex. 198.

[104] Franklin v. Merida, 50 Cal. 289.

[105] Johnson v. Pomeroy, 31 Ohio St. 247.

[106] Beverley's Case, 4 Co. 123; Mans-

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judgment by default against a lunatic, upon service of process on him alone, be void because his committee was not a party; and it is our opinion that, though evidently erroneous, the judgment is not void." [107] So in New Hampshire: "The fact that a person against whom a suit is commenced is, at the service of the process upon him, a person of insane mind, and that he so continued until judgment rendered, and that he appeared in person or by attorney, or not at all, is good cause to reverse the judgment upon a writ of error; though for reasons which we think inapplicable and without force here, and perhaps little credible to the jurisprudence of an enlightened country, it seems not to have been so held in England. But in such case the defect in the proceedings renders them only voidable and not void." [108] That a person of unsound mind should be irrevocably bound by proceedings of which he could have no intelligent consciousness seems a legal anomaly. It is true a court may acquire jurisdiction of his person, but only in the sense that it obtains jurisdiction of a chattel, for example, by its attachment. And the unfortunate defendant lacks those means of defending himself and of challenging the claims asserted against him which justice dictates as the inviolable right of every person. We should therefore expect that a judgment against him would be regarded at least as voidable by the court which pronounced it. And this is undoubtedly the better doctrine, and the one prevailing in most of the states,[109] although there are some cases which hold that such a judgment is not even voidable, and that no relief can be had against it except by an application to chancery for an injunction against its enforcement.[110] And it will be remembered that a court of equity would in such a case

fields's Case, 12 Co. 124; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Lamprey v. Nudd, 29 N. H. 299; Sternbergh v. Schoolcraft, 2 Barb. 153; Wood v. Bayard, 63 Pa. St. 320; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; Brittain v. Mull, 99 N. Car. 483, 6 S. E. Rep. 382; Foster v. Jones, 23 Ga. 168; Newell v. Smith, 23 Ga. 170; Walker v. Clay, 21 Ala. 807; Ewing v. Wilson, 63 Tex. 88; Johnson v. Pomeroy, 31 Ohio St. 247; Dickerson v. Davis, 111 Ind. 433, 12 N. E. Rep. 145; Maloney v. Dewey (Ill.), 19 N. E. Rep. 848; Heard v. Sack, 81 Mo. 610; Sacramento Bank v. Spencer, 53 Cal. 787.

[107] Allison v. Taylor, 6 Dana, 87, 32 Am. Dec. 68.

[108] Lamprey v. Nudd, 29 N. H. 299.

[109] Dickerson v. Davis, 111 Ind. 433, 12 N. E. Rep. 145.

[110] Clark v. Dunham, 4 Denio, 262; Sternbergh v. Schoolcraft, 2 Barb. 153; Robertson v. Lain, 19 Wend. 650.

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inquire into the merits of the judgment, and would not enjoin it on account of the defendant's lunacy, but only because its execution should appear to be against conscience and inequitable. If the fact of lunacy appeared anywhere in the record, we are much inclined to think that it would be within the province of an appellate court to reverse the judgment on error.

§ 206. Joint Defendants at Common Law.

At common law, if several defendants were joined in an action *ex contractu*, and all were brought before the court by service or appearance, it was absolutely essential to the plaintiff's recovery that he should establish a joint liability; in other words, he must recover against all or none; it was not competent to enter a judgment in favor of one defendant and against another.[111] And this rule still obtains in many of the states which have not departed widely from the common law practice. The rule, however, is subject to one important exception. Though the obligation in suit is joint, or joint and several, yet if one defendant pleads matter which goes to his personal discharge, such as bankruptcy, or to his personal disability to contract, such as infancy, or any other matter which does not go to the nature of the writ, or pleads or gives in evidence matter which is a bar to the action as against himself only, and of which the others could not take advantage, judgment may be rendered for such defendant against the rest.[112] "That rule was always adopted," says the court in Massachusetts, "with this exception,—that when one defendant pleaded in his discharge some matter personal to himself, as a discharge under a bankrupt act or insolvent law, and upon such plea had a verdict, the other defendants were still liable. The reason of the distinction is obvious, and it is this; that such a special personal

[111] Metropolitan, etc., Co. v. Morris, 39 Vt. 393; Platner v. Johnson, 8 Hill, 476; Barker v. Ayers, 5 Md. 202; Rohr v. Davis, 9 Leigh, 30; Park v. Edge, 42 Ala. 631; Helm v. Van Vleet, 1 Blackf. 342, 12 Am. Dec. 248; People v. Organ, 27 Ill. 27, 79 Am. Dec. 391; Griffith v. Furry, 30 Ill. 251, 83 Am. Dec. 186; Flake v. Carson, 33 Ill. 518; Goodale v. Cooper, 6 Ill. App. 81; Rupe v. New Mexico Lumber Ass'n (N. Mex.), 5 Pac. Rep. 730.

[112] Snyder v. Snyder, 9 W. Va. 415; Coe v. Hamilton, 1 Morris (Iowa), 319; Robinson v. Brown, 82 Ill. 279.

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defense does not falsify the averment of an original joint promise, but, admitting it, avoids it by the averment of matter subsequent."[113] But, supposing the exception not to arise in the particular case, so strictly was the rule enforced that not even the most conclusive proof or unqualified admission of the liability of one defendant would entitle the plaintiff to a verdict against him alone.[114] It has been held, however, that the rule has no proper application to an action against administrators as such.[115] And it should be observed that the rule applies only where all the defendants are brought before the court or named as parties in the writ. A judgment against one of several makers of a note, without process against the others, releases those who are not sued.[116] And in some of the states, in derogation of the common law rule, a distinction is taken between joint contracts and such as are joint and several, the courts holding that in an action upon the latter species of obligation the plaintiff may enter a *nol. pros.* against one of the defendants and proceed to judgment against the others.[117] Under the main rule here considered it is plainly erroneous to render a final judgment against a part of several defendants while the cause remains undisposed of as to the others.[118] Hence if one of the defendants suffers a default, and an interlocutory judgment is entered up against him, it cannot be made final until the case is finally concluded as to the other defendants; and even then, if they should succeed in maintaining a defense which went to the whole right of action, the verdict in their favor will enure to the benefit of the defaulted party, and judgment must be given for him, equally with the rest, notwithstanding the default.[119] And in a case in Texas, where the court declined to enter judgment against one defendant, and contin-

[113] Hathaway v. Crocker, 7 Met. 262.

[114] Barker v. Ayers, 5 Md. 202.

[115] Gray v. White, 5 Ala. 490.

[116] Mitchell v. Brewster, 28 Ill. 163; Bell v. State, 7 Blackf. 33.

[117] Peyton v. Scott, 2 How. (Miss.) 870. Where all the defendants are brought into court, judgment rendered by agreement against one is tantamount to a dismissal as to the others. Henry v. Gibson, 55 Mo. 570.

[118] Davidson v. Bond, 12 Ill. 84; Barbour v. White, 87 Ill. 164; Prewitt v. Caruthers, 7 How. (Miss.) 804.

[119] Taylor v. Beck, 3 Rand. 316; Rohr v. Davis, 9 Leigh, 80; Woodward v. Newhall, 1 Pick. 500; *supra*, § 82.

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ued the case as to him, this was held to make the judgment entered against the other defendant void.[120]

§ 207. In Actions of Tort.

The rule stated in the preceding section must be restricted in its application to actions *ex contractu*; it does not govern in the case of actions *ex delicto*. In a suit founded upon tort, against several defendants, the plaintiff may recover against as many and only such defendants as he proves to be guilty, and any defendant, as against whom the proof fails, is entitled to a verdict.[121] In Maryland, in an action of this kind, if, at the conclusion of the plaintiff's case, there is no evidence against one of the defendants, he is considered entitled to be acquitted; and this practice is necessary, as the court observes, for otherwise the plaintiff could deprive the defendant of material and competent witnesses by joining them as parties to the action.[122] So if a verdict is returned against all the defendants sued jointly in tort, but in respect to one of the defendants it is not sustained by the evidence, it will be set aside, as against that defendant, upon his proper application, and the judgment be permitted to stand as against the party proven guilty of the injury complained of.[123]

§ 208. Joint Debtor Acts.

In many of the states, the common law rule in respect to the recovery in actions against several defendants has been changed by statutes. These statutes — commonly called "joint debtor acts" — provide that judgment may be given "for or against one or more of several plaintiffs, and for or against one or more of several defend-

[120] Wooters v. Kauffman, 67 Tex. 488, 8 S. W. Rep. 465.

[121] Winslow v. Newlan, 45 Ill. 145; Harris v. Preston, 10 Ark. 201; Jansen v. Varnum, 89 Ill. 100. A judgment against a portion of the defendants in actions *ex delicto* amounts to a dismissal of the cause as against the other defendants. Davis v. Taylor, 41 Ill. 405.

[122] Hambleton v. McGee, 19 Md. 43.

[123] Hayden v. Woods, 16 Nebr. 306, 20 N. W. Rep. 345. See also Cauthorn v. King, 8 Oreg. 138.

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ants," and usually contain a further provision that "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."[124] Under these statutes, if a plaintiff commences an action against two or more defendants upon a joint obligation, he is no longer compelled to establish a joint cause of action against all, but a judgment may be taken against the party or parties shown to be liable, when the others are not liable.[125] Thus, when two defendants are sued jointly on a contract which, on its face, is the joint contract of both, but which in legal effect was at all times the contract of one only, a judgment may be rendered against the party liable and in favor of the other.[126] So where several persons are sued as partners on a note signed by one, and the evidence shows that there was no partnership, judgment may be rendered against the one who signed, and a nonsuit may be ordered as to the others.[127] Or a plaintiff, suing several as partners for a breach of a contract, may recover against such as he can prove to be parties to the contract, without proof of the partnership.[128] And where an action is brought against two or more upon a joint contract, an equitable defense peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff.[129] And a recovery may be had against one defendant alone, in a proper case, notwithstanding another of the debtors has been released by the plaintiff upon a compromise.[130] And it is held that a statute of the character above described is a provision as applicable to suits by attachment as to

[124] Code Civil Proc. Cal. §§ 578, 579; Code of N. Y. § 274; Code of Wis. § 184; Code Civil Proc. Ohio, § 371; Code of Iowa, § 1815; Wagn. Mo. Stat. p. 1019, § 32; Code of Ark. §§ 4701, 4704.

[125] Ah Lep v. Gong Choy, 13 Oreg. 205, 9 Pac. Rep. 483; Lampkin v. Chison, 10 Ohio St. 450; Hunt v. Standart, 15 Ind. 33; Eyre v. Cook, 9 Iowa, 185; Stimson v. Van Pelt, 66 Barb. 151; Longstreet v. Rea, 52 Ala. 195; Murray v. Ebright, 50 Ind. 362; Stafford v. Nutt, 51 Ind. 535; Richardson v. Jones, 58 Ind. 240.

[126] Claflin v. Butterby, 5 Duer, 327.

[127] Stoddart v. Van Dyke, 12 Cal. 437; Willis v. Morrison, 44 Tex. 27; Fielden v. Lahens, 2 Abb. App. Dec. 111.

[128] Crews v. Lackland, 67 Mo. 619.

[129] Barker v. Cocks, 50 N. Y. 689.

[130] Moss v. Jerome, 10 Bosw. 220.

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suits in any other form; and hence, where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone.[131] It is a further consequence of acts of this nature, that where the verdict is in favor of a part of the defendants and against the others, the judgment thereon, if entered against "the defendants" generally, will not be erroneous; for the judgment will be construed with reference to the verdict, and will be held to be against only those defendants against whom the verdict was given.[132] Under that clause of the joint debtor acts which provides that the court may render judgment against one of the defendants, leaving the action to proceed as to the others, whenever a several judgment would be proper, the cases hold that the true test, as to whether a separate judgment may be had, is whether a separate action could have been maintained.[133]

§ 209. One Defendant suffering Default.

In an action of contract against several defendants, if one of them suffers default, and another, under the general issue, sets up and maintains a defense which negatives the plaintiff's right to recover against either of the defendants and shows that he had no cause of action, the plaintiff will not be entitled to judgment against the one who was defaulted, but on the contrary the successful defense will enure to the latter's benefit, and judgment must be rendered for both the defendants.[134] So if one defendant interposes an objection by way of demurrer, going to the plaintiff's right to recover, and not merely a personal matter of discharge, which is sustained, and judgment rendered on it in his favor, it will enure to the benefit of his co-defendant.[135] On the other hand, if one of the defendants makes default

[131] Allen v. Clayton, 11 Fed. Rep. 73.

[132] Lamar v. Williams, 39 Miss. 342.

[133] Van Ness v. Carkins, 12 Wis. 186. See Parke v. Meyer, 28 Ark. 281.

[134] Bowman v. Noyes, 12 N. H. 302; Adderton v. Collier, 32 Mo. 507 (citing 2 Tidd's Prac. 986; Biggs v. Benger, 2 Ld. Raym. 1372; Porter v. Harris, 1 Lev. 63); State v. Gibson, 21 Ark. 140. Rich v. Husson, 4 Sandf. 115; Miller v. Longacre, 26 Ohio St. 291; Champlin v. Tilley, 3 Day, 303; Campbell v. McHarg, 9 Iowa, 354. Compare Storm Lake v. Iowa Falls, etc., R. Co., 62 Iowa, 218, 17 N. W. Rep. 489.

[135] State v. Williams, 17 Ark. 371.

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and the other goes to trial, the effect is to suspend the judgment against the defaulting defendant until the result of the trial is ascertained, and if the plaintiff obtains a verdict, he is then entitled to a joint judgment against all the defendants.[136] Nor is there any necessity, in such a case, of having previously taken an interlocutory judgment by default against the party failing to answer.[137] Where, in a joint action *ex contractu* against two defendants, one of them is defaulted, and the other appears, and separate judgments are rendered against both of them, if the defendant who appeared enters a review, the effect is to vacate the judgment as to both defendants and to carry the whole case to the next succeeding term, notwithstanding a separate judgment may have been entered on the record against the defendant who was defaulted.[138]

§ 210. Judgment, when Several, when Joint.

In general, where an action is brought upon a joint contract or obligation against several defendants who plead and defend jointly, the judgment must be joint, and it is error to render several judgments against them for several damages.[139] But where, for example in an action against partners on a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is considered merely an irregularity, which may be corrected on motion within the statutory time.[140] But where there are several defendants, and the items of damages are distinct, a joint judgment cannot be entered unless each defendant is liable to the full extent of the verdict.[141] And where the action is upon a joint and several contract, a several judgment would be proper, as the defendants might have been sued alone in such case; hence a judgment may be rendered against one or more without waiting the final trial.[142] So where, of two defendants, one is liable

[136] Fletcher v. Blair, 20 Vt. 124.

[137] Peters v. Crittenden, 8 Tex. 131.

[138] Downer v. Dana, 22 Vt. 22.

[139] Holmes v. Gay, 6 Bush (Ky.), 47; Rochester v. Anderson, 1 Bibb, 439; Starry v. Johnson, 32 Ind. 438; Howell v. Barrett, 3 Gilm. 433.

[140] Judd Linseed Oil Co. v. Hubbell, 76 N. Y. 543.

[141] Chambers v. Upton, 34 Fed. Rep. 473.

[142] Sears v. McGrew, 10 Oreg. 48. See Croasdell v. Tallant, 88 Pa. St. 193.

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individually, and the other in his representative character, the judgment against them should be several.[143] And in an action to subject assets descended to several heirs to a debt of their ancestor, the judgment, if for the plaintiff, should be several against each of the heirs for the amount received by him from the ancestor, not to exceed, however, the amount to which the plaintiff is entitled.[144] But although a judgment be rendered against two parties jointly, yet it must be remarked that the judgment itself is a joint and several obligation, and consequently an action can be maintained upon it against either of the judgment-debtors separately, and it can in like manner be used as a set-off against either.[145]

§ 211. Joint Judgment as an Entirety.

There are numerous expressions in the books to the effect that a judgment is an entirety, and that if it is rendered against several defendants jointly, it is not susceptible of division or apportionment, so as to be purged of the error or irregularity it may contain as to one of them, while standing good against the rest. Accordingly it is held in a number of the states, that if the judgment is void as against one defendant, for want of jurisdiction over him, it must be considered as void as to *all* the defendants, and therefore a mere nullity.[146] This question might arise, for example, in a case where two persons were named as defendants, but only one was served with process, the other being a non-resident or not found, and where after a contest by the defendant served, judgment should be rendered against

[143] Gray v. McDowell, 5 T. B. Monr. 501.

[144] Ransdell v. Threlkeld, 4 Bush, 347.

[145] Read v. Jeffreys, 16 Kans. 534. And see Stout v. Baker, 32 Kans. 113, 4 Pac. Rep. 141.

[146] Shuford v. Cain, 1 Abb. U. S. 302; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Richards v. Walton, 12 Johns. 434; Holbrook v. Murray, 5 Wend. 161; Rangely v. Webster, 11 N. H. 299; Knapp v. Abell, 10 Allen, 485; Buffum v. Ramsdell, 55 Me. 252, 92 Am. Dec. 589; Dickerson v. Chrisman, 28 Mo. 134; Hulme v. Jones, 6 Tex. 242, 55 Am. Dec. 774; Long v. Garnett, 45 Tex. 400; Thomas v. Loury, 60 Ill. 512; Brockman v. McDonald, 16 Ill. 112; Williams v. Chalfant, 82 Ill. 218; Van Renselaer v. Whiting, 12 Mich. 449; Hughes v. Lindsey, 10 Ark. 555; Smith v. Rollins, 25 Mo. 408; Winslow v. Lombard, 57 Me. 356; Burt v. Stevens, 22 N. H. 229; Donnelly v. Graham, 77 Pa. St. 274; City of St. Louis v. Gleason, 15 Mo. App. 25.

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both. According, then, to the foregoing rule, the judgment could have no more effect against the defendant who was served than against the other. Hence, to carry the supposition a step further, if the judgment were made the basis of an action, whether in a domestic or foreign tribunal, against the defendant served, he might show the irregularity of the proceedings in respect of his co-defendant, and that would be sufficient to defeat a recovery against himself. The result seems scarcely consonant to reason and justice. Yet some of the decisions, arguing from the entirety of the judgment, have felt obliged to hold precisely that position.[147] But there are many other authorities which hold that although a judgment may be void as against one of the defendants, for lack of jurisdiction, still it may be valid and binding upon the others, or at most voidable, but not void *in toto*.[148] And if this view is adopted, it is evident that the judgment will be attended by its usual incidents, as against the defendant over whom jurisdiction attached, until it is regularly reversed or vacated. Until that time an action will lie upon the judgment against him, and he will not be permitted to attack it collaterally. There are other grounds on which the judgment may be void as to one of several defendants, such as legal disability or his previous decease. But the same principle is understood to govern these cases also, and there exists the same diversity of opinion in regard to them. Some of the cases hold that if a joint judgment is void as to one defendant, because that defendant was a slave, an infant, a married woman, or was dead before its rendition, it is void as to all; or, if an incapacity of that kind is conceived as rendering the judgment voidable only as

[147] Hanley v Donoghue, 59 Md. 239, 43 Am. Rep. 554; Holbrook v. Murray, 5 Wend. 161.

[148] Newburg v. Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Douglass v. Massie, 16 Ohio, 271, 47 Am. Dec. 375; Ash v. McCabe, 21 Ohio St. 181; Jamieson v. Pomeroy, 9 Pa. St. 230; Shallcross v. Smith, 81 Pa. St. 132; Kitchens v. Hutchins, 44 Ga. 620; Green v. Beals, 2 Caines, 254; Crane v. French, 1 Wend. 311; Brittin v. Wilder, 6 Hill, 242; St. John v. Holmes, 20 Wend. 609, 33 Am. Dec. 603; York Bank's Appeal, 36 Pa. St. 460; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Winchester v. Beardin, 10 Humph. 247, 51 Am. Dec. 702; Collins v. Knight, 3 Tenn. Ch. 183; Mercer v. James, 6 Nebr. 406; Remington v. Cummings, 5 Wis. 138; Bailey v. McGinness, 67 Mo. 362; Cheek v. Pugh, 19 Ark. 574; Murphy v. Orr, 33 Ill. 489; Valentine v. Cooley, Meigs, 618, 33 Am. Dec. 166; Crank v. Flowers, 4 Heisk. 629; Smith v. Tupper, 4 Sm. & Mar. 261; 43 Am. Dec. 483.

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against the person affected, these cases hold it to be equally voidable as against the co-defendants.[149] But other decisions take the ground that a judgment rendered jointly against a married woman (for instance) and others who are *sui juris* is not, as to the latter, void and collaterally assailable, although as to the married woman it is a nullity, and although, also, it is an entirety for the purposes of review on appeal or error, and would be reversed as to all the defendants if thus directly assailed.[150] When we inquire as to the proper disposition to be made of a joint judgment against several defendants, which is void as to one of them, when it is brought before a court of review by writ of error or appeal, we find the authorities more nearly harmonious. In general, they agree that it cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety.[151] And conversely, if in favor of the defendants, invalidity as to one will vitiate it as to all. "The judgment, being joint in favor of all the defendants and erroneous as to one, will have to be reversed as to all. A judgment jointly entered in favor of several defendants, whether in an action upon contract or for tort, cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together."[152] The acceptance of this rule, however, is not quite universal. It is said to have no application under the statutes and system of practice in Nevada.[153] And in California, if one of several defendants appeals from a judgment which is erroneous as to him, on account of insufficient service, the court will not reverse the judgment as to the other defendants, but will only reverse it as against the appellant.[154] In Virginia it is

[149] Stenhouse v. Bonum, 12 Rich. 620; Tedlie v. Dill, 8 Ga. 104; Randalls v. Wilson, 24 Mo. 76.

[150] Holton v. Towner, 81 Mo 360; Shallcross v. Smith, 81 Pa. St. 132.

[151] Seargeant v. French, 10 N. H. 444; Sheldon v. Quinlon, 5 Hill, 441; Hickman v. Branson, 1 Houst. 429; Murphy v. O'Reiley, 78 Ky. 263; Draper v. State, 1 Head, 262; Ellison v. State, 8 Ala. 273; Wood v. Smith, 11 Tex. 367; Dickson v. Burke, 28 Tex. 117; Frazier v. Williams, 24 Ohio St. 625; Cavender v. Smith, 5 Iowa, 157; Fuller v. Robb, 26 Ill. 246; Kimball v. Tanner, 63 Ill. 519; Covenant Mut. Life Ins. Co. v. Clover, 86 Mo. 392; Powers v. Irish, 23 Mich. 429.

[152] McDonald v. Wilkie, 13 Ill. 22, 54 Am. Dec. 423, citing Harman v. Brotherson, 1 Denio, 537; Cruikshank v. Gardner, 2 Hill, 333; Sheldon v. Quinlon, 5 Hill, 441; Gaylord v. Payne, 4 Conn. 190; Bac. Abr., tit. *Error*, M.

[153] Wood v. Olney, 7 Nevada, 109.

[154] Ricketson v. Richardson, 26 Cal.

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held that although at common law a joint judgment which is erroneous as to one defendant must be reversed as to all, yet if the alleged judgment against one is not merely erroneous but absolutely *void* and a mere nullity, this rule does not apply.[155] Before leaving the subject, it is necessary to remark that if the judgment is *several* as to the parties, there may well be cases in which it will be good as to one though invalid as against another, and in which an appellate court would reverse it in part and affirm it in part.[156] Further, the rule that a judgment void as to one defendant is void as to all is considered to apply only to judgments at law and not to decrees in equity.[157]

It will be obvious from the foregoing review of the authorities that the cases on this topic cannot be reconciled. But it will also appear that some of the courts holding the entire invalidity of a joint judgment, which is void as to one defendant, have been forced to an extreme length in the matter by the highly technical conception of such a judgment as an ideal entirety. Sound legal reason appears to suggest that while such a judgment is undoubtedly erroneous and liable to be reversed on appeal, yet, while unreversed, it ought not to be open to impeachment, by the debtor as to whom no irregularity exists, in any collateral proceeding. It also seems consonant to justice that judgments of this character should not be vacated or set aside on the application of the party legally bound, because, presumably, it is the other only who has been deprived of his rights or injured by an irregular or erroneous practice. As to the former, the judgment should not be shorn of its usual consequences, and there seems to be no adequate reason why it should not constitute a good cause of action against him. Finally, it is too much to say that the judgment supposed would be absolutely *void* as to both or all the defendants. For a void judgment is a mere nullity and binds no one, and no one can acquire any rights under it; whereas many of the cases (even those which use the expression "void" in applica-

149. And see Saffold v. Navarro, 15 Tex. 76.

[155] Gray v. Stuart, 33 Gratt. 351.

[156] Powers v. Irish, 23 Mich. 429, 433; Buffum v. Ramsdell, 55 Me. 252, 92 Am. Dec. 589.

[157] Voorhis v. Gamble, 6 Mo. App. 1; Dickerson v. Chrisman, 28 Mo. 134.

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tion to such judgments) hold that a purchaser under such a judgment will be protected, that the record may be amended, that such a judgment merges the cause of action, that execution may be directed against one defendant and restrained as to the other, and so on, none of which consequences could transpire if the judgment were merely null and void.

§ 212. Confession of Judgment by Joint Defendants.

A judgment cannot be confessed by one of several joint debtors so as to bind those not joining in the confession.[158] But a more difficult question arises in regard to the validity of a judgment by confession entered upon a warrant or statement signed by a part only of those who are named in the judgment. Clearly it is nugatory as to any defendant not signing. But will it stand, notwithstanding this, as a good and valid judgment against those who did sign or execute the authority? Some of the decisions answer this question in the affirmative.[159] And their position seems to be supported by sound reason and justice. In California, however, on the principle of the entirety of a judgment, it is held that if the warrant authorizes the entry of judgment against a certain number, no judgment can be entered against a less number, and it will be void as to all.[160]

§ 213. Misnomer of Parties.

It is a well established rule that if process in an action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with the suit or judgment by proper averments.[161] "The point of the objection to the judgment of the

[158] Tripp v. Saunders, 59 How. Pr. 379.

[159] North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Mercer v. James, 6 Nebr. 406; York Bank's Appeal, 86 Pa. St. 458; Knox v. Bank, 57 Ill. 330.

[160] Chapin v. Thompson, 20 Cal. 681.

[161] Oakley v. Giles, 3 East, 168; Insurance Co. v. French, 18 How. 409; Smith v. Bowker, 1 Mass. 76; Fitzgerald v. Salentine, 10 Met. 436; Nat. Bank

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lower court is, that the defendant having been sued and served with process by a wrong name, the court acquired no jurisdiction of him, and could render no valid judgment against him. The objection gives the name quite too much importance. A name is a means of identity, but the change of the name or the application of a wrong name does not change the thing identified. It is not the name that is sued but the person to whom it is applied. Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fails to appear, or, appearing, fails to object that he is sued by the wrong name, and the judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name."[162] Exactly the same rule applies in the case of a corporation; though sued by a wrong name, it is bound, if duly served.[163] But it is essential to the plaintiff's recovery that it should be proved, not only that the real person was sued, but that he was duly served with process though under a mistaken name.[164] In a case where the complaint was against "—— Doyle" and others, and a summons was issued but there was no evidence that it was served, and John Doyle answered, and judgment was rendered against James Doyle, it was held to be void, because the party against whom it was given did not appear to be a party to the suit.[165] A misnomer in a judgment will also be cured, in a proper case, by the principle of *idem sonans*. Thus, where a bill is filed to set aside a decree on the ground that the complainants were sued by a wrong name and therefore were not before the court, if the names given are *idem sonantes*, the bill will be dismissed.[166] So where a judgment is rendered and execution

v. Jaggers, 31 Md. 88; Waldrop v. Leonard, 22 S. Car. 118; Bloomfield R. Co. v. Burress, 82 Ind. 83; Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51; Welch v. Kirkpatrick, 30 Cal. 202; Sutter v. Cox, 6 Cal. 415; Guinard v. Heysinger, 15 Ill. 288.

[162] Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51. But a judgment against "John Doe" in a suit wherein the defendant answered by his true name, and the record of the judgment was not amended by inserting it, is void as against that defendant. McKinlay v. Tuttle, 42 Cal. 571.

[163] Hoffield v. Board of Education, 33 Kans. 644, 7 Pac. Rep. 216.

[164] Fitzgerald v. Salentine, 10 Met. 436.

[165] Ford v. Doyle, 37 Cal. 346.

[166] Robertson v. Winchester, 85 Tenn. 171, 1 S. W. Rep. 781.

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issued against "Rosina Coons," it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of the defendant is shown to be "Rosina Kuhn." [167] It may also happen that the process will contain a misnomer of the plaintiff. And some of the cases, having a regard to the defendant's right to be fully informed as to the person whose demand he is required to answer, have held that if the process misnames the plaintiff it does not give sufficient notice of the suit to the defendant, the court acquires no jurisdiction, and a judgment against the defendant by default is null and void. It was so ruled in a case where one Cunningham, plaintiff in the action, was described as "Cunnington." [168] But the better reason is with the cases which hold that service of process in favor of the right party by a wrong name is good, and a judgment in favor of the right party by his proper name will after trial cure a misnomer in the complaint, the summons, or the other proceedings.[169] So a judgment and execution in the name of the treasurer of a township, instead of the trustees as directed by law, cannot be held void, but voidable only.[170] The omission of the initial letter of the middle name of a defendant, in the entry and docketing of a judgment recovered against him, does not render it invalid or prevent its becoming a lien upon his real estate as against subsequent purchasers from him in good faith. As observed by Daniels, J.: "It was enough that one Christian name was properly added to the surname of the defendant, for in legal proceedings the law recognizes but one Christian name, and where a party is sued by that alone, the proceedings taken may regularly be continued to judgment in that name, and the fact that he may have one or more other names between his first Christian name and his surname will in no way affect their validity. This is an old and well established rule of the common law that has in no manner been changed, either by legislation or the rulings of

[167] Kuhn v. Kilmer, 16 Nebr. 699, 21 N. W. Rep. 443.

[168] *Ex parte* Cheatham, 1 Engl. 531, 44 Am. Dec. 525.

[169] Kronski v. Missouri Pacific R. Co., 77 Mo. 362; McGaughey v. Woods, 106 Ind. 380, 7 N. E. Rep. 7.

[170] Hart's Lessee v. Johnson, 6 Ohio, 87. Where a petition was brought in behalf of J. and three other plaintiffs, a judgment thereon in behalf of J. "and Co.," was held not void by reason of the apparent discrepancy. Ellis v. Jones, 51 Mo. 180.

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the courts, in this state." [171] So there is no material variance where a judgment is entered in favor of "Laura Wilcox, guardian of W. *L.* Wilcox," when the correct name of the infant is W. *B.* Wilcox.[172]

§ 214. Descriptio Personæ.

The fact that a descriptive word or phrase is added to a party's name in a judgment neither affects the validity of the judgment nor changes the legal rights and relations which it engenders. Thus the addition of the word "executor" to a defendant's name in a decree, without more, does not prevent the decree from binding his own property; the addition is mere surplusage.[173] So a judgment against "D., treasurer," is a personal judgment, the word "treasurer" being merely *descriptio personæ.*[174]

[171] Clute v. Emmerich, 26 Hun, 10.

[172] Crawford v. Wilcox, 68 Tex. 109, 3 S. W. Rep. 695; Hicks v. Riley (Ga.), 9 S. E. Rep. 771.

[173] Tinsley v. Lee, 51 Ga. 482; Hall v. Craige, 68 N. Car. 305.

[174] Dougherty v. McManus, 36 Iowa, 657.

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CHAPTER XII.

THE VALIDITY OF JUDGMENTS AS DEPENDENT UPON JURISDICTION.

§ 215. Jurisdiction defined.
216. Sources of Jurisdiction.
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239. Construction of Judgment against "Defendants" generally.
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§ 215. Jurisdiction defined.

Etymologically the word "jurisdiction" signifies the power or duty of "declaring right," that is, of declaring, in the official character of a judge, what is the law applicable to a given state of facts,

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or what are the respective rights of parties, as determined by the application of law to the facts before the tribunal. The precise definition of the term, however, is rendered difficult by the complexity of the elements which enter into this power, and many of the explanations found in the books are partial or one-sided according as they lay the greater stress upon one or the other of the constituents of jurisdiction. The supreme court of Ohio has declared that "the power to hear and determine a cause is jurisdiction, and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal, to answer the charge therein contained."[1] Now this definition is open to exception in several respects. In the first place, the first clause is too restrictive. As has been justly said, "it is in truth the power to do both or either; to hear without determining, or to determine without hearing."[2] But even this does not go far enough. For jurisdiction is not merely the authority to determine a controversy, but also the power to announce the sentence of the law, and to announce it in such a manner that the legal rights of the parties shall be changed or modified and that new relations shall spring into existence. And further, it sometimes includes the power to command or forbid particular action or to award a particular remedy, as in cases of *mandamus*, injunction, or specific performance. In other words, jurisdiction is the power to set in operation the sanctions of the law. Again, while the preferring of a complaint or petition is the usual and regular mode of bringing a controversy to the cognizance of a court, it would be incorrect to make the jurisdiction depend upon the technicality or sufficiency in law of the case so presented. It is undoubtedly a principle of natural justice and of the law of the

[1] Sheldon v. Newton, 3 Ohio St. 494, citing United States v. Arredondo, 6 Pet. 709; Rhode Island v. Massachusetts, 12 Pet. 718.

[2] *Ex parte* Bennett, 44 Cal. 84.

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land that a person who is proceeded against in a court of law should have a full and fair opportunity to make his defense. But if he is denied this right, it seems to be rather an irregularity or failure of justice, on the part of the tribunal, than a fatal defect in its jurisdiction. If the defendant is duly served with process and so brought into court, that confers jurisdiction over him, and it is not affected by any subsequent illegal or arbitrary dealing with his rights. Nevertheless the supreme federal court has held[8] that an opportunity to the defendant to be heard is an essential element of jurisdiction—a decision which perhaps can be sustained on the theory that the court, by the denial of such opportunity, revokes its process and puts the defendant again out of court, but which otherwise appears to put an undue strain upon the meaning of the word.

We should therefore define jurisdiction as follows: It is the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of the law, or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a *res*) who present themselves, or who are brought, before the court in some manner sanctioned by law as proper and sufficient. If this definition appears complicated, it is because of the necessity of grouping three very different elements. For jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceeding. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended

[8] Windsor v. McVeigh, 93 U. S. 277.

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to submit for its determination. These several elements of jurisdiction will be taken up and considered in their order.

§ 216. Sources of Jurisdiction.

Since the administration of justice is a part of the business of government, and since judicial tribunals are the agencies devised for effecting this purpose, their jurisdiction must ultimately depend upon their institution by the sovereignty of the particular state or country. Hence the validity of their judgments may sometimes require to be tested on public or political grounds. We have elsewhere seen that the courts of a *de facto* government, or the *de facto* courts of a lawful government, are generally recognized as having jurisdiction.[4] But jurisdiction cannot be predicated of any voluntary or self-constituted tribunal, lacking the color of governmental authority. Its proceedings must at least appear to be had under the authority and sanction of the sovereign.[5] But supposing a legally constituted court, we are told that "by jurisdiction over the 'subject-matter' is meant the nature of the cause of action or relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in the authority specially conferred. Jurisdiction of the 'person' is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the '*res*' is obtained by seizure under the process of the court, whereby it is held to abide such order as the court may make concerning it."[6] By way of supplement to the above description we may add that the jurisdiction of a particular court, in respect to the matters of which it may take cognizance, may be defined in the constitutional or statutory enactment which creates it, or may be left to be inferred from the general nature of the court or the absence of specific limitations upon its powers, or may be enlarged or abridged by subsequent legislation. But where the constitution establishes a particular court and fixes its jurisdiction, it is not competent for the legislature to pass any stat-

[4] *Supra*, § 178.
[5] Rogers v. Wood, 2 B. & Ad. 245.
[6] Cooper v. Reynolds, 10 Wall. 316; Fithian v. Monks, 43 Mo. 515.

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ute abolishing the court, or either enlarging or abridging its jurisdiction.[7] And conversely if the constitution organizes a court and confers powers upon it, it does not require the aid of legislation to enable it to exercise those powers.[8] But if the alleged jurisdiction of a court to take any particular action is derived from a statute, and that statute is shown to be unconstitutional, the proceedings of the court must be considered void; for as the stream cannot rise higher than its source, no jurisdiction can be derived from a void act.[9] The question of the validity of a judgment, if depending on jurisdiction, must be determined by the jurisdiction of the court as existing at the time when the judgment was rendered.[10]

§ 217. Consent cannot confer Jurisdiction.

As jurisdiction is given by the law, the consent of the parties cannot confer the right to adjudicate upon any cause which the law has withheld from the cognizance of the particular court.[11] This rule may apply to cases where the territorial jurisdiction of the court is limited. Thus, under a constitutional provision that all civil suits shall be tried in the county wherein the defendant resides, a judg-

[7] Commonwealth v. Commissioners, 37 Pa. St. 237; Gibson v. Templeton, 62 Tex. 555; State v. Bank of East Tennessee, 5 Sneed, 573; Ward v. Thomas, 2 Cold. 565; Gibson v. Emerson, 2 Engl. 172; State v. Jones, 22 Ark. 331; Haight v. Gay, 8 Cal. 297; Deck v. Gherke, 6 Cal. 666; Zander v. Coe, 5 Cal. 230. See 2 Story on the Const. §§ 1773-4; Durousseau v. United States, 6 Cranch, 307; United States v. Moore, 3 Cranch, 159; *Ex parte* McCardle, 7 Wall. 506; United States v. Peters, 5 Cranch, 115; *Ex parte* Knowles, 5 Cal. 300; Ferris v. Coover, 11 Cal. 175; Greely v. Townsend, 25 Cal. 604. Thus, where the constitutional jurisdiction of the supreme court is appellate only, the legislature cannot confer upon it original jurisdiction in any case. Ward v. Thomas, 2 Cold. 565; State v. Bank, 5 Sneed, 573. The legislature cannot confer upon courts created by statute jurisdiction exclusive of that which the constitution gives to courts established by the constitution itself. Montross v. State, 61 Miss. 429. See Eaton &c. R. Co. v. Hunt, 20 Ind. 457.

[8] State v. Gleason, 12 Fla. 190.

[9] Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Reed v. Wright, 2 Greene (Iowa), 15. Compare Arnold v. Shields, 5 Dana, 18, 30 Am. Dec. 669.

[10] Champlin v. Bakewell, 21 La. Ann. 353.

[11] Home Ins. Co. v. Morse, 20 Wall. 451; Santom v. Ballard, 133 Mass. 465; State v. Fosdick, 21 La. Ann. 258; Mora v. Kuzac, 21 La. Ann. 754; Richardson v. Hunter, 23 La. Ann. 255; Fleischman v. Walker, 91 Ill. 318; Dicks v. Hatch, 10 Iowa, 380; Moore v. Ellis, 18 Mich. 77; Damp v. Dane, 29 Wis. 419; Peabody v. Thatcher, 3 Colo. 275.

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ment obtained in a county other than that of the defendant's residence, by an agreement between the plaintiff and defendant, the latter agreeing to acknowledge the jurisdiction, is considered to be void as against the rights of subsequent judgment-creditors who obtain their judgments in the manner and place prescribed by law.[12] But a more familiar application of the rule is in the case of an attempt to bring within the cognizance of the court a subject-matter of which by law it has no jurisdiction. Indeed we are told that it is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed.[13] And there is certainly good ground for doubting the applicability of the rule to the matter of jurisdiction of the person. For a defendant may cure a defective service of process, or waive the want of it, by appearing without exception. And this he appears also to do in confessing a judgment without action. So there are many cases holding that a person under legal disabilities may consent to the jurisdiction of the court, or waive an objection to it, by suffering a default, at least so far that the judgment will not be entirely void, though it may be erroneous or voidable.[14] And it has even been held that a judgment in a state court against a consul of a foreign nation, taken upon default, is valid; on the ground that his not appearing and pleading to the jurisdiction of the court is a waiver of the want of jurisdiction over him.[15]

[12] Georgia Railroad & Banking Co. v. Harris, 5 Ga. 527. The same rule will apply under the act of congress of March 3, 1887, § 1, providing that "no civil suit shall be brought before either of said [federal] courts against any person . . . . in any other district than that whereof he is an inhabitant,"—consent cannot confer jurisdiction.

[13] Hobart v. Frost, 5 Duer, 672.

[14] *Supra*, §§ 190, 196.

[15] Hall v. Young, 3 Pick. 80, 15 Am. Dec. 180.

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§ 218. Judgment without Jurisdiction is Void.

It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction, of either the parties or the subject-matter, is void and a mere nullity, and will be so held and treated whenever and wherever and for whatever purpose it is sought to be used or relied on as a valid judgment.[16] The effect of a want of jurisdiction is clearly stated in an early decision of the United States supreme court in the following language: "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."[17] Hence, for example, if a judgment is merely erroneous, the title acquired by a sale under it is valid and cannot be impeached collaterally; but if it is *void* for want of jurisdiction, the vendee takes no title whatever, and the sheriff's deed does not even create a cloud on the title which a court of equity can remove.[18] So, although a judgment upon a note rendered by a court having no jurisdiction of the case is void, the note is still a valid security; it is not merged in the judgment.[19] But in connection with this rule it is necessary to remember the legal presumptions in favor of the judgments and proceedings of courts of general jurisdiction and the rule against collateral attacks upon such judgments. The result deducible from a majority of the cases seems to be that it is only when the judg-

[16] Fisher v. Harnden, 1 Paine, 55; Towns v. Springer, 9 Ga. 130; Mobley v. Mobley, *Id.* 247; Beverly v. Burke, *Id.* 440, 54 Am. Dec. 351; Central Bank v. Gibson, 11 Ga. 453; Johnson v. Johnson, 30 Ill. 215; St. Louis & S. Coal Co. v. Sandoval Coal Co., 111 Ill. 32; Swiggart v. Harber, 4 Scam. 364, 39 Am. Dec. 418; Miller v. Snyder, 6 Ind. 1; Seely v. Reid, 3 Greene (Iowa), 374.

[17] Elliott v. Peirsol, 1 Pet. 328, 340, Trimble, J. See also Latham v. Edgerton, 9 Cow. 227.

[18] Bowers v. Chaney, 21 Tex. 363; Holland v. Johnson, 80 Mo. 34.

[19] Linn v. Carson, 32 Gratt. 170.

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ment appears *upon its face* to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes. This will be shown more fully in the succeeding chapters.

It has been held that a void judgment may be accepted as valid by the consent of the parties, so the rights of third persons be not prejudiced. "All the parties interested may lawfully agree to confirm an invalid transcript, or nugatory judgment, provided the confirmation is to be efficacious, and give a lien, only from the time of the agreement properly appearing."[20] But a void judgment does not fall within the class of subjects upon which a legislature may operate retroactively by a curative or confirmatory statute. An act of the legislature undertaking to validate a judgment of a court which was void for want of jurisdiction, would be an attempted exercise of judicial power by the legislature, since, the proceedings in court having been void, it would be the statute alone which should constitute an adjudication upon the rights of the parties; and it would also be objectionable as contravening the constitutional provision which secures to every man the enjoyment of his property except as the same may be taken from him by "due process of law," for this last phrase includes the attaching of jurisdiction, due notice, and an opportunity to be heard.[21] So when property has been attempted to be taken by a judicial proceeding which is void for want of jurisdiction, the legislature, for similar reasons, cannot validate it.[22] But if the judgment is merely defective, erroneous, or irregular, in consequence of the non-observance of some formality which the legislature might have dispensed with in advance, but is not objectionable on jurisdictional grounds, then it may be confirmed or validated by a retroactive statute.[23]

[20] Ramsey v. Linn, 2 Rawle, 229.

[21] Richards v. Rote, 68 Pa. St. 248; Lane v. Nelson, 79 Pa. St. 407; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Griffin v. Cunningham, 20 Gratt. 109; McDaniell v. Correll, 19 Ill. 226; Denny v. Mattoon, 2 Allen, 361; Israel v. Arthur, 7 Colo. 5.

[22] Richards v. Rote, 68 Pa. St. 248.

[23] Lane v. Nelson, 79 Pa. St. 407; State v. Union, 33 N. J. Law, 350; Cooley, Const. Lim. 107; Black, Const. Prohib. § 209.

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§ 219. Judgment against One not a Party.

A judgment rendered against one who was not made a party to the suit, or who does not appear from the record to have been proceeded against in the action or to have had his day in court, cannot be regarded as in any sense a valid judgment.[24] So a judgment against a defendant named in the writ, but not made a party, is merely void.[25] A judgment cannot pass against a person who is not mentioned in the proceedings and who has not joined issue or made himself a party; and a mere citation served on such person does not compel his appearance or justify a judgment by default.[26] Thus, in a suit on the bond given by the defendant in an attachment, to obtain a return of the property attached, it appeared that the judgment in the original action was rendered against the sureties in the bond, who were not parties, as well as against the attachment-defendant; and it was held that the judgment was a mere nullity as to the sureties, although it was not void as to the defendant.[27]

§ 220. Notice to Defendant.

It is an unquestioned principle of natural justice that a man should have notice of any legal proceeding that may be taken against him, and a full and fair opportunity to make his defense. The law never acts by stealth; it condemns no one unheard. It is true that in proceedings *in rem* the notice may be constructive only, but here the action is direc ed against the thing itself, and there is no attempt to fasten a personal liability upon the parties concerned.[28] It is true also that constructive service of process is authorized in some other cases, but not for the purpose of a personal judgment. A personal

[24] Ford v. Doyle, 37 Cal. 346; Overstreet v. Davis, 24 Miss. 393; Moseley v. Cocke, 7 Leigh, 225.

[25] Armstrong v. Harshaw, 1 Dev. 187.

[26] Bracey v. Calderwood, 36 La. Ann. 796.

[27] Cheek v. Pugh, 19 Ark. 574.

[28] A late case holds that notice and an opportunity to be heard are essential to the jurisdiction of all courts, even in proceedings *in rem*. Dorr v. Rohr, 82 Va. 359. Where a suit was commenced by attachment, but no property was attached or garnished, and there was no personal service on the defendant, *held*, that a judgment recovered in such suit was a nullity. Judah v. Stephenson, 10 Iowa, 493.

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judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void.[20] "We think it may be regarded as settled, that a judgment of any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally."[20] Nor is this rule confined to judgments at law. A decree in chancery against a defendant who was never served with process and did not appear, is void and may be set aside although not appealed from.[21] And if the court has not acquired jurisdiction of the person of the defendant, as in the case that no sufficient process has been served upon him, no judgment, even of abatement, can be rendered against the plaintiff; for the defendant must become a party before the court before he can have a judgment.[22]

§ 221. Statutes dispensing with Citation.

It may be made a question whether the legislature of a state can entirely dispense with notice or citation to the defendant in an action.

[20] Hollingsworth v. Barbour, 4 Pet. 466; Philadelphia, etc., R. Co. v. Trimble, 10 Wall. 367; Windsor v. McVeigh, 93 U. S. 277; Pennoyer v. Neff, 95 U. S. 727; St. Clair v. Cox, 106 U. S. 353, 1 Sup. Ct. Rep. 354; Freeman v. Alderson, 119 U. S. 188, 7 Sup. Ct. Rep. 165; Elliot v. McCormick, 144 Mass. 11; Steen v. Steen, 25 Miss. 513; Smith v. State, 13 Sm. & Mar. 140; Enos v. Smith, 7 Sm. & Mar. 85; Flint River Steamboat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178; Madden v. Fielding, 19 La. Ann. 505; Wilson v. Johnson, 30 Tex. 499; Capehart v. Cunningham, 12 W. Va. 750; Hawley v. Heyman, 28 La. Ann. 847; Roberts v. Stowers, 7 Bush, 295; North v. Moore, 8 Kans. 143; *Ex parte* Woods, 3 Ark. 532; Anderson v. Miller, 4 Blackf. 417; Smith v. Myers, 5 Blackf. 223; Wort v. Finley, 8 Blackf. 335; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. Rep. 566; Anderson v. Brown, 9 Mo. 646; Tyler v. Peatt, 30 Mich. 63.

[20] Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355, citing Bliss v. Wilson, 4 Blackf. 169; Smith v. Myers, 5 Blackf. 223; Wort v. Finley, 8 Blackf. 335; Bloom v. Burdick, 1 Hill, 130; Buchanan v. Rucker, 9 East, 192; Shaefer v. Gates, 2 B. Mon. 453; Shriver v. Lynn, 2 How. 43; Westervelt v. Lewis, 2 McLean, 511; Lincoln v. Tower, 2 McLean, 473; Hollingsworth v. Barbour, 4 Pet. 466; Campbell v. Brown, 6 How. (Miss.) 106; Shelton v. Tiffin, 6 How. 163.

[21] Outhwite v. Porter, 13 Mich. 533.

[22] King v. Poole, 36 Barb. 242.

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That this would be within its competence, is strongly intimated in an early decision of the supreme court of Georgia. "It is contended," said Lumpkin, J., "that the defendant must have notice, actual or constructive, otherwise no valid judgment could be rendered against him. We are not inclined to controvert this general rule. On the contrary we believe it to be well established by the authorities. There are several suggestions to make, however, as regards this principle. First, that it only obtains in the absence of *positive law*. The legislature may unquestionably authorize a judgment to be rendered against a party without notice. If the expression used in the statute will admit of a doubt, it will not then be presumed that a construction dispensing with notice can be agreeable to the intention of the legislature, the consequences of which are so unreasonable. But where the signification is manifest, there is no power of dispensation in the courts." [33] It may be strongly doubted, however, whether this is not ascribing an excessive power to the legislature. All our constitutions guarantee the rights and property of the individual against invasion except by "due process of law," which, according to an eminent writer, means, "in each particular case, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." [34] We are unable to discover any possibility of bringing a judgment, rendered without any species of notice to the defendant, within the terms of this definition. The question is different in regard to the constructive service of process. For this, as will appear hereafter, can in general only be used in a proceeding *in rem*, or one analogous to a proceeding *in rem*, and is not usually recognized as giving jurisdiction for a personal judgment, against the defendant, but only for an adjudication upon the *res* or *status* involved or for a decree which avails only against the property attached or found within the territorial jurisdiction.

[33] Flint River Steamboat Co. v. Foster, 5 Ga. 202, 48 Am. Dec. 248.

[34] Cooley, Const. Lim. 356. And see Stuart v. Palmer, 74 N. Y. 190; *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569; Hagar v. Reclamation Distr., 111 U. S. 707, 4 Sup. Ct. Rep. 663.

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§ 222. Statutes regulating Mode of Citation.

"It is competent for each state to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are, nevertheless, binding on its own citizens. For in respect to its own resident citizens, it is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct the manner of serving process, the notice which shall be given to defendants, and to declare the effect of a judgment rendered in pursuance of such notice."[35] Hence a judgment rendered in accordance with the requirements of the statute, though without actual notice to the defendant of the pendency of the suit, but upon such citation as the law authorizes (*e. g.*, leaving a copy of the summons at his last usual place of abode, though he is then out of the state), is conclusive upon the parties until set aside by some direct proceeding for that purpose.[36] But statutes allowing other than personal service of process must be strictly complied with to give the court jurisdiction, and it is held that this compliance must appear affirmatively in the proceedings.[37]

§ 223. Defects in the Process.

If the defendant is to be notified of the pendency of an action against him, it is obvious that the notice must be in itself sufficient to bring him properly before the court. Jurisdiction is dependent on the form and nature of the process to the extent that it can only arise from a proper service of a notice substantially sufficient to apprise the party of everything which he is then entitled to know. If this requirement is met, although there may be a defect in the notice such as to render the subsequent judgment *irregular*, there will not be such a want of jurisdiction as to make it *void*. Mere cognizance

[35] Thouvenin v. Rodrigues, 24 Tex. 468.

[36] Hurlbut v. Thomas, 55 Conn. 181, 10 Atl. Rep. 556.

[37] Zecharie v. Bowers, 1 Sm. & Mar. 584, 40 Am. Dec. 111. A judgment rendered against lands for delinquent taxes, without the statutory notice, is invalid. Fortman v. Ruggles, 58 Ill. 207.

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of the existence of the action is not a notice in the legal sense, upon which a valid judgment can be rendered. To be available, the notice must inform the party whose rights are to be affected of what is required of him and the consequences which may follow if he neglects to defend the action.[38] Hence a judgment rendered upon service of a notice which does not state the time or place at which the defendant is required to appear and defend, is void.[39] But where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process was returnable that such notice and service were sufficient, will not be held void in a collateral proceeding.[40] Thus if a judgment is obtained on unsealed process, and is afterwards revived without objection, the want of the seal does not impair the validity of the judgment.[41] So where the officer's return upon mesne process is not signed.[42] And a judgment is not invalidated by the fact of an unnecessary indorsement of the amount upon the summons.[43] Again, a judgment in an action in which the required number of days' notice was not given to the defendant is erroneous, but not void, and cannot be questioned in a collateral proceeding.[44] So a long summons issued by a justice's court against a non-resident of the county is not a nullity, though the statute declares that in such case the justice shall have no jurisdiction; the defendant waives the irregularity, and gives jurisdiction as to his person, if he appears and pleads to the complaint without objection to the process.[45]

§ 224. Defects in the Service.

Although the service of process in an action may have been characterized by some defect or irregularity, it does not necessarily follow

[38] Peabody v. Phelps, 9 Cal. 213.

[39] Kitsmiller v. Kitchen, 24 Iowa, 163. Acceptance of service is no waiver of defects in a summons which gave no notice of any time of appearance. Falkner v. Guild, 10 Wis. 563.

[40] Shawhan v. Loffer, 24 Iowa, 217.

[41] Heighway v. Pendleton, 15 Ohio, 735.

[42] McElrath v. Butler, 7 Ired. 398.

[43] Larimer v. Clemmer, 31 Ohio St. 499.

[44] Ballinger v. Tarbell, 16 Iowa, 491, 85 Am. Dec. 527. See Glover v. Holman, 3 Heisk. 519; West v. Williamson, 1 Swan, 277. Compare Johnson v. Baker, 38 Ill. 98, 87 Am. Dec. 293.

[45] Clapp v. Graves, 26 N. Y. 418.

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that the ensuing judgment will be void. For if the party would take advantage of such a matter, he must do so in the action itself by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all, that there can be said to be a want of jurisdiction. In any other case, there may be error in the subsequent proceedings, but they will be sustained against a collateral attack.[46] But a judgment recovered by default, upon service of the summons by delivery of a copy to a third person who is not a resident at the "house of defendant's usual abode," is void for want of jurisdiction.[47] And so a citation addressed to and served upon a stranger, although he is the authorized agent of the defendant, is not binding upon the latter and will not authorize a judgment against him.[48] So a judgment by default is void, when the service had upon the defendant consisted only of the handing to him by plaintiff's attorney of a copy of the declaration on the day before the original declaration was filed.[49] And the same consequences were held to result in a case where the return to the summons was made in the name of a deputy-sheriff instead of in the name of the sheriff himself.[50] And it is said that where the sheriff who serves the writ is himself the plaintiff, the judgment in the suit so begun is a nullity, and the defendant may restrain it by injunction.[51]

[46] Campbell v. Hays, 41 Miss. 561; Christian v. O'Neal, 46 Miss. 669. "A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires no jurisdiction and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal." Isaacs v. Price, 2 Dill. 351. See Cole v. Butler, 43 Me. 401; Hendrick v. Whittemore, 105 Mass. 23.

[47] Heffner v. Gunz, 29 Minn. 108, 12 N. W. Rep. 342.

[48] Waddill v. Payne, 23 La. Ann. 773. In an action against a firm, the error of rendering judgment against the members, upon mere service at their place of business, is not waived by a motion for a new trial made in the firm name, but subsequently withdrawn. Marienthal v. Amburgh, 2 Disney, 586.

[49] South Bend Plow Co. v. Manahan, 62 Mich. 143, 28 N. W. Rep. 768.

[50] Rowley v. Howard, 23 Cal. 401.

[51] Knott v. Jarboe, 1 Met. (Ky.) 504.

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§ 225. Appearance as a Waiver of Citation.

A defendant who voluntarily enters a general appearance in an action thereby cures a want of citation, or waives any objections which he may have to defects or irregularities in the notice, process, or service, so that the court acquires full jurisdiction over his person.[52] "While it is true that a judgment without personal service has no extra-territorial force, it is equally true that an appearance, either in person or by attorney, has the same force and effect as personal service, and a judgment rendered against a party who appears by attorney would have the same validity in any state of the Union as where it was rendered."[53] And it is held that a defendant who voluntarily appears and answers, although the answer in terms reserves the right to object to the jurisdiction of the court, is precluded thereby from objecting that the court has not acquired jurisdiction of his person; for a voluntary appearance is equivalent to personal service of the summons.[54] But it is necessary that he should actually enter an appearance to the action or do some act equivalent thereto. A recital in the record, by the clerk, at the time of rendering judgment, that the defendant had appeared at a previous term, is not sufficient evidence of an appearance to warrant a judgment as by default.[55] And a general entry that the parties appeared means only that those who were served appeared.[56] It is also to be remarked that, in order to have this effect, the appearance must be general. In the nature of things, a special appearance, entered for the sole purpose of taking advantage of defects or irregularities in the process

[52] Shields v. Thomas, 18 How. 253; Toland v. Sprague, 12 Pet. 300; Legee v. Thomas, 1 Blatchf. 11; Payne v. Farmers' Bank, 29 Conn. 415; Cristal v. Kelly, 88 N. Y. 285; Fox v. Reed, 3 Grant (Pa.), 81; Reynolds v. Lyon, 20 Ga. 225; Tipton v. Wright, 7 Bush, 448; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124; Miles v. Goodwin, 35 Ill. 53; Baker v. Kerr, 13 Iowa, 384; Adams Exp. Co. v. Hill, 43 Ind. 157; Louisville, etc., R. Co. v. Nicholson, 60 Ind. 158; Fulbright v. Cannefox, 30 Mo. 425; Suydam v. Pitcher, 4 Cal. 280; Harris v. Guin, 18 Miss. 563; Choteau v. Rice, 1 Minn. 192 (Gil. 166); Anderson v. Morris, 12 Wis. 689; Lane v. Leech, 44 Mich. 163.

[53] Wilson v. Zeigler, 44 Tex. 657.

[54] Mahaney v. Penman, 4 Duer, 603.

[55] Kimball v. Merrick, 20 Ark. 12.

[56] Chester v. Miller, 13 Cal. 558. See Barker v. Shepard, 42 Miss. 277.

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or service, cannot be construed as a waiver of those objections.[57] So an appearance by motion to set aside a default, entered against several defendants served, is not such an appearance as will cure a want of service upon others, and it is error to render a final judgment pending such a motion.[58] But where a defendant, after appearing specially and obtaining an order setting aside the service of an original process, submits the cause for decision on a demurrer to the bill, such submission constitutes a voluntary appearance and gives the court jurisdiction of the person.[59] The defendant may also appear by his authorized attorney, and this is equally efficacious, in waiving irregularities and conferring jurisdiction, as an appearance in person. Questions may sometimes arise as to the right of an attorney to appear for the defendant, but usually such an appearance will be presumed to have been entered with authority.[60] And the record showing that complainants appeared by attorneys, it will be presumed that the attorneys had authority to appear for *all* the complainants.[61] There are also cases holding that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared *without* authority, cannot be attacked for want of jurisdiction in any collateral proceeding and is binding upon the defendant.[62] We shall consider this point in a later section, in connection with the rule against the collateral impeachment of judgments.[63] But however it may be in regard to domestic judgments, it is very well settled that when the record comes from another state, a recital in it that the defendant appeared by attorney is conclusive of the fact of such appearance, but not that the attorney was authorized to appear, and the latter allegation may be controverted by the defendant.[64] It is scarcely necessary to add that if the court has not jurisdiction of the *subject-*

[57] Ames v. Winsor, 19 Pick. 207; Allen v. Lee, 6 Wis. 478; Campbell v. Swasey, 12 Ind. 70; Nye v. Liscom, 21 Pick. 263; Standley v. Arnow, 18 Fla. 361; Michels v. Stark, 44 Mich. 22.

[58] Klemm v. Dewes, 28 Ill. 317.

[59] Lente v. Clarke, 22 Fla. 515, 1 South. Rep. 149.

[60] Martin v. Judd, 60 Ill. 78; Leslie v. Fisher, 62 Ill. 118.

[61] Potter v. Parsons, 14 Iowa, 286.

[62] Brown v. Nichols, 42 N. Y. 26; England v. Garner, 90 N. Car. 197.

[63] *Infra*, § 272.

[64] *Infra*, vol. 2, § 903.

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matter, that objection is not waived by appearing to the action. For here the rule applies that "consent cannot confer jurisdiction."

§ 226. Defendant's Right to be heard.

It has been declared by the supreme court of the United States that "a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." In the case at bar, the trial court had caused the appearance of the defendant to be stricken out, but had nevertheless proceeded with the case and passed a judgment affecting his rights. This, in the opinion of a majority of the court, was equivalent to denying him the benefit of the citation. For jurisdiction, it was said, was the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore there could be no exercise of jurisdiction. By the action of the court the defendant was excluded from its jurisdiction.[65] And this doctrine derives some support from the cases holding that opportunity to be heard is absolutely essential to the guarantee of "due process of law."[66] Nevertheless, for the reasons stated in the beginning of this chapter, in defining jurisdiction, we are not convinced that irregularities in the action of the court, even so gross as those mentioned, can properly be said to deprive it of all jurisdiction and make its decision a mere nullity.

§ 227. Judgments against Non-Residents.

It is a principle of law, too well settled to require the citation of authorities in its support, that the sovereignty of a state or country, for judicial as well as other purposes, extends only to its own citizens, or resident aliens, or persons temporarily within its borders, and to property within its territory, but not to absent non-residents.

[65] Windsor v. McVeigh, 93 U. S. 274. [66] Stuart v. Palmer, 74 N. Y. 190.

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In many of our states, however, there are statutes authorizing the commencement of certain classes of actions by a merely constructive service of process, and these acts apply almost exclusively to proceedings against non-residents. The validity of judgments rendered under them has been much in question before the courts, and principally in cases where a judgment so given in one state has been sought to be enforced in another. This aspect of the subject will be fully considered in the chapter on judgments of a sister state, to which the reader is referred. But there are certain divisions of the topic which must be treated in this connection. And first, a distinction must be carefully noted between the jurisdiction over the state's own citizens and that over aliens. Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon a constructive notice only, and although he is temporarily absent from its dominions, and such a judgment must be everywhere recognized as valid and of binding force and effect.[67] This much being premised, the contrary rule may be stated, viz.: that a personal judgment (as distinguished from an adjudication upon status or an adjudication which is substantially *in rem*) rendered against a non-resident upon a species of constructive service only, in an action to which he did not appear, is limited in its effects to the state or country where rendered, and elsewhere is a mere nullity.[68] But if the non-resi-

[67] Beard v. Beard, 21 Ind. 321; Douglass v. Forrest, 4 Bing. 686; Becquet v. McCarthy, 2 B. & Ad. 951; McRae v. Mattoon, 13 Pick. 53; Henderson v. Staniford, 105 Mass. 504; Orcutt v. Ranney, 10 Cush. 183; Welch v. Sykes, 3 Gilm. 197; Price v. Hickok, 39 Vt. 292; Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615; Rangely v. Webster, 11 N. H. 299; Hinton v. Towns, 1 Hill (S. Car.) 439; Hunt v. Lyle, 8 Yerg. 142; Gilman v. Lewis, 24 N. J. Law, 246.

[68] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Buchanan v. Rucker, 9 East, 192; Pennoyer v. Neff, 95 U. S. 714; Bischoff v. Weathered, 9 Wall. 812; Cooper v. Reynolds, 10 Wall. 308; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight Co., 19 Wall. 58 D'Arcy v. Ketchum, 11 How. 165; Phelps v. Brewer, 9 Cush. 390; Newcomb v. Peck, 17 Vt. 302; Carleton v. Bickford, 18 Gray, 591; Hoffman v. Hoffman, 46 N. Y. 30; Zepp v. Hager, 70 Ill. 228; Aldrich v. Kinney, 4 Conn. 380; Reber v. Wright, 68 Pa. St. 471; Story, Confl. of Laws, § 546. No personal judgment, in the absence of a citation or its equivalent, can be rendered so as to be obligatory against an absentee; the only good purpose which can be attained by calling an absent person in warranty, through a curator *ad hoc*, is the giving of notice, as far as practicable, to the warrantor,

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dent, being within the state, is there personally served with process,[69] or if he appears in the action by a duly authorized attorney,[70] in either case the court has jurisdiction over him and the subsequent judgment is universally to be regarded as valid. And error in rendering a personal judgment on default against a defendant who is a non-resident, and had notice only by publication, is not available on behalf of a co-defendant who appeared.[71] In some of the states there are also statutory provisions that an action can be commenced and judgment rendered only in the county in which the defendant resides. And it has been held that this requisite is so jurisdictional in its character that a judgment rendered in another county is void and incapable of ratification.[72] But the better view appears to be that the defendant may waive this objection.[73]

§ 228. Extra-Territorial Service of Process.

It is a recognized rule of international law that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."[74] And this principle is fully adopted by the American cases. "Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the

of the pendency of the action, but it does not justify the rendition of a final judgment. Pagett v. Curtis, 15 La. Ann. 451.

[69] Mowry v. Chase, 100 Mass. 79; Downer v. Shaw, 22 N. H. 277; Murphy v. Winter, 18 Ga. 600.

[70] Holt v. Alloway, 2 Blackf. 108; Walker v. Lathrop, 6 Iowa, 516. A court has jurisdiction to render a valid judgment against a corporation of a foreign state, whenever the corporation appears generally by attorney, or when legal service has been made upon it according to the laws of the state where the court sits. March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

[71] Pattison v. Smith, 93 Ind. 447.

[72] Richardson v. Hunter, 23 La. Ann. 255; Georgia Railroad & Banking Co. v. Harris, 5 Ga. 527.

[73] Leach v. Kohn, 36 Iowa, 144.

[74] Story, Confl. of Laws, § 539.

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state, and process published within it, are equally unavailing in proceedings to establish his personal liability."[75] Therefore if a summons is sent by mail to a non-resident defendant and comes to his hands, or is served upon him at his own domicile by an officer of the law, although it does actually apprise him of the suit against him, yet it has no greater or other effect than a purely constructive or fictitious service. It fails for lack of authority in the sovereignty whence it emanated. It does not bind him to appear, and no judgment can be rendered on it which will be recognized as valid beyond the limits of the state which rendered it.[76] In some of the states, however, an attempt is made to discriminate between the two species of service, and to attach a slightly higher value to actual service, though extra-territorial, than to service by published advertisement, probably in view of the fact that, by the former method, it is certain that the defendant will at least be informed of the proceedings against him. Thus in Iowa, under a statute providing that "when a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear," such defendant may appear within two years and move the court for a retrial, it is held that this provision does not apply to the case of a defendant who was personally served outside the state and did not appear in the action.[77]

§ 229. Jurisdiction by Attachment of Non-Resident's Property.

Although a person may not reside in a particular state, it frequently happens that he may have property there, either real or personal.

[75] Pennoyer v. Neff, 95 U. S. 714, 727.

[76] Wilson v. Graham, 4 Wash. C. C. 53; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Folger v. Columbian Ins. Co., 99 Mass. 267; Price v. Hickok, 39 Vt. 292; Steel v. Smith, 7 Watts & S. 447; Holmes v. Holmes, 4 Lans. 388; Dunn v. Dunn, 4 Paige, 425; Lutz v. Kelly, 47 Iowa, 307; Ilsey v. Wilson, 1 Dev. & B. Eq. 568; Weil v. Lowenthal, 10 Iowa, 575. The rule applies also as between one of the United States and any foreign country. The judgment of a Canadian or any foreign court, upon service of its process made in Michigan, is not binding on a defendant who refused to recognize its jurisdiction, and it will not support an action in the courts of Michigan. McEwan v. Zimmer, 86 Mich. 765, 31 Am. Rep. 382.

[77] McBride v. Ham, 52 Iowa, 79, 2 N. W. Rep. 962.

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And this, it is said, will give the courts of that state jurisdiction of actions against him. Accordingly, there are statutes in most of the states providing for the institution of suits against non-residents by the attachment of their property within the territory. But it must be carefully noted that the jurisdiction is in reality over the *property*, not the person. The existence of property within a state gives its courts power and authority to adjudicate upon that property and to cause it to be applied in satisfaction of the debts of its owner, whoever and wherever he may be. But if they assume to investigate the owner's duties and determine his obligations, their authority to do so is merely incidental to their jurisdiction over his property, and because such an inquiry is a necessary preliminary to a right disposition of the property, but not because they have any control over his person. Consequently, "when the person is not within the jurisdiction of the court, and his property is within its jurisdiction, a judgment against him will be effectual only as a judgment *in rem* acting upon that property."[78] Hence, also, if the defendant was beyond the jurisdiction and was only constructively notified of the action, though his property was attached within the state, there is no warrant for a personal judgment against him; and if the judgment is expressed in general language, it cannot be considered or treated as a judgment *in personam*, but only as a judgment *in rem*.[79] Further, a judgment founded upon this species of jurisdiction will have no force or effect, beyond the state where it was rendered, further than to bind the property attached and disposed of.[80] For the further elucidation of this subject we quote the following from an opinion of the supreme court of Minnesota. "Such a judgment, though in form a judgment *in personam*, is in effect only a judgment *in rem*. It is a

[78] Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662.

[79] Johnson v. Dodge, 19 Iowa, 106; Payne v. Witherspoon, 14 B. Mon. 270; Mickey v. Stratton, 5 Sawy. 475; Packard v. Matthews, 9 Gray, 311. See Brown v. Tucker, 7 Colo. 30, 1 Pac. Rep. 221.

[80] Phelps v. Holker, 1 Dall. 261; Galpin v. Page, 18 Wall. 350; Cooper v. Reynolds, 10 Wall. 308; Pennoyer v. Neff, 95 U. S. 725; Pawling v. Bird, 13 Johns. 192; McDermott v. Clary, 107 Mass. 501; Arndt v. Arndt, 15 Ohio, 33; Woodruff v. Taylor, 20 Vt. 65; McVicker v. Breedy, 31 Me. 314; Williams v. Preston, 3 J. J. Mar. 600; Story, Confl. of Laws, § 549. See *infra*, vol. 2, § 904.

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judgment for no other purpose than to reach the property which a non-resident may have in the state, but who is not personally served with process therein. It is confined exclusively to such property, and is of no further force when that is exhausted. Beyond this it is evidence of nothing; nor does it bind or conclude the defendant in anything. An action could not be maintained on it in any other court here or elsewhere; nor, in my opinion, would the party in whose favor it was rendered be precluded thereby from still bringing another action on the original consideration, for any balance that might be due to him after exhausting the property which was in the state at the time jurisdiction attached. To hold that a judgment thus rendered has any vitality after exhausting the only thing over which the court rendering it had jurisdiction, is violative of a principle inherent in all free governments and which constitutes an inflexible rule at common law, viz., that no one can be condemned unheard." [81] Very important consequences follow from considering a judgment of this character as one *in rem* only. Thus it cannot be made the basis of an action of debt.[82] Nor can proceedings be taken against the defendant to compel him to submit to an examination concerning his property; nor can the plaintiff have a warrant for his arrest, as prescribed by the code, on account of his refusal to apply property in satisfaction of such judgment.[83] So again, the power of a court to render a personal judgment against the mortgagor for a deficiency, in an action for the foreclosure of the mortgage, does not extend to a case where the mortgagor is a non-resident and has neither appeared in the action nor been served with process within the state. The remedy of the plaintiff in such case is limited to the foreclosure and sale of the equity of redemption in the mortgaged premises.[84] In a case where, after attachment of property and publication of a citation, the plaintiff filed an amended petition, setting

[81] Stone v. Meyers, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104.

[82] Easterly v. Goodwin, 35 Conn. 273, 95 Am. Dec. 237.

[83] Bartlett v. McNeil, 60 N. Y. 53.

[84] Schwinger v. Hickok, 53 N. Y. 280. Where a plaintiff in possession of land obtained a judgment against a defendant, a non-resident of the state, upon service by publication only, and without his appearance in court, and afterwards the defendant in such action brought another action, as plaintiff, against the former plaintiff, as defend-

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up an entirely new cause of action, on which judgment by default was rendered without any further citation being published or service had, it was held that the court acquired no jurisdiction and the judgment was entirely void.[85] But after an appearance and plea by the defendant in a suit commenced by attachment, in which there has been only constructive service by publication, the suit becomes one *in personam*, and a personal judgment may properly be rendered against him.[86] So where the non-resident defendant acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants.[87]

§ 230. What Property bound.

There are numerous intimations in the books (though perhaps no direct decision) to the effect that a judgment against a non-resident, founded upon constructive service and attachment of property, will be valid and enforceable, not only against the property actually seized, but also against any other property of his within the state. In other words, that any property of the defendant found within the territorial jurisdiction may be subjected to execution under the judgment, although it is not a personal obligation against him. And a case in New York holds that such a judgment is effectual against any property within the jurisdiction during the pendency of the action and which was or might have been seized under attachment therein.[88] That these views are entirely untenable will be at once apparent if we consider the real nature of such a proceeding. It was shown in the preceding section to be substantially a proceeding *in rem*. But in a proceeding *in rem* jurisdiction is acquired only by seizure of the

ant, in the courts of another state, *held*, that in the trial of such subsequent action, the judgment in the first action was conclusive of the rights of said parties to the land in dispute. Venable v. Dutch, 37 Kans. 515, 15 Pac. Rep. 520.

[85] Stuart v. Anderson, 70 Tex. 588, 8 S. W. Rep. 295.

[86] Kerr v. Swallow, 33 Ill. 379; Darrah v. Watson, 36 Iowa, 116.

[87] Richardson v. Smith, 11 Allen, 134.

[88] Fiske v. Anderson, 33 Barb. 71. And in Vermont it is held that a judgment against a non-resident defendant, rendered without notice, will not be adjudged invalid as a matter of law, because the property returned as attached was of merely nominal value. Stevens v. Fisher, 30 Vt. 200.

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res, and the judgment is enforceable only against the *res*. It is therefore contrary to fundamental principles to attempt to extend its operation against property which was *not* seized, although, being within the territorial limits of the state, it *might* have been attached. And many well considered cases are explicit in declaring that such a judgment has no other force or validity whatever than to justify the disposition made of the property which was actually attached upon mesne process in the action.[89]

§ 231. Service by Publication without Attachment.

Some of the decisions hold that constructive service by publication, *without* attachment of property, will give the court such jurisdiction over a non-resident that its judgment, though not enforceable beyond the state, may be satisfied out of any property of the defendant found within the borders of the state;[90] or any property which was within the state at the time the order for publication was made, and which is not removed or sold to a *bona fide* purchaser before the judgment.[91] But this position was successfully controverted in the important and leading case of *Pennoyer* v. *Neff*,[92] and the rule established that such a judgment (except in an action for divorce, which is governed by special rules, to be considered hereafter[93]) is simply and entirely void for all purposes. The correct view is so clearly and ably stated in this decision that we quote at some length from the opinion. "The want of authority," said Field, J., "of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or

[89] Pennoyer v. Neff, 95 U. S. 714; Graham v. Spencer, 14 Fed. Rep. 603; Eastman v. Wadleigh, 65 Me. 251, 20 Am. Rep. 695; Coleman's Appeal, 75 Pa. St. 441; Tabler v. Mitchell, 62 Miss. 437; Johnson v. Holley, 27 Mo. 594.

[90] Quarl v. Abbott, 102 Ind. 233, 1 N. E. Rep. 476, 52 Am. Rep. 662.

[91] Jarvis v. Barrett, 14 Wis. 591.

[92] 95 U. S. 714.

[93] *Infra*, vol. 2, §§ 924-933.

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some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what will occur subsequently." [94]

§ 232. Statutes authorizing Constructive Service to be strictly construed.

All exceptional methods of obtaining jurisdiction over persons, natural or artificial, not found within the state, must be confined to the cases and exercised in the way precisely indicated by the statute.[95] Hence the statutory provisions for acquiring jurisdiction of a defend-

[94] Pennoyer v. Neff, 95 U. S. 714. And see Mitchell v. Gray, 18 Ind. 123; Smith v. McCutchen, 38 Mo. 415.

[95] Hebel v. Amazon Ins. Co., 33 Mich. 400.

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ant by publication of the summons, in the stead of a personal service, must be strictly and exactly pursued.[96] As it has been well said, "no principle is more vital to the administration of justice than that no man should be condemned in his person or property without notice and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of law, prescribed by the legislature for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill? If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void."[97] Thus, defendants cannot be summoned by publication unless shown to be non-residents.[98] And where, under the statute, a summons and return are necessary to give the court jurisdiction, an indorsement on the writ acknowledging service is not sufficient.[99] So a judgment following a service of summons purporting to be by publication, but which was made without affidavit and order, is

[96] People v. Huber, 20 Cal. 81; Pinkney v. Pinkney, 4 Greene (Iowa), 324; Hodges v. Brett, *Id.* 345; Edrington v. Allsbrooks, 21 Tex. 186. Thus, constructive notice by publication is allowed in divorce proceedings, but the statute authorizing it must be strictly complied with. "In obtaining constructive service in this way a strict compliance with the method pointed out by statute must be observed. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by the law in connection therewith. The statute, at the time these actions for divorce were commenced, commanded the 'usual exertion on the part of the sheriff to serve the summons,' notwithstanding the proceedings by publication. Rev. St. Colo. c. 13, § 8. And it has been held by this court that in divorce suits under that practice, a return *non inventus*, before the return day of the writ, would not support a notice by publication, and left the court without authority to proceed to judgment. Clayton v. Clayton's Heirs, 4 Colo. 410; Vance's Heirs v. Maroney, *Id.* 47; Palmer v. Cowdrey, 2 Colo. 6." Israel v. Arthur, 7 Colo. 5, 1 Pac. Rep. 438.

[97] Boswell v. Otis, 9 How. 336, 350.

[98] Johnson v. Patterson, 12 Ind. 471.

[99] Chickering v. Failes, 26 Ill. 507.

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void.[100] And so if the affidavit upon which the order for publication issued was substantially defective, there is no jurisdiction of the defendant.[101] Again, a judgment which is invalid because, service being made by publication, it was not shown that a copy of the petition and notice was mailed to the defendant, or that his residence was unknown (that being required by the usual wording of the statute), cannot be cured by giving such proof afterwards.[102] In case of notice by publication, the court acquires no jurisdiction until proper proof of a compliance with the statute requisitions is made to appear of record.[103] And an order of the court directing non-resident defendants to be notified by publication, will not authorize a judgment against resident defendants who have not been duly served with process.[104]

Before leaving the subject of constructive service of process, it must be remarked that a non-resident may be brought within the jurisdiction of an appellate court by mere publication of the notice, when it appears that he was personally cited or duly appeared in the action in the trial court. This is not a real exception to the rule of jurisdiction, but is based upon the consideration that the whole controversy, from its inception in the court below to its final determination by the court above, is but one suit. "Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared and litigated the merits of the controversy."[105]

[100] People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348.
[101] Braley v. Seaman, 80 Cal. 610.
[102] Hodson v. Tibbetts, 16 Iowa, 97.
[103] Tunis v. Withrow, 10 Iowa, 305, 77 Am. Dec. 117; Byram v. McDowell, 15 Lea, 581.
[104] Pomeroy v. Betts, 31 Mo. 419.
[105] Nations v. Johnson, 24 How. 195.

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§ 233. Joint Defendants.

By the common law, where process issued against two, on a joint cause of action, and only one appeared, the other must be outlawed before there could be any further proceedings.[106] And in this country, —independently of statutes,—where a suit is instituted against several defendants jointly, and one is not served with process, and the court assumes jurisdiction and proceeds to render judgment against them all, such judgment is absolutely void, so far, at least, as concerns the defendant not served.[107] Thus, where suit is brought against three and process issued to all, but it appears to have been served upon two only, there being no return as to the third, and none of the three answer, judgment should not be entered by default generally, without amendment, discontinuance, or some other action taken in regard to the defendant not served.[108] So where there are several defendants, and part are served in time and others are not, judgment cannot be entered against any at the return term, but the case must be continued.[109]

§ 234. Joint Judgment as an Entirety.

Supposing a judgment to be entered in violation of the common law rule just stated—that is, a joint judgment where some of the defendants were not served—it becomes important to determine whether it must be regarded as void for all purposes and in respect

[106] Edwards v. Carter, 1 Strange, 478.

[107] Wilbur v. Abbot, 60 N. H. 40; Odom v. Denny, 16 Gray, 114; McDoel v. Cook, 2 N. Y. 110; Jones v. Reed, 1 Johns. Cas. 20; Boaz v. Heister, 6 Serg. & R. 18; Vandiver v. Roberts, 4 W. Va. 493; Martin v. Williams, 42 Miss. 210, 97 Am. Dec. 456; Moody v. Lyles, 44 Miss. 121; Ayer v. Bailey, 5 How. (Miss.) 688; Faver v. Briggs, 18 Ala. 478; Houston v. Ward, 8 Tex. 124; Bayless v. Daniels, 8 Tex. 140; Johnson v. Vaughan, 9 B. Mon. 217; Hickey v. Smith, 6 Ark. 456; Dunn v. Hall, 8 Blackf. 82; Allen v. Chadsey, 1 Ind. 399; Brockman v. McDonald, 16 Ill. 112; Swift v. Green, 20 Ill. 173; Treat v. McCall, 10 Cal. 511; Proctor v. Lewis, 50 Mich. 329, 15 N. W. Rep. 495. In Ohio, it is said that a judgment against all of several defendants, where only a part are served with process, is erroneous but not void. Douglass v. Massie, 16 Ohio, 271, 47 Am. Dec. 375.

[108] Rogers v. Harrison, 44 Tex. 169.

[109] Evans v. Gill, 25 Ill. 116.

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to all parties, or merely voidable as against those who were not notified. This question has been considered in a preceding section; and it was there shown that, notwithstanding a great conflict of authorities, the better opinion was that such a judgment is at most voidable as to the defendant not served, while it ought to stand as a perfectly valid adjudication against the other until reversed, but that, if carried up by appeal or writ of error, it must be reversed as to both the defendants.[110] In case of a purely joint liability there may be justice in adhering to the stricter view; but otherwise the conception of a judgment as an entirety appears to be highly technical and ill adapted to the purposes of justice.

§ 235. Joint Judgment authorized by Statute.

In order to escape the rigor of the common law rule above stated, several of the states have passed statutes which provide that where an action is instituted against two or more defendants upon an alleged *joint* liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and if he recovers, may have judgment against all the defendants whom he shows to be jointly liable, but it must be so entered as to be enforceable only against the joint property of all and the separate property of those served.[111] But this statute must be strictly followed; the judgment must be in form against both; and a judgment against the one served alone is erroneous in substance.[112] Nor can the clerk, upon the application of the plaintiff, enter judgment upon default against the party served only; a judgment so entered is void.[113] And if it should appear upon the trial that the contract in suit was not joint, but was made with one of the defendants only, then of course the statute does not apply, and the plaintiff should be nonsuited.[114] Fur-

[110] *Supra*, § 211.

[111] Code Civil Proc. Cal. § 413; Code of N. Y. § 136; Gunzberg v. Miller, 39 Mich. 80; Johnson v. Lough, 22 Minn. 206.

[112] Nelson v. Bostwick, 5 Hill (N. Y.), 37, 40 Am. Dec. 310; Stehr v. Olbermann, 49 N. J. Law, 633, 10 Atl. Rep. 547.

[113] Kelly v. Van Austin, 17 Cal. 564.

[114] Fleming v. Freese, 26 N. J. Law, 263.

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ther, if the defendant who was not served was a non-resident of the state, and did not appear in the action, the judgment, so far as concerns him, can have no extra-territorial validity nor be enforced against him in the state of his domicile. And it is held that even in the courts of the state which rendered the judgment he would be allowed to show, in avoidance of the judgment, that he was not a joint contractor, as it is that fact alone that makes such judgment binding upon him.[115]

§ 236. Statutory Several Judgment.

In a number of the states, according to the statute law, or the practice prevailing in the courts, and in derogation of the common law, if two or more persons are sued in a joint action, the plaintiff may proceed against any one or more of them upon service of process on them, notwithstanding there may be others not served, and if his contention is successful, he may have judgment against those served, excluding the others.[116] In Vermont, in a case where process was sued against two persons, who were declared against as joint promissors, and service was made upon one only, the other not becoming a party in court, and evidence was given showing that the person served alone made the promise declared on, it was held, under the law of that state relating to such cases, that a judgment might be recovered against the person so making the promise.[117]

§ 237. Judgment against Partners.

At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by due

[115] Harker v. Brink, 24 N. J. Law, 333.

[116] Ingraham v. Gildemeester, 2 Cal. 88; Hirschfield v. Franklin, 6 Cal. 607; Kelley v. Bandini, 50 Cal. 530; Simpson v. Prather, 5 Oreg. 86; Loney v. Bailey, 43 Md. 10; Hunt v. Anderson, 33 Miss. 559; Raney v. McRae, 14 Ga. 589, 40 Am. Dec. 660; Moore v. Estes, 79 Ky. 282; Caldwell v. Harp, 2 McCord, 275; Merchants' Bank v. Evans, 9 W. Va. 373; Norfolk & W. R. Co. v. Shippers' Compress Co., 88 Va. 272, 2 S. E. Rep. 139; Fender v. Styles, 31 Ill. 460; Dillon v. Porter, 36 Minn. 341, 31 N. W. Rep. 56; Bennett v. Townsend, 1 Nebr. 460.

[117] Hodges v. Eastman, 12 Vt. 358.

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citation. Hence where an action is instituted against several persons constituting a partnership, either before or after its dissolution, and one partner is not served with process, and judgment is rendered against them all, such judgment will be voidable so far as concerns the partner who was not served.[118] On similar principles, and since one partner cannot bind his co-partner by a forthcoming bond to which he has signed the latter's name without authority, a statutory judgment on such bond is void as to the partner not signing, for want of jurisdiction.[119] In those states, however, where the "joint debtor acts" are in force, if not all the partners are served with process, still a judgment may be rendered against the firm, to be enforced against the partnership property and the individual property of the partners served.[120] But such a judgment will have no extra-territorial validity against any partner who was not served and did not appear,[121] the case being governed by the same rules which apply in any other action against joint defendants. And in California it is held that, where, in an action against a partnership on a joint liability, the complaint and summons designate the defendants individually, with a description that they are partners doing business under a firm name, the judgment can only be against the parties served, and not against a defendant not served with summons or who does not appear, though he be a member of the partnership.[122]

[118] Hall v. Lanning, 91 U. S. 160; Ingraham v. Gildemeester, 2 Cal. 88; Schloss v. White, 16 Cal. 68; Inos v. Winspear, 18 Cal. 397; St. John v. Holmes, 20 Wend. 609, 32 Am. Dec. 608; Mitchell v. Greenwald, 43 Miss. 167; Dreser v. Wood, 15 Kans. 344; Harford v. Street, 46 Iowa, 594; Bowler v. Huston, 30 Gratt. 266, 32 Am. Rep. 673; Faver v. Briggs, 18 Ala. 478; Anderson v. Arnette, 27 La. Ann. 237; Gaiennie v. Akin, 17 La. 42, 36 Am. Dec. 604.

[119] Smith v. Tupper, 4 Sm. & Mar. 261, 43 Am. Dec. 483.

[120] Newlon v. Heaton, 42 Iowa, 593; Patten v. Cunningham, 63 Tex. 666. A judgment to the effect that plaintiff do recover of the member served a certain sum "for which let execution issue, to be levied upon the goods and chattels of the firm and upon the individual property of the defendant served with citation," is a valid judgment against the partnership, under which the partnership property, real as well as personal, may be seized and sold. Alexander v. Stern, 41 Tex. 193.

[121] Hall v. Lanning, 91 U. S. 160; Scott v. Bogart, 14 La. Ann. 261.

[122] Davidson v. Knox, 67 Cal. 143, 7 Pac. Rep. 413.

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§ 238. Appearance for Defendant not Served.

In an action upon contract against several defendants, where only a part are served with process, but others voluntarily appear, a judgment for the plaintiff must be against all the defendants appearing.[123] But where an attorney appears specially for one defendant in an action against two, and afterwards, as attorney for "the defendant," acknowledges judgment in favor of the plaintiff, it is a good judgment only as to the defendant for whom such attorney appeared, and a joint execution is erroneous.[124]

§ 239. Construction of Judgment against "Defendants" generally.

Where process is served only on a part of the defendants named in the writ, and judgment is taken against "the defendants," without naming them, and without any appearance of those not served, the judgment will be understood to be only against those who were duly served.[125] In some of the states, the rendition of a judgment against a defendant who was not served and who did not appear is considered to be a mere clerical mistake which may be amended on motion in the trial court.[126]

§ 240. Jurisdiction of the Subject-Matter.

Thus far we have been considering the questions connected with the acquisition of jurisdiction over the defendant's person. We turn now to the equally important subject of the validity of judgments as dependent upon jurisdiction of the subject-matter. And first, it is an inflexible rule that any judgment rendered by a court upon a

[123] Mosher v. Small, 5 Pa. St. 221; Heaton v. Collins, 7 Blackf. 414; Hall v. Law, 2 Watts & S. 121.

[124] Kimmel v. Kimmel, 5 Serg. & R. 294.

[125] Morgan v. Morgan, 2 Bibb, 388; Clark v. Finnell, 16 B. Mon. 329; Boyd v. Baynham, 5 Humph. 386, 13 Am. Dec. 488; Winchester v. Beardin, 10 Humph. 247, 51 Am. Dec. 702; Neal v. Singleton, 26 Ark. 491. *Per contra*, Langley v. Grill, 1 Col. Ter. 71.

[126] Savage v. Walshe, 26 Ala. 619; Bergen v. Bolton, 10 Mo. 658.

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matter not within its jurisdiction is null and void, incapable of ratification, and subject to collateral impeachment.[127] The principles which govern this point have been well stated in the following language: "1. Where the judicial tribunal has general jurisdiction of the subject-matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted, upon notice to all proper parties, jurisdiction is acquired and cannot be assailed in any collateral proceeding. 2. Where the judicial tribunal has not general jurisdiction of the subject-matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction. 3. Where the judicial tribunal has not *general* jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding."[128] If we inquire more particularly into the meaning of the terms here employed, the answer is, that "by jurisdiction over the subject-matter is meant the nature of the cause of action or of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."[129] Now the powers to be exercised by a court may be prescribed and defined in several different ways, though always emanating from the sovereign authority of the state. First, the constitution or statute which creates the court may specifically enumerate the classes of actions or subjects of controversy to which its jurisdiction shall extend. This is usually the case in respect to the original jurisdiction of the supreme courts, and in respect to probate and similar courts. Or else the power may be conferred in general language; as where a court of record is invested with "general original jurisdiction in all cases,

[127] Smith v. Knowlton, 11 N. H. 191; Morse v. Presly, 25 N. H. 299; Eaton v. Badger, 33 N. H. 228; Reel v. Elder, 62 Pa. St. 308; Lyles v. Bolles, 8 S. Car. 258; Ponce v. Underwood, 55 Ga. 601; Wamsley v. Robinson, 28 La. Ann. 793; Gilliland v. Seller, 2 Ohio St. 223; Webb v. Carr, 78 Ind. 455.

[128] Bumstead v. Read, 31 Barb. 669.

[129] Cooper v. Reynolds, 10 Wall. 308.

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civil or criminal, at law or in equity," or where a separate chancery court is given general equity powers. And here no subject will be intended to be out of the jurisdiction of the court, unless clearly shown to be so by law. Or the power to hear and determine a particular class of actions or proceedings may be granted to a tribunal specially organized for that purpose or to one of the usual courts in addition to its common law powers. Or finally, the limitations of the jurisdiction may be introduced by way of exception or reservation from the general powers granted. And this may be either by withdrawing certain classes of actions from the cognizance of the court, as where a justice of the peace is forbidden to try any suit involving the title to real estate; or by fixing a money limit below which the jurisdiction shall not attach, as is the case in respect to most controversies before the circuit courts of the United States; or by designating the amount above which the jurisdiction shall terminate, as is usual in regard to justices' and other inferior courts.[130] But in every case, where jurisdiction of the subject-matter is challenged, recourse must be had to the sources of jurisdiction, whether constitution or statute, and if they show a want of authority in the court to adjudicate upon the particular controversy, its judgment must be considered incurably void. And an unconstitutional statute, it will be remembered, can have no avail as a source of jurisdiction; a judgment rendered under it is entirely without validity.[131]

§ 241. Sufficiency of Declaration.

In one of the early cases before the supreme court of the United States it was said, "if the petitioner states such a case in his petition that on a demurrer the court would render a judgment in his

[130] In Jones v. Jones, 3 Dev. 360, it was held that a judgment of a magistrate for a sum above his jurisdiction being void, no action could be maintained on it. But some other cases hold that a judgment of a court of record, founded upon a judgment of a justice of the peace which is in excess of his jurisdiction and consequently void, is erroneous but not void, and will stand good against collateral attacks. Moore v. Martin, 38 Cal. 428; Hinds v. Wallis, 13 Serg. & R. 213. But it is difficult to see how a nullity can be made the basis of an action.

[131] *Supra*, § 216.

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favor, it is an undoubted case of jurisdiction."[122] But probably this was not meant as equivalent to saying that if the petition were demurrable there would be *no* jurisdiction. Indeed it would be impossible, on any rational theory, to make the jurisdiction depend upon the validity of the case stated by the plaintiff. For the court must pass upon the sufficiency of the declaration, and jurisdiction to proceed at least so far must be acquired by the mere filing of the pleading and service of process. But it is equally certain that a court cannot, in ordinary cases, initiate a proceeding *sua sponte*. Its jurisdiction and power remain at rest until called into activity by the application of a suitor. Jurisdiction of the subject-matter, therefore, dynamically considered, depends upon the act of the parties in invoking the aid of the law, in some regular manner, for the determination of their controversy. A court has no more power, until its action is called into exercise by some sort of pleading, to render a judgment *in favor* of a party, than it has to enter a judgment *against* him until he has been brought within its jurisdiction by some method known to the law.[123]

§ 242. Jurisdiction of Question decided.

Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant. In other words a judgment which passes upon matters entirely outside the issue raised in the record is so far invalid. "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue.

[122] United States v. Arredonda, 6 Pet. 709. And see Humphries v. Bartee, 18 Miss. 282.

[123] Dunlap v. Southerlin, 63 Tex. 88.

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That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels." [134]

On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the

[134] Munday v. Vail, 34 N. J. Law, 418. To the same effect see Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. Rep. 385.

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heirs at law, who were infants, being made defendants, and the court not only directed an assignment of dower, but of its own accord decreed a sale of the residue of the land belonging to the heirs, it was held that, the court having exceeded its jurisdiction, the decree of sale was void and might be collaterally attacked.[135] In these cases the court lacked jurisdiction of the subject or question which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result will follow if, being invested with jurisdiction for a single purpose in a special statutory proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant, such judgment, being beyond its power, is void.[136]

§ 243. Loss of Jurisdiction.

In general, when jurisdiction has once fully attached in a cause, it will continue until the final disposition of the controversy. But this is not invariably the case, and a court may lose the jurisdiction which it has once rightfully acquired, after which it can make no further order or judgment. Such is the case when the cause has been taken up on appeal or error, and especially after the court of review has pronounced its judgment.[137] So where a pending litigation is removed from the state court to a federal court under the act of Congress in that behalf. Upon the filing of a proper petition, in a removable cause, the rightful jurisdiction of the state court ceases instantly, and every subsequent exercise of jurisdiction by it, including its judg-

[135] Seamster v. Blackstock, 88 Va. 232, 2 S. E. Rep. 86.

[136] Wood v. Stanberry, 21 Ohio St. 142; Fithian v. Monks, 43 Mo. 502; Boswell v. Dickerson, 4 McLean, 262.

[137] Boynton v. Foster, 7 Met. 415.

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ment if one is rendered, is erroneous, if not absolutely void.[138] The same result would follow, we apprehend, if a statute should deprive a court in which an action was pending of jurisdiction over that class of suits and transfer it to another tribunal, provided the law were explicitly made applicable to pending cases. And sometimes it may happen that jurisdiction is lost by the expiration of the term, without judgment rendered and without a proper continuance.[139]

§ 244. Jurisdiction attaching, Error does not Vitiate.

In any case where the court has jurisdiction of the subject-matter of the action, and the parties are before it by due service of proper process, the jurisdiction is never ousted by the erroneous exercise of the power which it confers, and the judgment in the case, though it may be marked by error which will cause its reversal by a higher court, is not for that reason *void*.[140]

[138] Dillon, Removal of Causes (5th edn.), §§ 185–6.

[139] See *supra*, §§ 179, 180. In Wisconsin, the failure of a justice to enter in his docket the *place*, as well as the time, to which a cause pending before him is adjourned, defeats his jurisdiction (unless the parties voluntarily appear in the action subsequently) and renders all subsequent proceedings therein void. Witt v. Henge, 58 Wis. 244, 16 N. W. Rep. 609.

[140] *Ex parte* Bigelow, 113 U. S. 328, 5 Sup. Ct. Rep. 542; *Ex parte* Kellogg, 6 Vt. 509; Moore v. Robison, 6 Ohio St. 302; Buckmaster v. Carlin, 3 Scam. 104.

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CHAPTER XIII.

COLLATERAL IMPEACHMENT OF JUDGMENTS.

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PART I. THE GENERAL RULE.

§ 245. Judgments not to be Attacked Collaterally.

Where the court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment, by parties or privies, in any collateral action or proceeding whatever.[1] "The

[1] Elliot v. Piersol, 1 Pet. 340; Gray v. Brignardello, 1 Wall. 627; Secrist v. Green, 3 Wall. 744; Gunn v. Plant, 94 U. S. 664; Bank of United States v. Voorhees, 1 McLean, 221; Woodman v. Smith, 37 Me. 21; Gorrill v. Whittier, 3 N. H. 265; Porter v. Gile, 47 Vt. 620; Hendrick v. Whittemore, 105 Mass. 23; Smith v. Shaw, 12 Johns. 256; People v. Downing, 4 Sandf. 189; Kean v. McKinsey, 3 Pa. St. 30; Billings v. Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Yaple v. Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Wood v. Bayard, 63 Pa. St. 320; Fridge v. State, 3 Gill & J. 103, 20 Am. Dec. 463; Lancaster v. Wilson, 27 Gratt. 624; Howison v. Weeden, 77 Va. 704; Fox v. Cottage Building Ass'n, 81 Va. 677; Skinner v. Moore, 2 Dev. & B. 138, 30 Am. Dec. 155; Morris v. Gentry, 89 N. Car. 248; Bridges v. Nicholson, 20 Ga. 90; Vickery v. Scott, 20 Ga. 798; Archer v. Guill, 67 Ga. 195; Moore v. Ware, 51 Miss. 206; Insurance Co. v. De Blanc, 31 La. Ann. 100; Kent v. Brown, 38 La. Ann. 802; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Willis v. Ferguson, 46 Tex. 496; Paul v. Smith, 82 Ky. 451; Thacker v. Chambers, 5 Humph. 313, 42 Am. Dec. 431; Hall v. Heffley, 6 Humph. 444; Lewis v. Simonton, 8

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doctrine of this court, and of all the courts of this country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such errors be considered when the judgment is brought collaterally into question."[2] This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principles of public policy. "It is one," says the court in Virginia, "which has been adopted in the interest of the peace of society and the permanent security of titles. If, after the rendition of a judgment by a court of competent jurisdiction, and after the period has elapsed when it becomes irreversible for error, another court may in another suit inquire into the irregularities or errors in such judgment, there would be no end to litigation and no fixed established rights. A judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become

Humph. 185; Bigelow v. Bigelow, 4 Ohio, 138, 19 Am. Dec. 591; Cochran v. Loring, 17 Ohio, 409; Newnam v. Cincinnati, 18 Ohio, 323; Sauer v. Twining, 81 Ind. 366; Cody v. Hough, 20 Ill. 43; Kern v. Strasberger, 71 Ill. 303; Harris v. Lester, 80 Ill. 307; Wright v. Marsh, 2 Greene (Iowa), 94; Hampson v. Weare, 4 Iowa, 13, 66 Am. Dec. 116; Callahan v. Griswold, 9 Mo. 775; Martin v. McLean, 49 Mo. 361; Yeoman v. Younger, 83 Mo. 424.

[2] McGoon v. Scales, 9 Wall. 23, Miller, J. We subjoin some further extracts from some of the best and most satisfactory opinions on this subject:

"It may now be regarded as a legal maxim that when a judgment is offered in evidence collaterally, in another suit, its validity cannot be questioned, except for want of jurisdiction in the court that rendered it." Paul v. Smith, 82 Ky. 451.

"No principle of law is better settled than that, where a court has jurisdiction of the subject-matter and of the persons of the parties, its judgment or decree, when questioned collaterally, will be held valid, and, notwithstanding the court may have proceeded irregularly, a purchaser in good faith, under its judgment or decree, will be protected." Harris v. Lester, 80 Ill. 307.

"It appears that the court which rendered the judgment had jurisdiction of the subject-matter involved and of the parties, in the suit in which the judgment was rendered. It is well settled that such a judgment can be impeached, between the parties thereto, only by some proper proceeding bearing directly upon the judgment itself, instituted for the purpose of having such judgment vacated and set aside. It cannot be impeached collaterally." Porter v. Gile, 47 Vt. 620.

"It is an essential and fundamental principle of the law that all properly

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useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title."[3] If the sentence last quoted seems somewhat extravagant, at least it will serve to show the substantial reasons upon which the rule rests and the inflexibility with which it is held by the courts. According to the supreme court of Massachusetts, the rule obtains "not because of an apparent authority in the court to render the judgment, but because the remedy by review or writ of error is held to be more appropriate."[4] This may be sufficient as a technical reason, but it cannot be doubted that the motives which have led to the establishment of the rule rather spring from the considerations of public policy, and the necessary finality of judicial decisions, indicated in the opinions previously quoted.

§ 246. To what Judgments the Rule applies.

The rule against collateral impeachment applies to every judgment, order, decree, or judicial proceeding, of whatever species, that is not absolutely void. If the judgment is *void on its face* it is of

constituted judicial proceedings must be upheld as regular, warranted by the facts and the law applicable to them, valid and effectual, until the contrary shall be shown and established by some competent proceeding for that purpose. Hence, wherever it appears on the face of the record, in any action or other judicial proceeding, that the court had jurisdiction of the parties litigant and the subject-matter in litigation, the law presumes that the court got jurisdiction in a regular or proper way, and that its orders, decrees, and judgments are valid and effectual, however irregular or fraudulent, until the irregularity and invalidity, because of fraud or other sufficient cause, shall be duly established, and such proceedings, orders, decrees, and judgments shall be declared invalid by proper decree. To allow the records of courts of justice, their judgments and decrees, to be questioned and held to be inoperative in the same tribunal that made them, or in other tribunals, would be subversive of judicial authority and destructive of public and private justice. The law is too true to itself, and too thorough in its life and vigor, to allow of such practical absurdity; it requires that its courts shall be careful to see that their judgments settle and establish rights, and when once made must prevail everywhere. The courts making them will be slow to disturb them, and never, except for adequate cause shown in a direct proceeding for the purpose." Morris v. Gentry, 89 N. Car. 248.

[3] Lancaster v. Wilson, 27 Gratt. 624, 629.

[4] Hendrick v. Whittemore, 105 Mass. 23.

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course a mere nullity and of no avail for any purpose, and this may be urged against it whenever it is brought in question.[5] But otherwise, whether it be regular or irregular, correct or erroneous, valid or voidable, it is not subject to collateral attack. The rule has been held applicable to a judgment *in rem*, where the court had jurisdiction of the *res;*[6] to a judgment condemning property in confiscation proceedings;[7] to decrees rendered by a court of equity, when sought to be assailed in the same or another court;[8] to a judgment in attachment;[9] to a decree confirming an auditor's report on the distribution of the estate of an assignor for the benefit of creditors;[10] to a judgment forfeiting a recognizance, that being within the competence of the court;[11] to an order passed by a superior court allowing a certain sum to the clerk for costs in insolvent criminal cases;[12] to an order of court approving the act of an administrator in allowing a claim against the estate;[13] to an order granting an allowance for the support of the widow and children;[14] to an order setting aside a judgment by default;[15] to a decree vacating a former decree upon a petition to be let in to a defense.[16] The entry of a judgment in the judgment-book, it is said, including the date of the judgment and the date of the docketing in the judgment-docket, while standing as part of the court's record, cannot be impeached collaterally.[17] And while affidavits may be read or proof heard, to show that words have been improperly stricken from a judgment, they cannot be received to falsify a record by showing that an alteration, correcting it, was improperly made.[18]

[5] *Supra*, § 170; *infra*, § 278.

[6] Otis v. The Rio Grande, 1 Woods, 279.

[7] Bragg v. Lorio, 1 Woods, 209.

[8] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. Rep. 407; Estep v. Watkins, 1 Bland, 486; Covington v. Ingram, 64 N. Car. 123.

[9] Harrison v. Pender, Busbee, 78, 57 Am. Dec. 573.

[10] Comm. v. Steacy, 100 Pa. St. 618.

[11] Rubush v. State, 112 Ind. 107, 13 N. E. Rep. 877.

[12] Duer v. Thweatt, 89 Ga. 578.

[13] Pitner v. Flanagan, 17 Tex. 7.

[14] Leaverton v. Leaverton, 40 Tex. 218.

[15] Bender v. Askew, 3 Dev. L. 150, 22 Am. Dec. 714.

[16] Southern Bank v. Humphreys, 47 Ill. 227.

[17] Ferguson v. Kumler, 25 Minn. 183.

[18] Walker v. Armour, 23 Ill. 658.

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§ 247. Tax Judgments.

The principle that a record cannot be impeached collaterally for mere errors or irregularities is equally applicable to a statutory judgment against land for taxes as to any other decree. "It is no objection," said the supreme court of Alabama in a recent case, "to the application of this principle that the present proceeding is to enforce the collection of delinquent taxes. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the tax payer, this principle forbidding the collateral assailment of judgments has often been invoked successfully in actions of this nature. It has accordingly been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempted from its influence."[19] Thus the judgment cannot be impeached because it embraces also a personal judgment against the owner of the land beside the proper judgment against the land itself; for that part of the judgment which is directed against the owner will be regarded as mere surplusage.[20] The cases even go to the length of holding that it cannot be shown against such a judgment, collaterally, that the taxes on the particular tract had been in fact paid before the suit,[21] although delinquency is the very fact upon which the jurisdiction of the court must be based. And in one state, tax judgments were sustained as valid and binding, although it was shown that the assessment on which they were based was illegal and void.[22] In Illinois, however, it appears to be settled law that a judgment *by default*, in a proceeding in a county court under the statutes of that state for the condemnation and sale of real estate for taxes, is not conclusive upon the tax payer, and may be collaterally impeached.[23]

[19] Driggers v. Cassady, 71 Ala. 529; Gunn v. Howell, 27 Ala. 663; Young v. Lorrain, 11 Ill. 637; Welshear v. Kelley, 69 Mo. 343; Eitel v. Foote, 39 Cal. 439; Branson v. Caruthers, 49 Cal. 375; Mayo v. Foley, 40 Cal. 281; Job v. Tebbetts, 5 Gilm. 376; Scott v. Pleasants, 21 Ark. 364; Cadmus v. Jackson, 52 Pa. St. 295; Chesnut v. Marsh, 12 Ill. 173; Black, Tax Titles, § 59; Cooley, Taxation, 526-530.

[20] Chesnut v. Marsh, 12 Ill. 173.

[21] Chauncey v. Wass, 35 Minn. 1, 30 N. W. Rep. 826; Cadmus v. Jackson, 52 Pa. St. 295; Black, Tax Titles, § 57.

[22] Mayo v. Ah Loy, 32 Cal. 477; Mayo v. Foley, 40 Cal. 281.

[23] Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. Rep. 136.

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§ 248. Adjudications in Bankruptcy.

An adjudication in bankruptcy having been made by a court having jurisdiction of the subject-matter, upon the voluntary appearance of the bankrupt, and being correct in form, it is conclusive of the fact decreed and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in property of the bankrupt.[24] On the same principle, a discharge in bankruptcy cannot be attacked collaterally for fraud or irregularity practiced in the proceedings in which it was obtained. "The discharge in bankruptcy pleaded by plaintiff to the defendant's set-off was a complete defense. The evidence offered by defendant, to the effect that it had no notice of the proceedings in bankruptcy, was properly excluded. The discharge read in evidence was conclusive. The regularity of the proceedings by which the discharge was procured cannot be inquired into collaterally." [25]

§ 249. Awards.

An award of arbitrators, like a judgment at law, concludes the parties, and cannot be impeached in a collateral proceeding, even although erroneous, if it was fairly made.[26] If it appears to be good on its face, none of the various grounds which might be urged against its justice or legality in a direct proceeding to set it aside will avail collaterally. Thus, it was said in an early case: "An award good upon the face of it cannot be impeached but upon objections which go to the misbehavior of arbitrators. If the reception of illegal evidence appear upon the award, it may be set aside, or if a mistake of fact appear upon the face, or by confession of the referees, it should be recommitted; but the court cannot inquire by extrinsic testimony into the justice of the award, for that would be to try the matters in dispute *de novo*." [27]

[24] Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. Rep. 799.

[25] Brown v. Covenant Life Ins. Co., 86 Mo. 51; Thornton v. Hogan, 63 Mo. 143; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677.

[26] Morse v. Bishop, 55 Vt. 231.

[27] Jocelyn v. Donnel, Peck, 274, 14 Am. Dec. 753.

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§ 250. Judgments of Inferior Courts.

We shall have occasion, in a later part of this chapter, to discuss the important distinction between superior and inferior courts, in respect to the presumptions by which the judgments of the former are sustained against collateral attacks upon their jurisdiction, and the requirement that judgments of the latter must show jurisdiction on their face. But it belongs to the present connection to advert to the well recognized rule that the judgments and decisions of an inferior court can in no case be assailed indirectly on account of errors or irregularities not affecting the jurisdiction.[28] Thus the regularity or legality of a judgment rendered by a justice of the peace, in a case falling within his competence and in which he had jurisdiction of the parties, so long as it is not reversed or annulled in some proper proceeding, is not open to collateral attack or impeachment.[29] On similar principles, an order or decree of a surrogate, or probate or orphans' court, jurisdiction having attached, is not examinable in any collateral proceeding.[30] Thus, in California, if a probate court acquired jurisdiction of the probate of a will, by presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and admitted the will to probate, that determination is final, except upon a direct proceeding by appeal,

[28] Comstock v. Crawford, 3 Wall. 396; Grusenmeyer v. Logansport, 76 Ind. 549; Bell v. Raymond, 18 Conn. 100; Long v. Burnett, 13 Iowa, 28; Roosevelt v. Kellogg, 20 Johns. 208; Bernal v. Lynch, 36 Cal. 135; Thompson v. Multnomah Co., 2 Oreg. 34; Shoemaker v. Brown, 10 Kans. 383.

[29] Tarbox v. Hays, 6 Watts, 398, 31 Am. Dec. 478; Billings v. Russell, 23 Pa. St. 189, 62 Am. Dec. 330; McDonald v. Simcox, 98 Pa. St. 619; Cumberland Co. v. Boyd (Pa.), 4 Atl. Rep. 346; Allen v. Martin, 10 Wend. 300, 25 Am. Dec. 564; Wesson v. Chamberlain, 3 N. Y. 331; Lightsey v. Harris, 20 Ala. 409; Reid v. Spoon, 66 N. Car. 415; Allen v. Mills, 26 Mich. 123.

[30] Welty v. Ruffner, 9 Pa. St. 224; Gilmore v. Rodgers, 41 Pa. St. 120; Leedom v. Lombaert, 80 Pa. St. 381; Boston v. Robbins, 126 Mass. 384; Van Dyke v. Johns, 1 Del. Ch. 93, 12 Am. Dec. 76; Ward v. Hudspeth, 44 Ala. 215; Grant v. Spann, 34 Miss. 294; Currie v. Franklin. (Ark.), 11 S. W. Rep. 477; Barney v. Chittenden, 2 Greene, (Iowa), 165; Halleck v. Moss, 22 Cal. 266; Haynes v. Meeks, 10 Cal. 110, 70 Am. Dec. 703. Error of judgment by a surrogate, however palpable, does not render proceedings under it void, and advantage can be taken of it only on appeal; it cannot be passed upon in a collateral suit or action. Woodruff v. Cook, 2 Edw. Ch. 259.

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and cannot be questioned collaterally.[31] So where the probate court has jurisdiction to order and confirm a sale of lands, the proceedings instituted for that purpose cannot be impeached collaterally.[32] And a decree of partition made by a probate court, even though irregular, cannot be avoided collaterally.[33] So also the matter of appointing and removing administrators is exclusively within the jurisdiction of the probate court, and an order of that kind cannot be attacked in a collateral manner.[34] The rule is by no means confined to the two species of inferior courts already mentioned. It extends equally to many varieties of judicial bodies and special tribunals, all being protected, as to their judgments, in collateral inquiries, except as to jurisdiction and in some cases fraud. For example, where a court-martial has cognizance of the charges made, and has jurisdiction of the person of the accused, its sentence is valid, when questioned collaterally, although irregularities or errors are alleged to have occurred in its proceedings.[35] So where a board of United States Land Commissioners has once acquired jurisdiction of a matter, its subsequent proceedings therein cannot be collaterally questioned.[36]

§ 251. Co-Ordinate Courts.

A judgment at law cannot be impeached collaterally in equity.[37] And conversely, the validity of a decree rendered by a court of equity cannot be impeached in a collateral action at law.[38] A judgment of a state court, no question as to its jurisdiction being involved, cannot be overhauled or corrected in a collateral proceeding in a Fed-

[31] *In re* Warfield, 22 Cal. 51, 83 Am. Dec. 49.

[32] Williams v. Sharp, 2 Ind. 101; Sturdy v. Jacoway, 19 Ark. 499; Tyson v. Belcher, (N. Car.), 9 S. E. Rep. 634. Where a court of probate ordered a sale of real estate, without finding that the debts allowed exceeded the personal estate, it was *held* that though such proceeding was erroneous and would be set aside on appeal, yet as the court had jurisdiction of the subject-matter, and there was no fraud in the case, the decree was valid until thus set aside, and could not be collaterally called in question. Brown v. Lanman, 1 Conn. 467.

[33] Snevily v. Wagner, 8 Pa. St. 396; Fowler v. Gordon, 24 La. Ann. 270.

[34] Steen v. Bennett, 24 Vt. 303.

[35] Keyes v. United States, 109 U. S. 336, 3 Sup. Ct. Rep. 202.

[36] Bernal v. Lynch, 36 Cal. 135.

[37] Redwine v. Brown, 10 Ga. 311.

[38] Watson v. Williams, 8 Ired. Eq. 232; Alexander v. Nelson, 42 Ala. 462.

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eral court.[39] The courts of the United States cannot lawfully treat as nullities the judgments of the courts of the several states, rendered in suits where the latter have jurisdiction of the cause and the parties, even if they are founded upon an erroneous construction of the bankrupt act or any other statute of the United States; the remedy for the correction of the error is by a writ of error in the supreme court of the United States.[40] And it is equally clear that the reverse of this rule must hold good. That is, that the judgments and decrees of the Federal courts, in cases where their jurisdiction is not disputed, must be impervious to collateral assailment in the courts of the states, although, for example, they may proceed upon an erroneous construction of a state constitution or statute.

§ 252. What constitutes a Collateral Attack.

We are next to inquire what constitutes a collateral attempt to impeach a judgment within the meaning of the rule prohibiting such endeavors. And here we shall find that the word "collateral" is always used as the antithesis of "direct," and it is therefore wide enough to embrace any independent proceeding. To constitute a *direct* attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose.[41] If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule. Thus, whether a judgment is irregular or erroneous is not a legitimate inquiry in a suit brought for its enforcement.[42] So in the distribution of a fund,

[39] Railroad v. Ferry Co., 108 U. S. 18, 1 Sup. Ct. Rep. 614, 617; Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. Rep. 575.

[40] Kittredge v. Emerson, 15 N. H. 227.

[41] Nichols v. Wimmer (Tex.), 19 Reporter, 475.

[42] Rogers v. Rogers, 15 B. Mon. 364. Nor in an action on a promissory note

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an auditor cannot inquire into the validity of a judgment regular on its face, although he may receive testimony to show that it has been paid or otherwise satisfied.[43] So, in an action of trespass to try title, a judgment ordering a sale of the premises under a mortgage, rendered in a former suit between the same parties, cannot be impeached.[44] In a suit on an appeal bond, the validity of the judgment which has been affirmed on appeal, cannot be questioned.[45] The same is true of a suit on a recognizance entered in an attachment suit; no allegations can be heard against the regularity of the judgment in attachment.[46] On the other hand, a complaint alleging that a justice's judgment is absolutely void upon its face, but that, though void, it is apparently a lien on land described in the complaint, and that the plaintiff is entitled as owner of the land to a decree annulling and avoiding such judgment, is a direct and not a collateral attack upon it.[47] And in Louisiana it is held that no improper or objectionable impeaching of a judgment collaterally is involved in a creditor intervening, in a suit brought by heirs against their mother to enforce payment for their interest in the deceased father's estate, which she has purchased, for the purpose of opposing the claims of the heirs, although their claims are founded on a probate decree confirming the sale, agreed on by the parties.[48]

§ 253. Proceedings to prevent Execution of the Judgment.

When a person against whom a judgment has been taken at law applies to a court of equity for relief against the judgment,—as by

given in satisfaction of the judgment. Mitchell v. State Bank, 1 Scam. 526.

[43] Bank's Appeal, 85 Pa. St. 528.

[44] Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546.

[45] Sturgis v. Rogers, 26 Ind. 1; Bostic v. Love, 16 Cal. 69.

[46] Eimer v. Richards, 25 Ill. 289. In an action of replevin, for goods sold by authority of an execution upon the judgment of a justice, that judgment cannot be impeached, although the plaintiff was the purchaser of the goods and the defendant in the action of replevin. Tarbox v. Hays, 6 Watts, 398, 31 Am. Dec. 478.

[47] Penrose v. McKenzie, 116 Ind. 35, 18 N. E. Rep. 384. See McCampbell v. Durst (Tex.), 11 S. W. Rep. 880.

[48] Bedell v. Hayes, 21 La. Ann. 643. For heirs to claim the benefit of the rule that a judgment of confiscation of lands operates only during the lifetime of the owner, is not impeaching the judgment collaterally. Slidell v. Bank, 27 La. Ann. 354.

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petition for an injunction to restrain its execution,—it might appear at first sight that such a proceeding constituted a direct attack upon the judgment. For its object is clearly to escape the consequences of the adjudication by showing adequate reasons for withholding them in the particular case. But a closer examination shows that an action of this character is in reality a collateral attack upon the judgment, and therefore cannot be based upon mere errors or irregularities. For first, if a court of equity sees fit to grant such an application, its intervention never takes the form of annulling, vacating, or opening the judgment, or in any wise interfering with its standing as a valid and binding adjudication. Its action is not direct but indirect. It lays its restraining hand upon the person not the judgment. What chancery does, in these circumstances, is to put its prohibition upon the person who has obtained the judgment, to prevent him from making a use of it which, as it appears, would be inequitable and against conscience. Secondly, it is very well settled, upon the authorities, that equity will not review judgments at law, unless for causes giving rise to the peculiar equitable jurisdiction, that is, as it is commonly phrased, "grounds of which the party could not have availed himself at law, or of which he was prevented from availing himself at law, by fraud, accident, or the act of the opposite party unmixed with negligence or fault on his own part."[88] From these considerations it will appear that an application to enjoin the collection of the judgment is strictly speaking a collateral attack upon it. And this view is fully sanctioned by the decisions. "It is a familiar doctrine," says the court in Indiana, "that such a proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack upon the judgment, and cannot be maintained on account of errors or irregularities merely, but only upon a showing that the judgment is void."[89] The same reasoning and the same conclusion will apply to the case of a motion to quash an execution. "Where a judgment of a court which has jurisdiction of the subject-matter and of the parties is either erroneous or irregularly entered, but stands unreversed and

[88] *Infra*, §§ 365, 366.

[89] Krug v. Davis, 85 Ind. 309.

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unvacated, and with no attempt made to supersede, alter, or in any way reform it, it would seem clear on principle that an execution issued on it cannot be quashed on the ground of error or informality in the judgment. Such seems the doctrine of the cases when they hold that the motion to quash the execution should be grounded upon something subsequent to the judgment, and that, where the execution substantially pursues the judgment, there is no fault in the execution."[61] But it has been declared by the supreme court of the United States that when application is made to collect judgments by process not contained in themselves,—as for example by *mandamus*,—and requiring, in order to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever.[62]

§ 254. Habeas Corpus Proceedings.

The writ of *habeas corpus* is very frequently sued out to obtain the release of a person held in custody under the judgment or sentence of a court, and in a great many instances the attempt has been made to impeach such judgment on grounds going to its legality or regularity, or even upon objections to the anterior proceedings. But the courts have resolutely set their faces against this practice, refusing to look beyond the judgment itself, except in the single case where a want of jurisdiction is alleged. A proceeding of this nature is undoubtedly a collateral attack upon the judgment; and exceptional as the remedy is, and beneficent as is the purpose it subserves, there is no good reason for permitting it to be made the vehicle for objections to the judgment or sentence which could not be urged against it in any other collateral proceeding. Accordingly the authorities declare that the writ will not be issued when it appears

[61] Merrick v. Merrick, 5 Mo. App. 128, citing Swinney v. Watkins, 22 Ga. 570; Shorter v. Mims, 18 Ala. 658; Skidmore v. Bradford, 4 Pa. St. 296.

[62] Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. Rep. 327.

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on the face of the petition that the petitioner is detained by virtue of the final judgment of a court of competent jurisdiction;[53] and that such a judgment, valid on its face, is an unanswerable return to a writ of *habeas corpus*.[54] But while errors or irregularities will not be thus inquired into, the subject of jurisdiction is legitimately open to investigation, including both jurisdiction of the person and subject-matter and of the particular order or sentence assumed to be passed, as well as the *sources* of jurisdiction when founded on statute or ordinance. The several points will be discussed in detail in the next following sections.

§ 255. Errors and Irregularities not Reviewable.

If the question is upon the judgment of a court of competent jurisdiction, the petitioner in *habeas corpus* cannot impeach it on the ground of any error or irregularity in the proceedings or sentence of the court which does not go to the extent of impairing or taking away its power or jurisdiction to act in the case.[55] The reason is

[53] *In re* Brittain, 93 N. Car. 587. That the allowance of the writ of *habeas corpus* is not a merely ministerial act but a judicial one, see Church on Hab. Corp. §§ 92-94.

[54] Smith v. Hess, 91 Ind. 424.

[55] *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Yerger, 8 Wall. 85; *Ex parte* Reed, 100 U. S. 13; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Williams, 1 Wash. C. C. 240; Phinney, Petitioner, 32 Me. 440; O'Malia v. Wentworth, 65 Me. 129; *In re* Dougherty, 27 Vt. 325; Walbridge v. Hall, 3 Vt. 114; Olmstead v. Hoyt, 4 Day, 486; Herrick v. Smith, 1 Gray, 1, 61 Am. Dec. 381; People v. Liscomb, 60 N.Y. 559, 19 Am. Rep. 211; People v. McLeod, 1 Hill, (N. Y.), 377, 37 Am. Dec. 328; Baker's Case, 11 How. Pr. 418; Commonwealth v. Keeper, 26 Pa. St. 279; Williamson's Case, 26 Pa. St. 9, 67 Am. Dec. 374; *Ex parte* Rollins, 80 Va. 314; *In re* Schenck, 74 N. Car. 607; Dover v. State, 75 Ala. 40; Kirby v. State, 62 Ala. 51; *Ex parte* Simmons, 62 Ala. 416; *Ex parte* Sam, 51 Ala. 34; Keen v. McDonough, 8 La. 185; State v. Fenderson, 28 La. Ann. 83; *Ex parte* Schwartz, 2 Tex. App. 74; *Ex parte* McGill, 6 Tex. App. 498; *Ex parte* Boland, 11 Tex. App. 159; *Ex parte* Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; Patterson v. Pressley, 70 Ind. 94; People v. Foster, 104 Ill. 156; *In re* Truman, 44 Mo. 181; *Ex parte* Toney, 11 Mo. 661; Rolfs v. Shallcross, 30 Kans. 758, 1 Pac. Rep. 523; *In re* Petty, 22 Kans. 477; Matter of Eaton, 27 Mich. 1; Petition of Semler, 41 Wis. 517; *In re* Blair, 4 Wis. 522; *Ex parte* Gibson, 31 Cal. 619; *Ex parte* Hartman, 44 Cal. 32; *Ex parte* Granice, 51 Cal. 375; *Ex parte* McCullough, 35 Cal. 98; *Ex parte* Lemkuhl, 72 Cal. 53, 13 Pac. Rep. 148; *Ex parte* Farnham, 3 Colo. 545; *Ex parte* Smith, 2 Nev. 338; *Ex parte* Twohig, 13 Nev. 302; Rex v. Carlile, 4 Car. & P. 415.

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this. If any such erroneous or irregular action has occurred, he has his remedy by appeal, error, or *certiorari*. And although, on a review by an appellate court, the objections presented might be amply sufficient to procure a reversal of the judgment, yet he cannot make the proceeding by *habeas corpus* a short cut to the same result, because that would be twisting the extraordinary remedy away from its proper object to make it subserve an entirely different purpose. The importance of this rule justifies its illustration by a number of examples. Thus the investigation on *habeas corpus* will not be allowed so wide a range as to include the nature, weight, or sufficiency of the *evidence* on which the judgment was rendered, or the reasons on which it was based.[56] Nor can advantage be taken in this manner of a defect in the verdict, although it would be sufficient to cause the reversal of the judgment on appeal or writ of error;[57] nor of any errors made by the court in granting, modifying, or setting aside orders in criminal cases;[58] nor of any errors alleged to have been committed in the determination of questions arising on a motion in arrest of judgment, these not being jurisdictional defects, although the question determined was whether an act charged in an indictment was or was not a crime.[59] It is the same of irregularities in the proceedings. On *habeas corpus* there can be no inquiry into a defective or irregular selection of the grand jury;[60] nor whether the indictment upon which the judgment was given, being regular on its face, was ever in fact found by a grand jury.[61] Neither can advantage be taken of the fact that the judgment does not specifically describe the offense of which the petitioner was convicted;[62] nor of the fact that only one officer was present at the returning of the verdict, instead of two as required by law;[63] nor of the fact that the court pronounced judgment upon a

[56] Macke v. Ryan, 31 Kans. 54, 1 Pac. Rep. 785; *In re* Gibson, 34 Kans. 641, 9 Pac. Rep. 763; *In re* Watson, 30 Kans. 753, 1 Pac. Rep. 775; *Ex parte* Jackson, 45 Ark. 158; Starr v. Barton, 84 Ga. 99; State v. Bloom, 17 Wis. 521; Griffin v. State, 5 Tex. App. 457; *In re* Bogart, 2 Sawy. 396; *Ex parte* Phillips, 57 Miss. 357.

[57] Dover v. State, 75 Ala. 40.

[58] *Ex parte* Hartman, 44 Cal. 34.

[59] *Ex parte* Parks, 93 U. S. 18; *Ex parte* Shaffenberg, 4 Dillon, 271.

[60] State v. Fenderson, 28 La. Ann. 82.

[61] *Ex parte* Twohig, 13 Nev. 302.

[62] *Ex parte* Gibson, 31 Cal. 619; *Ex parte* Smith, 2 Nev. 338.

[63] Rex v. Carlile, 4 Car. & P. 415.

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verdict on a charge of felony during the enforced absence of the petitioner in jail;[64] nor of the fact that the record shows affirmatively that there was no interval of time between the plea of guilty and the sentence, although the statute requires an interval of at least two days.[65]

§ 256. Jurisdiction may be examined.

In order that a judgment may be valid, it is necessary that the court should have had jurisdiction both of the person and the subject-matter; the want of such jurisdiction may be shown on *habeas corpus;* and if either element is proved to be wanting, the judgment is void and an imprisonment under it is illegal.[66] But it is to be observed that in criminal cases the question of jurisdiction of the subject-matter may frequently become a fact in issue, and in that event its determination by the verdict will preclude a fresh investigation of the subject on proceedings by *habeas corpus.* This is the case where the jurisdiction of the court over the place where the alleged offense was committed is traversed by the defendant, and the jury find that the *locus in quo* is within the limits of the court's territorial jurisdiction. After such a finding, the petitioner cannot impeach the judgment by showing that the place was without such limits.[67] It must also be remarked in this connection that there is a material difference in the authorities, as to the circumstances in which a judgment may be impeached for want of jurisdiction, when it is not void on its face. This topic will be treated in the third part of the present chapter. In the mean time, we call the reader's notice to the fact that the collateral investiga-

[64] *Ex parte* Farnham, 8 Colo. 545.

[65] *Ex parte* Smith, 2 Nev. 338.

[66] Reynolds v. Orvis, 7 Cow. 269; *Ex parte* Bridges, 2 Woods, 428; Cropper's Case, 2 Rob. (Va.) 842; Johnson v. United States, 3 McLean, 89; Miller v. Snyder, 6 Ind. 1. As regards the nature and effect of a judgment void for want of jurisdiction, and the right of every court to treat such judgment as a nullity, when drawn collaterally in question, there is no substantial difference between the case of an imprisonment under such a judgment, and one of any other illegal imprisonment under pretense of authority from the United States, in respect to the right of a state court to inquire in the first instance by *habeas corpus* into its legality. Matter of Tarble, 25 Wis. 390, 3 Am. Rep. 85.

[67] *In re* Newton, 16 C. B. 97; People v. Liscomb, 60 N. Y. 571, 19 Am. Rep. 211; Deckard v. State, 38 Md. 186.

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tion of a judgment on *habeas corpus* is only a special application of the general rule. And if a majority of the states refuse to allow parties or privies to attack a judgment, in general, for want of jurisdiction, unless the record itself shows where the jurisdiction failed, there is nothing in the nature of this special case to take it out of the rule. A word must be added in regard to a particular class of courts whose sentences have sometimes been thought to be open to revision on *habeas corpus*, viz., courts-martial. It is now well settled that while the jurisdiction of such a court may be challenged and examined in such a proceeding, its judgment cannot be disregarded or annulled, or the prisoner discharged, unless it is absolutely void. "The question of the jurisdiction of a general court-martial may always be inquired into upon the application of any party aggrieved by its proceedings, and so may that of every other judicial tribunal; but the range and scope of the inquiry is controlled by the same rules and limitations in both cases. There must be jurisdiction to hear and to determine, and to render the particular judgment or sentence imposed. If this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally upon *habeas corpus*. It would be as indecorous and as wanton a stretch of judicial power to assume in advance that a general court-martial will erroneously convict an accused person of a military offense, as it would be to indulge such a presumption concerning a common-law court."[88] Finally, the writ of *habeas corpus* cannot be used as substitute for *quo warranto*. "One convicted by a jury and sentenced in court by a judge *de facto*, acting *colore officii*, though not *de jure*, and detained in custody in pursuance of his sentence, cannot properly be discharged on *habeas corpus*. The validity of the appointment or election of an officer *de facto*, before whom a prisoner has been convicted of crime, will not be inquired into on *habeas corpus*."[89]

[88] *In re* Davison, 21 Fed. Rep. 620; *Ex parte* Reed, 100 U. S. 13; *Ex parte* Kearney, 7 Wheat. 38; Wise v. Withers, 3 Cranch, 331; Dynes v. Hoover, 20 How. 65; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. Rep. 1050. See People v. Warden, 100 N. Y. 20, 2 N. E. Rep. 870.

[89] 9 Am. & Engl. Encyclo. of Law, p. 236 (a source from which I have derived much assistance in preparing these sections); Griffin's Case, 1 Chase Dec. 364; State v. Bloom, 17 Wis. 521; People v. Stevens, 5 Hill, 630; Hoglan v. Carpenter, 4 Bush, 89.

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§ 257. Constitutionality of Statutes.

Applications for release on *habeas corpus* are not infrequently made on the ground that the law under which the prosecution and conviction were had was unconstitutional, and there is much conflict of authority upon the question whether an inquiry into the validity of such law is proper in a proceeding of this nature. In several of the states it is apparently the accepted rule that the constitutionality of a statute or ordinance cannot be examined on *habeas corpus*, and if no other ground is presented for the petitioner's discharge, the court will refuse to interfere.[70] It may be urged in support of this view that the trial court has always the right to pass upon the question of its own jurisdiction, and that if it assumes to act in the matter and to proceed to judgment, it necessarily affirms the validity of the statute under which its action is taken, which finding should be respected in every other court. This argument is not without weight. But on the other hand, it cannot be too strongly insisted that an unconstitutional law is no law at all. It cannot make that a crime which was not so before. It cannot confer jurisdiction. A proceeding taken under it is void, not merely erroneous. A person convicted under it is innocent, and is held in custody illegally. Hence if the validity of the law could not be tested on *habeas corpus*, we should have, supposing it to be in fact unconstitutional, a most anomalous case, viz., a person unlawfully restrained of his liberty, and that too in the most unwarrantable circumstances, whose relief is the sole object of this writ, and yet to whom relief must be denied. We are decidedly inclined to agree with the numerous cases which hold that the alleged unconstitutionality of the act or ordinance under which the petitioner is held is always a proper subject of inquiry on *habeas corpus*, and that if the court finds it to be invalid, it is justified in releasing the prisoner.[71] The Federal courts uniformly hold that the imprison-

[70] *Ex parte* Boenninghausen, 91 Mo. 301, 1 S. W. Rep. 761; *Ex parte* Bowler, 16 Mo. App. 14; Matter of Harris, 47 Mo. 164; Platt v. Harrison, 6 Iowa. 79; 71 Am. Dec. 389; Matter of Underwood, 30 Mich. 502; *Ex parte* Fisher, 6 Nebr. 309; *Ex parte* Winston, 9 Nev. 71; *In re* Callicott, 8 Blatchf. 89; *Ex parte* Booth, 8 Wis. 145.

[71] *Ex parte* Siebold, 100 U. S. 371;

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ment of a person under an invalid ordinance of a municipal corporation is such a case of unlawful restraint as will justify their releasing him on *habeas corpus*, because, being without "due process of law," it is in violation of the fourteenth amendment to the constitution of the United States.[72] But the circuit court will not overrule the solemn judgment of the supreme court of the state upon the question of the validity of such ordinance, where there is reasonable ground for doubt; in such cases the ultimate decision should be referred to the supreme court of the United States.[73] And there is authority to the point that the Federal courts have no jurisdiction to discharge a prisoner held under a state statute, on the ground that such statute is in violation of the constitution of the state, or in excess of the powers which the people of the state have conferred on their legislature; if it does not violate the Federal constitution, the question is for the state courts.[74]

§ 258. Jurisdiction to render the Particular Sentence.

In the case of *Ex parte Shaw*,[75] the supreme court of Ohio expressed the following views. "The question presented in this case is, whether, conceding that the sentence is for horse-stealing, and that, by statute, the sentence must be for a period not less than three years, the commitment is lawful. The courts are required by statute, upon conviction, to sentence for a period not less than three years. The sentence in this case is for one year. Does this render the sentence

Ex parte Clarke, *Id.* 899; *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte* Royall, 117 U. S. 241, 6 Sup. Ct. Rep. 734; Matter of Brosnahan, 4 McCrary, 1, 18 Fed. Rep. 62; *In re* Lee Tong, 9 Sawy. 335, 18 Fed. Rep. 253; Stockton Laundry Case, 26 Fed Rep. 611; *In re* Ziebold, 28 Fed. Rep. 791; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Whitcomb's Case, 120 Mass. 118; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. Rep. 298; Brown v. Duffus, 66 Iowa, 193, 23 N. W. Rep. 396; *Ex parte* Burnett, 30 Ala. 461; *In re* Payson, 23 Kans. 757; *Ex parte* Delaney, 43 Cal. 478; *Ex parte* Rollins, 30 Va. 314; *Ex parte* Mats, 19 Tex. App. 112.

[73] *In re* Lee Tong, 9 Sawy. 335, 18 Fed. Rep. 253; Stockton Laundry Case, 26 Fed. Rep. 611; *In re* Ah Jow, 29 Fed. Rep. 181; Laundry License Case, 22 Fed. Rep. 705; *Ex parte* Yung Jon, 28 Fed. Rep. 308.

[74] *In re* Wo Lee, 9 West C. Rep. 81.

[74] Matter of Brosnahan, 4 McCrary, 1, 18 Fed. Rep. 62.

[75] 7 Ohio St. 81, 70 Am. Dec. 55.

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void and the commitment of the relator unlawful? The question is one simply of jurisdiction. The court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence; and while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous." And accordingly the court refused to release the prisoner on *habeas corpus*. And a number of other cases agree with this doctrine.[76] But the argument is far from satisfactory. It involves the error of overlooking the fact that jurisdiction to render the particular sentence imposed is equally as essential to its validity as jurisdiction of the person or the subject-matter. If either of these three elements is wanting, the judgment is a nullity. Now in respect to the sentence, the court has precisely the jurisdiction which the statute gives it, no more and no less. And if the statute prescribes that the sentence shall be for not less than three years, the court is utterly without power to sentence for one year. This seems too plain for argument. And indeed the great preponderance of authority sustains the proposition that if the court had not jurisdiction to render the particular sentence,—if the sentence is different from that prescribed by the law, or is below the minimum or above the maximum,—that is good ground for releasing the prisoner on *habeas corpus*.[77]

[76] *Ex parte* Van Hagan, 25 Ohio St. 432; People v. Cavanagh, 2 Abb. Pr. 89; *Ex parte* Bond, 9 S. Car. 80, 30 Am. Rep. 20; *Ex parte* Crandall, 34 Wis. 177.

[77] *Ex parte* Lange, 18 Wall. 168; *Ex parte* Milligan, 4 Wall. 131; *Ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte* Bernert, 7 Pac. C. L. J. 460; *Ex parte* Page, 49 Mo. 291; People v. Walters, 15 Abb. N. Cas. 461; People v. Liscomb, 60 N. Y. 559; *Ex parte* Kearney, 55 Cal. 212; *In re* Petty, 22 Kans. 477; *Ex parte* Bulger, 60 Cal. 488; Miller v. Snyder, 6 Ind. 1; *Ex parte* Smith, 2 Nev. 338. The point is illustrated in the following clear and forcible manner, in *Ex parte* Lange, *supra:* "If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for the same reason be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court, and by the constitution."

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§ 259. Sufficiency of Process or Pleadings.

Upon proceedings by *habeas corpus*, the court from which the writ issues has no power to inquire into the sufficiency of the indictment or information on which the trial was had that resulted in the judgment under which the prisoner is detained; nor can it undertake to decide whether such pleadings state an indictable offense. And although the indictment be defective or irregular, or fail to disclose any crime known to the law, yet that is no reason for discharging the petitioner, and he must be remanded.[78] The rule rests upon the fact that such a defect is not jurisdictional. If the court has general jurisdiction of the subject-matter, and the party is properly before it, its judgment is conclusive and binding and cannot be attacked collaterally, and if error or irregularity supervenes, such as in the case supposed, it is error or irregularity in the *exercise* of the court's jurisdiction, and does not make its sentence a nullity. Further, if there is any power which a court possesses beyond question or cavil, it is the power to judge of the sufficiency of the indictment or complaint and to determine whether or not the offense charged is legally punishable. If it should come to a mistaken conclusion in regard to these matters, there would undoubtedly be *error* in the technical sense. But it must be remembered that *habeas corpus* cannot be made to discharge the functions of a writ of error or of an appeal. A view contrary to that here expressed is held by the supreme court of California.[79]

§ 260. To what Parties the Rule applies.

Having fully discussed the permissibility of collaterally impeaching judgments in the special case of proceedings upon *habeas corpus*, we

[78] *Ex parte* Watkins, 3 Pet. 193; *Ex parte* Parks, 93 U. S. 20; Petition of Semler, 41 Wis. 517; Davis's Case, 122 Mass. 324; Matter of Eaton, 27 Mich. 1; Emanuel v. State, 36 Miss. 627; Parker v. State, 5 Tex. App. 579; *In re* Truman, 44 Mo. 181; *Ex parte* Whitaker, 43 Ala. 323; *Ex parte* Twohig, 13 Nev. 302.

[79] Matter of Coryell, 22 Cal. 178; *Ex parte* Kearney, 55 Cal. 212.

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now resume the consideration of the main rule. And we are next led to inquire, to what parties does this rule apply? An answer is given by the supreme court of Vermont in the following terms: "The rule that a judgment of a court of competent jurisdiction is conclusive, until reversed or in some manner set aside and annulled, and that it cannot be attacked collaterally by evidence tending to show that it was irregular or improperly obtained, only applies to parties and privies to the judgment, who may take proceedings for its reversal, and in no sense extends to strangers."[80] Or, as the rule is sometimes stated, where a party has an opportunity to apply to the court entering the judgment to open it or vacate it, he must do so, and cannot resort to a collateral attack.[81] For instance, a stockholder in a corporation against which a judgment has been recovered, and out of whose estate the execution issued thereon has been satisfied, or may be satisfied, is so far a privy in law that he may bring error to reverse it; but for that very reason he cannot attack the judgment collaterally for any defect, such as an irregularity in the service of process.[82] But it is not every stranger who may impeach a judgment in a collateral proceeding. The law does not permit wanton or unnecessary attacks upon its judgments, and they will stand as valid against any third person who fails to show that he has a real and substantial interest in avoiding the judgment, and one which the law is bound to protect. As the cases express it, the rule does not apply to such third persons or strangers to the record as would be prejudiced in regard to some pre-existing right if the judgment were given full effect.[83] Again, admitting that the particular individual has the right

[80] Atkinson v. Allen, 12 Vt. 619, 36 Am. Dec. 361; Eureka Iron Works v. Bresnahan (Mich.), 33 N. W. Rep. 834; Caswell v. Caswell, 28 Me. 232. See Succession of Quinn, 30 La. Ann. 947. This was the rule of the common law. A judgment may be avoided without a writ of error, by a plea, where the party is a stranger to it. Randal's Case, 2 Mod. 308. That is, as a stranger cannot bring error, he may attack the judgment collaterally, if adverse to his interest, as for fraud or collusion.

[81] Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Griswold v. Stewart, 4 Cow. 457; Davoue v. Fanning, 4 Johns. Ch. 199.

[82] Came v. Brigham, 39 Me. 35.

[83] Eureka Iron Works v. Bresnahan (Mich.), 33 N. W. Rep. 834. The validity of a judgment foreclosing a mortgage cannot be questioned by one not connected with the mortgagor's title, as grantee, mortgagee, judgment-creditor, etc. Glass v. Gilbert, 58 Pa. St. 266.

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to allege cause against the judgment in a collateral proceeding, it must not be supposed that every possible objection is open to him for this purpose. It is stated, in Maine, that a stranger whose rights are affected may impeach a judgment collaterally on three grounds only, viz., that the court rendering it had no jurisdiction of the case; that the judgment was obtained by fraud or collusion; or that the judgment was irregularly or unlawfully rendered, to his prejudice.[84] But this rule,—in respect to the third ground stated,—is probably too liberal to be everywhere accepted as sound. The Pennsylvania courts hold that a stranger has no right to interfere with a judgment, however irregular, except where it is founded in collusion.[85] And it is said that only a defendant can avoid a judgment for irregularity (that is, by writ of error or motion to vacate), and as long as he is content to waive the irregularity, strangers cannot avail themselves of it collaterally.[86] It has been made a question how far this right is open to a garnishee, in respect to the judgment in the main proceedings. The correct view is stated in an Illinois decision, from which we quote as follows. "The first question arising on this record is whether a garnishee, who sues out a writ of error to reverse a judgment rendered against him, may inquire into the legality and regularity of the previous proceedings against the defendant in attachment. In one respect he unquestionably can. In a suit by attachment the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear therefore that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceed-

[84] Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527. See Lyles v. Bolles, 8 S. Car. 258; Boisse v. Dickson, 31 La. Ann. 741.

[85] Drexel's Appeal, 6 Pa. St. 272. And see Lowber and Wilmer's Appeal, 8 Watts & S. 387, 42 Am. Dec. 302.

[86] Rollins v. Henry, 78 N. Car. 342.

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ings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that, too, in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment." [87]

Part II. For Errors and Irregularities.

§ 261. Erroneous and Irregular Judgments.

No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction.[88] Thus defective findings, or the absence of any findings of fact in a trial by consent by the court, do not render the judgment a nullity, and it cannot be attacked collaterally therefor.[89] So obvious clerical errors in the judgment-roll which could not

[87] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Whitehead v. Henderson, 4 Sm. & Mar. 704; Matheney v. Galloway, 12 Sm. & Mar. 475; St. Louis, etc., Ins. Co. v. Cohen, 9 Mo. 421; Schoppenhast v. Bollman, 21 Ind. 285.

[88] Huff v. Hutchinson, 14 How. 586; Parker v. Kane, 22 How. 1; Thompson v. Tolmie, 2 Pet. 157; Bannister v. Higginson, 15 Me. 73; Davidson v. Thornton, 7 Pa. St. 128; Miltimore v. Miltimore, 40 Pa. St. 151; Clark v. Bryan, 16 Md. 171; Howison v. Weeden, 77 Va. 704; Fox v. Cottage Building Assn., 81 Va. 677; State v. Conoly, 6 Ired. 243; Den dem. White v. Albertson, 3 Dev. 241, 22 Am. Dec. 719; Upson v. Horn, 3 Strobh. 108, 49 Am. Dec. 633; James v. Smith, 2 S. Car. 183; Mobley v. Mobley, 9 Ga. 247; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Wall v. Wall, 28 Miss. 409; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Thouvenin v. Rodrigues, 24 Tex. 468; Driggers v. Cassady, 71 Ala. 529; Moore v. Tanner, 5 T. B. Mon. 42, 27 Am. Dec. 85; Dorsey v. Kendall, 8 Bush, 294; Derr v. Wilson, 84 Ky. 14; Sheldon v. Newton, 3 Ohio St. 494; Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355; Evans v. Ashby, 22 Ind. 15; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Lane v. Bommelmann, 17 Ill. 95; Swiggart v. Harber, 4 Scam. 364, 39 Am. Dec. 418; Wales v. Bogue, 31 Ill. 464; McBane v. People, 50 Ill. 503; Cameron v. Boyle, 2 Greene (Iowa), 154; Burton v. Warren Twp., 11 Iowa, 166; Perryman v. State, 8 Mo. 208; State v. St. Gemme, 31 Mo. 230; Lucas v. Todd, 28 Cal. 182.

[89] Breeze v. Doyle, 19 Cal. 101.

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deceive a person accustomed to such documents, are no ground for impeaching the judgment collaterally.[90] So if the judgment in a foreclosure case is entered prematurely, the remedy of the defendant must be sought by direct proceedings in the action.[91] The judgment of a court having jurisdiction is not rendered void or open to a collateral attack, because of a wrong judgment based upon an erroneous application of legal principles or insufficient evidence.[92] To take another illustration,—a guardian's sale of land, if not made at the time required by law, is illegal; but if the court improperly confirms it, its judgment is not open to collateral inquiry in a suit for the land, brought against a party who acquired the title under the purchaser at such sale in good faith.[93] So, when a judgment in replevin is offered in evidence in another suit, it cannot be objected to it that it gives costs in a case where costs ought not to be given by the statute; the judgment, though wrong, is conclusive when offered collaterally.[94]

§ 262. Mistakes in the Judgment.

Closely allied to the principle just discussed is the rule that a *mistake* in the rendition or entry of a judgment can be taken advantage of only in a direct proceeding. A final judgment cannot be collaterally impeached because the opinion of the court shows that a different judgment should have been entered.[95] So a judgment ordering the delivery of all the property of an intestate to his widow, instead of to her *in trust* for his minor children, as provided by the statute, though palpably erroneous, is proof against collateral attack.[96] So again, in an action to recover from a purchaser part of certain lands sold under a decree of court, the plaintiff, if a party to the suit in which the decree of sale was made, cannot, in answer to the defense of *res judicata*, attack the decree of sale collaterally

[90] Morrison v. Austin, 14 Wis. 601.
[91] Alderson v. Bell, 9 Cal. 315.
[92] Stevenson v. Bonesteel, 30 Iowa, 286.
[93] Brown v. Christie, 27 Tex. 73, 84 Am. Dec. 607.
[94] Lutes v. Alpaugh, 23 N. J. Law, 165.
[95] Cooley v. Smith, 17 Iowa, 29.
[96] Spencer v. McGonagle, 107 Ind. 410, 8 N. E. Rep. 266.

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by showing that that part of the lands was included in the decree by inadvertence and mistake.[97]

§ 263. Irregular or Defective Service.

We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction.[98] It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective.[99] Thus a judgment cannot be impeached in a collateral proceeding on the ground that the return of service of process was not made in a formal manner;[100] nor because the service of the writ did not conform to the requirements of the statute;[101] nor because service of the summons was made upon the return day.[102] So a judgment against a corporation, where process was served on individuals who are not called officers, is erroneous, and would probably be reversed on error; nevertheless it cannot be impeached by a stranger, in a suit in equity to which the corporation, the stockholders, and the persons so served are parties, when they make no objection, and no fraud or collusion is charged.[103] It is held that a recital in a judgment that the defendant was legally served with process cuts off all inquiry in a collateral proceeding as to the legality of the service.[104] But on the other hand, where the affidavits of service in an action were wholly insufficient to authorize the court to enter judgment, and such defect appeared upon the face of the judgment-roll, it was held that the judgment might be impeached collaterally.[105] Where the court has

[97] Jones v. Coffey, 97 N. Car. 347, 2 S. E. Rep. 165.

[98] *Supra*, §§ 223, 224.

[99] McCormick v. Webster, 89 Ind. 105; Murray v. Weigle, 118 Pa. St. 159, 11 Atl. Rep. 781; Allison v. Rankin, 7 Serg. & R. 269; Hollingsworth v. State, 111 Ind. 289, 12 N. E. Rep. 490.

[100] Campbell v. Hays, 41 Miss. 561.

[101] Cole v. Butler, 43 Me. 401.

[102] Dutton v. Hobson, 7 Kans. 196.

[103] Fahs v. Taylor, 10 Ohio, 104.

[104] Dunham v. Wilfong, 69 Mo. 355.

[105] Hyde v. Redding, 74 Cal. 493, 16 Pac. Rep. 380.

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jurisdiction of the subject-matter and the parties, and no fraud is shown, if judgment is confessed before the time for answering expires, this will not overthrow the judgment on a collateral attack, but all necessary presumptions will be entertained to support it.[106]

§ 264. Objections as to Parties.

As a general rule, any irregularity in regard to the number, character, or joinder of the parties to an action must be objected to at a proper time and manner in the progress of the suit, and will not justify a collateral impeachment of the judgment. For instance, where jurisdiction is not disputed, a misjoinder of parties is a mere error of practice, and cannot be taken advantage of, in an action of ejectment, to defeat the title of a purchaser at a sheriff's sale under the judgment.[107] So, "multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant except by demurrer, plea, or answer to the bill, although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed. *A fortiori* it does not render a decree void, so that it can be treated as a nullity in a collateral action."[108] A judgment entered in favor of a plaintiff, *against himself* and others, and revived to the use of one to whom it has been assigned, is valid as against a creditor of the plaintiff whose judgment is rendered after the revival.[109] On similar principles, a judgment in an action for delinquent taxes, being apparently regular, cannot be attacked collaterally on the ground that the suit should have been brought in the name of a different official plaintiff.[110]

[106] White v. Crow, 110 U. S. 183, 4 Sup. Ct. Rep. 71.

[107] Levan v. Milholland, 114 Pa. St. 49, 7 Atl. Rep. 194.

[108] Hefner v. Northwestern Life Ins. Co., 123 U. S. 747.

[109] Sponsler's Appeal (Pa.), 17 Atl. Rep. 1097.

[110] Somers v. Losey, 48 Mich. 294, 12 N. W. Rep. 188.

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§ 265. Legal Disability of Parties.

In an earlier chapter, we discussed at some length the validity of judgments against married women, infants, lunatics, and deceased persons. In regard to the former class of persons, it appeared to be the settled doctrine in many of the states that, in the absence of enabling statutes, a judgment against a *feme covert* is absolutely void.[111] If this position is taken, it inevitably follows that such a judgment may be, on that ground, impeached and avoided in any collateral proceeding. But it was shown in the same connection that numerous courts prefer to consider such judgments as voidable only, especially where the defense of coverture is not set up, but the defendant suffers a default.[112] It is unnecessary to repeat the discussion in this place. But the reader, in considering the sections cited, should keep in mind the rule that it is only when a judgment is *absolutely void* that it can be impeached collaterally, not when it is merely voidable.[113] And a further suggestion may be added,—that the real question is one of jurisdiction; for if the court may take jurisdiction of a married woman, a judgment rendered against her may be erroneous on account of her abnormal status, but will not be null. What is here said of married women will apply, with some modifications, to the case of infants.[114] But, by the general consensus of authority, a judgment against a lunatic is not to be considered as entirely void, and therefore it will be protected from collateral attacks.[115] It is a different question in regard to the validity of judgments against joint defendants, a part of whom were persons under legal disabilities or were not served with process. Whatever may be thought of the effect of such judgment upon the defendant who was

[111] *Supra*, §§ 188–192.

[112] In Pennsylvania, while it is true that the mortgage of a married woman is invalid unless separately acknowledged by her, and the absence of such acknowledgment may be set up as a defense to a recovery on the mortgage, yet if judgment be recovered on a *scire facias* issued on such mortgage, the judgment is conclusive that the mortgage was properly executed, and the validity thereof cannot be questioned in a collateral action of ejectment. Michaelis v. Brawley, 109 Pa. St. 7.

[113] For the difference between void and voidable judgments, see § 170.

[114] *Supra*, §§ 193–198.

[115] *Supra*, § 205.

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incapacitated or not within the jurisdiction, it seems but reasonable to hold it binding upon the other, supposing no similar objection to exist in his case. It might, as to him, be erroneous or voidable, but it should not be open to him, or to any other person in respect to him, to impeach it collaterally. This view was shown, in a preceding section, to be consonant to sound legal reason and supported by many weighty decisions.[116]

§ 266. Disqualification of Judge.

Notwithstanding some difference of opinion, it seems to be the more generally accepted doctrine that a decision rendered by a judge who was disqualified by reason of his interest in the subject-matter of the controversy is null and void, and that this may be shown against it in a collateral proceeding;[117] but that if the objection goes to the competence of the judge, on account of his relationship to one of the parties litigant, it will have no greater effect than to make the judgment erroneous or voidable, not laying it open to indirect impeachment.[118] Especially is this the case where the statutes authorize the parties to waive an objection of this character. The judgments and orders of a *de facto* judge, as we have already seen, are everywhere recognized as valid and binding, and of course they cannot be attacked collaterally on any allegation against the title of the person acting as judge.[119]

§ 267. Judgment for Excessive Amount.

If judgment is rendered for a sum exceeding the amount laid in the *ad damnum* clause of the writ, or claimed in the declaration or

[116] *Supra*, § 211. See Bailey v. McGinness, 57 Mo. 362.

[117] *Supra*, § 174.

[118] *Supra*, § 174. Compare Pierce v. Bowers, 8 Baxt. 353.

[119] *Supra*, § 175. When a judgment has been rendered by a court of general jurisdiction against a person over whom it had acquired jurisdiction, it cannot be attacked, in a proceeding to enjoin its collection, by a party to the judgment, on the ground that the special judge appointed by agreement was not regularly appointed and qualified. Littleton v. Smith (Ind.), 21 N. E. Rep. 886.

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complaint, or notified to the defendant by the indorsement on the summons, it is irregular and erroneous and is liable to reversal, but it is not void, and it cannot be impeached collaterally.[120]

§ 268. Insufficiency of Evidence.

When a judgment is rendered in a cause by a court whose jurisdiction over the subject-matter and the person of the defendant is not questioned, it cannot be attacked in any collateral proceeding by a showing that the evidence on which it was based was illegal, improperly received, or insufficient to sustain the judgment.[121] This very clear and sensible rule rests on several principles. In the first place, an objection of that sort does not go to the jurisdiction, and consequently the judgment cannot be void, although it may be erroneous. Again, the legality and sufficiency of the evidence is a question for the court to determine, and its decision should be accepted as final and conclusive, unless in an appellate court. Finally, if such re-opening of the cause were allowed, the doctrine of *res judicata* would be despoiled of its very salutary effect.

§ 269. Illegal or Insufficient Cause of Action.

A judgment cannot be impeached collaterally on account of any illegality or insufficiency in the cause of action on which the suit is brought; these are matters which must be set up in defense to the action, and which are concluded by the judgment.[122] Thus, where a judgment creditor brings a bill to enforce satisfaction of his judgment by charging equities, the judgment debtor cannot be permitted to show in defense that the contract upon which the judgment was rendered was infected with usury or other illegality.[123] So a judgment, when

[120] Smith v. Keen, 26 Me. 411; Chaffee v. Hooper, 54 Vt. 513; Bond v. Pacheco, 80 Cal. 530; Savage v. Hussey, 3 Jones, 149; *supra*, § 138.

[121] Odle v. Frost, 59 Tex. 684; Martin v. Porter, 4 Heisk. 407; Pollock v. Buie, 43 Miss. 140; Bartlett v. Russell, 41 Ga. 196.

[122] State v. Beloit, 20 Wis. 79; Lewis v. Armstrong, 45 Ga. 131; Bushee v. Surles, 77 N. Car. 62.

[123] Bank of Wooster v. Stevens, 1 Ohio St. 233, 59 Am. Dec. 619.

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attacked collaterally, will not be held to be void merely because the pleading upon which it is based seems to show upon its face that the action, when commenced, was barred by some statute of limitations.[124] A judgment rendered in a suit founded on an obligation before its maturity, is not subject to collateral attack.[125] And a judgment in an attachment suit cannot be impeached indirectly by showing that the creditor had no such demand against the defendant in attachment as would sustain that species of process.[126] Again, where a judgment is entered on a mortgage, the judgment will conclusively establish the due execution of the mortgage, although the latter may have been in fact void; the mortgage is merged in the judgment, which cannot be collaterally impeached except for fraud.[127]

Part III. For Want of Jurisdiction.

§ 270. Jurisdiction of Superior Courts presumed.

Before proceeding to consider in detail the permissibility of collaterally attacking judgments and decrees on an allegation of want of jurisdiction, it is necessary to advert to the presumption of law by which the acts and proceedings of courts of record are supported. It is a maxim, *omnia præsumuntur rite et solenniter esse acta.*[128] And this maxim, while often applied to transactions between private persons, has a special and peculiar applicability to the proceedings of public officers, and, more than in any other case, to the acts of the courts.[129] It is presumed that the doings of a court of record are regular and proper, that its jurisdiction was properly acquired, that its proceedings are legal and valid, and that its decisions are well-founded and free from error. "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to

[124] Head v. Daniels, 88 Kans. 1, 15 Pac. Rep. 911.

[125] Mikeska v. Blum, 63 Tex. 44; Robertson v. Huffman, 92 Ind. 247.

[126] Harrison v. Pender, Busbee L. 79, 57 Am. Dec. 573; Brantingham v. Brantingham, 12 N. J. Eq. 160.

[127] Butterfield's Appeal, 77 Pa. St. 197; Michaelis v. Brawley, 109 Pa. St. 7; Hartman v. Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679; Woolery v. Grayson, 110 Ind. 149, 10 N. E. Rep. 935.

[128] Co. Litt. 232; Broom's Maxims, 942.

[129] Reed v. Jackson, 1 East, 355; Lyttleton v. Cross, 3 B. & C. 327.

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have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."[130] Hence, jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.[131]

Coming now to the matter in more immediate contemplation, it is a part of this principle that the jurisdiction of the court cannot be collaterally denied. And the rule in this connection rests partly upon the maxim already quoted, and partly upon the peculiar doctrine which attaches the utmost conclusiveness to judicial records, and partly upon considerations of public policy which will be adverted to hereafter. But the rule must be taken with certain very important modifications. For first, it applies in its fullness only to the acts and judgments of courts of general jurisdiction or courts of record. We are told that nothing is intended to be out of the jurisdiction of a superior court but what specially appears to be so, and nothing is intended to be within the jurisdiction of an inferior court but what is specially alleged.[132] This point will be discussed in a later section. Again, in the case of foreign judgments, the presumption, though recognized, is not of great weight, and is always liable to be rebutted by evidence to the contrary. Finally, the presumption is not absolutely conclusive. For it may be contradicted by the face of the record. Whether it may be rebutted by extraneous evidence is a moot question, which we reserve for discussion in a subsequent connection. But there is no question that want of jurisdiction, if shown by the

[130] Voorhees v. Jackson, 10 Pet. 449, 472, Baldwin, J.; Hughes v. Cummings, 7 Colo. 138, 2 Pac. Rep. 289. All presumptions are in favor of the regularity of the proceedings of courts of record when collaterally assailed, and where a decree contains the finding of a fact specially which is pleaded in the petition, it must be presumed that sufficient evidence was submitted to the court to justify such finding. Hilton v. Bachman, 24 Nebr. 490, 39 N. W. Rep. 419.

[131] Blake v. Lyon Manuf. Co., 77 N. Y. 626.

[132] Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439.

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record itself, may be urged against the judgment at any time and in any proceeding. Thus guarded against undue breadth of statement, we are prepared to formulate the rule which is recognized and accepted by all the authorities, viz., the judgment of a domestic court, having general and superior jurisdiction, is always to be presumed regular and valid and founded upon jurisdiction properly and duly acquired, until the contrary is definitely made to appear in some permissible manner.[133] Hence, when a court of general jurisdiction pronounces judgment, the presumption is in favor of its jurisdiction, and it is not incumbent upon one who bases a right upon such judgment to aver facts essential to the existence of jurisdiction.[134] And whatever is upon the records of such a court is presumed to be rightfully there.[135] It is therefore important to consider the various conditions which the record may present in a given case,—as, whether it be complete or deficient, and whether it contain recitals as to jurisdiction or not,—and ascertain how the presumption will apply in the various circumstances. And this will now engage our attention.

[133] Voorhees v. Jackson, 10 Pet. 449; Kennedy v. Georgia State Bank, 8 How. 586; McCormick v. Sullivant, 10 Wheat. 192; Blaisdell v. Pray, 68 Me. 269; Penobscot R. Co. v. Weeks, 52 Me. 456; Morse v. Presby, 25 N. H. 299; Carleton v. Washington Ins. Co., 35 N. H. 162; Wingate v. Haywood, 40 N. H. 437; Mercier v. Chace, 9 Allen, 242; Hendrick v. Whittemore, 105 Mass. 23; Coit v. Haven, 30 Conn. 190; Ray v. Rowley, 4 Thomp. & C. 43; Hering v. Chambers, 103 Pa. St. 175; Clark v. Bryan, 16 Md. 171; Woodhouse v. Filbates, 77 Va. 317; Hill v. Woodward, 78 Va. 765; Wilson v. Wilson, 18 Ala. 176; Pender v. Felts, 2 Sm. & Mar. 535; Hardy v. Gholson, 26 Miss. 70; Briggs v. Clark, 7 How. (Miss.) 457; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Venable v. McDonald, 4 Dana, 336; Adams v. Jeffries, 12 Ohio, 253, 40 Am. Dec. 477; Callen v. Ellison, 13 Ohio St. 446; Wiley v. Pratt, 23 Ind. 628; Pardon v. Dwire, 23 Ill. 572; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Coleman v. McKnight, 4 Mo. 83; McGirk v. Chauvin, 3 Mo. 237, Gemmell v. Rice, 13 Minn. 400, (Gil. 371); Reinig v. Hecht, 58 Wis. 212, 16 N. W. Rep. 548; Hahn v. Kelly, 34 Cal. 391. In Newcomb's Exr. v. Newcomb, 13 Bush, 544, 26 Am. Rep. 222, it is said that the proceedings of the courts of Kentucky are not conducted according to the course of the common law, but are regulated by the code of practice; and in regard to judgments by courts of general jurisdiction within the state, the same presumptions must be indulged whether the judgment or proceeding follows the common law or is regulated by the statute, unless the statute prescribes a different rule for determining the validity of the judgment.

[134] Jackson v. Dyer, 104 Ind. 516, 3 N. E. Rep. 863.

[135] Drake v. Duvenick, 45 Cal. 455.

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§ 271. Silence or Incompleteness of the Record.

The presumption in favor of the jurisdiction of superior courts is most frequently invoked in aid of their judgments in cases where the record is silent on the subject of jurisdiction. It may be defective or incomplete in consequence of the loss or absence of parts of the record or from the omission of proper recitals. Or the record, though apparently complete and regular, may say nothing on the subject of jurisdiction. Or its deliverances may be obscure and ambiguous. For any of these reasons the record may fail to show affirmatively that the court had jurisdiction of the subject and persons, while yet it does not distinctly show a *want* of jurisdiction. In any of these cases the weight of authority sustains the rule that the judgment, if rendered by a superior domestic court, will sustain itself against any collateral attack by parties or privies on account of any alleged want of jurisdiction.[136] The rule is equally applicable in cases where there are numerous parties; the fact that the record is silent upon some matter touching the jurisdiction over some of the defendants does not affect the presumption in its favor.[137] So where two defendants are sued *ex contractu* and one confesses judgment for both, the authority to do so need not appear in the record, nor can the judgment of the court be collaterally impeached for this supposed defect.[138] Where the record does not show that a default was not properly entered, the presumption arises that the required notice was given.[139] Hence, when a party seeks in any collateral action to impeach the judgment or decree of a court of superior jurisdiction, on the ground that he had no legal notice of the pendency of the action, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired

[136] Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355; Coit v. Haven, 30 Conn. 190; Lawler v. White, 27 Tex. 250; Mitchell v. Meuley, 32 Tex. 460; Messinger v. Kintner, 4 Binn. 97; Swearengen v. Gulick, 67 Ill. 208; Goar v. Maranda, 57 Ind. 339; Fogg v. Gibbs, 8 Baxt. 464; Hahn v. Kelly, 34 Cal. 391; Sharp v. Brunnings, 35 Cal. 528.

[137] Kramer v. Breedlove (Tex.), 3 S. W. Rep. 561.

[138] Jackson v. Tift, 15 Ga. 557.

[139] Evans v. Young, 10 Colo. 316, 15 Pac. Rep. 424.

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jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach.[140] Nor is it enough to overcome this presumption that the judgment-roll is defective, or that some of the papers which should properly constitute a part of it are wanting.[141] Thus, where the papers in a case are all lost, and the record states that the judgment was taken by default without a jury, the court will presume that it was a case where such would have been the proper proceeding.[142] So where only part of the record is given in evidence, that part of it which relates to process and appearance being by agreement of parties withheld, it will be presumed that all parties who are named as such in the pleadings and judgment were properly before the court.[143] Again, where the docket showed a summons "returned on oath," but not that it had been served, it was held that the judgment was merely irregular and could not be impeached collaterally.[144] Where the record fails to state that the judgment was rendered at a regular term of the court, but states that it was entered on May 6, 1885, it will be presumed, in the absence of contrary evidence in the record, that the judgment was rendered at a regular term duly fixed by law.[145] "Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that the evidence was before the court and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail."[146] The same rule governs the case of an ambiguity or obscurity in the record. Thus, where two demurrers to a declaration were on file, and the judgment of the court refers to the "said demurrer," without specifying which

[140] Exchange Bank v. Ault, 102 Ind. 322, 1 N. E. Rep. 562.

[141] Herrick v. Butler, 30 Minn. 156, 14 N. W. Rep. 794.

[142] Fogg v. Gibbs, 8 Baxt. 464.

[143] Welsh v. Childs, 17 Ohio St. 319. Where the transcript of a law record, filed in an equity cause, showed a judgment by default, but did not purport to contain the process, and showed no service of process, but an answer and cross-bill admitted an agreement as to the management and conduct of the suit at law, *held*, sufficient evidence of appearance to sustain the judgment. Crank v. Flowers, 4 Heisk. 629.

[144] Sloan v. McKinstry, 18 Pa. St. 120.

[145] Baldridge v. Penland, 68 Tex. 441, 4 S. W. Rep. 565.

[146] Credit Foncier of America v. Rogers, 10 Nebr. 184, 4 N. W. Rep. 1012, per Lake, J.

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of them, it will be presumed that the court passed upon both.[147] So where, by reason of the loss of the record or any part of it, there is difficulty in discovering the ground upon which jurisdiction was taken in the particular case, if there be any ground upon which the court could rightfully have taken cognizance of the case, it will be presumed that it assumed jurisdiction on that ground, unless it be made to appear affirmatively by the record that it was taken on some other ground. "And if, in any case, from what remains of the record, it appears doubtful what was the real ground upon which it took jurisdiction, and it shall also appear from the proceedings that there were several grounds upon which the court seemingly acted, it will be assumed that cognizance was taken upon that one of the grounds which would give jurisdiction, if any such there be, and not upon either of the others."[148]

§ 272. Appearance by Attorney.

It has been made a question whether the presumption in favor of jurisdiction should be extended to the case where the record shows an appearance by attorney, which is apparently regular but was in fact unauthorized. Many of the cases lay down the rule, in the most uncompromising terms, that a judgment recovered against a defendant who was not served with process and had no knowledge of the suit, but for whom an attorney appeared, although without authority, can by no means be attacked for want of jurisdiction in any collateral proceeding, and is binding upon the defendant.[149] But on the other hand, there is not wanting authority for the view that the authority of the attorney may always be controverted.[150] The best and safest rule, in our judgment, is that formu-

[147] Watson v. Hahn, 1 Colo. 385.

[148] Woodhouse v. Filbates, 77 Va. 317.

[149] Brown v. Nichols, 42 N. Y. 26; Hamilton v. Wright, 37 N. Y. 502; Reed v. Pratt, 2 Hill, 64; Hoffmire v. Hoffmire, 8 Edw. Ch. 174; American Ins. Co. v. Oakley, 9 Paige, 496; Finneran v. Leonard, 7 Allen, 54, 83 Am. Dec. 665; Lowe v. Stringham, 14 Wis. 222; Baker v. Stonebraker, 34 Mo. 175; Carpentier v. Oakland, 30 Cal. 439; Field v. Gibbs, 1 Pet. C. C. 155.

[150] Wiley v. Pratt, 23 Ind. 628; Hess v. Cole, 23 N. J. Law, 125; Shumway v. Stillman, 6 Wend. 453; Shelton v. Tiffin, 6 How. 163. See Wright v. Andrews, 130 Mass. 149.

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lated in a recent case in Kansas, where it is said that while a judgment resting upon the unauthorized appearance of an attorney is void, yet an attorney's appearance, for a defendant whom he professes to represent, is presumed to be authorized until the contrary is shown; and it devolves upon the defendant impeaching this authority to show by positive proof that such appearance is invalid; and all the presumptions are in favor of a finding of the trial court that the appearance of the attorney is binding upon the defendant.[151] If the case is that of a judgment rendered in another state, a recital in the record that the defendant appeared by attorney is conclusive of the fact that the attorney did appear, but not that he had authority to appear.[152]

§ 273. Jurisdictional Recitals.

It commonly happens that the record itself will furnish evidence on the question of the jurisdiction of the court. And notwithstanding some vigorous dissent, the great majority of the decisions hold (in the case of a domestic as distinguished from a foreign judgment) that if the record shows the facts necessary to confer jurisdiction, or recites that jurisdiction did in fact attach, its averments are final and conclusive in every collateral proceeding, and cannot be contradicted by any extraneous evidence.[153] This is in consequence of the great sanctity attached to judicial records by the common law and their "uncontrollable verity." It is said: "If upon inspection of the record it appears that no notice has been given, the judgment or decree is void. On the other hand, if it be a judgment or decree of a domes-

[151] Reynolds v. Fleming, 30 Kans. 106, 1 Pac. Rep. 61, 46 Am. Rep. 86.

[152] *Infra*, vol. 2, § 903.

[153] McCormick v. Sullivant, 10 Wheat. 192; Walker v. Cronkite, 40 Fed. Rep. 133; Granger v. Clark, 22 Me. 128; Morse v. Presly, 25 N. H. 299; Cook v. Darling, 18 Pick. 393; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Hartman v. Ogborn, 54 Pa. St. 120, 93 Am. Dec. 679; Maples v. Mackey, 89 N. Y. 146; Clark v. Bryan, 16 Md. 171; Miller v. Ewing, 8 Sm. & Mar. 421; Dufour v. Camfranc, 11 Martin (La.), 607, 13 Am. Dec. 360; Smith v. Wood, 37 Tex. 616; Simmons v. McKay, 5 Bush, 25; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Rogers v. Beauchamp, 102 Ind. 33, 1 N. E. Rep. 185; Moffitt v. Moffitt, 69 Ill. 641; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; McAuley v. Fulton, 44 Cal. 355.

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tic court of general jurisdiction, and the record declares that notice has been given, such declaration cannot be contradicted by extrinsic proof. In such cases the judgment or decree is sustained, not because a judgment rendered without notice is good, but because the law does not permit the introduction of evidence to overthrow that which for reasons of public policy it treats as absolute verity. The record is conclusively presumed to speak the truth, and can be tried only by inspection. This results from the power of the court to pass upon every question which arises in the cause, including the facts necessary to the exercise of its jurisdiction, and as to which, therefore, its judgment, unless obtained by fraud or collusion, is binding, until reversed, on every other court."[154] Hence a recital in a judgment that the original process was served on the defendant, or that publication (when allowed in lieu of service of process) was made, or that the party appeared by attorney or by answer, is conclusive when the record is collaterally put in issue, unless the recital is positively contradicted by the record itself.[155] We proceed to illustrate the rule here stated by an account of certain typical cases. In *Reilly* v. *Lancaster*,[156] the validity of a tax judgment was collaterally involved. It contained a recital that "all the owners and claimants of the property above described have been duly summoned to answer the complaint herein and have made default in that behalf." It appeared, however, that the name of one of the owners was omitted from the printed summons, which was served by publication. Yet the judgment was sustained, the court indulging the presumption that there was adequate proof of service on that defendant although it did not appear in the record. In an important Ohio decision the record of a judgment declared that "the defendants, by C., their attorney, came into court, and by virtue of his power of attorney filed in this case, confessed judgment," etc. It was sought in a collateral proceeding to show that the only power of attorney among the papers in the case, and which was marked with the proper number of

[154] Wilcher v. Robertson, 78 Va. 602.
[155] Harris v. McClanahan, 11 Lea, 181.
[156] 89 Cal. 354. And see Sharp v. Brunnings, 85 Cal. 528; Hahn v. Kelly, 84 Cal. 391; Branson v. Caruthers, 49 Cal. 375; Bateman v. Miller (Ind.), 21 N. E. Rep. 292.

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the case, did not appear to be signed by some of the defendants, and that such defendants were at the time married women, and thereby to show that the judgment was rendered without jurisdiction and was void. But it was held that evidence of such facts could not be received to impeach the validity and effect of the judgment.[157]

But while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and return.[158] But the contradiction must be explicit and irreconcilable. It is not enough that the recital seems to be contradicted by *inferences* drawn from other parts of the record. For example, where the service of a summons to the September term of court was defective, and the cause was continued without any steps being taken, and at the ensuing term a decree was rendered which recited that the defendants "were duly served ten days before the first day of the October term," and the record contained only the summons to the September term, it was held that there was nothing appearing in the record to rebut the presumption in favor of the jurisdiction of the court as indicated by its finding in the decree.[159] So in an action against two defendants jointly, on a promissory note, personal service was had on one of them and the other was served by publication; the record did not show that the latter had filed any pleadings in the case, but the judgment of the court recited that "both parties waived a jury, and submitted the cause to the court upon the law and facts;" and it was held that the record disclosed a personal appearance of both defendants, and the recitals of the judgment were conclusive.[160] A very strong application of this rule of ascribing absolute verity to the record was made in a recent case in Texas. It was a collateral attack upon the judgment of a domestic court of general jurisdiction, and the nullity of the judgment for want of jurisdiction over the person of the defendant was insisted on, because the return upon the writ of citation showed that the alleged publication, as therein

[157] Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

[158] Pardon v. Dwire, 23 Ill. 572.

[159] Turner v. Jenkins, 79 Ill. 228.

[160] Smith v. Wood, 37 Tex. 616.

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recited, could not have been made. The judgment, however, recited that the defendant failed to appear and answer "but wholly made default, *although* duly cited with process." It was held that, to determine whether the record shows affirmatively that there was proper service, the whole of it must be considered together, and that the recital in the judgment, which was the last act of the court in the case, that the defendant was "duly cited," imported absolute verity.[161]

§ 274. Decision of the Court upon its own Jurisdiction.

The fact of its own jurisdiction may become a matter in issue before the court, or a question which it must determine before proceeding with the case, and then its decision that it has jurisdiction is generally considered final and conclusive in all collateral inquiries. When the jurisdiction of a court depends upon a fact which it is required to ascertain in its decision, such decision is binding until reversed in a direct proceeding.[162] Where a statute confers general jurisdiction over a class of cases upon a particular tribunal, its decision upon the facts essential to the existence of jurisdiction in a particular case belonging to the class will be conclusive as against collateral attack.[163] So when a notice which is defective, or the service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding.[164] And in case of an insufficient service of notice, if the court decides the question of jurisdiction erroneously, the judgment will be voidable but binding until reversed on appeal.[165] The determination of the question of the sufficiency of the affidavits presented to the court as proof of the service of a summons and the failure of

[161] Treadway v. Eastburn, 57 Tex. 209.

[162] Otis v. The Rio Grande, 1 Woods, 279. Thus the finding of the court that a person assuming to act as guardian was in fact such is sufficient *prima facie* to show that the court had obtained jurisdiction over the ward. Merritt's Lessee v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

[163] City of Delphi v. Startzman, 104 Ind. 343, 3 N. E. Rep. 937; Dequindre v. Williams, 31 Ind. 444.

[164] Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330, citing Shawhan v. Loffer, 24 Iowa, 217; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 123; Lyon v. Vanatta, 35 Iowa, 525; Woodbury v. Maguire, 42 Iowa, 339.

[165] Bonsall v. Isett, 14 Iowa, 309.

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the defendant to answer, is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed.[166] But in California, the decision of the probate court upon jurisdictional facts in a particular case is not conclusive upon parties not actually before the court, and can be questioned in a direct suit in the same court.[167] And it is said that when the record discloses the *evidence* of jurisdiction on which the court acted, its finding that it had jurisdiction is not conclusive unless the facts shown support it.[168]

§ 275. Cases denying Conclusiveness of Record.

The preceding sections show the immense preponderance of authority to be in favor of the rule that a judgment of a superior court can never be impeached collaterally for want of jurisdiction not appearing on its face. This rule, as we stated, is limited to domestic judgments. For in the case of a judgment coming from a sister state or a foreign country, it is agreed on all hands that want of jurisdiction may always be shown against it. But this is a special and peculiar question, and must be carefully separated from the point now under consideration. That being done, we still find a certain number of cases squarely denying the generally accepted rule. It is held in Texas that the doctrine of the absolute verity of a record does not apply when the want of jurisdiction is made a question. "This may always be set up when a judgment is sought to be enforced or any benefit is claimed under it; and this is not inconsistent with the principle which ordinarily forbids the impeachment or contradiction of a record."[169] So in New York. "The want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment."[170] In a recent Massachusetts decision it was held that a domestic judgment may be impeached, in an action thereon, by evidence that, at the time the

[166] Hotchkiss v. Cutting, 14 Minn. 537 (Gil. 408).

[167] Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

[168] Senichka v. Lowe, 74 Ill. 274. See, also, Goudy v. Hall, 30 Ill. 109.

[169] Fitzhugh v. Custer, 4 Tex. 391, 51 Am. Dec. 728; Thouvenin v. Rodrigues, 24 Tex. 468; Smith v. Tupper, 4 Sm. & Mar. 261, 43 Am. Dec. 483; Brown v. Balde, 3 Lans. 283.

[170] Putnam v. Man, 3 Wend. 202, 20 Am. Dec. 686.

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suit was brought, the defendant therein was a non-resident of the state and had no notice of its commencement or pendency.[171] So in Kansas it is held permissible to attack a judgment collaterally by proof that the sheriff's return of personal service is false and that defendant in reality never had notice of the action.[172] In another state, a recital in an order that a party appeared does not prevent him from showing at all times that he neither was served nor appeared.[173]

But the most important decision on this side of the question is that of *Ferguson* v. *Crawford*.[174] In this case the well-considered and well-reasoned opinion, by Judge Rapallo, contains such a discriminating review of the authorities, and such pertinent observations on the merits of the issue, that we find it necessary to quote from it at some length. "After considerable research," says the learned judge, "I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice." He then proceeds to review and comment upon the principal cases holding this rule, and continues: "It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are

[171] Needham v. Thayer, 147 Mass. 536, 18 N. E. Rep. 429.

[172] Mastin v. Gray, 19 Kans. 458, 27 Am. Rep. 149.

[173] Dozier v. Richardson, 25 Ga. 90.

[174] 70 N. Y. 253, 26 Am. Rep. 589.

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directly opposed to it. As has been already stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, and have further decided (in opposition to the holding of courts of some of the other states) that this may be done even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case,[175] have in their opinions made no discrimination between them.[176] When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provisions of the Constitution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and whatever pleas would be good to a suit thereon in the state where rendered, and none others, can be pleaded in any court in the United States.[177] In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such was the law of this state and the common law, and consequently that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the Union between the effect of domestic judgments and judgments of sister states, in regard to the conclusiveness of the

[175] Kerr v. Kerr, 41 N. Y. 272.

[176] Citing Borden v. Fitch, 15 Johns. 121 [8 Am. Dec. 225]; Starbuck v. Murray, 5 Wend. 148 [21 Am. Dec. 172]; Noyes v. Butler, 6 Barb. 613, and cases cited.

[177] Citing Hampton v. McConnell, 3 Wheat. 234; Story, Comm. on Cons. § 183; Mills v. Duryee, 7 Cranch, 481.

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presumption of jurisdiction over the person, is sought to be explained by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the Constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction; for if there is a conclusive presumption that there was jurisdiction, that presumption must exist as well in one case as in the other. The question whether or not the party is estopped cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another. But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments." The learned judge here proceeds to examine the New York authorities at some length, citing and quoting from those mentioned in the margin.[178] The pith of the argument extracted from them (and which is truly as applicable to one class of judgments as to the other) is that, to say that the paper relied on is a record because it recites the defendant's appearance, and that he cannot deny the jurisdiction over him because the paper is a record, is reasoning in a vicious circle; and that unless a court has jurisdiction, it can never make a record, such as to import absolute verity, and the party ought not to be estopped, by any allegation in a supposed record, from proving any fact which goes to establish the truth of a plea alleging want of jurisdiction. The conclusion of the learned judge's investigation is as follows: "In *Bolton* v. *Jacks*, 6 Rob. 198, Jones, J., says that it

[178] Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172; Bigelow v. Stearns, 19 Johns. 41, 10 Am. Dec. 189; Latham v. Edgerton, 9 Cow. 227; Davis v. Packard, 6 Wend. 327; Bloom v. Burdick, 1 Hill, 130; People v. Cassels, 5 Hill, 164; Harrington v. People, 6 Barb. 607; Noyes v. Butler, 6 Barb. 613; Hard v. Shipman, 6 Barb. 621; Wright v. Douglass, 10 Barb. 97; Chemung Canal Bank v. Judson, 8 N. Y. 254; Adams v. Saratoga & W. R. Co., 10 N. Y. 328; Pendleton v. Weed, 17 N. Y. 75; Porter v. Bronson, 29 How. Pr. 292.

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is now conceded, at least in this state, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and a party against whom a judgment is offered is not by the bare fact of such recitals estopped from showing by affirmative proof that they were untrue and thus rendering the judgment void for want of jurisdiction. It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. 198, and if adopted here is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity. The technical difficulty arising from the conclusiveness of the record is thus obviated." A recent case in California, without going so far as to admit that it is regular or proper practice to permit the collateral impeachment of a judgment for want of jurisdiction, yet holds that if the party *does in fact* so assail the judgment, and the result of the investigation is the discovery that it was not actually founded upon proper jurisdiction, then the nullity of the judgment must be declared, and its conclusive effects done away with, just as if it were void upon its face.[179]

[179] Hill v. City Cab Co. (Cal.), 21 Pac. Rep. 728. The court, in pronouncing its opinion, said as follows: "This was an action upon the judgment of a court

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§ 276. Arguments on the Conclusiveness of Records.

From an examination of the authorities cited in the preceding sections, it will be discovered that many of them have been chiefly influenced, in refusing to hear extraneous evidence on a plea of want of jurisdiction, by the traditional regard which has always been shown to judicial records. From the earliest times, the written memorials of courts have been held to import the most absolute and "uncontrollable verity." That records "always speak the truth," and cannot be contradicted, that they can be tried only by inspection, and are evidence of the highest nature, are legal commonplaces of almost legendary antiquity. Yet if we consider the present meth-

of general jurisdiction. The defendant pleaded in defense that said judgment had been obtained without service upon him, or any authorized appearance on his behalf. The court below found these facts to be true, but rendered judgment against defendant upon the ground that he did not show that he had a meritorious defense to the original action. We think that this was error. It is true that a court of equity will not give relief against a judgment unless it be shown that the complainant had a defense upon the merits. Equity, in such case, will simply hold its hand, and leave the parties to their rights at law. It is also true that at law a defendant cannot collaterally assail a judgment unless it be void on its face. This was held after careful consideration in Carpentier v. Oakland, 30 Cal. 439, and the general doctrine of that case has recently been approved. Hodgdon v. Railroad Co., 75 Cal. 648, 17 Pac. Rep. 928. And it is in accordance with the preponderance of authority elsewhere. See Freem. Judgm. (3d Ed.) § 116. In New York, where a contrary doctrine seems to prevail, it is admitted that the rule there rests upon the local law of that state, and 'finds no support in adjudications elsewhere.' Ferguson v. Crawford, 70 N. Y. 267. And we do not understand that our statute has changed the rule. Section 1916 of the Code of Civil Procedure simply means that evidence is admissible to impeach the judgment in the cases allowed by law,—not in all cases whatsoever. But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy. And upon such facts the law is that the judgment is void. Baker v. O'Riordan, 65 Cal. 371, 372, 4 Pac. Rep. 232; Merced Co. v. Hicks, 67 Cal. 109, 7 Pac. Rep. 179."

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ods of perpetuating the accounts of legal proceedings—the loose, careless, and irregular manner in which records are but too often made up, —it is difficult to find satisfactory reasons, in the thing itself, for attributing such sanctity to a judgment roll. In so far then as this rule rests only upon the inviolable character of the record, it seems to evince a too superstitious reverence for the notions of the early English law. But there is a broad and very serious consideration of public policy underlying the rule, upon which the best considered cases ultimately base their position. The stability of judicial records is requisite for the peace and comfort of society, and for the protection of all persons who may deal with rights or property in reliance upon their conclusiveness. As it has been said by a certain high court, if judgments were always open to collateral attacks, they would "no longer be a final adjudication of the rights of litigants, but the starting point from which a new litigation would spring up; acts of limitation would become useless and nugatory; purchasers on the faith of judicial process would find no protection; every right established by a judgment would be insecure and uncertain; and a cloud would rest upon every title."[180] Now while it may be conceded that the considerations here adduced are amply sufficient to sustain the rule against impeaching judgments collaterally for errors or irregularities, it is still a question whether they apply with equal force where the objection goes to the very jurisdiction of the court. But it must be admitted that the necessity of protecting innocent third persons, who may acquire rights or alter their legal relations on the faith of judicial records, is of grave importance.

On the other hand, the arguments for permitting want of jurisdiction to be shown collaterally, may be divided into two heads. First, there is the question of natural justice to the individual. To suffer a man to be condemned unheard, to permit him to be deprived of his property or his rights by proceedings of which he had no notice or in which he had no opportunity to be heard, is repugnant to every sentiment of fairness and right dealing, as well as wholly alien to the spirit of our jurisprudence. To sacrifice the individual to the wel-

[180] Lancaster v. Wilson, 27 Gratt. 629.

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fare of the community is no doubt a very high principle of political ethics, but it is scarcely at home in the body of our law, except in matters of police. On the contrary, it is the guarantee which the law gives of the inviolability of every man's rights and estate that constitutes its best title to the respect and confidence of the people. True, it is said that a defendant who is injured by the rendition of a judgment against him without jurisdiction of his person, may procure its reversal in an appellate court, or move to vacate it in the court which rendered it, or go to equity with an application for an injunction. But this is no adequate safeguard. These remedies are often illusory. For it is very possible that he may remain entirely ignorant of the adjudication against him until long after his rights are irrevocably lost. In the second place, if the court had no jurisdiction, its proceedings are void; and if the action of the court was void, its memorial of that action is no record. This argument is put in a very clear light in an early New York case, where the learned judge, speaking of an alleged record, used the following language: "It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit

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of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging want of jurisdiction." [181]

On the whole, therefore, we must conclude that, as a matter of strict law and logic, the authorities which permit the collateral impeachment of judgments for want of jurisdiction have the better of the argument; but that the considerations of public policy which demand the conclusiveness of the record are of such importance and gravity that they will be likely always to overbalance the claims of strict legal consistency.

§ 277. No Presumption against the Record.

The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption *against* the record. For if the record imports absolute verity, its recitals must be equally as conclusive when they make against the jurisdiction as when for it. If the record is silent as to jurisdictional facts, it will be aided by presumptions. But if it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete.[182] "Where

[181] Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172.

[182] Galpin v. Page, 18 Wall. 350, 366; Messinger v. Kintner, 4 Binn. 97; Blanton v. Carroll (Va.), 10 S. E. Rep. 329; Penobscot R. Co. v. Weeks, 52 Me. 456; Dillard v. Central Virginia Iron Co., 82 Va. 734, 1 S. E. Rep. 124; Pollard v. Wegener, 13 Wis. 569. In the important case of Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, Sanderson, J., delivering the opinion, said (p. 405): "Undoubtedly if the record is silent as to what was done in respect to some material matter, we will presume that what ought to have been done was done. If there is no proof of what was done in obtaining service in the record, we will presume that legal service was in fact made; but when the record shows what was done for the purpose of obtaining service, how can we presume that something different was in fact done? Would that not be to join issue with the record, and dispute what it says, which we have agreed cannot be done? When the record speaks at all, it must be understood to speak the truth as to the particular fact of which it speaks; for by the law of its creation it can tell

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the existence of any jurisdictional fact is not affirmed upon the record in a court of superior jurisdiction, it will be presumed upon a collateral attack that the court acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. But no presumptions in support of a judgment are allowed in opposition to any statement made in the record. If it appear that process was served in a particular mode, no other and different service can be presumed, for such presumption would contradict the record, which imports verity." [183] But the record must be taken as a whole. And if separate recitals of jurisdictional facts are found in different parts of it, which may reasonably stand together, they must all be considered together. And if the aggregate of information thus obtained shows jurisdiction rightly attaching, the judgment will not be void, though any one of the recitals, taken alone, would not be sufficient.[184] One other possible case remains; viz., where recitals in different parts of the record flatly contradict each other, and one would show jurisdiction and the other not. Here, since one recital *must* be false, it seems reasonable to assume the truth of that one which would support the jurisdiction. Thus in a case in Iowa, the record stated in one place

no lies, neither direct nor circumstantial. This is so not only when the record speaks in favor of the jurisdiction, but when it speaks against it. * * * Suppose, in a case of attempted personal service, the officer should return that he had served the summons upon A. B., the son of the defendant, by delivering to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the question of service. Could we presume, in the face of such a record, that he served it upon the defendant also? Undoubtedly not. There would be a want of jurisdiction upon the face of the record within the rule in hand; and the judgment would be declared a nullity whenever and wherever presented in support of a legal claim or right. We consider the true rule to be that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three."

[183] Hering v. Chambers, 103 Pa. St. 175; Ely v. Tallman, 14 Wis. 28.

[184] Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

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that the answer was filed April 8th, and in another place that it was filed April 16th; and it was presumed, in favor of the validity of the judgment, that the former statement was the true one.[185]

§ 278. Judgment Void on its Face may be Attacked collaterally.

When the record itself discloses the fact that the court had no jurisdiction of the controversy, or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached, by any person interested, whenever and wherever it is brought in question.[186] Thus when the defendant against whom a judgment was entered had no notice, and that appears from the proceedings, the judgment is void

[185] Conrad v. Baldwin, 3 Iowa, 207.

[186] Briscoe v. Stephens, 2 Bing. 213; Rogers v. Wood, 2 B. & Ad. 245; Whyte v. Rose, 3 Q. B. 493; Thompson v. Whitman, 18 Wall. 457; Lincoln v. Tower, 2 McLean, 473; Moore v. Edgefield, 32 Fed. Rep. 498; Penobscot R. Co. v. Weeks, 52 Me. 456; Gay v. Smith, 38 N. H. 171; Mercier v. Chace, 9 Allen, 242; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Latham v. Edgerton, 9 Cow. 227; Gage v. Hill, 43 Barb. 44; Fisher v. Longnecker, 8 Pa. St. 410; James v. Smith, 2 S. Car. 183; Towns v. Springer, 9 Ga. 180; Central Bank v. Gibson, 11 Ga. 453; Parish v. Parish, 32 Ga. 658; Campbell v. Brown, 6 How. (Miss.) 106; Enos v. Smith, 7 Sm. & Mar. 85; McComb v. Ellett, 8 Sm. & Mar. 505; Richardson v. Hunter, 23 La. Ann. 255; Edwards v. Whited, 29 La. Ann. 647; Dorsey v. Kendall, 8 Bush, 294; Summar v. Jarrett, 59 Tenn. 23; North v. Moore, 8 Kans. 143; Evans v. Percifull, 5 Ark. 424; Cavanaugh v. Smith, 84 Ind. 380; Bannon v. People, 1 Ill. App. 496; Dicks v. Hatch, 10 Iowa, 380; Bonsall v. Isett, 14 Iowa, 309; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; McMinn v. Whelan, 27 Cal. 300; Murphy v. Lyons, 19 Nebr. 689, 28 N. W. Rep. 328; Furgeson v. Jones (Oreg.), 20 Pac. Rep. 842. "We think it may be regarded as settled that a judgment of any court, in a suit requiring ordinary adversary proceedings, that appears upon its face or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired, by notice, of the person of the defendant, or without jurisdiction of the subject-matter, is void, and may be treated as being so when it comes in question collaterally." Horner v. Doe, 1 Smith (Ind.), 10. To the same effect is a recent ruling of the court in Delaware (Frankel v. Satterfield, 19 Atl. Rep. 898), where the following very positive language was employed: "Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an exe-

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on its face.[187] It is equally true of want of jurisdiction of the subject-matter. Orders and judgments which the court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding where they are relied on in support of a claim of right.[188] But it must be remarked that a want of jurisdiction seldom, if ever, appears on the face of a judgment except in the insufficiency of the jurisdictional recitals. "What do the cases mean," asks the supreme court of California, "when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done, in order to give the court jurisdiction, was not done? Or do they mean that a want of jurisdiction appears whenever what was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion. For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person."[189] In the generality of cases, therefore, a judgment will be void on its face only where the record recites the jurisdictional facts (for if it is silent jurisdiction will be presumed), and the facts as so recited are plainly insufficient to have conferred jurisdiction.

cution, or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal. This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question."

[187] Farmers' L. & T. Co. v. McKinney, 6 McLean, 1; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

[188] Withers v. Patterson, 27 Tex. 491, 86 Am. Dec. 643.

[189] Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

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§ 279. Superior Courts exercising Special Statutory Powers.

So far we have confined our attention to the presumptions of jurisdiction in the case of a superior court exercising its ordinary common law powers. It remains to speak of the exercise of peculiar statutory powers, and then of the judgments of inferior tribunals. And first, it is an established rule that when a court of general jurisdiction has special and statutory powers conferred upon it, which are wholly derived from statute, and not exercised according to the course of the common law, or are not part of its general jurisdiction, it is to be regarded as *quoad hoc* an inferior or limited court, and its judgments to be treated accordingly, that is, its jurisdiction must appear on the record and cannot be presumed.[190] It is said, in a New Hampshire decision, that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally by showing that the court or magistrates have acted in a case where they have no jurisdiction, or by modes of procedure which they are not authorized to adopt.[191] The same principle, under a slightly different aspect, is stated in a Connecticut case as follows: Where a statute confers upon a tribunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to

[190] Thatcher v. Powell, 6 Wheat. 119; Secombe v. Railroad, 23 Wall. 108; Morse v. Presly, 25 N. H. 299; Carleton v. Ins. Co., 35 N. H. 162; Huntington v. Charlotte, 15 Vt. 46; Striker v. Kelly, 7 Hill, 24; Denning v. Corwin, 11 Wend. 647; Smith v. Fowle, 12 Wend. 9; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Shivers v. Wilson, 5 Har. & J. 130, 9 Am. Dec. 487; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Foster v. Glazener, 27 Ala. 391; Mitchell v. Runkle, 25 Tex. Supp. 132; Earthman v. Jones, 2 Yerg. 493; Barry v. Patterson, 3 Humph. 313; Edmiston v. Edmiston, 2 Ohio, 251; Ludlow v. Johnson, 3 Ohio, 553, 17 Am. Dec. 609; Adams v. Jeffries, 12 Ohio, 253; Cone v. Cotton, 2 Blackf. 82; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Wight v. Warner, 1 Dougl. (Mich.) 384; Northcut v. Lemery, 8 Oreg. 317; Furgeson v. Jones (Oreg.), 20 Pac. Rep. 842.

[191] Sanborn v. Fellows, 22 N. H. 473, 489.

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the valid exercise of the power that such circumstances exist at the time and that the court proceed in the exact manner prescribed; and where the record of such court finds the existence of those circumstances, and that such manner of proceeding was adopted, the finding is only *prima facie* proof of those facts and they may be disproved by parol evidence.[192] But the most satisfactory and reasonable statement of the rule that we have encountered in the books is expressed by the court of appeals of Virginia, in the following language: "When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."[193] But we must guard against the supposition that everything beside an ordinary adversary proceeding is of this special and statutory character. For example, a warrant of attorney to confess judgment is a familiar common-law security, and the fact that the mode of procedure, in entering judgment thereon, is regulated by a statute does not convert the proceeding into one of such a special character that the same presumptions do not obtain as in the case of any ordinary judgment.[194] So the proceeding by writ of *ad quod damnum* to assess damages for land taken under its charter by a turnpike company is not in derogation of the common law.[195] Nor does the court, in an action to collect delinquent taxes,

[192] Sears v. Terry, 26 Conn. 273.

[193] Pulaski Co. v. Stuart, 28 Gratt. 872. And see Harvey v. Tyler, 2 Wall. 342; Galpin v. Page, 18 Wall. 350.

[194] Bush v. Hanson, 70 Ill. 480.

[195] Turnpike Co. v. Quimby, 8 Humph. 476.

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exercise its jurisdiction in a special or summary manner; its judgment therein is entitled to the same presumptions as attend its ordinary judgments.[196]

§ 280. Summary Proceedings.

It is well settled that a judgment in a summary proceeding must show upon its face everything that is necessary to sustain the jurisdiction of the court rendering it.[197] Thus, in a judgment on motion against a tax-collector and his sureties, rendered by *nil dicit*, the judgment entry must show the liability of the defendants for the debt or penalty sought to be recovered, and that the facts were proved necessary to give the court jurisdiction.[198]

§ 281. Constructive Service of Process.

Whether a proceeding in which service of process is made upon a non-resident defendant by publication of the summons, or attachment of his property, without an appearance by him, is entitled to be supported by the ordinary presumptions of the rightful acquisition of jurisdiction by superior courts, is a question of much importance, but upon which the authorities are by no means agreed. A majority of the cases hold that such proceedings are contrary to the course of the common law, are wholly dependent for their validity upon an exact compliance with the statutes authorizing them, are to be strictly scrutinized, and therefore, within the rule just stated, are not favored with any presumption unless the record does affirmatively show that everything necessary to the jurisdiction was actually and rightly done.[199] A very eminent judge has said that whenever "it appears from an inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judg-

[196] Brown v. Walker, 85 Mo. 262; Hogan v. Smith, 11 Mo. App. 314.

[197] Crockett v. Parkison, 3 Coldw. 219; Haynes v. Gates, 2 Head, 598.

[198] Graham v. Reynolds, 45 Ala. 578.

[199] Galpin v. Page, 18 Wall. 350; Neff v. Pennoyer, 3 Sawy. 298; Gray v. Larrimore, 2 Abb. U. S. 542; Brownfield v. Dyer, 7 Bush, 505; Hallett v. Righters, 13 How. Pr. 43; Boyland v. Boyland, 18 Ill. 552.

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ment is rendered, was, at the time of the alleged seizure, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."[200] But on the other hand, a number of decisions contend,—and with much show of reason,—that such a rule is arbitrary and illogical. For, say they, the court is none the less a court of general jurisdiction because in this instance the legislature prescribes a special mode for the exercise of its powers. The *process* is special and statutory, but the jurisdiction of the court depends upon the constitution or general laws. And the presumption in favor of the validity of judgments rests upon considerations of public policy, and upon the high character of the courts of record, and the fact that the judges are men learned and skilled in the law, —reasons which are not affected by the circumstance that in the cases supposed a peculiar method of executing their process is adopted. According to this view, in cases of constructive service, the record, if silent or incomplete, should be aided by the same presumptions which obtain in the case of ordinary judgments founded upon personal service.[201]

[200] Field, J., in Galpin v. Page, 18 Wall. 364.

[201] Gemmell v. Rice, 13 Minn. 400, (Gil. 371;) Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Nash v. Church, 10 Wis. 312; Lawler v. White, 27 Tex. 250. In Stuart v. Anderson, 70 Tex. 588, 8 S. W. Rep. 295, it is said: "It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while, in the other, this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have

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§ 282. Judgments of Inferior Courts not aided by Presumptions.

In respect to the subject now under discussion, there is a fundamental distinction between superior and inferior courts. In the case of judgments rendered by the latter, the rules already stated as applying to the former are directly reversed.[202] Courts of inferior or limited powers must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted; the record or minutes or papers in the case must affirmatively show the existence of every fact necessary to give jurisdiction in the particular cause; otherwise the judgment may be impeached collaterally, no presumptions are indulged in its support, and want of jurisdiction may be shown by evidence *aliunde*.[203] "Where one seeks to enforce the judgment of a court of limited and special jurisdiction, its organization is open to inquiry, and its jurisdiction must be established."[204] There are general expressions in the books which seem to indicate that, unless the jurisdiction of an inferior court appears fully and affirmatively on the record of its proceedings, the judgment will be absolutely *void*. And in that case there could be no question of introducing extraneous evidence either to support or contradict it.

been done, before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal."

[202] See, *supra*, §§ 270–273.

[203] Harris v. Willis, 15 C. B. 710; Turner v. Bank, 4 Dall. 11; Kemp v. Kennedy, 5 Cranch. 173; Crawford v. Howard, 30 Me. 422; Walbridge v. Hall, 8 Vt. 114; Nye v. Kellam, 18 Vt. 594; Smith v. Rice, 11 Mass. 513; Sayles v. Briggs, 4 Met. 421; Wells v. Stevens, 2 Gray, 115; Hendrick v. Whittemore, 105 Mass. 23; Henry v. Estes, 127 Mass. 474; Hall v. Howd, 10 Conn. 514, 27 Am. Dec. 696; Powers v. People, 4 Johns. 292; Simons v. De Bare, 4 Bosw. 547; Wickes v. Caulk, 5 Har. & J. 36; Clark v. Bryan, 16 Md. 171; Harvey v. Huggins, 2 Bailey, 267; Gray v. McNeal, 13 Ga. 424; Rutherford v. Crawford, 53 Ga. 138; State v. Ely, 43 Ala. 568; Steen v Steen, 25 Miss. 513; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Adams v. Tiernan, 5 Dana, 394; Hamilton v. Burum, 3 Yerg. 355; State v. Gachenheimer, 30 Ind. 63; Newman v. Manning, 89 Ind. 422; State v. Berry, 12 Iowa, 58; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Bersh v. Schneider, 27 Mo. 101; State v. Metzger, 26 Mo. 65; Chandler v. Nash, 5 Mich. 409.

[204] Crawford v. Howard, 30 Me. 422.

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It has been held, in fact, that evidence extrinsic to the record cannot supply facts requisite to the jurisdiction.[205] But while it is undoubtedly the rule that, the record of such a court being silent on the subject or defective in its showings, there is no presumption to aid it,—while we may even concede that under such circumstances it would be presumptively invalid,—there seems to be no good reason for refusing to hear proper evidence tending to show actual jurisdiction. And in some of the states the decisions are positive to the effect that jurisdictional requisites may be shown by outside evidence, except in the case of those facts which the law expressly directs the court to spread upon its records.[206] It is further to be remarked that although a court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to jurisdiction which obtain in the case of the superior courts.[207]

§ 283. Superior and Inferior Courts distinguished.

To draw a clear line of demarcation between superior and inferior courts is rendered almost impossible by the great differences in the judicial systems of the several states, as also by the fact that courts possessing similar powers are very differently regarded in different states. Practically, the question, in regard to any specific court, must be determined by the laws and decisions of the jurisdiction where it exists. But it has several times been attempted to formulate a distinction in general terms, and such expressions, though necessarily vague, may be of some assistance in prosecuting the inquiry. The United States supreme court, at an early day, observed that "the true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this,—a court which is competent by its constitution to decide

[205] Anderson v. Binford, 58 Tenn. 310.
[206] Jolley v. Foltz, 34 Cal. 321; Van Deuzen v. Sweet, 51 N. Y. 381.
[207] Moffitt v. Moffitt, 69 Ill. 641.

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on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities." [206] But this, it will be perceived, does not so much answer the question as state it in new terms. We must conclude that the difference between superior and inferior courts is one of relative rank and authority and not of intrinsic quality. Nor will the common distinction between "courts of record" and "courts not of record" aid us in framing a general rule, because a particular tribunal may be regarded in one state as a record court while an exactly similar

[206] Grignon v. Astor, 2 How. 319, 341, per Baldwin, J. See also Kemp v. Kennedy, 5 Cranch, 185; Hahn v. Kelly, 34 Cal. 391. "What tests are to be applied in determining the question of inferiority? It may be solved by showing that the court is either placed under the supervisory or appellate control of those named, or that the jurisdiction conferred upon it is limited and confined. Conceding that the act in question does not place the court which it creates under the supervisory control of the circuit court, and only allows appeals and writs of error to be prosecuted directly to the supreme court, yet it will still be an inferior tribunal if its jurisdiction is limited and inferior. General jurisdiction is that which extends to a great variety of matters. Limited jurisdiction, also called specific and inferior, is that which extends only to certain specified causes." State v. Daniels, 66 Mo. 200.

A court of record which has, by statute, all the power that any court could have over a certain subject of jurisdiction, especially if it be a subject of jurisdiction under the general rules of law or equity, is to be regarded (as to cases within that class) as a court of superior jurisdiction, within the rule which presumes the jurisdiction of such courts to render a particular judgment. Stahl v. Mitchell (Minn.) 43 N. W. Rep. 385.

"A tribunal which is not a common law court, which does not proceed according to the course of the common law, a newly created, limited, and special jurisdiction from which no appeal is allowed by statute, nor writ of error by the common law, yet determining in a summary way the most important rights and franchises, both as respects the people and private persons, is and cannot be otherwise than an inferior tribunal in the strictest sense of the word." Cunningham v. Squires, 2 W. Va. 422, 98 Am. Dec. 770.

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court in another state will not possess that character. In all the states there are courts having original jurisdiction of every (or nearly every) species of action or proceeding known to the common law, unlimited in respect to the amount or the character of the controversy. And these are unquestionably "superior" courts within the meaning of the rule. And the same is true of courts possessing general equity powers. In most of the states there are certain tribunals whose authority is wholly derived from statute, who are authorized to take cognizance only of a particular class of actions or proceedings, or to act only in certain specified circumstances, whose course of procedure is precisely marked out, and whose minutes or memorials are not dignified with the character of a record. And these are undoubtedly "inferior" courts within the meaning of the rule. But between these two classes lie a considerable number of courts, whose jurisdiction has a maximum money-limit, or which have general jurisdiction of a special class of cases, or are otherwise differentiated from both the foregoing types. And as to these it is useless to attempt a universal classification. We shall proceed to ascertain how these courts are regarded in the several states.

§ 284. Probate Courts.

In Pennsylvania, the orphans' court is a court of record of equal dignity with the common law tribunals, and its decrees, as to matters within its jurisdiction, are conclusive on parties and privies against all collateral attack and impeachment except for fraud.[209] In Ohio, the probate courts are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.[210] In Missouri also, the judgments and orders of probate courts, in matters within their jurisdiction, have the same import of verity as those of courts of general jurisdiction, and, like

[209] McPherson v. Cunliff, 11 Serg. & R. 422; Musselman's Appeal, 65 Pa. St. 485; Lex's Appeal, 97 Pa. St. 289.

[210] Shroyer v. Richmond, 16 Ohio St. 455.

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them, are not to be impeached in collateral proceedings.[211] And the same rule obtains in Vermont,[212] in Alabama,[213] in Arkansas,[214] in Minnesota,[215] and in California.[216] In Texas, it seems to have been held at one time that the proceedings of a probate court must show every fact necessary to give jurisdiction, and could not be sustained by any presumption of validity.[217] But the latest decisions are to the effect that if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, its judgment must be held conclusive in any other court of the same sovereignty when called in question collaterally.[218] On the other hand, in Mississippi, it is held that a decree of a probate court for the sale of real estate by an executor or administrator is invalid unless the record shows affirmatively a compliance with all the requirements of the statute under which the land was decreed to be sold.[219] And in Massachusetts, if a probate court exceeds its jurisdiction and makes a decree in a matter over which it has no power, the want of jurisdiction may be shown against such decree in any collateral proceeding, and it will then be treated as utterly void.[220] In New York, if a surrogate's decree shows jurisdiction on its face, its recitals are presumptive evidence of its validity when the question arises in a collateral proceeding.[221]

§ 285. Federal Courts.

The circuit, district, and territorial courts of the United States, though of limited jurisdiction, are not inferior courts in the technical

[211] Camden v. Plain, 91 Mo. 117, 4 S. W. Rep. 86; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

[212] Doolittle v. Holton, 28 Vt. 819, 67 Am. Dec. 745.

[213] Key v. Vaughn, 15 Ala. 497; Arnett v. Arnett, 33 Ala. 273; Duckworth v. Duckworth, 35 Ala. 70.

[214] Osborne v. Graham, 30 Ark. 67.

[215] Dayton v. Mintzer, 22 Minn. 393.

[216] Luco v. Commercial Bank, 70 Cal. 339, 11 Pac. Rep. 650; McCauley v. Harvey, 49 Cal. 497; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[217] Easley v. McClinton, 33 Tex. 288.

[218] Martin v. Robinson, 67 Tex. 368, 3 S. W. Rep. 550.

[219] Martin v. Williams, 42 Miss. 210, 97 Am. Dec. 456.

[220] Mercier v. Chace, 9 Allen, 242; Peters v. Peters, 8 Cush. 529.

[221] Rowe v. Parsons, 13 N. Y. Supreme Ct. 338. See Seymour v. Seymour, 4 Johns. Ch. 409; Chipman v. Montgomery, 63 N. Y. 236.

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sense of the term; their judgments and decrees stand on the same footing as those rendered by state courts of general jurisdiction, and their authority and jurisdiction are always to be presumed.[222] It is said: "The courts of the United States, though possessing a limited jurisdiction, yet, in the intendment of law, stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of those courts, there is no more necessity for showing the facts which confer jurisdiction than in a plea of a judgment of the highest tribunal known to the law. Their judgments cannot be impeached for irregularity or error in a collateral proceeding; they can only be vacated on motion, in the courts in which they are rendered, or reversed for error in an appellate jurisdiction." [223]

§ 286. Justices of the Peace.

It is not universally true that the courts of justices of the peace are inferior tribunals, within the rule in regard to presuming jurisdiction. In Texas, for example, such courts are created by the constitution, and exercise, within the limits therein defined, general exclusive jurisdiction; and accordingly their judgments, though not showing all the facts necessary to give jurisdiction, cannot be attacked collaterally as void therefor.[224] And in several other states, the judgments of such magistrates are considered as entitled to all the presumptions of validity. This is the case in Connecticut,[225] Vermont,[226]

[222] McCormick v. Sullivant, 10 Wheat. 192; *Ex parte* Watkins, 3 Pet. 193; Kennedy v. Georgia State Bank, 8 How. 611; Page v. United States, 11 Wall. 268; Livingston v. Van Ingen, 1 Paine, 48; Ruckman v. Cowell, 1 N. Y. 505; Matson v. Burt, 9 Hun, 470; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133; Turrell v. Warren, 25 Minn. 9; Pierro v. St. Paul & N. P. R. Co., 37 Minn. 314, 34 N. W. Rep. 38.

[223] Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

[224] Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730; Watkins v. Davis, 61 Tex. 414; Holmes v. Buckner, 67 Tex. 107, s. c., reported as Bryant v. Buckner, 2 S. W. Rep. 452.

[225] Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

[226] Wright v. Hazen, 24 Vt. 143; Farr v. Ladd, 37 Vt. 158.

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Pennsylvania,[227] Mississippi,[228] Tennessee,[229] and Alabama.[230] And in Massachusetts it is said that "the rule which makes the judgment of a court of record binding upon the parties, until reversed by proper proceedings therefor, although jurisdiction of the person was not properly obtained, is applicable as well to a justice of the peace as to one of a court of general jurisdiction."[231] But on the other hand, in Maryland, judgments rendered by justices will not be allowed to stand where the record fails to show affirmatively that a summons had been issued and served upon the defendant; such defect in the proceedings is fatal to the validity of the judgment and may be called in question in a collateral action.[232] And in Michigan a judgment entered by a justice by virtue of a statutory authority must show that the requirements of the statute have been complied with, and if it fails in this it is void.[233]

§ 287. Record of Inferior Court, showing Jurisdiction, is Conclusive.

It is important to be observed, in considering the effect of judgments rendered by inferior courts, that if the record *does* affirmatively show the facts necessary to confer jurisdiction, then the same presumptions are indulged in favor of the regularity and validity of its proceedings as are extended to the superior courts, and they cannot be collaterally impeached for errors or irregularities.[234] "Once it appears that it had jurisdiction to proceed, and did proceed, the same presumptions prevail in favor of the action and record of the inferior as of the superior court, and the verity of its record, and the presumptions which support it, are alike indisputable in any collateral way."[235]

[227] Billings v. Russell, 23 Pa. St. 189; Clark v. McComman, 7 Watts & S. 469; Tarbox v. Hays, 6 Watts, 398.

[228] Stevens v. Mangum, 27 Miss. 481.

[229] Turner v. Ireland, 11 Humph. 447.

[230] Lightsey v. Harris, 20 Ala. 411.

[231] Hendrick v. Whittemore, 105 Mass. 28.

[232] Fahey v. Mottu, 67 Md. 250, 10 Atl. Rep. 68.

[233] Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

[234] Comstock v. Crawford, 3 Wall. 396; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Reeves v. Townsend, 22 N. J. Law, 396; Wilson v. Wilson, 18 Ala. 176; Paul v. Hussey, 35 Me. 97; Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Gray v. McNeil, 12 Ga. 424.

[235] Featherston v. Small, 77 Ind. 148.

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Whether evidence would be heard in contradiction of the record of an inferior court on the subject of jurisdiction, where that record shows fully and affirmatively all that is necessary on the point, is a different question. Some of the authorities indicate that the jurisdiction could not be inquired into, in direct opposition to the face of the record, at least in the courts of the same state where the judgment was rendered.[236] But in New York such recitals are considered to be only *prima facie* evidence and subject to be contradicted, though sufficient to uphold the proceeding if not disproved.[237] In that state, however, it will be remembered, want of jurisdiction may be shown collaterally against the judgment of *any* court.[238] But it appears to be undisputed that if the jurisdiction of an inferior court, in any case, depends upon the existence of a certain fact or state of facts, and it is shown by the record that there was evidence tending to prove such facts, and that such evidence was adjudged sufficient, and the court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted.[239]

§ 238. No Presumption of Validity on Direct Attack.

"The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and consequently, that what purports to be a record is in fact no record at all."[240] Thus, although a judgment

[236] Gregory v. Bovier, 77 Cal. 121, 19 Pac. Rep. 232; Secombe v. Railroad, 23 Wall. 108.

[237] Belden v. Meeker, 2 Lans. 470.

[238] Ferguson v. Crawford, 70 N. Y. 253. See *supra*, § 275.

[239] Sheldon v. Wright, 5 N. Y. 497; Dyckman v. New York, 5 N. Y. 434; Porter v. Purdy, 29 N. Y. 106; Bolton v. Brewster, 32 Barb. 389; Agry v. Betts, 12 Me. 415; Waterhouse v. Cousins, 40 Me. 333; Betts v. Bagley, 12 Pick. 572; Angel v. Robbins, 4 R. I. 493; Bridgeport Savings Bank v. Eldredge, 28 Conn. 556; Evansville R. Co. v. Evansville, 15 Ind. 421; Shawhan v. Loffer, 24 Iowa, 217; Bonsall v. Isett, 14 Iowa, 309; Hungerford v. Cushing, 8 Wis. 324; Kipp v. Fullerton, 4 Minn. 473 (Gil. 366); People v. Hagar, 52 Cal. 182.

[240] Duncan v. Gerding, 59 Miss. 550. "The distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question *collaterally*, and those in which such record is *directly* impeached by writ of error or bill of review, is broad and well defined. In the one case juris-

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recites that the defendant was "duly and legally served with notice," yet, in a direct proceeding in the same court to set the judgment aside, the contrary may be shown.[241] So an officer's return of service of process may be impeached in a direct proceeding after judgment, where the return states facts which do not come within the personal knowledge of the officer.[242] But while jurisdiction is not presumed on a direct attack, and there is likewise no *conclusive* presumption that the record is free from irregularities or errors, yet, on appeal, error, or bill of review, it is incumbent on the party to overcome the *prima facie* correctness of the judgment. The judgment of a court of competent jurisdiction, it is said, is always presumed to be right, and a party in the appellate court alleging error in the court below must show it in the regular way in the record, or the presumption in favor of the correctness of the judgment will prevail.[243] Thus the findings and judgment of a court of record will always be presumed to rest upon sufficient evidence unless the contrary be clearly shown from the record.[244] In regard to the rule that the record imports absolute verity, an important observation is made by the New Hampshire court, to the following effect: "It is to be borne in mind that the record may be true, while the matters recorded are false, and may even be shown to be so by the record itself. Thus the record may recite that a particular plea was filed; it is conclusive evidence of that fact, but the record furnishes no evidence that the facts stated in the plea are true, for they may even in the same record be found to be false by the verdict of a jury. The allegations of parties derive no credit from their forming part of the record of a court. So far as this point is concerned, the record imports the truth of what occurred in the court and was there recorded." [245]

diction is presumed *prima facie* unless the record disproves it, while in the other, if it is denied, its existence must be proved by the record itself." Trimble v. Longworth, 13 Ohio St. 431, 439.

[241] Newcomb v. Dewey, 27 Iowa, 381.

[242] McNeill v. Edie, 24 Kans. 108; Bond v. Wilson, 8 Kans. 229, 12 Am. Rep. 466; Chambers v. Bridge Manufactory, 16 Kans. 270; Hanson v. Wolcott, 19 Kans. 207.

[243] Harman v. Lynchburg, 33 Gratt. 37; Wright v. Smith, 81 Va. 777; Wynn v. Heninger, 82 Va. 172; Jencks v. Smith, 1 N. Y. 90; McGirk v. Chawvin, 8 Mo. 237.

[244] Singleton v. Boyle, 4 Nebr. 414.

[245] Tebbetts v. Tilton, 31 N. H. 273, 286.

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§ 289. Foreign Judgments.

In respect to the collateral impeachment of judgments for want of jurisdiction, there is, as we have already intimated, a radical difference between foreign judgments and such as are rendered by the courts of the state where the collateral inquiry is prosecuted. The discussion of the effect of foreign judgments belongs to another part of this work. But it may be here briefly stated that if a judgment or decree, coming from a foreign country, is regular on its face, its jurisdiction will be taken for granted unless denied, but it may always be shown by evidence that in fact the foreign court had no jurisdiction.[246] A similar rule obtains in the case of judgments of one of the American states when called in question in the courts of another. If the judgment proceeds from a court of general powers, the jurisdiction will be presumed (so far as that the party relying on the adjudication need not plead the jurisdiction or set out the facts), but the party against whom it is offered may always deny and disprove the jurisdiction of the court rendering the judgment.[247]

Part IV. For Fraud.

§ 290. Whether Parties can Impeach Judgment for Fraud.

It is an unsettled question whether a judgment may be collaterally impeached for fraud by parties or privies. There are numerous expressions in the books which have more or less relation to this point, but we shall not, in this discussion, attempt to cite all the *dicta* bearing upon the subject or attach particular weight to any but direct adjudications of the question. In a majority of the states the rule is well settled that it is *not* permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud.[248]

[246] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Carleton v. Bickford, 13 Gray, 591. And see *infra* vol. 2, §§ 818, 835–838.

[247] Thompson v. Whitman, 18 Wall. 457; Galpin v. Page, 18 Wall. 350. And see *infra* vol. 2, §§ 897–901.

[248] Christmas v. Russell, 5 Wall. 290;

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The decisions are based upon the ground of the general conclusiveness of records, and the policy of the law which forbids their indirect contradiction or impeachment, and on the consideration that it is the business of a litigant to be on his guard against fraud and trickery, and that if his rights are nevertheless infringed, he has his proper remedy by action or motion to procure the annulment of the judgment or by application to equity for relief. In Pennsylvania, however, it is allowed to a party to show fraud against a judgment collaterally,[249] and the same doctrine is apparently held in New Hampshire.[250] This is also true in New York, although the rule in the latter state is founded rather upon the peculiarities of the code system of pleading and practice than upon general principles of law. A quotation from the most recent and important case on the subject will be found in the margin.[251] There are also decisions to the effect that where one party is allowed to offer a judgment in evidence without having pleaded it, the other ought to be allowed to impeach it by evi-

Granger v. Clark, 22 Me. 128; Hammond v. Wilder, 25 Vt. 842; McRae v. Mattoon, 13 Pick. 53; Boston & W. R. Co. v. Sparhawk, 1 Allen, 448; Greene v. Greene, 2 Gray, 361; Williams v. Martin, 7 Ga. 378; Smith v. Henderson, 25 La. Ann. 649; Kelley v. Mize, 3 Sneed, 59; Anderson v. Anderson, 8 Ohio, 109; Webster v. Reid, 1 Morris (Iowa), 467; Mason v. Messenger, 17 Iowa, 261; Smith v. Smith, 22 Iowa, 516; Field v. Sanderson, 34 Mo. 542.

[249] Hall v. Hamlin, 2 Watts, 354; Verner v. Carson, 66 Pa. St. 440. But "if the party who alleges fraud in the original judgment or decree has already been heard or had an opportunity to be heard in that proceeding, upon that same fraud, he is concluded and cannot retry it in a collateral proceeding." Otterson v. Middleton, 102 Pa. St. 78.

[250] State v. Little, 1 N. H. 257.

[251] Mandeville v. Reynolds, 68 N. Y. 528, 543, per Folger, J.: "The code of procedure has by its enactments taken away most, if not all, of the reasons of the rule which forbade the impeachment of a judgment collaterally. Now, in an action at law, matter which was formerly of equitable cognizance solely may be set up and given in evidence. As in ejectment, where the title of the plaintiff depends upon a deed or will, it may be averred and shown in defense that it was obtained by fraud and undue influence. And so if, in an action of ejectment, the defense rests upon a deed or will, the plaintiff can make proof that it was procured by fraud or other imposition. If there was an action at law upon a judgment, could not the defendant answer in pleading and show in proof that it was procured by fraud and imposition? So then if, in an action at law on some cause of action to which a valid judgment would be a good defense, it were set up and proven, could not the plaintiff prove in reply that it was got by the fraud or collusion of the defendant and others than the plaintiff? And collusion means, by consent or agreement of the parties to it. To which should be added, in knowledge and disregard of the rights of the

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dence of fraud, without being put to a direct suit to annul it, and notwithstanding it is regular upon its face.[252]

§ 291. Fraud in Procuring the Judgment.

In the preceding section we considered fraud in general as a ground for impeaching judgments. It is convenient, for the purposes of our further inquiry, to distinguish between fraud practiced in the procuring of the judgment and fraud as affecting the original cause of action. The former topic is illustrated by several important cases, to be now considered, as well as by many of those already cited. "The parties to an action," it is said, "cannot impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was obtained through their fraud or collusion. It is their business to see that it is not so obtained. Even if, without any fault or neglect of one party, his adversary succeeded by fraud in obtaining an unjust or unauthorized judgment, he must through some prescribed mode

party impeaching the results of it. The court acts upon the matters involved in the action now in a double capacity, as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which by the changing nature of the issues in the progress of the suit and trial, has become the main question in the case and legitimately before it for trial. It would be quite an abnegation of the conjoint power and jurisdiction of the court, to proceed in the case as long as the issues were of legal cognizance, and as soon as they became of equitable cognizance to turn the party over to another action, in perchance the same court, before the same judge, to have, in another trial, that matter proved and decided against the validity of the judgment, which, as the powers of the court are now in constant reciprocal activity, may as well be determined in one trial by the same tribunal. It is not merely that the same judges possess, in equal degrees, powers at law and powers in equity. It is, that the distinction between actions at law and suits in equity, and the forms of such actions are abolished, and that there is in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs. * * * The intent of the code is clear that all controversies respecting the matter involved in litigation shall be determined in one action. Whether fraud or imposition in the entry of a judicial matter of record could, before that enactment, have been set up against it collaterally at law or not, it may now be alleged against it, as an equitable defense to defeat a recovery upon it."

[252] Murray v. Murray, 6 Oreg. 17. And see Glover v. Flowers (N. Car.), 7 S. E. Rep. 579.

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reverse or annul the judgment before he can claim to treat it as invalid."[253] But it is necessary to distinguish between judgments entered by the collusion or fraud of both parties and such as are obtained by the fraud of the plaintiff. The former are void as to creditors only, not against the defendant, and may be attacked in any collateral proceeding by them, whilst the latter can be attacked by the defendant alone, directly, and in the proper court.[254] Thus, where a party by some act or declaration out of the record lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, it is fraudulent and may be impeached upon that ground.[255] A person against whom judgments have been obtained cannot maintain an action for damages against the parties who obtained them, the attorney who prosecuted and the officer who served the writ, for fraudulently conspiring together to injure and defraud him in those proceedings, while the judgments remain unreversed, for such action would constitute a collateral attack upon them.[256] But on the other hand an action to recover damages for the breach of a special contract, to discontinue an action by the defendant against the plaintiff, in consequence of which the defendant had judgment in his favor and the plaintiff was compelled to satisfy an execution issued thereon, is not liable to the objection that it seeks to impeach the judgment collaterally.[257] A composition in bankruptcy, under the federal statutes on the subject, cannot be impeached collaterally in an action at law in a state court, by a creditor who was a party to the proceedings, by showing that the composition was obtained by the fraudulent acts of the bankrupt.[258] On principles analogous to the foregoing, it is held that, after judgment in an election contest, rendered by agreement between the claimants and giving possession to the relator, the defend-

[253] Davis v. Davis, 61 Me. 398. See Boston & W. R. Co. v. Sparhawk, 1 Allen, 448. Compare Carr v. Miner, 42 Ill. 179.

[254] Meckley's Appeal, 102 Pa. St. 536; Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 326; Thompson's Appeal, 57 Pa. St. 178; Clark v. Douglass, 62 Pa. St. 415.

[255] Ellis v. Kelly, 8 Bush, 621. See Thomas v. Ireland (Ky.), 11 S. W. Rep. 653.

[256] Smith v. Abbott, 40 Me. 442; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527.

[257] Smith v. Palmer, 6 Cush. 513.

[258] Farwell v. Raddin, 129 Mass. 7; Bank v. Carpenter, 129 Mass. 1.

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ant, in his answer to the relator's alternative writ of mandate demanding possession, cannot assail the judgment on the ground that, being rendered by agreement and in consideration of a sum paid to defendant, it was corrupt and fraudulent and therefore void.[259]

§ 292. Fraud in the Cause of Action.

As a general rule, fraud in the contract recovered on should be set up as a defense in the action, and therefore is no ground for subsequently impeaching the judgment.[260] But in a Pennsylvania decision it was held that where actual fraud has been practised by a party in obtaining a deed, and the deed is used as a means of obtaining a judgment, the judgment will be void to the extent of the fraud, as to the party defrauded, although it may be valid as to other interests not involved in the fraud; and hence a collateral attack upon it, as to such fraud, is perfectly permissible; because the question of the fraudulent character of the deed had never been legally before the court and never adjudicated.[261]

[259] Mannix v. State, 115 Ind. 245, 17 N. E. Rep. 565. Chief Justice Niblack, in delivering the opinion of the court, said: "In the absence of an affirmative showing to the contrary, the presumption is that whatever a court has done in a proceeding of which it had jurisdiction has been correctly done. The reasonable inference from the allegations of the second paragraph of the answer, therefore, is that the judgment of the Hancock circuit court complained of was regular upon its face, and that it had been, as it purported to have been, entered by agreement of parties. Such a judgment is binding upon the parties to it until reversed upon an appeal, or until annulled or set aside by some direct proceeding instituted for that purpose. It is impervious to a collateral attack from a party to it, however corrupt or unlawful the agreement may have been which led to its rendition. It is, as contended, a well-established rule of law that the courts will not aid in the enforcement of a corrupt or unlawful contract, but will permit the parties to remain in the relative positions in which they have placed themselves; but that rule has no application to a judgment which, by inadvertence or collusion, may have been rendered upon such a contract. Such a judgment, as regards a collateral attack upon it, stands upon the same footing with other judgments rendered in the usual course of legal proceedings, and is as binding upon the parties as any other judgment so long as it remains unreversed, and not vacated by some direct proceeding. There was consequently no error in holding the second paragraph of the answer to have been insufficient upon demurrer."

[260] Hatch v. Garza, 23 Tex. 176.

[261] Jackson v. Summerville, 13 Pa. St. 359.

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§ 293. Creditor may show Fraud in a Judgment.

However the rule may be in regard to parties and privies, it is very well settled that any third person, a stranger to the judgment, whose rights would be injuriously affected if it were allowed to stand as against him, may show, in a collateral proceeding, that it was procured through the fraudulent contrivance of the debtor or the collusion of both parties, with a design to hinder or defraud him, and so have it considered and treated as void as to him.[262] "A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not a thing that can stand, even when robed in a judgment."[263] Or, as the rule is sometimes more broadly stated, a judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment debtor.[264] Hence a judgment confessed without any consideration and with fraudulent intent, may be questioned by other judgment- and execution-creditors of the defendant, and, as to them, the judgment and execution thereon will be vacated and set aside.[265] But a confession of judgment for the express purpose of enabling the creditor to redeem from a sale under a prior judgment is not fraudulent as against the purchaser; for the policy of the law is to encourage redemptions, in order that the

[262] Duchess of Kingston's Case, 20 How. St. Tr. 544; Perry v. Meddowcroft, 10 Beav. 122; Philipson v. Egremont, 6 Q. B. 605; Crosby v. Lang, 12 East, 409; Bandon v. Becher, 3 Cl. & Fin. 479; Gaines v. Relf, 12 How. 472; Pierce v. Strickland, 26 Me. 277; Sidensparker v. Sidensparker, 52 Me. 481; Great Falls Co. v. Worster, 45 N. H. 110; Atkinson v. Allen, 12 Vt. 619, 36 Am. Dec. 361; Alexander v. Gould, 1 Mass. 165; Smith v. Saxton, 6 Pick. 483; Leonard v. Bryant, 11 Met. 370; Downs v. Fuller, 2 Met. 135, 35 Am. Dec. 393; Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 281; Hall v. Hamlin, 2 Watts, 354; Mitchell v. Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408; Caldwell v. Walters, 18 Pa. St. 79, 55 Am. Dec. 592; Thompson's Appeal, 57 Pa. St. 175; Second Nat. Bank's Appeal, 85 Pa. St. 528; Ordinary v. Wallace, 2 Rich. 460; Hammock v. McBride, 6 Ga. 178; Faris v. Dunham, 5 T. B. Mon. 397, 17 Am. Dec. 77; De Armond v. Adams, 25 Ind. 455; Callahan v. Griswold, 9 Mo. 775; Hackett v. Manlove, 14 Cal. 85.

[263] Smith v. Cuyler, 78 Ga. 654, 3 S. E. Rep. 406.

[264] Palmer v. Martindell, 43 N. J. Eq. 90, 10 Atl. Rep. 802.

[265] Shallcross v. Deats, 43 N. J. Law, 177; Bryant v. Harding, 29 Mo. 347.

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property of the debtor may discharge as many of his liabilities as possible.[266] For another example, in an action by a creditor to set aside a deed as fraudulent, the grantee therein may show, although his deed is fraudulent as to creditors, that the complainant's judgment was obtained by fraud and artifice practised by him upon the grantor.[267] But inasmuch as the law always favors the stability and finality of judgments, it is held that a stranger who thus seeks to impeach a judgment as a fraud upon his rights must show the fraud by clear and satisfactory proof.[268]

§ 294. Fraud must affect the Creditors.

A very important element in the rule just stated is that the fraud alleged must be such as directly affects the party seeking to impeach the judgment. It is no ground for the intervention of third persons that fraud has been practised *upon* the debtor; it must be fraud practised *by* the debtor, either alone, or, as is more commonly the case, in collusion with the plaintiff in the judgment. For instance, upon the distribution of the proceeds of a sheriff's sale, a subsisting judgment can be attacked by other creditors collaterally only on the ground of collusion, not because it is a fraud on the debtor.[269] "The fraud which will authorize a creditor to impeach a judgment obtained by another against his debtor must be a fraud against the creditor, not a mere overreaching of the debtor in his litigation. There must be collusion." [270] Nor can creditors thus set up any matter of defense original or subsequent.[271] Fraudulent judgments, it is said, like fraudulent deeds, are good against all but the interests intended to be defrauded. Hence those parties whose interests are affected cannot require the court to vacate the judgment on the record, for that would have the effect to annul it as against the whole world.[272]

[266] Karnes v. Lloyd, 52 Ill. 113.

[267] Faris v. Dunham, 5 T. B. Mon. 397, 17 Am. Dec. 77.

[268] Clark v. Bailey, 2 Strobh. Eq. 143; Hulverson v. Hutchinson, 39 Iowa, 316.

[269] Sheetz v. Hambest, 81 Pa. St. 100; Bank v. Roseberry, 81 Pa. St. 309; Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 326; Lewis v. Rogers, 16 Pa. St. 18; Thompson's Appeal, 57 Pa. St. 175.

[270] McAlpine v. Sweetser, 76 Ind. 78.

[271] Lewis v. Rogers, 16 Pa. St. 18; Johns v. Pattee, 55 Iowa, 665, 8 N. W. Rep. 663.

[272] Thompson's Appeal, 57 Pa. St. 175.

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§ 295. What Creditors allowed to allege Fraud.

The privilege of impeaching a judgment collaterally for fraud is extended only to those third persons whose rights would be impaired or prejudiced if it were allowed full force and effect as against them.[273] In New York it is held that none but a judgment-creditor can impeach the *bona fides* of a judgment confessed by the debtor to a third person; an attaching creditor, whose attachment was levied after such confession, cannot do so.[274] But later rulings in the same state have modified this doctrine so far that now, if the attaching creditor's process has been levied upon tangible property (*i. e.*, property capable of manual delivery), he is permitted to assail the good faith of a prior confessed judgment which stands in his way.* At any rate, it seems clear that the party's claim must have been in existence at the date of the judgment, otherwise it could not properly be called a fraud upon his rights. Thus a judgment of separation of property, duly rendered in favor of a wife against her husband, cannot be inquired into or attacked collaterally by a creditor of the husband whose claim had not yet arisen when the judgment was rendered.[275] Privies, as well as parties to the judgment, are precluded, according to the majority of the decisions, from the collateral impeachment of it for fraud. But it is held that a judgment against a sheriff for his default is not so far conclusive on the sureties on his official bond but that they may attack it for fraud and collusion when it is made the basis of a suit against them.[276]

§ 296. False Testimony.

It is the unquestioned doctrine of the cases that a party to a judgment cannot impeach it collaterally on the ground that false testi-

And see Clark v. Douglass, 62 Pa. St. 408.

[273] Spicer v. Waters, 65 Barb. 227; De Armond v. Adams, 25 Ind. 455; Hackett v. Manlove, 14 Cal. 95.

[274] Bentley v. Goodwin, 38 Barb. 633. In Indiana, by statute, subsequent as well as existing creditors can collaterally impeach for fraud a judgment entered on confession. Feaster v. Woodfill, 23 Ind. 493.

*See Bates v. Plonsky, 28 Hun, 112; Bowe v. Arnold, 31 Hun, 256; Tannenbaum v. Rosswog, 6 N. Y. Supp. 578.

[275] Lewis v. Peterkin, 39 La. Ann. 780, 2 South. Rep. 577.

[276] Dane v. Gilmore, 51 Me. 544; Lowell v. Parker, 10 Met. 315.

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mony was given at the trial, on which testimony the judgment was rendered.[277] Neither will any action lie against a witness for committing perjury, whereby the plaintiff lost a former action, because its trial would necessarily involve a re-examination of the matters controverted and determined in the former action, and would constitute an attack upon the correctness of the former adjudication.[278] Thus, where, in a process of foreign attachment, judgment has been rendered discharging the trustee on his disclosure, the plaintiff in that process cannot maintain an action on the case against the trustee for obtaining his discharge by falsehood and fraud in his disclosure and by fraudulent collusion with the principal defendant.[279] In an early New York case it was held that an action would not lie against a person in that state for suborning a witness to swear falsely in a cause then pending in the courts of another state, in consequence whereof a judgment was given against the defendant in such cause, contrary to the truth and justice of the case; the decision being rested by Chancellor Kent on the ground that the merits of the original cause could not be thus overhauled in a collateral proceeding.[280] It is also held that an award, like a judgment, cannot be collaterally impeached by evidence that one party introduced false testimony.[281] Where judgments are recovered in a court of competent jurisdiction, and the defendant appeared and had an opportunity to defend, which judgments are still in full force and unreversed, he cannot maintain an action against a defendant for fraud and conspiracy in procuring such judgments against him.[282]

[277] Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Fisk v. Miller, 20 Tex. 579; The Acorn, 2 Abb. U. S. 434; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454.

[278] Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; Damport v. Sympson, Cro. Eliz. 520; Eyres v. Sedgewicke, Cro. Jac. 601.

[279] Lyford v. Demerritt, 32 N. H. 234.

[280] Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469.

[281] Woodrow v. O'Conner, 28 Vt. 776.

[282] Engstrom v. Sherburne, 137 Mass. 158.

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CHAPTER XIV.

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PART I. THE POWER TO VACATE JUDGMENTS.

§ 297. What Courts possess the Power.

The power to vacate judgments is an entirely different matter from the power to reverse judgments. It is a power inherent in and to be exercised by the court which rendered the judgment, and to that court and no other the application to set aside the judgment should be made.[1] It is a common law power, possessed by the court as a part of its necessary machinery for the administration of justice, and hence might be exercised without the grant of special statutory

[1] Grattan v. Matteson, 51 Iowa, 622.

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authority. In many of the states, however, this power is regulated by law, either in respect to the grounds upon which it may be put in operation, the time within which it may be invoked, the manner of calling it into play, or the practice upon an occasion for its exercise. And such regulations may either enlarge or abridge its common law scope, or otherwise transform it. But still the power remains essentially inherent in the nature and constitution of the court, not derivative. The power to vacate judgments is said to be incident to all courts of record, and to be usually exercised under restraints imposed by their own rules.[2] It is not commonly possessed by the inferior tribunals—courts not of record—such as the courts of magistrates or justices of the peace, though in some of the states it may be.[3] But it is generally considered that probate courts have the power, upon a proper showing, to vacate an order or decree irregularly or improvidently entered.[4] An auditor, appointed to make distribution of a fund, has no power to go behind the record and declare a particular judgment to be void and no lien, on account of any irregularity; for that would be assuming the power of the court to review its own judgments.[5]

§ 298. Legislature cannot interfere.

The power to open or vacate judgments is essentially *judicial.* Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall *in future* be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to

[2] Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681.

[3] See Frazier v. Griffie, 8 Md. 50; Rhodes v. De Bow, 5 Iowa, 260. In Pennsylvania, the court of common pleas has no power to open a judgment entered on a transcript of a judgment by a justice of the peace, filed in the court for purposes of lien, and let the defendant in to a defense. For all purposes except lien the judgment still remains before the justice and there only can it be attacked. One court cannot overhaul a judgment while it remains within the jurisdiction of the court which rendered it. Boyd v. Miller, 52 Pa. St. 431; Lacock v. White, 19 Pa. St. 495.

[4] Hamberlin v. Terry, 1 Sm. & Mar. Ch. 589; *In re* Marquis, 85 Mo. 615.

[5] Edwards's Appeal, 66 Pa. St. 89.

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judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant; and second, because it would be an unwarranted invasion of the province of the judicial department. It is therefore held by a majority of the decisions that a statute vacating, or directing the courts to vacate, a particular judgment or class of judgments, already rendered and become final before the enactment of the statute, and granting new trials in such actions, is unconstitutional and invalid.[6] A contrary rule obtains, however, in the state of Alabama.[7] And in Georgia, it is said that the power of the legislature to pass acts allowing the opening of existing judgments, and new trials thereunder, should be confined to allowing cross-actions, equitable defenses, and rights which have accrued since the judgment, to be set up; and that it does not extend to matters which were or by law should have been heard before the court by which the judgment was rendered.[8] At an early period, the supreme court of Pennsylvania ruled that a statute directing a particular judgment to be opened, and the defendant let in to a defense upon the plea of payment, was remedial in its character, and though the power thus exercised was partly judicial, it was not in violation of the constitution.[9] But this doctrine, so inconsistent with the rights and independence of the judiciary, and so subversive of the fundamentals of constitutional law, was afterwards vigorously repudiated by the same court, when it felt itself better able to withstand the encroachments of the legislative body.[10] As remarked by Chief Justice Gibson: "It is not more

[6] Merrill v. Sherburne, 1 N. H. 199; Lewis v. Webb, 3 Me. 326; Bates v. Kimball, 2 Chip. 77; De Chastellux v. Fairchild, 15 Pa. St. 18; Taylor v. Place, 4 R. I. 324; Miller v. State, 8 Gill, 145; Ratcliffe v. Anderson, 31 Gratt. 105; Griffin v. Cunningham, 20 Gratt. 31; Weaver v. Lapsley, 43 Ala. 224; Lanier v. Gallatas, 13 La. Ann. 175; Beebe v. State, 6 Ind. 515; Davis v. Menasha, 21 Wis. 491; Arnold v. Kelley, 5 W. Va. 446; Burch v. Newbury, 10 N. Y. 374; Hill v. Sunderland, 3 Vt. 567; Cooley, Const. Lim. 94; Black, Const. Prohib. §§ 146, 197.

[7] *Ex parte* Bibb, 44 Ala. 140.

[8] White v. Herndon, 40 Ga. 493; Bonner v. Martin, *Id.* 501; Kite v. Lumpkin, *Id.* 506.

[9] Braddee v. Brownfield, 2 Watts & S. 271.

[10] For the history of this change of

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intolerable in principle to pronounce an arbitrary judgment against a suitor, than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another contest." [11]

Part II. The Method of seeking Relief.

§ 299. By Audita Querela.

Audita querela is the name of a writ constituting the initial process in an action brought by a judgment-defendant to obtain relief against the consequences of the judgment, on account of some matter of defense or discharge arising since its rendition, and which could not be taken advantage of otherwise.[12] It is a regular suit with its usual incidents, pleadings, issues of law and fact, trial, judgment, and error.[13] The writ must be directed to the court which rendered the judgment and retains the record,[14] and all the parties to the judgment against which relief is sought must join in the writ or be duly and regularly served.[15] Upon the inquiry under the writ of *audita querela*, the record of the judgment is not conclusive by way of estoppel (the attack upon it being direct and not collateral), and hence the truth and justice of the whole matter is open to examination.[16] The judgment in this action cannot properly include affirmative relief to the defendant.[17] An appeal or writ of error will lie from it.[18] In regard to the grounds on which *audita querela* may be brought, it must be observed that this is a remedial process which bears solely upon the wrongful acts of the opposite party, and not upon the

attitude, see remarks of Sharswood, J., in Grim v. School District, 57 Pa. St. 436.

[11] De Chastellux v. Fairchild, 15 Pa. St. 18.

[12] 1 Am. & Eng. Encyclo. of Law, 1005.

[13] Brooks v. Hunt, 17 Johns. 484.

[14] Harper v. Kean, 11 Serg. & R. 299; Poultney v. Treasurer, 25 Vt. 168; Warner v. Crane, 16 Vt. 79.

[15] Melton v. Howard, 7 How. (Miss.) 103; Herrick v. Bank, 1 Williams (Vt.) 584; Gleason v. Peck, 12 Vt. 56; Tittlemore v. Wainwright, 16 Vt. 173; Starbird v. Moore, 21 Vt. 529.

[16] Folsom v. Connor, 49 Vt. 4; Paddleford v. Bancroft, 22 Vt. 529; Hill v. Warren, 54 Vt. 73.

[17] Foss v. Witham, 9 Allen, 572.

[18] Fitch v. Scovel, 1 Root, 56; White v. Clapp, 8 Allen, 283; Gordonier v. Billings, 77 Pa. St. 498.

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erroneous judgments or acts of the court; it is a writ in which the plaint sounds in tort.[19] Hence injury, actual or apprehended, is essential to the right to bring this writ. If the matter complained of is simply nugatory and void, the party can have no need of this process.[20] It will lie to vacate a judgment rendered against a non-resident defendant on constructive service of process, where the statutory prerequisites were omitted.[21] But not where an attorney, although without authority, has entered an appearance for such defendant.[22] It will also lie to procure the setting aside of a judgment which was irregularly entered after a discontinuance, or taken in violation of an agreement for a continuance;[23] or which was given against an infant who was not represented by his guardian;[24] or against a lunatic under similar circumstances.[25] So when a foreign judgment against the defendant has been reversed by the foreign appellate tribunal, but in the meantime he has been sued here on that judgment, he may have relief by *audita querela*.[26] This writ may also be brought when the debtor has been discharged in bankruptcy subsequent to the judgment;[27] or to set aside a judgment from which an appeal was wrongfully denied by the inferior court.[28] So where two suits are brought at the same time for the same cause of action, and proceed *pari passu* to judgment and execution, a satisfaction of either judgment may be shown, upon *audita querela*, in discharge of the other.[29] But on the other hand, the writ of *audita querela* will not lie in any case where the defendant had a legal opportunity to avail himself, before judgment, of the same matters

[19] Little v. Cook, 1 Aik. 363; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159.

[20] Bryant v. Johnson, 24 Me. 304.

[21] Folan v. Folan, 59 Me. 566; Dingman v. Myers, 13 Gray, 1; Marvin v. Wilkins, 1 Aik. 107; Alexander v. Abbott, 21 Vt. 476; Whitney v. Silver, 22 Vt. 634; Eastman v. Waterman, 26 Vt. 494; Harmon v. Martin, 52 Vt. 255.

[22] Spaulding v. Swift, 18 Vt. 214.

[23] Crawford v. Cheney, 12 Vt. 567; Pike v. Hill, 15 Vt. 183; Paddleford v. Bancroft, 22 Vt. 529; Hawley v. Mead, 52 Vt. 343; Kimball v. Randall, 56 Vt. 558.

[24] Judd v. Downing, Brayt. 27; Starbird v. Moore, 21 Vt. 529. See Barber v. Graves, 18 Vt. 290.

[25] Lincoln v. Flint, 18 Vt. 247.

[26] Merchants' Ins. Co. v. De Wolf, 33 Pa. St. 45.

[27] Petit v. Seaman, 2 Root, 178; Williams v. Butcher, 1 Week. Notes Cas. 304; Baker v. Judges, 4 Johns. 191.

[28] Edwards v. Osgood, 33 Vt. 224; Harriman v. Swift, 31 Vt. 385.

[29] Browne v. Joy, 9 Johns. 221.

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which he now sets up, or where his own negligence has brought about the injury complained of.[30] Nor can it be brought where the matter alleged would be a proper subject for a writ of error;[31] nor in respect to matters which constitute an equitable defense, not cognizable at law;[32] nor for irregularities which do not affect the substantial validity of the process in the action or the merits of the controversy;[33] nor on account of an erroneous taxation of costs or allowance of excessive interest.[34] In a majority of the states, the proceeding by *audita querela* has fallen into complete disuse, being superseded by the more summary method of applying for relief by motion, upon notice.[35] For, as a general rule, wherever this writ would lie at common law, the courts may now relieve on motion.[36] In two states, however,—Vermont and Massachusetts,—the writ of *audita querela* is still in use, and is applied to a great variety of purposes, as will appear from the cases cited in this section.

§ 300. By Error Coram Nobis.

Another common law method of obtaining relief against a judgment in the court which rendered it was by writ of error *coram nobis*. This writ was so called from the technical words, which recited that error was alleged to exist in a certain record remaining "before us," that is, before the court which had pronounced the judgment. It lay for the

[30] Avery v. United States, 12 Wall. 304; Lovejoy v. Webber, 10 Mass. 101; Barker v. Walsh, 14 Allen, 175; Faxon v. Baxter, 11 Cush. 85; Barrett v. Vaughan, 6 Vt. 243; Griswold v. Rutland, 23 Vt. 324.

[31] Weeks v. Lawrence, 1 Vt. 433; Dodge v. Hubbell, 1 Vt. 491; School Distr. v. Rood, 1 Williams (Vt.) 214; Sutton v. Tyrrell, 10 Vt. 87. Nor does it change the rule that the writ of error is taken away by statute. Tuttle v. Burlington, Brayt. 27; Dodge v. Hubbell, 1 Vt. 491; Spear v. Flint, 17 Vt. 497.

[32] Schott v. McFarland, 1 Phila. (Pa.) 58; Garfield v. University, 10 Vt. 536.

[33] Sawyer v. Doane, 19 Vt. 598; Lampson v. Bradley, 42 Vt. 165; Ball v. Sleeper, 23 Vt. 573.

[34] Johnson v. Roberts, 58 Vt. 599, 2 Atl. Rep. 482; Goodrich v. Willard, 11 Gray, 380; Clough v. Brown, 38 Vt. 179.

[35] Job v. Walker, 3 Md. 129; Huston v. Ditto, 20 Md. 305; Smock v. Dade, 5 Rand. (Va.) 639; Longworth v. Screven, 2 Hill (S. Car.), 298; Dunlap v. Clements, 18 Ala. 778; Chambers v. Neal, 13 B. Mon. 256; Marsh v. Haywood, 6 Humph. 210; McMillan v. Baker, 20 Kans. 50; McDonald v. Falvey, 18 Wis. 571.

[36] Share v. Becker, 8 Serg. & R. 239; Witherow v. Keller, 11 Serg. & R. 274; Baker v. Judges, 4 Johns. 191.

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correction of an error of fact (not an error of law) in respect to a matter affecting the validity and regularity of the proceedings, such as the death of one of the parties at the beginning of the suit, or the infancy, insanity, or coverture of the defendant, and which was not brought into the issue.[37] But if the court was fully informed of and rightly apprehended the facts in the case, its error in applying the law to such facts is not such an error as could be rectified in this proceeding. Nor will this writ lie to contradict or put in issue any fact that has been already adjudicated in the action. Thus, if the record states that the defendant appeared and confessed judgment, he cannot controvert that fact after the expiration of the term for the purpose of setting aside the judgment.[38] The writ of error *coram nobis*, like the proceeding by *audita querela*, has now fallen into practical desuetude, being almost entirely superseded by the more speedy and efficacious remedy by motion in the same court.[39] In any case, the writ will not lie after affirmance of the judgment in the appellate court.[40]

§ 301. By Bill of Review.

In those jurisdictions where the ancient forms of chancery pleading and practice remain in force, unmodified by statutes, the only proper method of obtaining the vacation or annullment of a decree in equity, after the term, is by bill of review. And this species of bill lies in cases of error apparent on the face of the record, for fraud, and on account of matters subsequent to the decree and which could not have been urged in defense.[41] But the rule that a decree once enrolled cannot be opened except by a bill of review, or by an original bill for fraud, "is subject to well founded exceptions, arising in cases

[37] Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Mississippi &c. R. Co. v. Wynne, 42 Miss. 315; Milam Co. v. Robertson, 47 Tex. 222; Hurst v. Fisher, 1 Watts & S. 438; Beall v. Powell, 4 Ga. 525; Day v. Hamburgh, 1 Browne (Pa.), 75; Castelline v. Mundy, 4 B. & Ad. 90; Beven v. Chesire, 3 Dowl. 70; King v. Jones, 2 Ld. Raym. 1525; Evans v. Chester, 2 Mees. & W. 847.

[38] Richardson v. Jones, 12 Gratt. 53.

[39] Pricket v. Legerwood, 7 Pet. 144; Sloo v. Bank, 1 Scam. 428; McKindley v. Buck, 43 Ill. 488; Life Association v. Fassett, 102 Ill. 315; Beaubien v. Hamilton, 3 Scam. 213.

[40] Lambell v. Pettyjohn, 1 Strange, 690.

[41] See Fries v. Fries, 1 McArthur, 291.

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not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."[42] To a bill to vacate a decree the plaintiff in such decree is a necessary party defendant. The omission of him as a party is a fatal defect.[43]

§ 302. By Direct Action.

In some of the states, instead of the somewhat summary method of vacating judgments on notice and motion, a practice prevails by which it is necessary to bring a direct action for this purpose, in the form of a regular suit, with plenary proceedings, in which the relief demanded is the annullment of the judgment complained of. In other respects the law and practice in these states, on the topic under consideration, does not differ materially from the rest. It may be remarked in passing that all the parties to the former suit must be made parties to an action to annul the judgment.[44]

§ 303. By Motion.

The method of procuring the vacation of judgments which is by far the most commonly used, at the present day, is the proceeding by application to the court which rendered the judgment, in the form of a motion, with notice to the adverse party.[45] This practice, being simple, speedy, and effective, is well calculated to promote the interests of justice with the least cost and trouble to suitors. The time within which such applications must be made, the parties who may apply, the grounds upon which an application may be based,

[42] Cowley v. Leonard, 28 N. J. Eq. 467; Smith v. Alton, 22 N. J. Eq. 572; Beekman v. Peck, 3 Johns. Ch. 415; Bennett v. Winter, 2 Johns. Ch. 205; Millspaugh v. McBride, 7 Paige, 509; Herbert v. Rowles, 30 Md. 271; Erwin v. Vint, 6 Munf. 267; Carter v. Torrance, 11 Ga. 654; Kemp v. Squires, 1 Ves. 205; Robson v. Cranwell, 1 Dick. 61.

[43] Harwood v. Railroad, 17 Wall. 78.

[44] Haggerty v. Phillips, 21 La. Ann. 729.

[45] See Frazier v. Williams, 18 Ind. 416.

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and the practice in proceedings of this character, are the subjects which will engage our attention in the remaining part of this chapter.

§ 304. Indirect Vacation of Judgment.

It has been held that the entry of a second judgment, in the same action, is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly cancelled or set aside. "When a judgment is once entered of record, it must stand as the judgment, until it is vacated, modified, or disposed of by some means provided by law; entering additional judgment entries is not one of them." [46] But on the other hand, it is said that although after a judgment has been entered up on a verdict, such judgment, strictly, should be set aside before a new trial is had, yet if, on motion, the verdict is set aside and a new trial granted and had, the judgment will be deemed to have been set aside.[47]

Part III. The Time of Applying.

§ 305. During the Term.

It is universally held that judgments are under the plenary control of the court which pronounces them during the entire term at which they are rendered or entered of record, and they may, during such term, be set aside, vacated, modified, or annulled by that court for cause shown.[48] Thus, in Kansas, it is said that "for the purpose of administering justice, the district court has a very wide and extended discretion in opening up judgments, and in setting aside or modifying

[46] Nuckolls v. Irwin, 2 Nebr. 60.

[47] Lane v. Kingsberry, 11 Mo. 402.

[48] Robinson v. Commissioners, 12 Md. 132; Rutherford v. Pope, 15 Md. 579; Townshend v. Chew, 31 Md. 247; Green v. Railroad, 11 W. Va. 685; Kelty v. High, 29 W. Va. 381, 1 S. E. Rep. 561; Fraley v. Feather, 46 N. J. Law, 429; Sagary v. Bayless, 13 Sm. & Mar. 153; Barker v. Justice, 41 Miss. 240; Pattison v. Josselyn, 43 Miss. 373; Ashley v. Hyde, 5 Ark. 100; McKnight v. Strong, 25 Ark. 212; Underwood v. Sledge, 27 Ark. 295; Ralston v. Lothain, 18 Ind. 303; Taylor v. Lusk, 9 Iowa, 444; State v. Treasurer, 43 Mo. 228; Rankin v. Lawton, 17 Mo. App. 574; Ballard v. Purcell, 1 Nevad. 342; Martin v. Skehan, 2 Colo. 614; Volland v. Wilcox, 17 Nebr. 46, 22 N. W. Rep. 71.

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proceedings had before it, if it does so at the same term at which the judgment or proceedings are had, and if all the parties are present in the court, and no advantage is taken of either party."[49] And similar rules obtain, no doubt, in all or nearly all the states.

§ 306. After the Term.

It was the rule of the common law,—and it is still adhered to with more or less consistency in most of the states,—that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them or to set them aside.[50] The supreme court of the United States has stated the rule concisely in the following language: "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors

[49] State v. Sowders (Kans.), 22 Pac. Rep. 425.

[50] Bronson v. Schulten, 104 U. S. 410; Brush v. Robbins, 3 McLean, 486; Bank v. Labitut, 1 Woods, 11; Loney v. Bailey, 43 Md. 10; Green v. Railroad, 11 West Va. 685; Ramsour v. Roper, 7 Ired. 346; Moore v. Hinnant, 90 N. Car. 163; Trustees v. Bailey, 10 Fla. 238; *Ex parte* Sims, 44 Ala. 248; Buchanan v. Thomason, 70 Ala. 401; Crothers v. Ross, 15 Ala. 800; Cotten v. McGehee, 54 Miss. 621; Merle v. Andrews, 4 Tex. 200; Rogers v. Watrous, 8 Tex. 62, 58 Am. Dec. 100; Ragsdale v. Green, 36 Tex. 193; Anderson v. Anderson, 18 B. Mon. 95; McManama v. Garnett, 3 Met. (Ky.) 517; Rawdon v. Rapley, 14 Ark. 203, 58 Am. Dec. 370; Ashley v. Hyde, 6 Ark. 92, 42 Am. Dec. 685; Blair v. Russell, 1 Smith (Ind.), 287; Bland v. State, 2 Ind. 608; Morgan v. Hays, Breese, 126, 12 Am. Dec. 147; Lampsett v. Whitney, 3 Scam. 170; Cook v. Wood, 24 Ill. 295; Cox v. Brackett, 41 Ill. 223; Smith v. Wilson, 26 Ill. 186; Ashby v. Glasgow, 7 Mo. 320; Spafford v. Janesville, 15 Wis. 474; Gray v. Gates, 37 Wis. 614; Salter v. Hilgen, 40 Wis. 363; Suydam v. Pitcher, 4 Cal. 280; Bell v. Thompson, 19 Cal. 706; Lattimer v. Ryan, 20 Cal. 628; Exchange Bank v. Streeter (Colo.), 4 Pac. Rep. 746. Upon dismissing a case for want of jurisdiction, it is error to render a judgment for costs, but such judgment cannot be vacated or expunged at a subsequent term. Derton v. Boyd, 21 Ark. 264.

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exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision."[51] And the federal circuit courts agree that they have no power to vacate or reverse their judgments or decrees, after the term, except in the cases specified in the decision of the supreme court just quoted.[52] In California, after the adjournment of the term, the court loses all control over its decisions, unless its jurisdiction is saved by some motion or proceeding at the time, except when the summons has not been served, in which case a party may, within six months, move to set aside the judgment.[53] In Massachusetts, a court which by statute holds weekly terms, has no authority, on motion at one of such terms, to vacate a final judgment duly entered at a previous term.[54] In Alabama, while the general rule is followed, it is considered that if, by agreement of the parties, the court sets aside a judgment after the term and again tries the cause, the judgment afterwards entered is not void for want of jurisdiction, though the court is not bound to retry a cause even if the parties consent.[55] But in some other states it is held that, notwithstanding the agreement of parties, all the proceedings subsequent to the first judgment are *coram non judice* and void.[56] And this indeed seems the more logical position. In Wisconsin, where a judgment entered is not void but simply irregular, the court has no power to vacate it after the term at which it was entered, or if entered by the clerk in vacation, after the term next succeeding its entry.[57] The rule stated applies to decrees in equity as well as judgments at law. In general, chancery cannot open a final decree after the end of the term at which it was made, unless upon a bill of review, or bill in that nature, or bill or petition impeaching the decree for fraud.[58] But here, as we have already said,[59] an exception must be made in the case of equity causes not heard upon

[51] Bronson v. Schulten, 104 U. S. 410.
[52] Allen v. Wilson, 21 Fed. Rep. 881.
[53] Shaw v. McGregor, 8 Cal. 521; Robb v. Robb, 6 Cal. 21; Bell v. Thompson, 19 Cal. 706.
[54] Wood v. Payea, 138 Mass. 61.
[55] Kidd v. McMillan, 21 Ala. 325; Hair v. Moody, 9 Ala. 399.
[56] Little Rock v. Bullock, 6 Ark. 282; Anderson v. Thompson, 7 Lea, 259.
[57] Egan v. Sengfeil, 46 Wis. 703, 1 N. W. Rep. 467.
[58] Brooks v. Love, 3 Dana, 7; Bobb v. Bobb, 2 A. K. Marsh. 240; McMicken v. Perin, 18 How. 507.
[59] *Supra*, § 301.

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the merits and in which the decree was entered by fraud, mistake, surprise, or other exceptional circumstances. If the rule applies to any courts it applies to all. The court of last resort in a state cannot set aside a judgment or decree rendered by it, after the expiration of the term at which it was rendered, unless the same is void on its face.[60]

Thus it will be seen that in many of the states there is a strong disposition not to depart widely from the common law rule on this point. The reasons of the rule are obvious and weighty. The interests of the individual as well as of the community demand that there should be a definitive end of every litigation; and nothing could be more impolitic than to leave it in the discretion of every court to revise and review and reconsider its judgments without limit. Yet it is very necessary to observe that this rule does not by any means obtain in all its rigor in every state and jurisdiction. The practice varies so much from state to state that it is most difficult to formulate general principles. But we shall find, in the first place, that the rule is almost everywhere subject to certain well-recognized exceptions; as where the judgment in question is entirely void, or was entered without the authority of the court, or is vitiated by some substantial irregularity. These instances will be discussed in succeeding sections under their appropriate titles. In the second place, it will be discovered that in some few states the rule is not observed at all, the courts exercising the power to vacate or open judgments in proper cases, without any limitation as to time.[61] Finally, in a considerable number of states, the statutes both prescribe the grounds on which judgments may be vacated and fix an arbitrary limit, usually six months or a year, within which the application may be made.

§ 307. Void Judgments.

It was intimated in the last section that a judgment which is entirely void may always be set aside at a subsequent term. And this is the general doctrine of the cases. Every court possesses inherent

[60] Donnell v. Hamilton, 77 Ala. 610.
[61] See Breden v. Gilliland, 67 Pa. St. 86; Capen v. Inhabitants of Stoughton, 16 Gray, 365.

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power to vacate entries in its record of judgments, decrees, or orders rendered or made *without jurisdiction*, either during the term at which the entries are made or after its expiration.[62] But in Wisconsin a final judgment in the court of last resort cannot be vacated after a year from its rendition on the ground that the court had no jurisdiction of the subject-matter.[63] And in another state it is held that to authorize the setting aside of a void judgment after the expiration of the term, the invalidity of the judgment must appear on the face of the record, and not from matter outside of it, except in cases of fraud, and where the judgment was rendered after the death of a party.[64] But it is not believed that this last rule would be insisted on in all jurisdictions, since, on a motion to vacate a judgment, the impeachment of the record is direct and not collateral.

§ 308. Interlocutory Judgments.

An interlocutory judgment or decree, made in the progress of a cause, is always under the control of the court until the final decision of the suit, and it may be modified or rescinded, upon sufficient grounds shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given.[65] And in some states it is held that mere office judgments (such as are entered of course) are under the control of the court in succeeding terms and can be modified or set aside on cause shown, even after judgment has been perfected; but it is within the discretion of the courts and their decision cannot be appealed from.[66] And it seems that a mere naked default, on which no judgment or decree has ever been entered, may be set aside at any time on proper grounds; in this case the discretion of the court is not limited as to time.[67] In California, a motion to vacate a default entered by the clerk may be made at any time

[62] Ladd v. Mason, 10 Oreg. 308; Bruce v. Strickland, 47 Ala. 192; Baker v. Barclift, 76 Ala. 414; *In re* College Street, 11 R. I. 472.

[63] State v. Bank, 20 Wis. 640.

[64] Pettus v. McClanahan, 52 Ala. 55.

[65] Miller v. Justice, 86 N. Car. 26; Davis v. Roberts, 1 Sm. & Mar. Ch. 543.

[66] Powell v. Jopling, 2 Jones (N. Car.) 400; Wilson v. Tarbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 637.

[67] Ordway v. Suchard, 31 Iowa, 487; Simmons v. Church, 31 Iowa, 284; Harper v. Drake, 14 Iowa, 533.

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before final judgment is entered, although the court may have adjourned for the term at which the default was entered before the motion is made.[68]

§ 309. Pennsylvania Practice.

In the state of Pennsylvania the practice in regard to opening judgments has been developed by a long line of cases, and has settled in a form different from that found in most other jurisdictions. In the language of Judge Sharswood: "Every court has power to open a judgment in order to give the parties a hearing or trial. In the case of judgments by confession or default, there is no limit of time to the exercise of this power, but in the case of judgments entered adversely after a hearing or trial, it is settled that it must be done before the end of the term at which they are entered."[69] And a judgment may be opened, for proper cause, notwithstanding it may have been several times revived by *scire facias*. "If the original judgment was obtained by fraud and misrepresentation, and the subsequent revivals were but a continuation of such fraud and misrepresentation, it is difficult to see how such revivals could add anything to the validity of the original judgment."[70]

§ 310. Judgment carried over the Term by Motion.

Whatever abridges or suspends the final character of a judgment will save it from the operation of the rule under consideration. A motion to vacate a judgment, made at the same term at which the judgment was rendered and continued to a subsequent term, may be allowed at such subsequent term.[71] But it is held that leave granted

[68] Willson v. Cleaveland, 30 Cal. 192.

[69] King v. Brooks, 72 Pa. St. 364. A somewhat similar practice obtains in Illinois, where it is said that courts of law exercise an equitable jurisdiction over judgments entered by confession, accompanied by warrants of attorney, and it will be exercised liberally in proper cases. Such judgments are often opened for the purpose of letting in a defense the party was precluded by accident, fraud, or otherwise, from making at the proper time, whilst the judgment itself is not vacated until the merits are determined in favor of the defendant. Hall v. Jones, 32 Ill. 38.

[70] Monroe v. Monroe, 93 Pa. St. 520.

[71] Windett v. Hamilton, 52 Ill. 180;

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at the term in which the judgment is entered, to move *in the next term* to set it aside, is irregular and void.[72] So where a judgment is entered by default against two joint defendants, and at the same time the cause is removed to the federal court on motion of a third defendant, after it is determined that the removal was erroneous and the cause is sent back to the state court, the latter court has the power at the first term thereafter, on plaintiff's motion, to strike off the judgment, although a term had intervened after it was entered; the rule (in Illinois) that a judgment may be set aside or amended only at the same or the next term after its entry not applying while the cause is pending in the federal court.[73]

§ 311. Under Statutes.

In many of the states, statutes have been enacted which provide that the court may, in its discretion, relieve a party from a judgment taken against him, on certain enumerated grounds, within a prescribed time from the rendition of the judgment, usually six months or a year, or in some jurisdictions two years, or within a similar period from notice of the judgment.[74] Our chief interest in these statutes is in connection with the causes which they specify as sufficient to warrant the vacation of the judgment, and in this regard they will be fully considered hereafter. But there are certain observations to be made on the time limit which they establish. In the first place, it appears that the two elements, the specified causes and the time limit, are mutually dependent. That is, if the application is based upon a ground *not* enumerated in the statute, but otherwise recognized as sufficient, it is not necessary that it be made within the statutory time.[75] Again, while unexcused delay will generally tell against an application of this sort, it is considered

Green v. Railroad, 11 W.Va. 685. Compare Ashley v. Hyde, 6 Ark. 92, 42 Am. Dec. 685.

[72] Hill v. St. Louis, 20 Mo. 584.

[73] Jansen v. Grimshaw (Ill.), 17 N. E. Rep. 850.

[74] For citations to these statutes, see *infra*, § 334. And see Carlisle v. Wilkinson, 12 Ind. 91; Hunt v. Stevens, 26 Iowa, 399; Kenedy v. Jarvis (Tex.), 1 S. W. Rep. 191; People v. Lafarge, 3 Cal. 130.

[75] Cowles v. Haynes, 69 N. Car. 406.

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that laches cannot be imputed to a party who takes all the time which the statute allows him to bring his motion or application.[76] Where the statutory time begins to run from "notice" of the judgment, this is construed as meaning knowledge of the rendition of such judgment, and the notice thereof need not be in writing.[77] And where the time is limited to one year, it is held that it is not enough that a motion for relief against the judgment be made within the year, but it must be brought to a hearing within that time.[78]

§ 312. Judgments against Non-Residents.

The statutes in some of the states provide that a non-resident defendant who has been constructively served by publication of summons, and against whom a judgment is given, may appear and have the judgment vacated and be admitted to defend the action, at any time within a limited period after the rendition of the judgment, which period varies, in the different states, from six months to five years.[79] And the right of a defendant so served, to be let in to a defense, is an absolute right if he brings himself within the statute; the court has no discretion in the matter, but must grant his application.[80]

§ 313. Laches of Party.

Aside from cases in which the time of applying for relief from the judgment is regulated by statute, and aside from cases in which the motion can only be made at the same term, we are now to inquire how the party's application will be affected by his delay or want of

[76] Independent School-District v. Schreiner, 46 Iowa, 172.

[77] Butler v. Mitchell, 17 Wis. 52.

[78] Knox v. Clifford, 41 Wis. 458.

[79] See Kinney v. O'Bannon, 6 Bush, 692; Blanchard v. Hatch, 32 Mo. 261; Allbright v. Warkentin, 31 Kans. 442; Davis v. Davis, 24 Tex. 187; Snow v. Hawpe, 22 Tex. 168; Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490.

[80] Allbright v. Warkentin, 31 Kans. 442, 2 Pac. Rep. 614. Where a non-resident defendant upon whom there was no personal service of process, applies, under the statute, within a year after judgment, for leave to file and serve an answer, there is no presumption against him of want of proper diligence, and hence he is not required to show affirmatively that he did not have actual notice of the action so as to defend before judgment. Frankoviz v. Ireland, 35 Minn. 278, 28 N. W. Rep. 508.

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diligence. And first, delay in moving to have a judgment vacated, so long as the party has *no notice* of the judgment or of the action, will not bar his right, even though innocent strangers may have taken titles in reliance on the judgment.[81] Again, lapse of time will not affect the right to vacate a judgment on the ground that the court never had jurisdiction to enter it.[82] But if the party actually knows that a judgment has been rendered against him, and the judgment is not simply and merely void, it is the undoubted rule that he must exercise reasonable diligence in procuring its vacation, and that his unexcused laches or delay, unduly protracted, will preclude him from obtaining the relief sought.[83] "In deciding upon an application to strike out a judgment after the term is past, for fraud, irregularity, deceit, or surprise, the court acts in the exercise of its quasi-equitable powers, and in every such case requires the party making the application to act in good faith and with ordinary diligence. Relief will not be granted if he has knowingly acquiesced in the judgment complained of, or has been guilty of laches or unreasonable delay in seeking his remedy."[84] So far the law is clear. But the moment we endeavor to ascertain *what* laches or delay will bar this right, we are involved in a sea of difficulties which invariably overflows the attempt to define "diligence" or "reasonable time." It is impossible to lay down general rules. Every case must be governed by its own facts and the decisions in the particular state. It may be profitable, however, to mention some of the principal cases in which the question has actually been decided. And to begin with the clearest,—"after the lapse of twenty years no judicial proceeding whatever ought to

[81] Stocking v. Hanson, 35 Minn. 207, 28 N. W. Rep. 507.

[82] Feikert v. Wilson, 38 Minn. 341, 37 N. W. Rep. 585.

[83] Ryder v. Twiss, 3 Scam. 4; Wade v. De Leyer, 40 N. Y. Super. Ct. 541; Cagger v. Gardiner, 1 How. Pr. 142; Nichols v. Nichols, 10 Wend. 560; McEvers v. Markler, 1 Johns. Cas. 248; Bliss v. Treadway, 1 How. Pr. 245; De Wandelaer v. Hagger, 1 How. Pr. 61; Landon v. Burke, 33 Wis. 452; Ammerman v. State, 98 Ind. 165; Reese v. Mahoney, 21 Cal. 305; Weeks v. Merritt, 5 Rob. (N.Y.) 610; Altmann v. Gabriel, 28 Minn. 132, 9 N. W. Rep. 633; Sanderson v. Dox, 6 Wis. 164; Ætna Ins. Co. v. McCormick, 20 Wis. 265; Welch v. May, 14 Wis. 200. The court will not, under ordinary circumstances, open a judgment and set aside an execution, unless the party asking relief applies immediately on receiving notice of the levy. McQuillan v. Hunter, 1 Phila. 49.

[84] McCormick v. Hogan, 48 Md. 404.

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be set aside for irregularity."[85] In another case in the same state, where fourteen years had elapsed since the entry of judgment, and no satisfactory excuse or reason for the delay was shown, the motion was held properly denied on the ground of laches.[86] It is also held that an unexplained delay of seven years,[87] or five years,[88] or two years,[89] or seventeen months,[90] or one year,[91] or eleven months,[92] will be sufficient to justify the court in refusing the relief asked. Where an application to have a decree of divorce set aside was not made until the lapse of more than four years after the plaintiff had been fully informed of the alleged fraudulent decree, and no excuse was shown for the delay other than that proceedings to review the decree had been instituted, and an action brought to set it aside in another court, it was held that the plaintiff's right was barred.[93] On the other hand, it is held in Pennsylvania that a nonsuit may properly be taken off even three years after its entry, where cause for its removal appears; such action lies within the sound discretion of the court, and is not reviewable by writ of error.[94] The case is slightly different where a judgment has been irregularly entered against an infant. The question here is, what time should reasonably be allowed to him, after he comes of age, in which to take proceedings against the judgment. It has been held that six years is an undue delay.[95] And in a New York case it was said that there must be a limitation to the time when such a motion could be made, and the old limitation of two years, after attaining his majority, was sufficiently liberal and would prevail.[96] In California, it is considered that ten days after a judgment is entered in the superior court, which has no terms, is a reasonable time within which to move to set aside such judgment.[97]

[85] Thompson v. Skinner, 7 Johns. 556.
[86] Wade v. De Leyer, 40 N. Y. Superior Ct. 541.
[87] Reese v. Mahoney, 21 Cal. 305.
[88] Bostwick v. Perkins, 4 Ga. 47.
[89] People v. Judges, 1 Dougl. 417; Wygant v. Brown, 7 N. Y. Supp. 490.
[90] Ammerman v. State, 98 Ind. 165.
[91] Sanderson v. Dox, 6 Wis. 164.
[92] Altman v. Gabriel, 28 Minn. 182, 9 N. W. Rep. 633.
[93] Nicholson v. Nicholson, 118 Ind. 131, 15 N. E. Rep. 223.
[94] Zebley v. Storey, 8 Week. Notes Cas. 212.
[95] Kemp v. Cook, 18 Md. 130.
[96] Barnes v. Gill, 13 Abb. Pr. N. S. 169.
[97] *In re* Langan's Estate, 74 Cal. 353, 16 Pac. Rep. 188.

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Part IV. The Parties who may Apply.

§ 314. Successful Party may Apply.

The courts have power, in a proper case, to set aside a judgment at the instance of the party in whose favor it is rendered.[98] The propriety and necessity of this rule are obvious. For the plaintiff's rights may be compromised, or not adequately recognized or protected, by the judgment as it stands, and without his own fault. If there are such irregularities in the judgment that he would be prevented from reaping its fruits, or if an excusable mistake has put him upon a wrong course of proceedings, or if the fraud or trickery of the defendant has prevented him from getting the full measure of relief to which he is entitled, it is but right to vacate the judgment on his motion, and afford him the opportunity to proceed anew with a more just and satisfactory result.

§ 315. Joint Defendants.

Where a judgment is rendered against several defendants jointly, but is irregular or void as to one of them,—as for want of authority or want of jurisdiction over him,—it will be vacated on the application of that defendant.[99] So where an attorney confesses judgment against several partners, under an authority derived from only one, it is the duty of the others to make prompt application to the court to open the judgment.[100] Whether, in such a case, it would be deemed necessary to vacate the judgment as to all the defendants, or only as to the moving defendant, would depend somewhat upon the nature of the cause of action, but principally upon whether or not, in the particular jurisdiction, a joint judgment is considered as an entirety,—a question which will be found fully treated in another connection.[101]

[98] Herdic v. Woodward, 75 Pa. St. 479; Downing v. Still, 43 Mo. 309.

[99] St. John v. Holmes, 20 Wend. 609, 32 Am. Dec. 603; Franks v. Lockey, 45 Vt. 395; Fall v. Evans, 20 Ind. 210.

[100] Cyphert v. McClune, 22 Pa. St. 195.

[101] *Supra*, § 211. And see Gould v. Sternburg, 69 Ill. 531.

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§ 316. Legal Representatives of Party.

Some of the statutes on this subject provide that when a judgment by default is taken on constructive service by publication, the defendant "or any person legally representing him," (or "his legal representatives"), may apply, within a limited time, to have it opened and the case retried. Under this clause it is held that one who was not a party to the proceeding in which the judgment was rendered, and who appears in his own right, is not entitled to have the judgment set aside.[102] But parties who have acquired the entire interest of a defendant in the subject-matter of an action are his "legal representatives" within the meaning of such clause, and the court may, upon such terms as may be just, relieve them from a default taken against him through their mistake, inadvertence, surprise, or excusable neglect.[103] And if a motion is made by persons other than the plaintiff, claiming to be his legal representatives, to set aside a judgment and to be substituted as plaintiffs, the parties making such motion must show a state of facts which would have supported such an application by the plaintiff in the judgment.[104] Without doubt the phrase above used is broad enough to include the executor or administrator of a deceased party if a proper case for his intervention should arise.

§ 317. Strangers.

As a general rule, a judgment will not be vacated or set aside at the motion of a third person, not a party to the action.[105] It will be remembered that such persons have the right to impeach a judgment collaterally, whenever and wherever it comes in conflict with their rights, if it was founded in fraud and collusion.[106] And this will generally be an adequate protection to them. But there may

[102] Parsons v. Johnson, 66 Iowa, 455, 23 N. W. Rep. 921.

[103] Plummer v. Brown, 64 Cal. 429, 1 Pac. Rep. 703.

[104] Couvin v. Bensley, 43 Cal. 253.

[105] Drexel's Appeal, 6 Pa. St. 272; *In re* Rowland's Estate, 4 Clarke (Pa.), 199; Smith v. Newbern, 73 N. Car. 303; Hinsdale v. Hawley, 89 N. Car. 87; Walton v. Walton, 80 N. Car. 26; Jacobs v. Burgwyn, 63 N. Car. 196; Packard v. Smith, 9 Wis. 184.

[106] *Supra*, §§ 293-295.

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be cases in which right and equity require that other creditors should have the privilege of proceeding directly for the annullment of a judgment which fraudulently abridges their own remedies. And in such instances the courts will not refuse their aid. Thus an invalid judgment by confession may be set aside at the instance of a junior judgment-creditor after notice to the plaintiff.[107] And if the purpose of a creditor in obtaining a judgment is not to collect his debt, but to help the debtor cover up his property, his judgment will be set aside, though it be shown that this debt was genuine.[108] So where a husband gives a mortgage, and suffers judgment on it, purposely, to defeat the wife of her dower, and the mortgagee has constructive notice of her rights, she may intervene and have a rule to open the judgment and let her in to defend to the extent of her dower.[109] It is also proper to vacate a judgment against an administrator, at the instance of the heirs, when the former's conduct has been so negligent as to leave the latter no other remedy and there is a good defense not presented by the defendant.[110] And the proper financial officer of a municipal corporation may move to vacate a judgment against it procured by the fraud or collusion of the other officers.[111] In New York, when a judgment creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the trial-court whether to determine the matter on motion, or to require the creditor to bring an action, and its determination is not appealable.[112]

Part V. What Judgments may be Vacated.

§ 318. General Rule.

In general, the equitable power of the courts now under consideration is unlimited in respect to the judgments, rules, orders, and decrees upon which it may be exercised. At first sight, it might

[107] Bernard v. Douglass, 10 Iowa, 370.
[108] Smith v. Schwed, 9 Fed. Rep. 483.
[109] McClurg v. Schwartz, 87 Pa. St. 521.
[110] McWillie v. Martin, 25 Ark. 556.
[111] Lowber v. Mayor of New York, 26 Barb. 262.
[112] Beards v. Wheeler, 76 N. Y. 218.

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appear inconsistent to speak of setting aside a judgment which is a mere nullity. Yet the courts hold that even though the judgment be entirely void, the party against whom it exists has the right to have it vacated, and thus clear away any cloud that it may cast upon his right to alienate his property so long as it remains of record against him.[113] The power is most commonly exercised in cases of judgments entered by default, but it is equally applicable, proper grounds being shown, to such as are rendered upon trial and verdict. Relief may be granted in this manner against judgments by confession,[114] and against probate orders and decrees,[115] and final settlements of administrators and trustees.[116] Under the code practice, on a motion to vacate a judgment in an equitable action, the same rules should be applied as in case of other judgments.[117] A rule absolute against a sheriff is not final and conclusive like a judgment between parties litigant; it may be vacated on motion at the same or a subsequent term.[118]

§ 319. Consent Judgments.

A court has power to vacate and set aside a consent judgment on the ground of fraud, mutual mistake, or surprise, but it cannot alter or correct it, except with the consent of all the parties affected by it.[119] And where, in compromise of a claim, judgment has been rendered against the defendant with his consent, he cannot, in the absence of proof of fraud, have it vacated on the ground that he acted on the erroneous advice of counsel.[120]

§ 320. Judgments in Divorce.

It was the doctrine and rule of the ecclesiastical courts in England that *sententia contra matrimonium nunquam transit in rem judicatam.*[121]

[113] Crane v. Barry, 47 Ga. 476; Mills v. Dickson, 6 Rich. 487; Forman v. Carter, 9 Kans. 674; Hervey v. Edmunds, 68 N. Car. 243; Olney v. Boyd, 50 Ill. 453.

[114] Hutchinson v. Ledlie, 36 Pa. St. 112.

[115] Whitaker v. Smith, 33 Ga. 287.

[116] Sheetz v. Kirtley, 62 Mo. 417.

[117] Ætna Ins. Co. v. McCormick, 20 Wis. 265.

[118] Wakefield v. Moore, 65 Ga. 268.

[119] Kerchner v. McEachern, 93 N. Car. 447; Stump v. Long, 84 N. Car. 616.

[120] Anderson v. Carr, 7 N. Y. Supp. 281.

[121] 7 Co. 43b.

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That is to say that a sentence or judgment against the validity of a marriage,—either annulling a merely voidable marriage, or declaring that a pretended marriage was absolutely void,—was never final, but was forever open to revision and reversal.[122] Nevertheless this maxim was not universally assented to, for we find occasional expressions of a contrary opinion on the part of eminent ecclesiastical judges.[123] Now in this country, there are several cases holding that the statutes which authorize courts to open judgments or decrees within a certain time after their rendition, on proper application, where there was no other service than that by publication, or on other specified grounds, do not include decrees of divorce; proceeding generally on the theory that policy requires judgments of this character to be regarded as more stable and unassailable than any other species.[124] There are undoubtedly excellent reasons for this distinction.[125] And it has at times seemed so important to legislative

[122] Bowzer v. Ricketts, 1 Hagg. Con. 213; Morris v. Webber, 2 Leon. 169; Meadows v. Duchess of Kingston, Amb. 756; Poynter, Mar. & Div. 157; Shelford, Mar. & Div. 474; 2 Bishop, Mar. & Div. §§ 748 *et seq.*, where all the learning on this point is collected.

[123] Norton v. Seaton, 3 Phillim, 162; Meadowcroft v. Huguenin, 3 Curt. 403; Prudam v. Phillips, 2 Amb. 763.

[124] Parish v. Parish, 9 Ohio St. 534; Cox v. Cox, 19 Ohio St. 502; Owens v. Sims, 8 Cold. 544; McJunkin v. McJunkin, 8 Ind. 30; Woolley v. Woolley, 12 Ind. 663; Lewis v. Lewis, 15 Kans. 181; O'Connell v. O'Connell, 10 Nebr. 390, 6 N. W. Rep. 467; Gilruth v. Gilruth, 20 Iowa, 225; Whitcomb v. Whitcomb, 46 Iowa, 487; Moster v. Moster, 53 Mo. 326; Tappan v. Tappan, 6 Ohio St. 64.

[125] "There are excellent reasons why judgments in matrimonial causes, whether of nullity or divorce, should be even more stable, certainly not less, than in others. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons, that uncertainty and fluctuation in it must be greatly detrimental to the public interests. And especially to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having the decree reversed and the marriage made void is past estimation." 2 Bishop, Mar. & Div. § 750. "The statutory provision is nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation." Parish v. Parish, 9 Ohio St. 537.

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bodies as to cause the enactment of clauses explicitly *excepting* adjudications in divorce from the operation of such statutes, as will appear from the cases just cited. But unless such decrees are thus specifically withdrawn from the general class, it is difficult to see how they can be considered as an exception to the terms of a statute plainly extending to *all* judgments, on any right principles of interpretation.[126] And aside from legislation, the courts will generally hear motions to vacate divorce judgments on the same grounds and conditions as any other judgments, except, perhaps, that they proceed with greater caution and with more anxious care for the intervening rights of strangers. Thus, where a decree of divorce has been obtained by fraud or deceit,—as where the complainant has practised fraud or trickery to prevent the defendant from having notice of the suit, or from appearing in the action, or from answering and defending the same,—the innocent party, thus deceived, may undoubtedly obtain the opening or vacating of the decree, by making a timely and proper application and showing good cause.[127] And this is especially the case where both parties to be affected by the vacation of the judgment have been parties to the fraud.[128] So also it is well settled that a decree of divorce may be vacated which is void for want of jurisdiction in the court which rendered it.[129] But a decree will not be vacated because, since the decree, the petitioner has been made, by a change in the law, an admissible witness to testify to his own innocence.[130]

[126] Lawrence v. Lawrence, 73 Ill. 577; Smith v. Smith, 20 Mo. 166.

[127] Holmes v. Holmes, 63 Me. 420; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Carley v. Carley, 7 Gray, 545; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Allen v. Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Getcher v. Getcher, 51 Md. 187; Rawlins v. Rawlins, 18 Fla. 345; Whitcomb v. Whitcomb, 46 Iowa, 487; Rush v. Rush, 46 Iowa, 649; Mansfield v. Mansfield, 26 Mo. 168; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Crouch v. Crouch, 30 Wis. 667; True v. True, 6 Minn. 458 (Gil. 315); Young v. Young, 17 Minn. 181 (Gil. 153); Singer v. Singer, 41 Barb. 139.

[128] Denton v. Denton, 41 How. Pr. 221.

[129] Holmes v. Holmes, 63 Me. 420; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; True v. True, 6 Minn. 458 (Gil. 315); Wortman v. Wortman, 17 Abb. Pr. 66; Allen v. Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Crouch v. Crouch, 30 Wis. 667; Weatherbee v. Weatherbee, 20 Wis. 499.

[130] Holbrook v. Holbrook, 114 Mass. 568.

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Part VI. Grounds for Vacating Judgments.

§ 321. Fraud and Collusion.

The power to set aside judgments for fraud or collusion, though expressly granted by statute in many of the states, is not dependent upon legislative recognition. It is a common law power, inherent in all courts of record, and may be exercised after the expiration of the term at which the judgment was rendered, on the application of the party injured.[131] In a recent California decision it is said that, when a judgment is attacked and sought to be set aside on the ground of fraud, it must appear that the fraud was practised in the very act of obtaining the judgment; for any fraud anterior to that is a defense available at law and therefore concluded by the judgment.[132] This, however, is not a rule of universal application. For there may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit, where the courts would not withhold relief on motion, although in such cases the complainant must show that he did not know of the fraud in time to plead it in defense and could not have discovered it by due diligence. Thus, in Louisiana, a judgment will be annulled if it is shown that the instrument on which it is based has been paid or satisfied before the institution of suit and the fact of payment concealed.[133] So where the defendant was tricked into signing a judgment-note, supposing it to be a simple promissory note, and judgment was then entered up on it.[134] In another case, A. brought ejectment against B., the tenant of C., and B. reported to C., whose counsel put in a demurrer and began to prepare a defense to the suit; but pending this preparation, and before argument on the demurrer, B., fraudulently and collusively with A., withdrew the demurrer. It was held proper to set

[131] Taylor v. Sindall, 34 Md. 88; Humphreys v. Rawn, 8 Watts, 78; Mayberry v. McClurg, 51 Mo. 256; Melick v. Bank, 52 Iowa, 94, 2 N. W. Rep. 1021; Conn v. Whiteside, 6 Humph. 47. *In re* Fisher, 15 Wis. 511; Dial v. Farrow, 1 McMull. 292, 36 Am. Dec. 267.

[132] Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. Rep. 908.

[133] Noyes v. Loeb, 24 La. Ann. 48.

[134] Anderson v. Field, 6 Ill. App. 307.

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aside a judgment taken by default by A., and to admit C. to a defense.[135] So where a decree declaring that certain heirs have no interest in the property, and enjoining them from setting up title thereto, was procured by the fraudulent practices and misrepresentations of the widow, it will be set aside in equity and the rights of the heirs established, even against purchasers, if they had notice.[136] But a judgment or decree will not be declared void for fraud because there may be suspicious circumstances connected with its rendition. Fraud will not be presumed. It must be satisfactorily shown.[137] It has been said that it would require a strong case to authorize the setting aside of a judgment taken by default on the ground that the same was procured through false representations.[138] And the fact that there was usury in the original mortgage debt, on which a judgment is founded, is not alone sufficient to establish fraud which will give another creditor a right to have the judgment set aside.[139] In some states, a judgment may be vacated for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by decree in chancery, or in a court of law by an independent action with appropriate pleadings, but it cannot be set aside on either of those grounds on motion.[140] In this connection it must be remarked that, in an action to set aside a judgment on the ground of fraud, neither the judgment thus sought to be vacated, nor an order refusing to set aside a default and permit an answer in that case, can be set up as a bar to the action.[141] The right to have a judgment set aside on the ground of fraud is one that admits of being waived, and the defendant, by his subsequent conduct, may be estopped to avail himself of it.[142] In a case where one of several defendants had a good defense, and by the fraudulent device of the plaintiff was prevented from making it, and was also prevented from making his motion within the time limited by law to set aside the judgment, it

[135] Barrett v. Graham, 19 Cal. 632.

[136] Hayden v. Hayden, 46 Cal. 332.

[137] Jones v. Brittan, 1 Woods, 667; Caldwell v. Fifield, 24 N. J. Law, 150.

[138] Obermeyer v. Einstein, 62 Mo. 341.

[139] Mahan v. Cavender, 77 Ga. 118.

[140] Dugan v. McGlann, 60 Ga. 353; Syme v. Trice, 96 N. Car. 243, 1 S. E. Rep. 480.

[141] States v. Cromwell (N. Y.), 14 N. E. Rep. 448.

[142] Schenck's Appeal, 94 Pa. St. 37.

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was held that, as against such defendant, the plaintiff was estopped to enforce the judgment.[143]

§ 322. Judgment taken contrary to Agreement.

Where it is apparent that there was an honest agreement between the parties that the case should be continued, and yet the plaintiff, without notice to the defendant and in violation of the agreement, enters up a default, or proceeds to trial and procures a judgment against the defendant in his absence, this is good ground for setting aside the judgment.[144] So where the plaintiff has previously filed a bill in equity concerning the same matter in litigation at law, and has obtained the defendant's consent for the case at law to stand continued until the bill has been heard, but afterwards takes judgment by default while the bill is still pending.[145] But it is said, in Iowa, that an oral agreement between the parties to delay or postpone the trial of a cause to a day beyond that set for trial, which is not communicated to the court whose action it is to govern, will be treated with but little favor in an application by the defendant to set aside a default.[146] In a case where the defendant neglected to answer in season, relying on the plaintiff's promise to call at his office and "fix the matter up," it was held no abuse of discretion to set aside the judgment and let in the answer, merits being shown.[147]

§ 323. Perjury.

Another species of fraud which the plaintiff may practice in procuring a judgment, and which will be sufficient to cause its vacation, is his own wilful perjury. "A defendant failing to defend cannot have the judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or other witness, nor even on account of the perjury of the other witnesses, provided the

[143] Johnson v. Unversaw, 80 Ind. 435.
[144] Binsse v. Barker, 18 N. J. Law, 268, 23 Am. Dec. 720; McIntosh v. Commissioners, 13 Kans. 171.
[145] Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.
[146] Dixon v. Brophey, 29 Iowa, 460.
[147] Stafford v. McMillan, 25 Wis. 566.

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plaintiff himself is wholly guiltless. Nor can he have the judgment vacated on account of any mistake or error on the part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes or errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit wilful and corrupt perjury, and no party is bound to exercise extraordinary diligence in preparing to meet such perjury."[148] In Minnesota, a statute provides an action to set aside a judgment obtained by means of the "perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party."[149] But it is held that an action cannot be maintained, under this section, upon the bare allegation that, upon an issue of fact squarely made, so that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witnesses.[150]

§ 324. Want of Notice.

It is in general good ground for setting aside a judgment that there was no service of process on the defendant, or that the service was materially irregular or defective, provided there has been no waiver of such defects by appearance or otherwise.[151] Thus where the return of the sheriff showed a service of the summons on Monday, but the proofs on a motion to set aside a default showed that the service was in fact made on Sunday, it was held that, although the return could not be impeached for the purpose of showing that the default was irregular, yet the fact might be proved for the purpose of excusing the default as a condition to obtaining relief.[152]

[148] Laithe v. McDonald, 12 Kans. 340. See a *dictum* to the same effect in Humphreys v. Rawn, 8 Watts, 78.

[149] Genl. Stats. Minn. 1878, c. 66, § 285.

[150] Hass v. Billings (Minn.), 43 N. W. Rep. 797.

[151] Simcock v. Bank, 14 Kans. 529; Hanson v. Wolcott, 19 Kans. 207; Carr v. Bank, 16 Wis. 50; Shuford v. Cain, 1 Abb. U. S. 302; Heffner v. Gunz, 29 Minn. 108, 12 N. W. Rep. 342; Davis v. Burt, 7 Iowa, 56; Smith v. Rollins, 25 Mo. 408; Harris v. Hardeman, 14 How. 334; Allen v. Rogers, 27 Iowa, 106; Hurlburt v. Reed, 5 Mich. 30.

[152] Smith v. Noe, 30 Ind. 117.

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But it is held that the appearance of a party against whom a judgment has been rendered, to move that it be opened and for leave to answer, is a general appearance to the merits and waives all defects in the service of process and other proceedings preliminary to the judgment.[153] Where the *return* of process is defective in not showing a due and legal service, this will also be ground for setting aside the judgment; but the court, in a proper case, may allow the return to be amended and dismiss the motion to vacate.[154]

§ 325. Unauthorized Appearance by Attorney.

By the English rule, where a defendant has been served with process, and an attorney without authority appears for him, the court will not interfere to set aside the proceedings, if the attorney be solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the court will relieve the defendant on equitable terms if he has a defense on the merits. But where a plaintiff, without serving a defendant, accepts the appearance of an unauthorized attorney for the defendant, the court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and the expense to which he has been put from the delinquent attorney by summary proceedings.[155] It is the prevailing doctrine of the American cases that a judgment obtained against a party upon whom no process was served, and for whom an attorney has entered an appearance without authority, may be set aside, even at a subsequent term.[156] In some of the states, however, there is still a disposition to base a distinction on the question of the attorney's solvency, and to hold that the judgment should not be vacated, if he is able to respond in damages, though he was entirely without authority to appear.[157] At any rate,

[153] Gray v. Gates, 37 Wis. 614.

[154] Stotz v. Collins, 83 Va. 423, 2 S. E. Rep. 737.

[155] Bayley v Buckland, 1 Exch. 1.

[156] Critchfield v. Porter, 3 Ohio, 518; Russell v. Pottawottamie Co., 29 Iowa, 256; Lyon v. Boilvin, 2 Gilm. 629; Marvel v. Manouvrier, 14 La. Ann. 8, 74 Am. Dec. 424.

[157] University v. Lassiter, 83 N. Car. 38, citing Bacon's Abr., Atty. B. p. 486; Denton v. Noyes, 6 Johns. 295, 5 Am. Dec. 237; State v. McLaughlin, 28 Cal. 668; Schirling v. Scites, 41 Miss. 644;

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the claim of a party for whom an appearance has been entered, to deny the authority of the attorney and ask relief, is viewed with great disfavor by the courts wherever innocent third persons have acquired rights under the judgment or decree sought to be annulled.[158] And relief will be denied where the fact of the attorney's authority is not fully negatived, but left in doubt under the testimony, and there is no allegation of a meritorious defense to the action.[159] Applications for relief against a judgment on this ground are more commonly made by bill in equity for an injunction against the enforcement of the judgment than by motion to vacate it, and the point will receive further consideration in connection with the former species of remedies.[160]

§ 326. Irregularities.

It is a general rule that the court in which a judgment was rendered may vacate it, on motion, at the same or a subsequent term, on proof that it was entered irregularly and not according to the course of the court.[161] Thus a judgment entered in favor of the plaintiff, before the time for answering has expired, may properly be set aside;[162] and so may a judgment entered while there was an

Smith v. Bowditch, 7 Allen, 137. And see Powers v. Trenor, 3 Hun, 3.

[158] Kenyon v. Shreck, 52 Ill. 382.

[159] Russell v. Pottawottamie Co., 29 Iowa, 256.

[160] *Infra*, § 374.

[161] Keaton v. Banks, 10 Ired. 381, 51 Am. Dec. 393; Dick v. McLaurin, 63 N. Car. 185; Cowles v. Hayes, 69 N. Car. 410; Branstetter v. Rives, 34 Mo. 318; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; Winslow v. Anderson, 3 Dev. & Bat. 9, 32 Am. Dec. 661; Hervey v. Edmunds, 68 N. Car. 243; Foreman v. Carter, 9 Kans. 674; Hunt v. Yeatman, 3 Ohio, 16; Wolfe v. Davis, 74 N. Car. 597; O'Hara v. Baum, 82 Pa. St. 416; Murdock v. Steiner, 45 Pa. St. 349; Downing v. Still, 43 Mo. 309; Doan v. Holley, 27 Mo. 256; Craig v. Wroth, 47 Md. 281. "It is well settled in this state that a judgment may be vacated or set aside on motion, at a term subsequent to the judgment term, for irregularity or improper conduct in procuring it to be entered. And this has become one of the accustomed and settled remedies for relief against judgments wrongfully obtained, where the impropriety or irregularity has not been superinduced by the fault or negligence of the judgment debtor." Huntington v. Finch, 3 Ohio St. 445. But some cases hold that if the alleged irregularity is not apparent on the face of the record, the power to vacate is limited to the term at which the judgment was rendered. Phillips v. Evans, 64 Mo. 17.

[162] Remnant v. Hoffman (Cal.), 11 Pac. Rep. 319; Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218; Mailhouse v. In-

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answer or demurrer on file and not yet disposed of.[163] Similarly, a judgment will be vacated which was rendered on issue joined without any notice of trial or appearance at the trial.[164] Or where a default was taken and final judgment entered on the first day of the term.[165] Or where an amendment was allowed which introduced an entirely new cause of action, and the defendant was defaulted without having had a proper opportunity to defend.[166] Or where the judgment was taken before the case regularly came up for hearing.[167] So a judgment may be set aside after the term if the verdict and judgment are for an amount in excess of the damages laid in the writ or claimed in the declaration or complaint.[168] Or if it was entered after the death of a party.[169] Or where a judgment was rendered on a joint contract against a part only of the defendants, when it should have been against all.[170] A judgment entered on a declaration reciting a bond and warrant of attorney to confess judgment, but without any appearance for the defendant or formal confession of judgment, will be set aside as irregular.[171] So also will a judgment taken by default, where it appears that the real party in interest was not made a party to the action.[172] But a defendant cannot have a judgment against him opened because the suit was brought in the name of a wrong person, if that person is authorized to receive satisfaction of the judgment and to give a valid discharge.[173] Inconsistency between the findings of fact and conclusions of law in the judgment of a referee confirmed by the court, is sufficient ground for setting the judgment aside.[174]

loes, 18 Md. 329. See *supra*, § 85. But see *per contra* Williamson v. Nicklin, 34 Ohio St. 123.

[163] Norman v. Hooker, 35 Mo. 366; Oliphant v. Whitney, 34 Cal. 25.

[164] People v. Bacon, 18 Mich. 247.

[165] Clegg v. Fithian, 32 Ind. 90.

[166] Weatherford v. Van Alstyne, 22 Tex. 22.

[167] Beach v. McCann, 1 Hilt. (N. Y.), 256; Findley v. Johnson, 1 Overt. 344.

[168] Barnes v. Branch, 3 McCord, 19; Andrews v. Monilaws, 8 Hun, 65. See *supra*, § 138.

[169] Bowen v. Troy Mill Co., 31 Iowa, 460; Holmes v. Honle, 8 How. Pr. 384. See *supra*, § 199.

[170] Mullendore v. Silvers, 34 Ind. 98.

[171] Lytle v. Colts, 27 Pa. St. 193. See also Knox Co. Bank v. Doty, 9 Ohio St. 505.

[172] Ebell v. Bursinger, 70 Tex. 120, 8 S. W. Rep. 77.

[173] Grinnell v. Schmidt, 2 Sandf. 706.

[174] Moore v. Richardson, 5 S. Car. 142.

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But on the other hand, it is not every trivial or inconsiderable irregularity that will support an application to vacate the judgment. The principles which should govern the exercise of this remedial power of the courts have been well stated by the supreme court of North Carolina in the following language: "A motion in the action to set aside the judgment for irregularity will be entertained by the court, if it should be made within a reasonable period after it was granted [rendered]. This, however, does not imply that every judgment affected in any degree, directly or indirectly, by some or any irregularity in the course of the action leading to it, will be set aside. Some irregularities are unimportant and do not affect the substance of the action or the proceedings in it; there are others of more or less importance that may be waived or cured by what may take place or be done in the action after they happen; and there are yet others so serious in their nature as to destroy the efficacy of the action and render the judgment in it inoperative and void. Whether the court will or will not grant such a motion in any case must depend upon a variety of circumstances, and largely upon their peculiar application to the case in which the motion shall be made. Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining interested in it, or when the judgment is void. The court will always, upon motion, strike from its record a judgment void for irregularity." [175] Although the irregularity might have defeated the proceeding, if objection had been timely and properly made, yet if it is such as must be deemed waived by the failure to object, it will not be ground for vacating the judgment.[176] A failure to give security for costs, under the general rule of the court, is no cause for setting aside the judgment.[177] It is also held that if any portion of a judgment is regular and valid, it will not be set aside as irregular and invalid upon motion.[178] An affidavit is not required to support a rule to strike off

[175] Williamson v. Hartman, 92 N. Car. 236.

[176] Cosgrove v. Butler, 1 S. Car. 241.

[177] Doe dem. Lytle v. Fenn, 3 McLean, 411.

[178] Challis v. Headley, 9 Kans. 684.

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a judgment which, on the face of the record, appears to have been unlawfully and improvidently entered.[179]

§ 327. Judgments against Persons under Disabilities.

We have already seen that a judgment against a married woman, rendered in an action to which her coverture, if pleaded, would have been a good defense, is certainly voidable, if not absolutely void;[180] and that the same is true of a judgment against an infant for whom no guardian was appointed or appeared.[181] It follows, of course, that such judgments may be set aside, upon a proper and timely application by motion, by the court which rendered them. Where a statute provides that judgments shall not be set aside on motion, for irregularities, after the lapse of a certain time, this does not apply to cases where the motion is based on errors of fact; and it is held that the entry of a judgment against an infant is not an irregularity but an error of fact; and the statute does not affect the power of the court to vacate it on motion.[182]

§ 328. Unauthorized Entries.

A judgment which was inadvertently or irregularly entered by the clerk of the court without any authority, may be vacated at any time.[183] In a case in Iowa, after an appeal had been perfected and a *supersedeas* bond filed, it was agreed between the parties to the action, without the consent of the sureties, that a judgment should be entered in the supreme court against the appellants and sureties, and a judgment of affirmance was accordingly entered. It was held that upon a motion made at the following term, at the instance of the sureties, the court had jurisdiction to set aside the judgment.[184]

[179] Allen v. Krips, 119 Pa. St. 1, 12 Atl. Rep. 759.

[180] *Supra*, § 190.

[181] *Supra*, §§ 193–196.

[182] Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153; Levy v. Williams, 4 S. Car. 515; Keaton v. Banks, 10 Ired. 381.

[183] Merrick v. Baltimore, 43 Md. 219; Wharton v. Harlan, 68 Cal. 422, 9 Pac. Rep. 727; United States v. McKnight, 1 Cranch C. C. 84.

[184] Drake v. Smythe, 44 Iowa, 410.

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§ 329. Judgment not Vacated because Erroneous.

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or *certiorari*, according to the case, but it is no ground for setting aside the judgment on motion.[185] Thus, the reception of secondary or illegal evidence in proof of a fact is no ground to annul the judgment rendered in the case.[186] The statutes enacted in many of the states, granting power to vacate judgments rendered against a party through his "mistake, inadvertence, surprise, or excusable neglect," do not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court.[187] So the decree of a court of equity cannot be set aside, on motion, for defective allegations in the bill or for defective pleadings; the proper remedy is by bill of review.[188]

§ 330. Not for Grounds which might have been pleaded in Defense.

A motion or proceeding to vacate or set aside a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence.[189] So where, in an action regularly commenced and prosecuted, without any fraud or fraudulent representations, judgment is rendered by consent against the defendants, they cannot

[185] State v. Horton, 89 N. Car. 581; Taliaferro v. Steele, 14 La. Ann. 656; Harriman v. Swift, 31 Vt. 385; Peake v. Redd, 14 Mo. 79; Bank of United States v. Moss, 6 How. 31.

[186] Elder v. New Orleans, 31 La. Ann. 500.

[187] Loomis v. Rice, 37 Wis. 262.

[188] Brown v. Bennett, 55 Ga. 189.

[189] Robichaud v. Nelson, 28 La. Ann. 578; Barksdale v. Greene, 29 Ga. 418; Easley v. Camp, 40 Ga. 698; Field v. Sisson, 46 Ga. 67.

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thereafter have the judgment set aside and a new trial granted, on the ground of the existence of a complete legal defense to the action, the nature and extent of which they were aware of at the time of the entry of judgment.[190] A judgment will not be stricken off because the warrant of attorney on which it was entered appears to be dated on Sunday; courts will not, on such grounds, interfere with an executed contract.[191] Where a judgment was obtained in a court of law, and an injunction was afterwards issued to restrain the collection of it, which injunction was dissolved and judgment entered on the injunction bond, it was held that a motion to vacate the latter judgment, upon an allegation that the original judgment had been satisfied by payment to the sheriff, could not be entertained; the proper course would have been to plead such payment or have satisfaction entered on the record.[192]

§ 331. Illegality of Cause of Action.

An apparent exception to the rule stated in the preceding section is that in some jurisdictions the courts exercise the power to open or vacate judgments in cases where the consideration on which they are founded is tainted with illegality. Usury has been considered a good ground for calling this power into operation.[193] But the general rule is wise and salutary, and exceptions of this kind should not be received with any degree of favor where the party objecting (as will usually happen) was not prevented from setting up the illegality as a defense to the action. In Georgia, it was held that a constitutional provision that the courts should not render or enforce any judgment for a demand founded on slave property as the consideration, did not

[190] Elder v. Bank, 12 Kans. 242.

[191] Baker v. Lukens, 85 Pa. St. 146.

[192] Council v. Willis, 66 N. Car. 359.

[193] Anderson's Appeal (Pa.), 1 Atl. Rep. 329; Fleming v. Jencks, 22 Ill. 475. But if usurious interest has been paid on a judgment-note after judgment has been entered on it, that does not make it necessary to open the judgment in order to give the debtor proper relief. The payment will be considered as an equitable payment on the judgment itself to the amount of the excess of interest, and the court may stay execution, as in any other case of alleged payment, until the facts can be ascertained and the just amount applied to the judgment. Shafer's Appeal, 99 Pa. St. 246.

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authorize them to vacate a judgment already rendered on such a demand.[194]

§ 332. Newly-discovered Evidence.

Where facts occur after judgment (or before judgment but after the time when the party can avail himself of them in the action) showing that the judgment ought not to be enforced, in whole or in part, relief may be given on account thereof, on motion to vacate the judgment, to order it satisfied, or to stay proceedings on it, according to the circumstances of the particular case.[195] But the party must be prompt and diligent. A judgment will not be vacated on the ground of newly-discovered evidence, when it appears that the defendant, knowing that the claim sued for was paid, and that there were receipts for its payment, yet neglected to appear and make efforts to procure evidence of the same.[196] And where a motion for a new trial has been overruled, on the ground that the newly-discovered evidence on which the application is based is not of sufficient importance for that purpose, the same evidence cannot be made the basis of a direct action to set aside the judgment.[197]

§ 333. Judgment on Reversed Judgment.

Where suit is brought in one state, say Colorado, on a judgment rendered by a trial court in another state, say Illinois, and judgment recovered thereon, and subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, is reversed, these facts, being properly brought before the court, constitute good ground for vacating the judgment in Colorado.[198] Similarly, where a judgment is entered on a warrant of attorney, and a transcript of it taken to another county, and afterwards the original

[194] Ransone v. Grist, 40 Ga. 241; Inman v. Jones, 44 Ga. 44; Bell v. Hanks, 55 Ga. 274.

[195] Cooley v. Gregory, 16 Wis. 303; Wells v. Wall, 1 Oreg. 295.

[196] Heathcote v. Haskins, 74 Iowa, 566, 38 N. W. Rep. 417.

[197] Mayor of New York v. Brady (N. Y.), 22 N. E. Rep. 237.

[198] Heckling v. Allen, 15 Fed. Rep. 196; Ætna Ins. Co. v. Aldrich, 38 Wis. 107.

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judgment is stricken off for cause, the judgment in the other county falls with it.[199] On analogous principles, when the defendant in a criminal case is tried, and a fine imposed on him, and judgment entered thereon for the amount of the fine and costs, and afterwards the governor remits the fine, the court should, on motion, vacate the judgment as to the fine, leaving it subsisting as to the costs.[200]

§ 334. Statutory Grounds for Vacating Judgments.

Hitherto we have been considering what may be called the common law grounds for vacating judgments,—those causes which, independent of statute, are recognized as sufficient to call into play the inherent power of courts of record to grant relief of this nature. In many of the states, however, the matter is regulated by statutes, which empower the courts to set aside judgments for certain enumerated causes within a limited time. Thus in ten states, the laws authorize the court, in its discretion and upon such terms as may be just, to relieve a party from a judgment or order taken against him through fraud or through his "mistake, inadvertence, surprise, or excusable neglect," provided the application be made within a certain time after the rendition or entry of judgment (or "after notice thereof") usually six months or a year.[201] In three others (Ohio, Iowa, and Kansas), the purport of the statute is substantially the same, though expressed in somewhat different language, the causes specified being "unavoidable casualty or misfortune preventing the party from prosecuting or defending," "fraud practised by the successful party in obtaining the judgment," mistake of the clerk, death of a party, etc.[202] In Connecticut, the statute authorizes the vacation of a judgment for mistake, accident, or other reasonable cause.[203] The construction of these terms will mainly occupy our attention through

[199] Banning v. Taylor, 24 Pa. St. 297.

[200] Chisholm v. State, 42 Ala. 527.

[201] Rev. Stats. Wis. § 2832; Code of New York, § 724; Code Civil Proc. N. Car. § 274; Code Civil Proc. Cal. § 473; Rev. Stats. Ind. (1881), § 396; Rev. Laws Vermont (1880), § 1422; Genl. Stats. Nevada (1885), § 3217; Rev. Stats. Idaho (1887), § 4229; Code Civil Proc. Dak. § 143; Code Civil Proc. Colo. § 75.

[202] Rev. Stats. Ohio (1880), § 5354; Rev. Code Iowa (1880), § 3154; Compiled Laws Kans. (1885), § 4382.

[203] Genl. Stats. Conn. (1888), § 1126.

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the succeeding sections. But before passing on, it is necessary to observe that these statutes are exclusive with respect to the causes which they enumerate but not as to other possible causes. That is, if a party seeks relief on the ground of one of the causes specified in the statute, he must bring himself well within its terms and his application must be made within the time limited. But the fact that such and such causes are provided by statute does not prevent the courts from acting on other causes, just and reasonable in themselves and good at common law, and where an application is based on such a ground, outside the statute, it is not governed by the statute, in respect to the time of moving or otherwise.[204]

§ 335. Mistake.

The ground of "mistake" specified by these statutes is one upon which the decisions are not very numerous, inasmuch as it usually blends into that of "excusable neglect." Nor are the rulings so harmonious and consistent as to indicate the general rules in any satisfactory manner. In one case, the defendant's affidavit stated that it was necessary for him to make inquiries in different places in order to ascertain facts preparatory to his defense, and that in consequence of the multitude and character of his business engagements calling him away from home, he mistook the time within which he was to answer. The application being made with due diligence, and merits being shown, it was held that the judgment by default against him should be vacated.[205] On the other hand, an affidavit that the party defaulted mistook the court in which his case was pending does not show sufficient ground for setting aside the judgment.[206] But where the default was shown to have been caused by the ignorance of the defendant and his becoming confused between a civil and a criminal action touching the same subject-matter and pending at the same time, this was considered a sufficient excuse.[207] In an action to set

[204] Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. Rep. 842; Cowles v. Haynes, 69 N. Car. 406; Bond v. Epley, 48 Iowa, 600. See People v. O'Connell, 23 Cal. 281.

[205] Johnson v. Eldred, 13 Wis. 482.

[206] Robertson v. Bergen, 10 Ind. 402.

[207] Bertline v. Bauer, 25 Wis. 486.

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aside a judgment on the ground of mistake, if the complaint fails to make explanation of the mistake or the causes which produced it, it fails to set forth facts sufficient to constitute a cause of action.[208] The mistake which will justify this relief may also be the mistake of the *court*. But "wherever it may be found that inadvertence or mistake is held to be a ground for setting aside a judgment, it will be noticed that it is not a mistake of the law, or an inadvertent conclusion by the court as to what the law is, but a mistake or inadvertence in doing something *not intended* to be done."[209] And where the judgment entered on the journal is different from what was intended by the court, but is shown to be such as *ought* to have been rendered, it will not be vacated or modified as entered by mistake.[210]

§ 336. Surprise.

Under a statute which empowers the court, within a year after notice of a judgment, to relieve a party therefrom on the ground of "surprise," the fact that the party was surprised by a ruling of the court, refusing to continue the cause on his motion, is not sufficient.[211] It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case should be continued or not pressed, or not brought to trial,[212] though that is also a kind of fraud. In a recent case in West Virginia, the facts were as follows: An action was brought in 1875 in the county court, and two years later it was transferred to the circuit court, no order except continuances being made in it after such transfer. The judge of the circuit court could not preside at the trial, and in 1887 the plaintiff, in the absence of the defendant and his counsel, caused a special judge to be elected, and, without the knowledge of the defendant, the case was tried, and a verdict and judgment rendered for the plaintiff. The defendant, being notified

[208] Douglass v. Brooks, 38 Cal. 670.

[209] Cooper v. Duncan, 20 Mo. App. 355.

[210] Murphy v. Swadner, 34 Ohio St. 672.

[211] Breed v. Ketchum, 51 Wis. 164, 7 N. W. Rep. 550. See Winter v. State, 18 Ga. 275.

[212] See, *supra*, § 322.

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of such judgment, moved the court to set the same aside because of the facts above stated, and upon his affidavit alleging surprise and the full payment of the debt sued on, the circuit court set aside the judgment and awarded the defendant a new trial. In this, it was held there was no error.[213] So again, where the respondent to a petition for a writ of prohibition files a demurrer and answer, and the demurrer is overruled, and judgment absolute given against him on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the judgment, for surprise, will be granted.[214]

§ 337. Casualty or Misfortune.

As we have already stated, it is only in three states that "unavoidable casualty or misfortune preventing the party from defending or prosecuting" is specifically named as a ground for vacating judgments. Yet the decisions under this clause are of general importance. For it cannot be doubted that failure to appear in consequence of an unavoidable casualty or misfortune would be a case of "excusable neglect" within the statutes in other states. An affidavit that the defendant was prevented from being present at the trial by an unavoidable railroad accident, shows a sufficient ground for vacating a judgment against him on default, if it appears that he has a good defense.[215] But that the party wrote to an attorney to appear for him, though without disclosing his defense, and had no knowledge that his letter was not delivered to the attorney until after the judgment was rendered and the court had adjourned, is not a sufficient excuse.[216] That the defendant was of unsound mind and therefore incompetent to make an intelligent defense to the action, is such a casualty or misfortune as will authorize the court to vacate a judgment against him.[217] If a party is deprived of the opportunity to

[213] Bennett v. Jackson, (W. Va.) 11 S. E. Rep. 734.

[214] Heilbron v. Campbell (Cal.), 23 Pac. Rep. 1032.

[215] Omro v. Ward, 19 Wis. 232.

[216] School District v. Lovejoy, 16 Fed. Rep. 323.

[217] Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. Rep. 556; 3 S. W. Rep. 138.

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interpose a meritorious defense by being detained as a convict in the penitentiary, the court may, on a proper application after his release, open the default and vacate the judgment.[218] But mere ignorance of the English language is not a sufficient ground for such relief, if the defendant knew that a suit had been commenced against him.[219]

§ 338. Sickness of Defendant.

In some of the states, it is held that the illness of a party, occurring on or continuing through the day of trial, and so severe as to confine him to his house and prevent him from attending the court and trying his suit, is such an "unavoidable casualty or misfortune" as entitles him to have the judgment against him set aside.[220] And in other states, this is considered a case of "excusable neglect."[221] But in some few jurisdictions there is a manifest reluctance to admit sickness as a sufficient excuse. In Georgia, a motion to set aside a judgment by default, on the ground that the defendant was sick when it was rendered and could not put in his plea, was overruled, no reason being shown why the plea was not filed before the trial term.[222] And in Indiana, the latest rulings decide that a judgment should not be vacated because the defendant was too sick to be present at the trial, as he might have appeared by attorney.[223] This seems to be the doctrine also in Illinois.[224] In one case the defendant showed that he was confined to his house, during the pendency of the action, by a wound in the foot, but the court refused to open the judgment.[225] The sickness of a member of the defendant's family may be a ground upon which the judge may grant a continuance, but it is not a reason for setting aside a default.[226]

[218] Bonnell v. R. W. & O. R. Co., 12 Hun, 218.

[219] Heisterhagen v. Garland, 10 Mo. 66.

[220] Gheer v. Huber, 82 Kans. 319, 4 Pac. Rep. 290; Luscomb v. Maloy, 26 Iowa, 444.

[221] Sage v. Matheney, 14 Ind. 369; Flanagan v. Patterson, 78 Ind. 514; Monroe v. Paddock, 75 Ind. 422; Depriest v. Patterson, 85 N. Car. 376; Goodhue v. Meyers, 58 Tex. 405.

[222] Cannon v. Harrold, 61 Ga. 158.

[223] Jonsson v. Lindstrom, 114 Ind. 152, 16 N. E. Rep. 400.

[224] Shaffer v. Sutton, 49 Ill. 506; Edwards v. McKay, 78 Ill. 570.

[225] Gardenhire v. Vinson, 39 Ark. 270.

[226] Skinner v. Bryce, 75 N. Car. 287.

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§ 339. Sickness of Counsel.

It is held by several very respectable authorities that the illness of defendant's counsel, so severe as to prevent him from appearing and trying the case, is a good ground for vacating the judgment.[227] This, however, has been fairly denied.[228] It seems reasonable to hold that such an excuse would not be sufficient if the party had any opportunity to retain other counsel, or otherwise to escape the default or verdict. But if the attorney's illness was so sudden that there was no time to employ other counsel, or if it was unknown to the defendant, or he was unable to act in the matter, or no one was present to ask for a continuance, it would be manifestly unjust to visit the misfortune upon the defendant who was guilty of no carelessness or lack of diligence. And indeed the cases hold that if *both* the attorney and the defendant were sick, whereby the former was prevented from attending to the case and the latter was prevented from retaining other counsel, the judgment should be vacated.[229] Whether the illness or death of a member of the attorney's family occurring at such a juncture as to draw him away from the case, is a sufficient ground for relief, is an unsettled question.[230] But without doubt it should be decided on the lines above laid down with respect to the counsel himself. In a case where the defendant employed a prominent attorney, who died three weeks before the return term, and whose death was conspicuously noticed in the newspapers, and the defendant then neglected to employ other counsel, and suffered a default, it was held that he was not entitled to have the judgment vacated.[231]

§ 340. Excusable Neglect.

The "excusable neglect" of the defendant is specifically mentioned, in the statutes of several states, as one of the grounds upon which

[227] Wilmarth v. Gatfield, 1 How. Pr. 52; Bristor v. Galvin, 62 Ind. 352; Stout v. Lewis, 11 Mo. 438.

[228] Clark v. Ewing, 93 Ill. 572; McFarland v. White, 13 La. Ann. 394.

[229] Harvey v. Wilson, 44 Ind. 231; Goodhue v. Meyers, 58 Tex. 405.

[230] Compare Powell v. Washington, 15 Ala. 803, with Stout v. Lewis, 11 Mo. 438.

[231] Kivett v. Wynne, 89 N. Car. 39.

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judgments may be set aside.[232] And under this designation may be classed the unavoidable absence of the party. Thus where, on the second day of the term, the defendant in a suit in which no answer had yet been put in was compelled to appear before the grand jury, and was still before them when the court adjourned at a time earlier than usual, and did afterwards file his answer with the clerk on the same day, it was held that he was entitled to have a judgment by default rendered against him on the said second day set aside.[233] So also where the defendant was necessarily absent in the actual military service of the United States;[234] and so where his failure to appear was on account of his compulsory attendance on the federal court elsewhere.[235] A default will be set aside when the defendant relied on the assurance of a co-defendant and of competent counsel that the co-defendant's answer was a perfect defense and would protect both;[236] or that he need not trouble himself about the joint obligation, as the other makers would pay it, his name having been forged;[237] or where he relied on the statement of the plaintiff's assignor as to the purpose of the suit.[238] But the fact that the defendant supposed a summons which was served on him to be a paper in another cause pending between himself and the plaintiff, and for that reason took no measures to answer it, is not excusable neglect.[239] However, where the officer did not read or give a copy of the summons to the defendant, but told him it was a subpoena for him as a witness in a case pending in another court than the one from which the summons issued, and the defendant did not learn the truth until too late, this was held a sufficient excuse.[240] If the party's negligence is without excuse or justification, he must suffer the consequences.[241] And it is gross negligence to pay no attention to an action for eighteen months after service of process.[242] In a case in North Carolina, it appeared

See Boyle v. Solstien (Cal.), 16 Pac. Rep. 898.

[232] *Supra*, § 334. See Egan v. Rooney, 38 How. Pr. 121. And see Keith v. McCaffrey, 145 Mass. 18, 12 N. E. Rep. 419.

[233] Frazier v. Bishop, 29 Miss. 447.

[234] Piper v. Aldrich, 41 Mo. 421.

[235] Tullis v. Scott, 38 Tex. 537.

[236] Wicke v. Lake, 21 Wis. 410.

[237] Rowland v. Jones, 2 Heisk. 321.

[238] Birch v. Frantz, 77 Ind. 199.

[239] White v. Snow, 71 N. Car. 232. See State v. O'Neil, 4 Mo. App. 221.

[240] Hite v. Fisher, 76 Ind. 231.

[241] Brand v. Stafford, 28 La. Ann. 51.

[242] Grootemaat v. Tebel, 39 Wis. 576.

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that the defendant had subpœnaed witnesses and supposed they would be present; he had also retained counsel and fully informed him of his defense; he thought his own presence at the trial would not be necessary, and therefore did not attend. But the witnesses failed to appear, and there was no one to ask for a continuance, wherefore a judgment was taken against him. The court held that his negligence was inexcusable and the judgment should not be opened.[243] Nor is it a case of excusable neglect when the only reason for not filing an answer in time was that the peculiar nature of the case required more than the usual time in the preparation of an answer and the attorney could not give it his undivided attention.[244] A verdict and judgment will not be set aside on the ground that the defendant has been prevented, by a mistake and without fault, from being represented at the trial and making his defense, when the defense which he sets up in the affidavits in support of his motion is entirely new and not disclosed by the original pleadings.[245]

§ 341. Negligence of Attorney.

In a majority of the states, the courts have steadily refused to set aside a judgment on the sole ground of the neglect, carelessness, or mistake of the attorney for the party against whom it was rendered. The act or omission of the attorney is the act or omission of the client, and no negligence will be excusable in the former which would not be excusable in the latter.[246] This view has recently found expression in a case in Kansas, of which the circumstances

[243] Waddell v. Wood, 64 N. Car. 624.

[244] Bailey v. Taafe, 29 Cal. 422.

[245] Kehler v. New Orleans Ins. Co., 23 Fed. Rep. 709.

[246] Babcock v. Brown, 25 Vt. 550, 60 Am. Dec. 290; Davison v. Heffron, 31 Vt. 687; Burke v. Stokely, 65 N. Car. 569; Foster v. Jones, 1 McCord, 116; Tarrant Co. v. Lively, 25 Tex. Supp. 399; Welch v. Challen, 31 Kans. 696, 3 Pac. Rep. 314; Kreite v. Kreite, 93 Ind. 583; Spaulding v. Thompson, 12 Ind. 477, 74 Am. Dec. 221; Jones v. Leech, 46 Iowa, 186; Niagara Ins. Co. v. Rodecker, 47 Iowa, 162; Ordway v. Suchard, 31 Iowa, 481; State v. Elgin, 11 Iowa, 216; Bosbyshell v. Summers, 40 Mo. 172; Austin v. Nelson, 11 Mo. 192; Gehrke v. Jod, 59 Mo. 522; Kerby v. Chadwell, 10 Mo. 392; Matthis v. Cameron, 62 Mo. 504; Merritt v. Putnam, 7 Minn. 493, (Gil. 399); Smith v. Tunstead, 56 Cal. 175; People v. Rains, 23 Cal. 127; Ekel v. Swift, 47 Cal. 620; Harper v. Mallory, 4 Nevad. 447.

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were so unusually severe as to deserve somewhat detailed mention. It appeared that the plaintiff resided in Kansas and the defendants in another state; that the defendants employed an attorney in Kansas to file an answer and attend to the case; that the attorney never filed such answer, but, before the time for filing it had expired, he left the state, and never returned, and no answer was ever filed in the case; that after more than four months had elapsed since the defendants made default by not filing an answer, a judgment was rendered against them in accordance with the prayer of the plaintiff's petition; that the defendants had no knowledge of the negligence of their attorney, or of the rendition of such judgment, until a long time after both had occurred; that the attorney was insolvent; and that the defendants had a good defense to the action. It was held that neither of these circumstances, nor all combined, could be considered such an "unavoidable casualty or misfortune preventing the party from defending" the action, that the defendants could have the judgment vacated and be let in to defend.[247] It is generally held that the attorney's neglect to file a plea in the action will not justify the setting aside of a judgment by default.[248] But a case in New York holds that where the defendant's counsel omitted to enter a plea, and the neglect of the client to examine the records to see whether his plea was on file was excusable, there was good ground to open the judgment.[249] Where a party had time to give his personal attention to the defense of the action before a default was entered, and he failed to do so, it was held that the fact that counsel, whom he supposed he had engaged to make his defense, omitted to do so, did not make it imperative on the court to set aside the default.[250] Nor will a default be vacated because the attorney miscalculated the time within which he was required to answer.[251] Nor because, after preparing a demurrer, he failed to file it in time, in consequence of a mistake on his part as to the day on which the time

[247] Welch v. Challen, 31 Kans. 696, 3 Pac. Rep. 314.

[248] Austin v. Nelson, 11 Mo. 192; Kerby v. Chadwell, 10 Mo. 392; Harper v. Mallory, 4 Nevad. 447; Tarrant Co. v. Lively, 25 Tex. Supp. 399; Jones v. Leech, 46 Iowa, 186.

[249] Clark v. Lyon, 2 Hilt. 91.

[250] Schroer v. Wessell, 89 Ill. 113.

[251] Smith v. Watson, 28 Iowa, 218.

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for filing would expire.[252] Nor will the client be relieved from the operation of a judgment rendered by reason of the inexcusable neglect of his attorney in so conducting the case that it was defaulted, although there may have been a sufficient defense.[253]

On the other hand, it is held in a few states (and notably in New York) that the negligence of the attorney is a sufficient ground for setting aside the judgment, provided the client himself was not directly in fault.[254] A party may be relieved from a judgment obtained against him by reason of the negligence, ignorance, or fraud of his attorney, without compelling him to resort to an action against the attorney or show the latter to be insolvent.[255] And even in the states which generally adhere to the stricter rule, there is a disposition to relax it somewhat under exceptional circumstances. Thus, where an attorney overlooked the case on the trial-calendar, by reason of its being placed thereon under a title calculated to mislead, and the case was called and defaulted, and there was a meritorious defense, it was held that the default and judgment rendered thereon might be set aside, application being made at the same term.[256] So where it was made to appear by affidavit of defendant's attorneys that the reason why they they did not appear and file an answer was on account of an accidental misplacement of the petition and notice handed to them by the plaintiff, whereby the case was overlooked by them in examining their papers at the commencement of the term, in order to ascertain what cases they had to attend, it was considered that setting aside the default was no abuse of discretion.[257] So it is

[252] People v. Rains, 23 Cal. 127.

[253] Brumbaugh v. Stockman, 83 Ind. 583.

[254] Nash v. Whetmore, 33 Barb. 159; Curtis v. Ballagh, 4 Edw. Ch. 639; Clark v. Lyon, 2 Hilt. 91; Phillips v. Hawley, 6 Johns. 129; Tripp v. Vincent, 8 Paige, 180; Millspaugh v. McBride, 7 Paige, 509, 34 Am. Dec. 360; Meacham v. Dudley, 6 Wend. 514. And see also Thompson v. Goulding, 5 Allen, 82; Bradford v. Coit, 77 N. Car. 72; Griel v. Vernon, 65 N. Car. 76; Hanson v. Michelson, 19 Wis. 498; Babcock v. Perry, 4 Wis. 31. But the mere fact that the defendant wrote to an attorney requesting him to enter an appearance for him, which the attorney failed to do, in consequence of which judgment was entered by default, does not make out such a case of "excusable neglect" as would justify the court in vacating the judgment. Burke v. Stokely, 65 N. Car. 569.

[255] Sharp v. Mayor of New York, 31 Barb. 578.

[256] Allen v. Hoffman, 12 Ill. App. 573.

[257] Ordway v. Suchard, 31 Iowa, 481.

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proper to vacate an order of dismissal, on motion of the plaintiff's attorney, supported by his statement that he had consented to the dismissal improvidently, and accompanied by his offer to refund the costs paid by the defendant after notice of the motion.[258] The negligence of any person who is delegated or employed by the attorney to attend to the case or take his place is of course imputable to the attorney himself, and will not be excusable in the one unless it would have been in the other.[259] The attorney for the defendants in a suit, being necessarily absent at the return term, employed another attorney to appear for him and gave him the name of the case as "Webster v. Harris & Williams." The case was entered upon the docket "Webster v. McMahon etc." The substitute, not knowing the cases to be the same, did not enter an appearance, and judgment was taken by default. The court refused to set it aside.[260]

§ 342. Misunderstanding of Counsel.

A misunderstanding between the defendant in an action and an attorney, as to whether the latter had been retained or not, in consequence of which the judgment goes by default, will be good ground, provided the mistake was genuine, for setting aside the judgment.[261] So where, in consequence of a misunderstanding between a defendant and his attorney, attributable to the negligence of a third person, the real defense is not interposed, and he does not discover the fact until after judgment has been recovered against him, it is no abuse of discretion to vacate the judgment.[262] So in a case where the defendant in a judgment by default applied to the court to open the same, and showed in his affidavit that he believed the case was being defended in his behalf by the attorneys who represented his co-defendants, and the record entries in the early stages of the cause showed that those attorneys appeared for "the defendants" generally, and

[258] Benwood Co. v. Tappan, 56 Miss. 659.

[259] Davison v. Heffron, 31 Vt. 687.

[260] Webster v. McMahan, 13 Mo. 582.

[261] Panesi v. Boswell, 12 Heisk. 323; McKinley v. Tuttle, 84 Cal. 235; Beatty v. O'Connor, 106 Ind. 81, 5 N. E. Rep. 880.

[262] Dixon v. Lyne (Ky.), 10 S. W. Rep. 469.

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there was shown to be a good defense on the merits, it was held that good cause appeared for opening the judgment.[263]

§ 343. Unavoidable Absence of Counsel.

Where, in the unavoidable absence of the defendant's attorney (as, when he is engaged in trying a case in another court, which was begun before the plaintiff's case was called, and is unexpectedly protracted) a judgment is entered for the plaintiff, if all appears to have been done in good faith, and the defendant could not proceed without his counsel, and there is a meritorious defense, the cases generally hold that this will be good ground for vacating the judgment.[264] But in Georgia the courts consider that the fact that counsel had professional business in two justice's courts on the same day, and was absent from one, believing he had leave of absence to attend to business in the other, is no cause for setting aside a judgment rendered during his absence, when it appears from the magistrate's return that he neither had leave of absence nor any sufficient reason to think he had.[265]

§ 344. Fraud of Attorney.

If an attorney corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So also, if a plaintiff is guilty of so influencing the attorney of the defendant by the payment of money without the knowl-

[263] Kupferle v. Merchants' Nat. Bank, 32 Ark. 717. See a similar case, Heaps v. Hoopes. 68 Md. 383, 12 Atl. Rep. 882.

[264] McArthur v. Slauson, 60 Wis. 293, 19 N. W. Rep. 45; Beall v. Marietta, 45 Ga. 28; Stout v. Lewis, 11 Mo. 438. In a case in Indiana, the defendant moved to set aside a default and judgment against him, and filed affidavits in support of his motion. The affidavits disclosed that he had employed counsel to defend for him, and had caused a subpœna to issue for his witnesses; that he had been prevented from attending court himself by the dangerous illness of his wife; and that his attorney, being provost-marshal of the district, had been so engaged in enforcing the draft that he had been unable to attend the court, and had neglected to speak to any other attorney to represent him in the case. The affidavits also disclosed a meritorious defense to the action. It was *held* that the motion to set aside the judgment should have been granted. Hill v. Crump, 24 Ind. 291.

[265] Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. Rep. 921.

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edge or consent of his client, as to make it the interest of such attorney that the plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any opposition to the rendition of the judgment in favor of the plaintiff, a new action may be maintained by the defendant to set aside such judgment and open the case for a new and fair hearing.[266]

§ 345. Misinformation as to Time of Trial.

Where the affidavit in support of a motion to set aside a default shows that the defendant and his counsel had been in attendance upon the court until the announcement was made by the judge that the case would not be tried at that term, and that upon the faith of this statement they left the court, after which a judgment by default was entered, and the affidavit also discloses a meritorious defense, there will be good cause for opening the default.[267] Where defendant and his attorney both resided out of the county, and the latter overlooked the fact that the law had been changed so as to fix the term of court at an earlier date, and relied on the assurance of the judge at a former term that nothing would be done in the case without notice to him, it was held that there was no abuse of discretion in setting aside the default.[268]

Part VII. Practice on Vacating Judgments.

§ 346. Notice of Application.

Where the power to vacate judgments depends upon such statutory provisions as we have been considering, it is generally requisite that notice of the application be given to the other party. But at common law this is not always necessary. It is not irregular for a

[266] Haverty v. Haverty, 35 Kans. 438, 11 Pac. Rep. 364; Beck v. Bellamy, 93 N. Car. 129.

[267] Ratliff v. Baldwin, 29 Ind. 16, 92 Am. Dec. 330; Cruse v. Cunningham, 79 Ind. 402; Sanders v. Hall, 37 Kans. 271, 15 Pac. Rep. 197.

[268] Jean v. Hennessey, 74 Iowa, 348, 37 N. W. Rep. 771; Buena Vista Co. v. Railroad, 49 Iowa, 657.

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court to set aside *during the term* a judgment rendered by it, without notice to the defendant. It cannot be assumed that the want of notice was prejudicial to him, the court having authority to set aside such judgment despite any objections he could make.[269] And in one case this was done, without notice, although the docket had been closed, the plaintiff's counsel had left the court, and a similar motion had been previously refused.[270] But after the term the case is different. Then the parties are no longer before the court, actually or constructively, and a judgment cannot be set aside on motion without notice to the adverse party or his representatives.[271] The notice should in general be addressed to and served upon the party himself. But it is held that the authority of an attorney so far continues after final judgment that service on him of notice of a motion to vacate the judgment for fraud in obtaining it will bind his client.[272] And no

[269] Smith v. Robinson, 11 Ala. 270; Rich v. Thornton, 69 Ala. 473; Desribes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Lake v. Jones, 49 Ind. 297; Burnside v. Ennis, 43 Ind. 411; Yancy v. Teter, 39 Ind. 305.

[270] Allison v. Whittier (N. Car.), 8 S. E. Rep. 338.

[271] Ingram v. Belk, 2 Rich. 111; Martindale v. Brown, 18 Ind. 284; Smith v. Chandler, 13 Ind. 513; Lake v. Jones, 49 Ind. 297; Burnside v. Ennis, 43 Ind. 411; Yancy v. Teter, 39 Ind. 305; Lane v. Wheless, 46 Miss. 666; Coleman v. McAnulty, 16 Mo. 173; Nuckolls v. Irwin, 2 Nebr. 60; Hettrick v. Wilson, 12 Ohio St. 136, 80 Am. Dec. 337.

[272] Beach v. Beach, 43 N. W. Rep. 701. In this case the supreme court of Dakota discussed the point in the following manner: "Did the court have jurisdiction of the plaintiff for the purpose of determining said motion? The general rule undoubtedly is that the power of an attorney under a general retainer expires when judgment is finally rendered, for usually there no longer exists any occasion for his services. The judgment is the final determination of the matters about which the attorney was retained. Macbeath v. Cook, 1 Moore & P. 513. But this is not so for every purpose, for at the common law the attorney's power was supposed to continue a sufficient length of time after entry of judgment to permit him, where successful, to issue execution, and until such action as might be necessary for the collection and satisfaction of the judgment. Gilb. Ex'ns, 93. This rule has become a part of the statute law of this territory to such an extent that the attorney of record for the successful party may at any time collect the judgment and execute satisfaction thereof. Section 5107, Comp. Laws. So after final judgment, if appeal be taken or writs of error brought, the employment of the attorney of record, in the absence of special notice indicating the contrary, is presumed to have continued, and the statute provides that notice shall be served upon them in such case. Section 5336, Id. This was also the rule before the Code. If the judgment be entered irregularly, shall not the attorney whose duty it was to enter it properly be served with notice of motion that it be corrected? It would seem that he more than any

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notice to the adverse party of such a motion is necessary when he is present by his counsel at the time the motion is made.[273] If the party is dead, his personal representative should receive the notice. The proper practice is to take an order reciting the judgment, the grounds relied on, the death of the party, and the qualification of the representative, and calling upon him to show cause why the judgment complained of should not be set aside, and this order should be served as others are.[274] Where a judgment which had been standing for several terms, and upon which an execution had issued, resulting in the sale of defendant's land, had been set aside on motion of the defendant, it was held that no notice of a motion on the part of the plaintiff to revoke the order setting the judgment aside, and to reinstate the same and the execution on the docket, was necessary.[275]

§ 347. Affidavit of Merits.

Where application is made to open a judgment, under the statutes for that purpose, it must be accompanied by an affidavit setting forth a good defense on the merits, and showing that the default occurred through mistake, surprise, or other statutory ground, and stating the facts constituting such mistake, surprise, etc., and also showing due diligence.[276] And independently of statutes, it has always been the

other person, even the party himself, is the one that ought to be notified; for, having been the attorney of record, and conducted the matters to a conclusion, he is best able to resist any attack upon it. These reasons apply with quite as much force when, as in this case, it is sought to set the judgment aside for fraud and want of jurisdiction in the court rendering it. Lusk v. Hastings, 1 Hill, 656, is analogous in many respects; and see, also, Doane v. Glenn, 1 Colo. 454. In Lee v. Brown, 6 Johns. 132, it was directed that an order to show cause why a judgment that had been entered seven years before should not be satisfied of record should be served on the attorney of record at the time the judgment was entered, the plaintiff in such judgment being absent from the state. If doubt remained of the sufficiency of the service of the notice, it would be dissipated by the admission of plaintiff's attorney that he had received a communication from plaintiff personally informing him substantially that he had forwarded affidavits to him to be used in resisting the motion, and he did use them in opposition thereto. We conclude that the first assignment of error, therefore, is insufficient, and must be overruled."

[273] Hill v. Crump, 24 Ind. 291.

[274] Grier v. Jones, 54 Ga. 154.

[275] Perry v. Pearce, 68 N. Car. 367.

[276] Van Horne v. Montgomery, 5 How.

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practice of our courts, from the very earliest times, on an application to open or set aside a judgment, to require some sort of showing, by affidavit or otherwise, that the judgment is unjust as it stands and prejudicial to the party complaining, and that he has a meritorious defense.[277] It may therefore be regarded as a universal requirement. But the rule is subject to a few well-defined exceptions in peculiar cases. Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits.[278] So the rule does not apply where it was grossly irregular for the default to have been entered;[279] nor where the defendant complains of irregularity amounting to denial of his substantial rights.[280] But in all cases where the application is not based upon want of jurisdiction or irregularity, but upon something presented as an *excuse* by the defendant, he must make an affidavit of merits. And nothing else can take its place and serve its purpose. An answer to the complaint, already on file or which the defendant proposes to file, is not equivalent to an affidavit of merits, although it discloses a defense apparently complete and meritorious, and although it is verified.[281] In several of the states the authorities hold that this affidavit is not sufficient if it merely states that the defendant *has* a meritorious defense to the action; but it must contain a full statement of the *facts* constituting the proposed defense, in order that the court may judge whether it is a good and meritorious defense or

Pr. 238; Hunt v. Wallis, 6 Paige, 371; Draper v. Bishop, 4 R. I. 489; Richardson v. Finney, 6 Dana, 319; Foster v. Martin, 20 Tex. 118; Cook v. Phillips, 18 Tex. 81; Watson v. Newsham, 17 Tex. 437; Frost v. Dodge, 15 Ind. 139; Dale v. Bugh, 16 Ind. 233; Lake v. Jones, 49 Ind. 297; Grubb v. Crane, 5 Ill. 153; Lamb v. Nelson, 34 Mo. 501; Palmer v. Russell, 34 Mo. 476; Adams v. Hickman, 43 Mo. 168; Butler v. Mitchell, 15 Wis. 355; People v. Rains, 23 Cal. 127; Bailey v. Taaffe, 29 Cal. 422; Reese v. Mahoney, 21 Cal. 305; Parrott v. Den, 34 Cal. 79.

[277] Miller v. Alexander, 1 N. J. Law, 400.

[278] Rice v. Griffith, 9 Iowa, 539; Branstetter v. Rives, 34 Mo. 318.

[279] Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

[280] Walla Walla Printing Co. v. Budd, 2 Wash. Ter. 336, 5 Pac. Rep. 602.

[281] Mowry v. Hill, 11 Wis. 146; Jones v. Russell, 3 How. Pr. 324. But see Omro v. Ward, 19 Wis. 232. In Nebraska, when a defendant files a motion to set aside a judgment rendered by default, and for leave to answer, he must accompany his motion with his proposed answer, duly verified. Spencer v. Thistle, 13 Nebr. 227, 13 N. W. Rep. 214.

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not.[283] But in some other states it is considered that the affidavit of merits is sufficient if it sets forth that the defendant has fully and fairly stated the case to his counsel and that he is advised by him, and believes, that he has a full, perfect, and meritorious defense to the action.[283] But an affidavit thus framed must allege that he has stated the "case" or "the facts of the case" to his counsel; if it merely shows that he has stated the "facts of his defense" to the counsel, it will not be sufficient.[284] And it seems that this manner of averring merits will not answer at all in chancery. Such an affidavit is not sufficient to authorize a court of equity to set aside a regular default or decree, but the affidavit should state the substance of the defense, or it should be stated under oath in some form, so that the court may judge whether it is meritorious.[285] The affidavit should be made by the applicant himself, unless good reasons exist for having it made by another person.[286] It may be made by an attorney if he has personal knowledge of the facts to be sworn to in it.[287] But the affidavit of an attorney, that from his client's statement of the case to him he believes that the client has a good and substantial defense upon the merits, is not sufficient.[288] Nor is an affidavit which states that from an examination of the defendant's case, so far as he has made such examination, he verily believes that it is better than the plaintiff's.[289] An affidavit of an attorney, upon information and belief, as to a defense on the merits, but containing no statement of the facts on which the same is based, and alleging as an excuse an unsuccessful search for the papers by a third person, who makes no affidavit to that effect, is insufficient.[290]

[283] Palmer v. Rodgers, 70 Iowa, 381, 30 N. W. Rep. 645; Lamb v. Nelson, 34 Mo. 501; Castlio v. Bishop, 51 Mo. 162; Foster v. Martin, 20 Tex. 118; Roberts v. Corby, 86 Ill. 182; Frost v. Dodge, 15 Ind. 139; Railroad v. Gates, 23 Ind. 238; Goldsberry v. Carter, 28 Ind. 59.

[283] Burnham v. Smith, 11 Wis. 258; Woodward v. Backus, 20 Cal. 137; Reidy v. Scott, 53 Cal. 69; Francis v. Cox, 33 Cal. 323.

[284] Morgan v. McDonald, 70 Cal. 32, 11 Pac. Rep. 350; Burnham v. Smith, 11 Wis. 258.

[285] Goodhue v. Churchman, 1 Barb. Ch. 596; Winship v. Jewett, 1 Barb. Ch. 173; McGaffigan v. Jenkins, 1 Barb. 31.

[286] Bailey v. Taaffe, 29 Cal. 422.

[287] Francoviz v. Smith, 35 Minn. 278, 28 N. W. Rep. 508.

[288] Stilson v. Rankin, 40 Wis. 527.

[289] Bailey v. Taaffe, 29 Cal. 422.

[290] Hitchcock v. Hertzer, 90 Ill. 542.

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§ 348. Meritorious Defense must be shown.

The defense, it is said, must be *meritorious*. By this we mean that it must be substantial and not merely technical, fair and honest and not unconscionable. It is considered in Pennsylvania that an application to open a judgment is in effect a demand for equitable relief, and the applicant must make out a case which would justify a chancellor in entering a decree.[291] Where the complaint, in an action to set aside a judgment, does not attempt to show that the plaintiff had or has any valid defense to the original action, a demurrer to the answer, whether good or bad, is properly overruled. "A bad answer is sufficient for a bad complaint."[292] In another case, where it was proposed to set aside a default and reinstate the case that the defendant might plead to the merits, and it appeared that substantially the same matters proposed to be pleaded had been determined against the defendant in a former litigation, it was held that the motion was properly denied.[293] But where a default has been taken against a person upon whom there was no service of process, and over whom the court acquired no jurisdiction, he is entitled to have the judgment annulled without showing a meritorious defense to the action.[294] A defendant who seeks to open a judgment which he has suffered voluntarily and under the advice of counsel, must show the court specifically in what his defense consists; general allegations will not suffice.[295] But on a motion to open a default the court will not determine absolutely whether the defense interposed will be sufficient at the trial, but merely see that it is not frivolous. If set up in good faith, and with a sufficient excuse for the party's negligence in not having presented it at the proper time, he will be let in to answer as of course.[296]

[291] Knarr v. Elgren (Pa.), 9 Atl. Rep. 875.

[292] Rupert v. Martz, 116 Ind. 72, 18 N. E. Rep. 381.

[293] Storey v. Weaver, 66 Ga. 296.

[294] Dobbins v. McNamara, 113 Ind. 54, 14 N. E. Rep. 887.

[295] Ellis v. Jones, 6 How. Pr. 296.

[296] Commissioners v. Hollister, 2 Hilt. 588.

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§ 349. Technical or Unconscionable Defense not Sufficient.

The privilege of vacating judgments is to be used only in the furtherance of justice, and a judgment should not be set aside unless it is unjust as it stands. Hence, if it is regular on its face, it will never be opened up merely for the purpose of letting in an unconscionable, dishonest, or purely technical defense.[297] That *usury* is to be regarded as a defense of this character is settled beyond question. The court will not open a judgment merely to allow the plea of usury to be set up, or, if it opens the judgment on other grounds, may forbid the defendant to interpose that defense.[298] In regard to a plea of the statute of limitations, there is room for more doubt. Some of the cases hold that such defense is not sufficient to justify the court in opening the judgment, at least if there is nothing to show that the debt is not still morally and honestly due.[299] Indulgence, it is said, should not be granted for the defendant's laches merely to enable him to deny the like indulgence to the laches of his adversary. In Ohio the decisions are that this plea is one not to be favored, and where an issue has been made up, or the defendant is in default, he will not be allowed to put in the plea of the statute, unless under peculiar circumstances.[300] But on the other hand, in some states it is held that the statute of limitations is a good and meritorious plea, that it is sufficient ground for opening the judgment, and that if the trial court refuses to set aside the judgment unless the defendant

[297] Parrott v. Den, 34 Cal. 79; Thatcher v. Haun, 12 Iowa, 303; Niagara Ins. Co. v. Rodecker, 47 Iowa, 162; Bank of Statesville v. Foote, 77 N. Car. 131; Mulhollan v. Scroggin, 8 Nebr. 202; Anderson v. Beebe, 22 Kans. 768; Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346); Pennington v. Gibson, 6 Ark. 447; Hazelrigg v. Wainwright, 17 Ind. 215; Marsh v. Lasher, 13 N. J. Eq. 253; Audubon v. Ins. Co., 10 Abb. Pr. 64; Bard v. Fort, 3 Barb. Ch. 632; Gay v. Gay, 10 Paige, 374; Gourlay v. Hutton, 10 Wend. 595.

[298] Farish v. Corlies, 1 Daly, 274; Lovett v. Cowman, 6 Hill, 226; Candler v. Pettit, 1 Paige, 427; Marsh v. Lasher, 13 N. J. Eq. 253; Morris v. Slattery, 6 Abb. Pr. 74; Grant v. McCaughin, 4 How. Pr. 216; Quincy v. Foot, 1 Barb. Ch. 496; Hazelrigg v. Wainwright, 17 Ind. 215.

[299] Pennington v. Gibson, 6 Ark. 447; Hawes v. Hoyt, 11 How. Pr. 454; Haines v. Lytle, 4 W. L. J. 1; Douglas v. Douglas, 3 Edw. Ch. 390.

[300] Sheets v. Baldwin's Admr., 12 Ohio, 120; Newsom's Admr. v. Ran, 18 Ohio, 240.

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will agree to waive this defense, it is a manifest abuse of discretion.[301] A set-off may perhaps be considered, in some instances, as a meritorious defense within this rule, but a judgment should not be opened to the prejudice of the plaintiff merely to enable the defendant to interpose a counter-claim which he may enforce by action, where there is no doubt as to the plaintiff's responsibility.[302] So again, the court will not open up a default to permit a defense of the statute of frauds to be made either by demurrer or plea, unless under special and peculiar circumstances.[303] In equity, a decree fairly and regularly obtained by default, for want of an answer, will not be set aside to let in a defense founded on a fraudulent speculation undeserving of the favor of the court.[304] But on the other hand, the plea of *res judicata* is not a technical but a meritorious defense. To prohibit the defendant from pleading a former judgment in bar of the present action, as a condition to lifting the default against him, is error.[305] And so, where the action is on a note, the defense that it was given for money lost in gaming is a defense to the merits, and should be allowed.[306] In California, it is said that the statement that the defense appears on the face of the complaint, shows it to be of a technical character merely and therefore insufficient.[307]

§ 350. Opening Judgment to admit Defense.

In Pennsylvania, the usual and favorite practice, upon a proper and timely application for relief against a judgment by confession or default, is to *open* the judgment, but without vacating it and without impairing its lien, and let the defendant in to a defense on the merits.[308] It is in the light of this statement that we are to understand the remark that to open a judgment is not to set it aside, and that when it is closed by the action of the court it takes its place as

[301] Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. Rep. 180; Mitchell v. Campbell, 14 Oreg. 454, 13 Pac. Rep. 190. See also Gourlay v. Hutton, 10 Wend. 595.

[302] Lahey v. Kingon, 22 How. Pr. 209.

[303] McCulloch v. Tapp, 4 West. L. M. 575.

[304] Parker v. Grant, 1 Johns. Ch. 630.

[305] Audubon v. Ins. Co., 10 Abb. Pr. 64.

[306] Ruckman v. Pitcher, 1 N. Y. 392; Bank of Kinderhook v. Gifford, 40 Barb. 659; Grant v. McCaughin, 4 How. Pr. 216.

[307] People v. Rains, 23 Cal. 127.

[308] Cochran v. Eldridge, 49 Pa. St. 356.

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if it had never been disturbed.[309] Thus, for example, a judgment entered on a warrant of attorney should be opened to let the defendant plead his discharge in bankruptcy, when he acts immediately upon notice.[310] On opening a judgment, in accordance with this practice, the judgment itself may be regarded as standing in the place of a declaration, and the entry of a *non pros.* for want of a declaration is irregular.[311] But the opening of the judgment leaves the burden and the mode of proof exactly the same as if the judgment had never been entered. Hence if the defendant pleads *non est factum* as to the instrument on which it was founded, the record of the judgment is not even *prima facie* evidence for the plaintiff.[312] When a judgment is thus opened, the defenses which may be set up are limited. For instance, it does not become subject to set-off generally. If the defendant has a valid claim against the plaintiff exceeding the amount of the judgment, he cannot recover a verdict for the excess. He may be permitted to attack the validity of the claim on which the judgment is founded, or the good faith of the transaction connected with the consideration, or to show subsequent payment of the debt or equitable discharge therefrom. But in some manner, either in law or equity, the subject-matter of defense must have attached to the judgment or the consideration on which it rests.[313] The defendant can urge defenses existing at the time of the rendition of the judgment, but not those accruing subsequently.[314] If a judgment be opened upon an affidavit of defense, and the defendant let in to a defense upon the merits, he will not, upon the trial, be permitted to take advantage of a technical exception to the form of action.[315] And, generally, the rules stated in the preceding section will apply to this manner of practice. So where a judgment on a note is opened, with leave to the defendant to defend on matters stated in his petition, he cannot set up a breach of contract not alleged in the petition.[316]

[309] Gloninger v. Hazard, 4 Phila. 354.

[310] Wise's Appeal, 99 Pa. St. 193; Adams's Appeal, 101 Pa. St. 471.

[311] Bush v. Monteith, 2 Week. Notes Cas. 112.

[312] West v. Irwin, 74 Pa. St. 258; Collins v. Freas, 77 Pa. St. 493.

[313] Beatty v. Bordwell, 91 Pa. St. 438.

[314] Curtis v. Slosson, 6 Pa. St. 265.

[315] Ekel v. Snevily, 3 Watts & S. 272, 38 Am. Dec. 758.

[316] Marsh v. Nordyke & Marmon Co. (Pa.), 15 Atl. Rep. 875.

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§ 351. Evidence.

In Georgia it is said that "a motion to set aside a judgment, like a motion to arrest it, must be based on some defect apparent on the face of the record. The two motions differ only in respect to the term in which each must be severally made." [317] But this is not the general rule or the general practice. Particularly when the proceeding is statutory, it is considered that the record may be attacked and contradicted, and the facts alleged as a reason for vacating the judgment may be established by any competent evidence. The court may hear any evidence which is calculated to aid it in reaching a conclusion, the rules of evidence not being so strictly adhered to as in the trial of an issue by a jury.[318] But the party must establish his right to such relief by clear and convincing proof.[319] Affidavits in support of the motion and in opposition thereto are admissible for either party, as well as oral testimony or depositions. But counter-evidence will not be heard in any form as to the matters alleged as constituting a defense to the original action.[320] In other words, upon a motion to set aside a judgment, the only issue is as to whether the judgment was entered fraudulently, irregularly, or improvidently, or through the "mistake, inadvertence, surprise, or excusable neglect" of the defendant, and whether the motion is made properly and in time. And to these points the evidence must be confined. The affidavit of merits cannot be contradicted. If it is inquired into at all, it is only to ascertain whether the facts stated in it, *assuming their truth*, constitute a good and meritorious defense. Those facts must of course be proved on the subsequent trial, but they are not in issue on the motion to vacate the judgment.

[317] Pulliam v. Dillard, 71 Ga. 598.

[318] Gay v. Grant (N. Car.), 8 S. E. Rep. 99; Shortz v. Quigley, 1 Binn. 222; McKinley v. Tuttle, 34 Cal. 235.

[319] Smith v. Black, 51 Md. 247.

[320] Buck v. Havens, 40 Ind. 221; Hill v. Crump, 24 Ind. 271; Pratt v. Keils, 28 Ala. 390; Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 53.

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§ 352. Imposition of Terms.

Since the opening or vacating of a judgment, in any case where an imputation of laches or inattention rests upon the party applying, is an act of grace and favor and is discretionary with the trial court, it has power to impose such terms as may be just and reasonable, as a condition to the granting of such relief, and its action in this respect will not be interfered with, unless for a gross and manifest abuse of discretion.[321] The most usual application of this power of imposing terms is the requirement that the party pay all previous costs in the action as a condition precedent to the opening of the judgment. Indeed this is so commonly done, in practice, as to have become almost a matter of course.[322] Yet it is not a legal necessity. It is equally in the discretion of the court, if it considers such action just and proper in the particular case, to omit this requirement. Thus an order vacating a judgment, on account of surprise or excusable neglect, need not require the payment of all costs as a condition precedent.[323] Another very common requirement is, that the party shall plead to the merits, or shall forbear to set up some particular defense which is considered unconscionable or purely technical. "No judgment ought to be opened without imposing terms which would forbid advantage to be taken of a mere technical error. A party has no right to a hearing after judgment, except for causes which touch the honesty and justice of the cause."[324] By referring to a former section,[325] the reader will see what species of defenses have been adjudged meritorious, within the meaning of this rule, and what technical or dishonest. Other conditions than those mentioned are less frequently employed, but generally

[321] Ensly v. Wright, 3 Pa. St. 501; McMurray's Heirs v. Erie, 59 Pa. St. 223; Huston Township Ins. Co. v. Beale, 110 Pa. St. 321, 1 Atl. Rep. 926; Fowble v. Walker, 4 Ohio, 64; Hovey v. Middleton, 56 Ill. 468; Mason v. McNamara, 57 Ill. 274; Young v. Bircher, 31 Mo. 136, 77 Am. Dec. 638; Magoon v. Callahan, 39 Wis. 141; Howe v. Coldren, 4 Nevad. 171.

[322] Howe v. Independence Co., 29 Cal. 72; Leet v. Grant, 36 Cal. 288; Bailey v. Taaffe, 29 Cal. 422; People v. O'Connell, 23 Cal. 281; Roland v. Kreyenhagen, 18 Cal. 455.

[323] Ryan v. Mooney, 49 Cal. 33. And see Robinson v. Merrill (Cal.), 22 Pac. Rep. 260.

[324] Bailey v. Clayton, 20 Pa. St. 295.

[325] *Supra*, § 349.

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the terms to be imposed rest in the discretion of the court, as it may be guided by the circumstances of the individual case. In a recent litigation it was held that, upon the facts of the case, an order granting leave to answer upon condition that the defendant consent to the appointment of a receiver of the property in question, pending the trial and determination of the issues raised by the answer, was not an abuse of discretion.[326] If it seems proper and necessary, the court may require the defendant to give security for the payment of the sum that may ultimately be recovered against him, or may order that the judgment itself stand as security. But where, upon an application by non-resident defendants for an order opening a judgment taken against them by default and for leave to answer, they presented a meritorious case for relief, but the court required, as a condition, that they file a bond with resident sureties, to be approved by the court, in a sum sufficient to secure the payment of the amount of such judgment as the plaintiffs might recover, this requirement was held to be an abuse of the discretion of the court.[327] It is to be noted that a judgment ordered to be set aside "on payment of all costs" remains in full force until such payment is made.[328] And so, if an order is made setting aside a judgment and default on condition that the moving party pay to the other a sum of money, and serve and file an answer within a certain time, the conditions must be complied with within the time fixed, or the judgment will remain in force in the same manner as if the order setting it aside had not been made.[329]

§ 353. Partial Vacation of Judgment.

Where a judgment is rendered on a petition which contains two distinct causes of action, though not separately stated and numbered, but united in a single count, and a motion is made to vacate and set aside the judgment and grant a new trial for defects apparent in the record, and the record discloses that judgment was properly entered

[326] Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436.

[327] Brown v. Brown, 37 Minn. 128, 33 N. W. Rep. 546. See also Union Nat. Bank v. Benjamin, 61 Wis. 512, 21 N. W. Rep. 523.

[328] Gregory v. Haynes, 21 Cal. 443.

[329] Hartman v. Olvera, 49 Cal. 101.

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on one cause of action and improperly entered on the other, it is held that the court will commit no error in sustaining the motion in part and vacating the judgment as to the one cause of action, while at the same time it overrules the motion in part and refuses to disturb the judgment in respect to the other cause of action.[330]

§ 354. Allowance of Application discretionary.

A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of allowance or refusal, will not generally be disturbed by the appellate court, unless there has been a manifest abuse of such discretion.[331] The *nature* of this discretion has been described, in a well-considered opinion of the supreme court of California, in terms which would probably be accepted as accurate and reasonable in all jurisdictions. "The discretion intended," says the court, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be

[330] Weaver v. Leach, 26 Kans. 179.

[331] Eldred v. Hazlett, 38 Pa. St. 16; Gilliland v. Bredin, 63 Pa. St. 393; Lamb's Appeal, 89 Pa. St. 407; Sweezy v. Kitchen, 80 Pa. St. 160; McClelland v. Pomeroy, 75 Pa. St. 410; Hudgins v. White, 65 N. Car. 393; Elliston v. Bank, 3 Dana, 99; Merritt v. Putnam, 7 Minn. 493; Seymour v. Supervisors, 40 Wis. 62; Wheeler & Wilson Manuf. Co. v. Monahan, 63 Wis. 194, 23 N. W. Rep. 109; Dougherty v. Nevada Bank, 68 Cal. 275, 9 Pac. Rep. 112; White v. Northwest Stage Co., 5 Oreg. 99. See Cavanaugh v. Railroad, 49 Ind. 149. "The exercise of jurisdiction upon rules to open judgments entered on warrants of attorney has always been held to be within the sound discretion of the courts. The act of April 4, 1877, which provides for an appeal to this court, has not changed the law in that respect. It provides only that the decision 'shall be reviewed by appeal in like manner and proceedings as equity cases are now appealed.' It is a mistake to suppose that the court cannot judge of the weight of the evidence and the credibility of witnesses, but must in every case, where there is a conflict of testimony, send the case to the jury." Earley's Appeal, 90 Pa. St. 322; Wernet's Appeal, 91 Pa. St. 319.

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doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merits *in foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other."[332] It is also said, however, that as a general rule, in a doubtful case, the court should incline to relieve. The exercise of the court's discretion ought to tend in a reasonable degree to bring about a judgment on the merits of the case, and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a rule, that the doubt should be resolved in favor of the application, proper terms and conditions being imposed.[333] A doubt as to the propriety of allowing the motion may arise from the nature of the evidence or the fact of its being evenly balanced. Thus, where the oath of the petitioner is opposed by the oath of the plaintiff in the judgment, it is no abuse of discretion to refuse to open the judgment.[334] But if the relief is accorded, it will be presumed, in the court above, that there was sufficient evidence to justify the order.[335] Where the situation of the judgment-creditor has undergone a material change, as by the incurring of expense in issuing and levying execution, and by the fact that a material witness has, by the death of the judgment debtor, become disqualified, there is no abuse of discretion in refusing to open the judgment.[336] In Missouri it is said that "while this court will not interfere with the discretion of the trial court in refusing to vacate and set aside a judgment where there is a conflict of evidence, it will do so when the evidence is all on one side and it is clear that the discretion has been abused."[337] In Wisconsin, the area of the court's discretion appears to be more contracted. It is said that "unless the default of the party is excused and a verified answer

[332] Bailey v. Taaffe, 29 Cal. 422.

[333] Watson v. San Francisco & H. B. R. Co., 41 Cal. 17.

[334] Barton's Appeal (Pa.), 7 Atl. Rep. 168.

[335] Willett v. Millman, 61 Iowa, 123, 15 N. W. Rep. 866.

[336] Jefferson Co. Bank v. Robbins, 67 Wis. 68, 29 N. W. Rep. 893.

[337] Craig v. Smith, 65 Mo. 536.

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tendered showing a defense on the merits," the appellate court will not interfere with a refusal to open the judgment.[338] A court having jurisdiction to set aside a judgment has the right to give any less relief by which justice may be obtained and by which the rights of a party in excusable default may be protected, and the mode of effecting this object is under the control and subject to the discretion of the court.[339] In California the trial court has no power to review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.[340] According to the practice in some of the states, the refusal of the court below to open a judgment is ground for an appeal, but cannot be brought up on writ of error.[341]

§ 355. Effect of Vacating Judgment.

If a judgment is absolutely void and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not. But if it is voidable only, and not void, it seems clear, as a matter of legal reason, that acts done under it by the plaintiff or others ought not to be invalidated by its subsequent vacation, *provided* that the reason for setting it aside be not attributable to the plaintiff, but the relief be granted as a matter of grace and favor to the defendant and on account of his mistake or excusable neglect. On the other hand, if the judgment is to be vacated by reason of the fraud or misconduct of the plaintiff, or for any irregularity for which he is actually or constructively to blame, it is equally clear that he should not be permitted to justify under it. And herein there is an important difference between the setting aside of an irregular judgment and the reversal of an erroneous judgment. "Although a void judgment, or one that is voidable for irregularity, will not, after being set aside, justify the acts of the party done under it before it was set aside, this principle has never been

[338] Union Lumbering Co. v. Supervisors, 47 Wis. 245, 2 N. W. Rep. 281.

[339] McCall v. McCall, 54 N. Y. 541.

[340] Hanson v. Hanson (Cal.), 20 Pac. Rep. 736.

[341] Gillespie v. Campbell (Pa.), 1 Atl. Rep. 665.

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applied to a judgment merely erroneous and reversed for error by a court of review. An irregular judgment is called voidable, and when set aside is treated as though void from the beginning; for the party himself is held chargeable with the irregularity; while a judgment pronounced by the court, although upon an erroneous view of the law, and subject therefore to be reversed by an appellate tribunal, is never treated as void, but valid for all purposes of protection to the party acting under it before reversal. The fact that in the one case the party is responsible for the irregularity, and in the other whatever of error there is in the judgment is the error of the court, seems to be the ground of distinction between the two, and it is manifestly a just and proper distinction. While it may well be held that a party is not justified by a judgment which is subsequently set aside for an irregularity in entering it up, it would seem unjust to hold that a judgment duly rendered by the court shall fail to protect a party acting under it before reversal, because reversed for error committed by the court." [342] Under the Pennsylvania practice, as already explained,[343] an order opening a judgment and letting the defendant in to a defense, does not destroy the lien from the date of its original entry.[344]

[342] Simpson v. Hornbeck, 8 Lans. 53.
[343] *Supra*, § 350.
[344] Steinbridge's Appeal, 1 Pen. & Watts, 481.

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CHAPTER XV.

RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.

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PART III. PRACTICE ON APPLICATION TO ENJOIN JUDGMENT.
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PART I. JURISDICTION OF EQUITY TO ENJOIN THE ENFORCEMENT OF JUDGMENTS.

§ 356. Origin of the Power.

The power and jurisdiction of the courts of equity to enjoin a party from enforcing a judgment which he has obtained, when it would be against conscience to permit him to do so, is at the present day so firmly established, so salutary in its operation, and so thoroughly in accord with the promptings of justice, that it is difficult to realize the stubbornness and bitter jealousy with which the beginnings of its exercise were resisted. That such was the fact, however, is fully certified by the historians. This species of jurisdiction "was one of the first subjects that engaged the attention of the English chancellors, and though violently resisted by common-law lawyers and judges, the power was largely exercised by Cardinal Wolsey in the reign of Henry VIII, and, according to Mr. Reeves, with great ability and justice. It is related of Sir Thomas More, who succeeded Cardinal Wolsey, that having invited the judges to dine with him, he showed them the number and nature of the causes in which he had granted injunctions to judgments of the courts of common law, and the judges, upon full debate of the matter, confessed that they could have done no otherwise themselves. Still, however, clamors against the equity jurisdiction continued until they culminated in the famous controversy in the reign of James I, which was conducted principally by Lord Coke against, and by Lord Ellesmere in favor of, the chancery jurisdiction. The very point of this controversy, according to Judge Story (1 Story's Eq. § 51), was whether a court of equity could give relief from or against a judgment at common law, and it was finally decided in favor of the equity jurisdiction.[1] From that time down to this day the jurisdiction has

[1] Spence, Chanc. Jur. p. 674.

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been exercised in England, and decrees of ecclesiastical courts have often been relieved against on the ground of fraud;[2] and so in like manner have awards,[3] and verdicts,[4] and judgments at law.[5] And even decrees in chancery may be avoided for the same cause."[6] Nor have the improvements of the law or the changes in judicial organization superseded this power of equity or obviated the necessity of its occasional exercise. A recent decision of the supreme court of the United States declares that the appropriate remedy to set aside or enjoin the execution of judgments at law wrongfully obtained is by bill in equity.[7] But this jurisdiction, though unquestioned, is one which, from the pressure of hardship, always an element in these cases, is liable to abuse; and the abuse of it, say the courts, is extremely mischievous, tending as it does to conflict between jurisdictions and to the promotion of needless litigation.[8] Hence "bills seeking relief from final judgments, solemnly rendered in the due and ordinary course of administration of justice by courts of competent jurisdiction, are always watched by courts of equity with extreme jealousy, and the grounds upon which interference will be allowed are, confessedly, narrow and restricted."[9]

§ 357. Nature of Relief granted.

The action of a court of equity in giving relief against a judgment at law is almost always indirect. Courts of chancery, it must be remembered, do not claim to exercise any supervisory power over the courts of law, or their proceedings. Judgments are not reversed or vacated in equity. Adjudications at law are not overhauled or re-examined. It is to the party himself that the energies of the court of equity are directed, and its remedial power is

[2] Van Brough v. Cock, 1 Chanc. Cas. 201; Bissel v. Axtell, 2 Vern. 47.

[3] Lonsdale v. Littledale, 2 Ves. 451.

[4] Williams v. Lee, 3 Atk. 223; Bateman v. Willoe, 1 Sch. & Lef. 201.

[5] Barnsley v. Powell, 1 Ves. Sen. 119; Gainsborough v. Gifford, 2 P. Wms. 424; Humphreys v. Humphreys, 3 P. Wms. 394.

[6] Cochran v. Eldridge, 49 Pa. St. 365, 368, citing Lloyd v. Mansell, 2 P. Wms. 73; Galley v. Baker, Cas. t. Talbot, 201; Bradish v. Gee, Amb. 229.

[7] Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. Rep. 901.

[8] Kersey v. Rash, 3 Del. Ch. 321.

[9] Johnson v. Templeton, 60 Tex. 238.

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exercised by putting restraint upon his usual liberty of following up his judgment by the appropriate process for its collection. Equity therefore acts on the *person*, not the proceeding; and while it will enjoin the *enforcement* of a judgment, in proper cases, it will not interfere with the judgment itself.[10] Some of the cases hold that a court of equity cannot set aside the judgment of a law court and award a new trial. And indeed this is rarely done, if ever, in express terms; but the same end is effected by decreeing that unless the party *consents* to have the judgment set aside and a new trial had, he shall be perpetually enjoined from collecting his judgment.[11] But cases sometimes arise where the right to move for a new trial at law was lost, or an application was refused, in consequence of some of the circumstances which equity always regards as sufficient warrant for its interference. In such instances, the complainant being in no fault, it is generally considered to be within the power of equity to grant a new trial.[12] Thus relief of this character may be granted where the judgment is against conscience, and the applicant had no opportunity to make defense, or was prevented from defending by accident, or the fraud or improper management of the adverse party, and without fault on his own part.[13] There is much learning in the books on this point, but it is merely collateral to our present subject and belongs more properly to a treatise on equity. A few words must be added as to the measure of the relief granted. It should always be adjusted to the exigencies of the particular case. If it is claimed that the judgment at law is *excessive*,—either because of the fraud or unfair

[10] Yancey v. Downer, 5 Litt. 8, 15 Am. Dec. 35; Richardson v. Baltimore, 8 Gill, 433; Contee v. Cooke, 2 Har. & J. 179; Blight v. Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219; Farmers' Bank v. Collins, 13 Bush, 188. On a bill filed by a defendant at law, on the ground that the subject is a trust and proper for equitable cognizance, an injunction ought not to be granted staying the trial at law, but only execution on the judgment which may be recovered. Justice v. Scott, 4 Ired. Eq. 108.

[11] Pelham v. Moreland, 11 Ark. 443; Lawless v. Reese, 3 Bibb, 486; Gainty v. Russell, 40 Conn. 450; Yancey v. Downer, 5 Litt. 8, 15 Am. Dec. 35.

[12] Knifong v. Hendricks, 2 Gratt. 212, 44 Am. Dec. 385; Carter v. Bennett, 6 Fla. 214; Hoskins v. Hattenback, 14 Iowa, 314; Land v. Elliott, 1 Sm. & Mar. 608; Howe v. Martell, 28 Ill. 445; Deputy v. Tobias, 1 Blackf. 311, 12 Am. Dec. 243.

[13] Carrington v. Holabird, 17 Conn. 530.

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dealing of the other party, or in consequence of a mistake or miscalculation,—that is no ground for enjoining the whole judgment. The creditor should merely be prohibited from proceeding to collect the excess.[14] So where the execution of a judgment has been enjoined, and the defendant, upon being interrogated, admits a partial payment of such judgment, the injunction should be perpetuated for the amount admitted to have been paid, and dissolved as to the remainder still due.[15]

§ 358. What Adjudications subject to the Power.

Generally speaking, all judgments rendered or purporting to be rendered by courts of law are subject to the equitable power here considered. As to the particular case of a judgment that is absolutely *void*, however, the authorities do not agree. Some of the decisions hold that the defendant in a judgment cannot have equitable relief against it because it is either erroneous or void, since, if void, it may be disregarded or may be set aside on motion, and if erroneous it may be revised on appeal.[16] There is much to be said in favor of this view, especially in contemplation of the known reluctance of equity to interfere if any adequate remedy offers itself at law. If the judgment is merely void, a sale under it would be a nullity. The purchaser would take no title, and the officer would be liable as a trespasser. Still, in some of the states, a bill for an injunction is considered the appropriate method for obtaining relief even against a void judgment, and this practice has become fully established by the rulings of the courts.[17] An injunction will lie to prevent the collection of a judgment which has been vacated or set aside by the court which rendered it.[18] And an execution issued on a judgment the record of which has been destroyed, there being no renewal by

[14] Hale v. Bozeman, 60 Miss. 965; Booth v. Kesler, 6 Gratt. 350; Barrow v. Robichaux, 14 La. Ann. 207.

[15] Perry v. Kearney, 14 La. Ann. 400. And see Kamm v. Stark, 1 Sawy. 547.

[16] Murphree v. Bishop, 79 Ala. 404; Lockridge v. Lyon, 68 Ga. 137; Sanches v. Camaja, 31 Cal. 170; St. Louis & C. R. Co. v. Reynolds, 89 Mo. 146, 1 S. W. Rep. 208.

[17] Glass v. Smith, 66 Tex. 548, 2 S. W. Rep. 195; Smith v. Deweese, 41 Tex. 595; Cooke v. Burnham, 32 Tex. 129; Chambers v. Hodges, 23 Tex. 110; Hernandez v. James, 23 La. Ann. 483.

[18] Ricketts v. Hitchens, 34 Ind. 348.

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substitution, will be enjoined.[19] But in the case of a judgment on a promissory note which was given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife, the chancery court refused to interfere, because the whole proceeding was "an abuse of legal process and a fraud on the law."[20] A judgment by *scire facias* is of the same force as any other, and while it may be enjoined in a proper case, the defendant is not entitled to any greater indulgence, in respect to his own neglect or omission, than in any other case.[21] It is also held that a court has power to enjoin the collection of a judgment which it had power to render, although, by reason of the accrued interest and costs, the amount exceeds the limit of original jurisdiction.[22] As a general rule, equity will not re-examine and readjust settlements which have been made by compromise judgments in courts of law having jurisdiction of the subject-matter. Yet a compromise judgment, if obtained by fraud, accident, or mistake, may be relieved against by injunction.[23] There is also undoubted jurisdiction in equity to set aside an *award*, if good and equitable reasons are presented for such action.[24] But a bill will not lie to vacate an award on the ground of mistake on the part of the arbitrators or failure to determine all the matters submitted; for these matters may be pleaded in defense to an action at law on the award.[25] Where, under a code practice, decrees are to be enforced by execution in the same manner as judgments at law, an injunction may be granted, if otherwise proper, to restrain the execution of a decree.[26]

§ 359. What Parties may Apply.

As a rule, relief in equity against a judgment at law is given only to the parties to the action,[27] or their privies,[28] or those whose rights

[19] Cyrus v. Hicks, 20 Tex. 483.
[20] Wells v. Smith, 13 Gray, 207, 74 Am. Dec. 631.
[21] Thompson v. Hammond, 1 Edw. Ch. 497.
[22] Davis v. Davis, 10 Bush, 274.
[23] Hahn v. Hart, 12 B. Mon. 426.
[24] Milnor v. Railroad, 4 Ga. 385.
[25] Mickles v. Thayer, 14 Allen, 114.
[26] Oro Fino Co. v. Cullen, 1 Idaho Ter. 126.
[27] Mayes v. Woodall, 35 Tex. 687; Marriner v. Smith, 27 Cal. 649.
[28] Bullock v. Winter, 10 Ga. 214.

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are directly affected by the judgment. Thus, one who has purchased land subject to the lien of a judgment cannot go into equity to enjoin the judgment, his grantor making no objection to it, unless he can show that it was founded in fraud and expressly designed to injure him in his rights as a purchaser.[29] So an execution in ejectment will not be restrained at the instance of a stranger holding a paramount title, for if his title is good the judgment does not affect him.[30] Nor will an injunction be granted to restrain execution-creditors from proceeding to sell the property of their debtor, on the ground that certain claims to the property have been interposed, casting a cloud upon the title, and rendering it probable that the property will bring less than its value, to the injury of other creditors of the same debtor, the debtor being insolvent.[31] A stranger to an execution, whose goods have been levied on under it, cannot have an injunction on the ground that the judgment was erroneous; for he has a good remedy at law.[32] But on the other hand, it has been held that where a judgment-creditor may collect from property that his debtor has not conveyed, but refuses or fails to do so, he may be enjoined from proceeding against the debtor's grantee.[33] It is certainly clear that a third person may maintain an action to perpetually enjoin the enforcement of a judgment which was procured through fraud and for the purpose of defrauding him.[34] And in some states it has been held that where a judgment is entered by confession without action, unless the statute authorizing such entry has been substantially complied with, the enforcement of the judgment may be enjoined, upon principles of equity, at the suit of a third party prejudiced thereby.[35] If the applicant is in privity of interest or estate with the defendant, he is of course not regarded as a stranger to the action, and his right to interfere is more easily established. Thus, where a suit was brought in Massachusetts against a corporation on a judgment rendered in

[29] Marriner v. Smith, 27 Cal. 649; Shufelt v. Shufelt, 9 Paige, 137; French v. Shotwell, 6 Johns. 235.

[30] Harper v. Hill, 35 Miss. 63. And see Whitman v. Willis, 51 Tex. 429.

[31] Robinson v. Thompson, 30 Ga. 933.

[32] Markley v. Rand, 12 Cal. 275.

[33] Hurd v. Eaton, 28 Ill. 122.

[34] Busenbark v. Busenbark, 33 Kans. 572, 7 Pac. Rep. 245.

[35] Schuster v. Rader (Colo.), 29 Pac. Rep. 505.

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New York, and no defense had been made by the company in the latter state, a temporary injunction was granted restraining the suit on a bill filed by an individual stockholder.[36] A judgment at law against two defendants may be annulled by a decree of a court of chancery as to one and remain binding as to the other.[37] But if the bill is filed by one defendant alone, the other should be made a party to the action, unless sufficient reasons for the omission be stated.[38] And where a separate judgment is rendered against each of two joint wrong-doers, neither judgment can be perpetually enjoined while both remain in force and unsatisfied, although one of such judgments has been assigned by the holder to a third person.[39] Since the sovereign is beyond the reach of any prohibitory process, it follows that an injunction cannot be issued to restrain the United States from collecting a judgment in its favor.[40]

§ 360. What Courts Exercise the Power.

The enjoining of a judgment at law is a purely equitable remedy. But it is not necessary for its exercise that the tribunal should be distinctively and individually organized as a chancery court. This power is habitually brought into play in those states where, for want of separate equity courts, the law courts apply equitable remedies. And even under the codes, where law and equity are fused, equitable jurisdiction, equitable proceedings, and equitable remedies are not abolished, although metamorphosed as to their external appearance. Questions as to the power to enjoin judgments most commonly arise between co-ordinate courts. Thus in Tennessee it is held that one chancery court may enjoin execution of a judgment wrongfully taken in another chancery court.[41] But in another state, it is held that one circuit court has no jurisdiction of an action to annul and enjoin the judgment of another circuit court.[42] In Iowa, an execution issued upon a judgment of the supreme court may be enjoined by the dis-

[36] Sumner v. Marcy, 3 Wood. & M. 105.
[37] Kennedy v. Evans, 31 Ill. 258.
[38] Gates v. Lane, 44 Cal. 392.
[39] Meixell v. Kirkpatrick, 25 Kans. 19.
[40] Hill v. United States, 9 How. 386.
[41] Douglass v. Joyner, 57 Tenn. 32.
[42] Plunkett v. Black, 117 Ind. 14, 19 N. E. Rep. 537.

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trict court of the county in which it is sought to be enforced.[43] The federal courts are prohibited by statute from granting writs of injunction to stay proceedings in any of the state courts.[44] And conversely, the state courts cannot restrain an action in any of the federal courts, or enjoin the collection of an execution issued from any of such courts.[45]

§ 361. Concurrent Remedies.

Embarrassing questions sometimes arise as to the right and power of equity to interfere by injunction against a judgment while the party has a concurrent and equally efficacious remedy by application to the court which rendered the judgment, or by appeal to a higher court. The general rule, however, as established by the best authorities, is that the party seeking relief must have exhausted all his resources at law, for equity will not grant an injunction where there is an adequate remedy at law.[46] Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief.[47] But the remedy at law, though adequate to the case, may have been lost through circumstances not attributable to the neglect or fault of the party seeking relief. In such instances, all question as to the right of equity to lend its aid is at once removed. Thus, where there are statutes authorizing the law courts to grant relief from their judgments in certain cases, this will not preclude a party, in a proper case, from obtaining relief in equity after the time limited for applying for relief under those statutes has elapsed, provided sufficient reasons are shown for not having made such application in time.[48] If, for example, the judgment was fraudulently and secretly entered up, and the defendant had no notice or knowledge of its existence until after the expiration of the time within which he

[43] Massie v. Mann, 17 Iowa, 131.

[44] 1 U. S. Stat. at Large, 335.

[45] Riggs v. Johnson Co., 6 Wall. 166; United States v. Keokuk, 6 Wall. 514; Strozier v. Howes, 30 Ga. 578; English v. Miller, 2 Rich. Eq. 320; Coster v. Griswold, 4 Edw. Ch. 364.

[46] Wilkinson v. Rewey, 59 Wis. 554, 18 N. W. Rep. 513; Crandall v. Bacon, 20 Wis. 639; Bibend v. Kreutz, 20 Cal. 109; Hart v. Lazaron, 46 Ga. 396.

[47] Grant v. Quick, 5 Sandf. 612; Dufossat v. Berens, 18 La. Ann. 339.

[48] District Twp. of Newton v. White, 42 Iowa, 608; Baker v. Riordan, 3 West C. Rep. 210.

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might have moved the law court to vacate it, it is a case for equitable interference, merits being shown.[49]

§ 362. Same; Relief on Motion.

The liberal practice of the courts in granting new trials and entertaining motions to vacate or open their own judgments, and the enactment of statutes in many of the states authorizing the setting aside of judgments taken against a defendant "through his mistake, inadvertence, surprise, or excusable neglect," have considerably abridged the province of equity in giving relief by injunction. And the rule is generally adhered to, as the more safe and conservative principle, that equity will not grant relief against an execution if the party can equally well be relieved, on motion, in the court which issued the execution or has control of it.[50] It is true that some cases maintain a different view, holding that although the judgment might be vacated or set aside on motion, and although the time for so moving has not yet expired, still equity may enjoin the enforcement of the judgment.[51] But in so holding they depart from the fundamental principles of equity and are not to be commended. If the time limited by law for seeking relief in the law court has already expired, without the neglect or fault of the party, that, as stated in the preceding section, is a different matter, and the right of equity to interfere is unquestioned. It has been held that the summary refusal of a motion for a new trial or for the vacation of the judgment will not prevent the party from coming into equity with a bill for an injunction, based on the same grounds.[52] But the weight of authority is against this proposition. The best cases hold that equity will refuse to act by

[49] Spooner v. Leland, 5 R. I. 848.

[50] Imlay v. Carpentier, 14 Cal. 173; Bibend v. Kreutz, 20 Cal. 109; Logan v. Hillegass, 16 Cal. 201; Hintrager v. Sumbargo, 54 Iowa, 604, 7 N. W. Rep. 92 (compare Connell v. Stelson, 33 Iowa, 147); Hart v. Lazaron, 46 Ga. 396. A party claiming that he had not been credited by the sheriff for all the money he had paid to him upon an execution, is not entitled to an injunction and relief in equity, as the court issuing the execution may be applied to to remedy the injustice complained of. Morrison v. Speer, 10 Gratt. 228.

[51] Landrum v. Farmer, 7 Bush, 46; Hernandez v. James, 23 La. Ann. 484; Caruthers v. Hartsfield, 8 Yerg. 366, 24 Am. Dec. 580.

[52] Simpson v. Hart, 14 Johns. 63.

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injunction when the grounds alleged have already been considered and held insufficient on a motion at law; in such case the whole matter is *res judicata* and equity will not re-open it.[53] To show the disposition of the chancery courts in this regard, we cite the case of *Dalhoff* v. *Keenan*,[54] where it appeared that the party had filed his petition for a new trial in the law court within the time prescribed by the code, alleging that the judgment was fraudulent, but this petition was dismissed because a necessary witness was absent and because the other party promised that he would make "a fair offer of compromise," and afterwards the complainant brought an action in equity to set aside the judgment and for a new trial of the issues. But it was held that the action in equity was properly dismissed, because the complainant had an adequate and speedy remedy at law, which he had begun to pursue but had improvidently abandoned.

§ 363. Same; Appeal or Error.

In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal or writ of error before equity will hear him. If, by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, he loses his remedy at law, he cannot proceed in equity by injunction, unless new and sufficient equities be alleged.[55] Nor will a judgment be enjoined when the complainant has neglected to except to it as he might have done.[56] So a judgment which is not appealed from, and which directs a forced sale of articles for its satisfaction which are by law exempt from forced sale, is not a nullity, however erroneous; and when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to injunction.[57] Nor is the death of a party before judgment sufficient ground for an injunc-

[53] Matson v. Field, 10 Mo. 100; Davis v. Bass, 4 Ind. 313; Collins v. Butler, 14 Cal. 223; Critchfield v. Porter, 8 Ohio, 518; Gray v. Barton, 62 Mich. 186, 28 N. W. Rep. 813.

[54] 66 Wis. 679, *s. c.* 24 N. W. Rep. 273.

[55] Long v. Smith, 39 Tex. 160; Brumbaugh v. Schmebly, 2 Md. 320; Palmer v. Malone, 1 Heisk. 549; James v. Neal, 3 T. B. Mon. 369; Flanneken v. Wright, 64 Miss. 217, 1 South. Rep. 157.

[56] Dibble v. Truluck, 12 Fla. 185.

[57] Rountree v. Walker, 46 Tex. 200.

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tion; the proper remedy is by error *coram nobis*.[58] In a case where judgment was rendered by a court of competent jurisdiction, and a case was made by the defeated party for the purpose of review in the appellate court, and the successful party wrongfully obtained possession of such case-made, and withheld it until the time had elapsed within which by statute a judgment could be reviewed above, it was held that the defeated party could not have an injunction against the collection of the judgment. For, said the appellate tribunal, his remedy is by petition in error in this court, and then if it appears that he was prevented from bringing the case here solely by the wrongful conduct of the opposing party, and he has himself been guilty of no laches, this court will entertain jurisdiction and examine the record as though it had been filed in time.[59] But if a meritorious bill of exceptions be dismissed because of a mistake made by the certifying judge, and without the fault of counsel, equity may restrain the enforcement of the judgment thus affirmed until the matters set up in the dismissed bill of exceptions can be heard.[60] And *a fortiori*, equity will relieve against a judgment where the law-judge refused to sign a bill of exceptions and the exceptions were such as should have been sustained.[61] In Illinois an extremely liberal practice appears to obtain. For it is held that relief may be obtained against a judgment, on the ground of fraud, although the party might find a remedy in a court of law, and even if the party had notice of the judgment in time to appeal, and made an abortive attempt to do so, this does not prevent him from applying to a court of equity for relief.[62]

§ 364. Same; Cross-Actions and Actions over.

In a number of instances courts of equity have refused to enjoin the collection of a judgment (unjust and inequitable though it might be), where the party had an adequate and available remedy at law by a cross-action, as for breach of warranty of the property for the

[58] Williamson v. Appleberry, 1 Hen. & M. 206.
[59] Muse v. Wafer, 29 Kans. 279.
[60] Kohn v. Lovett, 43 Ga. 179.
[61] Picket v. Morris, 2 Wash. (Va.) 255.
[62] Nelson v. Rockwell, 14 Ill. 375.

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price of which the suit was brought.[63] So where the defendant was prevented by unavoidable accident from setting up offsets to the plaintiff's demand, which were not connected with the claim sued on and may be enforced at law, he is not entitled to enjoin the judgment and interpose his counterclaims against it, but must pursue his remedy at law.[64] The availability of the legal remedy being the test, it would seem that the existence of a counterclaim, capable of being used as an independent cause of action, should be no bar to equitable relief, if it could not be enforced against the plaintiff in consequence of his being a non-resident and keeping beyond the jurisdiction. But the courts hold otherwise. On this state of facts an injunction has been refused.[65] On the same principle, equity will not interfere to give relief where the judgment debtor is in such a position that he may make himself whole, immediately upon paying the judgment, by a suit at law against a person who is responsible over to him for the loss or damage he may suffer.[66]

Part II. Grounds for Enjoining Judgments.

§ 365. General Grounds for Equitable Relief.

There are two reasons why equity is slow to interfere with the operation of judgments recovered in a court of law. In the first place, it is sensitive to the imputation of seeking to usurp a species of appellate jurisdiction and so to extend its power over all other courts. And secondly, a judgment on the merits ought to be forever conclusive between the parties, no re-examination should be allowed, and it is neither the function nor the ambition of equity to overhaul judgments at law. Hence, in applying to equity for relief, it is necessary that something more than a merely erroneous or irregular judgment should be shown. Some of the elements which universally afford an attaching-point for the equitable jurisdiction must be present, making it unconscientious for the successful party

[63] Ponder v. Cox, 26 Ga. 485; Henry v. Elliott, 6 Jones Eq. 175.
[64] Hudson v. Kline, 9 Gratt. 379.
[65] Beall v. Brown, 7 Md. 393.
[66] Drake v. Lyons, 9 Gratt. 54.

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to enforce his judgment as it stands. Thus, if the defense was one which could not be interposed at law, equity will relieve, because the party has not had a fair trial. So if he was ignorant of his defense, and guilty of no laches in failing to discover it; or was prevented from setting it up by fraud or accident, or the act of his adversary, without any negligence or fault on his own part. The object of an injunction to stay proceedings at law is to prevent the party against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident, mistake, or otherwise, and which would therefore be against conscience.[67] Hence equity cannot relieve against the operation of a judgment at law simply on account of its hardship.[68] It must first of all appear that it would be unjust and against conscience to enforce the judgment.[69] Then it must be shown that if a new and fair examination of the merits be had, the result will be other than that already reached.[70] There must be a meritorious defense. No matter what circumstances of fraud or irregularity may have attended the entry of the judgment, if it appears that no defense was made because no valid defense existed, and that the instrument in suit was given for a valid and valuable consideration, an injunction will be refused.[71] Nor will equity interfere unless it shall also be shown that the party has used due diligence and exhausted every means of defending the case or obtaining redress at law.[72] But on the other hand, where a proper case for relief by injunction is made out, the fact that the judgment-creditor is of undoubted solvency and able to refund the money which may be collected on the execution, will not prevent such equitable intervention.[73]

[67] Little v. Price, 1 Md. Ch. Dec. 182; Bachelder v. Bean, 76 Me. 370.

[68] Hill v. Rogers, Rice Ch. 7; Hamilton v. Adams, 15 Ala. 596, 50 Am. Dec. 150.

[69] Fowler v. Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

[70] Taggart v. Wood, 20 Iowa, 286; Sauer v. Kansas, 69 Mo. 46.

[71] Sohier v. Merrill, 3 Wood. & M. 179.

[72] Wells v. Wall, 1 Oreg. 295; Nevins v. McKee, 61 Tex. 412.

[73] Carrington v. Holabird, 19 Conn. 84.

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§ 366. General Rule stated.

The leading case in America upon the subject of equitable relief against judgments at law, is that of *Marine Insurance Co.* v. *Hodgson*.[74] In that case Chief Justice Marshall specified the grounds for the interference of equity in the following terms: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." And the principles here set forth, though perhaps somewhat extended by more recent decisions, have been adopted without question, as a general statement of the rule, in all our courts.[75] "When a party goes into chancery after a trial at law," says a learned judge in New York, "he must be able to impeach the justice and equity of the verdict, and it must be upon grounds which either could not be made available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part."[76] "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense, of which he could not avail himself at law because it did not amount to a legal defense, or had a good

[74] 7 Cranch, 332.

[75] Railroad Co. v. Neal, 1 Woods, 353; Emerson v. Udall, 13 Vt. 477; Pettes v. Whitehall Bank, 17 Vt. 435; Wingate v. Haywood, 40 N. H. 437; Hibbard v. Eastman, 47 N. H. 507; Vilas v. Jones, 1 N. Y. 274; Briesch v. McCauley, 7 Gill, 189; Little v. Price, 1 Md. Ch. 182; Kent v. Richards, 3 Md. Ch. 392; Windwart v. Allen, 13 Md. 196; Alford v. Moore, 15 W. Va. 597; Braden v. Reitzenberger, 18 W. Va. 286; Ponder v. Cox, 26 Ga. 485; Watts v. Gayle, 20 Ala. 817; Lafon v. Desessart, 1 Mart. N. S. 71; Nevins v. McKee, 61 Tex. 412; Lester v. Hoskins, 26 Ark. 63; Miller v. Morse, 23 Mich. 365; Kelleher v. Boden, 55 Mich. 295, 21 N. W. Rep. 346; Proctor v. Pettit (Nebr.), 41 N. W. Rep. 131; Wells v. Wall, 1 Oreg. 295; Mastick v. Thorp, 29 Cal. 444; Boston v. Haynes, 33 Cal. 31. Taggart v. Wood, 20 Iowa, 236.

[76] Vilas v. Jones, 1 N. Y. 274.

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defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."[77] So speak all the authorities.

§ 367. Errors and Irregularities.

The doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement simply on the ground that it was *unjust, irregular, or erroneous*, or because the equity court would, in deciding the same case, have come to a different conclusion.[78] A good illustration of this rule is furnished by the decision in a case where the defendant at law, after losing his case by reason of a suggestion of the court that his remedy was in chancery and not at law, applied for relief in equity. It was said: "If the party chose to believe in the opinion of the court, it must be at his own hazard, and

[77] Hendrickson v. Hinckley, 17 How. 443.

[78] 2 Story's Eq. Jur. § 1572; Baker v. Morgan, 2 Dow, 526; Tarver v. Tarver, 9 Pet. 174; Ludlow v. Ramsey, 11 Wall. 581; Pettes v. Whitehall Bank, 17 Vt. 435; Fletcher v. Warren, 18 Vt. 45; Paddock v. Palmer, 19 Vt. 581; Stillwell v. Carpenter, 59 N. Y. 414; Shottenkirk v. Wheeler, 3 Johns. Ch. 279; De Reimer v. Cantillon, 4 Johns. Ch. 85; Holmes v. Remsen, 7 Johns. Ch. 286; Donovan v. Finn, 1 Hopk. Ch. 59, 14 Am. Dec. 531; Vanarsdelen v. Whitaker, 10 Phila. 153; Holmes v. Steele, 28 N. J. Eq. 173; Phillips v. Pullen, (N. J. Eq.), 16 Atl. Rep. 9; Methodist Church v. Mayor of Baltimore, 6 Gill, 391, 48 Am. Dec. 540; Boyd v. Chesapeake Co., 17 Md. 195, 79 Am. Dec. 646; Slack v. Wood, 9 Gratt. 40; McDowall v. McDowall, 1 Bail. Eq. 824; Stockton v. Briggs, 5 Jones Eq. 309; Grantham v. Kennedy, 91 N. Car. 148; Cohen v. Dubose, 1 Harp. Ch. 102, 14 Am. Dec. 709; Hunt v. Coachman, 6 Rich. Eq. 286; Turpin v. Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615; Robuck v. Harkins, 38 Ga. 174; Jones v. Watkins, 1 Stew. (Ala.) 81; Coffin v. McCullough, 30 Ala. 107; Saunders v. Albritton, 37 Ala. 716; Ammons v. Whitehead, 31 Miss. 99; Walker v. Villavaso, 26 La. Ann. 42; Fitzhugh v. Orton, 12 Tex. 4; Pryor v. Emerson, 22 Tex. 162; Roller v. Wooldridge, 46 Tex. 485; Reynolds v. Horine, 13 B. Mon. 234; Burke v. Wheat, 22 Kans. 722; Missouri Pac. R. Co. v. Reid, 34 Kans. 410, 8 Pac. Rep. 846; *Ex parte* Christian, 23 Ark. 641; Clopton v. Carloss, 42 Ark. 560; Dunn v. Fish, 8 Blackf. 407; Macy v. Lloyd, 23 Ind. 60; De Haven v. Covalt, 83 Ind. 344; Drake v. Hanshaw, 47 Iowa, 291; Hazeltine v. Reusch, 51 Mo. 50; Merritt v. Baldwin, 6 Wis. 439; Jilson v. Stebbins, 41 Wis. 235; Ableman v. Roth, 12 Wis. 81; Pico v. Sunol, 6 Cal. 294; Logan v. Hillegass, 16 Cal. 200.

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it now seems to me to be no good ground for relief in equity that the court or his counsel gave him bad advice; he should have excepted to the opinion of the court in refusing to continue, and if on examination this should be found to be error, then he would have had relief; but having failed to do so furnishes no more ground for relief than he would have been entitled to if the court had committed any other error, and he had submitted to it till it was too late to redress it."[79] To take another illustration,—where a judgment was rendered according to a particular construction of a statute, and, after a writ of error thereon was barred by the statute of limitations, the supreme court gave a different construction to the statute in another case, it was held that equity would not interfere to open the judgment.[80] Again, that a debt was divided and suits brought on each portion in a justice's court which would have no jurisdiction over one suit for the whole amount, is no reason for enjoining the judgment in one suit, unless it also appears that by means of the division the defendant was deprived of some right or remedy, and that he had not consented to the division.[81] It is well settled that no injunction can be had against a judgment merely on account of a defect or insufficiency of the evidence, or because the rules of evidence were violated on the trial.[82] So an error in the calculation of interest on a judgment rendered and sought to be executed is no ground for an injunction.[83] But where, through fraud, accident, or mistake, a judgment has been entered for an amount, or in terms, not as intended, equity will give relief, on clear and satisfying proof.[84] Or, as differently stated, equity will relieve in cases of mistakes in judgments, decrees, or other matters of record, when the mistake is not judicial and there are no other means of obtaining redress.[85] Thus, where the defendant agreed that

[79] Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442.

[80] Jones v. Watkins, 1 Stew. (Ala.) 81. And see Cassel v. Scott, 17 Ind. 514.

[81] Pryor v. Emerson, 22 Tex. 162.

[82] Pico v. Sunol, 6 Cal. 294; Hunt v. Coachman, 6 Rich. Eq. 286; Merritt v. Baldwin, 6 Wis. 439; Vaughn v. Johnson, 9 N. J. Eq. 173.

[83] Walker v. Villavaso, 26 La. Ann. 42. But where a jury by mistake omitted to include interest in their verdict, and the mistake was not discovered in time to apply to the law court for relief, it was held that equity might relieve against the mistake. Cohen v. Dubose, 1 Harp. Ch. 102, 14 Am. Dec. 709.

[84] Katz v. Moore, 13 Md. 566.

[85] Smith v. Butler, 11 Oreg. 46, 4 Pac. Rep. 517.

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the justice before whom the case was pending should enter a conditional judgment against him, and the justice entered an absolute judgment by confession, it was considered that equity might relieve.[86] So where a judgment was entered against a sheriff, under a mistake of the clerk in supposing a bail-piece to be insufficient, when the counsel had agreed that it might be filed, relief was granted against the judgment.[87]

§ 368. Fraud.

Fraud has always been reckoned among the special abhorrences of equity, and fraud is one of the grounds upon which application is most frequently made to equity for relief or redress. It is well settled that equity will enjoin a party from enforcing a judgment which he has obtained by means of fraud.[88] "Fraud will vitiate a judgment, and a court of equity may declare it a nullity. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon."[89] The rule is concisely stated by the chancery court in New Jersey in the following language: "The court will grant relief against a judgment which is against conscience, which was obtained by fraud or in any other way by which injustice has been done, and where the injured party has had no opportunity for defense, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment is obtained, and timely application for relief is made to this court."[90] A bill will lie to vacate a judgment for fraud, even although it has already been made the foundation in another state of a suit in which

[86] Gwinn v. Newton, 8 Humph. 710.

[87] Smith v. Wallace, 1 Wash. (Va.) 254.

[88] White v. Crow, 110 U. S. 183, 4 Sup. Ct. Rep. 71; Wingate v. Haywood, 40 N. H. 437; Pearce v. Olney, 20 Conn. 544; Carrington v. Holabird, 17 Conn. 530; Greene v. Haskell, 5 R. I. 447; Munn v. Worrall, 16 Barb. 221; Corwithe v. Griffin, 21 Barb. 9; Whittlesey v. Delaney, 73 N. Y. 571; Binsse v. Barker, 18 N. J. Law, 263, 23 Am. Dec. 720; Burch v. Scott, 1 Bland, 112; Kent v. Richards, 3 Md. Ch. 392; Poindexter v. Waddy, 6 Munf. 418, 8 Am. Dec. 749; Smith v. Hays, 1 Jones Eq. 321; Brown v. Thornton, 47 Ga. 474; Dugan v. McGann, 60 Ga. 353; Hair v. Lowe, 19 Ala. 224; Hahn v. Hart, 12 B. Mon. 426; Crank v. Flowers, 4 Heisk. 629; Ogden v. Larrabee, 57 Ill. 389; Cowin v. Toole, 31 Iowa, 513; Bresnahan v. Price, 57 Mo. 422; Payne v. O'Shea, 84 Mo. 129; Burkee v. Smith, (Walk.) Mich. 327; Hayden v. Hayden, 46 Cal. 332.

[89] Wingate v. Haywood, 40 N. H. 437.

[90] Moore v. Gamble, 9 N. J. Eq. 246.

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the defendant's property in that state has been attached.[91] But equity will not interfere on the ground of fraud unless the fraud is clearly stated and proved.[92] And allegations that the judgment was obtained "through fraud and other ill practices" are too vague and general.[93] And further, in order to obtain equitable relief against a judgment on the ground of fraud, it is necessary to be alleged and shown that there is a good defense on the merits.[94] Or, as otherwise stated, it must be made clearly to appear that the judgment has no other foundation than the fraud charged, and that if there had been no fraud there would have been no judgment.[95] Thus equity will not relieve against a judgment alleged to have been obtained by fraud, where the relief asked for is merely a reduction of the damages.[96] It has been adjudged a good ground for the intervention of equity that the judgment, fairly and regularly rendered, has afterwards been fraudulently altered so as to increase the amount for which it stands,[97] or so as to include a person not originally named in it nor made a party to the action.[98] Aside from the cases just instanced, it is evident that the fraud on which the application to equity is based may be of three different characters, or arise in three several ways. First, there may have been fraud in the instrument or transaction on which the judgment at law is founded. This, since it constitutes a good defense to the suit at law, must be set up then and there. If the defendant was ignorant of it, or had no opportunity to plead it, or was prevented from setting it up by the artifice or fraud of his adversary, it may be available on a subsequent application to chancery. But otherwise it furnishes no ground for equitable interference.[99] Secondly, whatever was the character of the defense, supposing it to be good and meritorious, the successful party may have practised fraud or trickery in such wise as to prevent the other from

[91] Edson v. Cumings, 52 Mich. 52, 17 N. W. Rep. 693.

[92] Jones v. South, 8 A. K. Mar. 352.

[93] Rooks v. Williams, 13 La. Ann. 374.

[94] White v. Crow, 110 U. S. 183, 4 Sup. Ct. Rep. 71; Hair v. Lowe, 19 Ala. 224; Pearce v. Olney, 20 Conn. 544; Ableman v. Roth, 12 Wis. 81; Way v. Lamb, 15 Iowa, 79.

[95] Dringer v. Receiver of Erie Ry. Co., 42 N. J. Eq. 573, 8 Atl. Rep. 811.

[96] Essex v. Berry, 2 Vt. 161; Murdock v. De Vries, 37 Cal. 527.

[97] Babcock v. McCamant, 53 Ill. 214.

[98] Chester v. Miller, 13 Cal. 558.

[99] Muscatine v. Miss. & Mo. R. Co., 1 Dill. 536. And see *infra*, § 378.

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bringing it before the court. Here equity will relieve, if the applicant himself was guilty of no negligence or fault. And thirdly, the fraud charged may have been practised in the act of procuring the judgment to be entered, or in taking judgment in violation of an agreement to the contrary. This also is sufficient ground for the interference of equity. These propositions will be elaborated in the next succeeding sections.

§ 369. Fraud in Preventing Defense.

Where a party, having a good defense to an action commenced against him at law, is prevented, by the fraud or fraudulent representations of the plaintiff or his attorney, from setting up that defense, and a judgment is obtained against him, without any negligence or fault on his part, it is a proper case in equity for relief against the judgment.[100] As remarked by a learned judge, "a decree or judgment receives its force from the fact that it is the decision of a competent tribunal, before which both the parties have had an opportunity of appearing and prosecuting their claims and having them fairly adjudicated. When this is prevented by the fraud or circumvention of one of the parties, without the fault or negligence of the other, the decree or judgment of the court ceases to have its binding effect, and it is competent for the party injured to resort to a court of chancery to obtain relief."[101] Thus, in one case, a perpetual

[100] Huggins v. King, 3 Barb. 616; Spencer v. Vigneaux, 20 Cal. 442; Cummins v. White, 4 Blackf. 356; Mack v. Doty, Harr. Ch. (Mich.) 366; Poindexter v. Waddy, 6 Munf. 418, 8 Am. Dec. 749; De Louis v. Meek, 2 Greene (Iowa), 55, 50 Am. Dec. 491.

[101] Lockwood v. Mitchell, 19 Ohio, 448, 53 Am. Dec. 438. This was also the ground of the decision in the remarkable litigation reported as "The Wagner Cases," 59 Md. 318, s. c. 16 Reporter, 594. The circumstances of this case disclose such a singular and unprecedented state of facts that they deserve somewhat extended mention, both as a matter of legal curiosity and as an illustration of the rule stated in the text. We quote as follows from the opinion of Judge Miller: "In these seventeen cases appeals have been taken by Harrison Wagner from the same number of decrees of the circuit court for Frederick county, sitting in equity, perpetually enjoining the execution of a large number of magistrates' judgments rendered in his favor against the several appellees. They present, as a whole, a case without precedent in judicial annals. They show the rendition of 1296 magistrates' judgments, amounting in the aggregate to

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injunction was granted, in order to stay proceedings on a judgment at law obtained in a suit instituted in the name of a person not interested, whose name was used only for the purpose of preventing a

$127,836 debt, and $2348.10 costs, in favor of the appellant. They were all rendered by John A. Wilson and John H. Locke, two justices of the peace in Frederick county, 791 of them by the former, and 505 by the latter. Eight hundred and sixty-two are for the exact sum of $98 each, 432 for $100 each, and two for $80 each. The bills in these cases were filed by the twenty-seven defendants in these judgments, praying for injunctions to restrain the enforcement of them, and that the same be cancelled or otherwise dealt with as right and justice may require. With respect to the judgments rendered by Wilson, the bills charge in substance that Wagner, maliciously and wickedly designing and intending to cheat, defraud, and swindle the complainants out of large amounts of money, procured these judgments to be entered up by Wilson, who was falsely and unlawfully pretending to be a justice of the peace, but who, in fact, had no authority at the time to act as such; that neither at the time of the institution of the pretended suits nor at the time when the pretended judgments were rendered were the complainants indebted to Wagner in any sum of money whatever, and that the same, as well as any pretended claims upon which they may be founded, are wholly false, vexatious, and oppressive, and without any pretence or color of right or justice, and that the complainants had no knowledge of their existence until nearly a year after they were rendered. Interlocutory decrees, for want of answers, were entered in all the cases except one, and testimony under *ex parte* commissioners was taken by the complainants. Wagner, however, subsequently filed his answers, in which he denies all the allegations of fraud contained in the bills, avers that the several complainants were duly summoned in the several cases before the magistrate, who, he insists, was duly authorized to act as such at the time, declares that the judgments are genuine, valid, and effective, and admits that at the time of the filing of the bills it was his purpose and intention to enforce them. The gross iniquity of this whole transaction, manifest enough upon its face, is abundantly established by the proof. Wilson lived in a district of the county and at a place remote from that in which the parties sued resided, and these 791 judgments were rendered by him on fourteen different days, from the 30th of September to the 26th of December, 1878, all of them, save sixty, in the month of October, and as many as 242 on one day in that month. The inference is irresistible that he merely wrote them out on his docket without examining witnesses, and without the semblance even of an *ex parte* trial. The claims on which they are founded do not appear in the records, but it is impossible to conceive that Wagner could have had this number of separate *bona fide* claims against these parties, each for the exact sum either of $100 or of $98. It would be taxing credulity beyond all reasonable limits to ask any one to believe that such a set of claims ever grew out of honest dealings. But the complainants all testify that they never owed the man a cent; that they never had any business with him, and some of them swear that they never knew that such a person existed. . . . . But the appellant, by his counsel, insists that all this proof is immaterial; that the complainants were duly summoned, and should have defended the suits before the magistrate; that not having done so, and not having ap-

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defense which the defendant had against the real plaintiff in interest.[102] Fraud of this character—used as a means of preventing a defense—assumes many various shapes. One of its most frequent appearances consists in the violation of an agreement to dismiss the suit or not to press it. But this topic will be separately discussed in another section.

§ 370. Fraud in Procuring the Judgment.

While it is true that equity will not generally listen to an impeachment of a judgment on the ground of fraud, when the fraud alleged was antecedent to the judgment and was or might have been litigated in the action at law, yet fraud practised in the very matter of obtaining the judgment is regarded as perpetrated upon the court as well as upon the injured party, and a judgment so procured may be enjoined.[103] The rule has been thus stated: "The question of fraud

pealed therefrom, the judgments are now conclusive, and the rule is inflexible that in such a case a court of equity has no power to interfere. [This was of course the point upon which Wagner intended, from the very first, to rely.] But assuming that these cases, extraordinary and unprecedented as they are, cannot be treated as constituting an exception to the general rule, there is, fortunately for the ends of justice, proof enough in the records to exempt them from its operation. The rule is that where a party fails to avail himself of his proper defense at law, and is not prevented from so doing by fraud or accident, or the acts of the opposite party, unmixed with any negligence or fault on his part, equity will not interfere. Gott v. Carr, 6 G. & J. 312; Kirby v. Pascault, 53 Md. 536. But this rule, in terms, recognizes the doctrine which is equally well settled, that where a party is not in fault by failing to use reasonable diligence, and is prevented from defending the action at law by fraud or accident, or the acts of the opposite party, equity will lend its aid and give relief; and the proof shows that the complainants in all the cases involving these Wilson judgments, except two, are entitled to relief upon this ground alone." The court then proceeded to consider the evidence contained in the record as to the various cases, and continued: "This disposes of the judgments rendered by Locke, and we leave them with the remark that here, as in the case of those rendered by Wilson, the parties affected had no knowledge of their existence, and no attempt was made to execute them, until long after the time for appeal had passed. On this point the testimony in all the cases is the same, and is conclusive. As to the jurisdiction of a court of equity to pass the decrees appealed from we entertain no doubt." The court also held that equity could *cancel* the judgments.

[102] Greenleaf v. Maher, 2 Wash. C. C. 393.

[103] Muscatine v. Miss. & Mo. R. Co., 1 Dill. 536; California Beet Sugar Co. v.

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which is open to examination in such case is as to something which intervened in the proceedings by which the judgment was obtained, and it must have occurred in the very concoction or procuring of the judgment, and not have been known to the opposite party at the time, and for not knowing which he is not chargeable with neglect or inattention. The fraud must consist in something of which the complaining party could not have availed himself in the court giving the judgment, or of which he was prevented from availing himself there by fraud."[104] Where a claim on which an action had been brought was settled before the term of the court began, and the plaintiff wrongfully entered the action and took judgment, the court in equity granted an injunction against the execution.[105] So where a written agreement was made, on the understanding that payment might be made in money, or in property at a valuation by two honest men, and that this understanding should be indorsed upon the agreement, which the party afterwards refused to do, but took judgment on the contract, it was held that chancery would consider the indorsement as made and would enjoin the judgment.[106] But in order to obtain this relief it is essential that the complainant himself should be entirely free from any fraud or improper conduct. Thus a party against whom a judgment has been entered on a bond cannot obtain relief in equity, against such judgment, on the ground that he was acting as the agent of the judgment plaintiff in the sale of territory in which to sell a patented article, and that such bond was only a sham, by which to induce others to purchase patent rights, and was never to be enforced against him.[107]

§ 371. Deceit and Concealment.

Where a judgment at law has been procured by artifice or concealment on the part of the plaintiff, and the court where the fraud has

Porter, 68 Cal. 369, 9 Pac. Rep. 313; Watts v. Frazer, 80 Ala. 186; Hogg v. Link, 90 Ind. 346; Pearce v. Olney, 20 Conn. 544; 2 Pomeroy, Eq. Jur. § 919.

[104] Stilwell v. Carpenter, 2 Abb. New Cas. 238, 263.

[105] Devoll v. Scales, 49 Me. 320.

[106] Dandridge v. Harris, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

[107] Barnett v. Barnett, 83 Va. 504, 2 S. E. Rep. 788.

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been perpetrated is not able to afford adequate relief, a court of equity will take hold of the party who has committed the fraud and will prevent his using the judgment to the injury of his adversary.[108] Thus a vendee of land may come into equity to enjoin a judgment at law on the notes given for purchase-money, upon alleging the vendor's fraudulent representations of title in himself, a breach of his warranty of title, and the insolvency of his estate.[109] So on account of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.[110] So on account of a representation that the property was free from charges, when in fact it was incumbered by liens for more than its value.[111] In a case where the sureties on a replevin-bond alleged that they had been induced, while in a state of intoxication, to sign a blank paper, upon which the bond was afterwards written in, it was held that equity would not relieve them unless it were shown that an unfair advantage had been taken of their condition to their detriment.[112]

[108] Tomkins v. Tomkins, 11 N. J. Eq. 512; Griffith v. Reynolds, 4 Gratt. 46; Pratt v. Northam, 5 Mason, 95; Fish v. Lane, 2 Hayw. 522. In the case of Spencer v. Vigneaux, 20 Cal. 442, it appeared that S. sued V., G., and D., as partners, on a claim for $22,000; by the instrumentality of V., $10,000 had been paid on account of this claim, and should have been credited; but by collusion between S. and V. this fact was kept a secret from G. and D., and they were induced to let judgment be taken against them for the whole amount. Afterwards, having paid on the judgment more than the amount which would have been due after the proper credit of $10,000, they discovered the true state of the case and refused to pay the remainder, whereupon S. sued them for it upon the judgment. At this trial they offered to show the foregoing facts in defense, and D. further stated in his answer that, having been informed before the first trial that such a payment of $10,000 had been made, he had inquired of V., who denied it; that all the books of the partnership were in V.'s possession, and he was unable to get any further personal knowledge about the matter. *Held*, that this defense might be made, that D.'s statement exculpated him from laches, and that G. and D. were entitled to an injunction against S. to prevent the enforcement of the original judgment.

[109] Walton v. Bonham, 24 Ala. 513; Wray v. Furniss, 27 Ala. 471; Cox v. Jerman, 6 Ired. Eq. 526; Graham v. Tankersley, 15 Ala. 634; Jaynes v. Brock, 10 Gratt. 211.

[110] Davis v. Millandon, 14 La. Ann. 868.

[111] Poe v. Decker, 5 Ind. 150. But a vendee who enters under a title-bond and holds the land under that title till the statute of limitations bars a recovery against him by an adverse title, cannot set up defect of title in his vendor, existing at the date of the sale to him, as ground for an injunction against a judgment for the purchase money. Amick v. Bowyer, 3 W. Va. 7.

[112] Campbell v. Ketcham, 1 Bibb, 406.

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§ 372. Perjury.

Whether relief will be granted in equity on the ground that the judgment was procured by the perjury of the plaintiff or a witness, is disputed. There are some English and American cases holding that such action is proper, where adequate redress cannot be had at law, and where the proof to convict the perjured witness could not be obtained in time to be used on the trial.[113] But other decisions refuse to recognize this as a sufficient ground for equitable interference.[114] A recent New York case holds that an equitable action cannot be maintained to annul a judgment rendered upon conflicting evidence, on the ground that the opposite party and his witnesses conspired together to obtain a judgment by perjury and fraud and that the judgment was obtained by false evidence.[115] The same position is also taken in a late decision by one of the federal courts, where the learned judge declared that "it is not sufficient ground for relief in equity against a judgment at law that one of the parties, or that some witness, or many witnesses, testified falsely upon a material question of fact in issue. If, upon such grounds, a court of chancery were to reopen issues settled by verdict of a jury, and thus relieve suitors from judgments recovered at law, it is difficult to see where litigation would stop, and what stability there would be in the adjudications of courts of law."[116]

§ 373. Taking Judgment contrary to Agreement.

If the plaintiff or his attorney makes promises or representations to the defendant, to the effect that the suit will not be pressed, or brought to trial, or will be dismissed, or that credits will be allowed, or that no recovery will be sought against him, or any other similar

[113] Coddrington v. Webb, 2 Vern. 240; Tovey v. Young, Prec. in Chanc. 193; Peagram v. King, 2 Hawks, 605, 11 Am. Dec. 793; Burgess v. Lovengood, 2 Jones Eq. 457. As to perjury as a ground for opening and vacating judgments, see, *supra*, § 323.

[114] Demeritt v. Lyford, 27 N. H. 541; Gott v. Carr, 6 Gill & J. 309; Smith v. Lowry, 1 Johns. Ch. 320.

[115] Ross v. Wood, 70 N. Y. 8.

[116] Cotzhausen v. Kerting, 29 Fed. Rep. 821.

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matter, to induce him to refrain from defending the case, and if the latter, honestly relying upon the understanding thus established, omits to present his defense, notwithstanding which the plaintiff fraudulently and in violation of the agreement proceeds to take a judgment, equity will grant relief by injunction.[117] So where a judgment is fraudulently taken by default in violation of an agreement for a compromise, the interposition of a defense being thus prevented, its enforcement will be restrained, and titles acquired under it (with notice) will be voidable in equity.[118] So equity will relieve against a judgment obtained by inducing the defendant to withdraw an equitable plea filed in the case, by a promise of the plaintiff that if such plea were withdrawn he would do the equity set up in the plea, which he failed to do.[119] In another case, where the maker of a promissory note held a receipt, acknowledging payment thereof, from the indorsee, who sued upon the note, representing to the maker that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default, it was held that an injunction should be granted perpetually restraining the collection of the judgment from the maker.[120] Where a defendant suffers judgment to be taken against him in consideration of an agreement on the plaintiff's part that no money need be paid on it except upon the happening of a certain event, the plain-

[117] Pearce v. Olney, 20 Conn. 544; Chambers v. Robbins, 28 Conn. 552; Hinckley v. Miles, 15 Hun, 170; Dobson v. Pearce, 12 N. Y. 156; Moore v. Gamble, 9 N. J. Eq. 246; Miller v. Harrison, 32 N. J. Eq. 76; Chase v. Manhardt, 1 Bland, 333; Kent v. Ricards, 3 Md. Ch. 392; Holland v. Trotter, 22 Gratt. 136; Jarman v. Saunders, 64 N. Car. 367; Markham v. Angier, 57 Ga. 43; Purviance v. Edwards, 17 Fla. 140; Brooks v. Whitson, 7 Sm. & Mar. 513; Newman v. Meek, 1 Sm. & Mar. Ch. 331; Bumley v. Rice, 21 Tex. 171; Williams v. Fowler, 2 J. J. Mar. 405; Broaddus v. Broaddus, 3 Dana, 536; Edmonson v. Mosely, 4 J. J. Mar. 497; Newman v. Thomas, 5 Heyw. 78; Brandon v. Green, 7 Humph. 130; Stone v. Lewman, 28 Ind. 97; Johnson v. Unversaw, 30 Ind. 435; Wierich v. De Zoya, 2 Gilm. 385; Beams v. Denham, 2 Scam. 58; How v. Mortell, 28 Ill. 479; Rogers v. Gwinn, 21 Iowa, 58; De Louis v. Meek, 2 Greene (Iowa), 55, 50 Am. Dec. 491; Baker v. Redd, 44 Iowa, 179; Perry v. Siter, 37 Mo. 273; Roberts v. Miles, 12 Mich. 297; Scriven v. Hursh, 39 Mich. 98; Keelan v. Elston, 22 Nebr. 310, 34 N. W. Rep. 891; Leran v. McNamara, 55 Cal. 508.

[118] Murphy v. Smith, 86 Mo. 333; Nealis' Adm'r v. Dicks, 72 Ind. 374; Bridgport Sav. Bank v. Eldredge, 28 Conn. 556; Rogers v. Gwinn, 21 Iowa, 58; Hibbard v. Eastman, 47 N. H. 507; Kent v. Ricards, 3 Md. Ch. 392.

[119] Markham v. Angier, 57 Ga. 43.

[120] Baker v. Redd, 44 Iowa, 179.

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tiff will not be permitted to exact payment in violation of the agreement.[121] So where the liability of the principal had been fixed and discharged, and the surety had been lulled into security by the delusive promises of his creditor and had been the victim of artifice and circumvention, and the judgment against him was obtained in contempt of an injunction, and the assertion of any right under it would be fraudulent, it was considered a proper case for the intervention of equity.[122] In order to induce a court of equity to declare a judgment confessed for a certain amount to be merely collateral security for whatever sum might be found due from defendant to plaintiff, the court must be satisfied beyond a reasonable doubt that such was the agreement of the parties, but upon being so satisfied it will enjoin the enforcement of the judgment, on the ground that to enforce it would be a fraud on the defendant.[123] A judgment recovered before a justice for an unjust amount, after an executed agreement of settlement, relied on by the defendant, but invalid because made on Sunday, will be enjoined in equity.[124]

§ 374. Unauthorized Appearance of Attorney.

It was the rule of the early English law that where a regular attorney of the court appeared and answered for the defendant in a suit at law, a judgment recovered by the plaintiff would not be vacated, nor execution enjoined by a court of equity, though the attorney appeared without authority from the defendant, *unless* it were shown that the attorney was not of sufficient ability to answer for the damages caused by his unauthorized act, or there had been collusion between him and the plaintiff. And this view was at one time generally favored by the American courts, and even now it still retains its force in some few jurisdictions.[125] But in the progressive development of the law, this harsh and inequitable rule has fallen into

[121] Moore v. Barclay, 16 Ala. 158.
[122] Cage v. Cassidy, 23 How. 109.
[123] Keighler v. Savage Manuf. Co., 12 Md. 383, 71 Am. Dec. 600. See Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442.
[124] Blakesley v. Johnson, 18 Wis. 580.
[125] Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth v. Balch, 40 N. H. 368; Hoffmire v. Hoffmire, 3 Edw. Ch. 174; American Ins. Co. v. Oakley, 9 Paige, 496. See 1 Salkeld, 86.

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desuetude. It has been abandoned by the English courts.[126] And in this country, almost universally, it is now held that equity may enjoin the collection of a judgment, unjust in itself, which was procured upon the appearance of an attorney without authority, without any regard to the question of the latter's solvency and ability to respond in damages.[127] But the complainant must make it appear that the judgment is inequitable in itself, by reason of some fraud or trick or collusion, or that the result would or might have been different if there had been a full and fair trial upon the merits.[128] If an attorney, assuming without authority to act for a *plaintiff*, brings a suit and loses it, the defendant recovering a judgment for costs, equity will restrain the enforcement of such judgment in the same circumstances which would induce it to relieve the defendant in the converse case.[129]

§ 375. Negligence or Mistake of Counsel.

It is well settled that equity will not relieve against a judgment at law on account of any ignorance, unskilfullness, or mistake of the party's attorney (unless caused by the opposite party), nor for counsel's negligence or inattention.[130] The fault is in such cases attrib-

[126] Bayley v. Buckland, 1 Exch. 1; Robson v. Eaton, 1 Term, 62; Hubbart v. Phillips, 13 Mees. & W. 702.

[127] United States v. Throckmorton, 98 U. S. 61; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; De Louis v. Meek, 2 Greene (Iowa), 55, 50 Am. Dec. 491; Critchfield v. Porter, 8 Ohio, 518; Allen v. Stone, 10 Barb. 547; Jones v. Williamson, 5 Cold. 371; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Gifford v. Thorn, 9 N. J. Eq. 702. In United States v. Throckmorton, *supra*, Mr. Justice Miller said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, [or by] a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

[128] Budd v. Gamble, 13 Fla. 265; Harris v. Gwin, 18 Miss. 563.

[129] Smyth v. Balch, 40 N. H. 363; Robson v. Eaton, 1 Term, 62.

[130] Crim v. Handley, 94 U. S. 652;

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uted to the party himself. Thus the neglect of an attorney to plead a valid and proper defense, or to attend the trial, either intentionally or through forgetfulness, and his failure for like reasons to notify his client of the time of trial, whereby a judgment is wrongfully obtained against the client, furnishes no ground for relief against the judgment.[131] So a party cannot obtain a new trial in equity, on the ground that his counsel mistook the facts of his defense, if he was present at the trial.[132] Nor is it an adequate ground for relief that the counsel neglected to assign errors on an appeal in the case.[133] In a case in California it appeared that the defendant's attorney on the trial objected to the introduction of certain testimony, and the court erroneously overruled the objection. An exception was taken to the ruling, and by reason of such erroneous ruling the plaintiff recovered judgment. The testimony was taken down by the official reporter, who failed to note the objection and exception. The defendant moved for a new trial, and adopted as his statement the report of the official reporter, without observing the error in the report, and for that reason failed to obtain a new trial. It was held that the mistake had been accompanied by such negligence on the part of the attorney that a court of equity would not relieve against the judgment.[134] A few exceptions to this rule are to be discovered in the books. Thus, in an early case in Tennessee, where a defendant at law had instructed his counsel in his defense, but the plea was so framed that the evidence did not support it and the defense therefore failed, it was considered that equity would be justified in giving

Winn v. Wilson, 1 Hemp. 698; Rogers v. Parker, 1 Hughes, 148; Warner v. Conant, 24 Vt. 851, 58 Am. Dec. 178; Burton v. Wiley, 26 Vt. 430; McBroom v. Sommerville, 2 Stew. (Ala.) 515; Watts v. Gayle, 20 Ala. 817; Broda v. Greenwald, 66 Ala. 538; Dibble v. Truluck, 12 Fla. 185; Barrow v. Jones, 1 J. J. Mar. 470; Morton v. Nunnelly, 8 Heyw. 210; Chester v. Apperson, 4 Heisk. 639; Graham v. Roberts, 1 Head. 56; Burton v. Hynson, 14 Ark. 32; White v. Bank, 6 Ohio, 529; Winchester v. Grosvenor, 48 Ill. 517; Dinet v. Eigenmann, 96 Ill 39; Kern v. Strausberger, 7 Ill. 413; Fuller v. Little, 69 Ill. 229; Shricker v. Field, 9 Iowa, 366; Jones v. Leech, 46 Iowa, 186; Miller v. Bernecker, 46 Mo. 194; Bowman v. Field, 9 Mo. App. 576; Huebschman v. Baker, 7 Wis. 542; Farmers' Loan Co. v. Bank, 23 Wis. 249; Boston v. Haynes, 33 Cal. 31; Quinn v. Wetherbee, 41 Cal. 247.

[131] Sharp v. Moffitt, 94 Ind. 240.

[132] Jamison v. May, 13 Ark. 600.

[133] Miller v. Bernecker, 46 Mo. 194; Dinet v. Eigenmann, 96 Ill. 39.

[134] Quinn v. Wetherbee, 41 Cal. 247.

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relief.[135] In New York—where, to be sure, the practice is excessively liberal in this respect—the courts will entertain a motion for the vacation of a judgment on the ground of the neglect or mistake of counsel. With a fine spirit of humanity, but with little regard for the settled principles of law, they declare that they will not suffer a client to be ruined because he has employed an incompetent or unworthy attorney.[136]

§ 376. Want of Jurisdiction.

It is generally held that where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if it be shown that there is a meritorious defense to the action.[137] And the fact that the law-court, in rendering judgment, passed on the sufficiency of an alleged service of the notice is not a bar to a readjudication of the question in an action to restrain execution of the judgment.[138] It is also held that where a judgment passes against a party before actual notice to him, although a copy of the writ was left at his residence, he being then absent from the state, equity will relieve if there is a substantial defense.[139] But it is no ground for relief that the defendant *forgot* that the writ was served upon him, whereby he was prevented from appearing and defending,[140] or that he erroneously supposed the

[135] Click v. Gillespie, 4 Heyw. 4.

[136] Sharp v. Mayor of New York, 31 Barb. 578.

[137] Myers v. Daniels, 6 Jones Eq. 1; Morgan v. Scott, Minor, 81; Brooks v. Harrison, 2 Ala. 209; Secor v. Woodward, 8 Ala. 500; Crafts v. Dexter, 8 Ala. 767; Stubbs v. Leavitt, 30 Ala. 352; Robinson v. Reed, 50 Ala. 69; Dunklin v. Wilson, 64 Ala. 162; Southern Ex. Co. v. Craft, 43 Miss. 508; McFaddin v. Spencer, 18 Tex. 440; Walker v. Winne, 8 Yerg. 62; Ingle v. McCurry, 1 Heisk. 26; Ridgeway v. Bank of Tenn., 11 Humph. 523; Ryan v. Boyd, 33 Ark. 778; Montague v. Mitchell, 28 Ill. 481; Weaver v. Poyer, 79 Ill. 417; Wilday v. McConnel, 63 Ill. 278; Coon v. Jones, 10 Iowa, 131; Givens v. Campbell, 20 Iowa, 79; Campbell v. Edwards, 1 Mo. 324; San Juan Co. v. Finch, 6 Colo. 214; Martin v. Parsons, 49 Cal. 94; Jeffery v. Fitch, 46 Conn. 601. *Per contra*, Armsworthy v. Cheshire, 2 Dev. Ch. 234, 34 Am. Dec. 273.

[138] State Ins. Co. v. Waterhouse, (Iowa), 43 N. W. Rep. 611.

[139] Jones v. Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419.

[140] Cullum v. Casey, 1 Ala. 351; Dewees v. Richardson, 1 A. K. Marsh. 312.

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suit was intended to be against another person.[141] Nor will equity relieve on account of the want of notice, where it appears that the rendition of the judgment was suspended, by consent, until the opinion of the supreme court in another case between the same parties could be had, and that the judgment was not given until after such opinion had been obtained.[142] Chancery has also refused to interfere in a case where the defendant, not denying that he had been duly served, alleged that he was not a citizen or resident of the state and had been fraudulently decoyed within the jurisdiction in order to procure service on him; for, said the court, the objection should have been taken by appearing in the original suit and moving to set aside the service.[143] Applications of this character are most commonly made in cases where, out of several defendants, only a part have been notified of the suit. Thus a judgment rendered against a joint maker of a note, without service upon him of any summons or process, is void, and where it appears that the right of action on the note has expired, so that there exists a good defense, a perpetual injunction will be granted, restraining the execution of such judgment.[144] So a judgment confessed by one partner against the firm, without the consent of the others, will be enjoined.[145] But on the other hand, where a judgment has been obtained against a principal and surety, it is no ground for an injunction in favor of the surety that the *principal* was not served with process and had no opportunity to defend.[146] Equity also has jurisdiction to vacate a judgment which has been fraudulently altered so as to include a defendant who was not served and not originally included in the judgment.[147] Although the general consensus of judicial opinions is as stated in the beginning of this section, the decisions in some of the states hold that equity ought not to restrain a judgment on the mere ground that it was void for want of jurisdiction, since the complainant has an adequate remedy at law, by motion, or otherwise, in the original cause.[148] Probably the true note of dis-

[141] Higgins v. Bullock, 78 Ill. 205.
[142] Stein v. Burden, 80 Ala. 270.
[143] Marsh's Admr. v. Bast, 41 Mo. 493. Compare Grass v. Hess, 87 Ind. 198.
[144] Gerrish v. Seaton, 78 Iowa, 15, 34 N. W. Rep. 485.
[145] Christy v. Sherman, 10 Iowa, 535.
[146] Mason v. Miles, 63 N. Car. 564.
[147] Chester v. Miller, 18 Cal. 558.
[148] Fullan v. Hooper, 66 How. Pr. 75. Morris v. Morris, 76 Ga. 733; Partin v. Luterloh, 6 Jones Eq. 341.

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tinction is struck in the cases that rule that equity will not enjoin the judgment unless it be shown to be inequitable and unjust; if the party merely relies upon a defect of jurisdiction, without attempting to show that the merits are with him also, he must seek his remedy at law.[149]

§ 377. Judgment founded on False Return of Service.

Equity may vacate or enjoin the judgment of a court of law, when it is shown to be unjust and that the court rendering it never had jurisdiction of the person of the defendant, although assuming it, in consequence of a false return of service by the sheriff or other officer.[150] In a case in California, where the action was to enforce a tax-lien on land, and there was no service of summons and no appearance by the defendants, and the court commissioner drafted the decree, and either fraudulently or by neglect inserted a clause in the decree that the summons had been served and the judge, deceived by the false recitals in the decree, signed it and ordered it to be entered as the judgment of the court, and at the sheriff's sale under the decree the commissioner became the purchaser and obtained a sheriff's deed, it was held that a court of equity would grant relief to the owner, by restraining the purchaser from setting up the judgment as an estoppel or from using it to perpetuate the advantage he had gained.[151] It should be remarked that there is a line of decisions wherein the application of the rule above stated is materially restricted. These cases hold that equity should not grant relief unless the false return of service was procured or induced by the plaintiff, or unless the latter can be in some way connected with the

[149] Stokes v. Knarr, 11 Wis. 389; Gerrish v. Hunt, 66 Iowa, 682, 24 N. W. Rep. 274.

[150] Miller v. Gorman, 38 Pa. St. 309; Brooks v. Harrison, 2 Ala. 209; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Walker v. Gilbert, Freem. Ch. 85; Jones v. Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419; Ridgeway v. Bank of Tenn., 11 Humph. 522; Ingle v. McCurry, 1 Heisk. 26; Bell v. Williams, 1 Head, 229; Estis v. Patton, 3 Yerg. 381; Ryan v. Boyd, 33 Ark. 778; Owens v. Ramstead, 22 Ill. 161; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Newcomb v. Dewey, 27 Iowa, 381; Stone v. Skerry, 31 Iowa, 582; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

[151] Martin v. Parsons, 49 Cal. 95.

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deception, thus linking the case supposed with the category of those wherein the defendant was prevented from setting up his defense by the trickery or fraud of his adversary.[152] The analogy here presented is plausible, but deceptive. For in case the plaintiff is in no fault, and the officer is alone to blame for the false return, these decisions can suggest no remedy except that the defendant should pay the judgment and then bring his action against the officer.[153] Practically, however, this remedy must often be illusory. And at its best, it involves a circuity and remoteness of obtaining redress which is foreign to the spirit of equity. But although the main rule for cases of this sort may be regarded as generally well settled, there is a material difference of opinion as to whether the relief will be granted when there still exists a complete and adequate remedy in the original suit. Numerous respectable authorities hold that it should be granted;[154] others that it should be refused.[155] But at all events, before equity will interpose by injunction in a case of this description, it must be averred and proved that the defendant has a meritorious defense, or at least something more than the mere barren right of being permitted to defend.[156]

§ 378. Legal Defense not Interposed.

The rule is well settled and perfectly inflexible, that if the defendant in an action at law had a good defense, purely legal in its nat-

[152] Walker v. Robbins, 14 How. 584; Johnson v. Jones, 2 Nebr. 126; Taylor v. Lewis, 2 J. J. Mar. 400, 19 Am. Dec. 135; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Gardner v. Jenkins, 14 Md. 58.

[153] In Walker v. Robbins, 14 How. 584, it was said: "In cases of false returns affecting a defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the marshal."

[154] Landrum v. Farmer, 7 Bush, 46; Caruthers v. Hartsfield, 8 Yerg. 366, 24 Am. Dec. 580; McNairy v. Eastland, 10 Yerg. 309; Connell v. Stilson, 33 Iowa, 147; Hernandez v. James, 23 La. Ann. 483; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

[155] Bibend v. Kreutz, 20 Cal. 109; Sanchez v. Carriga, 31 Cal. 170; Comstock v. Clemens, 19 Cal. 77; Chambers v. Bridge Co., 16 Kans. 270; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

[156] Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Coon v. Jones, 10 Iowa, 131; Secor v. Woodward, 8 Ala. 500; Gardner v. Jenkins, 14 Md. 58; Harris v. Gwin, 10 Sm. & Mar. 563; Fowler v. Lee, 10 Gill & J. 358, 32 Am. Dec. 172.

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ure, of the existence of which he was aware, and which he had an opportunity to set up, but neglected to defend himself, he cannot come into equity seeking relief against the judgment in that action, on the same grounds which constituted that defense, unless his failure to make the defense was due to circumstances of fraud, accident, or surprise, entirely unmixed with negligence or fault on his own part.[157] In other words, "a court of chancery will not entertain a party seeking relief against a judgment at law in consequence of his default upon grounds which might have been successfully taken in the said [law] court, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defense at law was not made." [158] Thus relief in equity was refused in a case where the defendant had a good defense of a discharge under the bankrupt act, but neglected to answer or plead it because the plaintiff had commenced the suit

[157] Hungerford v. Sigerson, 20 How. 156; Wynn v. Wilson, 1 Hempst. 698; New Orleans v. Morris, 3 Woods, 103; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Tyler v. Hamersley, 44 Conn. 419; Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121; Foster v. Wood, 6 Johns. Ch. 86; Mills v. Van Voorhis, 10 Abb. Pr. 10; Katz v. Moore, 13 Md. 566; Ewing v. Nickle, 45 Md. 413; Lyday v. Douple, 17 Md. 188; Huston v. Ditto, 20 Md. 305; Harnsbarger v. Kinney, 13 Gratt. 511; Smith v. McLain, 11 W. Va. 654; Jackson v. Patrick, 10 S. Car. 207; Robbins v. Mount, 3 Ga. 74; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Vaughn v. Fuller, 23 Ga. 366; Neal v. Henderson, 72 Ga. 209; Foster v. State Bank, 17 Ala. 672; Thomas v. Phillips, 4 Sm. & Mar. 358; Williams v. Jones, 10 Sm. & Mar. 108; Semple v. McGatagan, 10 Sm. & Mar. 98; Scroggins v. Howarth, 23 Miss. 514; Ship v. Wheeless, 33 Miss. 646; Jordan v. Thomas, 34 Miss. 72, 69 Am. Dec. 387; Gaines v. Kennedy, 53 Miss. 103; Minor v. Stone, 1 La. Ann. 283; Todd v. Fisk, 14 La. Ann. 13; McRae v. Purvis, 12 La. Ann. 85; Gibson v. Moore, 22 Tex. 611; Jordan v. Corley, 42 Tex. 284; Prewitt v. Perry, 6 Tex. 260; Coffee v. Ball, 49 Tex. 16; Smith v. Durrett, Sneed, (Ky.) 236, 2 Am. Dec. 714; Cowan v. Price, 1 Bibb, 173, 4 Am. Dec. 627; Paynter v. Evans, 7 B. Mon. 420; Galbraith v. Martin, 5 Humph. 50; Brandon v. Green, 7 Humph. 130; Andrews v. Fenter, 1 Ark. 186; Lester v. Hoskins, 26 Ark. 63; Bently v. Dillard, 6 Ark. 79; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696; Menifee v. Ball, 7 Ark. 520; Raburn v. Shortridge, 2 Blackf. 480; Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; Smith v. Powell, 50 Ill. 21; Higgins v. Bullock, 73 Ill. 205; Johnson v. Lyon, 14 Iowa, 481; Faulkner v. Campbell, 1 Morris (Iowa), 148; Collier v. Eastòn, 2 Mo. 146; Kelly v. Hurt, 74 Mo. 561; Kelleher v. Boden, 55 Mich. 295, 21 N. W. Rep. 346; Sargeant v. Bigelow, 24 Minn. 370; Snyder v. Vannoy, 1 Oreg. 344; Marsh v. Edgerton, 1 Chand. (Wis.) 198; Phelps v. Peabody, 7 Cal. 50; Agard v. Valencia, 39 Cal. 292.

[158] Braden v. Reitzenberger, 18 W. Va. 286; Nevins v. McKee, 61 Tex. 412.

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before his discharge in bankruptcy, and continued it, unknown to him, from term to term, until after his discharge, before taking judgment; for he knew of the institution of the suit and was bound to notice everything else that was done.[159] Nor will equity relieve because the party did not prove on the trial payments which he alleges he had made, unless he shows some fraud or circumvention practised to prevent his making the proof.[160] Nor because the promissory note upon which judgment was rendered was without consideration.[161] That the legal defense was not presented or considered through the oversight of counsel or the error of the judge, or the failure on the part of the defendant to collect the evidence in due season and present it in a way to be available, is no sufficient excuse.[162] And if the defendant is precluded from setting up in equity defenses which he *might* have made available at law, much less can he urge, as a ground for relief in equity, any defenses which actually *were* tried and determined at law. Equity will invariably decline to re-examine a question which was fully and fairly examined at law. The decision, however inequitable it may appear, is final, and the matter is *res judicata*.[163] Hence a judgment obtained without fraud or mistake, upon issue joined and after litigation, will be interfered with by a court of equity only when it appears, first, that to allow its execution would be against equity and good conscience, and second, that the facts rendering it thus inequitable were not available as a defense in the action in which the judgment was recovered.[164]

[159] Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221.

[160] Deaver v. Erwin, 7 Ired. Eq. 250; Harnsbarger v. Kinney, 13 Gratt. 511.

[161] Garrison v. Cobb, 106 Ind. 245, 6 N. E. Rep. 332.

[162] Lebanon Mut. Ins. Co.'s Appeal (Pa.), 1 Atl. Rep. 559.

[163] Bateman v. Willoe, 1 Sch. & Lef. 204; Marine Ins. Co. v. Hodgson, 7 Cranch, 332; Truly v. Wanzer, 5 How. 141; Hendrickson v. Hinckley, 17 How. 443; Forsythe v. McCreight, 10 Rich. Eq. 308; More v. Bagley, Breese, 60, 12 Am. Dec. 144; Yongue v. Billups, 23 Miss. 407; Briesch v. McCauley, 7 Gill, 189; Brown v. Wilson, 56 Ga. 534; White v. Cahal, 2 Swan, 550; Simpson v. Hart, 1 Johns. Ch. 97; Emerson v. Udall, 13 Vt. 477; Agard v. Valencia, 39 Cal. 292; Foster v. State Bank, 17 Ala. 672; Snyder v. Vannoy, 1 Oreg. 344; Sumner v. Whitley, 1 Mo. 708; Matson v. Field, 10 Mo. 100.

[164] Clute v. Potter, 37 Barb. 199.

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§ 379. Illegality of Consideration.

In regard to judgments rendered upon a contract which was inherently illegal or immoral, there has been some difference of opinion as to whether equity ought not to relax the strictness of the rule stated above, and enjoin such judgments, irrespective of the fact that such illegality of the consideration might and should have been set up as a defense at law. Some cases are to be found in which relief has been thus granted where the judgment was founded upon usury.[165] But the more favored opinion is that where the defense of usury was open to the defendant at law and he had an opportunity to set it up, but neglected to do so, equity will not relieve.[166] There are also precedents for the intervention of equity to annul gaming contracts, though the defense could have been interposed at law.[167] In Illinois, a statute provides that all judgments, mortgages, bonds, notes, etc., given or executed for any money won by gaming, may be set aside by any court of equity upon bill filed for that purpose by the person giving, entering into, or executing the same, or by any other person interested therein. This, it is held, applies as well to judgments rendered in contested actions as to judgments on confession. And, such a suit being authorized by statute, the fact that the illegality of the contract sued on would have constituted a good defense to the action in which the judgment was recovered, does not oust the court of chancery of jurisdiction.[168] In a recent case it was held that a bill would lie to enjoin the plaintiff from collecting a judgment confessed five years previously, under a warrant of attorney in a bond, the defendant having had no day in court, upon the ground that the consideration of the bond was an agreement to suppress a prosecution for a felony.[169] But the supreme federal court holds, and with

[165] Frierson v. Moody, 3 Humph. 561.

[166] Lucas v. Spencer, 27 Ill. 15; Chinn v. Mitchell, 2 Met. (Ky.) 92; Brown v. Toell, 5 Rand. 543, 16 Am. Dec. 759.

[167] Woodson v. Barrett, 2 Hen. & M. 86; Skipwith v. Strother, 3 Rand. 214; Clay v. Fry, 3 Bibb. 248, 6 Am. Dec. 654.

[168] Rev. Stats. Ill. c. 38, § 135; West v. Carter (Ill.), 21 N. E. Rep. 782; Mallett v. Butcher, 41 Ill. 382; Lucas v. Nichols, 66 Ill. 41. See also Lucas v. Waul, 12 Sm. & Mar. 157.

[169] Given's Appeal, 121 Pa. St. 260, 15 Atl. Rep. 468. And see Heath v. Cobb, 2 Dev. Ch. 187.

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undoubted justice, that equity should not relieve against a judgment at law on the ground that it was founded on a consideration illegal and expressly forbidden by the laws of the state, when the party applying for relief was *in pari delicto* with the other; "a position," says the court, "which, however it might shield him against attempts from associates in wrong, so far as these should be urged through the instrumentality of courts of justice, can invest him with no rights, either at law or in equity, as against advantages acquired by his confederates." [170]

§ 380. Excuses for not defending at Law.

Among the excuses for not making one's defense at law which are generally considered as sufficient to justify the interference of equity are the following:—fraud, circumvention, or any other improper act of the other party whereby a defense was presented; mistake, surprise, or accident; and justifiable ignorance of the facts constituting a defense. Some of these have already been considered, and the others will be considered in their order. But first it is necessary to advert to certain kinds of excuses which have been adjudged inadequate, and to the manner of satisfying the court of the existence of a valid excuse. That the debtor had a valid defense, but was advised by his counsel that it was not necessary to bring it forward before the court, is unanimously condemned as insufficient to warrant the intervention of a court of chancery.[171] So when the grounds relied on in equity are equally available at law, it is no ground for relief that parties, who were not at the time of the trial examinable as witnesses, have since been made so by statute.[172] If a party, having a good defense at law, by his own voluntary act deprives himself of the means of making it, a court of equity will not interpose in his behalf; as where a party, having a good defense to a note, voluntarily executes a deed of trust to secure its payment, equity will not enjoin the execution of the trust on account of such defense to the

[170] Sample v. Barnes, 14 How. 70; Creath v. Sims, 5 How. 192.

[171] Duckworth v. Duckworth, 35 Ala. 70; Brown v. Wilson, 56 Ga. 534; Shricker v. Field, 9 Iowa, 367.

[172] Kendall v. Winsor, 6 R. I. 453.

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original note.[173] In regard to the evidence to prove the state of facts alleged as an excuse for the party's failure to make his defense at law, it is said that "the same certainty of proof is not required to establish an excuse for not making the defense at law that would be demanded to establish the existence of that defense."[174] Yet as it is the excuse, and not the defense, which must be established at this stage of the proceedings, it is of no avail to prove the defense if the excuse remains without evidence to support it. For example, where A. pays a debt for which he and B. are liable, and afterwards recovers a judgment at law against B. for half the amount, and on a bill by B. for relief against the judgment, on the ground that he was surety for A. in the debt, he fails to prove his alleged reason for not making the defense at law, but proves that he was surety for A., there can be no relief afforded to him in equity.[175]

§ 381. Same; Mistake.

A mistake of *fact*, provided it be honest and genuine, and such as a man might reasonably make, will be a sufficient excuse for not defending an action at law, and will warrant a court of equity, if the judgment be against conscience, in interposing by injunction to restrain its enforcement.[176] For instance, where A., a creditor of B., called upon the latter to execute a bond with surety for the debt, and supposing himself authorized by the conversation, applied to C. to execute the bond as surety, who did so accordingly, and A. subsequently recovered judgment on the bond, it was held, upon a bill by C. showing that A.'s representation of his authority from B. was made under a mistake, that the judgment should be enjoined as against C.[177] But it is no ground for relief in equity that the party was prevented from making his defense at law by a mistake of *law*,

[173] Fanning v. Farmers' Bank, 8 Sm. & Mar. 139.

[174] Rice v. Bank, 7 Humph. 39.

[175] Turner v. Davis, 7 Leigh, 227, 30 Am. Dec. 502.

[176] Bibend v. Kreutz, 20 Cal. 109; Chase v. Manhardt, 1 Bland Ch. 350; Ford v. Ford, Walker, 505, 12 Am. Dec. 587; Drew v. Clarke, Cooke, 373, 5 Am. Dec. 698; Partridge v. Harrow, 27 Iowa, 96; Wilson v. Boughton, 50 Mo. 17; Kohn v. Lovett, 43 Ga. 180.

[177] Bird v. Chaffin, 1 Dev. & Bat. Ch. 55.

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although it was a mutual mistake of both parties to the suit.[178] Nor that the defendant mistook his rights and so failed to make a defense which it was competent for him to present at law.[179] Nor will equity interfere because of his ignorance of the nature of the proceeding against him and a misapprehension of what was necessary to charge him.[180] Nor because he misunderstood the nature of the action and because those interested in the matter were out of the county.[181] Nor will relief be granted where the defendant, misnamed in the process, was in court when the judgment was rendered against him by default, and failed to defend by advice of his counsel.[182] Where an application for relief is made upon this ground, due diligence must be shown and the facts set forth showing how the omission occurred.[183]

§ 382. Same; Surprise.

In the cases where surprise has been accepted as a sufficient excuse for not defending at law, it has generally transpired that the surprise was one intentionally prepared by the plaintiff and sprung upon the defendant at the trial, whereby the case is assimilated to that of a fraud or trick on the former's part. Thus, in an early case, the payee of an usurious note pretended to have sold and transferred the same to a third person, in whose name a suit at law was brought upon the note, whereby the makers of the note were induced to suppose that the payee of the note could be examined by them as a witness in that suit to prove the usury, but such payee, when called as a witness at the trial, testified that he was one of the real plaintiffs in interest in the suit, and declined to testify as to the alleged usury, and from the state of the pleadings he could not be examined as a plaintiff under the statute for the prevention of usury. It was held that the defendants in that suit could maintain a bill in chancery against the real plaintiffs in the suit at law for discovery and relief, upon the ground that they had been deceived

[178] Richmond v. Shippen, 2 Pat. & H. 327; Meem v. Rucker, 10 Gratt. 506; Hubbard v. Martin, 8 Yerg. 498.

[179] Dickerson v. Commissioners, 6 Ind. 128, 63 Am. Dec. 373.

[180] Meem v. Rucker, 10 Gratt. 506.

[181] State Bank v. Stanton, 2 Gilm. 352.

[182] Graham v. Roberts, 1 Head, 56.

[183] Simmons v. Martin, 53 Ga. 620.

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and defrauded out of their defense at law.[184] But an injunction will not be allowed on the ground of surprise, where there was no surprise but such as the party might have reasonably anticipated.[185] And a party seeking relief in equity on this ground must show that the surprise was not in consequence of his own negligence.[186] Thus it is no excuse that the witness on whom the defendant relied, but whom he had never questioned, failed to prove the defense set up.[187] So the fact that the party's counsel was surprised by the production of a certain piece of evidence is no ground for relief in equity, if he was previously cognizant of the evidence.[188] On the same principle, surprise of a party or his counsel, at the fact that the supreme court refused to review the judgment of the circuit judge, under a stipulation of the parties which had, in effect, made the decision of such judge final, is no ground for equitable interference with the judgment.[189]

§ 383. Same; Accident or Misfortune.

Unavoidable accident or misfortune, preventing the party from making his defense at law, is a sufficient ground for the interference of equity in an otherwise meritorious case.[190] This, it will be remembered, is one of the grounds specified in the statutes of some of the states as authorizing the vacation of a judgment on motion in the court where rendered.[191] It may be stated that equity is guided by practically the same rules which have been applied by the courts of law in construing these statutes, except, perhaps, that the lines are rather more closely drawn in equity, and less indulgence is shown in respect to the kinds of accident which are accepted as sufficient excuses, and in respect to the possibility of the party's surmounting the obstacle and making his defense. A few illustrative cases may follow here. It has been broadly held that the sickness of a party,

[184] Post v. Boardman, 10 Paige, 580.
[185] Fowler v. Roe, 11 N. J. Eq. 367; Shannon v. Reese, 38 Ala. 586.
[186] Lawson v. Bettison, 12 Ark. 401.
[187] Williams v. Lockwood, 1 Clark Ch. 172.
[188] Gibson v. Watts, 1 McC. Ch. 490.
[189] Farmers' Loan Co. v. Walworth Bank, 23 Wis. 249.
[190] Kersey v. Rash, 3 Del. Ch. 321.
[191] *Supra*, §§ 337-340.

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or the pendency of another suit against him requiring his attendance, will not authorize the interference of equity.[192] And this is undoubtedly true, if it would have been possible for him to be represented by counsel. Floods, which prevented him from reaching the place of trial, will furnish a sufficient excuse, but only in case the bill is very explicit as to the time of the prevalence of high water and of the meeting and adjournment of court, and as to the efforts that were made to reach it, and as to the impossibility of a successful defense in the absence of the defendant.[193] In another case, equity refused to enjoin a judgment on the ground that the defendant was precluded by intense excitement prevailing in the country from attending court, that it was dangerous to travel from home, that it was generally understood there would be no court, and that the judge of the court said that he should hold no session for the trial of cases.[194] It should be remarked, in this connection, that a good excuse for not being present at the term at which judgment was rendered, is not sufficient where no counsel was employed, nor witnesses summoned, nor any other steps taken to defend the action.[195] The inability of the party's attorney to attend the court, or his sickness, may, under some circumstances, entitle the party to relief in equity;[196] but it is no ground for an injunction that defendant's counsel was absent, when it appears that the defendant, if present at the trial, might have employed other counsel equally competent.[197] So the death of defendant's original counsel, and want of familiarity, on the part of the counsel who succeeds him, with the grounds of the defense, do not furnish a sufficient reason for equity to enjoin the enforcement of the judgment.[198] On the other hand, equity has thought it proper to give relief on account of the loss of a written contract without which the defense at law

[192] Phar v. Reynolds, 3 Ala. 521. But where the defendant was taken sick on the way to trial and was thereby prevented from making affidavit to the loss of certain papers, and the court, in consequence, refused to admit secondary evidence of them, he was relieved in equity from the judgment against him. Hord v. Dishman, 5 Call, 279.

[193] English v. Savage, 14 Ala. 342; Brooks v. Whitson, 15 Miss. 513.

[194] George v. Tutt, 36 Mo. 141.

[195] McCollum v. Prewitt, 1 Ala. Sel. Cas. 498; Cole v. Hundley, 16 Miss. 473.

[196] McBroom v. Sommerville, 2 Stew. 515.

[197] Crim v. Handley, 94 U. S. 652; Mock v. Cundriff, 6 Port. 24.

[198] Powell v. Stewart, 17 Ala. 712.

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could not be made;[199] but has refused its aid where it was not satisfied that the loss of the particular document would endanger the complainant's defense in the court of law.[200] In a case where parties were prevented from making their defense at law by the acts of the plaintiff, until the only witness by whom the defense could be proved was dead, and a resort to a court of chancery in consequence thereof became indispensable, it was held that they were entitled to relief in that court.[201] But the fact that a witness omitted, in giving his testimony, to state a material fact, and that the complainant, by reason of his deafness, did not know of such omission until after the trial, is no ground for relief.[202]

§ 384. Ignorance of Legal Defense.

It may be regarded as well settled, upon the authorities, that equity will grant relief against a judgment at law where it is shown that there is a good and valid defense to the action on the merits, of which the defendant was ignorant at the time of the trial, and which he could not have discovered, by the exercise of reasonable and proper diligence, in time to set it up at law.[203] For example, where an administrator has recovered judgment for the purchase money of property of his intestate sold by him, it is a sufficient excuse to the vendee for not defending at law, that he did not know until after the judgment was rendered that the administrator had no authority to sell.[204] So where the creditor obtains a judgment at law against the sureties before they have notice of an agreement to forbear suit, equity will enjoin its collection.[205] But it is an important corollary

[199] Vathir v. Zane, 6 Gratt. 246.

[200] Rogers v. Cross, 3 Chand. 84.

[201] Mack v. Doty, Harr. Ch. (Mich.) 366.

[202] Stone v. Moody, 6 Yerg. 31.

[203] Davis v. Tileston, 6 How. 114; Garrett v. Lynch, 45 Ala. 211; Wales v. Bank of Michigan, Harr. Ch. (Mich.) 308; Hubbard v. Hobson, Breese, 147; Jones v. Kilgore, 2 Rich. Eq. 63; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Inglehart v. Lee, 4 Md. Ch. 514; Baltzell v. Randolph, 9 Fla. 366; Meek v. Howard, 10 Sm. & Mar. 502; Brown v. Luehers, 79 Ill. 575; Wells v. Wall, 1 Oreg. 295; Ludington v. Handley, 7 W. Va. 269; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Rust v. Ware, 6 Gratt. 50.

[204] Crisman v. Beasley, 1 Sm. & Mar. Ch. 561.

[205] Armistead v. Ward, 2 Pat. & H. 504.

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to the above rule—or, indeed, an integral part of the rule—that mere ignorance of his defense is not sufficient; it must be shown that the party is guilty of no negligence, and that he could not possibly have ascertained it by the exercise of careful and reasonable diligence.[206] It must appear that the defendant's ignorance was not due to any lack of diligence on his part, or that it was caused by the act of the opposite party.[207] "A party who seeks the aid of a court of chancery, after a judgment at law against him, on the ground that he was ignorant of the defense, must show the exercise of ordinary diligence to discover it; or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part."[208] Thus an alteration in an instrument sued on at law may be taken advantage of there, and the failure of the defendant to discover the alteration until after judgment is no ground for relief in equity.[209] So the allegation that there was a mistake in an account, upon which a judgment at law was recovered, which was not discovered until after the trial and verdict, is not sufficient to authorize an injunction against the judgment.[210] Nor is it any ground for relief in equity that defendant did not know, at the time of the trial at law, what the legal criterion of damages was.[211]

§ 385. Discovery must have been sought.

It is no excuse for failure to set up a legal defense in the action at law that the defendant could not make it available without invoking the aid of chancery to get a discovery; he should have obtained such discovery before going to trial at law.[212] This principle was once

[206] Brown v. Swann, 11 Wheat. 497; Avery v. U. S., 12 Wall. 304; Marine Ins. Co. v. Hodgson, 7 Cranch, 333; McCollum v. Prewitt, 37 Ala. 573; Taylor v. Sutton, 15 Ga. 103; Leggett v. Morris, 6 Sm. & Mar. 723; Slack v. Wood, 9 Gratt. 40; Taliaferro v. Bank, 23 Ala. 755; Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; McCown v. Macklin, 7 Bush, 308; Thompson v. Berry, 3 Johns. Ch. 395; Tutt v. Ferguson, 13 Kans. 45; Garrett v. Lynch, 45 Ala. 204.

[207] Carolus v. Koch, 72 Mo. 645.

[208] Stinnett v. Branch Bank, 9 Ala. 120.

[209] Shelmire v. Thompson, 2 Blackf. 270.

[210] Falls v. Robinson, 5 Md. 365.

[211] McKean v. Read, 6 Litt. 395, 12 Am. Dec. 318.

[212] Norton v. Woods, 5 Paige, 249;

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stated by Chancellor Walworth in the following terms: "As a general rule, if a party against whom an action is brought has a legal defense, he must avail himself of it in the suit at law. It will be too late, after he has suffered a judgment to be recovered against him there, to apply to this court for relief. And even where the facts constituting the legal defense can only be established by a discovery from the plaintiff, if they are fully known to the defendant, and he can avail himself of them upon the trial by the aid of a bill of discovery, he should resort to that mode of defense when the necessity of it is apparent, or he may be precluded by the judgment in that suit. In cases of this kind, however, this court will accept of a satisfactory excuse for not resorting to a bill in the first instance, and may grant relief after judgment has been obtained in the suit at law." [213]

§ 386. Newly-discovered Evidence.

On principles analogous to those just considered, it is held that where the defendant knew of his defense at the time of the trial at law, but had no evidence to support it, was ignorant that any such evidence existed, and could not have discovered it by the exercise of due diligence, equity will grant him relief upon the ascertainment and production of such evidence.[214] But here, it is obvious, any court would be slow to pardon any negligence or sloth on the part of the defendant in seeking for the evidence which he needs. Being

Bartholomew v. Yaw, 9 Paige, 165; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Albritton v. Bird, R. M. Charlt. 93; Barker v. Elkins, 1 Johns. Ch. 465. See also Norris v. Hume, 2 Leigh, 334, 21 Am. Dec. 631; Brown v. Swann, 10 Pet. 497; Green v. Massie, 21 Gratt. 358.

[213] Norton v. Woods, 5 Paige, 249. An exactly opposite view was taken in Deputy v. Tobias, 1 Blackf. 311, 12 Am. Dec. 243, where Holman, J., said: "But a bill of discovery is the *dernier resort* in obtaining testimony, inasmuch as when it is resorted to, it shuts the door against every other method. Therefore it is purely discretionary with every suitor whether he will file such a bill or not, and he can never be considered in laches for not seeking a discovery from the opposite party."

[214] Alley v. Ledbetter, 1 Dev. Ch. 453; Levan v. Patton, 2 Heisk. 108; Cox v. Railroad, 44 Ala. 611; McGehee v. Gold, 68 Ill. 215; Rust v. Ware, 6 Gratt, 50, 52 Am. Dec. 100; Inglehart v. Lee, 4 Md. Ch. 514; Foote v. Silsby, 1 Blatchf. 545; Taylor v. Sutton, 15 Ga. 103; Pearce v. Chastain, 3 Ga. 226; Mills v. Van Voorhis, 10 Abb. Pr. 10; Mellick v. First Nat. Bank, 52 Iowa, 94, 2 N. W. Rep. 1021. *Per contra*, Gusman v. De Poret, 33 La. Ann. 333.

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aware that he has a good legal defense, it is his duty, as well as his interest, to make the most careful and exhaustive efforts to arm himself with the testimony which will support it. If he has not done this,—if he has been negligent in the search for evidence,—equity will not relieve him.[215] And the substance of the newly-discovered evidence must be set forth in the bill, in order that the chancery court may judge whether it is of the requisite character and weight.[216] In regard to the last point, the circumstances under which equity will grant a new trial because of newly-discovered evidence have been summed up as follows: (1) The evidence must have been discovered since the trial. (2) It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. (3) It must be material in its object, and such as ought, on another trial, to produce an opposite result on the merits. (4) It must not be merely cumulative, corroborative, or collateral.[217] It remains to be stated that the statutory provisions, in many of the states, authorizing the law courts to grant new trials on the ground of newly-discovered evidence, do not divest the courts of equity of the power to grant a new trial in cases where the facts will justify it.[218]

§ 387. Negligence of Party precludes Relief.

A litigant is required to exercise the greatest degree of watchfulness over the progress of his case in court; and if he fails to attend the trial and assert his rights, merely in consequence of his own opinion of the state of the docket, or through forgetfulness, or negligence of any other kind, he will have no standing in equity after a judgment.[219] That he omitted to defend the suit in consequence of

[215] Taylor v. Bradshaw, 6 T. B. Mon. 145, 17 Am. Dec. 132; Glover v. Hedges, 1 N. J. Eq. 113; McCaulis v. Duval, 69 Ga. 744.

[216] Miller v. McGuire, 1 Morris (Iowa), 150.

[217] Wynne v. Newman, 75 Va. 816. The evidence must be of such a conclusive character that if it had been offered it would have produced a different result. Bloss v. Hull, 27 W. Va. 503.

[218] Hone v. Queen, 4 Nebr. 108; Colyer v. Langford, 1 A. K. Mar. 237; Duncan v. Lyon, 3 Johns. Ch. 356; Baltzell v. Randolph, 9 Fla. 366.

[219] Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Yancey v. Downer, 5

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being misled by the clerk of the court as to its character, is considered as inexcusable negligence.[220] So, where a garnishment suit is pending, but is not prosecuted to judgment for two terms after that to which it was made returnable, the garnishee has no right to think that the suit is abandoned as to him and settle his debt, and if he does so, equity will not grant him relief from a judgment subsequently obtained against him in the garnishment suit.[221] So where a defendant at law, having a good legal defense, merely writes to counsel to defend him, without instructing him in his defense, he is guilty of such neglect as to preclude relief in equity against a judgment.[222] But a distinction must be taken between such neglect as is attributable solely to the party himself and such as is brought about by the improper or deceitful conduct of the other side. The former is not excusable, the latter sometimes is. Thus, in a case where the complainant's name had been forged on a note and he was sued upon it; and one of the makers of the note sent him word that he need not trouble himself about it, as the other makers would pay it; and the sheriff also told him that there was no necessity of his appearing at the first term; and the other makers put in a plea for all at the return term; and the complainant was sick and unable to attend or employ counsel; but the other makers withdrew their plea and allowed judgment to go by default; and the plaintiff knew that the complainant's name was forged; it was held that the latter was not guilty of such negligence as would preclude him from having the judgment at law set aside upon a bill in equity.[223]

§ 388. Defense not available at Law.

Thus far we have been speaking only of defenses purely legal in their character and which could have been interposed in the action at law. But where the case varies from this type, entirely different

Litt. 8, 15 Am. Dec. 35; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389. And see Briggs v. Smith, 5 R. I. 213; McVicar v. Filer, 31 Mich. 304.

[220] Hanna v. Morrow. 43 Ark. 107.

[221] Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

[222] Stanard v. Rogers, 4 Hen. & M. 438; Hill v. Bowyer, 18 Gratt. 364; Sanders v. Fisher, 11 Ala. 812.

[223] Rowland v. Jones, 2 Heisk. 321.

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rules apply. If the matter relied on by the complainant could not have been received as a defense in the trial at law, because it fell within the exclusive jurisdiction of chancery, or by reason of the forms of legal procedure, equity will relieve notwithstanding there may have been an ineffectual attempt to defend at law.[224] And where the defendant has both a legal defense and an equitable defense, the latter not cognizable at law, a failure to use diligence in making his legal defense will not, it seems, prevent a court of equity from granting an injunction upon proof of the equitable defense, in case a judgment is rendered against him.[225] The most difficult question under this head arises in connection with the codes of practice, enacted in several of the states, which confer large equitable powers upon the courts of law. One decision holds that such a statute merely permits, but does not require, an equitable defense to be made to an action on a legal demand; and therefore, if the defendant fails to avail himself of this privilege, and permits a judgment to go against him, he may still bring an equitable action to obtain relief against the judgment.[226] Notwithstanding the plausibility of this reasoning, it is opposed by the weight of the authorities, which rule that the fact that a defense is equitable is no excuse for not setting it up at law, if available under the code.[227]

§ 389. Defense available either at Law or Equity.

There is a third possibility in regard to the character of the defense to the action; it may be one that is equally available either at law or in equity. In this event, where the defense is a matter of which courts of law and equity have concurrent jurisdiction, it is generally held that the party may choose the forum in which to make his

[224] Crim v. Handley, 94 U. S. 652; Hendrickson v. Hinckley, 17 How. 443; Ferriday v. Selcer, 1 Freem. Ch. 258; Calloway v. McElroy, 3 Ala. 406; Clifton v. Livor, 24 Ga. 91; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Venum v. Davis, 35 Ill. 568; Dunham v. Downer, 31 Vt. 249; Kersey v. Rash, 3 Del. Ch. 321; Newton v. Field, 16 Ark. 216.

[225] Cornelius v. Thomas, 1 Tenn. Ch. 283; Winchester v. Gleaves, 3 Heyw. 213.

[226] Dorsey v. Reese, 14 B. Mon. 157.

[227] Kelly v. Hurt, 74 Mo. 561; Winfield v. Bacon, 24 Barb. 154; Savage v. Allen, 54 N. Y. 458.

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defense, and if he omits to do so at law, he may then have recourse to equity for relief against the judgment.[228] Thus, in some of the states, equity will relieve against a judgment at law, by default, for money won at gaming, because here the jurisdiction of law and equity is concurrent, and the party may have his election where he will set up his defense; and if he so chooses he may let judgment go by default at law, and then resort to equity; although it would of course be otherwise if he had presented his defense at law and failed.[229] For if, in any case where the jurisdiction of law and equity is concurrent, the party makes his defense in the trial at law, he will be regarded as having made his election; and if he fails he will have no ground for a bill in equity for relief against the judgment, unless his defeat transpired through fraud or accident.[230] And this election is manifested, it is said, "by offering any defense whatever, it matters not whether by demurrer to the declaration, or by plea in abatement or in bar."[231] But it is also held that if there is a doubt whether a defense is available at law, and there is an undoubted jurisdiction in equity, and at law the defendant omits to make his defense, or if he makes it and it is overruled on the ground that it cannot be considered at law, a court of equity may afford relief, notwithstanding a trial at law.[232]

§ 390. Satisfaction or Release of Judgment.

Payment, release, or discharge of the claim on which a suit is founded must generally be set up as a defense before judgment. It

[228] Harlan v. Wingate, 2 J. J. Mar. 138; Dorsey v. Reese, 14 B. Mon. 157; Morrison v. Hart, 2 Bibb, 4, 4 Am. Dec. 663; Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696; Bently v. Dillard, 6 Ark. 79; Rathbone v. Warren, 10 Johns. 587. But compare Vaughn v. Johnson, 9 N. J. Eq. 173; Galbraith v. Martin, 5 Humph. 50.

[229] Clay v. Fry, 3 Bibb, 248, 6 Am. Dec. 654; Lucas v. Nichols, 66 Ill. 41; Gough v. Pratt, 9 Md. 526; Collins v. Lee, 2 Mo. 16. See *supra*, § 379.

[230] Haughey v. Strang, 2 Port. 177, 27 Am. Dec. 648; Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749; Burton v. Hynson, 14 Ark. 32; Dickson v. Richardson, 16 Ark. 114; Morrison v. Hart, 2 Bibb, 4, 4 Am. Dec. 663; Dunham v. Downer, 31 Vt. 249.

[231] Le Guen v. Gouverneur, 1 Johns. Cas. 505, 1 Am. Dec. 121.

[232] King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415.

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forms no exception to the rule that matters cannot be heard on a bill in equity which might have been pleaded in the action at law, unless the party was prevented from bringing them before the court by fraud or accident, without his own fault or negligence.[233] But payment made after the institution of suit, where it cannot be brought to the notice of the court before judgment, under the local practice, is good ground for enjoining the judgment.[234] Whether a bill in equity for an injunction is the proper remedy to prevent a judgment-plaintiff from proceeding to collect anew a judgment which has been in fact satisfied, has been disputed. Some of the cases hold that such an application is meritorious and should be allowed.[235] But others, and we think with better reason, consider that equity ought not to interfere in such a case, inasmuch as the party has a prompt and adequate remedy at law.[236] But it is held that a court of equity will relieve against the suing out or levy of any process of execution upon a judgment enjoined which has been discharged by proceedings in bankruptcy.[237]

§ 391. Injunction as a Means of securing Set-Off.

As equity may order one judgment to be set off against another, so also it has power to restrain the execution of a judgment when it is made to appear that the judgment-defendant has a debt against the plaintiff exceeding the judgment in amount and that the latter is insolvent.[238] But a bill for this purpose cannot be sustained on the mere ground that the defendant has claims against the plaintiff which might be the subject of set-off, if there is no averment to show that the former for any reason could not have availed himself of his right of set-off in the action in which the judgment against him was recov-

[233] Foster v. Wood, 6 Johns. Ch. 90; Duncan v. Lyon, 8 Johns. Ch. 356, 8 Am. Dec. 513.

[234] Humphreys v. Leggett, 9 How. 297; Florat v. Handy, 35 La. Ann. 816.

[235] Bowen v. Clark, 46 Ind. 405; Shaw v. Dwight, 16 Barb. 536; Mallory v. Norton, 21 Barb. 424.

[236] McRae v. Davis, 5 Jones Eq. 140; Perrine v. Carlisle, 19 Ala. 686; Lansing v. Eddy, 1 Johns. Ch. 49.

[237] Peatross v. McLaughlin, 6 Gratt. 64.

[238] McClellan v. Kinnaird, 6 Gratt. 352. And see also Hinrichsen v. Reinback, 27 Ill. 295; Sumner v. Whitley, 1 Mo. 708; Capehart v. Etheridge, 63 N. Car. 353.

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ered.[239] Nor will proceedings on a judgment at law be enjoined in equity in order to give the defendant an opportunity to set off or recoup a counterclaim, where such claim is unliquidated and arose out of an entirely distinct transaction.[240] An injunction granted to restrain the collection of a judgment on the ground that the debtor therein is entitled to a credit for a sum less than the whole amount of the judgment, should provide that the judgment-creditor may proceed by execution to collect the undisputed balance of the judgment.[241]

§ 392. Personal Disability of Parties.

Courts of equity are sometimes called upon to restrain the enforcement of a judgment on the ground that it was taken against a person who, at the time, was incapacitated for legal action by some personal disability, such as infancy, coverture, or lunacy. The degree of validity to be attributed to such judgments is chiefly disputed, as we have already seen, in cases where a judgment by default has been rendered upon a cause of action to which the infancy or coverture, if pleaded, would have been a complete defense.[242] If, on the one hand, such disability of the defendant is not regarded as a jurisdictional defect, a judgment of this character will at most be voidable and not void. This is the position taken by many of the courts, as will appear from the sections just cited. But in such case, the remedy is obviously by motion or other appropriate proceeding in the court rendering the judgment. And any application to equity for relief would be met by the familiar rule that an injunction cannot be granted on account of matters which might and should have been pleaded in defense to the action at law. But if, on the other hand, as many decisions hold, such a status as coverture amounts to a negation of that juristic personality which is essential to the formation of any and all legal relations, then it is equally evident that the courts of law can acquire no jurisdiction over a defendant so circumstanced, and that a judgment

[239] Wolcott v. Jones, 4 Allen, 367; Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224.

[240] Jackson v. Bell, 31 N. J. Eq. 554.

[241] Levy v. Steinbach, 43 Md. 212.

[242] See, as to married women, §§ 188–191; as to infants, §§ 193–197; and as to lunatics, § 205.

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such as that supposed would be simply null. That equity would have power to restrain its collection seems clear beyond doubt. And it will become still more clear if we reflect that, since, on the premises, the defendant would have no power to employ an attorney or interpose a defense, the case is brought well within the confines of the rule which has formed the connecting thread of this whole chapter, viz: that chancery will relieve against an inequitable judgment on grounds which could not have been pleaded at law.[243] The reader will be further advised of the doctrines on this topic by referring to the discussion of the general subject in a previous chapter. It is held that service of process on a privileged person (as a member of the legislative body) is not void, and his remedy is by motion or plea, and not by injunction to restrain an execution on a judgment by default against him on such service.[244]

Part III. Practice on Application to Enjoin Judgment.

§ 393. Nature and Requisites of Bill.

A bill in equity for an injunction against a judgment at law should always show that the merits of the controversy are with the complainant. If it alleges no defense to the claim on which the judgment was rendered it states no cause of action and will be dismissed.[245] So the bill should not only show a good reason why the evidence was not saved by a bill of exceptions (if such was the case), but should also show what the evidence was which authorized the judgment complained of, and the grounds of the party's defense, the reason, if any, why it was not made, and such other facts as would make a case, or there will be no error in the dismissal of the bill.[246] And a bill seeking to enjoin a judgment and execution, which does not so identify them as to make it appear what judgment and exe-

[243] Griffith v. Clarke, 18 Md. 457; Medart v. Fasnacht, 15 La. Ann. 621.

[244] Peters v. League, 13 Md. 58, 71 Am. Dec. 622.

[245] Rotan's Heirs v. Springer (Ark.), 12 S. W. Rep. 156.

[246] Buntain v. Blackburn, 27 Ill. 406.

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cution are meant, and which does not limit the prayer for injunction to any particular judgment and execution, is demurrable.[247]

§ 394. Conditions on Granting Relief.

In accordance with the general rule and policy of equity, it is held that he who seeks relief against a judgment must *do* equity; that is, he must restore any advantage he may have gained, and he must submit to all orders of the court necessary to adjust the rights of the litigants in entire accordance with equity.[248] Thus, if the whole amount involved is not disputed, the complainant must pay or offer to pay what he admits to be due, or show some sufficient excuse for his failure; otherwise his case cannot be sustained.[249] An order for an injunction to a sale under execution does not become effectual until any conditions required by the order (such as the execution of a bond) have been complied with.[250] Equity will of course be guided, in the matter of imposing conditions, by the peculiar circumstances of the individual case.

§ 395. Effect of Enjoining Judgment.

An injunction to prevent a judgment-plaintiff from proceeding further with his execution does not generally operate as a release of errors.[251] And so the injunction, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction.[252] Hence, "when the operative energy of an execution has been suspended by an injunction, a sale under a junior execution does not affect the lien acquired by such elder execution, but the property in the hands of any person remains liable to a levy

[247] Adams v. White (Fla.), 2 South. Rep. 774.

[248] Creed v. Scruggs, 1 Heisk. 590; Reeves v. Cooper, 12 N. J. Eq. 223; Baragree v. Cronkhite, 83 Ind. 192; Yonge v. Shepperd, 44 Ala. 315; Overton v. Stevens, 8 Mo. 623; Flickinger v. Hull, 5 Gill, 60; Shelton v. Gill, 11 Ohio, 417; Hill v. Harris, 42 Ga. 412.

[249] Yonge v. Shepperd, 44 Ala. 315.

[250] Pell v. Lander, 8 B. Mon. 554.

[251] St. Louis, A. & T. H. R. Co. v. Todd, 40 Ill. 89.

[252] Smith v. Everby, 4 How. (Miss.) 178.

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when the injunction is removed."[253] But where the collection of an execution is enjoined, and the officer has other junior executions in his hands, and proceeds to sell the property levied upon, he cannot apply the proceeds to the execution enjoined, although before the return of the process the injunction, by consent, is dissolved by order of court.[254] A judgment suspended by injunction may be revived on the death of either party, and the injunction operates on the judgment on *scire facias*, prohibiting execution thereon.[255] Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien.[256] Where a judgment upon a bill of exchange against an acceptor was enjoined, it was held not to enjoin suits against the other parties to the bill.[257]

§ 396. Dissolution of Injunction.

Where the injunction of an entire judgment at law has in the first instance been properly granted, and the answer shows that the complainant is entitled to some relief, though not to the extent claimed in the bill, the injunction may be dissolved in part, or continued on such terms as will insure ultimate justice between the parties; but to authorize such dissolution, or a requirement that the complainant pay a portion of the judgment into court, as a condition to the continuance, the answer should show explicitly the amount which the plaintiff at law is in equity entitled to receive. If this be not done, and there is no danger of the debt being lost by continuing the injunction, it should be retained until the final hearing.[258] On dissolving an injunction shown to be groundless, damages may be given against the complainant according to the amount of the judgment enjoined.[259]

[253] Lynn v. Gridley, Walker (Miss.), 548, 12 Am. Dec. 591.

[254] Newlin v. Murray, 63 N. Car. 566.

[255] Richardson v. Prince George, 11 Gratt. 190.

[256] Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549.

[257] Bohannon v. Combs, 12 B. Mon. 563.

[258] Maulden v. Armistead, 18 Ala. 500.

[259] Stewart v. Robinson, 24 La. Ann. 182.

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CHAPTER XVI.

THE LIEN OF JUDGMENTS.

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PART I. ORIGIN AND NATURE OF JUDGMENT-LIENS.

§ 397. Early History of Judgment-Liens.

At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. "This was in accordance with the policy of the feudal law, introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute of Westminster 2d, 13 Edward I, c. 18, by which, in the interest of trade and commerce, the writ of *elegit* was for the first time provided for. By that statute the judgment-creditor was given his election to sue out a writ of *fi. fa.* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a *moiety* of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an *elegit*, and the interest which the creditor acquired in the lands by virtue

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of the judgment and writ was known as an estate by *elegit*."[1] It will be at once apparent that the right thus conferred upon the creditor gave rise to a true judgment *lien*, although it differed materially, both in its extent and the manner of its enforcement, from the type with which we are now familiar.

§ 398. Judgment-Lien is Statutory.

If we inquire, therefore, in any case, for the ultimate basis of the lien of a judgment on land, it must be supported by statutory authority. In most, if not all, of the American states, the legislatures have enacted in express and positive terms that judgments shall be liens on land for a prescribed number of years. But in some, this direct creation of a most effective remedy did not come until comparatively late in their history. In the interval, it is true, real estate was considered bound by a judgment against its owner, but that was only in virtue of the early English statute above referred to, which had been adopted by the state or not repudiated. Thus the statute of Westminster 2d "was substantially adopted in Virginia at an early day, and in consequence of this right to subject a moiety of the defendant's lands, the courts held that a lien was acquired by the judgment, which extended to all the defendant's lands within the state, and which was superior to the claims of subsequent purchasers, though for valuable consideration and without notice. The lien thus acquired was a legal lien, and remained so long as the capacity to sue out an *elegit* continued, whether the writ was sued out or not."[2] But, compared with the species of judgment lien now commonly known, it could only be regarded as a qualified or restricted lien. For, from the nature of the writ which occasioned it and by which it was to be enforced, it could not be foreclosed by a *sale* of the realty, but only by taking it into possession and receiving the rents and profits. In the absence, then, of express legislative enactment, judgments do

[1] Hutcheson v. Grubbs, 80 Va. 254; Jones v. Jones, 1 Bland Ch. 443, 18 Am. Dec. 327; 2 Co. Inst. 394; 3 Bl. Comm. 418; Bac. Abr. *Execution*, D.

[2] Hutcheson v. Grubbs, 80 Va. 254; Borst v. Nalle, 28 Gratt. 423; Price v. Thrash, 30 Gratt. 515; Leake v. Ferguson, 2 Gratt. 420; Taylor v. Spindle, 2 Gratt. 44. See also Coombs v. Jordan, 3 Bland's Ch. 284, 22 Am. Dec. 236.

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not attach as liens to real estate in the modern sense of the term.[3] "Unless there is a statute in the particular state expressly making a judgment a lien on real estate, no such property will attach to it; and the only kind of lien belonging to it will be that arising in consequence of the right to take out an *elegit*."[4] An illustration of this may be found in a decision of the supreme court of Pennsylvania that, in divorce proceedings, an order for the payment of the wife's expenses and support *pendente lite* is not a judgment such as to create a lien on the husband's lands; the ruling being based on the ground that there is no statutory authority for so regarding it.[5]

§ 399. Legislative Control of Judgment-Liens.

Since liens arising from judgments are exclusively the creatures of statute, we should naturally expect to find them largely under the control of the legislature, except in so far as the necessity of preserving vested rights and contractual obligations should forbid such interference. And so the decisions have always held. Thus a law requiring a judgment to be docketed in each county where it is sought to bind real estate of the defendant, although previously it was a lien throughout the state without this, is constitutional and valid.[6] So a statute changing the mode of acquiring a lien under an existing judgment upon the property of the debtor (for example, by substituting the lien of a docketed judgment for that formerly created by a *fieri facias*) is not objectionable on constitutional grounds.[7] So again, it has been held that a statute which provides that "no judgment *heretofore* rendered or which may hereafter be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after the rendition of such judgment, shall operate as a lien upon the estate of any judgment-debtor to the prejudice of any *bona fide* judgment-creditor," affects the remedy merely, and, in its operation upon judgments rendered before its passage, it is not

[3] Walker v. Elledge, 65 Ala. 51; Carlisle v. Godwin, 68 Ala. 137; Mitchell v. Wood, 47 Miss. 281.

[4] United States v. Morrison, 4 Pet. 124.

[5] Groves's Appeal, 68 Pa. St. 143.

[6] Tarpley v. Hamer, 9 Sm. & Mar. 310.

[7] Whitehead v. Latham, 83 N. Car. 283.

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to be considered *ex post facto*, nor does it impair the obligation of contracts.[8] However it may be in regard to judgments entered before the passage of the act, it is certain that a statute denying to final judgments *thereafter* rendered the incident of a lien on real property does not impair the obligation of contracts made before its enact-

[8] McCormick v. Alexander, 2 Ohio, 65, 75; Bank of U. S. v. Longworth, 1 McLean, 35; Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696. In McCormick v. Alexander, *supra*, the conclusion is thus reasoned out: "In order to dispose correctly of this objection, it is only necessary to ascertain the nature of the right vested in Evans [the judgment creditor]. It was not a right acquired by contract or agreement; it was not one which vested in him in consequence of the recovery of judgment alone, for, as has been before observed, it is not the necessary consequence of a judgment that it shall operate as a *lien* upon either real or personal estate. Whether it shall so operate, and how far, depends upon legislative enactment. Had this right vested in Evans by contract, he could not have been deprived of it but by his own act. The legislature are restrained from passing any law which shall impair or even change the nature of a contract. Neither can a law regulating judgments and executions be considered as a law which enters into the nature of contracts, or which the parties have in view when they contract. Judgments are recovered as well for injuries sustained by torts, as for those which are sustained by reason of breach of contract. Judgments, too, are recovered not only for breach of contracts entered into in our own state, but for the breach of those which are made in other states and countries. When these judgments are once rendered, they operate equally as *liens*, without reference to the consideration for which they are rendered. The law of the place where a contract is made, or is to be executed, may be said, in a certain degree, to constitute a part of the contract. It is always to be taken into consideration in construing, but never in enforcing, the contract. A contract made in Virginia, and to be executed in that state, must be construed according to the laws of Virginia; but if that contract is enforced in Ohio, it must be done according to the laws of Ohio. This right, then, was not vested in him by contract, neither was it vested in him by the operation of a law which could, with propriety, be said to constitute a part of the contract, if, perchance, his judgment was founded upon a contract. Neither was this right founded in any principle of natural justice; because if it were founded in natural justice, we might suppose all the laws on this subject would be similar in all countries, whereas we find them variant. Further, if natural justice had anything to do with the case, it would seem to dictate that the debt first contracted should be first paid, whereas we well know that the priority of the judgments does not at all depend upon the priority of the demands upon which they are founded. If any creditor suffers, it is generally the one who is most indulgent. Inasmuch, then, as this right was vested in Evans, not by any contract of his own—not by any principle of natural justice—but by the mere operation of a law which cannot, with propriety, be said to enter into the nature of, or constitute a part of, the contract, I see no reason for saying that the legislature had not power to repeal this law, thereby depriving him of his right."

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ment.[9] And conversely, what the legislature can take away, it can confer by a retrospective law. Thus a statute of Texas which provided that "whenever final judgments *shall be* rendered in any court of record of this state, said judgments shall become a lien," etc., was held to be retroactive, the words italicized being construed as equivalent to "shall have been," and so giving a lien to judgments rendered before its passage.[10]

§ 400. Lien gives no Property in Debtor's Land.

"If anything is settled by reason and authority, it is that a judgment-creditor is not entitled to the protection of a purchaser of the legal title against an equitable owner or his creditors, or to any advantage which his debtor had not." [11] A judgment-lien, binding the present and future real property of the debtor, is a creation of statute laws and has no other existence; a general lien by judgment does not constitute *per se* a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment.[12] Hence a judgment creditor has neither *jus in re* nor *jus ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution.[13] So if A. makes a verbal contract with B. to sell him a tract of land and puts him in possession, judgment-creditors of B. do not thereby, by virtue of the lien of their judgments or the levy of execution, acquire such an interest in the land as to entitle them to be subrogated to the rights of B., and to compel A. to make a conveyance to them upon paying him the purchase-price which B. was to pay.[14] But on the other hand, a judgment-creditor has the right to proceed by ancillary pro-

[9] Moore v. Holland, 16 S. Car. 15.

[10] Moore v. Letchford, 35 Tex. 185, 14 Am. Rep. 368.

[11] Reed's Appeal, 13 Pa. St. 476.

[12] Finch v. Winchelsea, 1 P. Wms. 277; Brace v. Duchess of Marlborough, 2 P. Wms. 49; Conard v. Ins. Co., 1 Pet. 443; Pierce v. Brown, 7 Wall. 205; Cover v. Black, 1 Pa. St. 493; Reed's Appeal, 13 Pa. St. 475; Sill v. Swackhammer, 103 Pa. St. 7; Kollock v. Jackson, 5 Ga. 153; Foute v. Fairman, 48 Miss. 536; Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563; Swarts v. Stees, 2 Kans. 236, 85 Am. Dec. 588; Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

[13] Dail v. Freeman, 92 N. Car. 351.

[14] Logan v. Hale, 42 Cal. 645.

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ceedings, in any other court of concurrent jurisdiction with the court rendering the judgment, to remove clouds from titles to any property which he deems to be subject to the lien of his judgment.[15] A judgment for a sum of money, which may be satisfied by a sale of real estate if not otherwise satisfied, is not *lis pendens* in regard to the title to the real estate of the defendant in the judgment; either it is a lien or the real estate is not affected by it.[16] Since a judgment-lien constitutes no property in the land itself, the judgment-debtor has a right, previous to levy, to cut timber and firewood, which, if not removed, are his personal property and do not pass by execution-sale.[17] An assignee in bankruptcy takes the property subject to all existing liens, and cannot avail himself of a claim that an execution was dormant at the time of the assignment, if the bankrupt could not.[18]

§ 401. Lien is General.

"A judgment is not a specific lien upon any specific real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment-creditor as to the existence of such liens."[19] In the case, however, where mortgaged premises have been sold at a sheriff's sale under a judgment junior to the mortgage, and where the time for redemption has not expired, the general lien of the judgment is turned into a specific lien upon the premises, to the extent of the amount of the bid at the sheriff's sale and of the interest thereon.[20] It should also be noted, that the lienbeing but an incident of the judgment, its loss does not necessarily impair the validity of the judgment as a personal security. Thus a judgment obtained against a decedent in his lifetime, the lien of which has expired by failure to revive, is sufficient evidence of a claim in the distribution of a fund which belongs to his estate.[21]

[15] Scottish-American Mortgage Co. v. Follansbee, 14 Fed. Rep. 125.

[16] St. Joseph Manuf. Co. v. Daggett, 84 Ill. 556.

[17] School District v. Werner, 43 Iowa, 643.

[18] Crane v. Penny, 2 Fed. Rep. 187.

[19] Rodgers v. Bonner, 45 N. Y. 379; Lanning v. Carpenter, 48 N. Y. 408; Dozier v. Lewis, 27 Miss. 679; Mansfield v. Gregory, 11 Nebr. 297, 9 N. W. Rep. 87.

[20] Snyder v. Stafford, 11 Paige, 71.

[21] Esterly's Appeal, 109 Pa. St. 223.

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§ 402. Courts cannot control the Lien.

As a general rule, and except in special and peculiar cases, it does not belong to the courts of law to prescribe the kind or extent of the lien which shall result from the judgments they pronounce, or to control it in any way, as by restricting it to certain described property.[22] The court has usually nothing to do with the manner in which its judgment shall be enforced or the fund from which it shall be satisfied; it merely pronounces the sentence of the law upon the facts before it, to which, thereupon, the incident of a lien attaches by virtue solely of positive law. It is of course to be understood that reference is here made to judgments at law, as distinguished from decrees in chancery. The powers of equity in this respect are sufficiently familiar.

§ 403. Parties cannot change Nature of Lien.

"The lien of a judgment upon the lands of the judgment-debtor is entirely the creature of the statute, and is not dependent in any manner upon the contract of the parties. It begins, continues, and terminates at the will of the legislature."[23] Hence parties cannot by agreement convert a judgment into a chattel mortgage or a bill of sale, or give to it any greater effect than the law gives it; and a parol agreement that a judgment shall be a lien upon all the debtor's personal property will not be enforced in equity, even as against subsequent assignees who assent to the arrangement.[24]

§ 404. Docketing the Judgment.

It is a general statutory requisite that judgments shall be duly entered upon the docket before they can become liens upon the debtor's realty, at least as against subsequent purchasers in good faith.[25] And it is the duty of a plaintiff to see that his judgment is

[22] Castro v. Illies, 13 Tex. 229; Hadwin v. Fisk, 1 La. Ann. 43.

[23] Houston v. Houston, 67 Ind. 276.

[24] Lanning v. Carpenter, 48 N. Y. 408.

[25] But it is held that a judgment, though undocketed, is good against

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rightly and properly entered; for if the officer, in entering it, omits the initial letter of the defendant's name, which distinguishes him from others of the same name, whereby a purchaser of the defendant's real estate was deceived, although the judgment would be binding as between the original parties to it, there could be no recovery from the purchaser as terre-tenant.[26] Where a judgment, through inadvertence of the clerk of the court, was docketed in the wrong book, so that it appeared earlier than its proper place, in the chronologic order of judgments docketed, but still it appeared among those docketed within the ten years allowed for judgments to be a lien, it was held that one who took a mortgage upon land of the debtor, within ten years from the docket entry, was chargeable with constructive notice of the judgment, and held subject to its lien, although he failed, through the irregularity in the record, to gain actual notice of it.[27]

§ 405. Indexing the Judgment.

In many of the states there is a further statutory requirement, designed for convenience and expedition in making searches, that the judgment be duly *indexed*. This is usually done in a separate book or series of books kept for that purpose, and under the judgment-debtor's surname in its alphabetical order. The statute may be so framed as to make the index an essential part of the record; and when this is the case, a judgment is no lien upon the debtor's property, until correctly indexed, as against a purchaser who has searched the index with due care.[28] And the judgment, though duly filed and recorded, creates no lien if it is not indexed.[29] In Virginia it has been decided that indexing the judgment is no part of the record; and a judgment-creditor who procures his judgment to be properly docketed secures a valid lien, even though it is not prop-

subsequent *creditors* with or without notice. Gordon v. Rixey, 76 Va. 694. Under the Texas statute which requires judgments to be recorded in order to create liens, an unrecorded writ of error bond, given upon an unrecorded judgment, creates no lien. Hart v. Russell, 32 Tex. 81.

[26] Wood v. Reynolds, 7 Watts & S. 406.

[27] Hesse v. Mann, 40 Wis. 560.

[28] Metz v. State Bank, 7 Nebr. 165; Sterling Manuf. Co. v. Early, 69 Iowa, 94, 28 N. W. Rep. 458.

[29] Nye v. Moody, 70 Tex. 434, 8 S. W. Rep. 606.

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erly indexed, as against a purchaser who has been led to buy by the omission in the index.[30]

§ 406. Certainty required in Docket and Index.

The common occurrence of mistakes in the docketing and indexing of judgments, such as mis-spelling of names and other irregularities, has frequently led the courts to pass upon the degree of certainty required in these entries. The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser (for example), exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment. At the same time, "a subsequent purchaser is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril."[31] A description of a person by the name by which he is commonly known is sufficient for the purposes of a docket entry.[32] That the name is mis-spelled is not always a fatal error. If it is spelled phonetically,—that is, if the name as written on the index would be pronounced in the same manner as the person's true name is commonly and habitually pronounced,—it is sufficient to give notice, provided that the variation in spelling is not so radical that no one would be likely to think of the names as identical.[33] But there must be such a degree of approximation as to be readily understood. For instance, a judgment rendered against "Bankhead," and recorded and indexed as against "Burkhead," confers no lien.[34] So it has been held that "Helen" and "Ellen" cannot be regarded as the same name; and a judgment entered and indexed against "Ellen Desney" is not constructive notice that it is a lien upon lands of "Helen Desney."[35] Again, the statute requiring record notice of judgment-liens intends

[30] Old Dominion Granite Co. v. Clarke, 28 Gratt. 617.
[31] Metz v. State Bank, 7 Nebr. 165.
[32] Jones's Estate, 27 Pa. St. 336.
[33] Myer v. Fegaly, 39 Pa. St. 429.
[34] Anthony v. Taylor, 68 Tex. 403, 4 S. W. Rep. 531.
[35] Thomas v. Desney, 57 Iowa, 58, 10 N. W. Rep. 315.

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that the docket shall exhibit the names spelled in English. It is to furnish a guide to the eye, not the ear. Hence, "Joest" will not serve for "Yoest."[36] The omission of the initial letter of the defendant's middle name does not render the entry invalid or prevent the judgment from becoming a lien as against subsequent purchasers. "It was enough that one christian name was properly added to the surname of the defendant, for in legal proceedings the law recognizes but one christian name, and where a party is sued by that alone, the proceedings taken may regularly be continued to judgment in that name, and the fact that he may have one or more other names between his first christian name and his surname will in no way affect their validity. This is an old and well established rule of the common law, that has in no manner been changed, either by legislation or the ruling of the courts in this state."[37] The term "Junior" is a convenient means of distinguishing between father and son who bear the same name, but, on common law principles, it is no part of the younger man's name, and hence is not required to be included in the docket-entry of a judgment against him, although the "Senior" of the same name resides in the same county.[38] A judgment against a firm, docketed without setting out the christian names of the individual partners, is held in Pennsylvania to be of no effect as a lien, so far as regards subsequent purchasers and incumbrancers in good faith.[39] But an opposite view obtains in California.[40] It must further be observed that a judgment duly rendered against one whose name is mis-spelled or otherwise incorrectly given in the proceedings, will be a lien on his real estate, when docketed, against all but those who can claim that by reason of the error the docket was no notice to them. A fraudulent grantee cannot object to it.[41]

[36] Heil's Appeal, 40 Pa. St. 453, 80 Am. Dec. 590.

[37] Clute v. Emmerich, 26 Hun, 10.

[38] Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

[39] York Bank's Appeal, 36 Pa. St. 458; Ridgway's Appeal, 15 Pa. St. 177, 53 Am. Dec. 586; Smith's Appeal, 47 Pa. St. 128; Hamilton's Appeal, 103 Pa. St. 368.

[40] Hibberd v. Smith, 50 Cal. 511.

[41] Fuller v. Nelson, 35 Minn. 213, 28 N. W. Rep. 511.

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Part II. What Judgments create Liens.

§ 407. What is necessary to Judgment-Liens.

In order that a judgment should create a lien upon the real property of the debtor, it is first of all necessary that it should be capable of collection by execution against such property. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.[43] So a judgment against a municipal corporation is not a lien on its real estate, because no execution can issue against the land.[43] Next, it is essential that the judgment should have been rendered by a lawful and validly constituted court. Upon this point questions have seldom arisen, except in connection with the acts of courts created by the insurrectionary authorities in the southern states during the late civil war. Thus it was held in Alabama that judgments rendered by the courts of that state, during the period referred to, did not create such a lien upon the property of the judgment debtor as, in the absence of legislation, could be recognized and enforced by the courts of the now existing state government.[44] Later decisions, it is true, have recognized a higher degree of validity in such judgments;[45] but it is only by acknowledging the rightful existence of those courts, so that the change of opinion does not militate against the rule here contended for.

In the next place, in order that there should be a lien, it is necessary that there be a valid and subsisting judgment. If the alleged judgment is absolutely void and a mere nullity, it can of course create no lien. Or, to speak more exactly, it creates that which may bear the semblance and color of a lien, but which is incapable of originating or transferring rights, since the judgment itself, to which the lien is only an incident, will not bear the test of judicial

[43] *In re* Boyd, 4 Sawy. 262.

[43] Schaffer v. Cadwallader, 86 Pa. St. 126.

[44] Martin v. Hewitt, 44 Ala. 418; Noble v. Cullom, 44 Ala. 554; Barclay v. Plant, 50 Ala. 509. The incident of lien was accorded to such judgments by Rev. Code Ala. § 2877, Act Feb. 19, 1867.

[45] Parks v. Coffey, 52 Ala. 42; Hill v. Huckabee, 52 Ala. 155; Hill v. Armistead, 56 Ala. 118. See *supra*, § 173.

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scrutiny. Similarly, where a verdict and judgment are set aside and a new trial granted, such judgment does not operate as a lien upon the defendant's property.[46] And so a judgment which has been reversed upon appeal, is not a lien, pending its further appeal, upon the defendant's estate, and it will not be allowed to prejudice the title of a *bona fide* purchaser for value.[47] It was even held, in an early Massachusetts case, that a deed of land was a good and lawful conveyance, although an execution had been levied upon the land, when the judgment under which the execution issued, though not yet reversed, was so erroneous that it was "legally certain" that it would be reversed.[48]

In the next place, it is requisite that the judgment should be for a definite and certain sum of money.[49] A judgment which specifies no sum recovered, but refers to the pleadings to show what is adjudged, cannot create a lien on lands of the defendant as against a party lending on the property without other notice than that afforded by the registry of the judgment.[50] But a judgment in an action for an accounting between partners, requiring the payment of a specified sum of money by one of the parties to a receiver, may be docketed in favor of the receiver and be enforced by execution.[51] And a final judgment of a court of record is a lien, although for costs only.[52]

In the next place, it is important to pay some attention to the kind or character of the judgment, with reference to its capacity for creating a lien. A judgment by confession carries with it a lien on lands,[53] and so of course does a judgment by default, if it is final and definite. In Pennsylvania, under the statutes on the subject, an award has no greater effect than the verdict of a jury until approved by the court and judgment entered on it, and consequently, until that is done, it does not constitute a lien on realty.[54] In another state, a forfeited

[46] Paxton v. Boyce, 1 Tex. 317.

[47] Foot v. Dillaye, 65 Barb. 521; Meyer v. Campbell, 12 Mo. 603.

[48] Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32.

[49] Hamburger v. Easter, 57 Ga. 71; Lirette v. Carrane, 27 La. Ann. 298; Eames v. Germania Turn Verein, 74 Ill. 54.

[50] Lirette v. Carrane, 27 La. Ann. 298.

[51] Geery v. Geery, 63 N. Y. 252.

[52] Bobb v. Graham, 15 Mo. App. 289.

[53] Gilman v. Hovey, 26 Mo. 280.

[54] Stephen's Appeal, 38 Pa. St. 9. An

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forthcoming bond has the force of a judgment, so as to create a lien upon the lands of the obligors, but only from the time the bond was returned to the clerk's office.[55] A recognizance to the commonwealth, or a judgment thereon in favor of the commonwealth, creates no lien upon the estate of the party, unless by express statute.[56] So a rule absolute against a sheriff requiring him to pay over money is not such a judgment as binds his property in the same way in which judgments on verdicts bind it.[57] The mere loaning of money to a judgment debtor, to be applied by him in part satisfaction of a judgment which is a lien upon the debtor's land, does not operate to transfer such lien, in whole or in part, to the lender, even though it was understood between the parties to the transaction that it should have that effect.[58]

§ 408. Interlocutory Judgments.

It is generally held that an interlocutory judgment by default, which lacks finality until the amount of the recovery is ascertained, cannot be considered as creating a lien. The incident of lien does not attach until the sum to be recovered is made definite and finally entered up, and then it does not relate back to the entry of the interlocutory judgment.[59] But the supreme court of Pennsylvania has ruled that a judgment entered by default for want of a plea is not interlocutory but final, and constitutes a lien upon the defendant's real estate from the date of entry, although the damages may not have been assessed, if the claim is for a sum certain or is ascertainable by calculation.[60] But a judgment by confession for a sum to be ascertained by the prothonotary binds the real estate of the defendant only from the time of the liquidation of the sum by the prothonotary.[61]

award of arbitrators in favor of a plaintiff, from which he appeals, is not a lien upon the defendant's real estate so long as the appeal stands. Eaton's Appeal, 83 Pa. St. 152.

[55] Cabell v. Given, 30 W. Va. 760, 5 S. E. Rep. 442.

[56] Commonwealth v. Adkins, 8 B. Mon. 380.

[57] Speer v. McPherson, 24 Ga. 146.

[58] Unger v. Leiter, 32 Ohio St. 210.

[59] De Saussure v. Zeigler, 6 Rich. 12; Davidson v. Myers, 24 Md. 538.

[60] Sellers v. Burke, 47 Pa. St. 344; Hays v. Tryon, 2 Miles (Pa.), 208; Bryan v. Eaton, 4 Week. Notes Cas. 493.

[61] Philadelphia Bank v. Craft, 16 Serg. & R. 347.

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§ 409. Judgments against Personal Representatives.

Inasmuch as executors and administrators are not invested with the title to the lands of the decedent, it follows that judgments rendered against them in their representative character have no operation as liens upon realty belonging to the estate.[62] And in Connecticut, under a statute which provides that if the owner of an unsatisfied judgment shall file a certificate in the town clerk's office, it shall constitute a lien upon land belonging to the debtor, which may be foreclosed or redeemed in the same manner as a mortgage, if an execution could have been levied thereon, it is held that a judgment creditor who has obtained a judgment against the administrator of his debtor's estate cannot thus obtain a lien against the land of the estate.[63]

§ 410. Nunc Pro Tunc Judgments.

A purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the land of a third person by the rendition of a *nunc pro tunc* judgment against his grantor.[64] In a case in Indiana, two judgments having been rendered by a justice of the peace, the plaintiff took transcripts and filed them in the clerk's office of the proper county; afterwards the judgment debtor sold a tract of land situated in that county and received the purchase-money in full; a few days later the transcripts, together with the order-book in which they were recorded, were destroyed by fire; afterwards the justice made out new transcripts, and these were duly filed. It was held that the judgments, as evidenced by the second transcripts, were not liens on the land.[65] An amendment of a judgment which was originally incomplete cannot relate back so as to impair the title of one who purchased the judgment

[62] Laidley v. Kline, 8 W. Va. 218; Woodyard v. Polsley, 14 W. Va. 211.

[63] Flynn v. Morgan, 55 Conn. 130, 10 Atl. Rep. 466.

[64] Miller v. Wolf, 63 Iowa, 233, 18 N. W. Rep. 889.

[65] Sheldon v. Arnold, 17 Ind. 165.

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debtor's land, prior to the order of amendment, in good faith and for a valuable consideration.[66]

§ 411. Decrees in Chancery.

It is generally held, under statutes assimilating judgments and decrees in respect to their effects and means of enforcement, that a decree in chancery, if for a liquidated sum of money, creates a lien upon the debtor's land.[67] The proviso here inserted obviously restricts the class of decrees attended with this incident within narrow limits. Thus it is said: "A decree of foreclosure is not such a decree as will confer a general lien as a judgment at law. True, the statute provides that decrees of courts of chancery 'shall, from the time of their being pronounced, have the force and effect of a judgment at law.' A judgment at law gives a general lien, but it is not every decree in chancery that can give a lien similar to a judgment. There are a great variety of decrees in chancery which give no lien, such as decrees or injunctions to stay waste, to surrender and cancel securities, to set aside fraudulent conveyances, and various others; yet the language of the statute covers all decrees. Hence the language of the statute must be limited, and as a lien is only a security for a money demand, no decree in chancery can confer a lien under the statute except a decree expressly for the payment of money. At law it is only a judgment against a debtor or a judgment for the payment of money that gives a lien; a judgment in ejectment gives no lien. Hence the decrees in chancery that confer liens similar to judgments are decrees for the payment of money. A decree of foreclosure is not a decree for the payment of money."[68] A decree providing that if the defendant does not, in a given time, pay the plaintiff a certain sum, certain property of the defendant, real and personal, on which the plaintiff has a specific lien, shall be sold, is not a decree which creates a lien on other real estate of the defendant.[69]

[66] Lea v. Yeates, 40 Ga. 56.

[67] Scriba v. Deanes, 1 Brock. 166; Eames v. Germania Turn Verein, 74 Ill. 54; Blake v. Heyward, 1 Bailey Ch. 208; Close v. Close, 28 N. J. Eq. 472.

[68] Myers v. Hewitt, 16 Ohio, 449, 454, per Read, J. And see Hamburger v. Easter, 57 Ga. 71.

[69] Linn v. Patton, 10 Wa. Va. 187.

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In an action to enforce a mortgage, if a judgment is entered directing a sale of the mortgaged property and an application of the proceeds on the amount due, and further declaring that, in case of a deficiency, the plaintiff have execution for the balance, the lien of the judgment does not attach to real estate of the defendant other than that mortgaged, until after a sale has been made and a deficiency reported, even if the judgment is docketed when first rendered.[70] "A mere contingent provision, referring to no particular amount, and in abeyance until the contingency is determined, is not within the meaning of the statute. It may become a valid and perfect judgment, but until the amount to be recovered is ascertained and fixed, no effect can be given to it as a lien."[71] It is also held that a judgment recovered for a debt secured by a mortgage on lands cannot become a lien on such lands; and a sale of the equity of redemption under an execution on such judgment will not confer any title upon the purchaser; and it makes no difference that the judgment was not recovered upon the bond accompanying the mortgage, so long as it was obtained for the same indebtedness.[72] It should be added that chancery may create a lien directly by decree for that purpose.[73]

§ 412. Judgments of Inferior Courts.

Judgments rendered by justices of the peace and other inferior courts are not generally recognized by the statutes as creating a lien upon the debtor's realty. But it is commonly provided that such judgments may be transferred, by transcript, to one of the superior courts, and that, the transcripts being duly filed and entered, the judgments shall have the same effect, as liens, as if originally rendered by the court to which they are so transferred. The lien attaches from the time of filing the transcript with the clerk of the superior

[70] Hibberd v. Smith, 50 Cal. 511; Culver v. Rogers, 28 Cal. 520; Chapin v. Broder, 16 Cal. 403; Winston v. Browning, 61 Ala. 80; Hershey v. Dennis, 53 Cal. 77; Bell v. Gilmore, 25 N. J. Eq. 104. *Per contra*, Fletcher v. Holmes, 25 Ind. 458.

[71] Chapin v. Broder, 16 Cal. 403.

[72] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70.

[73] Carmichael v. Abrahams, 1 Dessau. 114.

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court.[74] And this, although the clerk may neglect to enter such judgment in the docket of the court.[75] The transcript, to become a lien on real estate, must be filed in the proper court of the county where the judgment was recovered, and cannot in the first instance be filed in the court of another county.[76] While the allowance of a claim against the estate of a decedent, by a probate court, has all the force and effect of a judgment, it is not generally regarded as creating a lien on the estate.[77]

§ 413. Judgments of Federal Courts.

In states where the judgments of state courts of record create a lien upon the lands of the judgment-debtor, the judgment of a United States circuit or district court, sitting within the state, has the same operation, as a lien, in the county where rendered, and, under certain restrictions to be hereafter noticed, throughout the territory of the state.[78]

§ 414. Statutory Basis of such Liens.

If, as we have already seen, judgment-liens are essentially the creatures of statute law, it is pertinent to inquire how the judgments of the federal courts came to be invested with this operation. Until a recent date there was no legislation of congress specifically declaring that such judgments should have the incident of a lien upon land. Nor could it be within the province of a state legislature to enact that they should have that effect. The answer to the question is given

[74] Bunding v. Miller, 10 Mo. 445.

[75] Petray v. Howell, 20 Ark. 615.

[76] Pemberton v. Pollard, 18 Nebr. 435, 25 N. W. Rep. 582.

[77] Kennerley v. Shepley, 15 Mo. 648, 57 Am. Dec. 219; Stone v. Wood, 16 Ill. 177.

[78] Massingill v. Downs, 7 How. 760; Williams v. Benedict, 8 How. 107; Brown v. Pierce, 7 Wall. 205; Cropsey v. Crandall, 2 Blatchf. 341; Lombard v. Bayard, 1 Wall. Jr. 196; Carroll v. Watkins, 1 Abb. U. S. 474; Barth v. Makeever, 4 Biss. 206; Shrew v. Jones, 2 McLean, 78; Sellers v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301; Lawrence v. Belger, 31 Ohio St. 175; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Manhattan Co. v. Evertson, 6 Paige, 457; Andrews v. Wilkes, 6 How. (Miss.), 554; Simpson v. Niles, 1 Smith (Ind.), 104; Pollard v. Cocke, 19 Ala. 188.

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in the following language: "Judgments were not liens at common law, but congress, in adopting the modes of process prevailing in the states at the time the judicial system of the United States was organized, made judgments recovered in the federal courts liens in all cases where they were so by the laws of the states, and a later act of congress has provided that judgments shall cease to have that operation in the same manner and at the same periods in the respective federal districts as like processes do when issued from the state courts."[79] It must not be supposed, however, that this indirect method of vesting such judgments with the quality of lien was in any sense a recognition of a right in the states to regulate the operation of federal judgments. Judgment-liens in the federal courts owe their existence solely to the authority of the national government. As remarked by the supreme court of Ohio: "That judgment-liens are the creations of positive law, without which they cannot exist, and that they cannot survive the law which gives them being, are principles too well settled to be drawn in question. I suppose it equally clear that they must be created by the government under whose authority the judgment is rendered. The state may determine the effect of its own judgments, but cannot affect those rendered by the courts of the United States; while the same limitation is equally true of the legislation of the general government. Each has an equal right to provide for the security and satisfaction of judgments rendered in its courts, but neither has any power whatever to limit this sovereign right in the other."[80] But since congress originally adopted the state laws on the subject, the rules for determining the nature and character of the judgments that would give a lien, for ascertaining what species of estates were bound thereby, and similar matters, had to be sought in the laws and decisions of the particular state.[81] Thus it is ruled

[79] Baker v. Morton, 12 Wall. 150, Clifford, J. See also Koning v. Bayard, 2 Paine, 251. The act of congress above referred to is as follows: "Judgments or decrees, rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon." U. S. Rev. Stats. § 967. This was substantially a re-enactment of the act of July 4, 1840, c. 43, § 4; 5 U. S. Stat. at L. 393.

[80] Corwin v. Benham, 2 Ohio St. 36.

[81] Perkins v. Brierfield Iron Co., 77 Ala. 403.

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that a verdict alone, without the entry of a judgment, in a federal court, gives no lien upon land in Pennsylvania.[82] So if, under the state law, the lien of a judgment rendered by a court of the state attaches from the day of the final adjournment of the term, the same rule applies to federal judgments in that state.[83] So judgment-liens of the federal courts are subject to the state statute of limitations like the liens of domestic judgments.[84] And the lien of such a judgment may be modified or suspended, during the pendency of an appeal or writ of error, in accordance with the state practice, in the discretion of the federal court.[85]

§ 415. Territorial Extent of such Liens.

In the absence of restrictive legislation by congress, the lien of a federal judgment was always held to be co-extensive with the jurisdiction of the court which rendered it. That is to say, if the judgment was entered by a federal district court, its lien extended to all chargeable property of the debtor throughout the *district*, and was not restricted to the particular county in which the court was sitting, although, by the state law, the lien of a judgment rendered by a state court in that county would not extend into another county; and similarly, if the judgment were rendered by a United States circuit court, its lien would cover all property of the debtor within the confines of the *state*.[86] To this effect was a decision of the chief federal court, where it was said: "In those states where the judgment or the execution of the state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create

[82] Estate of Morris, 6 Phila. 184.

[83] Jones v. Guthrie, 23 Ill. 421.

[84] Abbey v. Bank, 34 Miss. 571, 69 Am. Dec. 401.

[85] United States v. Sturgis, 14 Fed. Rep. 810.

[86] Conrad v. Ins. Co., 1 Pet. 453; Shrew v. Jones, 2 McLean, 78; Cropsey v. Crandall, 2 Blatchf. 341; Carroll v. Watkins, 1 Abb. U. S. 474; Lombard v. Bayard, 1 Wall. Jr. 196; Barth v. Makeever, 4 Biss. 206; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Doyle v. Wade (Fla.), 1 South. Rep. 516; Hall v. Green, 60 Miss. 47; Branch v. Lowery, 31 Tex. 96; United States v. Duncan, 12 Ill. 523; Sellers v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301.

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a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the federal courts."[87] As a necessary consequence of this doctrine it was held that state statutes requiring judgments to be recorded in the county in which the land lies could have no effect upon the lien of the judgment of a federal court.[88] But congress has recently passed an act which materially changes the law in this respect, and in effect puts the judgments of the federal courts upon the same footing with those of the state courts, in respect to the territorial extent of their lien. The wording of the act is given in a note.[89] The purport of this statute appears to be as follows: 1. The judgment of a federal court will become a lien upon real property situated in the

[87] Massingill v. Downs, 7 How. 760.

[88] Doyle v. Wade (Fla.), 1 South. Rep. 516; Carroll v. Watkins, 1 Abb. U. S. 474. Compare Hall v. Green, 60 Miss. 47.

[89] Act of Congress of August 1, 1888 (25 U. S. Stats. at L. 357), provides as follows: "That judgments or decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state: *Provided*, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county." See this statute construed in Alsop v. Moseley (N. Car.), 10 S. E. Rep. 124.

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county where the court was sitting at the time of its rendition, at all events and without any reference to docketing, etc., under state laws. 2. The judgment may become a lien on property situated within the state, but in a different county, upon these two conditions: (a) that the state laws authorizing the transfer of a judgment, for purposes of lien, from one county to another, expressly include judgments of the federal courts in the description of the judgments which may be so transferred; and (b) that the requirements of such state laws, in regard to docketing the judgment in the second county, be complied with.

A judgment in favor of the United States, recovered in one of the federal courts *out of* the state of New York, is not a lien upon lands *within* that state from the docketing of the judgment, although, by the law of the United States, an execution on such judgment may be issued against the defendant's property in any state of the Union.[90]

§ 416. Decrees in Admiralty.

A final decree in admiralty in the United States district court in a suit *in personam*, for the payment of money, is a lien on the lands of the defendant in the district. "Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as a matter of daily practice, render decrees therein for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provisions under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts." [91]

[90] Manhattan Co. v. Evertson, 6 Paige, 457.

[91] Ward v. Chamberlain, 2 Black, 430.

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Part III. To what Property the Lien attaches.

§ 417. Territorial Restriction of Lien.

Although a judgment *in personam* has the effect of establishing a claim against the defendant which follows his person and may be enforced against him, by some appropriate proceeding, wherever he may be found, yet it can be collected by the direct process of execution only within the territory over which the court rendering the judgment has jurisdiction and within which its process may run. Hence, as a general rule, the judgment constitutes a lien only upon the real estate of the debtor lying within such territorial limits. A judgment rendered in one state or country is not a lien upon land in another state or country.[92] In order to have that effect, it must be made the basis of a suit and judgment in the second state or country, and then the lien will attach as an incident of the second judgment, not the first. And even within the limits of the same state, unless it is otherwise provided by the statutes, the lien of a judgment attaches only to the real estate of the debtor which lies within the particular county where the judgment was rendered and docketed.[93] But where a judgment-lien attaches upon lands in a certain county, and afterwards a new county is set off, within which these lands (or part of them) fall, the lien does not cease to exist by reason of such new organization, but holds during the full period allowed by statute without any further record.[94] "It is supposed that when a new

[92] Billan v. Hercklebrath, 23 Ind. 71. But where a judgment was recovered in M. county, Virginia, and became a lien on lands in B. county, its lien was neither lost nor impaired by reason of the division of the state of Virginia into two states and the falling of M. county into the state of West Virginia. Gatewood v. Goode, 23 Gratt. 880.

[93] King v. Portis, 77 N. Car. 25; Baker v. Chandler, 51 Ind. 85; State Bank v. Carson, 4 Nebr. 498; Goodell v. Blumer, 41 Wis. 436; Farmers' Bank v. Heighe, 8 Md. 357. In Alabama it was held, in 1843, that the lien of a judgment in any court of record of the state extended to all the lands of the judgment debtor within the state. Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301. And in Pennsylvania, in 1792, a similar ruling was made in regard to the effect of a judgment in the supreme court. Ralston v. Bell, 2 Dall. 158.

[94] Davidson v. Root, 11 Ohio, 98, 37 Am. Dec. 411; Bowman v. Hovions, 17 Cal. 471; Hays's Appeal, 8 Pa. St. 182; West's Appeal, 5 Watts, 87.

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county is organized, with no saving clause in the act, and land subject to a judgment-lien in the old county falls within the new organization, the lien ceases to exist. We do not think so. The lien being given by express provision, although it is admitted, as a part of the remedy, to be within the control of the legislature, must, nevertheless, remain until lost by the act of the judgment creditor, or taken away by subsequent legislation." [95]

§ 418. Transfer of Judgment to Another County.

In many of the states there are statutes authorizing a transcript of a judgment recovered in one county to be docketed in another, for the purpose of binding lands of the judgment debtor situated in the latter county.[96] Such a transfer, however, does not destroy the lien of the judgment on the debtor's property in the county where it was originally docketed.[97] But on the other hand, if the statute enacts that its lien shall continue in the second county for a prescribed term after the filing of the transcript there, it is held that the lien will bind the land in the second county during the whole of such term, although, in the interval, it may have expired by limitation in the first county.[98] It is to be noted that a transcript thus entered in another county is not a judgment of the court to which transferred, but a *quasi* judgment for certain limited purposes, such as lien, execution, and revival. Hence if the original judgment is set aside for irregularity, the judgment on the transcript will fall with it.[99] Another consequence of this principle is that no authority can be derived from the statute for a transfer of the same judgment from the second county to a third,—that would be merely an exemplification of an exemplification. If it is desired to bind lands in a third county, a transcript must be taken directly from the first.[100] And when a judgment is so transferred, its merits cannot be inquired into at all by

[95] Davidson v. Root, 11 Ohio, 98, 37 Am. Dec. 411.

[96] Farmers' Bank v. Heighe, 3 Md. 357; Goodell v. Blumer, 41 Wis. 436; Perry v. Morris, 65 N. Car. 221; Neil v. Colwell, 66 Pa. St. 216; Code Civil Proc. Cal. § 674.

[97] Perry v. Morris, 65 N. Car. 221.

[98] Donner v. Palmer, 23 Cal. 40.

[99] Brandt's Appeal, 16 Pa. St. 343.

[100] Mellon v. Guthrie, 51 Pa. St. 116.

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the court to which it is taken; it is there only for purposes of enforcement and satisfaction.[101] In regard to the requisites of the transcript, it is necessary that it should be sufficient to give reasonably certain and definite information to subsequent purchasers or lienors. It is held to answer this requirement if it sets out the date of the rendition of the judgment, the names of the parties to the suit, the amount of the debt, and the costs of the action.[102] If the statute provides that "judgments at law" may be thus transferred from one county to another, this term will not be given an extensive signification, but will be taken in its strict meaning. Thus, a verdict, without the rendition of judgment upon it, is not capable of being taken to another county for purposes of lien.[103] And under a statute worded as above, a decree of a court of equity cannot be thus transferred to another county, although it be for the payment of a definite sum of money.[104] But a valid and subsisting judgment may be transferred after the death of the plaintiff, and the suggestion of death and substitution of the administrator may be made either before or after the transfer.[105]

§ 419. Lien binds Real Estate.

The language usually employed in statutes on this subject is to the effect that judgments shall be a lien on the "real estate" or "real property" of the defendant. These terms serve well enough to exempt chattels from this operation of a judgment, but leave room for a certain ambiguity as to the various species of estates and interests in land which may possibly come under the designation of realty. These questions will be examined in succeeding sections. It has been held that judgments against a turnpike company are not liens upon the turnpike road.[106] And under the laws of Texas regulating railways, a railroad is not considered real estate within the meaning of a statute which makes the judgment of a court of record a lien on the "real estate" of the debtor.[107] But if the laws of the particular

[101] King v. Nimick, 84 Pa. St. 297.
[102] Wilson v. Patton, 87 N. Car. 318.
[103] Bailey v. Eder, 90 Pa. St. 446.
[104] Brooke v. Phillips, 88 Pa. St. 188.
[105] Walt v. Swinehart, 8 Pa. St. 97.
[106] Beam's Appeal, 19 Pa. St. 453.
[107] Scogen v. Perry, 82 Tex. 21.

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state are so framed as to give the character of fixtures to the rolling stock of a railroad, then such stock will be subject to the lien of a judgment.[108]

§ 420. Actual Interest of Debtor bound.

The lien of a judgment attaches to the precise interest or estate which the judgment-debtor has, actually and effectively, in the land. By this is meant that, as the recovery of a judgment against him cannot of itself operate to change the quantity of his interest in the property, so its lien cannot be made effectual to bind or convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated. Hence it is of no consequence that he may have an *apparent* or colorable interest greater than would pass by his conveyance of the title; the lien has no effect except upon his actual estate, legal or equitable, according as the law varies in the different jurisdictions.[109] "The general lien of a judgment-creditor upon the lands of his debtor is subject to all equities which existed against such lands in favor of third persons at the time of the recovery of the judgment. And the court of chancery will so control the legal lien of the judgment-creditor as to restrict it to the actual interest of the judgment-debtor in the property, so as fully to protect the rights of those who have a prior equitable interest in such property or in the proceeds thereof."[110] "The moment a judgment is docketed it becomes in law a general lien on all the real estate of the debtor, not only as against himself, but also as against all other persons deriving title through or under him subsequent to

[108] Railroad Co. v. James, 6 Wall. 750.

[109] Baker v. Morton, 12 Wall. 150; *In re* Estes, 6 Sawy. 459, 3 Fed. Rep. 134; Sanford v. McLean, 3 Paige, 117; Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236; *Ex parte* Trenholm, 19 S. Car. 126; Blankenship v. Douglass, 26 Tex. 225, 82 Am. Dec. 608; Holden v. Garrett, 23 Kans. 98; Doswell v. Adler, 28 Ark. 82; Unknown Heirs v. Kimball, 4 Ind. 546, 58 Am. Dec. 688; Sharpe v. Davis, 76 Ind. 17; Heberd v. Wines, 105 Ind. 237, 4 N. E. Rep. 457; Churchill v. Morse, 23 Iowa, 229, 92 Am. Dec. 422; Union Bank v. Maynard, 51 Mo. 548; Uhl v. May, 5 Nebr. 157; Galway v. Malchow, 7 Nebr. 285; Colt v. Du Bois, 7 Nebr. 391; Berkley v. Lamb, 8 Nebr. 392; Nessler v. Neher, 18 Nebr. 649, 23 N. W. Rep. 845.

[110] Buchan v. Sumner, 2 Barb. Ch. 207, 47 Am. Dec. 305.

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such judgment. It affects the legal estate, and the lien of the judgment cannot at law be detached or defeated by any species of alienation whatsoever." [111] A judgment is not a lien on land unless there is a legal or equitable seisin of the judgment-debtor; but where he is the actual possessor, that is sufficient, for actual possession is *prima facie* evidence of title.[112] On the other hand, although the legal title to land is in one, yet if another has actual possession, a judgment against the former is a lien only upon his interest, whatever that may be, for the possession of the other is notice to all the world of his claims.[113] In Illinois it is held that a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources.[114]

§ 421. Title held in Trust.

The lien of a judgment does not in equity attach upon the mere legal title to land existing in the defendant, when the equitable title is in a third person.[115] And transitory seisin of lands by the judgment-debtor, in trust for another, will not subject the lands to the judgment-lien.[116] To illustrate, in a recent case it appeared that A. agreed to purchase three lots from B. as agent for C., and the deed was made out to A., but he declined to receive it on the ground that he could not pay for the lots and had agreed to let D. have them at the stipulated price. The agent refused to alter the deed, and D. paid the money to him, and A. conveyed the property to D. It was held that under these circumstances a judgment against A. was not a lien on the lands conveyed to D. The court observed that A. "was vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit, and held the legal title in trust for D. Under such circumstances

[111] Morris v. Mowatt, 2 Paige, 586, 22 Am. Dec. 661.

[112] Jackson v. Town, 4 Cow. 599, 15 Am. Dec. 405.

[113] Uhl v. May, 5 Nebr. 157; Lumbard v. Abbey, 73 Ill. 177; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740.

[114] Massey v. Westcott, 40 Ill. 160.

[115] Ells v. Tousley, 1 Paige, 280; Lounsbury v. Purdy, 11 Barb. 490; Withnell v. Courtland Wagon Co., 25 Fed. Rep. 372; Hays v. Regar, 102 Ind. 524, 1 N. E. Rep. 886. See also Fulton's Estate, 51 Pa. St. 204.

[116] Aicardi v. Craig, 42 Ala. 311.

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A. had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value."[117] So where a grantee is named in a conveyance and designated as "trustee," this is sufficient to allow him to hold the title for the unnamed beneficiary, if one actually exists, and a judgment and levy of execution against the trustee individually are a lien only on his personal interest, if any, in the property.[118] So in an action against a partner, who held the legal title to a mine in trust for the benefit of the firm, to enforce a lien for labor performed thereon, where judgment is rendered against him, only his interest in the mine can be sold to satisfy such lien.[119] Another important application of this principle is in the case where one sells and conveys real estate to which he has no title, or an imperfect title, at the time of the sale, and subsequently acquires a perfect title, the same then enuring to the benefit of the grantee. If, between the date of the conveyance and the acquisition of the perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.[120] The case of *Carter* v. *Challen*[121] was decided on similar principles. It there appeared that a tract of land was sold by the sheriff and a deed therefor made to the purchaser, who soon afterwards died intestate. An execution against one of the heirs of the purchaser was levied on what was supposed to be the heir's undivided half interest in the land. But the present plaintiff enjoined a sale under the execution, claiming to be the equitable owner. It was shown that the plaintiff paid the purchase-money, had always been in possession of the land, his possession being prior to the date of the judgment, and had exercised rights of and claimed ownership, and that the purchaser did not claim ownership in his lifetime. It was held that the transaction created a resulting trust in favor of the plaintiff, superior to the lien of the judgment, as the continuous possession by the plaintiff was sufficient constructive notice of ownership.

[117] Atkinson v. Hancock, 67 Iowa, 452, 25 N. W. Rep. 701.

[118] Boardman v. Willard, 78 Iowa, 20, 34 N. W. Rep. 487.

[119] Rosina v. Trowbridge (Nevada), 17 Pac. Rep. 751.

[120] Watkins v. Wassell, 15 Ark. 73.

[121] 83 Ala. 135, 3 South. Rep. 313.

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§ 422. Inchoate Title.

On the general principle that a judgment-lien attaches to the precise interest which the debtor has in the land, whatever that interest may be, the authorities hold that the lien may be considered as binding several species of inchoate or inceptive titles. Thus a purchaser at a sale under order of the probate court acquires an inceptive title or interest in the property so purchased at the time it is struck down to him, and judgments entered against him subsequent to the sale, but prior to its confirmation by the court, are a lien upon such interest subject to the future confirmation of the sale.[122] So a purchaser at sheriff's sale, before his deed has been acknowledged, has an inceptive interest in the land by the contract, which may be bound by the lien of a judgment.[123] And numerous cases have decided that a judgment-lien will attach to land which has been purchased from the government, in advance of the issuance of a patent to the buyer.[124] But it is also held, and with much show of reason, that a judgment is not a lien upon a mere right of pre-emption.[125]

[122] Holmes' Appeal, 108 Pa. St. 23. But a purchaser who has utterly failed to comply with the terms of sale, has no estate in the premises, legal or equitable, to be bound by a judgment-lien. Jacobs' Appeal, 28 Pa. St. 477.

[123] Morrison v. Wurtz, 7 Watts, 437; Slater's Appeal, 28 Pa. St. 169.

[124] Levi v. Thompson, 4 How. 17; Landes v. Brant, 10 How. 348; Huntington v. Grantland, 33 Miss. 453; Jackson v. Williams, 10 Ohio, 69; Rogers v. Brent, 5 Gilm. 578; Cavender v. Smith, 5 Iowa, 157.

[125] Harrington v. Sharp, 1 Greene (Iowa), 131, 48 Am. Dec. 365. In this case the court said: "Under our statute a judgment is a lien only on the 'real estate of the person' against whom it was rendered. By the language 'real estate of the person,' we understand that the fee-simple, or estate of inheritance, must be in the person, in order to have the judgment against him operate as a lien upon the land. A mere pre-emption right confers no such fee or estate upon a person. It is but a temporary and conditional interest, unknown to the common law. It only imparts to the pre-emptioner a right over others to purchase the land within a limited period, at a stipulated price, and if he fails to pay the price within the time required, the right ceases. It is of a nature no greater than an estate for years—a mere equitable and contingent interest; and hence we are firmly of opinion that a judgment cannot operate as a lien upon a pre-emption right to lands."

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§ 423. Land Fraudulently Conveyed.

Where a person has aliened his land by a conveyance which is in fraud of his creditors, and afterwards a judgment is recovered against him, many of the authorities hold that such judgment does not attach as a lien upon the land, at least until the commencement of an action by the judgment-creditor to set aside the conveyance; on the ground that the fraudulent conveyance is not void, but voidable, and that it is valid as between the parties, and as to the plaintiff, until attacked.[128] In one of the cases cited in the margin, Judge Deady, after an extensive review of the authorities, expressed himself as follows: "In my own opinion the lien of a judgment which is limited by law to the property of or belonging to the judgment-debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void,' but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser. The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment-debtor, is not a mode prescribed by which a creditor may attack a conveyance fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other

[128] Miller v. Sherry, 2 Wall. 249; Brooks v. Wilson, 6 N. Y. Supp. 116; Manhattan Co. v. Evertson, 6 Paige, 465; McKee v. Gilchrist, 8 Watts, 230; Mulford v. Peterson, 35 N. J. L. 127; Neal v. Foster, 36 Fed. Rep. 29; Rappleye v. International Bank, 93 Ill. 396; *In re* Estes, 8 Fed. Rep. 134.

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act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it."[127]

But on the other hand, many well considered cases hold that a subsequent judgment *is* a lien on land previously conveyed in fraud of creditors, and that the judgment-creditor may treat the conveyance as simply void, and may rest exclusively upon his legal remedies, without invoking the aid of a court of equity; that is, he may proceed to sell the land upon execution, leaving it to the sheriff's vendee to impeach the fraudulent conveyance.[128] According to another view, if the debtor has fraudulently conveyed away or incumbered his real estate, so as to interpose an obstacle which embarrasses

[127] *In re* Estes, 8 Fed. Rep. 131, 141.

[128] Jackson v. Holbrook, 36 Minn. 494, 32 N. W. Rep. 852; Chautauqua Co. Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460; Eastman v. Schettler, 13 Wis. 324; Smith v. Morse, 2 Cal. 524; *In re* Lowe, 19 Fed. Rep. 589; Slattery v. Jones, 96 Mo. 216, 8 S. W. Rep. 554. In Jackson v. Holbrook, *supra*, the choice of remedies open to the judgment-creditor is indicated as follows: "A judgment-creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditors' bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied. Erickson v. Quinn, 15 Abb. Pr. (N. S.) 168. In the first two classes, the creditor enforces his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such cases succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void. Freem. Ex'ns, § 447. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case, no trust is created in respect to the property, but the creditor falls back upon his legal remedy, and, instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title. Erickson v. Quinn, *supra*. And where assets are applied by the court in creditors' suits, as respects real estate, the rule is, as in other cases, to prefer prior liens, in the distribution. 'Where the law gives priority, equity will not destroy it; and especially where legal assets are created by statute as judgment-liens, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery.' Kent, C. J., Codwise v. Gelston, 10 Johns. 522; Scouton v. Bender, 8 How. Pr. 185; Wiswall v. Sampson, 14 How. 67."

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the creditor in appropriating it by legal process in satisfaction of his debt, then the latter may file his bill to remove out of the way such fraudulent conveyance or incumbrance, and it is not necessary for him to first take out execution on his judgment, for the judgment is a lien on the land.[129] But of course these rules only apply in cases where the conveyance was made with intent to hinder and defraud creditors. Thus a judgment is not a lien on land which the debtor has previously conveyed in good faith to his son, in trust for his wife, to pay a debt really due her.[130] And in any other case where the fraudulent purpose was clearly wanting, the judgment would be no lien.

§ 424. Exempt Property.

In the nature of things, a judgment cannot operate as a lien upon any property which is by law exempt from seizure and sale on execution. Under a statute providing that judgments shall be liens on real estate subject to execution, where the entire property of a resident householder at the time of the rendition of a judgment is less in value than the amount allowed by law as exempt from execution, and so continues, the judgment does not become a lien on his real estate, and his grantee takes it free from any lien of the judgment or execution issued upon it.[131]

§ 425. Homestead Property.

Since land held as a homestead is not liable to levy and sale on execution, it is not bound by the lien of a judgment against the owner. Hence, while the land retains this character, the owner will not be deterred from placing incumbrances upon it, or even alienating it, by the fact that there are judgments outstanding against him.[132] But a judgment-lien against property acquired *before* the

[129] Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

[130] Benson v. Maxwell (Pa.), 14 Atl. Rep. 161.

[131] Dumbould v. Rowley, 113 Ind. 353, 15 N. E. Rep. 463.

[132] Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; McDonald v. Badger, 23 Cal. 400, 83 Am. Dec. 123; Sullivan v. Hendrickson, 54 Cal. 258; Monroe v. May, 9 Kans. 466; Gapen v. Stephenson, 17 Kans. 618; Lamb v. Shays, 14

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filing of a declaration of homestead by the debtor and his wife, or before the debtor's marriage, or otherwise before the land acquires the character of a homestead, subjects such property to sale under execution; such lien cannot be divested by any subsequent act of the owners.[133] And if the property loses its character as a homestead, it then becomes subject to existing and future judgments. Thus, under a law which enacts that the homestead exemption shall exist "so long as the same shall be owned and occupied by the debtor as such homestead," a judgment against the owner of land is a lien which remains dormant while the land is so occupied, but it becomes living and operative as soon as the homestead occupation is abandoned.[134] In that event, all existing judgments will attach together as of the date of the abandonment, but without regard to their seniority, and priority will belong to the creditor who first manifests his diligence by levying on the property.[135] It is evident that if an abandonment of the homestead character of the land precedes the debtor's alienation of it by such an interval of time that the two acts cannot be considered as parts of the same transaction, the liens of existing judgments will attach, and the property will go to the purchaser burdened with such liens.[136] But a more difficult question arises in case the relinquishment of the homestead consists in the very act of selling it. According to the decisions in some of the states, if the owner of a homestead attempts to alienate the land *ipso facto* he abandons its character as a homestead, and at the same instant the liens of existing judgments against him attach to the property, and the purchaser must therefore take it charged with such liens.[137] This view is based

Iowa, 567; Wiggins v. Chance, 54 Ill. 175; Black v. Epperson, 40 Tex. 162; Briggs v. Briggs, 45 Iowa, 318; Grimes v. Portman (Mo.), 12 S. W. Rep. 792.

[133] Kennerley v. Swartz, 83 Va. 704, 3 S. E. Rep. 348; Smith v. Richards (Idaho), 21 Pac. Rep. 419, citing Freeman on Executions, §§ 249, 249*d*, 249*e*; Thompson on Homestead, § 317; Smyth on Homestead, § 35; Platt on Married Women, § 71; Kelly v. Dill, 23 Minn. 435; Bullene v. Hiatt, 12 Kans. 82; Robinson v. Wilson, 15 Kans. 448; Bartholomew v. Hook, 23 Cal. 278; Rix v. McHenry, 7 Cal. 89; Elston v. Robinson, 21 Iowa, 532.

[134] Kellerman v. Aultman, 30 Fed. Rep. 888.

[135] Bliss v. Clark, 39 Ill. 596; McDonald v. Crandall, 43 Ill. 231.

[136] Ackley v. Chamberlain, 16 Cal. 181; Marriner v. Smith, 27 Cal. 649; Green v. Marks, 25 Ill. 222.

[137] Kellerman v. Aultman, 30 Fed. Rep. 888; Eaton v. Ryan, 5 Nebr. 47; State Bank v. Carson, 4 Nebr. 498; Moore v.

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upon the wording of the statutes, and probably does not universally prevail. Under a law providing that homesteads shall be exempt from any execution issued on a money judgment, a judgment allowing the plaintiff in divorce to recover of the defendant a certain sum of money will not constitute a lien on the defendant's homestead estate.[138]

§ 426. Life-Estates.

A judgment against a devisee of a life-estate, existing and unsatisfied at the time of the testator's death, becomes thenceforth a lien upon the interest devised.[139] So where a testator devised certain real estate to his executors in trust for his son, directing the trustees to "permit and suffer" the son "to have, receive, and take the rents, issues, and profits thereof for the term of his natural life," and, after the son's death, devising the same land to the son's heirs at law, it was held that the trust so attempted to be created was a passive one, and invalid under the statute, and that the son took a life-estate upon which a judgment against him was a lien.[140] But where an estate for life is subject to be divested by the breach of a condition subsequent, a breach which forfeits the estate destroys the lien thereon of a judgment against the tenant for life.[141] So a judgment recovered against a devisee for life, vested, under the will, with power to consent that the executors shall sell the real estate at their discretion and appropriate the income for the support of the devisee and his family during his life, does not work an extinguishment of the power; but the lien of the judgment is subject to the power.[142]

§ 427. Estates by Curtesy.

A judgment against a husband is a lien on his life-interest in the wife's lands, although execution is suspended until her death.[143] And

Granger, 80 Ark. 574; Jackson v. Allen, 80 Ark. 110; Folsom v. Carli, 5 Minn. 335 (Gil. 264); Tillotson v. Millard, 7 Minn. 513 (Gil. 419); Hoyt v. Howe, 3 Wis. 752; Whitworth v. Lyons, 39 Miss. 467.

[138] Stanley v. Sullivan, 71 Wis. 585, 37 N. W. Rep. 801.

[139] Bridge v. Ward, 35 Wis. 687.

[140] Verdin v. Slocum, 71 N. Y. 345.

[141] Moore v. Pitts, 58 N. Y. 85.

[142] Leggett v. Doremus, 25 N. J. Eq. 122.

[143] Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Beard v. Deitz, 1 Watts, 309.

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a judgment against a tenant by the curtesy initiate after issue born, binds his estate in his wife's lands which have been ordered to be appraised in proceedings in partition, but which have not been accepted or sold at the date of the recovery of the judgment.[144]

§ 428. Reversions and Remainders.

Estates in reversion or in remainder, if vested, are legal estates and subject to sale under execution, or liable to be taken under an *elegit*. They are therefore subject to the lien of judgments against the reversioner or remainder man.[145] The purchaser would of course succeed to the precise interest of the judgment-debtor, and would not be entitled to the immediate possession unless, or until, the latter would be so entitled. "A judgment is a lien upon all lands of which the defendant was seised or entitled to, or any estate in lands to which he was entitled, at the time of the entry of the judgment or at any time after. A remainder or reversion, if vested, can be levied upon and sold for the payment of such judgment."[146] A reversion after an estate for life is bound by a judgment obtained against the ancestor from whom it immediately descended.[147] In cases where the debtor's interest is not vested but contingent, the authorities are not so harmonious. In several of the states it is held that a contingent remainder is not liable to be sold on execution and hence not subject to the lien of a judgment.[148] But in Pennsylvania it has been held that where a judgment has been obtained against a man who has an interest in property, either by way of executory devise or contingent remainder, it is a lien upon such interest; and although the lien might not become effective until the estate vested, yet it must be preferred to such liens as have been obtained after the party has acquired a complete title.[149]

[144] Bank v. Stauffer, 10 Pa. St. 398.

[145] Williams v. Amory, 14 Mass. 20; Brown v. Gale, 5 N. H. 416; Woodgate v. Fleet, 44 N. Y. 1; Humphreys v. Humphreys, 1 Yeates, 427; Den dem. Rickey v. Hillman, 7 N. J. L. 180; Bockover v. Ayres, 22 N. J. Eq. 13.

[146] Bockover v. Ayres, 22 N. J. Eq. 13.

[147] Burton v. Smith, 13 Pet. 464.

[148] Allston v. Bank, 2 Hill (S. Car.) Eq. 235; Watson v. Dodd, 68 N. Car. 528; Jackson v. Middleton, 52 Barb. 9.

[149] Ogden v. Knepler, 1 Pears. (Pa.) 145.

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§ 429. Leasehold Interests.

At the common law a leasehold interest, or estate in land for years, was regarded as only a chattel interest and was therefore not bound by the lien of a judgment against the holder, although, like any other species of personal property, it might be levied upon and sold under execution.[150] And this view is still held in some of the states.[151] But in several other jurisdictions, under the construction given to their particular statutes, leasehold interests are regarded and treated as real estate, and hence are subject to the lien of judgments.[152] In Iowa, a building on leasehold property, which the tenant has a right to remove at the end of his term, is, with the interest of the tenant in the land, subject to the lien of a judgment against him, which is paramount to the lien of a subsequent mortgage executed by him.[153] In New York, the code provides that the term "real property," as used in the laws relating to the execution sale of land, shall apply to leasehold property where the lessee, or his assignee, at the time of sale, is possessed of "at least five years unexpired term of lease." Consequently a judgment, though duly docketed, is not a lien on the judgment-debtor's interest in the unexpired term of a lease having but two years to run.[154] And judgments do not attach to leasehold premises unless where there is possession in the lessee.[155] In regard to leases which give the tenant the privilege of purchase, there is some difference of opinion. In an early case in Pennsylvania, where a lease was made to one and his heirs for forty-nine years, reserving to the lessee a privilege of building, with a covenant by the lessor to purchase the improvements at the end of forty-nine years or convey the land to the lessee, his heirs and assigns, at a valuation, and the

[150] Merry v. Hallett, 2 Cow. 497; Vredenburg v. Morris, 1 Johns. Cas. 223; Northern Bank v. Roosa, 13 Ohio, 334.

[151] Krause's Appeal, 2 Whart. 398; Association v. Bolster, 92 Pa. St. 123.

[152] Northern Bank v. Roosa, 13 Ohio, 334; First Nat. Bank v. Bennett, 40 Iowa, 537; McLean v. Rockey, 3 McLean, 235; Steers v. Daniel, 4 Fed. Rep. 587. In the case last cited this construction is given to the statutes of Tennessee.

[153] Haden v. Goppinger, 67 Iowa, 106, 24 N. W. Rep. 743.

[154] Taylor v. Wynne, 8 N. Y. Supp. 759, construing Code Civil Proc. N. Y. § 1430.

[155] Crane v. O'Connor, 4 Edw. Ch. 409.

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lessee afterwards erected valuable buildings, it was held that the lessee had such an interest in the land as was bound by a judgment against him. "He had an interest greater than leasehold; eventually it might be fee simple."[156] And a similar ruling has recently been made in Illinois.[157] But in Iowa it is held that a judgment-creditor cannot maintain an action in equity to establish the lien of his judgment upon land in the possession of the judgment-debtor, under a lease for a term of years, with the right, if he so elects, to purchase the land at a designated price, as no lien can attach upon the mere *option* of the debtor.[158]

§ 430. Land held by Joint Owners.

A judgment against a tenant in common or copartner is a lien upon the interest of the debtor in the land, and if upon a partition this interest is converted into money, the priority of the judgment-lien is preserved as against the fund.[159] It is to be observed that a judgment against a tenant in common does not prevent a partition, at his instance against whom the judgment is, or that of any other of the tenants. If partition is made, the lien of the judgment will attach to the part allotted to the defendant in the judgment.[160] In a case in Maryland, it appeared that H. and G. made a parol agreement to purchase certain real estate jointly; the negotiations were intrusted to G., and he made the purchase alone and on his own credit; he also gave a bond for the purchase-money and took possession; but G. subsequently proved unable to meet his share of the purchase-money, and H. advanced it and took a conveyance in fee from G. and the original grantor. Upon this state of facts it was held that judgments rendered against G. prior in date to such conveyance were liens on his interest in the land, but as to those ren-

[156] Ely v. Beaumont, 5 Serg. & R. 124.

[157] Gorham v. Farson, 119 Ill. 425, 10 N. E. Rep. 1.

[158] Sweezy v. Jones, 65 Iowa, 272, 21 N. W. Rep. 603.

[159] Eldridge v. Post, 20 Fla. 579; Garvin v. Garvin, 1 S. Car. 55.

[160] Barrington v. Clarke, 2 Pen. & Watts, 115, 21 Am. Dec. 432; Longwell v. Bentley, 23 Pa. St. 103; Williard v. Williard, 56 Pa. St. 127; Argyle v. Dwinel, 29 Me. 45.

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dered subsequent to that period, H. was entitled to relief by perpetual injunction against them.[161]

§ 431. Partnership Property.

A judgment against a partnership for a firm debt, entered by confession of all the partners, is a lien upon the partnership real estate.[162] And so also a judgment of a separate creditor against one of the partners will be a lien on the firm property, although subordinated to all claims against the partnership as such. Where realty is purchased with partnership funds and held and used for partnership purposes, though the legal title is in the name of individual partners, the statutory lien of a judgment of a separate creditor, on such land, must be postponed to the equity of a firm creditor whose claim accrued during the continuance of the partnership, although subsequent to the time that such statutory lien attached. Such lien is good only to the extent of the residuary interest of the partners in the land, after the satisfaction of all claims against the partnership.[163] Conversely, a judgment against the firm is a lien on the separate real estate of the individual partners.[164] But where, upon a hearing before an auditor appointed to determine the validity of certain claims against an estate, a judgment obtained against the firm of which the decedent was a member was filed, it was held that as the record did not show the names of the individual partners, the judgment could not be charged upon the individual property of the decedent.[165]

§ 432. After-Acquired Property.

In most of the states it is held that the lien of a judgment attaches to and binds land acquired by the debtor *after* the rendition and dock-

[161] Hollida v. Shoop, 4 Md. 465, 59 Am. Dec. 88.

[162] *In re* Codding, 9 Fed. Rep. 849.

[163] Page v. Thomas, 43 Ohio St. 38, 1 N. E. Rep. 79, s. c. 54 Am. Rep. 788. And see also Meily v. Wood, 71 Pa. St. 488; Hoskins v. Johnson, 24 Ga. 625.

[164] Cummings' Appeal, 25 Pa. St. 268, 64 Am. Dec. 695; Pitts v. Spotts (Va.), 9 S. E. Rep. 501. A contrary view is maintained in Stadler v. Allen, 44 Iowa, 198.

[165] Fox's Appeal (Pa.), 11 Atl. Rep. 228.

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eting of the judgment; it being either so provided by statute, or by following the doctrines of the English common law.[166] But in two states—Pennsylvania and Ohio—it has been firmly settled from a very early day that the lien will not attach to after-acquired lands unless they are levied on, and consequently the debtor can make clear title to such lands in the interval, and execution cannot be levied on lands which the defendant got by purchase after the judgment, if he aliened them in good faith before levy.[167] And this doctrine has also been accepted in a few other states.[168] By the English common law the lien attached to subsequently acquired realty without a levy.[169] In Illinois, the rule is that where an execution is issued upon a judgment within one year from its rendition, the judgment will become a lien upon any real estate the judgment-defendant may acquire subsequent to its rendition and within seven years, but if no execution is issued thereon within a year, no lien will exist.[170] The lien of a judgment attaches to after-acquired property from the time the title vests in the debtor, but does not relate back to the date of the judgment. Hence the liens of all judgments in existence when the debtor acquires the property attach simultaneously and equally.[171]

[166] Ridgely v. Gartrell, 3 H. & McH. 449; McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 739; Handly v. Sydenstricker, 4 W. Va. 605; Ralston v. Field, 32 Ga. 453; Harrison v. Roberts, 6 Fla. 711; Moody v. Harper, 25 Miss. 484; Jenkins v. Gowen, 37 Miss. 444; Cayce v. Stovall, 50 Miss. 396; Thulemeyer v. Jones, 37 Tex. 560; Barron v. Thompson, 54 Tex. 285; Greenway v. Cannon, 3 Humph. 177, 39 Am. Dec. 161; Chapron v. Cassaday, 3 Humph. 661; Davis v. Benton, 2 Sneed, 665; Babcock v. Jones, 15 Kans. 296; Bank v. Watson, 13 Ark. 74; Ridge v. Prather, 1 Blackf. 401; Curtis v. Root, 28 Ill. 367; Wales v. Bogue, 31 Ill. 464; Steele v. Taylor, 1 Minn. 274 (Gil. 210); Colt v. Du Bois, 7 Nebr. 391; Leonard v. White Cloud Ferry Co., 11 Nebr. 340, 7 N. W. Rep. 538.

[167] Calhoun v. Snider, 6 Binn. 135; Rundle v. Ettwein, 2 Yeates, 23; Packer's Appeal, 6 Pa. St. 277; Lea v. Hopkins, 7 Pa. St. 492; Moorhead v. McKinney, 9 Pa. St. 265; Waters' Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Ross' Appeal, 106 Pa. St. 82; Roads v. Symmes, 1 Ohio, 281, 13 Am. Dec. 621; McCormick v. Alexander, 2 Ohio, 65; Stiles v. Murphy, 4 Ohio, 92.

[168] Harrington v. Sharp, 1 Greene (Iowa), 131, 48 Am. Dec. 365; Filley v. Duncan, 1 Nebr. 134 (compare Colt v. Du Bois, 7 Nebr. 391).

[169] 4 Kent's Comm. *425–6.

[170] Breed v. Gorham, 106 Ill. 81.

[171] Cayce v. Stovall, 50 Miss. 396. See *infra*, § 460.

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§ 433. Equitable Estates and Interests.

At common law, and generally in the absence of a statute expressly giving to it that effect, the lien of a judgment does not extend to an *equitable* interest held by the judgment-debtor in the land.[172] For instance, a judgment is not a lien upon a possible equitable interest of the debtor in a tract of land, which interest arises out of a mistake made by the sheriff, in selling the land on execution, as to the quantity contained in the tract.[173] In many of the states, statutes have been enacted changing the common law rule and assimilating legal and equitable estates for purposes of lien and execution. But in cases of ambiguity in such acts, or lack of specific reference to equitable interests, considerable doubt has been expressed as to the propriety of departing from the ancient rule. Thus in Oregon, although the statute enacts that a judgment shall be "a lien on all real property of the judgment-debtor not exempt from execution, owned by him in the county at the time of docketing," yet it is held that a judgment at law is not a lien upon an equitable title in land.[174] On the other hand, in Maryland, it is considered that a judgment is a legal lien upon an equitable estate in lands, and binds them from its date, on the ground that the statute makes no distinction between the two species of interests.[175] Under the statutes of Iowa, judgments of superior courts are liens upon all interests of the judgment-debtor in real estate, whether legal or equitable, and it is immaterial, as between the parties, whether such interest appears of record or not.[176] In

[172] Morsell v. First Nat. Bank, 91 U. S. 357; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. Rep. 194; Withnell v. Courtland Wagon Co., 25 Fed. Rep. 372; Jackson v. Chapin, 5 Cow. 485; Bogart v. Perry, 1 Johns. Ch. 52; Dixon v. Dixon, 81 N. Car. 323; Powell v. Knox, 16 Ala. 364; Kirkwood v. Koester, 11 Kans. 471; Baird v. Kirtland, 8 Ohio, 21; Russell v. Houston, 5 Ind. 180; Jeffries v. Sherburn, 21 Ind. 112; Harrington v. Sharp, 1 Greene (Iowa), 131, 48 Am. Dec. 365; Trask v. Green, 9 Mich. 358; Nessler v. Neher, 18 Nebr. 649, 26 N. W. Rep. 471; Smith v. Ingles, 2 Oreg. 43; Bloomfield v. Humason, 11 Oreg. 229, 4 Pac. Rep. 332.

[173] Russell v. Houston, 5 Ind. 180. See, a similar case, Terrell v. Prestell, 68 Ind. 86.

[174] Smith v. Ingles, 2 Oreg. 43.

[175] McMechen v. Marman, 8 Gill & J. 57.

[176] Lathrop v. Brown, 23 Iowa, 40; Blain v. Stewart, 2 Iowa, 378.

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Pennsylvania the same result is reached, but without the aid of a statute. The reason is thus stated by the court: "At common law an equitable estate is not bound by a judgment or subject to an execution, but the creditor may have relief in chancery. We have no court of chancery, and have therefore, from necessity, established it as a principle that both judgments and executions have an immediate operation on equitable estates." [177]

Although at common law, and so far as regards the competence of the law courts, without the aid of a statute, there is no method of making a judgment-lien effectual upon a purely equitable estate in the land held by the debtor, yet it has always been held by the courts of chancery that, for their purposes, such interests were just as much bound by the judgment as any legal estate, and could be subjected to its satisfaction through the processes of equity.[178] "Courts of chancery, in adjusting the conflicting rights of creditors, following by analogy the principles of the common law, will, as far as equity and good conscience permit, regard a judgment as a lien upon the equitable real estate of the debtor." [179] In Tennessee a judgment creates a lien upon equitable estates in land, to be asserted in a court of chancery, co-extensive with the lien which at law exists upon legal estates, and which will in like manner attach to after-acquired equitable realty.[180]

§ 434. Equity of Redemption.

It is generally held that a judgment creates a lien upon an equity of redemption of real estate from the time it is recorded.[181] And a judgment-debtor cannot, by conveying his equity of redemption to a prior mortgagee, cut off the lien of a judgment.[182] So a judgment

[177] Auwerter v. Mathiot, 9 S. & R. 402; Carkhuff v. Anderson, 3 Binn. 4; Semple v. Mown, 4 Phila. 85.

[178] Unknown Heirs v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Lee v. Stone, 5 Gill & J. 1, 23 Am. Dec. 589; Haleys v. Williams, 1 Leigh, 140, 19 Am. Dec. 743; Michaux' Admr. v. Brown, 10 Gratt. 612; Roach v. Bennett, 24 Miss. 98.

[179] Lee v. Stone, 5 Gill & J. 1, 23 Am. Dec. 589.

[180] Chapron v. Cassaday, 3 Humph. 661.

[181] Bank v. Morsell, 1 McArthur, 155; Julian v. Beal, 26 Ind. 220; Taylor v. Cornelius, 60 Pa. St. 187. Compare Blair v. Chamblin, 89 Ill. 526.

[182] Walters v. Defenbaugh, 90 Ill. 241.

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obtained against the owner of an equity of redemption in mortgaged premises, after a decree of foreclosure but before a sale of the premises by the master, has an equitable lien upon the surplus moneys produced by the sale under the decree; but it is otherwise if the judgment was docketed subsequent to the sale.[183] Where, after making a contract for the sale of land, the vendor assigns his claim for the purchase-money and conveys the legal title to another as collateral security for a debt, such conveyance is in legal effect a mortgage, and the vendor has a right of redemption, or a resulting trust, which is bound by the lien of a judgment subsequently rendered against him.[184] But in a case where a court of chancery, upon a creditor's bill, had ordered the debtor to convey his realty to a receiver appointed by the court, it was held that a judgment recovered against the debtor after his conveyance to the receiver did not create a lien upon the lands.[185] And in general, where a debtor has conveyed an estate to trustees upon an *active* trust, so that there remains in him nothing more than a reversionary equitable interest, and afterwards a judgment is recovered against him, its lien will not, at common law, attach to such remaining interest of the debtor. But in equity the judgment-creditor is not without remedy. For, by filing a bill for that purpose, he may secure a *quasi* lien, which will give him an interest in any surplus which may remain from the estate after discharging the trusts and which would result to the grantor's benefit, paramount to that of the latter.[186] Thus, at common law, a judgment is not a lien upon real estate which, before the judgment was rendered, had been conveyed to trustees with a power of sale to secure the payment of debts of the grantor described in the deed of trust.[187] But in many of the states, under the statutes or settled precedents of the courts, before adverted to, which have changed the

[183] Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252. See Sullivan v. Leckie, 60 Iowa, 326, 14 N. W. Rep. 355.

[184] Kimports v. Boynton, 120 Pa. St. 306, 14 Atl. Rep. 135.

[185] Chautauqua Co. Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

[186] Freedman's Savings Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. Rep. 194; McFerran v. Davis, 70 Ga. 661; Schroeder v. Gurney, 10 Hun, 413; Chautauqua Co. Bank v. White, 6 N.Y. 236, 57 Am. Dec. 442.

[187] Morsell v. Bank, 91 U. S. 357; Marlow v. Johnson, 31 Miss. 128.

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ancient rule in regard to legal liens upon equitable estates, it is now held that the resulting trust in favor of the grantor in such a trust deed is property which will be bound by the lien of a subsequent judgment, and that such lien may be enforced by levy and sale of the land subject to the incumbrance of the trust deed.[188] After a sale, however, under the deed of trust, the debtor's right to redeem is removed from the land and is represented by the surplus in the hands of the trustee, against which such judgment-lien is continued and may be enforced in equity.[189] But if the judgment-creditor suffers a sale to be made under the deed of trust, without getting out execution on his judgment or otherwise giving the trustee actual notice of his claim, and the latter pays over the surplus in his hands, after satisfying the objects of the trust, to the grantor, the judgment-creditor cannot recover in an action against the trustee, for the latter is not bound to search the records for possible liens upon the fund.[190]

§ 435. Judgment against Trustee.

A trustee cannot bind land held under the trust by a confession of judgment. The lien resulting from such judgment will attach to nothing but the personal interest, if any, which the trustee may have in the estate.[191] But a trustee who, without the knowledge of his *cestui que trust*, purchases real estate, takes the title in his own name, and pays part of the consideration with trust funds in his hands and gives his own note and mortgage for the remainder, has an interest in the land upon which a judgment against him will attach as a lien.[192]

§ 436. Land held under a Power.

If land is held by one under a power of appointment which he might exercise for his own benefit, it is generally held that he has

[188] Trimble v. Hunter (N. Car.), 10 S. E. Rep. 291; Hale v. Horne, 21 Gratt. 112; Pahlman v. Shumway, 24 Ill. 127; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

[189] Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

[190] Warner v. Veitch, 2 Mo. App. 459; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

[191] Huntt v. Townshend, 31 Md. 336.

[192] Martin v. Baldwin, 30 Minn. 537, 16 N. W. Rep. 449.

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such an interest in the estate as will be bound by the lien of a judgment against him.[193] In a case in New York, it appeared that certain lands were devised to trustees upon certain conditions, and with a further provision by which the *cestui que trust*, S., was empowered and authorized to convey and dispose, by his last will and testament, of all the said land, or any part thereof, and to limit and appoint the uses thereof in such manner as he might deem proper. In case S. should die without having made such will and appointment, then remainder in fee to his surviving issue. S. during his life conveyed several portions of the land to different grantees, and died without surviving issue. It was held that the power originally given to S. was a general power, of which he might have the exclusive benefit, and that, having exercised it, his interest in the property was to be deemed assets, upon which judgments recovered against him were equitable liens.[194]

[193] Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. Rep. 194. In this case Matthews, J., said: "Prior to the enactment of 1 & 2 Vic., c. 110, it was settled in England that at law a judgment against the party having a power of appointment, with the estate vested in him until and in default of appointment, was defeated by the subsequent execution of the power in favor of a mortgagee. Doe v. Jones, 10 B. & C. 459; Tunstall v. Trappes, 3 Sim. 286, 300. And it was held to be immaterial that the purchaser had notice of the judgment; Eaton v. Sanxter, 6 Sim. 517; or that a portion of the purchase-money was set aside as an indemnity against it. Skeeles v. Shearly, 8 Sim. 153, s. c. on appeal, 3 Myl. & Cr. 112. In that case, Sir John Leach, the vice-chancellor, decided that the effect of the transmission of the estate by appointment was, that the appointee takes it in the same manner as if it had been limited to him by the deed under which the appointor takes in default of appointment, and, consequently, free and disconnected from any interest which the appointor had in the tenements in default of appointment; that, as the appointee is in no sense the assignee of the appointor, he cannot be affected by judgments which affect only the estate and interest of the appointor, and, that being so, the circumstance of his having notice of such judgments is immaterial. The statute of 1 & 2 Vic., c. 110, altered the law in this respect, by making judgments an actual charge on the debtor's property, where he has, at the time the judgment is entered up, or at any time afterward, any disposing power over it, which he might, without the assent of any other person, exercise for his own benefit; so that it would continue to bind the property, notwithstanding any appointment. 2 Sugden on Powers, 7th Lond. Ed. 33; Burton on Real Property, 8th Lond. Ed. 283; Hotham v. Somerville, 9 Beav. 63."

[194] Tallmadge v. Sill, 21 Barb. 34.

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§ 437. Judgment against Cestui Que Trust.

The equitable estate or interest of a *cestui que trust* in a dry or passive trust merely, is liable to execution and sale on a judgment recovered against him.[195] But in this country generally, in the absence of a statute changing the rule of the common law, a judgment is not a lien on the interest or estate of the beneficiary in an *active* trust, nor is there any remedy at law to enforce the payment of a judgment out of such interest or estate.[196] The creditor may indeed obtain relief upon a bill in equity, but the ground of the jurisdiction is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution.[197] In an early Virginia case, it appeared that a deed of marriage settlement vested certain real estate

[195] Doe dem. McMullen v. Lank, 4 Houst. (Del.) 648.

[196] Flanagin v. Daws, 2 Houst. (Del.) 476; Beckett v. Dean, 57 Miss. 282.

[197] Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. Rep. 226. In delivering the opinion of the court in this case, Matthews, J., observed: "At common law executions upon judgments could not be levied upon estates merely equitable, because courts of law did not recognize any such titles and could not deal with them. They could not be levied upon the estate of the trustee when the judgment was against the *cestui que trust* for the same reason; and when the judgment was against the trustee, if his legal estate should be levied on, the execution-creditor could acquire no beneficial interest, and if the levy tended injuriously to affect the interest of the *cestui que trust*, the latter would be entitled to relief, by injunction or otherwise, in equity. Lewin on Trusts, 181, 186; 2 Spence, Eq. Jur. 39. But as courts of equity regarded the *cestui que trust* as the true and beneficial owner of the estate, to whose uses, according to the terms of the trust, the legal title was made subservient, so in its eyes the estate of the *cestui que trust* came to be invested with the same incidents and qualities which in a court of law belonged to a legal estate, so far as consistent with the preservation and administration of the trust. This was by virtue of a principle of analogy, adopted because courts of equity were unwilling to interfere with the strict course of the law, except so far as was necessary to execute the just intentions of parties, and to prevent the forms of law from being made the means and instruments of wrong, injustice, and oppression. Thus equitable estates were held to be assignable and could be conveyed or devised, were subject to the rules of descent applicable to legal estates, to the tenancy by the curtesy, though not to dower, by an anomalous exception afterwards corrected by statute 3 & 4 Will. 4, c. 105; and were ordinarily governed by the rules of law which measure the duration of the enjoyment or regulate the devolution or transmission of estates; so that, in general, whatever would be the rule of law, if it were a legal estate, was ap-

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in a trustee, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for the grantor's son. The annuitant being yet alive, a creditor of the son recovered judgment against him and brought a bill in equity to subject the son's equitable interest in the estate to the debt. It was held that such equitable interest could not be taken in execution at law, but that it was bound by the judgment in equity, and would be applied to the satisfaction of the debt; but as the annuitant was yet living and could not be compelled to take a gross sum in satisfaction of the annuity, and as the trustee was to hold the subject and pay the annuity out of the profits, equity ought not to direct an out and out sale of the debtor's interest subject to the annuity, but ought only to direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.[198] In Indiana, judgments are by statute liens on lands held in trust for the judgment debtor in their chronological

plied by the court of chancery by analogy to a trust estate. 1 Spence, Eq. Jur. 502. When the object of the bill is to obtain satisfaction of the judgment, by a sale of the equitable estate, it must be alleged that execution has been issued. This is not supposed to be necessary wholly on the ground of showing that the judgment-creditor has exhausted his remedy at law; for, if so, it would be necessary to show a return of the execution unsatisfied, which, however, is not essential. Lewin on Trusts, 513. But the execution must be sued out; for if the estate sought to be subjected is a legal estate, and subject to be taken in execution, the ground of the jurisdiction in equity is merely to aid the legal right by removing obstacles in the way of its enforcement at law; Jones v. Green, 1 Wall. 330; and if the estate is equitable merely, and therefore not subject to be levied on by an execution at law, the judgment-creditor is bound, nevertheless, to put himself in the same position as if the estate were legal, because the action of the court converts the estate, so as to make it subject to an execution, as if it were legal. The ground of the jurisdiction, therefore, is not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest subject to prior incumbrances, or according to circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers according to the order in which they may be entitled to participate. Sharpe v. Earl of Scarborough, 4 Ves. 538. It is to be noted, therefore, that the proceeding is one instituted by the judgment-creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill."

[198] Coutts v. Walker, 2 Leigh, 268.

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order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.[199]

§ 438. Interest of Vendor under Executory Contract.

Where the owner of land executes an agreement for the sale and conveyance of the same, he continues to be the legal owner so long as any part of the purchase-money conditioned in the contract remains unpaid, and his interest in the estate (which is the fee, subject to the equitable right of the vendee) is bound by the lien of a judgment duly docketed against him after the execution of the agreement, but before the execution of a deed; and on a sale under such judgment, the sheriff's vendee succeeds to the precise situation of the original vendor, and becomes entitled to require and receive payment of the balance of the purchase-money.[200] Since, however, the lien of a judgment attaches only to the real and effective interest of the debtor, and is subject to all prior rights and equities, it can never operate to pass any greater or more extensive estate than the debtor himself could have transferred by his voluntary alienation. Hence, in the case supposed, the equitable right of the vendee to require a conveyance upon fulfilling his part of the contract is not cut out or set aside by the attaching of the judgment-lien. No matter into whose hands the legal title may pass by sale under execution, the vendee's claim remains the same. And the execution purchaser's interest is limited to the amount of purchase-money remaining due, after payment of which he must convey the legal title.[201] In this

[199] Maxwell v. Vaught, 96 Ind. 186.

[200] Minneapolis & St. Louis R. Co. v. Wilson, 25 Minn. 382; Young v. Devries, 31 Gratt. 304; Stewart v. Coder, 11 Pa. St. 90; Ware v. Jackson, 19 Ga. 452; Gaar v. Lockridge, 9 Ind. 92; McMullen v. Wenner, 16 Serg. & R. 18, 16 Am. Dec. 543; Fasholt v. Reed, 16 Serg. & R. 266; Lefferson v. Dallas, 20 Ohio St. 68; Filley v. Duncan, 1 Nebr. 134, 93 Am. Dec. 337; Uhl v. May, 5 Nebr. 157; Courtnay v. Parker, 16 Nebr. 311, 20 N. W. Rep. 120 (s. c. 21 Nebr. 582, 33 N. W. Rep. 262); Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. Rep. 869; Wells v. Baldwin, 28 Minn. 408, 10 N. W. Rep. 427. *Per contra*, Woodward v. Dean, 46 Iowa, 499; Hampson v. Edelen, 2 Har. & J. 64, 3 Am. Dec. 530; Georgetown v. Smith, 4 Cranch C. C. 93; Moore v. Byers, 65 N. Car. 240; Money v. Dorsey, 7 Sm. & Mar. 15.

[201] Filley v. Duncan, 1 Nebr. 134, 93 Am. Dec. 337; Moyer v. Hinman, 17

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divided condition of the title, judgments against vendor and vendee respectively, by their different creditors, bind the right of each in the land, whether legal or equitable.[202] Now it is evident that three cases may arise, according to the situation of the parties in reference to the payment of purchase-money at the date of the docketing of the judgment. For either the *whole* of the price may have been paid at that time, or *none* of it, or a part only. And these three cases, though presenting somewhat different features, are all governed by the same general principle. In the first place, if the whole of the purchase-money has been paid by the vendee at the time judgment is entered against the vendor, the lien will indeed attach upon the title still remaining in the latter (until the execution of the deed), but it could pass no real or beneficial interest in the land. The purchaser at sheriff's sale under the judgment would acquire nothing but the naked legal title, which he would hold in trust for the vendee, and which he must convey upon demand or at the time stipulated in the agreement.[203] Similarly, if, by the agreement, the whole purchase-money is to be applied to the discharge of judgments prior to the agreement, and is so applied, a judgment subsequent to the agreement is not binding on the land.[204] In the next place, although none of the purchase-money has been paid, yet the contract of sale will give the vendee an equitable interest in the estate which is not to be displaced by a subsequent judgment-lien against the vendor.[205] The purchaser at an execution sale under the judgment would take

Barb. 187. "The equitable title of the vendee in a contract for the purchase of land, made in good faith and for a full and adequate consideration, is superior to the lien of a judgment-creditor whose judgment is recovered with notice, actual or constructive, of such contract. The judgment is a technical lien upon the land, subject to the contract, because the legal title rests in the vendor, but to be enforced only against the interest of the latter to the extent of the unpaid purchase-money. Upon the fulfillment of the contract by the parties thereto such lien ceases, and is as effectually cut out as if the deed had been executed at the date of the contract. The judgment-debtor, having no lien, cannot afterwards apply to a court of equity to redeem from a prior mortgage." Berryhill v. Potter (Minn.), 44 N. W. Rep. 251.

[202] Chahoon v. Hollenback, 16 Serg. & R. 425, 16 Am. Dec. 587.

[203] Manly v. Hunt, 1 Ohio, 257; Lounsbury v. Purdy, 11 Barb. 490; Thomas v. Kennedy, 24 Iowa, 397.

[204] Foster v. Foust, 2 Serg. & R. 11.

[205] Hampson v. Edelen, 2 Harr. & J. 64, 3 Am. Dec. 530; Lane v. Ludlow, 2 Paine, 591.

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the legal title, but he would take it charged with the contract of sale, and could demand from the vendee no more than the stipulated price. In the third place, if a part of the purchase-money has been paid and the purchaser's note given for the balance, the lien of a judgment will still attach to the vendor's interest.[206] Yet if the note given for such balance of price is passed away, before maturity, to a *bona fide* holder for value without notice, and is duly paid in his hands (no injunction preventing either of these acts being done), then the vendor has no longer any interest in the property, and the lien is gone.[207] An exception to the rule is sometimes based upon the fact of possession in the vendee. Thus it has been held that land in the possession of a vendee under a valid contract to purchase cannot be sold as the property of the vendor under judgments which did not obtain liens until after the contract was made.[208] At any rate, it appears to be well settled that the docketing of the judgment is not notice of the lien to the purchaser in possession, since, after he has taken his contract for the purchase, he is not bound to keep the run of the dockets; and payments subsequently made by him to the judgment-debtor, pursuant to the contract, without actual notice of the judgment, are valid as against its lien upon the land.[209] If the premises are sold at sheriff's sale, on a judgment against the vendor entered before the date of the contract for a sum exceeding the amount the vendee was to pay, the latter is entitled to the surplus, in preference to a creditor of the vendor whose judgment was obtained after the date of the articles.[210]

[206] Bell v. McDuffie, 71 Ga. 264.

[207] Riddle's Appeal (Pa.), 7 Atl. Rep. 282. In Moore v. Byers, 65 N. Car. 240, it was held that where a vendor of land receives part of the purchase-money and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterward a judgment is obtained against him, and he then dies, such judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes, when collected, will be assets for the payment of debts.

[208] Adickes v. Lowry, 15 S. Car. 128; Elwell v. Hitchcock (Kans.), 21 Pac. Rep. 109.

[209] Moyer v. Hinman, 13 N. Y. 180; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656.

[210] Siter's Appeal, 26 Pa. St. 178; Crouse's Appeal, 28 Pa. St. 139.

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§ 439. Interest of Vendee under Executory Contract.

In regard to the interest of the *vendee* in an executory contract for the sale of lands, it must be remembered that his estate is equitable merely, the legal title remaining in the vendor, and consequently, at common law, it would not be subject to levy and sale on execution. But, as we have already seen,[211] the common law rule as to judgment-liens on equitable interests has been modified in many of the states by statutes. Hence it is held, in several jurisdictions, that where a vendee of land has paid part of the purchase-money and holds a bond for title, but has not yet received a conveyance, he has acquired such an interest in the land as will be bound by the lien of a judgment against him.[212] Of course an execution-purchaser of such interest would succeed to the precise situation of the judgment-debtor, and would be entitled to demand a deed from the original vendor upon complying with the terms of the original contract, but would take no higher or greater interest. On the other hand, in some few of the states, either in pursuance of the common law doctrine or by express provision of the statutes, it is held that the interest of a debtor in a contract for the purchase of lands cannot be sold on an execution against him, but the remedy of the judgment-creditor is by a suit in equity, after his execution at law has been returned unsatisfied.[213] It is also held that a conveyance with covenant of title made by a grantor who has a bond for a deed, and before he obtains the legal title, vests the legal title in the grantee *eo instanti* when the grantor obtains it, and there is no space of time in which the lien of a judgment obtained against such grantor, after the conveyance was made, can attach against the land.[214]

[211] *Supra*, § 438.

[212] Adams v. Harris, 47 Miss. 144; Foster's Appeal, 3 Pa. St. 79; Auwerter v. Mathiot, 9 Serg. & R. 402; Catlin v. Robinson, 2 Watts, 373; Ralston v. Field, 32 Ga. 453; Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236; Jackson v. Parker, 9 Cow. 73; Russell's Appeal, 15 Pa. St. 319; Pugh v. Good, 3 Watts & S. 56, 37 Am. Dec. 534; Waters's Appeal, 35 Pa. St. 523, 78 Am. Dec. 354; Rand v. Garner, 75 Iowa, 311, 39 N. W. Rep. 515.

[213] Ellsworth v. Cuyler, 9 Paige, 418; Boughton v. Bank of Orleans, 2 Barb. Ch. 458; Cooper v. Cutshall, 1 Smith (Ind.), 128; Gentry v. Allison, 20 Ind. 481; Roddy v Elam, 12 Rich. Eq. 343.

[214] Lamprey v. Pike, 28 Fed. Rep. 30. Compare Van Camp v. Peerenboom, 14 Wis. 65.

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§ 440. Estates successively Conveyed.

A judgment-creditor cannot enforce his lien against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment.[215] And where lands subject to the lien of a judgment have been sold or incumbered by the owner at different times to different purchasers, there is no contribution among the successive purchasers, but the various tracts are liable to the satisfaction of the judgment in the inverse order of their alienation or incumbrance, the land last sold being first chargeable. In such case, the equities between the several purchasers are equal, yet the first purchaser, having the prior equity, is preferred.[216] A judgment-creditor, having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable for the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.[217]

Part IV. Date of the Lien.

§ 441. Common Law Rule.

It was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term and are considered as rendered on that day; and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment.[218] "This general

[215] James v. Hubbard, 1 Paige, 228.

[216] Savings Bank v. Cresswell, 100 U. S. 630; Relfe v. Bibb, 43 Ala. 519; McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 739 (overruling Beverley v. Brooke, 2 Leigh, 425); Nailer v. Stanley, 10 Serg. & R. 450, 13 Am. Dec. 691; Clowes v. Dickenson, 5 Johns. Ch. 235; Rodgers v. McCluer, 4 Gratt. 81, 47 Am. Dec. 715; Bank of Hamburg v. Howard, 1 Strobh. Eq. 173; James v. Hubbard, 1 Paige, 228; Merritt v. Richey, 97 Ind. 286; Day v. Patterson, 18 Ind. 114; Sidener v. White, 46 Ind. 588; Houston v. Houston, 67 Ind. 276; Jones v. Myrick, 8 Gratt. 179.

[217] Jones v. Myrick, 8 Gratt. 179.

[218] Johnson v. Smith, 2 Burr. 967; Bragner v. Langmead, 7 T. R. 20; Waghorne v. Langmead, 1 Bos. & Pul. 571;

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principle of the common law, like many others, is of such remote antiquity, and so long recognized without dispute, that the reasons and policy on which it was founded are, in a great degree, left to conjecture. One reason is assigned *arguendo* in the case of *Wynne* v. *Wynne* [1 Wils. 39] cited at the bar: that all the suitors whose cases are in such a situation as to entitle them to a judgment on the first day of the court ought to be in the same situation, and none to have any advantage over another, and as it is impossible for the court to give judgment in all such cases in one day, the only means of putting them upon a footing of equality is to refer all given in the same term to the first day, and give them the same effect as if they were really so. Another reason may have been to prevent debtors from withdrawing their property from the effect of judgments against them by alienations made after it was known that in the course of the term a judgment would pass. Whatever was the foundation of the rule, it operated uniformly as between different creditors, and the creditors of and purchasers from the debtor, without any exception, so far as I have been able to discover, until the case of purchasers was provided for by the statute 29 Car. 2, c. 3, § 14, which required that the true date of all judgments should be noted on the margin of the roll, and provided that they should bind, as to purchasers, only from such date. Before that statute, judgments confessed in vacation, under powers of attorney previously given for that purpose, related to the first day of the preceding term and overreached intermediate alienations. To remedy this mischief—of allowing judgments confessed under powers of attorney, when no previous suit was depending, to overreach intermediate alienations—was the chief object of the provision of the statute on that subject, as appears by its preamble. . . . . But cases might occur in which judgments might be rendered during a term which could not by possibility relate to the

Fann v. Atkinson, Willes, 427; Odeo v. Woodward, 2 Ld. Raym. 766; Robinson v. Tonge, 3 P. Wms. 397; Farley v. Lea, 4 Dev. & Bat. 169, 32 Am. Dec. 680; Foust v. Trice, 8 Jones, 494; Harding v. Spivey, 8 Ired. 63; Skipwith v. Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Colt v. Du Bois, 7 Nebr. 391; Mutual Assurance Soc. v. Stanard, 4 Munf. 539; Brockenbrough v. Brockenbrough, 31 Gratt. 580; Hooton v. Will. 1 Dall. 450; Sturgess v. Bank of Cleveland, 3 McLean, 140.

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first day; as where it appears that the plaintiff's case was not in a condition for a judgment on the first day, if the court had been prepared to hear it, and some further proceeding was indispensably necessary to mature his case for judgment. *Wynne* v. *Wynne*, 1 Wils. 42; *Swann* v. *Broome*, 3 Burr. 1596. . . . . These are the only adjudged cases I have met with in which exceptions have been allowed to the general rule, and they are founded upon obviously good reasons, that might very well apply to all cases in which it appeared that the plaintiff's case could not be matured for judgment on the first day of the term." [219]

§ 442. Exceptions to the Rule.

The principal exceptions to this rule of the common law have been already mentioned, in the decision quoted in the preceding section, and the authorities are generally in harmony with the conclusions there reached. Thus it is agreed that the rule does not apply to a judgment rendered during the term in a case which was in such a condition that the judgment could not have been given on the first day of the term.[220] And at a very early day, it was held that, as between creditors, judgments by confession do not relate to the preceding term, but take priority according to the times of their entry.[221] In North Carolina it has been adjudged that a rule of court, that all judgments docketed during the term "shall be deemed to be docketed on the first day of the term," makes them relate to the first day even when the judge fails to open court on that day.[222] But on the other hand, in Virginia, it is considered that the lien dates only from the first day on which the court is actually in session.[223] So, in Ohio, a mortgage handed in for record on the first day of the term of court, but before the court actually convened, was held to prevail against the lien of a judgment recovered at the same term. The court said: "At what time, then, does a term of court begin? It

[219] Coutts v. Walker, 2 Leigh, 268.

[220] Swann v. Broome, 3 Burr. 1596; Yates v. Robertson, 80 Va. 475; Withers v. Carter, 4 Gratt. 407, 50 Am. Dec. 78.

[221] Welsh v. Murray, 4 Dall. 320.

[222] Norwood v. Thorp, 64 N. Car. 682.

[223] Skipwith v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642.

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cannot be said that a term of court commences before the judges authorized to hold court have convened. There can be no term of court unless there *is* a court. If judgments attach only as liens from the beginning of the term of court, they attach from the time on the first day of the term at which the court was duly organized and opened."[224] As against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance.[225] And in at least one state the common law rule

[224] Follett v. Hall, 16 Ohio, 111, 47 Am. Dec. 365; Holliday v. Franklin Bank, 16 Ohio, 533.

[225] Morgan v. Sims, 26 Ga. 283; Pope v. Brandon, 2 Stew. 401, 20 Am. Dec. 49. In the case last cited it was said: "The deed of assignment to the plaintiff bears date on the day when the term of this court commenced at which the judgment in favor of the Messrs. Brandon was rendered; but the judgment was not rendered until the first day of February, more than twenty days thereafter. From these facts it is argued for the defendants that the judgment relates retrospectively to the first day of the term, and from that period created a lien on the real property of the bank in favor of the Messrs. Brandon, which it was not competent for the bank to divest by its transfer on that or any succeeding day. It is a well settled rule of the common law that a judgment operates to restrain the control of the debtor over his real estate so as to defeat its satisfaction; but this rule, it is believed, does not give to a judgment a retrospective operation against a *bona fide* assignee. The reason of the rule is founded upon the supposition that the proceedings of a court of record are of public notoriety, and that he who purchases real estate after judgment purchases with a knowledge of its existence. To give effect to purchases under such circumstances would be a fraud upon the judgment-creditor. The reason, it is apparent, will not extend to give judgments a lien from a period of time anterior to their rendition, for until then the purchaser cannot be advised of its existence, and consequently cannot be held to have purchased in fraud of a judgment-creditor. *Cessante ratione cessat ipsa lex.* The argument of the retrospective influence of judgments is predicated upon the idea that as the whole term is considered in law as but one day, everything done during the term must relate to its commencement. This conclusion does not necessarily follow. It is true that the term of a court is for some purposes but one day; as a plea put in on the last day of the term is a plea of the first day of the term, and upon this idea of continued sitting of the court, judges may alter and amend their judgments in the same term. This fiction, like all others which the law acknowledges, is designed to advance, but never to defeat, the purposes of justice. *In fictione juris semper consistit æquitas.* To give a retroactive effect to a judgment would be rather subversive than promotive of justice, as a purchaser could not be constructively advised of it, until it had an actual existence. So particular have the courts been in adjusting the question of priority between the fair purchaser and the judgment-creditor, where the deed of sale and the judgment bear date of the same day, that

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has never been accepted at all. "The uniform, uninterrupted practice in Pennsylvania for more than a century [that is, a century prior to 1805] has been to consider the binding effect of judgments upon lands to take place only from the actual entry of the judgments. Judgments thus entered have never been supposed liable to be affected by fictions or relations. This custom has been used and approved since the first settlement of the province and conduces to safety and security. As between conflicting judgment-creditors, the well known rule applied to the truth of the fact as to the entry of the judgments, *qui prior est tempore potior est jure*, must govern."[226]

§ 443. Present Statutory Rules.

That the rule of the common law, fixing the date of the lien of a judgment by relation to the first day of the term, has been abolished in a great majority of the states, and has been much modified in others, will appear from the following synopsis of the present statutes on the subject:

In Kansas, Nebraska, Ohio, and Wyoming, the lien attaches "from the first day of the term at which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced, shall bind such lands only from the day on which such judgment was rendered."[227]

In Virginia and West Virginia, the lien attaches "at or after the date of such judgment, or, if it was rendered in court, at or after the commencement of the term at which it was so rendered."[228]

In seven states and territories (Arkansas, Indiana, Iowa, Missouri,

inquiries are allowed to ascertain the precise period of the execution of the one and the rendition of the other; *Ex parte* Stagg, 1 N. & McC. 405. Having shown that a judgment can only operate prospectively against a fair purchaser, we are brought to the third and last point of inquiry," etc. But the contrary was undoubtedly the rule of the common law until the enactment of stat. 29 Car. 2, c. 3, § 14.

[226] Welch v. Murray, 4 Yeates, 197.

[227] Civil Code Kans. (Taylor), § 419; Code Civil Proc. Nebr. (1885), § 477; 1 Rev. St. Ohio (1890), § 5375; Rev. St. Wyom. (1887), § 2722. See as to Ohio, Jeffrey v. Moran, 101 U. S. 285; Urbana Bank v. Baldwin, 3 Ohio, 65.

[228] Code of Va. (1887), § 3567; Code of W. Va. (1887), p. 863, § 5. See Yates v. Robertson, 80 Va. 475.

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New Mexico, North Carolina, and Wisconsin), the lien commences on the day of the "rendition" of the judgment.[229]

In nine states and territories (Colorado, Dakota, California, Idaho, Montana, Minnesota, New York, Oregon, and Utah), the lien of a judgment commences from the date on which it is "docketed."[230]

In Alabama and Texas, it begins from the date on which the judgment is "registered."[231]

In Arizona, from the day when the judgment is "recorded and indexed."[232]

In New Jersey, from the date of its "actual entry."[233]

In Florida, the lien commences when the judgment is "entered and pronounced in any court."[234]

In Pennsylvania, the lien attaches from the date of entry or revival of the judgment.[235]

In Georgia and Illinois, judgments rendered at the same term are all of equal date.[236]

In Maine, New Hampshire, and Vermont a judgment is regarded as having been rendered on the last day of the term unless it appears by the record to have been rendered on a different day.[237]

In Maryland, according to the decisions, "a judgment has relation to the time when it is entered up. It will not affect any *bona fide*

[229] Dig. Stats. Ark. 1884, p. 801, § 3918; Code Civil Proc. Ind. § 608; 2 McClain's Code of Iowa (1888), p. 1177, § 4089; 1 Rev. St. Mo. (1879), p. 461, § 2731; Code Civil Proc. New Mex. § 2133; Code of N. Car. § 435; Rev. St. Wis. (1878), § 2902. See Friar v. Ray, 5 Mo. 511.

[230] Civil Code Colorado, § 211; Code Civil Proc. Dak. § 300; Code Civil Proc. Cal. § 671; Rev. St. Idaho (1887), § 4457; Comp. St. Mont. (1887), p. 139, § 307; Genl. St. Minn. (1878), c. 66, § 277; Code Civil Proc. N. Y. § 1250; Hill's An. Laws of Oreg. p. 342; 2 Comp. Laws of Utah (1888), p. 300, § 3414. See Stannis v. Nicholson, 2 Oreg. 332.

[231] Ala. Act Feb. 28, 1887, § 1; Paschal's Tex. Dig. art. 3963. See Quinn v. Wiswall, 7 Ala. 645; Ala. C. & N. Co. v. State, 54 Ala. 86; *Ex parte* Dillard, 68 Ala. 594; Powe v. McLeod, 76 Ala. 418.

[232] Rev. St. Arizona, § 2252.

[233] Revision of New Jersey, p. 520, § 2.

[234] McClellan's Dig. Laws Fla. p. 618, § 1.

[235] 1 Bright. Purd. Pa. Dig. p. 946, § 5.

[236] Code of Ga. (1882), § 3578; Rev. St. Ill. (1889), p. 840, § 1. See Morgan v. Sims, 26 Ga. 283; Ryhiner v. Frank, 105 Ill. 326.

[237] Chase v. Gilman, 15 Me. 64; Goodall v. Harris, 20 N. H. 363; Strafford Bank v. Cornell, 2 N. H. 324; Bradish v. State, 35 Vt. 452; Huntington v. Charlotte, 15 Vt. 46.

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conveyance made for value before that time, for it only attaches upon that which is then or afterwards becomes the property of the debtor." [238] And in Tennessee, also, the lien commences from the actual date of the judgment and has no relation back to the beginning of the term.[239]

§ 444. Cases in which Lien relates back.

There are certain cases in which, by an exception to the now commonly accepted rule, the lien may relate back to a time anterior to the actual date of the judgment. Thus, in a proceeding *in rem* by attachment on land, the lien of the judgment of condemnation is a specific lien on the property condemned, which relates back to the time when the attachment was laid, and ripens into a perfect legal title in the purchaser under the execution.[240] So, upon the declaration of the forfeiture of a writ of error bond, by a judgment affirming the judgment below, the lien which springs out of it relates back to the time of its execution and binds the land of the surety in the county where the original judgment was rendered from that time.[241] Again, "a judgment entered on the day on which the defendant's land is sold by the sheriff on an execution, is a lien on his land at the time of the sale, although entered at a later hour of the day than the sale, and is entitled to share in the proceeds." [242] But on the other hand, a judgment for damages for detention of dower takes date, as a lien, from the time of its entry, and not from the time when the right to dower accrued.[243] So the lien of a judgment on which execution is stayed dates not from the rendition of the judgment, but from the time when execution may be sued out.[244] And in general, except under the most exceptional circumstances, the lien cannot be considered as relating back to the time of the accrual of the cause of action.[245]

[238] Dyson v. Simmons, 48 Md. 207, 215; Anderson v. Tuck, 83 Md. 225.

[239] Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232.

[240] Cockey v. Milne, 16 Md. 200.

[241] Berry v. Shuler, 25 Tex. 140; Shane v. Francis, 80 Ind. 92.

[242] Small's Appeal, 24 Pa. St. 396.

[243] Evans v. Evans, 1 Phila. 113.

[244] United States Bank v. Winston's Exr., 2 Brock. 252.

[245] White v. Railroad Co., 52 Iowa, 97, 2 N. W. Rep. 1016; Lentz v. Lamplugh, 12 Pa. St. 344.

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PART V. PRIORITY AND PRECEDENCE OF JUDGMENT-LIENS.

§ 445. Lien is Subject to Prior Equities.

The attaching of a judgment-lien upon land does not disturb the condition of the title with respect to existing equities, interests, or other liens. The new lien must simply take its place in the ranks. It is therefore subject to all the equities which were held against the land in the hands of the judgment-debtor at the time the judgment was rendered. And if called upon in a proper case, the courts of chancery are always ready to protect the rights of those who hold such equities, as against the legal lien of the judgment, and to confine the efficacy of the latter to the actual interest, or residuary estate (so to speak) of the debtor, after due recognition is given to the outstanding equities in their proper order.[246] Thus a lien by contract upon real property, prior in time to the judgment, is paramount to the judgment-lien, though the judgment-creditor has no notice or knowledge of such prior lien by contract, and a purchaser at execution-sale under the judgment, with notice, actual or constructive, acquires no greater interest than the judgment-debtor had.[247] In a case where a person who had contracted for the purchase of land obtained a deed for the same from the vendor under an agreement that it should not be used until the balance of the purchase-money then due was paid, it was held that this was a valid delivery of the deed to pass the legal title to the land to the vendee subject to the vendor's equitable lien for the unpaid purchase-money, and that such balance of price must be paid in preference to a judgment

[246] Finch v. Earl of Winchelsea, 1 P. Wms. 277; Brown v. Pierce, 7 Wall. 205; Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252; Buchan v. Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305; Ellis v. Tousley, 1 Paige, 280; Coombs v. Jordan, 3 Bland, 284, 22 Am. Dec. 236; Floyd v. Harding, 28 Gratt. 401; Walke v. Moody, 65 N. Car. 599; Coster's Exr. v. Bank of Georgia, 24 Ala. 37, 64; Larthet v. Hogan, 1 La. Ann. 330; Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608; Frazer v. Thatcher, 49 Tex. 26; Wharton v. Wilson, 60 Ind. 591; Foltz v. Wert, 103 Ind. 404, 2 N. E. Rep. 950; Wells v. Benton, 108 Ind. 585, 8 N. E. Rep. 444; Goodell v. Blumer, 41 Wis. 436.

[247] Doswell v. Adler, 28 Ark. 83.

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against the vendee which was a lien upon his estate in the land.[248] A specific equitable lien upon land is entitled to a preference over a subsequent legal lien by judgment. But an equitable lien created to secure an antecedent indebtedness (for example, an agreement by a debtor to execute a mortgage to his creditor) is not entitled to a preference over a lien by judgment where both attach upon the land at the same time.[249] Nor are judgment-creditors protected against trusts of which they have no notice, or allowed in equity to hold against the *cestui que trust*.[250] An opinion counter to the general rule has sometimes been expressed in Pennsylvania. In a case in that state it appeared that A. advanced money to B. and took his judgment therefor, on the faith of an entry of satisfaction of a prior judgment; but upon the application of the equitable assignee of the prior judgment, the court struck off the entry of satisfaction. In the distribution of the proceeds of a sheriff's sale of B.'s real estate, it was held that A. was entitled to be paid in full, before the prior judgment could participate in the distribution; for A. was not required to look into equities to which he was not a party and of which he had no knowledge.[251]

[248] Arnold v. Patrick, 6 Paige, 310. In a later case in the same state it was said: "The question as to the extent to which a secret, equitable, and unrecorded lien of a vendor, for unpaid purchase-money of lands sold and conveyed by him, exists as against a judgment-creditor after the lien is recorded, or other parties than the vendee, must depend upon the facts and circumstances of the particular case. Such lien cannot exist generally against purchasers in good faith, under a conveyance of the legal estate, without notice, when the purchase-money has been paid. The general rule stated applies more particularly to cases where it is sought to enforce an equitable lien for the purchase-money, which has never been put on record as against subsequent mortgagees or purchasers in good faith and for a valuable consideration. In such a case it is too clear to admit of any question that the rights of the person claiming such equitable lien should yield, by reason of his neglect, to the claims of subsequent incumbrancers or purchasers, and it may well be asserted that a prior claimant for the purchase-money, under such circumstances, has, by his silence and neglect, yielded his right." Spring v. Short, 90 N. Y. 538. See Tallman v. Farley, 1 Barb. 280.

[249] Dwight v. Newell, 3 N. Y. 185.

[250] Shryock v. Waggoner, 28 Pa. St. 430.

[251] Harner's Appeal, 94 Pa. St. 489.

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§ 446. As against Prior Unrecorded Conveyance.

In many of the states there are statutes which make a deed or mortgage invalid unless it is duly recorded. And where the law stands thus, it is generally held that the lien of a judgment is to be preferred to a conveyance executed before the rendition of the judgment but not recorded until afterwards, *provided* that the judgment-creditor has no actual notice of the existence of such prior conveyance.[252] "As a general proposition," says the court in Texas, "a judgment lien only attaches to the actual interest of the debtor in the land; but on account of our registration laws, ordinarily, if the judgment-lien attaches before the creditor has notice of the existence of the unrecorded deed, then such deed is subordinated to the lien, and subsequent notice of the existence of the deed would work no change in the rights of the parties."[253] But this applies only to a creditor who is not informed as to the prior deed or mortgage. If, at the time of docketing the judgment, he has notice of the unrecorded conveyance, the judgment-lien will take second place.[254] And this notice may very well be constructive, or inferred from circumstances. Thus, where land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land some years after his sale and conveyance.[255] But although an unrecorded deed to lands takes precedence of a judgment as against the judgment-creditor, if, before the recovery of his judgment,

[252] Reed v. Austin, 9 Mo. 722, 45 Am. Dec. 336; Frothingham v. Stacker, 11 Mo. 77; McClure v. Thistle, 2 Gratt. 182; Young v. Devries, 31 Gratt. 304; Lash v. Hardick, 5 Dill. 505; Mayham v. Coombs, 14 Ohio, 428; Cavanaugh v. Peterson, 47 Tex. 198; Firebaugh v. Ward, 51 Tex. 409; Guiteau v. Wisely, 47 Ill. 433; Hawkins v. Files, 51 Ark. 417, 11 S. W. Rep. 681; Cleveland v. Shannon (Ark.), 12 S. W. Rep. 497; Anderson v. Nagle, 12 W. Va. 98; Andrews v. Matthews, 59 Ga. 466; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. Rep. 468; Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co., 58 Miss. 846, 38 Am. Rep. 348.

[253] Calvert v. Roche, 59 Tex. 463.

[254] Lamberton v. Bank, 24 Minn. 281.

[255] Powell v. Allred, 11 Ala. 318.

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he has actual notice of the conveyance by the debtor, yet the *assignee* of such judgment, who buys without notice that his assignor had notice before the rendition of the judgment of the unrecorded conveyance, is not affected by the notice to his assignor.[256] And so, while a mortgage imperfectly recorded is ineffectual as a lien against subsequent judgment-creditors, yet if there be a second mortgage, between the first and the judgments in point of time, to which the proceeds of the mortgaged premises when sold would be paid, and this mortgagee had actual notice of the first mortgage when he took his own, the first mortgage is good as to him, and therefore is entitled to have the money appropriated to it.[257]

But in a number of states the statutes are such that a deed or mortgage is valid without being recorded. And in these jurisdictions the courts adhere to the rule that a judgment is a lien only upon the actual interest of the debtor, and consequently that the judgment acquires no lien at all if the land has been previously conveyed away, although the deed is not recorded, or that its lien is subordinated to that of a prior unrecorded mortgage.[258] But if there be a sale made under such subsequent judgment to a third person, for value paid and without notice, the rights of such purchaser will take priority over those of the grantee in an unrecorded deed or mortgage.[259]

§ 447. Precedence of Purchase-Money Mortgage.

A mortgage or trust-deed given to secure the balance of purchase-money on a tract of land, executed simultaneously with the conveyance of the legal title and duly recorded, has priority of lien over judgments obtained against the purchaser anterior to the conveyance.[260] In such case, the purchaser acquires only a temporary

[256] Duke v. Clark, 58 Miss. 465.

[257] Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania, 7 Watts. & S. 335, 42 Am. Dec. 240.

[258] Sparks v. Bank, 7 Blackf. 469; Schroeder v. Gurney, 73 N. Y. 430; Mellon's Appeal, 32 Pa. St. 121; Larrimer's Appeal, 22 Pa. St. 41; Norton v. Williams, 9 Iowa, 528; Bell v. Evans, 10 Iowa, 353; Wilcoxson v. Miller, 49 Cal. 193; Hampton v. Levy, 1 McCord Ch. 107; Farley v. McAlister, 39 Tex. 602.

[259] Evans v. McGlasson, 18 Iowa, 150; Paine's Lessee v. Mooreland, 15 Ohio, 435.

[260] Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Parsons v. Hoyt, 24 Iowa, 154; Scott v. Warren, 21 Ga. 408; Straus

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seisin, and not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the mortgage, as the deed and the mortgage are but parts of the same transaction.[261] And where the purchaser, at the same time he receives the conveyance, executes a mortgage to a *third person*, who advances the purchase-money for him, such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself.[262] Thus if A. executes a deed of land to B., and B. mortgages it to C., and also conveys it back to A., the two deeds and mortgage being executed as parts of one transaction solely to enable B. to procure a loan from C., no lien of a judgment held by D. against B. at the time thereof can attach to B.'s interest, and no execution afterward issued can be levied thereon.[263] But where a judgment debtor acquires title to land after the judgment has been obtained, and immediately executes a mortgage thereof to a third person to secure him against some contingent liability, and *not* to secure the purchase-money of the land, the judgment will be the elder lien.[264]

§ 448. Priority of Government Claims.

It is provided, by section 346 of the Revised Statutes of the United States, that "whenever any person indebted to the United States is insolvent . . . . the debts due the United States shall be first satisfied," and this priority is declared to extend to cases in which an act of bankruptcy is committed. Section 5101 provides that in the order for a dividend in a bankruptcy proceeding, after paying certain costs and expenses, "debts due the United States shall have priority." It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens

v. Bodecker (Va.), 10 S. E. Rep. 570; Cowardin v. Anderson, 78 Va. 88; Summers v. Dame, 81 Gratt. 791; Clark v. Munroe, 14 Mass. 351; Clark v. Butler, 32 N. J. Eq. 664, Curtis v. Root, 20 Ill. 53; compare Roane v. Baker (Ill.), 2 N. E. Rep. 501.

[261] Cowardin v. Anderson, 78 Va. 88.

[262] Haywood v. Nooney, 8 Barb. 648; Cowardin v. Anderson, 78 Va. 88; Clark v. Munroe, 14 Mass. 351; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. Rep. 519.

[263] Ransom v. Sargent, 22 Kans. 516.

[264] Root v. Curtis, 88 Ill. 192.

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upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency."[265] In Pennsylvania, under the act of February 28, 1866, the lien of taxes due to a city upon real estate is prior to that of a judgment obtained before the taxes were levied.[266] In another state it is held that a judgment obtained against one in his lifetime has the preference over a debt or specialty passed to the state after such judgment, in the settlement of the estate of the decedent.[267]

§ 449. Priority by Date of Entry.

By reference to a preceding section it will be seen that in at least seventeen states and territories, by the statutes, the lien of a judgment commences from the day when it is docketed or registered or the date of its actual entry. And it is a general rule that, as between all judgment liens entered at different times, that which was first docketed has the preference.[268] And on similar principles, where several judgment creditors resort to equity to subject an equitable interest of their debtor in land to the satisfaction of their judgments, they will be entitled to satisfaction according to the priority of their judgments in point of time.[269] As between a judgment at law and a decree in equity, where the law requires both to be enrolled, the same rule obtains; and where a decree is obtained prior to a judgment against the same defendant, but the judgment is enrolled before the decree, the judgment takes the precedence.[270] As between a judgment in another county and a mortgage, priority of lien is determined by priority of registration in the county where the land is situated.[271] A judgment for a firm debt has no priority over a judgment pre-

[265] United States v. Lewis, 13 N. B. R. 38; Cottrell v. Pierson, 12 Fed. Rep. 805; Hoppock v. Shober, 69 N. Car. 153; Conard v. Ins. Co., 1 Pet. 438; Brent v. Bank, 10 Pet. 596. In so far as the early case of Thelusson v. Smith, 2 Wheat. 396, may have asserted a different doctrine, it must be regarded as overruled by the later decisions of the supreme court of the United States above cited.

[266] Eaton's Appeal, 83 Pa. St. 152.

[267] Hollingsworth v. Patten, 3 Har. & McH. 125.

[268] Johnson v. Mitchell, 17 Ga. 593; Puryear v. Taylor, 12 Gratt. 401.

[269] Haleys v. Williams, 1 Leigh, 140, 19 Am. Dec. 743.

[270] McKee v. Gayle, 42 Miss. 676.

[271] Firebaugh v. Ward, 51 Tex. 409.

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viously obtained against the several members of the firm on their individual liabilities, and the purchaser at a sale under execution to enforce the latter judgment takes a good title as against the purchaser at a sale under the former.[272] So the lien of a judgment rendered pending a petition for divorce, and before the rendition of a decree for alimony, is superior to that of the decree, where the petition does not allege a claim to any specific tract of land, or pray for alimony by way of annuity upon the husband's real estate generally.[273] The same rule which applies as between two judgments also governs the case of a conflict between a judgment and a conveyance, where the laws require the latter to be registered. Thus, according to a late case, under a statute providing that judgments shall be entered by the clerk on the judgment docket of the court, and, if docketed within ten days from the end of the term, shall be a lien on the debtor's real estate from the beginning of the term, a deed executed in November is superior to a judgment rendered in the preceding August and docketed in the following July.[274] And where a judgment is a prior lien to a mortgage, a purchaser under the judgment will stand in the place of the judgment-creditor and take precedence of the mortgage, although his title under the sheriff's sale be defective.[275] It remains to notice certain exceptional cases wherein a departure from the foregoing rule has been sanctioned. These are mostly governed by considerations of justice and equity. Thus, where money is made under several executions issued on different judgments, that issuing upon the elder judgment is not entitled to priority of satisfaction if it has been delayed or suspended in fraud of the rights of other creditors.[276] So where, upon promissory notes given for the purchase-money of land and secured by an express lien or equitable mortgage in the deed of conveyance, several judgments are rendered,

[272] Davis v. Delaware & Hudson Canal Co., 109 N. Y. 47, 15 N. E. Rep. 873. The law is the same also in the converse case; subsequent judgments against the individual members of the firm are postponed to a prior judgment against the firm. Stevens v. Bank of Central New York, 31 Barb. 290.

[273] Hamlin v. Bevans, 7 Ohio, (pt. 1,) 161, 28 Am. Dec. 625.

[274] Holman v. Miller (N. Car.), 9 S. E. Rep. 429.

[275] Wait's Exr. v. Savage (N. J.), 15 Atl. Rep. 225.

[276] Bank v. Henderson, 5 How. (Miss.) 292.

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in favor of two different holders of such notes, against the maker, each of the judgments is entitled to share in the proceeds of the land, even though one may have been recovered and enrolled before the other.[277] In a case in West Virginia, where two judgments had been recovered, one in 1868 and the other in 1869, and the one last recovered was docketed in 1870, while the one first obtained was docketed in 1871, but both were docketed before a contract in writing or deed to a purchaser for valuable consideration without notice was recorded, it was held that the judgment *first* recovered, though last docketed, had priority.[278]

§ 450. Two Judgments entered the Same Day.

The rule obtaining in a majority of the states is that, as between judgments entered of record on the same day, there is no priority, for the law cannot in this case regard fractional parts of a day; hence all such judgments create equal liens, and the issuing of an execution on any one of them does not affect the others, but, the land of the defendant being sold, a *pro rata* distribution of the proceeds must be made in satisfaction of the judgments.[279] In North Carolina, however (and in a few sporadic cases elsewhere), it is held that where several judgments are docketed on the same day, the court will inquire into the fractional part of a day, in order to ascertain which was the first entered and give it the preference.[280] In New York, and some other states, the doctrine is that where two judgments in favor of different plaintiffs against the same defendant are filed and docketed on the same day, neither has the preference as a *lien*; but if one of the creditors first takes out an execution and delivers it to the sheriff before the other creditor takes out his execu-

[277] Aaron v. Warner, 62 Miss. 370.

[278] Anderson v. Nagle, 12 W. Va. 98.

[279] Claason's Appeal, 22 Pa. St. 359; Metzler v. Kilgore, 8 Pen. & W. 245, 23 Am. Dec. 76; Ladley v. Creighton, 70 Pa. St. 490; Mechanics' Bank v. Gorman, 8 Watts & S. 304; Clawson v. Eichbaum, 2 Grant (Pa.), 130; Emerick v. Garwood, 1 Browne (Pa.), 20; Rockhill v. Hanna, 4 McLean, 554; McLean v. Rockey, 3 McLean, 235; Bruce v. Vogel, 38 Mo. 100; Janney v. Stephen, 2 Pat. & H. 11; Burney v. Boyett, 1 How. (Miss.) 39.

[280] Bates v. Hinsdale, 65 N. Car. 423; Lemon v. Staats, 1 Cow. 592; Biggam v. Merritt, Walker (Miss.) 430, 12 Am. Dec. 576.

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tion, and the lands of the debtor are taken and sold, a priority will be gained by the vigilant creditor, and his execution must be first satisfied.[281] In Mississippi, the question of the priority of the rendition of two judgments in the same courts is to be determined by the minutes of the court, and it is not admissible to show by evidence *aliunde* that the one last entered was in fact first rendered.[282]

§ 451. Judgment and Conveyance entered the Same Day.

The doctrine has sometimes been expressed that a judgment entered on a given day, no matter at what hour, is a lien during the whole of that day, and therefore has preference over a mortgage or other conveyance recorded at any hour of the same day.[283] But this view is generally rejected, as too refined and artificial, although, in some states, a distinction is still made between a deed and a mortgage, as to their respective rank as against a judgment docketed on the same day. It may now be regarded as well settled that, in a contest between a *vendee* of the land and a judgment-creditor whose judgment was docketed on the same day with the conveyance, the fractions of the day must be taken into consideration, the precise time of each ascertained, and the rule applied "first in order first in right." [284] In the language of Chief Justice Gibson of Pennsylvania, "the argument that a judgment, whose date in contemplation of law covers the whole day, is necessarily anterior to a conveyance at an intermediate point of the same day, is too subtle to be solid. The conclusion attempted would not be borne out by the most fanciful effect of the legal fiction; for it might be possible to deliver a conveyance so exactly at the stroke of twelve as to leave no room for an intervening lapse of any appreciable portion of time. But justice is not to be

[281] Waterman v. Haskin, 11 Johns. 228; Adams v. Dyer, 8 Johns. 347, 5 Am. Dec. 344; Lippencott v. Wilson, 40 Iowa, 425; Tilford v. Burnham, 7 Dana, 109; Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76.

[282] Johnson v. Edde, 58 Miss. 664.

[283] Hollingsworth v. Thompson, 5 Harringt. 432. See Boyer's Estate, 51 Pa. St. 432, 91 Am. Dec. 129.

[284] Clawson v. Eichbaum, 2 Grant (Pa.), 130; Mechanics' Bank v. Gorman, 8 Watts & S. 304; Small's Appeal, 24 Pa. St. 398; Ladley v. Creighton, 70 Pa. St. 490; Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232.

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dispensed on principles so artificial where it can be avoided. When judgments bear the same date, they must necessarily come in together; but between a judgment and a conveyance, actual priority must be shown like any other fact."[285] The last statement in the foregoing quotation,—that the precise time of entry of the judgment may be shown by less than record proof,—though reasonable and well calculated to promote justice, is not everywhere accepted. In at least one state, the courts refuse to hear evidence outside the record, on the question of the actual priority of the judgment and the deed, and award the precedence to the lien of the former unless it actually appears of record to have been subsequent to the conveyance.[286] In a contest of this sort, it is held, the lien of the judgment takes effect from its rendition by the judge, and not from the time of signing the minutes of the court.[287]

In a contest for priority between a *mortgagee* of the land and a judgment-creditor whose judgment was docketed on the same day with the mortgage, it seems reasonable to accord to the former the same rights and privileges that are granted to a purchaser. And in Tennessee this is the accepted doctrine. The hour of entry may be inquired into, and actual priority will give legal precedence.[288] But in Pennsylvania the rule is otherwise. Evidence is not admissible of the hour at which the judgment was rendered; if the judgment-lien and the mortgage-lien are created on the same day, they are entitled to equality of distribution.[289] "The fractional division of a day cannot be noticed in determining the time when the lien of a judgment attached. If it could be, there is nothing on the record of this judgment to show whether it was entered at an earlier or a later moment than the mortgage. The rule in such cases is to treat the two liens as commencing simultaneously, and if the land of the

[285] Mechanics' Bank v. Gorman, 5 Watts & S. 304; Hoppock's Ex'rs v. Ramsey, 28 N. J. Eq. 413.

[286] Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232; Berry v. Clements, 9 Humph. 312.

[287] Clark v. Duke, 59 Miss. 575.

[288] Murfree v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232; Berry v. Clements, 9 Humph. 312.

[289] Clawson v. Eichbaum, 2 Grant (Pa.), 130; Claason's Appeal, 22 Pa. St. 359; Hendrickson's Appeal, 24 Pa. St. 363.

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debtor is not sufficient to pay both, the loss must be divided in equal proportions." [290]

§ 452. Judgment given to secure Future Advances.

Though a judgment confessed to secure future advances to be made to the borrower himself will, in equity, be postponed to a subsequent *bona fide* judgment for a subsisting debt, except for such advances as had been made before the second judgment was obtained, yet a judgment confessed to secure existing debts which the plaintiff agrees to pay or assume, to the amount of the judgment, does not come within that category, and is valid from the date, against subsequent liens, although at the date of the confession no debt is specified except one due to the plaintiff himself.[291] A judgment entered on a bond conditioned that the obligor will pay to the obligee the sum of all notes, checks, drafts, and obligations which B. has incurred or may hereafter incur to a certain bank, is a lien for future advances as against intervening incumbrances only from the date of such future advances.[292]

§ 453. Prior Undocketed Judgment.

As we have already shown, a judgment does not attach as a lien upon real estate until it is duly entered of record. Hence a prior undocketed judgment will be postponed to a subsequent conveyance or incumbrance effected in good faith and put on record. And if, before the purchase of real estate, the purchaser, having received information that a transcript of a judgment against the owner has been filed, goes to the proper officers, and in good faith causes an examination of the records to be made, and they disclose the fact that there is no judgment-lien, he is justified in acting upon the belief that there is none.[293] But if a judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence,

[290] Hendrickson's Appeal, 24 Pa. St. 363.

[291] Walker v. Arthur, 9 Rich. Eq. 397.

[292] Kerr's Appeal, 92 Pa. St. 236.

[293] Bell v. Davis, 75 Ind. 314.

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against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault.[294]

§ 454. As against Subsequent Dower Right.

Where the lien of a judgment has attached to land, and the owner afterward marries, the lien is not thereby divested or postponed to the wife's inchoate right of dower created by the marriage.[295] But if the lien attaches subsequent to the marriage, it will be subordinate to the wife's right of dower.[296]

§ 455. Priority by Superior Diligence.

In cases where several judgments have an exact equality of lien, it will sometimes happen that one of the creditors, by his superior activity and diligence, will put himself in a position to claim a preference over the other, and such claim is always recognized and enforced. This is the case, in some states, where two judgments are entered on the same day, but one creditor sues out execution while the other remains inactive.[297] And this claim, founded on superior vigilance, will sometimes even result in elevating a junior judgment above the rights of the elder lien. Thus, where plaintiff and defendant were judgment-creditors of the same party, and sought to enforce their judgments against a piece of land which had been fraudulently conveyed away by the judgment-debtor, it was held that, the plaintiff having taken the first steps to uncover the property fraudulently conveyed, his rights were superior to those of the defendant, although the latter held the senior judgment.[298] On similar principles, an attachment is a valid charge upon land from the moment it is levied,

[294] Bunn v. Lindsay, 95 Mo. 250, 7 S. W. Rep. 473.

[295] Brown v. Williams, 31 Me. 403; Sanford v. McLean, 3 Paige, 117, 23 Am. Dec. 773; Lane v. Gover, 3 Har. & McH. 394; Queen Anne's Co. v. Pratt, 10 Md. 5; Davidson v. Frew, 3 Dev. 3, 22 Am. Dec. 708; Hodges v. McCabe, 3 Hawks, 78; Bisland v. Hewitt, 11 Sm. & Mar. 164; Robbins v. Robbins, 8 Blackf. 174; Eiceman v. Finch, 79 Ind. 511.

[296] Gould v. Luckett, 47 Miss. 96, 116.

[297] *Supra*, § 450.

[298] Boyle v. Maroney, 78 Iowa, 70, 35 N. W. Rep. 145; Bridgman v. McKissick, 15 Iowa, 260; Howland v. Knox, 59 Iowa, 46, 12 N. W. Rep. 777; Lyon v. Robbins, 46 Ill. 276; Armington v.

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so that a sale on execution relates back to that event for the purpose of defeating all intervening incumbrances, as a judgment recovered between the levy of the attachment and the judgment in the attachment suit.[299] So again, if a judgment-creditor delivers his execution to the sheriff merely for the purpose of protection against other creditors and with no *bona fide* intention of making the money, and directs the sheriff not to levy, or not to sell, until he receives further orders, such acts will postpone the lien of his judgment to that of junior creditors who proceed in good faith to a levy and sale.[300]

§ 456. Priority by Prior Levy.

There are some cases in which a junior judgment may acquire the precedence by virtue of superior diligence in making a levy. Thus, under the laws of some of the states, where a judgment-creditor allows more than one year to elapse after his judgment has become a lien on real estate, before he takes out and levies an execution, his lien becomes subsequent and inferior to the liens of other judgment-creditors.[301] In this connection we must call attention to an extremely interesting and peculiar question—called the "triangular question"—which arises where there is a judgment not levied within a year, a junior judgment levied within the year, and thus acquiring a preference as against the senior judgment, and an intervening mortgage executed and recorded prior to the rendition of the second judgment. Under these circumstances it is held that the senior judgment must be first paid, and then the mortgage, and the junior judgment must be postponed to both. The difficulties of the ques-

Rau, 100 Pa. St. 165; Haak's Appeal, 100 Pa. St. 59. But a very vigorous dissent from this opinion has been expressed in a recent case in Minnesota. Jackson v. Holbrook; 36 Minn. 494, 32 N. W. Rep. 852.

[299] Lackey v. Seibert, 23 Mo. 85; Langdon v. Raiford, 20 Ala. 532. Compare Lichton v. McDougald, 5 Ga. 176.

[300] Field v. Liverman, 17 Mo. 218; Patton v. Hayter, 15 Ala. 18.

[301] Lamme v. Schilling, 25 Kans. 93. Under the laws of Ohio regulating the lien of judgments, a judgment levied within a year from its rendition, upon a part of the lands of the judgment debtor, is not a lien upon the lands not levied upon, as against a subsequent judgment rendered more than a year after the first and levied upon such lands within a year from its rendition. Pence v. Cochran, 6 Fed. Rep. 269.

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tion, and its solution, are thus presented by the supreme court of Ohio: "If it be attempted to settle the question on the principle of superiority, it runs in a circle and produces no result. If the junior judgment takes it from the senior judgment, then the mortgage would take it from the junior judgment, and the senior judgment from the mortgage, and thus perpetually without a conclusion. If it be attempted to reason it out by interposing intervening liens, it results in a triangle of equal equities, without any circumstance to determine in favor of either. If it be said that the intervening mortgage should protect the senior judgment, because it was superior to the junior judgment and inferior to the senior, so it might, with equal reason, be said that the senior judgment should check the mortgage in favor of the junior judgment, or that the junior judgment should protect the mortgage from the senior judgment. The court therefore felt the necessity of establishing a rule, and that which was considered least objectionable was adopted, to wit, that each should have precedence according to age. This, too, has some show of reason in the fact that the lien of the senior judgment extended to the whole estate mortgaged, and the mortgagee took subject to such lien, and would hold only as to the balance of the estate after satisfying the senior judgment, and the lien of the junior judgment attached only to the balance left, if any, after satisfying the mortgage out of the balance left by the senior judgment. Or, in other words, the junior judgment attached only to the equity of redemption in that portion of the interest covered by the mortgage, after satisfying the lien of the senior judgment." [302] Where there are two executions against the same defendant, the lien of the executions, as between the execution-creditors, attaches from the levy, and not from the time at which they went into the hands of the officer.[303]

[302] Holliday v. Franklin Bank, 16 Ohio, 535; Brazee v. Bank, 14 Ohio, 318; Fitch v. Mendenhall, 17 Ohio, 578.

[303] Field v. Milburn, 9 Mo. 492.

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§ 457. Postponement by Stay of Execution.

It is held that an extension of time for payment or stay of execution on real estate to a time short of the statutory period of limitation of a judgment-lien may be made without prejudice to the creditor, and does not postpone the judgment to other and junior judgments.[304] But on the other hand, a mortgage for a valuable consideration made pending a stay of execution by order of the plaintiff, will take precedence of the judgment.[305]

§ 458. Postponement by Failure to Revive.

In those jurisdictions where a judgment, in order that its lien may continue, must be periodically revived, the lien of a judgment not revived within the statutory time will be superseded by the lien of younger judgments in full original life or which have been duly revived.[306] And the same consequence will result although the record shows that the elder judgment was for purchase-money.[307]

§ 459. Sale under Junior Judgment.

It is the settled rule in at least two states, that the lien of the senior judgment is divested by a sale under the junior judgment and execution, and the remedy of the senior creditor is to claim enough of the fund to satisfy his judgment.[308] And so, under a statute which provides that judgments shall take precedence in the order in which executions shall be taken out and levied, in a case where the first lien was a judgment on which no levy had been made, and the second lien was a mortgage, and the third a judgment under which a levy and sale took place, it was held that the lien of the elder judgment was destroyed, and in an action to foreclose the mort-

[304] Marshall v. Moore, 86 Ill. 321.
[305] Sanford v. Ogden, 34 Ala. 118.
[306] Bank v. Crevor, 2 Rawle, 224.
[307] Ruth's Appeal, 54 Pa. St. 173.
[308] Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435; Dowdell v. Neal, 10 Ga. 148; Sanders v. McAfee, 42 Ga. 255; Tarver v. Ellison, 57 Ga. 54; Jones v. Wright, 60 Ga. 364; Blohme v. Lynch, 26 S. Car. 300, 2 S. E. Rep. 136.

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gage, it was considered to be free from the lien of the first judgment, and, being prior to the second judgment, it was free from that lien also.[208] But the general rule undoubtedly is, that a sale under the junior judgment does not divest the lien of the elder judgment; the property passes subject to such elder lien; the junior creditor is entitled to all the money made at his sale, but afterwards, at any time within the statutory period, the senior creditor may take the appropriate steps to enforce his lien.[210] And it is even held that where both judgments, the elder and the junior, are the property of the same person, he may proceed to levy and sell under the younger lien without any prejudice to his right afterwards to enforce the other, or without disturbing or destroying its lien, provided his conduct is free from any imputation of deceit or unfairness towards the purchaser.[211]

§ 460. Order of Priority on After-Acquired Lands.

If several judgments are rendered and entered against the same defendant at different times, and he afterwards acquires the legal title to real estate, the liens of the several judgments attach together upon the property at the same instant; all stand upon the same footing, and the oldest judgment has no priority.[212] This general rule is accepted in all the states, so far as we have been able to discover, except Oregon. In that state, judgment-liens attach to after-acquired property in the order of the dates of the docketing of the judgments.[213] In another state, where *personal* property of the defendant in execution is brought into the county after executions of different judgment-creditors have come to the sheriff's hands against

[208] Lambertville Nat. Bank v. Boss (N. J.), 13 Atl. Rep. 18. Compare Holliday v. Franklin Bank, 16 Ohio, 535; *supra*, § 456.

[210] Commercial Bank v. Yazoo Co., 6 How. (Miss.) 530, 38 Am. Dec. 447; Rankin v. Scott, 12 Wheat. 177; Littlefield v. Nichols, 42 Cal. 372; Shotwell v. Murray, 1 Johns. Ch. 512; Bruce v. Vogel, 38 Mo. 100; Lathrop v. Brown, 23 Iowa, 40; Hiestand v. Williamson (Pa.), 18 Atl. Rep. 427.

[211] Shotwell v. Murray, 1 Johns. Ch. 512.

[212] Relfe v. McComb, 2 Head, 558, 75 Am. Dec. 748; Michaels v. Boyd, 1 Smith (Ind.), 100; Moody v. Harper, 25 Miss. 484; Cayce v. Stovall, 50 Miss. 396; Davis v. Benton, 2 Sneed, 665.

[213] Creighton v. Leeds, 9 Oreg. 215.

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such defendant, the eldest judgment-creditor who has preserved his lien will have the prior right.[214]

Part VI. Duration of the Lien.

§ 461. General Rules.

In the statutes of every state there is fixed a limitation of the period during which a judgment shall continue to be a lien upon real estate. Sometimes this period is set absolutely at ten years; sometimes the lien runs for five years, with the privilege of renewal for an equal period, and successive revivals after that; and in some jurisdictions the statutory time may vary from the types here cited. Occasionally we meet with a statute which makes the life of the lien depend upon the issuing of execution, or which makes a distinction, as to its continuance, founded on the character of the person against whom it is set up, whether he be the debtor, a purchaser, or a subsequent incumbrancer. Thus, in Nebraska, the lien of a judgment continues for five years after the rendition of the judgment, and as against all persons except *bona fide* judgment-creditors, for five years after the issuance of execution.[215] A judgment, however, does not lose its lien upon real estate by the suffering of an execution, issued thereon, to lie dormant in the sheriff's hands. The doctrine on the subject of dormant executions does not apply to real estate, the lien upon which depends upon the docketing of the judgment, and not upon the execution or levy. And such lien does not become dormant until the expiration of the full statutory limitation.[216] In cases where the judgment must be periodically revived, it is held that the ques-

[214] Wood v. Gary, 5 Ala. 43.

[215] Reynolds v. Cobb, 15 Nebr. 378, 19 N. W. Rep. 502. See Pasour v. Rhyne, 82 N. Car. 149. Under Code Va. 1873, c. 182, §§ 12, 13, providing that no execution shall issue, nor any *sci. fa.* or action brought, on certain judgments after the lapse of ten years from the return-day of an execution on which there is no return by an officer, or after twenty years from the return-day of an execution on which there is such return, a judgment on which no execution has ever been issued becomes dead, both in law and equity, after ten years, and ceases to be a lien upon the real estate of the defendant. McCarty v. Ball, 82 Va. 872, 1 S. E. Rep. 189.

[216] Muir v. Leitch, 7 Barb. 341.

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tion, whether the lien has been kept alive and remains in force, must be determined by an inspection of the record; if the record does not show its existence, the lien is lost.[217] The lien of a judgment in favor of the state is never lost by lapse of time.[218]

§ 462. Dormant Judgment Acts.

In the state of Georgia there are statutes—called the "dormant judgment acts"—which prescribe that after the lapse of a certain time, the lien of a judgment shall be lost, unless, within that time, steps have been taken to enforce it. These laws, it is held, are not merely statutes of limitation; and, as against junior judgment-creditors, dormancy is not prevented by an entry on an execution in these words: "Dec. 1, 1881. Paid on the within execution five dollars, balance due and unpaid," signed by the defendant.[219] A decree in equity which merely prescribes the performance of a duty, is not within either the letter or the spirit of these acts.[220] Of course such a decree creates no lien; but the point of the decision is that the statutes in question form no obstacle to an order that the decree be carried out, made after the statutory time for the limitation of judgments.

§ 463. Legislative Abridgment of the Time.

It is a familiar principle of constitutional law that a statute, retroactive in its operation, which merely changes the remedy provided for the enforcement of an existing right, cannot be said to impair the obligation of contracts, if a substantive and effective remedy is still left to the creditor. And it is an equally well known rule that a statute of limitations, applying retroactively to existing rights or remedies and abridging the period of time allowed for their enforcement, is not invalid in such application, if a reasonable

[217] Duffey v. Houtz, 105 Pa. St. 96.

[218] Commonwealth v. Baldwin, 1 Watts, 54, 26 Am. Dec. 33.

[219] Stanley v. McWhorter, 78 Ga. 87, 1 S. E. Rep. 260. See also Nelson v. Gill, 56 Ga. 536.

[220] Butler v. James, 33 Ga. 143.

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length of time is left for the assertion of such rights, or the prosecution of such remedies, before the bar of the statute cuts them off. Now, using these two admitted rules as premises, it is easy to deduce the conclusion that a statute shortening the time during which, by earlier laws, the lien of a judgment was to continue, is not open to any constitutional objection, in its application to judgments whose lien had attached before the act was passed, *if* a reasonable time (though less than the original period) is still allowed to the judgment-creditor in which to enforce his lien. And so the authorities hold.[321] But the case is different if the statute is made to apply to a case in which the whole of the new period of limitation had run before the passage of the act, so that the lien would be instantly cut off. Thus, where a statute had provided that a final judgment should be a lien for ten years, and that the creditor might have an additional three years within which to revive it, and a later act repealed the proviso allowing the additional three years, it was held that the latter act was unconstitutional, as interfering with vested rights, when applied to a judgment the lien of which had expired before its passage, but the additional three years for reviving which had not then expired.[322]

§ 464. Lien of Transferred Judgment.

The length of time during which the lien of a judgment transferred from one county to another shall continue depends entirely upon the construction of the local statute. In Pennsylvania such lien continues for five years from the entry of the judgment in the county to which it is transferred.[323] But on the other hand, in Indiana, under a statute declaring that the lien of a judgment shall continue for ten years after the rendition thereof, and another statute, providing that when a transcript of a judgment from another county is filed, the judgment set forth in the transcript shall be a lien on property within the county to the same extent as judgments of the local court, from the time of filing the transcript, it is held that the lien of a judg-

[321] Henry v. Henry (S. Car.), 9 S. E. Rep. 726; McCormick v. Alexander, 2 Ohio, 65; *supra*, § 399.

[322] King v. Belcher (S. Car.), 9 S. E. Rep. 359.

[323] Knauss' Appeal, 49 Pa. St. 419.

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ment, a transcript of which is filed in another county, is in force for ten years after its rendition, and not ten years from the time of filing the transcript.[334]

§ 465. Extension of Lien by Agreement of Parties.

It has been held that where a judgment is rendered in pursuance of a written agreement of the parties, entered of record, that the judgment shall be rendered collectible and payable nine years from its date, the ten years during which such judgment will remain a lien on the real estate of the defendant will not commence to run until the expiration of the nine years.[335] In the case cited the law of Indiana is thus stated: The lien of judgments upon real estate is regulated by statute, and the general rule is that the lien continues for ten years from the rendition of the judgment and no longer; but there are four exceptions, the statute excluding from the computation of time (1) the time during which the party is restrained by an appeal from proceeding, (2) the time during which the plaintiff is restrained by an injunction, (3) the time the plaintiff may be prevented from proceeding by the death of the defendant, and (4) the time the plaintiff may be prevented from enforcing the judgment by an agreement of the parties entered of record. But it must be considered very doubtful whether any such exception as that last mentioned would be admitted in other states, unless specifically provided for by the statute. As between the parties a judgment may be kept alive, although once paid, for the purpose of securing another loan; but as against subsequent lien-creditors, a mortgage or judgment once paid cannot be kept alive.[336]

§ 466. Survival against Judgment-Debtor.

The lien of a judgment expires, at the end of the statutory period, only as against subsequent purchasers or incumbrancers, but it still

[334] Brown v. Wuskoff, 118 Ind. 569, 19 N. E. Rep. 463. See a later decision in the same case in 21 N. E. Rep. 243.

[335] Applegate v. Edwards, 45 Ind. 329.

[336] Peirce v. Black, 105 Pa. St. 342.

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continues, the judgment being unsatisfied, against the judgment-debtor himself.[327] Hence if one suffers his property to be sold on execution issued on a judgment after its lien has expired by limitation, he cannot afterwards, in a collateral proceeding, call in question the validity of the sale.[328] So in a case where the real estate of a debtor was sold by the sheriff, and the proceeds applied to the payment of all judgments which had been either entered or revived within five years, and they were all thereby discharged, and there was a surplus, and there were two judgments the liens of which had expired, in consequence of their not being revived, it was held that the surplus belonged to the holders of those two judgments. For although, as to creditors whose judgment-liens were in force, these unrevived judgments had undoubtedly ceased to be liens, yet, as between them and the judgment-debtor, the liens continued notwithstanding their non-revival within the statutory time.[329] Inasmuch as the statutes ordinarily provide that the lien shall expire, after a certain time, as against "*bona fide* purchasers and subsequent incumbrancers," some attention to these terms becomes necessary. As to the former, it is held that if a purchaser collusively contrives with the judgment-debtor to deprive the creditor of his lien upon the lands purchased, knowing that the judgment is unpaid, or if he purchases under circumstances indicating an intention to deprive the creditor of the means of collecting his judgment, such purchaser will not be protected as a *bona fide* purchaser of the land, discharged of the lien of such judgment, although he pays the full value of the estate.[330] As to the term "subsequent incumbrancers" in these statutes, it is held to apply to creditors of a grantee of the judgment-debtor, where the conveyance was made within the statutory period, and the debts were contracted after the grantee's investiture with the legal title.[331]

[327] McCahan v. Elliott, 103 Pa. St. 634; Fetterman v. Murphy, 4 Watts, 424, 28 Am. Dec. 729; Aurand's Appeal, 34 Pa. St. 151; Bank of North America v. Fitzsimmons, 3 Binn. 342.

[328] Hinds v. Scott, 11 Pa. St. 19, 51 Am. Dec. 506; Tufts v. Tufts, 18 Wend. 621; Yeager v. Davis, 112 Ind. 230, 13 N. E. Rep. 707.

[329] Brown's Appeal, 91 Pa. St. 485.

[330] Pettit v. Shepherd, 5 Paige, 493, 28 Am. Dec. 437.

[331] Gridley v. Watson, 53 Ill. 186.

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§ 467. Death of Judgment-Debtor.

In the state of Pennsylvania the lien of a judgment is continued as to land bound by it for the period of five years after the defendant's death, although he aliened the land after the rendition of the judgment.[332] And as against his heirs or devisees, the lien is without limit and need not be revived.[333] "A judgment of record at the time of the death of the defendant, though without lien on his real estate at the time of death, does not fall into the class of mere debts, whose lien is limited to five years after the death of a decedent unless suit be brought for the same, according to section 24 of the act of Feb. 24, 1834. That section expressly excepts debts secured by mortgage or judgment. The record gives notice of the debt to all persons interested, and it remains unaffected by time as to all volunteers, until a presumption of payment arises."[334]

§ 468. Remedies of Creditor after Expiration of Lien.

It is well settled that the lien of a judgment cannot be enforced in equity after the right to enforce the judgment at law has ceased to exist.[335] Nor, if the creditor has lost his lien by the failure to take the proper steps in time, can he change the result by the mere act of issuing an execution.[336] But it is not necessary that a judgment should be revived in order to maintain its lien on money in the sheriff's hands.[337]

Part VII. Suspension and Discharge of Judgment-Liens.

§ 469. General Principles.

Inasmuch as the lien of a judgment does not merely bind the debtor's estate by his own consent or sufferance, but attaches by force

[332] Stevenson v. Black (Pa.), 1 Atl. Rep. 312, following Nicholas v. Phelps, 15 Pa. St. 36.

[333] Shearer v. Brinley, 76 Pa. St. 300; Konigmaker v. Brown, 14 Pa. St. 269.

[334] Baxter v. Allen, 77 Pa. St. 468.

[335] Smith v. Meredith, 30 Md. 429. Hutcheson v. Grubbs, 80 Va. 251.

[336] Roe v. Swart, 5 Cow. 294.

[337] Commonwealth v. Gleim, 3 Penr. & W. 417.

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of law in consequence of the rendition of the judgment against him, it follows that he cannot relieve his land from its burden by any act short of satisfying the judgment, nor can he, without a release from the judgment-creditor, change, limit, or impair the lien or prejudice the rights of its holder. The act of the debtor, therefore, in selling, conveying, mortgaging, or leasing the land, or his abandonment or repudiation of the title, or attornment to a third person (if he really had an interest subject to the judgment), cannot affect or destroy the lien of the judgment when once it has attached.[338] Thus a voluntary assignment for the benefit of creditors does not affect liens on the land assigned created by existing judgments against the assignor.[339] Nor, after such an assignment, does the failure of a creditor to sue out and levy execution impair the lien of his judgment.[340] But in one state it has been held that although a judgment is by law a lien upon the land of the defendant, yet he may after the judgment convey good title, if he has at all times afterwards a sufficient amount of property, subject to and within reach of an execution, to satisfy the judgment.[341]

§ 470. Suspension of Lien by Injunction.

An injunction against the enforcement of a judgment at law, if not perpetual, does not destroy the lien of the judgment, but merely suspends it until the dissolution of the injunction, after which the lien will revive and continue for the full statutory period.[342] Whether this statutory period is to be computed *exclusive* of the time during which the lien was so suspended, is not clear upon the authorities, and must be determined by the language of the local statute. In one state the law expressly excepts from the computation of the period for which the lien continues in life "the time during which

[338] Morris v. Mowatt, 2 Paige, 586, 23 Am. Dec. 661; Decker v. Gilbert, 80 Ind. 107; Brooker v. Sprague, 99 Ind. 169; Rodgers v. McCluer, 4 Gratt. 81, 47 Am. Dec. 715; Agricultural Bank v. Pallen, 8 Sm. & Mar. 357, 47 Am. Dec. 92; Tinney v. Wolston, 41 Ill. 215.

[339] Schaeffer's Appeal, 101 Pa. St. 45.

[340] Scott v. Dunn, 26 Ohio St. 63.

[341] Howse v. Judson, 1 Fla. 133.

[342] Smith v. Everby, 4 How.(Miss.) 178; Lynn v. Gridley, Walker (Miss.), 548, 12 Am. Dec. 591; *supra*, § 395.

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the plaintiff is restrained by an injunction."[343] But in another state, for want of a similar saving clause in the statute, the courts have been forced to conclude that if the lien ran out during the pendency of such an injunction, it was finally lost, and could not be revived, upon the dissolution of the injunction, at least as against a *bona fide* purchaser from the judgment-debtor.[344] But here considerations of equity must intervene, and it becomes important to inquire at whose instance the injunction was issued. For instance, in a case where the creditor was prevented from enforcing his execution until after the time prescribed by the statute, in consequence of an injunction granted on the application of a mortgagee of the property, the lien of whose mortgage was, at the issuance of the injunction, secondary to that of the judgment, and the injunction was subsequently dissolved, upon the failure of the mortgagee to establish his claim to protection, it was held that he could not take advantage of the fact that the lien of the judgment was lost, and that he was not entitled to hold the property discharged of the lien of the judgment.[345] In Alabama a judgment-lien is discharged by an injunction issued upon the execution of a bond with sureties by the judgment-debtor, if the bond provides the plaintiff with another security for the payment of his judgment.[346]

§ 471. Stay of Proceedings.

In general, the lien of a judgment is not destroyed by an agreement of the parties to stay execution for a specified period.[347] And a stay of proceedings by order of court, pending a motion for a new trial, or by appeal with stay-bond, merely suspends the running of the statutory time during which a judgment is a lien on real estate, but it does not postpone its beginning until after the stay has ceased.[348]

[343] Applegate v. Edwards, 45 Ind. 329.
[344] Tucker v. Shade, 25 Ohio St. 355.
[345] Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549.
[346] Bartlett v. Gayle, 6 Ala. 305.
[347] Brewster v. Clamfit, 33 Ark. 72; Love v. Harper, 4 Humph. 113; Ayers v. Waul, 44 Tex. 549.
[348] Barrollhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Isler v. Brown, 66 N. Carr. 556.

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§ 472. Opening or Vacating Judgment.

Opening a default judgment merely to let the defendant in to a defense does not destroy its lien; the lien continues for the statutory period.[346] But *vacating* a judgment effectually obliterates it for all purposes; and of course the lien is thereby cancelled, leaving the judgment-debtor free to sell or incumber the property anew. But judgments which have been vacated are sometimes restored, and thereby the lien of the judgment re-attaches. A party whose judgment has been illegally vacated will not be deprived of his lien if he ultimately procures the reversal of the order which set it aside, unless the equities of *bona fide* purchasers or incumbrancers have intervened. And further, the lien is restored to the exact position it occupied at the time the judgment was vacated. That is, it continues to take precedence of any liens which were junior to it at that date, unless the holders of such junior liens have acquired new rights, by proceedings under their several judgments, of which they cannot justly be deprived.[350]

§ 473. Appeal or Error.

It is generally held that the lien of a judgment is not discharged by an appeal being taken, but merely suspended; nor is the judgment on appeal a discharge of the lien of the judgment below.[351] "Even if there be a new judgment [*e. g.*, of affirmance on appeal], this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence, although a new judgment be predicated on the first." [352] And where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed.[353]

[346] Cope's Appeal, 96 Pa. St. 294.

[350] King v. Harris, 34 N. Y. 330, s. c. 30 Barb. 471.

[351] Hardee v. Stovall, 1 Ga. 92; Montgomery v. McGimpsey, 7 Sm. & Mar. 557; Curtis v. Root, 28 Ill. 367; Moore v. Rittenhouse, 15 Ohio St. 310; Dewey v. Latson, 6 Cal. 130; Leonard's Appeal, 94 Pa. St. 180. *Per contra*, Campbell v. Spence, 4 Ala. 548, 39 Am. Dec. 301.

[352] Planters' Bank v. Calvit, 3 Sm. & Mar. 143, 41 Am. Dec. 616.

[353] Thomson v. Chapman, 83 Va. 215, 2 S. E. Rep. 273.

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§ 474. Bankruptcy.

The lien of a judgment-creditor who fails to prove his debt is not displaced by the subsequent bankruptcy of the debtor. And where a judgment-debtor is declared a bankrupt, has his homestead set apart, procures his discharge, and afterwards disposes of the property set apart as a homestead, it at once becomes subject to execution under the prior judgment. "Liens are not destroyed but preserved by the bankrupt act." [354]

§ 475. Appointment of Receiver.

It is held that the lien of a judgment on the real estate of a corporation is not lost or affected by the subsequent appointment of a receiver to settle the business of such corporation; nor is the judgment-plaintiff thereby prevented from proceeding by execution, levy, and sale of such property to make his debt.[355]

§ 476. Taking Defendant on Ca. Sa.

At common law, "the writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods." [356] Hence the lien of the judgment is destroyed by an execution against the debtor's person. It may, however, revive, in the few cases in which the creditor, failing to obtain satisfaction by this means, is permitted to resort to other remedies; but not as against intervening rights. "If the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon, as against creditors who have obtained a precedence during such sus-

[354] Jackson v. Allen, 30 Ark. 110; McCance v. Taylor, 10 Gratt. 590.

[355] Southern Bank v. Ohio Ins. Co., 22 Ind. 181.

[356] 3 Bl. Comm. 414.

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pension."[357] Where a judgment is recovered against several, and a *ca. sa.* served on one of them, who executes a forthcoming bond, which is forfeited, this does not extinguish the lien of the judgment upon the land of the others.[358]

§ 477. Payment.

The lien of a judgment is discharged by payment of the judgment.[359] But a tender of the amount of the judgment, if not accepted, does not extinguish its lien.[360] An attorney's lien upon a judgment affects only his client's interests, and not the right of the opposite party to discharge the judgment with depreciated funds.[361] But although a judgment lien or obligation may be extinguished at law by the payment of the debt, yet, for the benefit of a surety who has paid it, the lien in equity continues in full force.[362] But after it is thus discharged, it is said that the lien cannot be restored by any subsequent agreement between the parties;[363] although, in some jurisdictions, it appears that it may be kept alive for the purpose of securing further advances.[364]

§ 478. Cancellation or Entry of Satisfaction.

A judgment creditor who enters satisfaction of his judgment, or causes an execution to be returned satisfied, authorizes others to treat the property of the debtor as released from the lien incident to the judgment.[365] And so a judgment, when cancelled by order of the court, ceases to be a lien on real estate owned by the debtor during the life of the judgment.[366] On the same principle, where the defendant executed his notes for the amount of the judgment rendered

[357] Rockhill v. Hanna, 15 How. 189.
[358] Leake v. Ferguson, 2 Gratt. 419.
[359] Banks v. Evans, 10 Sm. & Mar. 35, 48 Am. Dec. 784.
[360] People v. Beebe, 1 Barb. 379; Law v. Jackson, 9 Cow. 641.
[361] Neil v. Staten, 7 Heisk. 290.
[362] German American Sav. Bank v. Fritz, 68 Wis. 390, 32 N. W. Rep. 123.
[363] De La Vergne v. Evertson, 1 Paige, 181, 19 Am. Dec. 411.
[364] Peirce v. Black, 105 Pa. St. 342.
[365] Page v. Benson, 22 Ill. 484; Bank v. Ford, 13 Ala. 431.
[366] Worthington v. Nelson (Iowa), 36 N. W. Rep. 911.

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against him, which was subsequently cancelled, it was held that the judgment ceased to exist, and there was no longer a lien upon the defendant's real estate, when no fraud was imputable in obtaining the cancellation.[367]

§ 479. Sale of the Land.

A sale of land under an execution extinguishes the lien of the judgment on the land sold.[368]

§ 480. Acquisition of Title by Judgment-Creditor.

Since a judgment is a general lien upon all the debtor's real estate, it does not merge when the judgment-creditor acquires title to a particular portion of such lands, but may, in ordinary cases, be enforced against the remaining lands.[369] In case the creditor should become the owner of the *only* piece of land belonging to the debtor, there would probably be a merger of the lien, but no loss of the right to satisfy the judgment by levy upon personalty. But the precise question does not appear to have come before the courts.

§ 481. Release of Lien.

A release by a judgment creditor, at the instance of the debtor, of one of several tracts of land bound by a judgment, will not operate as a release of the others.[370] It is said that a release of a judgment-lien may be by parol, but the proof thereof must be clear, satisfactory, and conclusive.[371] There may also be a species of release in equity or by estoppel. Thus, where lands subject to the incumbrance of a judgment are conveyed with covenants of warranty to a purchaser for full value, the grantee and his successors in interest occupy a position similar to that of sureties for the judgment-debtor and are entitled to the same equities; and a release by the judgment-creditor,

[367] Polk Co. v. Nelson (Iowa), 43 N. W. Rep. 80.

[368] Surtliff v. Easton, 2 Wend. 297.

[369] Caley v. Morgan, 114 Ind. 350, 16 N. E. Rep. 790.

[370] Wolfe v. Gardner, 4 Harringt. 338.

[371] Dalby v. Cronkhite, 28 Iowa, 223.

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without their consent and with knowledge of their rights, of any security to which, in equity, they would be entitled on payment of the judgment, discharges the lien of the judgment.[372] In a case in New York, it appeared that the agent of the judgment-creditor was present at a sale, by the debtor to a third person, of certain lands on which the judgment was a lien, drew the conveyance, and was informed of the sale, and the debtor soon afterward delivered to such agent, as security for the judgment-debt, the notes given in payment for the land conveyed. It was held that the receipt of these notes by the agent of the creditor, with knowledge of their consideration, although it did not affect the creditor's lien upon the lot as security for the judgment in case it should not be otherwise satisfied, imposed on him, in equity, a duty to apply the proceeds of the notes in reduction of the judgment.[373]

[372] Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625.

[373] Ingalls v. Morgan, 10 N. Y. 178.

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CHAPTER XVII.

REVIVAL OF JUDGMENTS BY SCIRE FACIAS.

§ 482. Nature and Functions of the Writ.
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§ 482. Nature and Functions of the Writ.

A *scire facias* is a judicial writ founded upon some matter of record, as a judgment, mortgage, recognizance, tax-lien, or letters-patent, and requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of such record, or (as in the case of *scire facias* to repeal letters patent) why the record should not be annulled and vacated.[1] Among the various uses to which this writ may be put, two only are important to our present purpose. In the first place, it lies to secure the right to issue execution on a judgment, when that right has either become dormant through failure to exercise it, or cannot be exercised without preliminary judicial proceedings. Thus, in the case of a judgment against an executor of assets *quando acciderint*, and in cases where a new person is to be charged or benefited by the execution, *scire*

[1] Brown's Law Dict. tit. "*Scire Facias;*" 2 Tidd's Pr. 1090.

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facias is first to be brought. So, at common law, all writs of execution had to be sued out within a year and a day after the judgment was entered, otherwise the judgment was presumed to be satisfied and extinct, but this writ would lie to revive the right to issue execution if such presumption were contrary to the fact.[2] In any of these cases the writ commands the sheriff to "make known" to the defendant that he be in court on the return-day, in order to show cause why the plaintiff ought not to have execution against him; and it is more fully described as a writ of *scire facias quare executionem non*. In the second place, the statutes of some of the states provide that a judgment shall cease to be a lien on real estate at the expiration of a certain period of time (usually five or ten years), but also provide that, within that period, the judgment may be revived by a proceeding by *scire facias*, with the effect of continuing its lien for another like period. When used for this purpose, the writ requires the defendant to show cause why the judgment should not be revived and its lien continued.

In this sense, the proceeding by *scire facias*, while it partakes in some measure of the characteristics of an independent action at law (as, in requiring service of a writ and a plea by the defendant), yet is not regarded as a new suit. In contemplation of law it is merely a continuation of the action which resulted in the judgment now sought to be revived, and as dependent upon the liability already created by that judgment.[3] Each successive writ of *scire facias* to revive a judgment, or to recover damages for the breach of the con-

[2] Brown, *ubi sup.* See Pennock v. Hart, 8 Serg. & R. 369.

[3] Hatch v. Eustis, 1 Gall. 160; Fitzhugh v. Blake, 2 Cranch C. C. 37; Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266; State Treasurer v. Foster, 7 Vt. 52; Comstock v. Holbrook, 16 Gray, 111; Gray v. Thrasher, 104 Mass. 373; Eldred v. Hazlett, 38 Pa. St. 16; Irwin v. Nixon's Heirs, 11 Pa. St. 419, 51 Am. Dec. 559; Kirkland v. Krebs, 34 Md. 93; Ingram v. Belk, 2 Strobh. 207, 47 Am. Dec. 591; Funderburk v. Smith, 74 Ga. 515; Brown v. Harley, 2 Fla. 159; Perkins v. Hume, 10 Tex. 50; Masterson v. Cundiff, 58 Tex. 472; Carter v. Carriger, 3 Yerg. 411, 24 Am. Dec. 585; Blackwell v. State, 3 Ark. 320; Wolf v. Poundsford, 4 Ohio, 397; Challenor v. Niles, 78 Ill. 78; Denegre v. Haun, 13 Iowa, 240; Eaton v. Hasty, 6 Nebr. 419, 29 Am. Rep. 365. But a *scire facias* to revive a judgment on which no execution issued in a year and a day may be regarded as a suit on the judgment, so far as concerns the plaintiff's right to discontinue as to parties not served. Hanson v. Jacks, 22 Ala. 549.

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dition of a bond on which the judgment has been rendered, must be founded upon the judgment which immediately preceded it; for a recovery upon a writ of *scire facias* is a bar to any subsequent recovery upon the original judgment.[4] It must be observed that this writ, as a remedy for the revival or enforcement of a judgment, is not universally applicable in the United States. In some jurisdictions, where the only form of action authorized by law is the "civil action," the writ of *scire facias* is unknown in practice.[5]

§ 483. Venue of the Action.

It is a settled rule that a *scire facias* to revive a judgment can issue only from the court in which the record remains of the judgment to be revived.[6] Thus, proceedings to revive a judgment against the heirs of the defendant, so as to have execution against lands inherited by them, must be brought in the court where the judgment was rendered, and an independent suit therefor in another county, where a transcript had been filed to obtain a lien, cannot be maintained where the lands have been sold without fraud.[7] Where the defendant resides out of the county, service must be perfected by sending out process to the county where he is to be found, directed to the sheriff of that county, whose duty it then becomes to serve and return the process.[8] Where a judgment has been obtained before a justice of the peace, and a transcript taken and filed in the court of common pleas, a *scire facias* to revive the judgment must be issued by the common pleas and not by the justice.[9] This writ cannot be brought in a court of chancery to enforce or revive a decree, unless

[4] Collingwood v. Carson, 2 Watts & S. 220; Custer v. Detterer, 3 Watts & S. 28.

[5] Humiston v. Smith, 21 Cal. 129.

[6] Vallance v. Sawyer, 4 Me. 62; State v. Brown, 41 Me. 535; State v. Kinne, 39 N. H. 129; Carlton v. Young, 1 Aik. 332; Gibson v. Davis, 22 Vt. 374; Osgood v. Thurston, 23 Pick. 110; Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 326; Boylan v. Anderson, 8 N. J. Law, 529; Tindall v. Carson, 16 N. J. Law, 94; Grimke's Exrs. v. Mayrant, 2 Brev. 202; Dickinson v. Allison, 10 Ga. 557; Funderburk v. Smith, 74 Ga. 515; Chapman v. Nelson, 31 La. Ann. 341; Masterson v. Cundiff, 58 Tex. 472; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. Rep. 638; Challenor v. Niles, 78 Ill. 78; Camcs v. Crandall, 4 Iowa, 151; Wilson v. Tiernan, 3 Mo. 577.

[7] Thompson v. Parker, 88 Ind. 96.

[8] Dickinson v. Allison, 10 Ga. 557.

[9] Brannan v. Kelley, 8 Serg. & R. 479.

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there be a statute authorizing executions to issue upon decrees in equity.[10]

§ 484. Right to Sue out Scire Facias.

At common law, a party was not entitled to maintain a *scire facias* to have execution of a judgment where there was no change of parties, and the writ was available only in cases where the time for issuing execution was past.[11] But according to the modern decisions, an action of debt, or a *scire facias*, may be brought on a judgment after an execution has issued, and it is not a valid objection to such a proceeding that, at the time of its commencement, the plaintiff could have proceeded by execution.[12] And where a party unnecessarily sues out a *scire facias*, when he might have an immediate execution, the writ should not be quashed for that reason, but execution should not issue until he obtains judgment under the writ.[13] Complete satisfaction of the judgment will alone suffice to prevent its revival in this manner. Thus a subsisting levy on land is no bar to a *scire facias* on the judgment to continue its lien or to substitute a representative of either party.[14] So a conditional appropriation by an auditor to a judgment-creditor in the distribution of proceeds of the debtor's real estate, will not prevent the reviving of the judgment for the whole amount, where no money has been actually received upon it, and the conditions attached to the appropriation have not been fulfilled.[15] So a *scire facias* may be issued to revive a judgment which has been removed by a writ of error sued out without bail and still pending; for a writ of error without bail is not a *supersedeas*.[16] But the writ cannot be used to revive a judgment on which no execution could ever have issued.[17]

[10] Jeffreys v. Yarborough, 1 Dev. Ch. 510; Curtis v. Hawn, 14 Ohio, 185; Logan v. Cloyd, 1 A. K. Mar. 201.

[11] Harmon v. Dedrick, 3 Barb. 192.

[12] Stewart v. Peterson's Exr., 68 Pa. St. 230; Stille v. Wood, 1 N. J. Law, 118.

[13] Lambson v. Moffett, 61 Md. 426.

[14] Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338.

[15] Masser v. Dewart, 46 Pa. St. 534.

[16] Boyer v. Rees, 4 Watts, 201.

[17] Turner v. Dupree, 19 Ala. 198; Horton v. Clark, 40 Ga. 412.

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§ 485. Time of Issuing the Writ.

Where the statute provides that no judgment shall continue a lien on realty for a longer period than five years (or ten years) from the day of entry or revivor, unless a writ of *scire facias* to revive it be sued out within that period, the limitation of the time of bringing the writ begins to run from the rendition of the judgment.[18] But in such case the day of entry of the judgment is to be excluded in the computation of the period within which it must be revived.[19] And where the last day of the period thus computed falls on Sunday, a writ of *scire facias* issued on the Monday following is in time to preserve the lien.[20] And if the process of *scire facias* to revive issues a single day within the time, it saves the bar; and the terre-tenant may be connected with this process, though not named in it, by an *alias*, which latter may issue any time within five years.[21] In some states, the life of a judgment-lien is continued for a certain period after the death of the debtor, without reference to the time that may have elapsed since its entry or last revival, provided it had not then become dormant. But elsewhere it is held that if more than five years of the whole period (ten years) have elapsed during the life of the debtor, then the creditor has only the remainder of the ten years in which to revive the judgment against the personal representatives.[22] In Pennsylvania a judgment may be revived against terre-tenants at any time within the period of five years, notwithstanding there may have been an intermediate revival by *scire facias* without notice to them.[23] But an *alias scire facias*, issued after five terms from the former, is not sufficient to preserve the lien of a judgment which had expired in the interval.[24] In the same state it was for-

[18] Scott v. Seelye, 39 La. Ann. 749, 2 South. Rep. 309; Ayre v. Burke (Va.), 4 S. E. Rep. 618.

[19] Green's Appeal, 6 Watts & S. 327; Lutz's Appeal, 124 Pa. St. 273, 16 Atl. Rep. 858.

[20] Lutz's Appeal, 124 Pa. St. 273, 16 Atl. Rep. 858.

[21] Lichty v. Hochstetler, 91 Pa. St. 444; Porter v. Hitchcock, 98 Pa. St. 625; Silverthorn v. Townshend, 87 Pa. St. 263.

[22] Handy v. Smith's Admr., 30 W. Va. 195, 3 S. E. Rep. 604.

[23] Furst v. Overdeer, 3 Watts & S. 470.

[24] Allen v. Liggett, 81 Pa. St. 486.

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merly held that where there was a stay of execution, the five years within which the judgment must be revived, did not begin to run until the expiration of the stay.[25] But this was afterwards changed by a statute.[26]

§ 486. Pleadings.

The writ of *scire facias* to revive a judgment is not merely a form of summons or citation to the defendant; it also serves the purpose of a declaration, to which the defendant may plead or demur, as to any other declaration. And as the proceeding is not original, but a continuation of the former action, the plaintiff is not required to file a new declaration or rule the defendant to plead.[27] Where a legal title to have execution of the original judgment is not set out in the writ, judgment may be arrested as for want of a cause of action.[28] A *scire facias* to revive a judgment must therefore follow the original judgment in amount, date, and parties; otherwise it is defective under a plea of *nul tiel record*.[29] But it is sufficient if the writ contains such recitals as will point to the judgment intended to be revived with such certainty that the defendant must know what judgment is meant.[30] It is not necessary to aver that execution was not issued within a year and a day; that the judgment remains unpaid and unsatisfied is a sufficient allegation.[31] So a writ of *scire facias*, in reciting a judgment on a *prior scire facias*, need not recite the amount for which such judgment was obtained; such a recital is in no respect uncertain, informal, or insufficient, when the writ recites the judgment on the prior *scire facias* as it would be set out in the full and formal record of that judgment.[32] So a *scire facias* against

[25] Pennock v. Hart, 8 Serg. & R. 369.

[26] Penna. Act, Mar. 26, 1827.

[27] Blake v. Dodemead, 2 Strange, 775; Bank of Scotland v. Fenwick, 1 Ex. 792; Nunn v. Claxton, 3 Ex. 712; Prather v. Manro, 11 Gill & J. 261; Bowie v. Neale, 41 Md. 124; Bish v. Williar, 59 Md. 382; McVeigh v. Bank of Old Dominion, 76 Va. 267; Brown v. Harley, 2 Fla. 159; Hopkins v. Howard, 12 Tex. 7; State v. Robinson, 8 Yerg. 370; Calhoun v. Adams, 43 Ark. 238; Farris v. People, 58 Ill. 26; Merchants' Mut Ins. Co. v. Hill, 17 Mo. App. 590; Foster on *Scire Facias*, 349.

[28] McKinney v. Mehaffey, 7 Watts & S. 276.

[29] Richter v. Cummings, 60 Pa. St. 441; Wolf v. Poundsford, 4 Ohio, 397; Warfield v. Brewer, 4 Gill, 265.

[30] Ward v. Prather, 1 J. J. Mar. 4.

[31] Albin v. People, 46 Ill. 372.

[32] Brown v. Chesapeake & Ohio Canal Co., 4 Fed. Rep. 770.

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the heir, on a judgment recovered against the ancestor, need not aver ineffectual proceedings against the personal representatives; but if no such proceedings have been had, such defense must be set up by plea.[33] But on the other hand, a writ of *scire facias* to enforce a judgment rendered against a trustee is insufficient if it be only alleged therein that the plaintiff recovered a judgment against the defendant as trustee. It should appear for what the trustee was made chargeable.[34] A substantial variance between the recitals in the writ of *scire facias* and the judgment to be revived would break the continuity of the lien; but if the objection be formal and technical only, it will not affect the lien of the original.[35]

§ 487. Service of Writ.

At common law, the rule is that two returns of *nihil* to a writ of *scire facias* are equivalent to a return of *scire feci;* that is, the court thereupon acquires jurisdiction of the defendant and may proceed to award execution on the original judgment.[36] But here an important distinction is recognized, viz., that if execution is awarded upon a return of *scire feci*, the defendant is concluded by the judgment; but when it is awarded upon two returns of *nihil*, the defendant may afterwards present his defense by *audita querela*, or upon motion to the court, and may have the full benefit thereof.[37] The common law rule is still adhered to in some of the states. According to the opinion of the supreme court of Massachusetts, if the law prescribes no particular form of notice to be given to a defendant beyond the jurisdiction of the court, it is for the court to cause such notice to be given to him as shall be reasonable and enable him to appear and defend

[33] Rogers v. Denham, 2 Gratt. 200.

[34] Gibson v. Davis, 22 Vt. 374.

[35] Dougherty's Estate, 9 Watts & S. 189, 42 Am. Dec. 326.

[36] Randal v. Wale, Cro. Jac. 59; Barret v. Cleydon, Dyer, 168; Bromley v. Littleton, Yelv. 112; Andrews v. Harper, 8 Mod. 227; Warder v. Tainter, 4 Watts, 270; Chambers v. Carson, 2 Whart. 9; Cumming v. Eden, 1 Cow. 70; Woodfork v. Bromfield, 1 Murph. 187; Ingram v. Belk, 2 Strobh. 207, 47 Am. Dec. 591; Barrow v. Bailey, 5 Fla. 9; Dunlevy v. Ross, Wright, 287; Sans v. People, 3 Gilm. 327; Choate v. People, 19 Ill. 63.

[37] Barrow v. Bailey, 5 Fla. 9; Fitz. Nat. Brev. 104.

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his rights.[38] In some other states it is held that the writ of *scire facias* must be served personally.[39] In cases where there is a terre-tenant of the land, he must also be served with process; yet if he appears and confesses judgment on the *scire facias*, he thereby waives the objection that he was not served.[40] The question, who are to be considered terre-tenants in such sense as to require a service of the writ upon them in order to continue the lien of the judgment, will be examined in a later section. In Pennsylvania it is held that service is good when made on the defendant, who remains in the possession of his real estate, although he has made an assignment for the benefit of his creditors.[41]

§ 488. Parties Plaintiff.

The plaintiff in a *scire facias* will ordinarily be the same person who was plaintiff in the original judgment, and in such case his capacity to sue out the writ will be governed by the same rules which determine the capacity of persons to maintain other species of actions. Thus, a married woman may bring a *scire facias* to continue the lien of a judgment against her husband, the judgment having been entered in her favor before they were married.[42] When the writ is used to revive a judgment in favor of an intestate, it should be issued in the name of his administrator; but if issued in the name of the intestate, it may be amended by sustituting that of the administrator.[43] Where the judgment has passed by assignment to a third person, the determination of the proper plaintiff in an action to revive it will depend upon the statutory rules in the particular jurisdiction. If the law requires all suits to be brought in the name of "the real party in interest," the *scire facias* should be sued out in the name of the assignee. If, however, such a provision does not exist, a suit to revive a judgment is properly brought in the name of the original plaintiff, even though the judgment may have become

[38] Comstock v. Holbrook, 16 Gray, 111.
[39] McCombs v. Feeter, 1 Wend. 19; Rice v. Talmadge, 20 Vt. 378.
[40] Dickerson's Appeal, 7 Pa. St. 255.
[41] *In re* Dohner, 1 Pa. St. 101.
[42] Kinkade v. Cunningham, 118 Pa. St. 501, 12 Atl. Rep. 410.
[43] Challenor v. Niles, 78 Ill. 78.

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the property of a third person.[44] In Michigan, where the statute allowing an assignee to pursue remedies in his own name is permissive only, it is held that *scire facias* may be prosecuted by the assignee of a judgment in the name of the assignor, where he alleges a *bona fide* assignment, and also that there is a sum unpaid on the execution rightfully belonging to the assignee.[45]

§ 489. Parties Defendant.

The general rule is that "all the parties to the original judgment must be parties to the proceedings to renew or revive that judgment."[46] It is also a rule that all persons must be joined who have a substantial interest in the land to be bound by the lien. But the failure to make a naked trustee, who has no beneficial interest in the land, a party to a writ issued for the revival of the judgment, will not destroy the hold of the judgment on a *cestui que trust* who is duly joined.[47] In a recent case in the United States circuit court for the western district of Tennessee, the question was on a *scire facias* to revive a judgment against the old corporation of the city of Memphis. It appeared that the legislature had abolished the charter of that city and organized the same inhabitants and territory into a municipal corporation by another name, and the supreme court of the state had construed the legislation as creating a successor to the old corporation liable for its debts. It was therefore adjudged that *scire facias* was the proper remedy to revive a judgment existing against the old corporation at the time of the repeal of the charter, against the new corporation; and the fact that the assets of the extinct municipality were undergoing administration in a court of equity under regulations prescribed by the legislature did not defeat the plaintiff's right to a revivor, nor the fact that there was no property liable to execution in the hands of the new corporation.[48] A number of judgments against the same person may be consolidated and revived in one

[44] Marbury v. Pace, 30 La. Ann. 1330.
[45] McRoberts v. Lyon (Mich.), 44 N. W. Rep. 160.
[46] Funderburk v. Smith, 74 Ga. 515.
[47] Bowers v. Harner, 3 Phila. 146.
[48] Grantland v. Memphis, 12 Fed. Rep. 287.

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amicable action of *scire facias*, although one of them is also against another defendant, and, when so revived, the continuity of the liens is preserved.[49]

§ 490. Same; Judgment against Decedent.

Scire facias is the proper remedy to revive a judgment against an ancestor so as to compel the heirs at law to satisfy it out of lands inherited by them.[50] But as to the proper persons to be made defendants to a revival of this sort, there is the greatest diversity of practice in the different states. In some jurisdictions the rule obtains that it is not necessary to make the executors or administrators of a deceased defendant parties to the writ, the subject-matter in dispute being beyond their province, but that the heirs and terre-tenants must be joined.[51] In Pennsylvania, on the other hand, it is established law that where a judgment has been obtained against a man in his lifetime, it may be revived after his death, for the purpose of lien and execution, by a *scire facias* issued against his personal representatives alone, and in such case it is unnecessary to bring in the widow and heirs by a writ against them.[52] And conversely it is held, in the same state, that under these circumstances, if the writ be sued only against the heirs in possession of the inheritance, it is erroneous; the executor or administrator *must* be made a party to it.[53] In Indiana, it is said that the administrator and heirs of a decedent are properly joined as defendants in a proceeding to revive a judgment against him.[54] It is to be remarked that a *scire facias* against the heirs and terre-tenants of the judgment-debtor will not reach property never owned by such debtor, but inherited by his children after his death from a third person.[55]

[49] Yeager's Appeal (Pa.), 18 Atl. Rep. 137.

[50] Bank v. Kendall, 21 Miss. 278.

[51] Tessier v. Wyse, 3 Bland, 40; Walden v. Craig, 14 Pet. 147.

[52] Middleton v. Middleton, 106 Pa. St. 252; Grover v. Boon, 124 Pa. St. 399, 16 Atl. Rep. 885; McMillan v. Red, 4 Watts & S. 237.

[53] Brown v. Webb, 1 Watts, 411.

[54] Graves v. Skeels, 6 Ind. 107.

[55] Adams v. Stake, 67 Md. 447, 10 Atl. Rep. 444.

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§ 491. Same; Joint Defendants.

In case the judgment sought to be revived was rendered against two or more joint defendants, it is a practically universal rule that the *scire facias* must follow the judgment, and all the original defendants must be made defendants to the writ, if living; if one has died, the writ must be against the survivors jointly with the heirs and terre-tenants of the decedent (or his personal representative in proper cases); and it is irregular to take proceedings against the surviving defendants alone, or against the representatives of the decedent without joining the survivors.[56] Hence, where a plaintiff for any sufficient cause desires to revive a judgment against one or more of several defendants without joining all, his remedy is by an action of debt on the judgment; it cannot be done by *scire facias*.[57] So where a writ to revive a judgment against several is not served on one of them, the plaintiff cannot discontinue the proceeding as to him and revive the judgment against the others.[58]

§ 492. Terre-Tenants.

A terre-tenant, in the sense in which the term is used in connection with the subject-matter now under consideration, is one who has an estate in the land, coupled with the actual possession, which he derived mediately or immediately from the judgment-debtor while the land was bound by the lien. And the rule is, that on a *scire facias* to revive the lien of a judgment on land which is in the possession of a terre-tenant, it is essential that the terre-tenant be made a party to the proceedings.[59] In Pennsylvania, however, under the wording

[56] Sainsbury v. Pringle, 10 B. & C. 751; Fowler v. Rickerly, 9 Dowl. P. C. 682; Panton v. Hall, Salk. 598; Rex v. Chapman, 3 Anst. 811; Grenell v. Sharp, 4 Whart. 344; Commonwealth v. Mateer, 16 Serg. & R. 416; Dowling v. McGregor, 91 Pa. St. 410; McAfee v. Patterson, 2 Sm. & Mar. 593; Henderson v. Vanhook, 24 Tex. 358; Bolinger v. Fowler, 14 Ark. 27; Calloway v. Eubank, 4 J. J. Mar. 280; Gray v. McDowell, 5 T. B. Mon. 501; Murray v. Baker, 5 B. Mon. 172; Huey v. Redden, 3 Dana, 488; Mitchell v. Smith, 1 Litt. 243; Foster on *Scire Facias*, 20, 21.

[57] Carson v. Moore, 23 Tex. 450.

[58] Greer v. State Bank, 10 Ark. 455; Coleman v. Edwards, 2 Bibb, 595. Compare Hanson v. Jacks, 22 Ala. 549.

[59] Lusk v. Davidson, 3 Pen. & W. 229;

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of the statute, it has been decided that the *issuing* of a *scire facias* within five years after the judgment was rendered continues the lien on lands that had been conveyed by the defendant, although no *service* of the writ is actually made on the terre-tenant.[60] In the same state the statutes provide two modes of reviving a judgment, (1) by agreement between the parties and terre-tenants, (2) by a writ of *scire facias*. And it is held that a revival by agreement with the judgment-debtor alone does not continue the lien, as against the terre-tenants, after the expiration of the statutory period.[61] But, on the other hand, an amicable revival of the judgment by the terre-tenant, by an agreement to which the defendant is not a party, will continue the lien of the judgment on the land.[62] And if the writ is served upon the terre-tenant, it matters not that judgment is not formally entered against him on the *scire facias*.[63]

As to who are to be considered terre-tenants, the authorities are in the main harmonious, the definition given at the beginning of this section exhibiting the substantial result of the various rulings. And first, the party must have a substantial interest or estate in the land. Thus, a mere occupant, holding in the character of a yearly lessee of the defendant, need not be made a party to the writ.[64] So an assignee for the benefit of creditors is not a purchaser; he is a mere volunteer standing in the place of the assignor, and, as a general rule, has no rights against the lien-creditors of the assignor which the latter did not himself have.[65] Secondly, the person to be bound as terre-tenant must derive his title from the judgment-debtor. "Where a party is in possession holding title adverse to that of the defendant, or paramount to his, such party is not a terre-tenant within the

McCrary v. Clark, 82 Pa. St. 457; Morton v. Croghan, 20 Johns. 106; Von Puhl v. Rucker, 6 Iowa, 187. In Pennsylvania, under the act of Apr. 16, 1849, the terre-tenant is not entitled to notice of the revival of a judgment as between the original parties, unless he has, at the time of such revival, recorded his deed or taken such possession of the land as amounts to constructive notice to the judgment creditor. Buck's Appeal, 100 Pa. St. 109.

[60] Meinweiser v. Hains, 110 Pa. St. 468, 2 Atl. Rep. 431.

[61] Baum v. Custer (Pa.), 13 Atl. Rep. 771; Armstrong's Appeal, 5 Watts & S. 352.

[62] Sames's Appeal, 26 Pa. St. 184.

[63] Day v. Willy, 3 Brewst. 43.

[64] Clippinger v. Miller, 1 Pen. &. W. 64.

[65] Kepler v. Erie Savings Co., 101 Pa. St. 602.

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meaning of the law, because his rights are in no manner affected by the judgment. If he has a good title, the judgment does not bind his land, nor can a sale under the execution affect his interest. One who purchased the lands at a tax sale, and went into possession, is not a terre-tenant. If the sale was valid, the purchaser held a title paramount to the judgment, and not to be affected by the proceedings under the execution. If the sale was invalid, then the purchaser was in possession without title under the judgment-debtor, and not as his terre-tenant."[66] In the third place, the person designated as terre-tenant must have obtained his title from the judgment-debtor during the time when the land was bound by the lien of the judgment. A purchaser *after the lien has expired* is not a terre-tenant and is not bound by the judgment on the *scire facias*.[67] The failure of a judgment-creditor to preserve his lien, by neglecting to give the terre-tenant notice of a *scire facias* to revive, will not discharge the liability of a surety on the bond upon which the judgment was entered.[68]

[66] Polk v. Pendleton, 31 Md. 118.

[67] Dengler v. Kiehner, 13 Pa. St. 38, 53 Am. Dec. 441. In this case Gibson, C. J., said: "A judgment-creditor has a right to call on a terre-tenant of land, purchased by him from the debtor while it was bound by the judgment, to show why the debt ought not to be levied on it; and the terre-tenant having slept his time, being warned, is concluded as to everything he might have made matter of defense to the *scire facias*. But the creditor must at least have laid a *prima facie* case; he must show that he whom he calls a terre-tenant actually stood in the relation of one, else there will not have been such privity between them as would estop the latter by the judgment. But who is a terre-tenant? Not every one who happens to be in possession of the land. There can be no terre-tenant who is not a purchaser of the estate, mediately or immediately, from the debtor, while it was bound by the judgment; and when he has taken a title thus bound, he must show how the lien of it has been discharged, whether by payment, release, or efflux of time. These are matters of defense which may be precluded. True, we have a statute which directs notice to be given to occupants, but only to let the lessee of a terre tenant in to a defense, which his landlord may have neglected to make, for his protection. The facts of this case are, that the estate had been bound by the judgment, but that the lien of it had expired when the ancestor of the plaintiffs purchased it. It had ceased to be a judgment of greater effect against the land than it was against the debtor's chattels, and the purchaser's title was paramount to it. He was not a terre-tenant or the lessee of a terre-tenant, and as he had not a day in court, the judgment, being *inter alios*, was not an estoppel. The case is clearly within the principle of Mitchell v. Hamilton [8 Pa. St. 496], and is ruled by it."

[68] Kindt's Appeal, 102 Pa. St. 441.

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§ 493. Defenses.

On the general principle of *res judicata* (which applies equally to proceedings by *scire facias* as to any other action or suit), and on the further ground that this method of reviving a judgment is merely a supplementary step in the original action, the defendant is absolutely precluded from going behind the judgment and offering in defense to the *scire facias* any matter which existed before the rendition of the original judgment and might have been presented in the former proceeding.[69] In no case and under no circumstances can the merits of the original judgment be inquired into by the defendant on a writ to revive it. As a rule, therefore, the only allowable pleas to a *scire facias* upon a judgment are (1) *nul tiel record* (under which the defendant may deny the existence of the original judgment or allege that it is entirely void), and (2) payment, including release, satisfaction, or discharge of the original judgment.[70] Thus the objection that a bond and warrant were usurious cannot be taken to a *scire facias* on the judgment confessed on the warrant.[71] So where the charter of a corporation makes the stockholders personally liable for all debts except loans, and a judgment is obtained against the corporation and a *scire facias* sued out against the stockholders to charge them personally, there are no defenses open to them except (1) that

[69] Allens v. Andrews, Cro. Eliz. 283; Cook v. Jones, Cowp. 727; Thomas v. Williams, 3 Dowl. P. C. 655; Baylis v. Hayward, 4 Ad. & El. 256; Dickson v. Wilkinson, 3 How. 57; United States v. Thompson, Gilp. 614; Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746; Springfield Manuf. Co. v. West, 1 Cush. 388; Thayer v. Tyler, 10 Gray, 164; Sigourney v. Stockwell, 4 Met. 518; Stephens v. Howe, 127 Mass. 164; Robbins v. Bacon, 1 Root, 548; Bradford v. Bradford, 5 Conn. 127; McFarland v. Irwin, 8 Johns. 77; Cardesa v. Humes, 5 Serg. & R. 65; Davidson v. Thornton, 7 Pa. St. 128; Carr v. Townsend, 63 Pa. St. 202; Weaver v. Wible, 72 Pa. St. 469; Pittsburgh, etc., R. Co. v. Marshall, 85 Pa. St. 187; Kemp v. Cook, 6 Md. 305; May v. State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726; Ferebee v. Doxey, 6 Ired. 448; Koon v. Ivey, 8 Rich. 37; Camp v. Baker, 40 Ga. 148; Miller v. Shackelford, 16 Ala. 95; Betancourt v. Eberlin, 71 Ala. 461; Mathews v. Mosby, 13 Sm. & Mar. 422; Anderson v. Williams, 2 Cush. (Miss.) 684; Pollard v. Eckford, 50 Miss. 631; Baxter v. Dear, 24 Tex. 17, 76 Am. Dec. 89; Bell v. Williams, 4 Sneed, 196; Love v. Allison, 2 Tenn. Ch. 111; Vredenburgh v. Snyder, 6 Iowa, 39; Walkins v. State, 7 Mo. 334; Riley v. McCord, 24 Mo. 265.

[70] Blackburn v. Beall, 21 Md. 208; Dowling v. McGregor, 91 Pa. St. 410; McCracken v. Swartz, 5 Oreg. 62.

[71] Lysle v. Williams, 15 Serg. & R. 135.

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they are not stockholders, or (2) that the debt on which the judgment was founded was for a loan.[73] But there may be exceptional cases, in which this rule would not be strictly enforced. Thus, if the defendant dies after verdict and before judgment, and his administrator becomes a party to the suit and judgment passes against him, and execution is issued and returned unsatisfied, then, on *scire facias* against the administrator, he may well plead no assets or insolvency, for he had no time to make such plea in the original suit.[73]

§ 494. Same; Payment, Release, Set-Off.

We have already seen that the payment, satisfaction, release, or discharge of the original judgment is one of the defenses available in an action by *scire facias* to revive it. It is also held that "accord and satisfaction" is also a proper plea to such an action.[74] But evidence is not admissible of payment anterior to the rendition of the original judgment.[75] And so, where a separate judgment has been rendered against one obligor on a joint and several obligation, and a *scire facias* is issued to revive the judgment, the defendant cannot avail himself of a release given to his co-obligor subsequent to the original judgment.[76] Set-off or counterclaim is in no case available as a defense. Where the defendant offered certain claims against the plaintiff, being unsettled partnership accounts, as a set-off, it was held that they were properly ruled out.[77] A terre-tenant, but no one else, may also plead that the land is discharged from the lien of the original judgment.[78]

§ 495. Same; Discharge in Bankruptcy.

A discharge in bankruptcy is also a good defense to a *scire facias* to revive a judgment, provided the defendant was so discharged *after*

[73] Wilson v. Pittsburgh Coal Co., 43 Pa. St. 424.

[73] Hatch v. Eustis, 1 Gallison, 160. And see Colwell v. Rockwell, 100 Pa. St. 133.

[74] McCullough v. Franklin Coal Co., 21 Md. 256.

[75] McVeigh v. Little, 7 Pa. St. 279.

[76] United States v. Thompson, Gilp. 614.

[77] Jenkins v. Anderson (Pa.), 11 Atl. Rep. 558; Anderson v. Gage, Dudley (S. Car.), 319.

[78] Silverthorn v. Townshend, 87 Pa. St. 263.

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the rendition of the original judgment; if before, he ought to have pleaded it in the principal suit.[79] But where a judgment entered before the institution of bankruptcy proceedings is revived by *scire facias*, after the discharge of the bankrupt, upon the land subject to its lien when entered, and so restricted that it can only be enforced on such real estate (and against the proceeds thereof in the hands of a trustee for sale), the defendant is fully protected, and any execution issued on the judgment would be restrained accordingly.[80] In the case of a *scire facias* to revive a judgment *of revival*, a plea that the defendant was discharged as a bankrupt at a time which was after the original judgment but before the judgment of revival, comes too late and is inadmissible.[81]

§ 496. Same; Invalidity of Original Judgment.

Under a plea of *nul tiel record* to a *scire facias* to revive a judgment, the defendant may take advantage of any facts (as total want of jurisdiction) which make the original judgment absolutely *void;* but if the judgment be not absolutely void, the defendant cannot, under this plea, object to mere errors or irregularities.[82] Thus, the failure to file a complaint in a suit commenced by attachment, although an irregularity for which, on appeal, a judgment by default would be reversed, is no defense to a *scire facias* to revive the judgment recovered in that suit.[83] So the defendant is estopped to make the defense that the judgment was rendered against him by default on insufficient service, where he has pleaded the same judgment in bar, on a plea of former recovery, in a subsequent action on the same demand.[84] The defendant can indeed move to set aside the original judgment because surreptitiously obtained, or the judgment will be opened if given on default in ignorance of the party's rights, or upon

[79] Spring Run Coal Co. v. Tosier, 102 Pa. St. 342; Stewart v. Colwell, 24 Pa. St. 67; Duncan v. Hargrove, 22 Ala. 150.

[80] Walters v. Oyster, (Pa.), 1 Atl. Rep. 430.

[81] Stewart v. Colwell, 24 Pa. St. 67.

[82] Campbell's Appeal, 118 Pa. St. 128, 12 Atl. Rep. 299; Hauer's Appeal, 5 Watts & S. 473; Davidson v. Thornton, 7 Pa. St. 128; Tripp v. Potter, 11 Ired. 121; McFadden v. Lockhart, 7 Tex. 573; Anthony v. Humphries, 9 Ark. 176; Bell v. Williams, 4 Sneed, 196.

[83] Betancourt v. Eberlin, 71 Ala. 461.

[84] Kennedy v. Bambrick, 20 Mo. App. 630.

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the showing of a defense which arose afterwards; but otherwise he can only object by showing that the judgment has been paid or never existed.[85] But judgments which are absolute nullities cannot be revived. They cannot be continued in existence when they never had any life.[86]

§ 497. Same; Collateral Agreements.

It is no defense to the revival of a judgment that the plaintiff had agreed not to issue execution.[87] And so a verbal assurance by a grantor that a clause in the deed, reserving the lien of a judgment owned by him, should never be enforced, in whole or in part, against the grantee, one of the heirs of the defendant in the judgment, on the ground of which the deed was accepted, is a purely voluntary contract, and void in a *scire facias* for revival against the grantee as an heir.[88] But on the other hand, under the plea of payment, the defendant may give in evidence that when he executed the bond and warrant upon which the judgment was confessed, the plaintiff promised to cancel it upon an event which has occurred since the judgment.[89] So an agreement entered into prior to the date of a judgment, as to the mode of its discharge, but which was not to be executed until afterwards, and all payments made in pursuance of such agreement, are admissible in evidence in support of the plea of payment and satisfaction.[90] Also, the terre-tenant may offer evidence of a collateral agreement between the original parties, the effect of which is not to impair the judgment but to restrict its lien.[91]

§ 498. Judgment on Scire Facias.

According to the practice obtaining in a majority of the states, and founded on the view that this species of proceeding is not a new suit but a continuation of the original action, it is error for the court

[85] Weber v. Detwiller (Pa.), 8 Atl. Rep. 910.

[86] *In re* Board of Administrators, 37 La. Ann. 916.

[87] Ladd v. Church, 6 Phila. 591.

[88] Codding v. Wood, 112 Pa. St. 371, 3 Atl. Rep. 455.

[89] Hartzell v. Reiss, 1 Binn. 289.

[90] Downey v. Forrester, 35 Md. 117.

[91] Sankey v. Reed, 12 Pa. St. 95.

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to proceed to render a new judgment, on a *scire facias* to revive; the proper entry is, that the plaintiff have execution of the judgment mentioned in the writ and his costs.[92] And, since this entry is but a reiteration of the former judgment, and not an independent sentence, it follows that if the original judgment be reversed, a judgment on a *scire facias* to revive it will likewise fall.[93]

§ 499. Practice in Pennsylvania.

In the state of Pennsylvania the practice is different from that described in the preceding section. "A judgment regularly revived by *scire facias*," says the supreme court of that state, "is not void even if the original judgment was void. A *scire facias* here is a substitute for an action of debt elsewhere; the judgment on it is *quod recuperet*, instead of a bare award of execution; it therefore warrants the awarding of the execution. The last judgment cannot be considered invalid, although it was entered on a *scire facias* issued on a previous judgment that was void. The new judgment, being regular on its face and voidable only, has a sufficient vitality to support the sale."[94] A revival of judgment by amicable *scire facias*, to be valid, and to be notice to subsequent purchasers or subsequent judgment-creditors, must be docketed; it is not sufficient that it be filed among the papers of the original judgment and noted upon the docket entry of such judgment.[95]

[92] Denegre v. Haun, 13 Iowa, 240; Humphreys v. Lundy, 87 Mo. 320; Hanley v. Adams, 15 Ark. 282; Camp v. Gainer, 8 Tex. 372; Murray v. Baker, 5 B. Mon. 172.

[93] Mills v. Conner, 1 Blackf. 7; Eldred v. Hazlett, 88 Pa. St. 16.

[94] Duff v. Wyncoop, 74 Pa. St. 300; Buehler v. Buffington, 43 Pa. St. 278; Custer v. Detterer, 3 Watts & S. 28.

[95] McCleary's Appeal, 1 Watts & S. 299.

[END OF VOLUME I.]

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A TREATISE

ON

THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

By HENRY CAMPBELL BLACK, M. A.

AUTHOR OF TREATISES ON "TAX-TITLES," "CONSTITUTIONAL PROHIBITIONS," ETC.

IN TWO VOLUMES

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PART I. ORIGIN AND GENERAL PRINCIPLES OF THE DOCTRINE OF RES JUDICATA.

§ 500. Basis of the Doctrine of Res Judicata.

That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society. For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus

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the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled. At no period of judicial history have the courts been insensible of these facts. From the earliest times they have steadily adhered to the rule of the conclusiveness of judgments. Out of the multiplicity of controversies that have come before them, presenting a thousand minute shades of difference, they have framed continually more and more detailed rules for the application of the main principle. In this way, by perpetual classification and sub-division, the jurisprudence of the subject has attained a breadth, a depth, and a closeness of texture, which would seem to promise an immediate precedent for the decision of any imaginable case. It would be useless to recapitulate the eulogiums which courts and judges have lavished upon this most salutary doctrine. It is so firmly rooted as a cardinal principle of our legal system, that he who praises its wisdom or its beneficent effects, praises the law itself. But it is important to inquire a little more closely into its technical relations to some other parts of our jurisprudence. The principle of the conclusiveness of judgments has been classified, through a very long period of English law, as a branch of the doctrine of estoppel. That is, the first division of that doctrine, viz., estoppel by record, includes as well the judgments of courts as the records of legislative and other public bodies. If the term estoppel is to be taken in its ancient sense, as denoting the preclusion of a man, by reason of his previous acts or conduct, to *speak the truth*, it is obvious that this classification is objectionable. For if the purpose of judicial proceedings is to ascertain and declare the truth, then the effect of a judgment is to forbid a man to *deny* the truth. Other defects in the analogy will readily present themselves to the mind and need not be enlarged upon here. But if it be well understood that the real point of resemblance between the conclusive effect of a judgment and a genuine estoppel of the technical sort is that each *excludes any contradictory evidence*, then no harm is done in classing them together, and no attempt to break away from the old terminology is necessary. Historically it would be going too far to say that the English rules on this subject have been derived from the doctrine of *res judicata* in the Roman law. In each country the

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importance of the principle, as a sound maxim of public policy, was early recognized, and the rules were gradually developed to keep pace with the increasing complexity of civilization. But that English and American judges have greatly profited by exploring the rules of the civil law in this regard must be plain to the most cursory observer. That system, so admirable in its harmonious and consistent development, has commended itself to the judicial understanding no less in this field of inquiry than in many others. The very fact of the adoption and naturalization of the phrase *res judicata* in our legal language is evidence of this. And our further investigations will disclose many additional proofs of the assistance our jurisprudence has thus derived from the older body of law. As there will be frequent occasion to cite the Roman writers in the following pages, it will be well to add a brief account of the doctrine of *res judicata* as they held it.

§ 501. In the Roman Law.

According to the practice of the Roman law, as it was administered by the prætor, a defendant might repel the plaintiff's claim not only by a direct contradiction of the facts out of which it was alleged to arise, and not only by pleading facts (such as payment) which of themselves extinguished the right of action, though admitting it to have been originally valid, but also by showing such facts as might induce the prætor, on equitable grounds, to declare certain defenses admissible, the effect of which, if established, would be, not indeed to destroy the action *ipso jure*, but to render it ineffectual by means of the *exceptio* thus allowed. An exception therefore resembled our plea in "confession and avoidance" only to the extent that it avoided the action, though without confessing it. Among these exceptions was the *exceptio rei judicatæ*, or plea of former judgment. The name *res judicata* was given to any claim, defense, or disputed question which had been passed upon and determined by the definitive sentence of a court or judge. Of such a matter it was said, *transit in rem judicatam*. And such a sentence, in respect to the points decided by it, was binding and conclusive upon the parties and could not be

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contradicted or impeached by them, as was expressed by the well-known maxim, *Res judicata pro veritate accipitur.*[1] The exception to which we have referred was therefore in effect a plea that the matters stated by the plaintiff had already passed into judgment, and for that reason could not be again litigated or controverted. But in order to produce this effect it was necessary that the previous judgment should have been upon the very same point and between the same parties. "*Et generaliter (ut Julianus definit) exceptio rei judicatæ obstat, quotiens inter easdem personas eadem quæstio revocatur, vel alio genere judicii.*"[2] Such was the general nature of the principle and its effects. Of course there were a multitude of subsidiary rules directing its application to particular sets of circumstances, but these are foreign to our present purpose. Such of the secondary rules as present analogies to the provisions of our own law, or throw light upon the latter, will be considered in their proper connection.

§ 502. Modern European Systems.

In those countries which have modelled their jurisprudence upon the pattern of the civil law, the important doctrine of *res judicata* has been adopted with its main features unchanged from the aspect they wore in the age of the Antonine jurists.[3] The same rules, for example, still obtain in regard to the necessary identity of the parties and the subject-matter. Thus, in the Civil Code of France, it is said: "The authority of the thing adjudged (*chose jugée*) has place only in regard to that which has constituted the object of a judgment. It is necessary that the thing demanded be the same; that the demand be founded upon the same cause; that the demand be between the same parties, and formed by and against them in the same capacity."[4]

§ 503. In Anglo-American Jurisprudence.

This great principle of the conclusiveness of judgments is firmly imbedded in the jurisprudence of England. Though recognized with

[1] Dig. 1, 5, 25. See Broom's Leg. Max. 827; Gaius, 4, 106.

[2] Dig. 44, 2, 7, 4.

[3] See Tomkins & Jencken, Mod. Rom. Law, 94.

[4] *Code Civil*, § 1351.

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more or less distinctness from very early times, it was never so satisfactorily stated as in the great case of the Duchess of Kingston,[5] where Chief Justice De Grey declared the rule to be that "the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." This language, from being constantly quoted with approbation, has acquired almost the force of a statute. Another early and leading case upon the general subject is one decided by Lord Ellenborough,[6] wherein he said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, that creates the estoppel. The recovery itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." That the same principle is equally recognized in our own country could be made apparent by a multitude of citations. It would be idle, however, to adduce authorities in support of a proposition so familiar, and we are content merely to quote from one or two opinions in which its reasons or importance have been especially well stated. In a leading case in Massachusetts, Chief Justice Shaw observed: "It is a principle lying at the foundation of all well conducted jurisprudence, that when a right or a fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and those in privity with them in law or estate. The ground of such principle, we think, when rightly understood, is, that it presents evidence of a fact of so high a nature that nothing which could be proved by evidence *aliunde* would be sufficient to overcome it; and therefore it would be useless for a party, against whom it can be properly applied, to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so. Such is the char-

[5] 20 How. St. Tr. 355; 2 Smith's Lead. Cas. *424.

[6] Outram v. Morewood, 3 East, 346.

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acter of an estoppel by record, as in case of an issue on a question of fact judicially tried and decided."[7] Still more emphatic is the testimony of the federal supreme court to the inviolability of this principle. In the case selected for citation the remarks of the learned judge were specifically directed to the legal system of Louisiana, but his observations will apply with equal truth to any of the United States. He said: "Under the system of that state, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence that commentators upon it have said that *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."[8]

§ 504. The Rules Stated.

After these preliminary observations we are prepared to state categorically the *two main rules* which govern the subject of estoppel by judgment, as the same may be deduced from the general result of all the authorities. The first of these chief rules is as follows: A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.[9] The sec-

[7] Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518.

[8] Jeter v. Hewitt, 22 How. 352, Campbell, J.

[9] Aislin v. Parkin, 2 Burr. 665; Outram v. Morewood, 3 East, 346; Hopkins v. Lee, 6 Wheat. 109; Smith v. Kernochen, 7 How. 198; Doe dem. Parrish v. Ferris, 2 Black U. S. 606; Society v. Hartland, 2 Paine, 536; Campbell v. Strong, 1 Hempst. 265; Divoll v. Atwood, 41 N. H. 443; Hollister v. Abbott, 31 N. H. 442, 64 Am. Dec. 342; Towns v. Nims, 5 N. H. 259, 20 Am. Dec. 578; Spencer v. Dearth, 43 Vt. 98; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Denison v. Hyde, 6 Conn. 508; Church v. Leavenworth, 4 Day, 274; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 323; Burhans v. Van Zandt, 7 N. Y. 523; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Hyatt v. Bates, 35

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ond of the main rules on the subject may be thus stated: A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties or their privies, upon the same cause of action, so long as it remains unreversed.[10] Or, as otherwise phrased: "The doctrine of *res judicata* is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." [11]

§ 505. Judgment can be Nothing less than Conclusive.

It is important to be observed in this connection that a judgment, when offered as evidence in a subsequent litigation, is either *conclusive* evidence, suffering no contradiction, or it is of no effect at all; and it is not admissible as evidence of the matters on which it is based except where it is conclusive. That is to say, it can never be admissible as *tending* to prove a given fact; for if it is offered as against a stranger to the former litigation it is not admissible at all, and if against a party or privy it is conclusive.[12]

Barb. 308; Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Gardner v. Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Finley v. Hambest, 30 Pa. St. 190; Lentz v. Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Whitehurst v. Rogers, 38 Md. 503; Mervine v. Parker, 18 Ala. 241; Wall v. Wall, 28 Miss. 409; Montesquieu v. Heil, 4 La. 51, 23 Am. Dec. 471; Foster v. Wells, 4 Tex. 101; Estill v. Taul, 2 Yerg. 466, 24 Am. Dec. 498; Peay v. Duncan, 20 Ark. 85; Grant v. Ramsey, 7 Ohio St. 157; Babcock v. Camp, 12 Ohio St. 11; Hargus v. Goodman, 12 Ind. 629; Heichew v. Hamilton, 4 Greene (Iowa), 317, 61 Am. Dec. 122; Street v. Beckman, 43 Iowa, 496; Offutt v. John, 8 Mo. 120, 40 Am. Dec. 125; Wales v. Lyon, 2 Mich. 276; Barker v. Cleveland, 19 Mich. 230; Jackson v. Lodge, 36 Cal. 37; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

[10] Young v. Black, 7 Cranch, 567; Ramsey v. Herndon, 1 McLean, 450; Hughes v. Blake, 1 Mason, 515; Smith v. Whiting, 11 Mass. 445; Gardner v. Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Rice v. King, 7 Johns. 20; Baker v. Rand, 13 Barb. 152; Kent v. Hudson River R. Co., 22 Barb. 278; Beall v. Pearre, 12 Md. 550; Jones v. Wetherbee, 4 Strobh. 50, 51 Am. Dec. 653; Thornton v. Campbell, 6 Fla. 546; Hayden v. Boothe, 2 A. K. Mar. 353; Trammell v. Thurmond, 17 Ark. 203; Housemire v. Moulton, 15 Ind. 367; Bougher v. Scobey, 21 Ind. 365; Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761; McKnight v. Taylor, 1 Mo. 282; Chase v. Swain, 9 Cal. 130.

[11] Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125.

[12] Bethlehem v. Watertown, 51 Conn. 490.

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§ 506. Difference between Conclusiveness of Judgment and Bar by Former Recovery.

In a former section we stated that there were *two* main rules of law on the subject of *res judicata*. This was done for the purpose of marking a sharp distinction between the principles governing the two typical cases in which a judgment may be offered as evidence. For first, it may be brought forward as evidence of some one particular point which is involved in a different litigation between the same parties. Or secondly, it may be offered as a bar to the whole action, on the ground that it is a determination, previously had between the parties, of the same controversy. Now these two cases are distinguished by important changes in the rule; in so much that they suggest a clear line of cleavage for the logical division of the general subject, and a principle for the classification of the multitude of authorities. In speaking of the former case, we use the phrase "conclusiveness of the judgment;" in referring to the latter, we shall employ the term "bar by former judgment." The differences between the two cases are found chiefly in two regards, viz.: as respects the identity of the subject-matter in the successive suits, and as respects the scope of the estoppel, as to the matters determined by it. In the first place, if the former judgment is offered as evidence on a particular point, it is immaterial that the causes of action in the two suits are different, but it is necessary that that point should have constituted an *issue* in both suits. "The principle will be found to run through nearly all the American cases, that the judgment of a court of competent jurisdiction directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; hence a judgment may not only be evidence, but conclusive evidence, in relation to such point, and still be no bar, strictly and technically speaking, to a second action."[13] For example, where it was necessary

[13] Spencer v. Dearth, 43 Vt. 98, 105; Lindsey v. Danville, 46 Vt. 144; Beloit v. Morgan, 7 Wall. 619; Merriam v. Whittemore, 5 Gray, 316; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350.

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to the plaintiff's right to recover, in the former suit, that he should prove the defendant to have been a member of a certain firm at a specified time, the judgment will be conclusive evidence of that fact in a subsequent suit between the same parties on an entirely different cause of action.[14] In the second place, there is an important difference as to the matters determined by the former judgment. This point has been treated at large in an opinion of the United States supreme court written by Mr. Justice Field. Said the learned judge: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into

[14] Lynch v. Swanton, 45 Me. 100.

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litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."[15] It is said, in regard to the latter of the two cases supposed, "this species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense."[16] It is scarcely accurate, however, to speak of an estoppel "by verdict," since a verdict alone, without a judgment upon it, is of no force in this direction, and it is the judgment alone which, in any case, creates the estoppel.

§ 507. Scope of this Chapter.

In the present chapter we propose to discuss only the first branch of the main subject as indicated above, viz., the effect of a judgment as evidence in a second and *different* controversy. The effect of a judgment as a *bar* to a second suit is reserved for the next succeeding chapter. The distinction between judgments *in rem* and judgments *in personam*, and between domestic and foreign judgments, is also postponed to later chapters. At present we speak only of domestic judgments *in personam*, and of their conclusiveness upon the points or issues determined by them.

[15] Cromwell v. Sac. Co., 94 U. S. 351. To the same effect, see Radford v. Folsom, 3 Fed. Rep. 199; Laird v. City of De Soto, 32 Fed. Rep. 652; Foye v. Patch, 132 Mass. 105; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Jones v. Commercial Bank, 78 Ky. 413.

[16] Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

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PART II. WHAT JUDGMENTS ARE CONCLUSIVE.

§ 508. Character of the Adjudication.

The principle of the rule as to *res judicata*, except in the case of mere subsidiary motions and some other instances, has no reference to the form or the object of the litigation in which the particular fact is determined which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision.[17] But to create an estoppel, it is essentially necessary that there be a genuine and honest judgment. It must not be merely collusive or simulated. A judgment or sentence, we are told, "is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit. There is no judge; but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." [18]

§ 509. Judgment must be Final.

It is well settled that the doctrine of *res judicata* applies only to *final* judgments, not to interlocutory judgments or orders which the court which rendered them has power to vacate or modify at any time.[19] This principle is also an accepted doctrine of the modern Roman law.[20] It is true that, so far as concerns the further prosecution of the *same case*, an interlocutory judgment for the plaintiff (as, upon

[17] *In re* Roberts, 59 How. Pr. 186.

[18] Earl of Bandon v. Becher, 3 Cl. & Fin. 510. And see Shannon v. Shannon, 4 Allen, 134.

[19] Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co., 14 Abb. New Cas. 215; Webb v. Buckalew, 82 N. Y. 555; Collins v. Jennings, 42 Iowa, 447; 1 Wharton on Ev. § 781.

[20] 1 Pothier on Obl. (Evans' tr.) p. 534.

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a default, where the damages remain to be assessed) determines every fact alleged in the declaration which, but for such judgment, plaintiff would have to prove to establish his right to recover, and precludes the parties from introducing any evidence to enlarge, lessen, or defeat the right so determined.[21] But at the same time a judgment by default only admits for the purpose of the action the legality of the claim or demand in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim.[22] An order admitting an alien to citizenship, is in the nature of a judgment and conclusive upon the question of the length of his residence within the United States.[23]

§ 510. Effect of Pending Appeal.

In many of the states it is held that the pendency of an appeal suspends the operation of the judgment in respect to all its usual effects, and hence, the judgment not becoming final while the appeal remains undetermined, it cannot be pleaded in bar, in the interval, nor used in evidence as an estoppel.[24] This seems also to be the view taken in Pennsylvania, where it is said that, as a judgment must be final before it can operate as an estoppel, a decree in admiralty from which an appeal is taken and pending cannot be pleaded in bar.[25] So in Vermont, an appeal from a judgment of a justice of the peace vacates and annuls the judgment, and thereafter there is no existing judgment which will conclude the parties as a matter of evidence or which can be relied upon as a matter of estoppel.[26] But in several other states the rule is that, although an appeal suspends the operation of the judgment for purposes of execution, still, so long as it remains unreversed, its conclusiveness is not affected by the appeal, and in the meantime it may be pleaded or produced in evidence as if

[21] Morey v. King, 49 Vt. 304; *supra*, vol. 1, § 91.

[22] Cromwell v. Sac. Co., 94 U. S. 351.

[23] The Acorn, 2 Abb. U. S. 434.

[24] Sharon v. Hill, 26 Fed. Rep. 337; Woodbury v. Bowman, 13 Cal. 634; Sherman v. Dilley, 3 Nevad. 21 (compare Rogers v. Hatch, 8 *Id.* 35); Day v. De Yonge (Mich.), 33 N. W. Rep. 527; Haynes v. Ordway, 52 N. H. 284; Ketchum v. Thatcher, 12 Mo. App. 185; Byrne v. Prather, 14 La. Ann. 653; Glenn v. Brush, 3 Colo. 26.

[25] Souter v. Baymore, 7 Pa. St. 415, 47 Am. Dec. 518.

[26] Small v. Haskins, 26 Vt. 209.

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final.[27] Thus in Texas, when the defense of *res judicata* is set up, it is improper to admit in evidence a writ of error, bonds, etc., to show that the judgment has been appealed from, as an appeal does not vacate but merely suspends the judgment.[28] In the federal practice, also, a writ of error from the supreme court to the circuit court does not have the effect, pending the proceedings, to suspend the operation of the judgment of the circuit court as a bar or estoppel.[29]

§ 511. Reversed Judgment.

The reversal of a judgment will of course completely destroy its efficacy as an estoppel, since it annuls the very thing which would have made the judgment conclusive, namely the judicial affirmation that the resolution of the issue propounded was in such and such wise.[30] And the same is true of an order of the court which has been vacated or revoked; it is stripped of any conclusive character it may have possessed.[31]

§ 512. Not affected by Motion for New Trial.

The fact that a motion for a new trial is pending and undetermined in the former action does not destroy or in any way affect the operation of the judgment therein rendered as an estoppel, since such a motion does not operate as a *supersedeas* or stay execution.[32]

§ 513. Voidable and Void Judgments.

In order that a judgment should operate either as a bar to a subsequent action between the parties or as conclusive evidence upon a particular point determined by it, it is necessary that it should be a

[27] Sage v. Harpending, 49 Barb. 166; Burton v. Burton, 28 Ind. 342; Allen v. Mayor, 9 Ga. 286. See also Paine v. Schenectady Ins. Co., 11 R. I. 411; Cloud v. Wiley, 29 Ark. 80.

[28] Thompson v. Giffin, 69 Tex. 139, 6 S. W. Rep. 410.

[29] Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 277.

[30] Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. 9; Regina v. Drury, 3 C. & Kir. 193.

[31] 1 Wharton on Ev. § 781.

[32] Young v. Brehl, 19 Nevad. 379, 12 Pac. Rep. 564. See *infra*, § 684.

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valid and subsisting adjudication. But here the distinction is to be carefully noted between judgments that are absolutely *void* and those which are merely *voidable* for errors in fact or irregularities.[33] The former kind are of no effect whatever, either by way of estoppel or for any other purpose.[34] Hence if the court from which the judgment proceeds had no jurisdiction over the parties to the suit; or if the subject-matter of the controversy was beyond its lawful cognizance; or if, these two elements of jurisdiction being present, it still assumed to go beyond the sphere of the actual litigation, as developed by the pleadings and evidence, and render a judgment or decree upon a matter not in dispute or not submitted to it;[35] in either such case the sentence cannot have the force of *res judicata*. But where the court has jurisdiction of the subject-matter and the parties, and where jurisdiction attaches in the particular case and authorizes the particular adjudication made, its judgment, although it may be voidable for irregularities, or liable to be reversed or set aside for errors in law or fact, is binding and conclusive upon the parties until its effect is destroyed in some regular proceeding for that purpose.[36]

[33] The distinction between void and voidable judgments has already been explained at some length. *Supra*, vol. 1, §§ 170, 215, 218.

[34] Miller v. Barkeloo, 8 Ark. 318; Agnew v. Adams, 26 S. Car. 101, 1 S. E. Rep. 414; Dunklin v. Wilson, 64 Ala. 162; Hancock v. Flynn, 8 N. Y. Supp. 183. "In order to constitute a judgment, on a fact or title distinctly put in issue, an estoppel in another action, between the same parties and their privies, in reference to the same subject-matter, it is essential that the tribunal passing upon the question should have jurisdiction. It is only when they act within the sphere assigned to them that their adjudications are binding upon the parties in future controversies relating to the same matter." Gage v. Hill, 43 Barb. 44.

[35] Houston v. Musgrove, 35 Tex. 594; *supra*, vol. 1, § 242.

[36] Elliot v. Piersol, 1 Pet. 340; Gunn v. Plant, 94 U. S. 664; Gorrill v. Whittier, 3 N. H. 269; Claggett v. Simes, 31 N. H. 56; Minor v. Walter, 17 Mass. 237; Smith v. Shaw, 12 Johns. 256; Wilkinson v. Vorce, 41 Barb. 370; Camberford v. Hall, 3 McCord, 345; Lancaster v. Wilson, 27 Gratt. 624; Den dem. White v. Albertson, 3 Dev. L. 241, 23 Am. Dec. 719; Vickery v. Scott, 20 Ga. 798; Kenan v. Miller, 2 Kelly (Ga.), 325; Rodgers v. Evans, 8 Ga. 143, 52 Am. Dec. 390; Peterman v. Watkins, 19 Ga. 153; Crutchfield v. State, 24 Ga. 335; Ponder v. Moseley, 2 Fla. 207, 48 Am. Dec. 194; Wyman v. Campbell, 6 Port. 219, 31 Am. Dec. 677; Cole v. Conolly, 16 Ala. 271; Moore v. Ware, 51 Miss. 206; Willis v. Ferguson, 46 Tex. 496; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Kern v. Strasburger, 71 Ill. 303; Reed v. Wright, 2 Greene (Iowa), 15; Delaney v. Reade, 4 Iowa, 292; Hart v. Jewett, 11 Iowa, 276; Haygood v. McKoon, 49 Mo. 79; Walker v. Rogan, 1 Wis. 597; *supra*, vol. 1, § 261.

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§ 514. Erroneous Judgments.

It is not essential to the operation of a judgment or decree as an estoppel that it should be *legally right;* it is enough if a court having jurisdiction has decided the point in issue.[37] "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, as a general rule, is regarded as binding in every other court."[38] Hence when a judgment of a court of general jurisdiction is offered as evidence in a collateral suit, and is pertinent to the issue in such collateral suit, the judgment, however erroneous, is admissible, and is conclusive upon the point to which it speaks, unless it is made affirmatively to appear that the court which rendered it had no jurisdiction of parties or subject-matter.[39]

§ 515. In Actions to Annul Judgments.

In an action of nullity, the judgment attacked as null cannot of course be pleaded as *res judicata;* but this principle does not apply where the grounds of nullity asserted had been considered and validly determined by that judgment itself.[40] Nor can the plea of *res judicata* be opposed to an action of which the very object is the interpretation and regulation of the judgment pleaded in bar.[41]

Part III. Organization and Character of the Court.

§ 516. Judgment must be rendered by a Validly Constituted Court.

The validity of a judgment as a bar or estoppel depends primarily upon the organization and character of the tribunal from which it professes to emanate. And it is first of all requisite that the judg-

[37] State v. Ramsburg, 43 Md. 325.
[38] Nations v. Johnson, 24 How. 195.
[39] Watson v. Hopkins, 27 Tex. 637.
[40] Hoggatt's Heirs v. Crandall, 39 La. Ann. 976, 3 South. Rep. 89.
[41] Davidson v. New Orleans, 32 La. Ann. 1245.

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ment should have been rendered by a legally constituted court,—one known to and recognized by the law.[42] In the case cited a document was offered in evidence, purporting to be a judgment, which appeared on its face to have been put forth by certain persons who were members of the English court of Exchequer, joined with others who were not; and it was said that it was evidently a proceeding before persons not forming any court known to the laws of the land as having authority to decide the matter in issue or make the decree in question; and it was therefore adjudged inadmissible. In the language of Chief Justice Marshall: "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."[43] Yet, in the case of domestic tribunals, if the body pronouncing the sentence has the character of a *de facto* court, its adjudications, made in the course of regular proceedings, are generally held valid and binding upon the parties, although afterwards it is declared to be an unconstitutional and unlawful body.[44] We have already considered this point at some length, as also the proper effect to be given to judgments rendered in the courts of the southern states during the late war.[45] It must also be remarked, in this connection, that the courts will in proper cases give effect to decisions made by the ruling bodies of voluntary societies, clubs, or eleemosynary institutions, or by the tribunals appointed within them for the settlement of their own disputes,—not, indeed, on the ground that such bodies are courts known to the law, but because the party has voluntarily bound himself to abide by their decision upon matters within their jurisdiction. Thus, in a case in Iowa, a decision by the "grand lodge" of a certain society, finding that the plaintiff was lawfully expelled from his lodge on account of fraud and deceit practised by him in respect to certain benefits and relief which he claimed to be entitled to, and that consequently his claim for such benefits must

[42] Rogers v. Wood, 2 B. & Ad. 245.

[43] Rose v. Himely, 4 Cranch, 241.

[44] State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Anone, 2 Nott & M. 27; Den d. Gilliam v. Reddick, 4 Ired. 368; State v. Alling, 12 Ohio, 16; Masterson v. Matthews, 60 Ala. 260; State v. Porter, 1 Ala. 688; Mayo v. Stoneum, 2 Ala. 390.

[45] See *supra*, vol. 1, § 173.

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be dismissed, was held to be a good defense to an action at law by him to recover the same claims.[46] Returning to the judgments of the regular courts, it is further to be observed that while the judgments of courts of *concurrent* jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties, the judgments of courts of *exclusive* jurisdiction are evidence whether the matter arises incidentally or is the matter directly at issue.[47]

§ 517. Courts of Equity.

A decree in chancery, like a judgment at law, when rendered on the merits, is final and conclusive upon the parties, not only as to facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated.[48] "We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance.[49]

§ 518. Decrees in Equity binding at Law, and Vice Versa.

In the application of the principle of *res judicata*, there is no difference between courts of law and courts of equity; when an issue of fact or of law has been adjudicated upon the merits in either tribunal, it cannot be again litigated in the other.[50] Thus, subject to certain limitations to be hereafter noticed, a judgment at law on the

[46] Woolsey v. Independent Order, etc., 61 Iowa, 492, 16 N. W. Rep. 576. See also State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. Rep. 760; Sale v. First Baptist Church, 1 Am. & Eng. Corp. Cas. 169. As to college orders, see Rex v. Grundon, 1 Cowp. 315.

[47] Duchess of Kingston's Case, 20 How. St. Tr. 355; Mackintosh v. Smith, 4 Macq. H. L. Cas. 918, 924.

[48] McDonald v. Mobile Life Ins. Co., 65 Ala. 358; Evans v. Tatem, 9 Serg. & R. 261, 11 Am. Dec. 717; Bank of United States v. Beverley, 1 How. 148; Poole v. Seeney (Iowa), 24 N. W. Rep. 520; Low v. Mussey, 41 Vt. 393.

[49] Pennington v. Gibson, 16 How. 65.

[50] Strang v. Moog, 72 Ala. 460; Western Mining Co. v. Virginia Coal Co., 10 W. Va. 250.

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merits will bar any further action between the same parties on the same subject-matter in a court of chancery; the principle being that equity will not overhaul a judgment at law, nor allow its merits to be canvassed a second time, unless some of those circumstances are shown upon which the jurisdiction of equity is peculiarly based.[51] And this rule, here applied to cases involving a determination of the whole cause of action, holds equally good with respect to a particular point or question decided by the judgment at law and coming in issue in the subsequent suit in chancery. For example, where the complainant, being a corporation, without fraud or collusion recovers a judgment against its debtor on a contract, the judgment determines the validity of the contract, and the question cannot be re-opened when the creditor goes into equity to reach and condemn equitable assets.[52] So on a petition to restrain execution under a judgment, equity will not hear the same grounds of defense which were set up and decided at law; they are *res judicata*. The exceptions are, where the defense, though available at law, was not there presented, for reasons which sufficiently excuse the omission; where newly-discovered evidence supplements or changes it; where there was fraud in procuring the judgment; and where the defense is of a purely equitable character.[53] Where a court of equity and a court of law have *concurrent* jurisdiction of the subject-matter of a suit, if the plaintiff elects to proceed at law in the first place, the decision of the question in that court will be conclusive upon the rights of the parties in a subsequent suit in equity, to the same extent that it would have been in a new suit at law in relation to the same matter.[54] "To

[51] Mayor v. Lord, 9 Wall. 409; Tilton v. Cofield, 93 U. S. 163; Cowan v. Wheeler, 25 Me. 267, 43 Am. Dec. 283; Lane v. Lane, 80 Me. 570, 16 Atl. Rep. 323; Hollister v. Barkley, 11 N. H. 501; Shottenkirk v. Wheeler, 3 Johns. Ch. 275; Donovan v. Finn, 1 Hopk. Ch. 59, 14 Am. Dec. 531; Hendrickson v. Norcross, 19 N. J. Eq. 417; Pratt v. Weyman, 1 McCord, Ch. 156; Tilson v. Davis, 32 Gratt. 92; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; McCampbell v. McCampbell, 5 Litt. 92, 15 Am. Dec. 48; Triplett v. Gill, 7 J. J. Mar. 432; Hunt v. Terril, 7 J. J. Mar. 67; Rogers v. Waller, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758; Robbins v. Collier (New Mex.), 5 Pac. Rep. 538; Baldwin v. McCrea, 38 Ga. 650.

[52] Alabama Warehouse Co. v. Jones, 62 Ala. 550.

[53] For a full discussion of this point, see *supra* vol. 1, §§ 365-392.

[54] Orcutt v. Orms, 3 Paige, 459; Southgate v. Montgomery, 1 Paige, 41.

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give a court of equity jurisdiction on the same unvaried matter, properly determined at law, would make a court of equity a court of errors and appeals."[55] But where the subject-matter is one of which equity has *exclusive* cognizance, the case is different. "When a cause involves matter exclusively within the jurisdiction of equity, its final decision at law will not preclude a re-examination in chancery. Under such circumstances the doctrine of *res judicata* does not apply. For as the matter on which the intervention of equity is asked could not have been determined at law, it cannot be within the estoppel of the legal decision."[56]

And conversely, when a cause has been heard on the merits in chancery, this will preclude the parties from any further controversy concerning the same questions in a court of law.[57] But there may be an adjudication of a cause in equity which, while it is final for the purposes of that forum, does not involve such a determination of the real matters in litigation—the merits of the controversy—that it ought in justice to prevent the parties from carrying their dispute to a court of law. Thus, for example, where the maker of a promissory note brings an action in equity to enjoin the negotiation of the note and to obtain its surrender and cancellation, on the ground of fraud and want of consideration, and his petition is dismissed on the merits, he is not thereby estopped from setting up the same matter as a defense to a subsequent action at law against him on the note. Because such prior adjudication amounts to no more than a refusal of equity to interfere with his remedies at law. The court which decided this point expressed itself as follows: "The only effect, in our opinion, of the dismissal of the petition, was to declare that the plaintiff had no equitable right to maintain the action, and that the rights of the parties remained the same as if no action had been brought or injunc-

[55] Overton v. Searcy, Cooke (Tenn.), 36, 5 Am. Dec. 665.

[56] Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Bryant v. Hunter, 3 Wash. C. C. 48; Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Hawkins v. Depriest, 4 Munf. 469.

[57] Washington Bridge Co. v. Stewart, 3 How. 413; Parker v. Kane, 22 How. 1; Hall v. Dodge, 38 N. H. 346; Pierson v. Catlin, 18 Vt. 77; Bigelow v. Winsor, 1 Gray, 299; Powers v. Chelsea Bank, 129 Mass. 44; Williams v. Row, 62 Pa. St. 118; Westcott v. Edmunds, 68 Pa. St. 34; Baldwin v. McCrea, 38 Ga. 650; Putnam v. Clark, 34 N. J. Eq. 532; Pleasants v. Clements, 2 Leigh, 474; Morgan's Heirs v. Patton, 4 T. B. Mon. 453.

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tion allowed, save only that the dismissal was a bar to the bringing of another action [*i. e.*, in equity] for the same matter."[58]

§ 519. Probate Adjudications.

The effect to be given to the decrees and orders of the probate courts, as matters of evidence, is governed by special and peculiar rules. On this account, and because the subject is one of some magnitude, the full discussion of it is reserved for a later sub-division of this chapter, being mentioned here only for the sake of logical connection, and being for the present dismissed with the remark that such adjudications, upon matters within the special cognizance of those courts, are generally held binding at law, though not always in equity.[59]

§ 520. Judgments of the Federal Courts.

The judgment or decree of one of the federal courts constitutes a complete bar to the prosecution of a subsequent suit upon the same cause of action in a state court,[60] or a complete estoppel in respect to the points actually determined by it. And conversely, a point which has been once litigated and determined in a state court cannot be again drawn in question between the parties in a federal court.[61] The courts of the United States, though possessing a special and limited jurisdiction, are not to be regarded as courts of *inferior* jurisdiction in such sense that their proceedings must show jurisdiction on their face in order to be respected and to be protected from collateral impeachment.[62] And although they are organized under a governmental authority distinct from that which creates the state courts, their judgments are not to be treated, in the state courts, as *foreign* judgments; but the courts of a state must receive the judgment of a

[58] Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, *Id.* 471.

[59] See *infra*, §§ 633–646.

[60] Cincinnati, U. & F. W. R. Co. v. Wynne, 14 Ind. 385. Thus if the federal court, sitting in bankruptcy, wrongfully allows the bankrupt the exemption claimed by him, the remedy is not in the state courts. Brengle v. Richardson, 78 Va. 406.

[61] Tioga, etc., R. Co. v. Blossburg, etc., R. Co., 20 Wall. 137.

[62] *Supra*, § 285.

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federal court with the same "full faith and credit" that is to be accorded to the judgment of a court of record in another of the states.[63]

§ 521. Courts of Admiralty.

Where a matter has been directly litigated in a common law court, that judgment may be set up as an estoppel in a court of admiralty.[64] And conversely, the sentence of an admiralty court, within its jurisdiction, is conclusive upon the matters decided when the same issues are brought in question in a court of law.[65] As the decrees made in admiralty are for the most part *in rem*, it is chiefly in that character that we are called upon to consider their binding effect, and the reader will find the subject discussed in a later chapter of this book. As a general rule, a judgment *in rem* is everywhere conclusive as to all the grounds upon which it proceeds. But it has been held that a decree in a suit *in rem* in admiralty, brought by a master to recover his wages, holding that he had deserted his vessel and had therefore forfeited his entire wages, is no bar to a common law action to recover for the same services.[66]

[63] See *infra*, §§ 938, 939.

[64] Goodrich v. The City, 5 Wall. 566.

[65] Cupisino v. Perez, 3 Dall. 194; The Rio Grande, 23 Wall. 458.

[66] Granger v. Judge of Wayne Circuit, 27 Mich. 406; Murphy v. Granger, 32 Mich. 358. In the earlier of these two cases, Judge Campbell said: "No case has been cited, and we have not been able to find any, wherein it has been held that a common law court has any right to prevent a party from enforcing a common law remedy, on account of the pending of any but common law proceedings. It being his absolute right to sue at common law if he chooses, the common law will protect him in it. And inasmuch as proceedings to enforce a security are in their nature collateral to proceedings to establish a personal liability, there is always a possibility at least that, whether the personal claim be made out or not, the remedy against the security may not be established, or, if established, may not be adequate. And while a double satisfaction can never be obtained in any court, concurrent and cumulative remedies are by no means unknown and are not universally forbidden. Questions have frequently arisen on this subject, and the decisions do not sustain the right of courts to interfere with the lawful action of the parties suing. Admiralty and common law remedies have not been regarded as so far alike in their rules and effect as to stand on the same footing. . . . . Neither, until satisfied, will even a judgment *in rem* or *in personam* prevent further proceedings on the same claim." In this case, it will be perceived, the *pendency* of the admiralty proceedings was held no bar to the suit at law. In the later of the cases cited, it was decided that the plaintiff was not estopped by the adverse *judgment* in the admiralty case.

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§ 522. Inferior Courts.

The judgment of a justice of the peace or other inferior tribunal (in a case where jurisdiction of the parties and subject-matter appears from the face of the proceedings), so long as it remains unreversed, is, for every purpose, as binding and conclusive between the parties as that of the highest court of record in the state.[67] Thus, in a suit brought on a judgment recovered in an inferior court, if the record shows jurisdiction of the subject-matter, the judgment will be conclusive against the parties, and no matter of defense which existed anterior to the recovery of the judgment can be pleaded or given in evidence on the trial.[68] In a case in New Jersey, where justices of the peace and surveyors of highways made a determination in writing, relating to encroachments on a road by adjoining land-owners, which determination was partially acted upon, and boundary-lines fixed, and afterwards an entirely different determination, as to the place and encroachments on the same road, was made by the same officers, without the first determination being set aside or reversed, it was held that the action of this body was a judicial one, and the first determination was a bar to the second and rendered it invalid.[69]

§ 523. Ecclesiastical Courts.

In England, the sentence of an ecclesiastical court *ex directo*, in a matter properly cognizable there, is conclusive evidence when the same matter comes in question directly or collaterally in a court of

[67] Flitters v. Allfrey, L. R. 10 C. P. 29; Spaulding v. Chamberlin, 12 Vt. 538, 36 Am. Dec. 358; Pease v. Howard, 14 Johns. 479; Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Boyer v. Schofield, 2 Keyes, 631; Hallock v. Dominy, 69 N. Y. 238; Emery v. Nelson, 9 Serg. & R. 12; Hazelett v. Ford, 10 Watts, 101; Cumberland Coal Co. v. Jeffries, 27 Md. 526; Burke v. Elliott, 4 Ired. 355, 42 Am. Dec. 142; Ludwick v. Fair, 7 Ired. 422, 47 Am. Dec. 333; Shaver v. Shell, 24 Ark. 122; Bernal v. Lynch, 36 Cal. 135; Thompson v. Multnomah Co., 2 Oreg. 34.

[68] Van Doren v. Horton, 25 N. J. Law, 205.

[69] State v. Briggs, (N. J.), 11 Atl. Rep. 423. See Stone v. Augusta, 46 Me. 127; Galbraith v. Black, 4 Serg. & R. 207.

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law or equity.[70] In this country, the tribunals established by religious societies for the adjudication of questions of faith and discipline are not recognized as courts of the land. But the decisions of such ecclesiastical judicatories as to their own jurisdiction in ecclesiastical matters, where there is not a clear absence of jurisdiction, will receive great weight in the civil courts. Where such tribunals have jurisdiction, civil courts will not inquire whether they have proceeded according to the laws and usages of their church, or whether they have decided correctly; but their decisions are final and binding upon the parties and courts.[71] But when *property rights* are concerned, the ecclesiastical courts have no power whatever to pass upon them so as to bind the civil courts. If a member of the church feels himself aggrieved in his rights of property by the action of an ecclesiastical tribunal, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of that tribunal.[72]

§ 524. Courts-Martial.

Courts-martial are lawful tribunals, existing by the same authority as the civil courts of the United States, have the same plenary jurisdiction in offenses by the law military as the latter courts have in controversies within their cognizance, and in their special and more limited sphere are entitled to as untrammeled an exercise of their powers. Provided a court-martial has jurisdiction to hear and determine and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they cannot be reviewed collaterally in any other court in any kind of proceeding.[73] The sentence of such a court, when confirmed, "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-

[70] Meadows v. Duchess of Kingston, Ambler, 756; Kenn's Case, 7 Co. 43b.

[71] Connitt v. Reformed Church, 54 N. Y. 551. See Church v. Witherell, 8 Paige, 296; Gable v. Miller, 10 Paige, 627; Shannon v. Frost, 3 B. Monr. 258; German Reformed Church v. Seibert, 3 Pa. St. 291.

[72] Watson v. Garvin, 54 Mo. 353.

[73] Dynes v. Hoover, 20 How. 65; *In re* White, 17 Fed. Rep. 723; *In re* Davison, 21 Fed. Rep. 618; *Ex parte* Reed, 100 U. S. 13; Brown v. Wadsworth, 15 Vt. 170, 40 Am. Dec. 674; Chesterfield v. Perkins, 58 N. H. 573.

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matter or charge, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court by the verdict of a jury." [74] The binding effect of such sentences also extends to the question of the composition of the court. Thus, the officer who orders a court-martial being necessarily obliged to decide whether thirteen officers can be convened without injury to the service, and also whether the appointment thereon of officers of inferior rank can be avoided, his decision on both points is conclusive.[75]

§ 525. Military Tribunals.

It has also been held that the judgment of a military tribunal erected by the commander of the forces in occupation of a district of conquered territory, for the general administration of justice therein, is binding and conclusive upon the parties in all other courts.[76] This

[74] Dynes v. Hoover, 20 How. 65.

[75] Wooley v. United States, 20 Law Reporter, 631.

[76] Hefferman v. Porter, 6 Cold. 391, 98 Am. Dec. 459. The opinion by Ellett, J., is as follows: "This suit was brought by Hefferman against Porter in September, 1865. The defendant, among other things, pleaded in bar the judgment of a tribunal known as the civil commission, created by order of the commander of the United States forces in the District of Memphis in April, 1863, before which, it is alleged, the plaintiff impleaded the defendant concerning the same causes for which the present action is brought. . . . . The defendant seeks to give effect to the judgment of this tribunal as *res judicata*, while the plaintiff denies to it any validity whatever, and insists that the proceeding was *coram non judice* and void. No objection is stated to the organization of the court, its mode of proceeding, or the forms of trial, judgment, or execution; but it is insisted that such a court is unknown to the constitution and laws of the state, or of the United States, and that it was not within the power of the military commander to create it. . . . . The questions, as to the power of the commander of the military forces of the United States, in any district in the insurrectionary states, held in firm possession by force of arms, during such belligerent occupation, to establish such temporary government in such district, or any part thereof, as he might see proper, and to appoint and control the necessary officers and agents, and to prescribe the mode in which such government should be administered, are not open questions in this court. [Rutledge v. Fogg, 3 Cold. 554; Isbell v. Farris, 5 *Id.* 426.] . . . . Government of such territory, while so held in military occupation, is not

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decision appears to us so entirely in accordance with the doctrines of international law, and so obviously right in itself, that it is rather surprising that it should have been overruled. Such, however, is the case. A later decision of the same court, abandoning the position before taken, announces the rule that while the commander of a military district in insurrectionary territory may establish a tribunal for the trial of *military* offenses, he cannot set up a civil commission for the trial of *civil* causes, and a judgment rendered by such a commission is a nullity.[77] Though the question is no longer of much practical importance, it is to be regretted that the earlier and correct view should have been thus forsaken.

less a duty than a necessity; and the right to create a government, or rather the right to govern, implies the right to determine in what manner and through what agencies such government is to be conducted. The municipal laws of the place may be left in operation, or they may be suspended, and other laws put in force. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their place. Civil rights and civil remedies may be suspended, and military laws and military courts and proceedings may be substituted for them; or new tribunals may be established, and new legal remedies and civil proceedings may be introduced. Halleck, International Law, 380. The conqueror exercises for the time being the powers of a *de facto* government, and the jurisdiction and authority possessed and exercised by the tribunals created by him must depend upon his discretion. . . . . The establishment of legal tribunals for the adjudication and protection of civil rights, is the most favorable condition for the conquered people. There is always more or less security in a judicial body, organized according to the forms of law, for the administration of justice according to the rules that obtain in courts of judicature. There is a dignity and responsibility about such a position that does not fail to command a decent regard to the ordinary rules of justice and of right, or to mitigate the rigor of military rule to some degree of harmony with the humane theories of modern warfare. If, then, the power to create such civil courts exists, by the laws of war, in a place held in firm possession by a belligerent military occupation, and if their judgments and decrees are held to be binding on all parties during the period of such occupation, as the acts of a *de facto* government, we are not able to see on what grounds we can refuse to them a like effect when pleaded as *res judicata* before the regular judicial tribunals of the state, since the return of peace."

[77] Walt v. Thomasson, 10 Heisk. 151. Reliance is mainly placed on the ruling of the Judge Advocate General (Holt) in two cases before the said commission, apparently not reported.

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§ 526. Awards of Arbitrators.

In regard to its conclusiveness upon the points adjudged, and as a bar to a future action for the same cause, an award by arbitrators, which is regular and final, has precisely the same effect as a judgment or decree of a court.[78] And the opinion has been expressed, in New York and some other states, that after a submission of all demands of the parties against each other, and an award thereon, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award; though the demand for which the action is brought was by mistake omitted to be laid before the arbitrators, or intentionally withheld, and was not considered or decided on by them.[79] But the preponderance of authority is opposed to this view. It is generally held that an award will not operate as a bar to a future action for a demand which was not actually submitted to the arbitrators nor adjudicated by them, notwithstanding it was in existence when the submission was made, and although the agreement was to submit all demands.[80] If arbitrators, to whom an action on a mortgage is submitted, estimate, in making their award, other claims of the plaintiff against the defendant, without the plaintiff's express assent thereto, and their award does not in amount

[78] Greene v. Darling, 5 Mason, 201; Roth v. Colvin, 32 Vt. 125; Bulkley v. Stewart, 1 Day, 130, 2 Am. Dec. 57; Holmes v. Aery, 12 Mass. 134; Boston Water Power Co. v. Gray, 6 Met. 131; Armstrong v. Masten, 11 Johns. 189; Brazill v. Isham, 2 Kern. 9; Prentiss v. Farnham, 22 Barb. 519; Sinclair v. Tallmadge, 35 Barb. 602; Hostetter v. Pittsburgh, 107 Pa. St. 419; Lloyd v. Barr, 11 Pa. St. 41; Richardson v. Lanning, 2 Dutch. 130; Corbin v. Adams, 76 Va. 58; Ballard v. Mitchell, 8 Jones, 153; Whitlock v. Crew, 28 Ga. 289; Anders v. Anders, 9 Ired. 214; Penisten v. Somers, 15 La. Ann. 679; Groat v. Pracht, 31 Kans. 656, 3 Pac. Rep. 274; Rogers v. Holden, 13 Ill. 293; Ross v. Watt, 16 Ill. 99; Jarvis v. Fountain Water Co., 5 Cal. 179; Johnston v. Paul, 23 Minn. 46; Kane v. Fond du Lac, 40 Wis. 495.

[79] Wheeler v. Van Houten, 12 Johns. 311; Bunnel v. Pinto, 2 Conn. 431; Owen v. Boerum, 23 Barb. 187; McJimsey v. Traverse, 1 Stew. 244, 18 Am. Dec. 43; Robinson v. Morse, 26 Vt. 392; Lowenstein v. McIntosh, 37 Barb. 251.

[80] Webster v. Lee, 5 Mass. 334; Newman v. Wood, Mart. & Yerg. 190; Whittemore v. Whittemore, 2 N. H. 26; Buck v. Buck, 2 Vt. 417; Hewitt v. Furman, 16 Serg. & R. 135; Bixby v. Whitney, 5 Me. 192; Edwards v. Stevens, 1 Allen, 315; Hodges v. Hodges, 9 Mass. 320; King v. Savary, 8 Cush. 309; Elliott v. Quimby, 13 N. H. 181.

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exceed the plaintiff's claim on the mortgage, he will not thereby be barred in an action to recover those other claims from the defendant.[81] In general a mere agreement to submit a demand to arbitration, without action taken upon it, is no bar to a suit upon the demand at law.[82] But in Pennsylvania it is held that where a contract for the construction of works contains a stipulation that all questions of dispute arising thereunder shall be submitted to a designated person as arbitrator for a final decision, such stipulation is a bar to an action at common law for any such matter in dispute.[83] In some of the states the rule is, that the award itself holds exactly the position of a verdict of a jury; that is, it is not definitely conclusive upon the parties until the judgment of the court has been entered upon it.[84] An award of arbitrators finding "no cause of action" is a finding for the defendant, and a judgment upon it is conclusive of the plaintiff's right.[85] An award is also said to be evidence of every fact the decision of which is clearly implied in such award, although not expressly stated to have been decided.[86] In regard to questions of law, the rule is that if they are distinctly submitted, the decision of the arbitrators will be final unless it appears upon the award that the arbitrators, intending to decide according to the law, have plainly mistaken what it is, and have acted on an erroneous rule of law.[87] The well-known principle, that arbitrators are not bound to proceed according to the ordinary rules of evidence, sometimes produces the curious result that, while an award is conclusive in a court of law, a judgment of a court may not be conclusive in an arbitration. It is said that if parties submit to referees all demands between them, a judgment recovered by one of them against the other, and by him laid before the referees, will not be conclusive upon them, but they may, should they see fit, re-examine it upon its merits. "They were not bound," said the supreme court of New Hampshire in deciding this point,

[81] Conelly v. Arnold, 6 Watts, 312.

[82] Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

[83] Hostetter v. Pittsburgh, 107 Pa. St. 419.

[84] Todd v. Old Colony & F. R. Co., 3 Allen, 18, 80 Am. Dec. 49; Taylor v. Sindall, 34 Md. 38; Shelbina Association v. Parker, 58 Mo. 327.

[85] Green v. Fricker, 7 Watts & S. 171.

[86] Shackelford v. Purket, 2 A. K. Mar. 435, 12 Am. Dec. 422.

[87] Crabtree v. Green, 8 Ga. 8.

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"by the legal qualities which might have belonged to it in a court of law. If they considered the judgment inequitable, they were at liberty to disregard it in whole or in part, and to decide according to what they considered the equity of the case. They might admit evidence to show it was improperly rendered on the merits, as they might admit other evidence which would be inadmissible in a court of law."[88] On principles similar to those which govern the law of awards, it is held that when parties have agreed to refer a case to the "commission of appeals" of a state and to abide by its award, the judgment of that court is binding and conclusive upon the supreme court as to all questions so settled in that case.[89]

§ 527. Decisions of Appellate Courts.

The doctrine of *res judicata* applies as well to judgments of courts of last resort as to those of *nisi prius* courts. If the same subject-matter comes in question in a second action before an appellate court, it is bound by its own former decision.[90] And where an appeal is taken to the court of last resort, and the action of the court below is affirmed for want of assignment of errors, the matter is *res judicata* and the parties are concluded, notwithstanding the fact that the appellate court had no opportunity to pass upon the merits of the question raised by the appeal.[91]

§ 528. Judgment given by Divided Court.

It has sometimes been contended in argument that a judgment pronounced by a divided court was, for that reason, not conclusive. But the authorities distinctly declare that such a judgment is just as conclusive and binding upon the parties, in every respect, as if rendered upon the concurrence of all the judges upon every question involved in the case.[92]

[88] Baker v. Merrifield, 18 N. H. 357.
[89] Stelle v. Shannon, 62 Tex. 198.
[90] Chouteau v. Gibson, 76 Mo. 38; Lucas v. San Francisco, 28 Cal. 591; Sturgis v. Rogers, 26 Ind. 1.
[91] Miller v. Bernecker, 46 Mo. 194.
[92] Durant v. Essex Co., 7 Wall. 107.

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§ 529. Criminal Sentences not Evidence in Civil Issues.

Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them respectively are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact.[93] To illustrate,—in a suit by a widow for the homicide of her husband, the record of the acquittal of the defendant, under an indictment for the murder of the husband, is not evidence for the defendant in the civil suit, and a plea of such acquittal is demurrable.[94] Again, on the trial of an action on a policy of insurance on the life of the insured, made on condition that it should be void if he should die in the known violation of any law, the record of the trial and acquittal by a court of competent jurisdiction of the person who killed the insured, is not competent evidence to prove that the condition was broken.[95] So again, the owner of stolen goods may maintain an action for them against a person in whose possession they are found, notwithstanding the fact that such person, on an indictment in the criminal court, was acquitted of the charge of having knowingly received them from the hands of the thief.[96] For another example, in an

[93] Mead v. Boston, 8 Cush. 404; Cluff v. Insurance Co., 99 Mass. 317; Jones v. White, 1 Strange, 68; Hutchinson v. Bank, 41 Pa. St. 42; Corbley v. Wilson, 71 Ill. 209; Petrie v. Nuttall, 11 Exch. 569; Betts v. New Hartford, 25 Conn. 180; Clark v. Irvin, 9 Ohio, 131; Chesapeake, O. & S. W. R. Co. v. Dyer Co., (Tenn.) 11 S. W. Rep. 943. The reason of the rule is well stated by Dr. Wharton in his work on Evidence (§ 777) as follows: "The reasons why a judgment in a civil case should bind all subsequent proceedings between the same parties on the same cause of action do not apply, so it is generally argued, when a criminal judgment is sought to be afterwards used in civil litigation. In the first place, while the parties to a civil suit, by appearing, accept the arbitrament of the court, and thereby enter into obligation to be bound thereby, in a criminal prosecution the defendant is regarded as attending by compulsion, and as entering into no such obligation. In the second place, the parties to a civil suit cannot be identical with those to a criminal suit, for in a criminal suit it is the sovereign who, nominally at least, prosecutes. Hence, in the Roman law, as well as in our own, a prior criminal judgment is not conclusive as to a subsequent civil suit for the same subject-matter."

[94] Cottingham v. Weeks, 54 Ga. 275.

[95] Cluff v. Insurance Co., 99 Mass. 317.

[96] Rohm v. Borland (Pa.), 7 Atl. Rep. 171.

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action for slander, which consisted in charging the plaintiff with having committed a certain crime, the defendant pleaded the truth of the words spoken, and on the trial the court permitted the plaintiff to read in evidence the record of an indictment against him for the same crime and of his trial and acquittal; but on appeal it was held that this was error.[97] In respect to the general rule thus stated and exemplified, the Roman law agrees with our own.[98] But the modern French law attaches a much higher degree of conclusiveness to criminal sentences; for it permits the litigation of a claim presented before a civil tribunal only in cases where it is not inconsistent with a previous decision emanating from the criminal jurisdiction.[99]

Apparent exceptions to the general rule are to be found in some of the cases, but on examination they will not be found to contradict the leading principle. Thus, in an action of tort for malicious prosecution, the record of the criminal proceedings had against the plaintiff and the judgment of acquittal in which those proceedings resulted, are admissible in evidence to show what became of the prosecution and the *fact* of the plaintiff's acquittal.[100] But this does not contravene our general rule. For, as we shall hereafter see more fully, a judgment is always evidence, in all issues, as against all persons, strangers as well as parties, to prove the fact of its own rendition; while the rule contended for only goes to the extent of saying that the criminal sentence is not evidence in the civil issue of the facts on which it is founded. Hence if it were attempted, in the case supposed, to go beyond the limits above indicated, and make the judgment of acquittal prove the plaintiff's *innocence* of the crime charged, the courts would promptly deny it any such effect. And this ruling would be sustained by the further consideration that evidence of the party's guilt or innocence is not relevant in such a case, the real question being whether the prosecutor had probable cause for believing him guilty.[101]

[97] Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98.

[98] 1 Wharton on Ev. § 777, citing L. 8 Cod. de Ord. Jud. iii. 8.

[99] Marcadé, Explication du Code Napoléon, t. 5, pp. 192-199.

[100] Caddy v. Barlow, 1 Man. & Ry. 275; Arundell v. Tregono, Yelv. 116; Legatt v. Tollervey, 14 East, 301; Basebe v. Matthews, L. R. 2 C. P. 684.

[101] Skidmore v. Bricker, 77 Ill. 164.

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Again, it may happen that the *parties are the same* in the two actions, civil and criminal; and here, the main reason of the rule being taken away, the rule itself will not always apply. Thus it is said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of the preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless the fact or act has been put in issue and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. When an acquittal in a criminal prosecution on behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same." [102]

In the next place, a criminal sentence may be admissible in evidence as a species of *admission*, although, strictly, it is not proper to

Compare Maybee v. Avery, 18 Johns. 352.

[102] Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. Rep. 437. See also Starkie on Ev. pt. 2, § 80; Cooke v. Sholl, 5 T. R. 255. That even where the parties are the same, a criminal judgment is not always and necessarily admissible evidence in a civil issue,

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be received as *res judicata*. Thus, in a civil action for assault and battery, the defendant gave in evidence, in mitigation of damages, the record of his conviction in a criminal court on an indictment for the same assault and a receipt of the sheriff for the fine and costs of the prosecution. The judge charged that, the record of such conviction having been given in evidence by the defendant himself, it was no longer matter of doubt that an assault had been committed, and the plaintiff would be entitled to some damages. And herein, it was held, there was no error.[103] On the same principle, if the defendant in a criminal prosecution pleads "guilty," the record of such prosecution and plea may be used as evidence against him in a subsequent civil action involving the same subject-matter, as tending to prove the act or fact on which the indictment was framed. But since it is not the criminal *judgment*, but the *plea*, or rather the fact of his having so pleaded, that thus becomes evidence, it is not conclusive upon him. It is receivable as an admission or confession, but it may be controverted, and must be weighed by the jury.[104] And a plea of *nolo contendere* to an indictment with a protestation of the defendant's innocence will not conclude him in a civil action from disputing the facts charged in the indictment.[105]

The converse of the foregoing general rule holds equally true. That is, a judgment in a civil action is not ordinarily admissible as evidence in a subsequent criminal prosecution. For example, a judgment recovered against a defaulting tax collector and his sureties, in a civil action at the suit of the county, is not competent evidence against them in a prosecution on the criminal side afterwards instituted for the default.[106] And so a former judgment in a civil action is not conclusive in a *penal* action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions.[107] But in one case, in a prose-

may be seen from United States v. Schneider, 85 Fed. Rep. 107.

[103] Moses v. Bradley, 8 Whart. 272.

[104] Green v. Bedell, 48 N. H. 546; Clark v. Irvin, 9 Ohio, 131; Bradley v. Bradley, 11 Me. 367; Woodruff v. Woodruff, 11 Me. 475; Regina v. Fontaine Moreau, 11 Q. B. 1033; 1 Phil. on Ev. 25; 1 Whart. on Ev. §§ 783, 838.

[105] Commonwealth v. Horton, 9 Pick. 206.

[106] Britton v. State, 77 Ala. 202.

[107] Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646.

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cution for the unlawful removal of a fence from land, it was considered that a judgment in a former civil action between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line between their respective lands was defined and settled, was admissible in evidence. The court here recognized the general rule that civil judgments are not admissible in criminal prosecutions, but thought that the establishment of the boundary line was one of the "legal consequences" of the judgment, to prove which, as well as the fact of its rendition, a judgment is always admissible, even against strangers.[108] But one criminal sentence is always receivable as evidence of a relevant fact in another criminal proceeding against the same person. Thus, on the trial of an indictment for an assault on a police officer, committed while the defendant was under arrest for drunkenness, the record of a conviction and sentence of the defendant for drunkenness at the time of his arrest is conclusive evidence of that fact.[109]

§ 530. Decisions of U. S. Land Department.

The decisions of the registers and receivers of the United States land department, upon all questions of fact, when acting within their peculiar and exclusive jurisdiction, if unaffected by fraud or mistake, are final and conclusive and cannot be reviewed by any other branch of the government or any court.[110] So also the decision of the surveyor-general upon a contest in relation to the right to land is conclusive between the parties and the courts cannot reopen the question. "Congress has organized a land department of the government,

[108] Darrell v. State, 83 Ind. 357.

[109] Commonwealth v. Feldman, 131 Mass. 588.

[110] Wilcox v. Jackson, 13 Pet. 511; Lytle v. Arkansas, 9 How. 333; Barnard v. Ashley, 18 How. 44; Garland v. Wynn, 20 How. 6; Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 Wall. 653; Shepley v. Cowan, 91 U. S. 340; Moore v. Robbins, 96 U. S. 535; Mitchell v. Cobb, 13 Ala. 137; Boatner Ventress, 8 Mart. N. S. 644, 20 Am. Dec. 266; Robbins v. Bunn, 54 Ill. 48, 5 Am. Rep. 75; Boyce v. Danz, 29 Mich. 146; Lamont v. Stimson, 8 Wis. 545, 62 Am. Dec. 696; State v. Batchelder, 7 Minn. 121, (Gil. 79); Hosmer v. Wallace, 47 Cal. 461; Powers v. Leith, 58 Cal. 711; Ferry v. Street (Utah), 11 Pac. Rep. 571; Abbott v. Bahr, 8 Chand. 210; Jeffords v. Hine (Ariz.), 11 Pac. Rep. 351. See Smelting Co. v. Kemp, 104 U. S. 636.

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whose business it is made to determine those questions which arise out of the disposal of public lands, and the courts of the country cannot interfere to regulate or control that business without introducing uncertainty and confusion into the whole system."[111] And similarly, a decision of the board of commissioners of Mexican land claims (created by act of congress of March 3, 1851), jurisdiction having attached, cannot be attacked collaterally for mere errors or irregularities.[112] But in order that the rulings of these officers should be entitled to the character of *res judicata*, it is vitally necessary that they should have kept strictly within their jurisdiction. For instance, "if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction, as much so as if a court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case beyond that sum."[113] Further, it is said that the registers and receivers of the land-office are empowered to decide on the true location of grants or confirmations, and so far their decisions are conclusive; but not on the legal and often complicated questions of title, and as to these points their rulings are not final.[114] It is also an important and well-settled rule that when these officers have been induced by means of fraud, mistake, or imposition, to convey a portion of the public domain to a person not entitled thereto, relief will be granted in equity.[115] Thus their decision in allowing a pre-emption claim is examinable in a court of chancery, for fraud or mistake, at the suit of one legally entitled to a right of pre-emption in the same land.[116] This rule was fully developed in a recent important decision of the United States supreme court, wherein it was held that the government has the same right to resort to a court of equity to set aside or annul a patent for land, where fraud has been practised in procuring its issue, as an individual would have in regard to his own deed procured under sim-

[111] Pin v. Morris, 1 Oreg. 280.
[112] Beard v. Federy, 3 Wall. 478.
[113] Wilcox v. Jackson, 13 Pet. 511.
[114] Tate v. Carney, 24 How. 357.
[115] Wynn v. Garland, 16 Ark. 440; Bisson v. Curry, 35 Iowa, 72; State v. Bachelder, 5 Minn. 223, (Gil. 178); Garland v. Wynn, 20 How. 77; Johnson v. Towsley, 13 Wall. 72; Moore v. Robbins, 96 U. S. 535.
[116] Wynn v. Garland, 16 Ark. 440.

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ilar circumstances. And it was said that, without denying that the officers of the land department exercise functions which are in their nature judicial, this doctrine is to be referred to cases in which individuals have, as against each other, contested the right to a patent before those officers, whose decision upon the facts before them is then held to be conclusive between those parties. But when fraud or imposition has been practiced upon those officers, or when they have radically mistaken the law in regard to the disposition of the public lands, it has always been held that a court of equity could afford a remedy; and where there has been no contest, and the patent is issued upon the mere production by the claimant of his *ex parte* proofs of performance of the necessary conditions, it is especially necessary that the government should have a remedy in equity if those proofs were founded in fraud and perjury.[117]

§ 531. Rulings of Government Officials.

By an extension of the principle of *res judicata*, from its strict application to the judgments of the courts, the conclusive effect of a judgment has been accorded to the rulings of certain officials of the general government, when exercising functions which are judicial in their nature. Thus the decision of the United States commissioner of patents, in granting or extending a patent, cannot be attacked collaterally for fraud and imposition practised upon him, but only in a direct suit to impeach and set aside the patent.[118] So also, rulings made by the comptroller of the currency, upon matters within his special jurisdiction in respect to the national currency, are held binding in collateral inquiries.[119] But it has been said that the decision of the secretary of the interior, that a pre-emption claim is valid, is not an estoppel upon one who contested the same, not as a pre-emption claimant, but claiming under an act of congress donating land to a state, even if it is binding upon contesting claimants of the

[117] United States v. Minor, 114 U. S. 233, 5 Sup. Ct. Rep. 836. And see United States v. Rose, 24 Fed. Rep. 196.

[118] Eureka Co. v. Bailey Co., 11 Wall. 488; Rubber Co. v. Goodyear, 9 Wall. 788.

[119] Casey v. Galli, 94 U. S. 673.

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right to pre-emption.[120] The appraisement and liquidation of customs-duties by the appraiser and collector are considered binding and conclusive in all collateral proceedings, and in the absence of any re-liquidation or re-appraisement, cannot be disregarded or reviewed except in the modes provided in the statutes; a suit in the district court is not one of those modes.[121]

§ 532. Boards of Municipal Officers.

On the principles laid down in the preceding sections, the character of conclusiveness attaches to the rulings made by certain boards or officers of municipal corporations. Thus, when the statutes commit to a board of county commissioners or supervisors or auditors, or to a town council, the duty of examining and auditing claims against the municipality, their action in auditing, adjusting, allowing, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive unless reversed on appeal.[122] "The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned in a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful and rests upon disputed evidence, and what amount shall be allowed, when not fixed by statute, are questions which the statute commits to the determination of the board of audit, and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction and acts in good faith, its audit cannot be overhauled, but is final as well to the tax-payers as to the claimant."[123] So also, road commissioners, in adjudicating upon the necessity of a road and in locating and making assessments for the same, act judicially; the records of their proceedings and judgments are entitled to the same respect as the records and judg-

[120] Megerle v. Ashe, 33 Cal. 74.

[121] United States v. McDowell, 21 Fed. Rep. 563.

[122] Osterhoudt v. Rigney, 98 N. Y. 222; Placer Co. v. Campbell (Cal.), 11 Pac. Rep. 602; Colusa Co. v. De Jarnett, 55 Cal. 375; Carroll v. Board of Police, 28 Miss. 38; Kelly v. Wimberly, 61 Miss. 548; State v. Buffalo County, 6 Nebr. 454; Maxwell v. Board of Commissioners (Ind.), 19 N. E. Rep. 617.

[123] Osterhoudt v. Rigney, 98 N. Y. 222.

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ments of other tribunals, so long as they act within their jurisdiction, and cannot be attacked collaterally.[124] But in Indiana, and possibly elsewhere, a board of city commissioners, appointed under a statute in relation to the laying out of streets in cities, and charged with the assessment of benefits and damages to property-owners, do not constitute a court, nor have their reports the effect of judgments.[125] Where the law has committed to the common council of a city the duty of canvassing the returns and from them determining the result of an election, and the council has performed that duty and made their determination, the question as to the effect of the returns made is not open for determination by a jury in an action in which the title of the officer to his office comes up collaterally. "If the question had arisen in an action in the nature of a *quo warranto* information, the evidence would have been competent. But it would be intolerable to allow a party affected by the acts of a person claiming to be an officer, to go behind the official determination to prove that such official determination arose out of mistake or fraud."[126] Where a board of commissioners of police are invested with jurisdiction to try members of the police force of a city for immoral or disorderly conduct, their judgment that a policeman has been guilty of such conduct is conclusive until reversed.[127] In England, on similar principles, orders of the commissioners of sewers, requiring land-owners to repair and alter sea-walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon.[128]

§ 533. Judgments Conclusive on Habeas Corpus.

The conclusive and irrefragable character of a judgment when it is brought in question in proceedings by *habeas corpus*, has been clearly stated by the supreme court of Pennsylvania in the following language: "On a *habeas corpus* the judgment even of a subordinate

[124] Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.

[125] City of Elkhart v. Simonton, 71 Ind. 7.

[126] Hadley v. Mayor of Albany, 33 N. Y. 603, 88 Am. Dec. 412.

[127] Queen v. Atlanta, 59 Ga. 318.

[128] Regina v. Leigh, 10 Ad. & El. 898.

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state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until it is regularly brought up for revision. . . . . But the rule is so familiar, so universally acknowledged, and so reasonable in itself, that it requires only to be stated. It applies with still greater force, or at least for much stronger reasons, to the decisions of the federal courts. Over them we have no control at all, under any circumstances, or by any process that could be devised." [129] The proceedings on *habeas corpus* in the federal courts are not governed by the laws of the states on that subject, but by the common law of England as it stood at the adoption of the constitution, subject to such alterations as congress may prescribe; and under that system, a decision under one writ, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs by any court or magistrate having jurisdiction.[130] We have already treated of the collateral impeachment of judgments by *habeas corpus* proceedings, and the limitations under which the validity of the sentence may be thus inquired into.[131]

Part IV. Of the Persons concluded by Judgments.

§ 534. Parties and Privies.

To state the rule in its most general form, we may say that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation.[132] And, in the case of a former adjudication set up in defense, it is no bar unless the parties to the

[129] Williamson's Case, 26 Pa. St. 9, 17, 67 Am. Dec. 374. See also Doyle v. Commonwealth, 107 Pa. St. 20; State v. Bechdel, 37 Minn. 360, 34 N. W. Rep. 334; *Ex parte* Adams, 25 Miss. 883, 59 Am. Dec. 234; *In re* Graham (Wis.), 43 N. W. Rep. 148.

[130] *Ex parte* Kaine, 3 Blatchf. 1.

[131] *Supra*, vol. 1, §§ 254–259.

[132] Day v. Combination Rubber Co., 2 Fed. Rep. 570; Ainslie v. Mayor of New York, 1 Barb. 168.

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first judgment are the same as those to the second proceeding.[123] On the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way.[124] Further, a valid and subsisting judgment is conclusive against *each* party,—against the defendant, that the amount adjudged is due, and against the plaintiff, that no more is due on account of the contract or liability put in suit.[125] Now it becomes important to inquire, who are considered *parties* to a litigation in such sense as to be bound by the decision therein? According to the definition first formulated by a leading writer on Evidence, and followed in many cases, "those are held to be parties who have a right to control the proceedings, to make defense, to adduce and cross-examine the witnesses, and to appeal from the decision if any appeal lies."[126] The classification proposed by a learned judge in Georgia is also worth quoting here. It is as follows: "Under the term *parties* the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers by its result, and for or against whom the record of the former proceedings might be adduced in evidence in another trial; those who have the right to be heard, and to offer testimony and examine the witnesses. *Privies* are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator. All others not included in either of these classes are of course *strangers*."[127] A disposition is manifest in some of the authorities to require record evidence of the connection of a party with the suit. "Parties to a judgment are those whose names appear upon the record as plaintiff and defendant."[128] "To ascertain the

[123] Degelos v. Woolfolk, 21 La. Ann. 706.

[124] Appeal of Chandler's Ex'r, 11 Week. Notes Cas. 421.

[125] Bank of Mobile v. Mobile & Ohio R. Co., 69 Ala. 305.

[126] 1 Greenleaf on Ev. § 535; Peterson v. Lothrop, 84 Pa. St. 228; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626.

[127] Brown v. Chaney, 1 Kelly (Ga.), 412, Lumpkin, J.

[128] Same's Appeal, 26 Pa. St. 184; Walters v. Wood, 61 Iowa, 290, 16 N. W. Rep. 116.

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extent of the effect of a judgment or decree, in relation either to the matters thereof or parties thereto, the record of the suit in which it may have been rendered or pronounced should be explored. It affords the information *most*, if not *solely*, to be relied upon, in the progress of such an inquiry. The law imputes to the record absolute verity, and will not permit the matter which it imports to be gainsaid or traversed. . . . . And hence results (as we believe) the *rule* that none are to be considered as parties to a suit, and bound in that character by a judgment or decree therein, but those who are named as such in the record thereof." [139] While it is true that, in the majority of cases, the record will furnish all necessary information as to the parties to the prior proceeding, and while undoubtedly it should be consulted in all cases, the above statement of the rule cannot be accepted without important qualifications. For, in the first place, it may happen that a party is sued by a wrong name. Yet if he is rightly served, and makes no objection to the misnomer, and is afterwards connected with the record by proper averments, he will be conclusively bound by the judgment.[140] And in the second place, as will appear more fully in succeeding sections, persons often connect themselves with a suit, by actively assuming the prosecution or defense, and thereby become bound by the result of the litigation, although not appearing on the record. But with such exceptions as these, it is generally true that the record-parties are those who are estopped by the judgment. It is also said that no person is a party to a suit, or bound by a judgment therein, without a judicial notice of some sort.[141] And this may be readily conceded, in so far as it applies only to those who are *involuntarily* brought into the litigation.

§ 535. Persons under Disabilities.

Whether a judgment is binding and conclusive as an estoppel upon a married woman, an infant, or a lunatic, will depend upon the question whether a judgment against such a person is to be con-

[139] Allin v. Hall, 1 A. K. Marsh. 525.
[140] Barry v. Carothers, 6 Rich. 331; *supra*, vol. 1, § 213.
[141] Shaefer v. Gates, 2 B. Mon. 458, 38 Am. Dec. 164.

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sidered valid, voidable, or void. If it is a mere nullity, it has no force or virtue whatever as evidence or as a bar. But otherwise, no matter how irregular or erroneous, it must be held conclusive in all other proceedings, until duly reversed or set aside. The validity of such judgments was discussed in detail in an earlier chapter.[142]

§ 536. Party bound only in the Capacity in Which he Appears.

It is not only necessary that the person sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character.[143] "A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment." [144] This rule is one of the fundamentals of the jurisprudence of the subject. For it is found in the Roman law,[145] as well as our own, and is also a familiar principle of the modern French and other continental systems.[146] To proceed to illustrations of the rule:—a plea of former adjudication which shows that the party sought to be estopped in his individual capacity had sued in the former case in the character of guardian, is bad on demurrer unless it also shows that the merits of the case, as to such party individually, were in some way involved in the issues and determined by the prior judg-

[142] As to married women, see *supra*, vol. 1, §§ 188–192; as to infants, §§ 193–196; as to insane persons, § 205.

[143] Robinson's Case, 5 Co. 32b; Fenwick v. Thornton, Mood. & M. 51; Leggett v. Great Northern Ry. Co., 1 Q. B. Div. 599; Lander v. Arno, 65 Me. 26; Davis v. Davis, 30 Ga. 296; Sample v. Coulson, 9 Watts & S. 62; Brooking v. Dearmond, 27 Ga. 58; Erwin v. Garner, 108 Ind. 488, 9 N. E. Rep. 417; Mansfield v. Hoagland, 46 Ill. 359; Stoops v. Woods, 45 Cal. 439.

[144] Rathbone v. Hooney, 58 N. Y. 463; Jennings v. Jones, 2 Redf. Surr. 95.

[145] "The third requisite to the *exceptio rei judicatæ* is that the person who demands the same thing as before should demand it in the same quality, and that the demand should also be made from the defendant in the same quality as before." 1 Pothier on Obl. (Evans' tr.) p. 556.

[146] Code Civil, art. 1351; Marcadé, Explication du Code Napoléon, t. 5, pp. 175–180.

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ment.[147] So where an action is brought against a person as executor, upon an agreement made by him, and judgment is entered in his favor on the ground that he is not liable thereon in his representative capacity, this does not bar a subsequent suit to charge him personally upon the same agreement.[148] Again, one suing as the heir of his mother is not bound by a judgment against him in a suit in which he appeared as the heir of his father.[149] An equity of redemption owned by an assignee in bankruptcy as such, is not barre d by a foreclosure in which he is made a party, is served and appears in his individual name only, and in which his official character is in no wise mentioned.[150] And so if a person is interested in the subject-matter of a suit in two capacities, the one as trustee in one deed of trust, and the other as beneficiary in a different deed of trust, both securities being upon the same property, and he is made a party to a suit brought to set aside the latter trust deed, in which no reference is made to him as trustee in the other trust deed, he will not be regarded as a party to said suit in his capacity of trustee in the former deed.[151] Where suit is brought against a sheriff for taking certain goods, and he justifies under an execution in favor of A., this is no bar to a second suit, by the same plaintiff for the same goods, where the sheriff justifies under an execution in favor of B. Though a party to both suits, he is not a party in respect to the same *interest* in the two.[152] But it may sometimes happen all the interests of the party, in his several capacities, are before the court in the same litigation; and in that case the reason of the rule ceases, and he is bound in all characters. Thus a decree in a suit brought by an executor in his own right, but to which he was a necessary party as executor, and in which the rights of his testator were adjudicated, is conclusive between the administrator *de bonis non* and the other parties to it, and cannot be re-examined in a subsequent suit between them.[153] And so if a devisee of land, in possession thereof pending

[147] McBurnie v. Seaton, 111 Ind. 56, 12 N. E. Rep. 101.

[148] Hall v. Richardson, 22 Hun. 444.

[149] Caruth v. Grigsby, 57 Tex. 259.

[150] Landon v. Townshend, 112 N. Y. 93, 19 N. E. Rep. 424.

[151] McNutt v. Trogdon, 29 W. Va. 469, 2 S. E. Rep. 328.

[152] Stoops v. Woods, 45 Cal. 439.

[153] Manigault v. Holmes, 1 Bail. Eq. 288.

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the settlement of the testator's estate, be also the executrix of the testator's will, a recovery in an action by her in her own name, for trespass to the land, is a bar to her recovery for the same cause of action in her capacity as executrix.[154] If one sues as trustee, and afterwards in his individual capacity in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself; and if he bought it afterwards, he is a privy to the person who was represented.[155]

§ 537. Nominal and Real Parties.

It is not always necessary that the parties to the two suits should be nominally the same, in order that one recovery may bar another; it is in general sufficient if they are really and substantially in interest the same.[156] So to render a decree conclusive upon a person it need not be against him particularly by name; it is enough if it is adverse to his interest.[157] For instance, the lessor of the plaintiff is the real party in a common law action of ejectment, and the nominal plaintiff has no interest, and consequently, in an ejectment brought by Doe on the demise of J. S. against B., J. S. is bound by a judgment for the defendant.[158] So the equitable assignee of a chose in action is estopped by the verdict and judgment thereon, in the same manner as if he were a party to the record; because, though not nominally a plaintiff or defendant, the suit is for or against his interest.[159] An analogous principle governed the decision of the case of *Foust* v. *Huntington*.[160] It was a suit for an injunction to restrain a city and its servants from extending street improvements on to the plaintiff's property, and the defendants filed a joint answer setting up a former

[154] Colton v. Onderdonk, 69 Cal. 155, 10 Pac. Rep. 395, 58 Am. Rep. 556, citing Stewart v. Montgomery, 23 Pa. St. 412; Atherton v. Atherton, 2 Pa. St. 112.

[155] Corcoran v. Chesapeake Co., 94 U. S. 741.

[156] Follansbee v. Walker, 74 Pa. St. 306; Manly v. Kidd, 33 Miss. 141; Verplanck v. Van Buren, 76 N. Y. 247; Lowry v. McMurtry, 1 Sneed, 251.

[157] Taylor v. Cornelius, 60 Pa. St. 187; Johnston v. Churchill, 6 Litt. 177; Wiswall v. Samson, 14 How. 52.

[158] Wright v. Tatham, 1 Ad. & El. 3, 19.

[159] Rogers v. Haines, 3 Me. 322.

[160] 118 Ind. 139, 15 N. E. Rep. 337.

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adjudication, which answer was demurred to, because, of the present defendants, the city only was a party to the former suit, and the matter was not *res judicata* as to the others, and the answer, being joint, and bad as to them, was bad as to all. But it was held that the demurrer should be overruled, as the city was the real party in interest, and its rights being settled in the former case, the adjudication was conclusive as to its agents in making the improvements. But where a devisee and proponent of the will assigned all her interest in the testator's estate to the plaintiff, agreeing to indemnify him against costs and charges of her attorney, and the plaintiff afterwards appeared and objected to her further prosecuting the probate of the will, but which, over his objection, was proceeded with, and the plaintiff was thereby compelled to pay the attorney's costs taxed therein, it was held that he was not a party to the proceeding so as to bar an action against her for breach of the contract.[161] And in general, where the principal parties and the thing demanded in the two suits are different, the judgment in one cannot be pleaded as *res judicata* in the other.[162]

§ 538. Use Plaintiff.

Where a suit is prosecuted by one person for the use of another, the latter being the assignee or equitable owner of the claim and the real party in interest, a judgment therein will bar a second suit by the latter in his own name.[163] And conversely, an action by one for the use of another will be barred by a prior recovery in a suit in which the present use plaintiff sued in his own name and behalf. In such a case it was said: "There was no error in the admission of the record of the former judgment. The parties in that suit and in the action tried below were substantially the same. In the former, J. F. was the legal, in the latter he is the equitable plaintiff. The subject-matter of the two suits appeared by the record to be identical. The presumption would be, upon the issues, that the merits

[161] Dodge v. Zimmer, 110 N. Y. 43, 17 N. E. Rep. 399.

[162] White v. Gaines, 29 La. Ann. 769.

[163] Gill v. United States, 7 Ct. of Cl. 522.

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had been passed upon in the former proceeding. Such being the case, if no technical objection appeared to have been raised upon the record to the right of J. F. to maintain the action as legal plaintiff, the judgment in that action would be a bar to a subsequent action by him as equitable plaintiff. If it appeared that only the equitable, not the legal, right was in J. F., it would be presumed that the defendant had waived that purely technical objection. It would be very unreasonable and contrary to the settled rules upon the subject to permit the plaintiff, having once been defeated on the merits, to try the same question over again in a different form." [164]

§ 539. Stranger Promoting the Litigation.

"Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record." [165] Thus one who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest although his name does not appear therein, and he is bound by the judgment rendered.[166] For instance, where controversy arises between an assignee of an insolvent and a purchaser of realty of the assigned estate, concerning the liability of the assignee to pay taxes thereon, and the purchaser employs counsel and procures the matter to be litigated to judgment in the name of the county treasurer, such judgment, as to the purchaser, is conclusive of the question.[167] So where a municipality, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterwards the city declined to pay the assessed damages, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city," it was held that the persons who instigated the proceedings were concluded from

[164] Follansbee v. Walker, 74 Pa. St. 306.

[165] Claflin v. Fletcher, 7 Fed. Rep. 851.

[166] Conger v. Chilcote, 42 Iowa, 18.

[167] Burns v. Gavin, 118 Ind. 320, 20 N. E. Rep. 799.

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asserting a prior dedication of the same land for public use as a street.[168]

§ 540. Person Assuming the Defense.

A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation, if he openly and actively, and in respect to some interest of his own, assumes the defense of the action. Thus a judgment in ejectment will bind parties who voluntarily appear as defendants therein and file an answer, in which they deny the complainant's allegations, and allege ownership and right to possession of the premises sued for in themselves, although they were not named as parties in the complaint, nor served with summons, nor was the complaint amended to include their names, nor any order of court granted allowing them to appear.[169] So where the claimant of personalty sold by another assumes the defense of an action for the purchase-price brought by the vendor against the vendee, on the understanding that if the defense prevails the vendee will pay the claimant instead of the vendor, the judgment concludes the claimant's rights.[170] Again, where, in a suit against a guardian to set aside for fraud a release given by the ward, the sureties on the guardian's bond employ counsel to defend, and counsel appear in the case and examine witnesses, the sureties paying costs and disbursements in the suit, they cannot afterwards assert that they are not bound by the decree because they were not made defendants of record.[171] But in order that this result may be brought about, it is necessary that three conditions be fulfilled. In the first place, the person so intervening in the suit must come in for the assertion or protection of some claim or interest of his own. He must not be a mere intermeddler. This interest may either be an interest in the subject-matter of the particular litigation,[172] or it may consist in a responsibility over to the

[168] Landis v. Hamilton, 77 Mo. 554. On the same principle, see Palmer v. Hayes, 112 Ind. 289, 13 N. E. Rep. 882.

[169] Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. Rep. 867.

[170] Estelle v. Peacock, 48 Mich. 469, 12 N. W. Rep. 659. And see Wood v. Ensel, 63 Mo. 193.

[171] Parr v. State (Md.), 17 Atl. Rep. 1020.

[172] The case of persons having *similar* interests and uniting in the prosecution

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defendant, which will attach if judgment goes against him, and resting either on some covenant or an implied obligation to indemnify him. Secondly, he must have defended the action avowedly and with notice to the opposite party, and not upon a secret understanding. And thirdly, his interposition must have been so complete that he was practically substituted for the defendant in the management and control of the case. That he employed the attorney who appeared for the defendant of record; that he himself testified as a witness; that he was present and aided in the conduct of the trial; that he cross-examined the witnesses; that he lent assistance in money or services to the defendant; that he joins in taking an appeal;—none of these circumstances alone is sufficient to make him a party to the judgment.[173] Where, in a suit between two parties, other persons interested in the decision of the question in favor of one of the parties, on account of its effect upon their property, contribute to the employment of his counsel, such persons do not thereby become parties to the suit, and are not bound by the judgment.[174]

or defense of a test case does not really come within this rule, because they are estopped, not so much by the judgment in the test case, as by their agreement to abide by its result.

[173] Schroder v. Lahrman, 26 Minn. 87, 1 N. W. Rep. 801; Cannon River Ass'n v. Rogers (Minn.), 43 N. W. Rep. 792; Lacroix v. Lyons, 33 Fed. Rep. 437; Brady v. Brady, 71 Ga. 71; Turpin v. Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615; Majors v. Cowell, 51 Cal. 478; Allin v. Hall, 1 A. K. Mar. 525. In the case last cited it was said: "It is alleged that they [the appellees] had an interest and took an agency in that suit which ought to subject them to the decree therein as *virtual*, as much as if they had been *express*, parties thereto. Any zeal which third persons may display in favor of a party to a suit, or any assistance they may afford him, either in money or services, may subject them to the animadversion of the law as barrators or maintenors, or entitle them to the kind regards of the good and the virtuous, as a spirit of unjust and oppressive litigation, or the just claims of worth and indigence, shall have been subserved or promoted thereby. But it would be a dangerous doctrine to say that those circumstances, or any of the other acts which are alleged to have been done by the appellees in relation to that suit, should subject them to the decree therein as virtual parties thereto. It would be substituting vague conjecture, or at best the erring discretion of the judge, for that record certainty which it is believed the law affords in that class of cases."

[174] Lounsdale v. Portland, 1 Oreg. 381.

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§ 541. Person Submitting his Interest is Bound.

The effect of a judgment as an estoppel upon a person who, although not nominally a party to the action, had submitted his interests to the adjudication of the court, was considered in the case of *Sevey* v. *Chick*.[175] The action was a writ of entry, and the counsel of the respective parties made and filed a written agreement that the title of the tenant's lessor to the disputed premises might be given in evidence in defense, and such lessor also agreed in writing that "his title should be tried in that action the same as though the suit were against him." It was held that the verdict and judgment in the action, being against the title of such lessor, constituted an estoppel against an action for the same premises brought by such lessor against the grantee of the demandant in the first action; for he had made himself a party to that suit. In another case, where the suit was for foreclosure, an adult, not named as a defendant nor served with summons, appeared and answered, reciting that he had been sued by a fictitious name and setting up a claim to the land. Judgment was rendered against him by his true name, though the complaint was not amended. It was held that the judgment was conclusive against him on collateral attack, whether his claim was adverse to the mortgagor or not, he having submitted both his person and his cause to the jurisdiction of the court.[176] So where the court allows any person to appear and be heard upon the argument of a motion, in the decision of which he is interested, such hearing is as effectual as though such person had received notice of the motion and had been named as a formal party to it, and he is fully concluded by the disposition which the court may make of such motion.[177] And so an adjudication which settles a disputed boundary line of lands is binding not only upon parties of record, but upon one who was interested in the defense of the action, and who in fact conducted the defense, though in the name of another.[178] But an assignee of

[175] 13 Me. 141.

[176] Johnston v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. Rep. 753. And see Goss v. Singleton, 2 Head, 67; Parker v. Moore, 59 N. H. 454.

[177] Jay v. De Groot, 2 Hun, 205.

[178] McNamee v. Moreland, 26 Iowa, 96.

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third persons who is admitted to appear and defend, on the supposition that the interests of his assignors might in some way be affected by the action, and who afterwards withdraws his appearance by leave of court, is not to be considered a party to the action, nor privy to the judgment, nor bound by it.[179]

§ 542. Witnesses.

The fact that one appeared merely as a *witness* in the former proceeding does not make him privy to the judgment rendered therein, so that he will be bound by it in a subsequent suit between the witness and one of the parties to the prior action.[180]

§ 543. Effect of Additional Parties.

It is not always a conclusive objection to the admissibility of a record as an estoppel or as a bar that the parties to the former action included some who are not joined in the second action, or *vice versa*.[181] "The fact that parties in the first suit are not identically the same as those in the second, when the first case was decided on the merits, and not upon an exception to joinder or non-joinder of parties, is certainly no answer to the plea [of former recovery], otherwise, no matter how often a case be decided, the parties might renew the litigation by simply joining with them a new party."[182] "The objection that the first action was between other parties is not well grounded, and has no basis in fact to rest it upon the principle of *res inter alios acta*. That principle applies where the party against whom the record is offered was not himself a party to it. In such case, the general rule is that the record is not admissible. But here this defend-

[179] Swamscot Machine Co. v. Walker, 23 N. H. 457. And see Woods v. White, 97 Pa. St. 222; Sergeant v. Ewing, 30 Pa. St. 75.

[180] Yorks v. Steele, 50 Barb. 397; Wright v. Andrews, 130 Mass. 149; Blackwood v. Brown, 32 Mich. 104; Schroder v. Lahrman, 26 Minn. 87, 1 N. W. Rep. 801.

[181] Lawrence v. Hunt, 10 W end. 80, 25 Am. Dec. 539; Davenport v. Barnett, 51 Ind. 329; Thompson v. Roberts, 24 How. 233; Dows v. McMichael, 6 Paige, 139; Hanna v. Read, 102 Ill. 596; Hawkins v. Lambert, 18 B. Mon. 99.

[182] Girardin v. Dean, 49 Tex. 243.

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ant was a party to that record, and the objection in fact is that other persons were also parties thereto. As we understand the rule, that single fact alone constitutes no valid objection to the admission of the record."[183] For example, if, in an action brought against one of two joint promisors, the non-joinder of the other promisor is not pleaded in abatement, but the case is tried on the merits and judgment is rendered against the plaintiff, and another action for the same cause is brought by the same plaintiff against the two promisors, the parties in the two actions are, within the rule of law, the same.[184] This rule is of course subject to certain necessary limitations, depending upon the character in which the parties sue and the nature of the matter in litigation. Thus, where one of two joint owners of a chattel brings an action against a third person for an injury to the chattel, and judgment goes against him, this will bar a subsequent action by the two owners, suing jointly, against the same person for the same injury; because, since the owner who first sued was barred by the judgment against him, his being united with the other in the second action was a fatal misjoinder; but the original suit would not operate to bar an action by the joint owner who was not included therein as plaintiff, against the same defendant, for his aliquot share of the damages arising out of the alleged injury, because he was not a party to that action.[185] But it has been held by the supreme court of the United States that where a former judgment is conclusive upon one of several plaintiffs, but not upon the others, in consequence of their not having been parties to the action in which it was rendered, it is not error to exclude it when offered in evidence by the defendant as an estoppel, at least, if the circumstances of the case are such that one or more of the plaintiffs may be entitled to recover though the others be debarred.[186]

[183] Larum v. Wilmer, 85 Iowa, 244.

[184] French v. Neal, 24 Pick. 55.

[185] Brizendine v. Bridge Co., 2 B. Mon. 32, 36 Am. Dec. 587. And see Fell v. Bennett, 110 Pa. St. 181, 5 Atl. Rep. 17.

[186] Blackburn v. Crawford, 3 Wall. 175.

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§ 544. Effect of Severance as to Parties.

In an action against several defendants, if the case is discontinued or dismissed as to one of them, he is not bound by the judgment rendered therein.[187] So where one of two defendants in an action in a state court removes so much of the controversy therein as lies between the plaintiff and himself into the federal court, under the act of congress in that behalf, he will not be bound by any adjudication made against his co-defendant in the state court after the removal was effected.[188] In a recent case it appeared that, the action being against four defendants, judgment was rendered in favor of one of them and against the others, under a statute authorizing that practice. The latter moved for a new trial, and the motion, though overruled below, was sustained on appeal on the ground of insufficient evidence. The action was subsequently dismissed in the trial court, but was re-commenced in the federal court against all four defendants on the same cause of action. It was held that the former judgment, so far as it related to the defendant in whose favor it was rendered, not having been appealed from, was a bar to the action against him in the federal court.[189] Again, where the issue submitted, upon a cause transferred to the chancery court, was as to whether a defendant had an interest in the property in controversy as his father's partner, and there was another party in the cause, claiming title to the property, who was not a party to this issue, and the decree found that all the property belonged to the father, it was held that, as to the one not a party to the issue, the decree was not binding.[190] By a combination of this principle with the principle that estoppels must be mutual, we deduce the rule that a defendant joined in an action with other defendants, and who has procured a separate trial of the issues between himself and the plaintiff, cannot claim that a trial between the plaintiff and another defendant is an adjudication as to him.[191]

[187] Berber v. Kerzinger, 23 Ill. 346; Browner v. Davis, 15 Cal. 9.

[188] State v. Teidermann, 10 Fed. Rep. 20.

[189] Bloch v. Price, 32 Fed. Rep. 447.

[190] McReynolds v. McReynolds, 74 Iowa, 89, 36 N. W. Rep. 903.

[191] Eikenberry v. Edwards, 71 Iowa, 82, 32 N. W. Rep. 188.

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§ 545. One Plaintiff suing in Behalf of Many.

Under certain circumstances, persons who were not parties of record may be bound by the judgment, on the ground of their having been represented by one or more other plaintiffs holding similar and homogeneous interests. Thus in an action to foreclose a corporation mortgage, where the lienholders are so numerous that it is impracticable to bring them all before the court, and some of them are allowed to prosecute for the benefit of all, and a special master is appointed with instructions to report the names of the lienholders and the amount due each, those who appear before the master and prove their claims are as much bound by a judgment or order affecting the subject-matter of the suit as if they had formally been made parties.[192] But in order that this may result, it appears to be necessary that such interested persons should *accept* the representation and connect themselves with the litigation, either by coming into the suit or by seeking to share in the fruits of the judgment. It is in their option to make it available to themselves, but it is not available *against* them unless they so act with reference to it.[193] Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund.[194]

§ 546. Unknown Owners.

A person designated in the proceedings as an "unknown owner" will also be concluded by the judgment in a proper case. Thus, where a statute authorizes proceedings in partition to be taken against "unknown owners" as well as those specifically made parties, and provides that the judgment rendered shall be binding and conclusive

[192] Carpenter v. Canal Co., 35 Ohio St. 307; Hurlbut v. Butenop, 27 Cal. 50; Kerr v. Blodgett, 48 N. Y. 66.

[193] O'Brien v. Browning, 49 How. Pr. 109; Brower v. Bowers, 1 Abb. App. Dec. 214.

[194] *Ex parte* Howard, 9 Wall. 175; Williams v. Gibbes, 17 How. 239.

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(1) on all parties named therein, (2) on all persons interested in the premises who may be unknown, to whom notice shall have been given by personal service or by publication as therein directed, and (3) on all persons claiming from such parties or any of them; it is held that upon a complaint for partition against certain named parties and others as "unknown owners," and publication of notice as directed by the statute, a person in possession, claiming to hold a part of the land in severalty, and by a title paramount to that of the parties actually named in the proceedings, and who was not named as a party and had no actual notice of the commencement or pendency of the proceedings, is concluded by the judgment as an "unknown owner," in the absence of evidence that there was any fraud or collusion in the institution of the action or procuring the judgment, and his title is bound thereby.[195]

§ 547. Evidence to Identify Parties.

When a former judgment is received in evidence, the identity of the names in the judgment with those in the pending action is *prima facie* sufficient to establish the identity of the persons. If, however, there appears to be a discrepancy, parol testimony is admissible to show the identity of the parties named in the record with those named in the pending action.[196] Where, in ejectment, the record of a former action by the same plaintiff, involving the title to the same land, is read in evidence, it is for the *court* to determine whether the complaint therein charged one named as defendant in that action with having an interest in the land, and whether the judgment was conclusive upon such defendant, and this being affirmatively decided, it is for the *jury* to determine, upon other evidence appropriate to that point, whether the present defendant is the same person who was named and served as defendant in that suit.[197] Parol evidence is also admissible to show that a third person, though not appearing on the record as a party to the former action, was in fact the real

[195] Nash v. Church, 10 Wis. 303, 78 Am. Dec. 678; Cook v. Allen, 2 Mass. 461.

[196] Garwood v. Garwood, 29 Cal. 514; Greely v. Smith, 3 Wood. & Minn. 236.

[197] Warner v. Mullane, 23 Wis. 450.

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party in interest, had the sole management of the case, put his title in issue, and is therefore bound by the judgment.[198]

§ 548. Estoppel must be Mutual.

In the application of the rule of *res judicata*, it is essential that its operation be mutual. Therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely, no person can claim the *benefit* of a judgment, as an estoppel upon his adversary, unless he would have been *prejudiced* by a contrary decision of the case.[199] Thus, where the plaintiff is not a party to the record offered in evidence, not being concluded by it himself, he cannot rely upon it as a technical estoppel upon a garnishee.[200] In a case in New York, it appeared that, after an assessment had been laid by the authorities of a city for the expense of grading a street, certain persons who were assessed brought suit against the city to vacate the assessment,

[198] Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515.

[199] Wenman v. McKenzie, 5 El. & Bl. 447; Densmore v. Tomer, 14 Nebr. 392, 15 N. W. Rep. 734; Gwynn v. Hamilton, 29 Ala. 233; Wood v. Davis, 7 Cranch, 271; Simpson v. Jones, 2 Sneed, 86; Phillips v. Thompson, 3 Stewart & P. 369; Redmond v. Coffin, 2 Dev. Eq. 443; Bradley v. Johnson, 49 Ga. 412; Bell v. Wilson (Ark.), 12 S. W. Rep. 328; Nowack v. Knight (Minn.), 46 N. W. Rep. 348. In Valentine v. Mahoney, 37 Cal. 389, it was said: "Judgments bind parties and privies, but do not extend to strangers in person and estate. This is the general rule, but neither the benefits of judgments, on the one side, nor their obligation, on the other, are limited exclusively to parties and their privies. A purchaser *pendente lite* with notice of the action is bound by the judgment—that is, the property purchased is bound—when the judgment is against his vendor, and he has the benefits of the judgment, when in his vendor's favor. Judgments against corporations in certain cases are conclusive upon the members of the corporation. Sureties upon certain classes of bonds or undertakings are bound by judgments against their principals. Judgments of ouster against intruders into public offices, judgments *in rem*, judgments declaring the personal status of parties, are conclusive upon all the world. The rule of evidence in respect to these matters is reciprocal, and where the judgment would be admissible in evidence against a party, when it was against the right under or through which he claims, it would also be admissible in his favor when the judgment was the other way."

[200] Groshon v. Thomas, 20 Md. 334; Harris v. Plant, 31 Ala. 639.

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and recovered a judgment declaring the assessment null and void. Afterwards, the present plaintiff, not a party to that suit, brought his action to vacate the assessment as to his property, alleging the same grounds against its validity as had been successfully urged in the prior controversy. But it was held that he was not entitled to the benefit of that judgment as *res judicata*, the decision proceeding upon the basis of the rule above stated.[201] There are a few cases, however, in which this just and reasonable doctrine seems to have been disregarded. Thus in a Louisiana decision, it was held (according to the syllabus of the case) that where the plaintiff in a suit formally avers that the defendant had collected certain warrants, the property of the plaintiff, and prays the defendant's condemnation for the amount of the warrants, he thereby estops himself from subsequently suing another person as the collector of the warrants.[202]

§ 549. What Constitutes Privity.

It is well settled that a judgment is conclusive, not only upon those who were actual parties to the litigation, but also upon all persons who are in privity with them.[203] This is not only a doctrine of our own law but also a principle of general jurisprudence, as appears from the rule of the Roman law that "the plea of *res judicata* is available against him who has succeeded to the rights of ownership of the person who suffered the judgment."[204] It is therefore important to ascertain what constitutes privity within the meaning of the decisions on this subject. Now privity is defined to be a "mutual or succes-

[201] Moore v. Albany, 98 N. Y. 396.

[202] Board of School Directors v. Hernandez, 31 La. Ann. 154. This decision seems to be clearly wrong, as the estoppel certainly would not be mutual. The case does not explain itself. Bigelow says (Estoppel, 3d. edn. p. 59) that it is "difficult to understand" and "seems to be at variance with the fundamental principle." Herman (Estoppel, p. 944), puts it on the ground of an estoppel by pleading.

[203] Beebe v. Elliott, 4 Barb. 457; Ludington's Petition, 5 Abb. New Cas. 307; Bush v. Knox, 5 Thomp. & C. 130; Towers v. Tuscarora Academy, 8 Pa. St. 297; Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688; Soward v. Coppage (Ky.), 9 S. W. Rep. 389; Cole v. Favorite, 69 Ill. 457; Sobey v. Beiler, 28 Iowa, 323; Adams County v. Graves, (Iowa), 36 N. W. Rep. 889; Stoutimore v. Clark, 70 Mo. 471; Finney v. Boyd, 26 Wis. 366; Cunningham v. Harris, 5 Cal. 81.

[204] Dig. 44, 2, 28.

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sive relationship to the same rights of property."[205] And the common law writers classify privies as privies in law, in blood, or in estate, sometimes adding, as a fourth class, privies in representation. But for the purposes of a discussion of the doctrine of *res judicata*, this classification is of no practical importance. For we have to do only with privies in *estate*. And if a person is bound by a judgment, as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject-matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist. And in order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected *through or under* one of the parties.[206] For example, in an action for the conversion of a chattel, alleged to have been stolen from the plaintiff and to have afterwards come into the possession of the defendant, and which the defendant upon demand has refused to deliver to the plaintiff, a judgment in favor of the defendant in a previous action brought by him to recover possession of the property, against a police officer by whom it had been taken under a search-warrant, as the plaintiff's property stolen from him, of which previous action the plaintiff had knowledge, but to which he was not a party, does not constitute a defense, there being no privity between the plaintiff and the officer.[207] This part of the rule has been differently stated in the following terms: Wherever equity would subrogate a second plaintiff to all the rights of the first, the judgment is conclusive of every fact necessarily adjudicated against him who primarily ought to satisfy it.[208] In the second place, privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter *after* the rendition of the judgment; if their title or interest attached before that fact, they are not bound unless made parties.[209] Thus a tenant of the defendant in ejectment,

[205] Bouvier's Law Dict.; 2 Greenleaf on Ev. § 189.

[206] Calderwood v. Brooks, 28 Cal. 151; Thompson v. Clark, 4 Hun. 164.

[207] Scott v. Drennen, 9 Daly, 226.

[208] Lloyd v. Barr, 11 Pa. St. 41.

[209] Doe d. Foster v. Derby, 1 Ad. & El. 768; Wilson v. Davol, 5 Bosw. 619; Hunt v. Haven, 52 N. H. 162.

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who acquired his lease before the commencement of the suit, is not estopped as to his term by a judgment in the action obtained against his lessor.[210]

Taking the rule to be, therefore, that every person is a privy to a judgment whose succession to the rights of property thereby affected, coming through one or other of the parties, occurred subsequent to the commencement of the suit, we may proceed to illustrate it by some of its more familiar applications. For instance, a judgment rendered against the grantor in a conveyance of realty, as defendant in an action involving the title thereto, will be conclusive upon his grantee taking after the suit.[211] So, questions determined by a court of competent jurisdiction in a suit against the assignor of a lease, for rent accruing subsequent to the assignment, cannot be reconsidered in a suit by the assignor against the assignee for the repayment of such rent.[212] Where, in an action of trover, the defendant justifies the taking by the command of a third person, and under the title of the latter, he is to be regarded as a privy of such third person, and the record of a former recovery by the plaintiff against such third person, for the taking of the property, is admissible in evidence against the defendant, and is conclusive as to the plaintiff's title and right of possession.[213] Again, where an ejectment suit to try the title to land was determined in favor of the plaintiff, and after its decision the defendant conveyed the property, and his grantee afterwards obtained the possession of the land, in an action of ejectment against the latter's grantee, it was held that he was estopped from denying the plaintiff's title because of the former suit against the grantor.[214] Hence we see that the rule of conclusiveness upon privies applies equally where the person to be bound is two or more steps removed from the record-party who constituted his source of title, provided no new title has accrued in his hands. Tenants

[210] Satterlee v. Bliss, 36 Cal. 489.

[211] Eakin v. McCraith, 2 Wash. Ter. 112, 3 Pac. Rep. 838; Central Nat. Bank v. Hazard, 30 Fed. Rep. 484; Cushing v. Edwards, 68 Iowa, 145, 25 N. W. Rep. 940.

[212] Ruppel v. Patterson, 1 Fed. Rep. 220.

[213] Calkins v. Allerton, 3 Barb. 171.

[214] Whitford v. Crooks, 54 Mich. 261, 20 N. W. Rep. 45.

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who enter under other tenants, on whom notice in ejectment has been served, will be concluded by the judgment.[215]

§ 550. Purchaser Pendente Lite.

It is a general rule that a purchaser of property (except negotiable paper before maturity), who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit the same as if made a party of record.[216] "We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased *bona fide* and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record." [217] "The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset." [218] It is on this principle that the purchaser of mortgaged premises, taking title after the institution of a foreclosure suit, is bound by the judgment of foreclosure rendered against the mortgagor, although such purchaser is not made a party to the suit.[219] So one who becomes the purchaser and assignee of a mortgage, pending a suit to set the same aside as void for fraud,

[215] Smith's Lessee v. Trabue's Heirs, 1 McLean, 87.

[216] Murray v. Ballou, 1 Johns. Ch. 566; Craig v. Ward, 1 Abb. App. Dec. 454; Wickliffe v. Bascom, 7 B. Mon. 681; Diamond v. Lawrence Co., 37 Pa. St. 353, 78 Am. Dec. 429; Hersey v. Turbett, 27 Pa. St. 418; American Bank v. Andrews, 12 Heisk. 806; Haynes v. Calderwood, 23 Cal. 409; Gregory v. Haynes, 13 Cal. 591; Sawyer v. McAdie (Mich.), 38 N. W. Rep. 292; Snowman v. Harford, 62 Me. 434; Jackson v. Stone, 18 Johns. 447; Moon's Admr. v. Crowder, 72 Ala. 79.

[217] Brightman v. Brightman, 1 R. I. 112.

[218] Tilton v. Cofield, 93 U. S. 163; Inloe v. Harvey, 11 Md. 524; Salisbury v. Morss, 7 Lans. 359; 1 Story, Eq. Jur. § 406.

[219] Knowles v. Lawton, 18 Ga. 476; Williams v. Terrell, 54 Ga. 463; Guerin v. Danforth, 45 Ga. 493; Barden v. Brady, 37 Ga. 665; Stokes v. Maxwell, 59 Ga. 78; Malone v. Foote, 64 Ala. 486; Daniels v. Henderson, 49 Cal. 243.

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thereby comes into the same position as if he were a co-defendant of record; and hence, in subsequent proceedings between such purchaser and any of the actual defendants, the judgment in that suit is conclusive as to the same question of fraud again arising.[220] The plaintiff in the action need not make such purchaser a party, or otherwise notice his purchase. If the latter desires to defend the suit, he must make himself a party to it in some proper manner, as, in equity, by supplemental bill, before it terminates.[221] In a late case it is said that the purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered, since otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seem to be indispensable to give effect to the doctrine of *lis pendens*: (1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.[222] It is generally held that the commencement of a suit by service of a summons, or by subpœna in equity, is not in itself sufficient to create a *lis pendens* as against a subsequent purchaser; but in order to produce that effect, there must also be a complaint or bill on file at the time of his purchase in which the claim upon the property is set forth.[223] In many of the states (as also in England) the common law on this subject has been changed by statutes, which provide for the filing of a "notice of *lis pendens*," in actions concerning real property, without which a purchaser who takes title during the suit is not bound by the judgment. But it is to be observed that the only office of a notice of *lis pendens* is to give constructive notice to, and to bind by the subsequent proceedings, those who may deal with the defendant in respect to the property involved in the action during its pendency and before final judgment. And

[220] Craig v. Ward, 36 Barb. 377.

[221] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70.

[222] Houston v. Timmerman (Oreg.), 21 Pac. Rep. 1037.

[223] Leitch v. Wells, 48 N. Y. 585; Murray v. Ballou, 1 Johns. Ch. 566.

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no notice is necessary to make the judgment effectual as against parties claiming under the defendant by transfer subsequent to the judgment. The judgment disposes of the rights of the parties, is a matter of public record, and is conclusive both upon the defendant and any subsequent grantee.[224] It is also conclusive, without such notice, upon a purchaser who has actual knowledge of the pendency of the suit.[225]

§ 551. Mortgagor and Mortgagee.

On the general rules of privity in law, it is held that a judgment against a mortgagor of realty, rendered prior to the execution of the mortgage, binds the mortgagee as a privy, and is conclusive as to all defenses which might have been urged against the claim on which it is founded.[226] But judgment in an action begun by a mortgagee of land to set aside a tax deed as a cloud upon the title, is not binding upon the mortgagor, where he was in no way a party to the action.[227] And similarly a sale of mortgaged premises to the holder of a mechanic's lien thereon, under a decree in his favor against the owner, is not conclusive of the rights as between him and a subsequent mortgagee, unless such mortgagee was made a party to the proceedings.[228]

§ 552. Sheriff and his Vendee.

For the statement that a sheriff and his vendee are in privity, in respect to the property affected, we find an authority in an early case in Michigan. There it appeared that the plaintiff brought an action against a sheriff for taking certain personal property, which, on final hearing, was determined against the plaintiff. After the sheriff had sold the property, the plaintiff brought his action to recover the same against the purchaser at the sheriff's sale. But it was held that the judgment in the suit against the sheriff was a bar to the action against

[224] Sheridan v. Andrews, 49 N. Y. 478.
[225] Sampson v. Ohleyer, 22 Cal. 200.
[226] Cook v. Parham, 63 Ala. 456. See also Schnepf's Appeal, 47 Pa. St. 87.
[227] Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. Rep. 283.
[228] Gamble v. Voll, 15 Cal. 507. See Wabash, St. L. & Pac. Ry. Co. v. Central Trust Co., 33 Fed. Rep. 238.

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the purchaser. The court put its decision distinctly on the ground of privity between the sheriff and his vendee, saying: "The interest of the defendant in the property in question is identical with that of the sheriff; he succeeded to all the rights of the sheriff and no more. Those rights, as against the plaintiff, have been forever determined by the judgment in question." [219] There is another view which may be taken of a question such as this, viz., that of regarding the sheriff as a mere conduit for the title, and his vendee as coming into privity with the title of the original owner divested by the sale. Thus, in Pennsylvania, it is held that a purchaser at a tax sale of land is in privity with the title, if any, that is divested by the sale and passes to him; and hence he is bound by concurrent verdicts and judgments in prior actions of ejectment, to which his predecessors in title were parties, as to the location and title of the land in question.[220] There is no such privity between a sheriff and a plaintiff in an attachment as to render a judgment recovered against the sheriff by a keeper of attached property, for services as such keeper, a bar in favor of the plaintiff in the writ, when sued on a contract to pay for another part of the same services.[221]

§ 553. Co-Tenants.

In general, a judgment rendered against one of two joint owners or tenants in common is not an estoppel upon the other, nor does it conclude him from urging or contesting the same grounds in an action against himself.[222] And this upon the very obvious ground that such co-owners do not claim through or under each other. Thus, if ejectment is brought by a stranger against one of two persons in joint possession, the one not made defendant cannot be expelled under a writ of possession issued upon a judgment in the action, even though the

[219] Prentiss v. Holbrook, 2 Mich. 372.

[220] Strayer v. Johnson, 110 Pa. St. 21, 1 Atl. Rep. 222. This decision, so far as it concerns a *tax sale*, would not be universally accepted; because, in many of the states, a tax sale cuts off all previous titles and interests and inaugurates a wholly new, original, and independent title. Black on Tax Titles, § 232.

[221] Hawley v. Dawson, 16 Oreg. 344, 18 Pac. Rep. 592.

[222] Bass v. Sevier, 58 Tex. 567; Walker v. Perryman, 23 Ga. 314; Stokes v. Morrow, 54 Ga. 597; Freem. Co-Tenancy, § 168.

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declaration, judgment, and writ embrace the whole of the premises and treat the defendant as sole occupant.[233] And conversely, a judgment in favor of a co-tenant for all the land claimed by the several tenants in common does not estop the defendant, in a future action against him by the one not a party before, from contesting the latter's title. Such a judgment may indeed inure to the benefit of all the tenants in common, so far as the right to possession is concerned, when the declaration discloses their several interests; but in such subsequent action, it can have no effect, except in so far as the assertion of title in the former suit by the co-tenant may have interrupted the running of the statute of limitations.[234]

§ 554. Remaindermen.

According to the commonly accepted doctrine, "if several estates in remainder be limited in a deed, and one of the remaindermen obtain a verdict for him, on an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainderman, in an action brought against him for the same land, though he does not claim any estate under the first remainderman, because they all claim under the same deed."[235] The reason for the general rule holding all the remaindermen in privity, and mutually bound by a judgment against one of their number, is not far to seek. For if the rule were not so, the deed or will of a grantor or testator might so limit the title passed as to leave the holder of an outstanding and paramount title without remedy, because of his not being able, until after the happening of some remote event, to ascertain the persons against whom to institute his action.[236] Accordingly "it is well settled that it is not necessary that remaindermen after the first estate of inheritance should be made parties; and where real estate is in controversy which is subject to an entail, it is sufficient to make the

[233] Stokes v. Morrow, 54 Ga. 597.

[234] Walker v. Read, 59 Tex. 187; Read v. Allen, 56 Tex. 182; Williams v. Sutton, 43 Cal. 65.

[235] Pyke v. Crouch, 1 Ld. Raym. 730; Rushworth v. Pembroke, Hard. 472; Doe v. Tyler, 6 Bing. 390; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Goebel v. Iffla, 111 N. Y. 170, 18 N. E. Rep. 649; Johnson v. Jacob, 11 Bush, 646. See also Buller's N. P. 232.

[236] Johnson v. Jacob, 11 Bush, 659.

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first tenant in tail *in esse* in whom an estate of inheritance is vested a party, with those claiming prior interests, without making those parties who may claim in remainder or reversion after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder, although, by the failure of all the previous estates, the estates in remainder or reversion might afterwards become vacated."[237] But there is no privity in estate between a tenant in dower and the reversioner; and the latter cannot be affected by a verdict for or against the tenant for life unless he come in upon aid prayer.[238] So also a tenant by the curtesy is not such a representative of the tenant in fee, or in such privity of estate with him, that a judgment or decree affecting the title of the former will conclusively bind the estate of the latter.[239]

§ 555. Parties to Negotiable Paper.

There is in general no such privity between the makers, indorsers, acceptor, and holder of a bill or note that a judgment in one action upon the instrument will bar another, or furnish an estoppel against a particular allegation or defense in the subsequent suit.[240] It is familiar law that the holder of such paper may pursue his remedies by successive actions against any or all of the persons severally liable to make payment, until he obtains satisfaction. But, on the other hand, he must in each instance prove his case and not rely on a previous judgment. That is, a judgment in a suit on a note, against one party, cannot be read by the plaintiff as evidence in another action on the same note against another defendant who was not a party to the first suit.[241] But a judgment on a bill lost after its maturity is a complete bar to another action brought by any person

[237] Baylor v. Dejarnette, 13 Gratt. 152, 166, citing Reynoldson v. Perkins, Ambl. 564; Lloyd v. Jones, 9 Ves. 37, 56; Cockburn v. Thompson, 16 Ves. 321; Hopkins v. Hopkins, 1 Atk. 581; Giffard v. Hart, 1 Sch. & Lef. 386; Finch v. Finch, 1 Ves. Jr. 534; Cholmondeley v. Clinton, 2 Jac. & Walk. 133.

[238] Adams v. Butts, 9 Conn. 79.

[239] Hubbell v. Hubbell, 22 Ohio St. 208.

[240] Morris v. Lucas, 8 Blackf. 9; Levi v. McCraney, 1 Morris, 91; Jordan v. Ford, 7 Ark. 416; Fenn v. Dugdale, 31 Mo. 580; Barker v. Cassidy, 16 Barb. 177; Wells v. Coyle, 20 La. Ann. 396; Bigelow on Est. 69.

[241] Crabb v. Larkin, 9 Bush, 154.

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receiving the same after maturity; because a holder receiving it after that time would take it subject to the defense of payment to the former holder.[243] And it is also held that a judgment for the defendant, on a plea of want of consideration, in an action by the indorsee of a promissory note against the maker, is a bar to a subsequent action, in another state, by the payee against the maker.[244]

§ 556. Husband and Wife.

There is no privity, in the sense in which we now use the term, between a man and his wife. In a case in New York, it appeared that the plaintiff brought the action to recover his damages resulting from the loss of his wife's services, occasioned by an injury sustained by her by reason of the negligence of the defendant, a municipal corporation. Upon the trial, the judgment-roll in a former action, brought by the wife against the defendant, in which she recovered damages for the same injury, was, against the defendant's objection, received in evidence as conclusively establishing that the wife had been injured through the defendant's negligence. It was held that, as the husband was not a privy in blood, representation, estate, or law to his wife, the court erred in so admitting the judgment in evidence, and a new trial was granted.[244] A judgment rendered against the husband for property claimed as the separate property of the wife, in a proceeding against the husband to which the wife was not made an actual party, is not binding on the wife.[245] On similar principles, in a statutory action by surviving children against a railroad company for the death of their mother caused by the alleged negligence of the defendant, the plaintiffs are not concluded by a judgment rendered in a suit brought by their father, for himself only, upon the same cause of action, to which they were not parties.[246]

[243] Elliott v. Woodward, 18 Ind. 188.

[244] Leslie v. Bonte (Ill.), 22 N. E. Rep. 594.

[244] Neeson v. Troy, 29 Hun, 173; Groth v. Washburn, 89 Hun, 824. But compare Ballou v. Ballou, 110 N. Y. 394, 18 N. E. 118.

[245] Read v. Allen, 56 Tex. 182.

[246] Galveston, H. & S. A. R. Co. v. Kutac (Tex.), 11 S. W. Rep. 127.

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§ 557. Guardian and Ward.

A ward is not concluded or estopped by a judgment against the guardian, in an action brought upon the promise of the latter to pay for the education and maintenance of the ward; because, as such judgment binds only the guardian, and not the ward's estate, the latter could not control the management of the suit nor appeal from the judgment.[247] But in Louisiana it is held that a judgment regularly rendered between the new tutor and the former tutor of a minor, will sustain the plea of *res judicata* in an action brought by the minor, arrived at his majority, against his former tutor.[248]

§ 558. Decedent and Heirs.

An heir is in privity with his ancestor, and a devisee with his testator, so that either is concluded by an adjudication which was an estoppel upon his source of title.[249] Thus a judgment against a party in a suit brought by him as owner, for the recovery of certain land, may be pleaded as *res judicata* in a subsequent petitory action for the same land brought by his heirs.[250] Of course in such a case as this the conditions of privity are fully met. For the heir or devisee both claims *under* the former owner and *after* the judgment constituting the estoppel.

§ 559. Decedent and Representatives.

An administrator, so it is held, is in privity with his intestate so far as concerns the personalty.[251] But an executor is in privity with the testator only so far as, by the terms of the will, he succeeds to the position of the decedent.[252] Where, pending an action, one of the defendants dies, and on the plaintiff's motion his executor is sub-

[247] Morris v. Garrison, 27 Pa. St. 226.
[248] Porche v. Ledoux, 12 La. Ann. 350.
[249] Boykin v. Cook, 61 Ala. 472.
[250] Sharkey v. Bankston, 30 La. Ann. 891.
[251] Steele v. Lineberger, 59 Pa. St. 313.
[252] Manigault v. Deas, 1 Bail. Eq. 283; Ladd v. Durkin, 54 Cal. 395.

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stituted, and no notice is served on the executor, and he does not appear nor adopt the answer of his testator as his own, and the testator is named in the judgment, the rights of the executor are not affected by the trial and judgment, and the judgment is a nullity so far as he is concerned.[253]

§ 560. Administrator and Heir or Devisee.

At common law, there is no privity between the executor or administrator of an estate and the heirs and devisees, and consequently a judgment against the former is not evidence against the latter in a matter affecting the realty.[254] "A judgment against an administrator," says the supreme court of Pennsylvania, "is conclusive as to the personal estate, but only *prima facie* as to the realty. Heirs and devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item included in or constituting the judgment against the administrator, if they can; so that, in fact, the only importance of the judgment against the administrator, so far as the realty is concerned, is that it is *prima facie* evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it."[255] The most important application of this rule is in the case where a claim allowed by the probate court, or a judgment recovered against the administrator, in another court, is sought to be charged upon the land. Thus, when the administrator applies for leave to sell real estate for the purpose of paying a judgment against him, rendered at the suit of a creditor of the estate, the judgment is not conclusive upon the heirs at law, but they may contest the application. The judgment will be presumptive evidence of the existence of a debt

[253] McCreery v. Everding, 44 Cal. 284.

[254] Osgood v. Manhattan Co., 3 Cow. 612, 15 Am. Dec. 304; Steele v. Lineberger, 59 Pa. St. 313; McCoy v. Nichols, 4 How. (Miss.) 81; Stewart v. Montgomery, 23 Pa. St. 410; Garnett v. Macon, 6 Call, 308; Stone v. Wood, 16 Ill. 177; Dorr v. Stockdale, 19 Iowa, 269; Moss v. McCullough, 5 Hill, 131; Alston v. Munford, 1 Brock. 266; Boykin v. Cook, 61 Ala. 472; Lehman v. Bradley, 62 Ala. 31; Teague v. Corbitt, 57 Ala. 529; Laidley v. Kline, 8 W. Va. 218; Chant v. Reynolds, 49 Cal. 213.

[255] Steele v. Lineberger, 59 Pa. St. 313.

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against the estate, but the heirs may disprove that fact, may impeach the judgment on the ground that it was recovered by the fraud or collusion of the administrator, may set up defenses which he omitted to make, or may show that there is no deficiency of assets to pay it.[256] It is the same when the interests of the heirs are proceeded against, not by an application of the administrator, but by their being made defendants to a creditors' bill to subject the real estate to the payment of a judgment recovered against the personal representative. They are not concluded by the judgment. They may make any defenses against the alleged debt which the decedent if living might have made, or which would have been available to the personal representative in the action at law, and may also set up defenses which the latter has, by his own acts or laches, precluded himself from making.[257] But this right of defending does not extend to mere technical objections or irregularities, not going to the question of the liability of the ancestor for the debt, sufficiency of assets, or other meritorious defenses.[258] However, the heir is not estopped to set up the defense of the statute of limitations.[259] The same general principles govern other cases in which transactions primarily concerning the administrator are liable to affect the interests of the heirs. Thus an administration account, settled in a cause in which

[256] Stone v. Wood, 16 Ill. 177; Gaither v. Welch, 3 Gill & J. 259; Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358. The rule is otherwise in Ohio. It is there held that where an action is brought against an administrator on a liability contracted by the intestate, resulting, though contested in good faith and with due diligence, in a judgment against the administrator, such judgment, remaining unreversed and unsatisfied, is conclusive evidence of indebtedness against the estate, on the administrator's subsequent application for an order to sell the realty. Faran v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617. And in South Carolina it is said: "It has been uniformly held that the lands of a decedent may be sold under a judgment recovered against the administrator, even though the heirs were not parties to the proceeding in which the judgment was recovered." But the court added that this doctrine should not be extended further than the decided cases imperatively demand. Wilson v. Kelly, 19 S. Car. 160.

[257] Sharpe v. Freeman, 45 N. Y. 802; Wood v. Byington, 2 Barb. Ch. 387; Darrington v. Borland, 3 Port. 9; Teague v. Corbitt, 57 Ala. 529; Lehman v. Bradley, 62 Ala. 31; Scott v. Ware, 64 Ala. 174; Brewis v. Lawson, 76 Va. 36; Watts v. Taylor, 80 Va. 627; Daingerfield v. Smith, 83 Va. 81, 1 S. E. Rep. 599; Hobbs v. McMakin (Ky.), 4 S. W. Rep. 793.

[258] Buntyn v. Holmes, 9 Lea, 319.

[259] Starke v. Wilson, 65 Ala. 576.

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the heirs are not parties, is not competent evidence as against them.[260] So also, a decree of insolvency merely ascertains, as between the personal representatives and the creditors, the status of the estate; as to the heirs at law or the legatees, it is *res inter alios acta*, not affecting their rights, and not evidence against them of any fact ascertained by it.[261] On the principle of the mutuality of estoppels, the converse of our main proposition is equally true. That is to say, a judgment rendered in a cause to which the heirs only were parties is not binding upon the administrator of the estate.[262]

The rule that there is no legal privity between the administrator and an heir or devisee is the rule of the common law, and, as we have seen, it prevails in a majority of the states. But in at least one jurisdiction, on account of the statutory provisions relative to the powers and duties of personal representatives, a contrary doctrine obtains. In California, it is held that when an administrator sues in ejectment to recover the land of his intestate, and alleges the seisin of the deceased, and issue is joined on this point, and judgment rendered, the judgment binds the heirs of the intestate and all persons claiming under them, and is conclusive evidence against them.[263] Without going so far as this, there are certain generally recognized instances in which a judgment for or against the administrator will be at least *admissible* in evidence as against the heirs, although it may not bind them imperatively. Thus a judgment recovered against the personal representatives of a decedent, though not conclusive, is *prima facie* evidence of the amount of the debt, in a

[260] Robertson v. Wright, 17 Gratt. 534.

[261] Randle v. Carter, 62 Ala. 95.

[262] Dorr v. Stockdale, 19 Iowa, 269. But see Hardaway v. Drummond, 27 Ga. 221, 73 Am. Dec. 730.

[263] Cunningham v. Ashley, 45 Cal. 485. In reaching this conclusion, the court (per Wallace, C. J.) expressed itself as follows: "If the judgment be in favor of the administrator, it amounts to an adjudication that the title of the deceased, represented by the administrator, is superior to that upon which the defendant relies; and such a judgment would, upon that point, estop the defendant or his privies in a subsequent action brought for the recovery of the same premises in favor of the administrator, or the heirs, after distribution made, or in favor of any person who had subsequently succeeded to that title, or to the right to assert it in court. All these consequences necessarily flow from the statutory right of the administrator to sue for the recovery of the estate of the deceased, otherwise there is the anomaly of an action brought, and a judgment rendered upon the issue joined, by which judgment, however, nothing is in effect

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scire facias against the heirs brought for the purpose of charging the realty.[264] So it is held that in a suit for specific performance of a contract for the sale of land against an executor, a decree rendered against him is conclusive against the heirs, in the absence of fraud.[265] In an English case, in a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the realty) was held to be *prima facie* evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence.[266] It is finally to be observed that, in some circumstances, there is privity between the administrator and the distributees of the personalty. Thus, an administrator having been a party to a bill, and consented to a decree thereunder, by which his accounts were settled and the debts marshalled and their payment arranged, the distributees of the estate are to be considered as represented by him, and, in the absence of collusion between the administrator and the other parties, they are bound by the decree.[267] But it has also been held that a judgment rendered in an action had between the administrator and the heirs is not binding or conclusive upon the legatees.[268]

§ 561. Executor and Legatee.

The executor of an estate is in privity with a legatee of personalty until the legacy is delivered, and consequently the latter is concluded by a judgment against the former.[269] Thus a judgment regularly

determined, and no one concluded. So if, upon an action brought by the administrator against a defendant in possession of real property, upon the allegation of seisin in the deceased at the time of his death, it be adjudged that the intestate was not seised, or that the defendant had the better title, the legal consequence follows that the administrator, the heirs and creditors, and all persons subsequently asserting that title, as having vested in themselves by reason of the death of the intestate, are alike estopped to deny the superiority of the title of the defendant adjudicated in the former action."

[264] Sergeant v. Ewing, 36 Pa. St. 156; Stone v. Wood, 16 Ill. 177.

[265] Shannon v. Taylor, 16 Tex. 418.

[266] Harvey v. Wilde, L. R. 14 Eq. 438.

[267] Barclay v. Kinsey, 72 Ga. 725. But compare Wright v. Phillips, 56 Ala. 69.

[268] Valsain v. Cloutier, 8 La. 170, 22 Am. Dec. 179.

[269] Redmond v. Coffin, 2 Dev. Ch. 437; Hooper v. Hooper (W. Va.), 9 S. E. Rep. 937.

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obtained against an executor by one who claims a debt due from the testator is conclusive against the executor and the estate in his hands unadministered, as to the existence and the amount of the debt; and legatees cannot go behind the judgment, by pointing out a defense (such as the statute of limitations), which the executor might have made but did not.[270]

§ 562. Successive Administrators.

Although an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor,—by all acts done within the line of his duty and authority, which are not tainted with fraud; not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees, and distributees,[271] —yet, as there is no technical privity between an administrator in chief and a succeeding administrator *de bonis non*, a judgment rendered against the former, according to the best authorities, is neither conclusive nor admissible against the latter.[272] Thus, where a decree of a court of chancery for a sum of money was obtained against an executor, it was held that such decree could not be made the foundation of a suit against an administrator *de bonis non cum testamento annexo*.[273] And conversely, a judgment against the administrator *de bonis non* of a debtor, is not evidence of the de btas against the representative of the administrator in chief.[274] When we reflect that the executor of an executor is bound as a privy by a judgment or other estoppel against his predecessor, the doctrine just stated may appear somewhat anomalous. But the reason of the distinction, as explained by Dr. Bigelow, is found in the fact that an executor, deriving his power from the special confidence reposed in him by the testator, is allowed to transmit that authority to another; whereas an administrator acts merely as an officer of the court appointing him, and cannot transmit

[270] Castellan v. Guilmartin, 54 Ga. 299.

[271] Martin v. Ellerbe, 70 Ala. 326.

[272] Martin v. Ellerbe, 70 Ala. 326; Thomas v. Sterns, 33 Ala. 137; Rogers v. Grannis, 20 Ala. 247; Coleman v. McMurdo, 5 Rand. 51; Graves v. Flowers, 51 Ala. 402.

[273] Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703.

[274] Thomas v. Sterns, 33 Ala. 137.

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his authority, and has no connection with his successor, further than that they both represent the same decedent.[275]

§ 563. Principal and Ancillary Administrator.

Where letters of administration upon the same estate are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; nor, if the one recovers a judgment against a debtor of the estate, can the other sue upon it as a cause of action accruing to himself; for in contemplation of law there is no privity between the principal and the ancillary administrator.[276] In one of the earlier cases on this subject the United States supreme court remarked: "These administrations were independent of each other; the respective administrators represented M., the deceased intestate, by an authority co-extensive only with the state where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees according to the laws of the state granting the authority. No connection existed, or could exist, between them, and therefore a recovery against the one in Tennessee was not evidence against the other in Mississippi."[277] Again, there is no such privity between an *executor*, acting under authority of the probate court at the decedent's domicile, and an ancillary administrator, deriving his powers from the probate court of another state, that a judgment against the administrator will be evidence against the executor. In deciding this point, the court in Massachusetts reasoned thus: "It is said that

[275] Bigelow on Est. 100.

[276] Aspden v. Nixon, 4 How. 467; Stacy v. Thrasher, 6 How. 44; Hill v. Tucker, 13 How. 466; McLean v. Meek, 18 How. 16; Dent v. Ashley, 1 Hempst. 54; Taylor v. Barron, 35 N. H. 484; Grout v. Chamberlin, 4 Mass. 613; Talmadge v. Chapel, 16 Mass. 71; Pond v. Makepeace, 2 Met. 114; Low v. Bartlett, 8 Allen, 259; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 174; Merrill v. Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; Lightfoot v. Bickley, 2 Rawle, 431; Latine v. Clements, 3 Kelly, 426; Jones v. Jones, 15 Tex. 463, 65 Am. Dec. 174; Carrigan v. Semple (Tex.), 12 S. W. Rep. 178; Rosenthal v. Renick, 44 Ill. 202; Story, Confl. Laws, § 522; Bigelow on Est. 255.

[277] McLean v. Meek, 18 How. 16.

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they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in Vermont, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independently." [278] But the case is somewhat different with respect to *two executors*. Executors of the same decedent in different states are, as regards creditors of the estate, executors in privity, bearing to the creditors the same responsibilities as if there were only one executor. And although a judgment recovered against an executor qualified in one state is not conclusive upon an executor in another state, yet it may be admissible to show that the demand had been carried into judgment, and that the other executor was precluded by it from pleading prescription or the statute of limitations upon the original cause of action.[279]

§ 564. Administrator and Probate Purchaser.

There is no privity between an administrator and a purchaser under a sale by order of the court of probate. Consequently a decree in a suit to which the administrator was a party is not available to estop the purchaser, who was not a party.[280]

§ 565. Co-Heirs or Distributees.

There is no such privity between the co-heirs or distributees of an estate as will make a judgment against a part a bar to a suit in favor of the rest. Each is entitled in his own right to his share in the ancestor's estate, and to contest any conflicting claim. Such per-

[278] Low v. Bartlett, 8 Allen, 259.
[279] Hill v. Tucker, 13 How. 458.
[280] Crandall v. Gallup, 12 Conn. 365.

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sons do not claim through or under one another, and hence a judgment against a part should not prevent the rest from being heard.[281]

§ 566. Surviving Partners and Representatives of Deceased.

A judgment recovered against the surviving member of a copartnership, for a debt alleged to have been due by the firm, in a suit in which the representatives of the deceased partner were not made parties, is not evidence as against such representatives of the indebtedness of the decedent, in a subsequent suit to charge his estate with the debt, there being no privity between the parties.[282] But such judgment would be admissible to prove the simple fact of a recovery against such surviving partner.[283] This latter fact might become relevant to the issues in such suit, in the easily supposed case where the plaintiff had to show the insolvency of the firm and of the surviving partner. Here the recovery of the judgment and return of an execution unsatisfied would be pertinent evidence. But as to the existence of a valid claim upon the decedent's estate, that would have to be proved by evidence outside the judgment.

§ 567. Warrantor and Warrantee.

It is a well settled rule that where one who has conveyed land to another, with warranty of title, is vouched in by the latter, upon due and proper notice, to defend an action of ejectment brought by a third person against the warrantee for the recovery of the same land, or voluntarily appears and assumes the defense, the judgment in ejectment, if given for the stranger, is *conclusive evidence*, in a subsequent action by the covenantee against his grantor, of the fact that the former has been evicted from his possession by a paramount title.[284] More precisely, "a person holding a covenant running with

[281] Walker v. Perryman, 23 Ga. 309.

[282] Trustees v. Lawrence, 11 Paige, 80; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. St. 411; Runkel v. Phillips, 9 Phila. 619; Buckingham v. Ludlum, 37 N. J. Eq. 137.

[283] Sturges v. Beach, 1 Conn. 507.

[284] Smith v. Compton, 3 B. & Ad. 407;

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the land, being sued for the land or on his covenant, may give notice to a prior grantor, in the chain of title, to sustain the title, and on failure to do so, the judgment may be read in evidence against him to show that the last covenantor had been sued, a judgment recovered against him, and that his covenant had not been performed, and the amount he had been compelled to pay; and in such a suit the plaintiff would not be required to prove the title under which the eviction was had, except that it was not a title derived from himself."[235] It is of course of no consequence to the result whether the person thus called in does in fact appear and defend or not. If he omits to do so, it is at his own risk. Nor, probably, is it material whether the judgment against the covenantee goes by default or is rendered after a trial of the issues.[236] But there must be a judgment, in order that the warrantor may be concluded. In ejectment, for example, although the covenant of warranty is not broken without eviction by paramount title, yet eviction by a judgment is not legally necessary to a *breach of the covenant;* the warrantee may voluntarily yield possession to a person having a better title, and then claim on the covenant; but

Williamson v. Williamson, 71 Me. 442; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Knapp v. Marlboro, 34 Vt. 235; Turner v. Goodrich, 26 Vt. 707; Pitkin v. Leavitt, 13 Vt. 379; Chamberlain v. Preble, 11 Allen, 370; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Hinds v. Allen, 34 Conn. 195; Miner v. Clark, 15 Wend. 425; Kelly v. Church, 2 Hill, 105; Adams v. Conover, 22 Hun, 424; Swenk v. Stout, 2 Yeates, 470; Collingwood v. Irwin, 3 Watts, 310; Ives v. Niles, 5 Watts, 323; Terry v. Drabenstadt, 68 Pa. St. 400; Chapman v. Holmes, 5 Halst. 20; Wilson v. McElwee, 1 Strobh. 65; Middleton v. Thompson, 1 Spears, 67; Harbin v. Roberts, 33 Ga. 45; Wimberly v. Collier, 32 Ga. 13; Graham v. Tankersley, 15 Ala. 634; Cummings v. Harrison, 57 Miss. 275; Williams v. Leblanc, 14 La. Ann. 757; Lord v. Cannon, 75 Ga. 300; Jones v. Waggoner, 7 J. J. Mar. 144; Cox v. Strode, 4 Bibb, 4; Davenport v. Muir, 3 J. J. Mar. 310, 20 Am. Dec. 143; Williams v. Burg, 9 Lea, 455; Boyd v. Whitfield, 19 Ark. 469; King v. Kerr, 5 Ohio, 158, 22 Am. Dec. 777; Harding v. Larkin, 41 Ill. 413; McConnell v. Downs, 48 Ill. 271; Chicago & N. W. R Co. v. Northern Line Packet Co., 70 Ill. 221; Bever v. North, 107 Ind. 544, 8 N. E. Rep. 576; St. Louis v. Bissell, 46 Mo. 157; Wendel v. North, 24 Wis. 223; Mason v. Kellogg, 38 Mich. 132; Dalton v. Bowker, 8 Nevad. 190; Rawle on Cov. for Title, § 117.

The only state in which this rule is distinctly repudiated is North Carolina. See Martin v. Cowles, 2 Dev. & Bat. 101; Shober v. Robinson, 2 Murph. 33; Wilder v. Ireland, 8 Jones, 85.

[235] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221.

[236] See Chamberlain v. Preble, 11 Allen, 370; Jackson v. Marsh, 5 Wend. 44.

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this he does at his own peril, and in a suit against the warrantor the burden of proof is on the plaintiff to show the paramount title, whereas a judgment against him would have been conclusive of that fact.[287] It is further to be observed that when a warrantor, either voluntarily or upon notice, comes in to defend a suit against one to whom he is liable over, he comes in subject to all such reasonable rules and orders as the court may see fit to make in the cause. Hence, in a case where B. assumed the defense of a suit against A., to whom he was liable over, and the court ordered him, upon the motion of A., to furnish A. security for the costs, and thereupon B. abandoned the defense without complying with such order, it was considered that he was concluded by a judgment against A. the same as though he had made full defense.[288]

This same rule of estoppel will also apply to cases where the responsibility over rests upon other covenants than the warranty of title. Thus, in a case in New York, it appeared that certain land, upon which stood a mill and dam, was conveyed by a deed with covenant for quiet enjoyment. The grantee entered and operated the mill, maintaining the dam at the same height at which it was when the conveyance was made. An adjoining owner sued him for damages for overflowing his lands and recovered judgment. The grantor was duly notified of the action; and afterwards the grantee sued for breach of the covenant of quiet enjoyment. It was held that the judgment conclusively established against the covenantor that he had no right, at the time of the conveyance, to maintain the dam at that height, and also established a breach of said covenant.[289]

When a party institutes a suit founded upon a title which his grantor has covenanted to warrant, and the defendant sets up a title adverse to and inconsistent with the title thus warranted, the grantor may be notified to come in and defend against that title, in the same manner that he may be notified to defend against an adverse title set up in an action against his grantee. And when so called in, he will, in the same manner and to the same extent, be bound by the result of the litigation.[290] But "the right of a plaintiff to give notice may

[287] Callis v. Cogbill, 9 Lea, 187.
[288] Colburn v. Pomeroy, 44 N. H. 19.
[289] Adams v. Conover, 22 Hun, 424.
[290] Andrews v. Denison, 16 N. H. 469,

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be limited to cases where, in some form, a defense involving the title warranted has been set up. If he might give the notice upon the institution of his suit, without any knowledge whether the defense would involve the validity of the title warranted and the covenant of warranty, it would, in effect, be a notice to come in and prosecute the suit, which would not be a good notice."[291] In at least one state, the right to thus call in the warrantor is secured to the plaintiff by statute.[292]

§ 568. Defenses Open to Warrantor.

But although the judgment against the warrantee is in general conclusive upon the warrantor when the latter had notice, there are still some defenses which are open to him in a subsequent action against him by the warrantee, viz., that the recovery was upon a title derived from the warrantee himself, or in consequence of some fact occurring after the date of the covenant, or that his covenant was special, or that it did not run with the land, or that he made no covenant.[293] Thus, where the warrantor is called in to defend, and succeeds in showing that the agreement was only for a special warranty (in which form his deed was drawn), and that the plaintiff in the suit does not claim through or under him, and on that ground has judgment, this will bar a subsequent action against him by the grantee, the character of the warranty agreed upon being thereby determined.[294] This point is further elucidated by an interesting case from South Carolina, in which the facts were as follows: A. conveyed a tract of land to B. with warranty, and B. in turn conveyed it to C. Afterwards D. entered upon the land, and was made defendant to an action by C. C., however, was defeated in this action,

43 Am. Dec. 565; Brown v. Taylor, 18 Vt. 631, 37 Am. Dec. 618; Pitkin v. Leavitt, 18 Vt. 379; Gragg v. Richardson, 25 Ga. 566, 71 Am. Dec. 190; White v. Williams, 13 Tex. 258; Rawle on Cov. for Title, § 118. A contrary view is maintained in Tennessee. Farrell v. Alder, 8 Humph. 44.

[291] Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565.

[292] Code of La., art. 2495.

[293] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221; Davenport v. Muir, 3 J. J. Mar. 310, 20 Am. Dec. 143; Twambly v. Henley, 4 Mass. 441.

[294] Monks v. McGrady, 71 Tex. 134, 8 S. W. Rep. 617.

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and D. was established in the possession of a portion of the land. C. then sued B. upon his deed and warranty, and the latter vouched A., his warrantor, to come in and defend the title, but A. omitted to appear, and C. recovered against B. Thereupon B. brought his action of covenant against A. upon his covenants of seisin, quiet enjoyment, and general warranty. In this last action the plaintiff introduced in evidence the record of the action of C. against D. It was held that this record was admissible to show the quantum of damages sustained by B., and to show eviction by title paramount to B.'s, but that A. had a right to show that, notwithstanding the eviction was by title paramount to B.'s, yet it was not paramount to *his* title; but if he failed to do so, the verdict was conclusive against him.[295] Further, it is held that where a grantor in a deed has once responded to a suit on his covenant of warranty, brought by a proper party, he is not liable to a second suit on the same covenant; and the judgment obtained against him in the first suit is admissible as evidence in the second.[296]

§ 569. Requisites of Notice to Warrantor.

We have said that the warrantor must have notice of the action against his grantee, in order to be bound by the result. By this is meant a *notification* proceeding from the latter. Merely that he *knew* of the action and talked about it, and intimated that he had evidence which would defeat it, is not enough.[297] And the mere fact that a person testifies as a witness on the trial of a suit is not sufficient evidence that he had such legal notice as the law intends him to receive, in order to be bound by the judgment.[298] Although if he actually appears and openly and actively assumes the defense, it will be presumed that he was duly notified.[299] In regard to the character of the notice, the books say that it must be unequivocal, certain, and explicit, but that it need not appear of record, and that no particular

[295] Middleton v. Thompson, 1 Spears (S. Car.) 67.

[296] Vancourt v. Moore, 26 Mo. 92; Brady v. Spurck, 27 Ill. 478.

[297] Paul v. Witman, 3 Watts & S. 409.

[298] Lebanon v. Mead, 64 N. H. 8, 4 Atl. Rep. 392.

[299] Harding v. Larkin, 41 Ill. 413.

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form of words is required.[300] Whether the notice must be in writing or not, is a point not so definitely settled. Good authority may be cited for the view that it will not answer its purpose unless written.[301] But the prevalent opinion appears to be that a *parol* notice, if certain, explicit, and otherwise good, will be fully sufficient.[302] Thus it is said by the supreme court of Minnesota: "This notice must be clear and explicit, and convey precise information that unless the person to whom it is addressed establishes the validity of the title in the first action, he will be estopped by the judgment. But no case has decided that the notice should be in any particular form. In some it is suggested that it would be better if notice in writing were required, but most of the cases assume that if sufficient in substance it need not be in writing; and except for facility in proving it, and certainty as to its character, we see no reason why it should be written or formal. If it clearly apprise the person to whom it is given that an action involving the title has been commenced, and that the defendant giving it looks to him to establish the title in that action, the object of the notice is accomplished." [303]

§ 570. Warrantor must have an Opportunity to Defend.

In order that the warrantor may be bound by the result of the litigation, it is not only necessary that he should be notified of the suit, as above described, but it is also essential that he should have a fair and full opportunity to defend his title and to avail himself of every legal means of avoiding an adverse judgment.[304] And this privilege extends to the right to move in arrest, move for new trial, take a statutory new trial, appeal from the judgment, and generally resort to any and

[300] Greenlaw v. Williams, 2 Lea, 533; Williams v. Burg, 9 Lea, 455; Paul v. Witman, 8 Watts & S. 410; Boyd v. Whitfield, 19 Ark. 447; Davis v. Wilbourne, 1 Hill (S. Car.) 27; Somers v. Schmidt, 24 Wis. 421; Collins v. Baker, 6 Mo. App. 588.

[301] Mason v. Kellogg, 88 Mich. 132; Rawle on Cov. for Title, § 119. And see Somers v. Schmidt, 24 Wis. 417.

[302] Ferrea v. Chabot, 63 Cal. 564; Miner v. Clark, 15 Wend. 427; Cummings v. Harrison, 57 Miss. 275.

[303] Hersey v. Long, 30 Minn. 114, 14 N. W. Rep. 508.

[304] Saveland v. Green, 36 Wis. 612; Axford v. Graham, 57 Mich. 422, 24 N. W. Rep. 158.

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all remedies which would be open to the original defendant. Thus it is said: "Where a grantee seeks to conclude a grantor in an action on the covenants of the deed, by the result of the suit in which the grantee was ousted under an alleged paramount title, it should appear not only that the grantor was notified of the suit and requested to defend it, but that he was allowed to do so to the utmost extent of the law, if he desired to. Otherwise a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This would be clearly unjust. And it would be equally so to allow the grantee to acquiesce arbitrarily in the result of a first trial in ejectment, and conclude his grantor by it, refusing the latter the privilege of taking the second trial allowed by the statute and conducting the litigation farther. That being a statutory right in this particular action, its refusal to the grantor is denying him a full opportunity to use legal remedies to defend the title he had covenanted to defend, as much as it would be to refuse him the right to appeal." [305] In such a case, therefore, the judgment against the grantee would clearly not be binding and conclusive upon the grantor.

§ 571. Effect of Judgment when Warrantor is not Notified.

If the warrantor is *not* notified to come in and defend the action against his grantee, what effect is to be given to the judgment rendered therein, when the latter subsequently sues for the breach of the warranty of title? On this question there is some diversity of opinion. In one state the decisions seem to favor the view that the judgment is *prima facie*, though not conclusive, evidence of the superior title of the person who recovered it, it being still open to the warrantor to make any defenses he can against the judgment and to show (assuming the burden of proof) the validity of his own title.[306] But this position is not generally approved. According to the decided

[305] Eaton v. Lyman, 26 Wis. 61.

[306] Collingwood v. Irwin, 3 Watts, 310; Paul v. Witman, 3 Watts & S. 407.

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preponderance of authority, the record in the former suit will be admissible against the warrantor to prove the fact of *eviction*,—that the grantee was ousted by a judgment of a court (which, however, is no more than the familiar truth that a judgment is always evidence of its own existence),—but it will not be admissible at all, not even as *prima facie* evidence, to show that the eviction was had under a paramount title.[307]

§ 572. Warrantor of Personal Property.

The same general principles which have been expounded in the five preceding sections apply also to cases of sales of personal property. Where there is an express or implied warranty of title, and the goods are taken from the vendee by a judgment in a suit against him by a third person, of which action the vendor was duly notified and was requested to defend, the latter is conclusively bound by such judgment.[308] "The vendor in possession of personal property impliedly warrants the title to the thing sold. He is therefore bound to make good to the purchaser all his losses resulting from the want of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. . . . . It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the individuals who have sold the prop-

[307] Cox v. Strode, 4 Bibb, 4; Booker v. Bell, 3 Bibb, 173, 6 Am. Dec. 641; Knapp v. Marlboro, 31 Vt. 674; Everling v. Holcomb, 74 Iowa, 722, 39 N. W. Rep. 117; Sisk v. Woodruff, 15 Ill. 15; Stephens v. Jack, 3 Yerg. 403, 24 Am. Dec. 583; Tam v. Shaw, 10 Ind. 469; Hardy v. Nelson, 27 Me. 525; Graham v. Tankersley, 15 Ala. 645; Rhode v. Green, 26 Ind. 83; Walton v. Carr, 67 Ind. 164; Clements v. Collins, 59 Ga. 124; Hanson v. Buckner, 4 Dana, 254; Ryerson v. Chapman, 66 Me. 557; Wilder v. Ireland, 8 Jones, 87.

[308] Boyd v. Whitfield, 19 Ark. 447; Brown v. McMullen, 1 Hill (S. Car.), 29; Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372; Pickett v. Ford, 4 How. (Miss.) 246; Blasdale v. Babcock, 1 Johns. 517; Marlatt v. Clary, 20 Ark. 251; Salle v. Light, 4 Ala. 700, 39 Am. Dec. 317; Thurston v. Spratt, 52 Me. 204; Baltimore Steam Packet Co. v. Garrison, 6 Daly, 246; Buchanan v. Kauffman, 65 Tex. 235; Fallon v. Murray, 16 Mo. 168.

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erty are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice." [209] There are cases holding that this principle of estoppel upon a warrantor called in to defend applies only to cases where the *title* is involved, not to cases where the controversy turns upon the question of the soundness, quality, etc., of the chattel. Thus it is said that a judgment recovered against a seller of goods, for breach of an implied warranty of soundness, is not evidence which will enable him to recover against the person from whom he bought on a like warranty, even though the first seller was duly notified of the action.[210] But the principle is in fact often applied to cases where the title to the chattel is not so much in controversy as some collateral matter. Thus, where the assignor of a note warranted it free from set-off, and in a suit by the assignee against the maker, of which the assignor was notified and which he assisted in prosecuting, there was judgment for a set-off, it was held that in an action by the assignee against the assignor for deceit, such judgment was conclusive evidence of the set-off.[211] If the vendor was *not notified* of the action against his vendee, still, according to some of the cases, the judgment against the latter is *prima facie* evidence of the vendor's want of title, so as to throw upon him the burden of proving his title.[212] But this doctrine has been denied.[213] And indeed it is difficult to distinguish this case, in principle, from the parallel case of a sale of land with warranty of title, where, as appears by the preceding section, if the warrantor was not notified, the judgment is not admissible even as *prima facie* evidence of the invalidity of his title, or the strength of that of the successful claimant.

[209] Thurston v. Spratt, 52 Me. 204.

[210] Smith v. Moore, 7 S. Car. 209, 24 Am. Rep. 479. In an action upon a covenant of warranty of the soundness of a slave the plaintiff cannot introduce as evidence the record of a judgment recovered against him, because of the unsoundness of the slave, by one to whom he had sold, subsequent to his own purchase from the defendant, with warranty of soundness; because the matters in issue in the two suits are different, viz., the soundness of the slave at two distinct times. But the court said the case would have been otherwise if the *title* had been the issue in each suit. Morgan v. Winston, 2 Swan, 472.

[211] Walker v. Ferrin, 4 Vt. 523.

[212] Marlatt v. Clary, 20 Ark. 251.

[213] Roper v. Rowlett, 7 Lea, 320.

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§ 573. Indemnitors.

An obligation to indemnify upon notice that suit has been brought is also an obligation to defend the suit or to abide the consequences of a judgment, and the judgment will bind the indemnitor, when the latter is notified to defend and fails to do so.[314] The rules upon this subject were well stated in a certain New York decision, where the court said that covenants to indemnify against the consequences of a suit were of two sorts, the first class including cases where the covenantor expressly made his liability dependent on the event of a litigation to which he was not a party and stipulated to abide the result, and the second comprising cases where the covenant was one of general indemnity merely against claims or suits. In cases of the first class, said the court, the judgment would be conclusive evidence against the indemnitor, although he was not a party and had no notice, because its recovery was the very event against which he covenanted. But in cases of the second class, the judgment would be merely *prima facie* evidence against the indemnitor, and he might be let in to show that the principal had a good defense to the claim. And in both cases the indemnitor was of course to be understood as saving the right, which the law gives in every case where the suit is between third persons, of contesting the proceeding on the ground of a collusive agreement to put the charge upon him.[315] In pursuance of these principles, it is held that where the assignor of a mortgage covenants with the assignee that the property mortgaged will produce a given sum over and above the costs of foreclosing, and that if it does not he will pay the deficiency, the proceedings in the suit to fore-

[314] Troy v. Troy & Lansingburgh R. Co., 3 Lans. 270; Kip v. Brigham, 6 Johns. 158; Trustees of Newburgh v. Galatian, 4 Cow. 340; Beers v. Pinney, 12 Wend. 309; Mehaffy v. Lytle, 1 Watts, 314; Konitzky v. Meyer, 49 N. Y. 571. "It is a well settled rule that where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and an opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner." Commercial Assur. Co. v. American Cent. Ins. Co., 68 Cal. 430, 9 Pac. Rep. 712.

[315] Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275.

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close will be conclusive evidence against the assignor, in an action on the covenant, to show the amount of the deficiency.[316] But on the other hand, in order to make a judgment against one of several former partners conclusive upon another partner, who, upon dissolution, assumed the firm debts, the evidence of notice to the latter of the bringing of the action in which the judgment was obtained must be very clear.[317] In an English case it appeared that A. had become surety for C., who was a collector of taxes, and that B. and C. had thereupon executed a joint and several indemnifying bond to A. Judgment was taken against A., at the suit of the receiver-general, for the default of C., and A. then sued B. upon the indemnity bond. It was held that the judgment against A. was evidence, in his suit against B., that he had been sued, but was not evidence of the amount he was legally liable to pay, because B. was not a party to that action.[318] The same general principle governs the case of actions upon indemnifying bonds given to officers of the law in the discharge of their duties. Where, for example, the plaintiff in an execution gives to the sheriff a bond to hold him harmless for selling property levied on under the execution, and the sale is made, and the real owner then recovers against the sheriff in trespass, such judgment is evidence, in a subsequent action by the sheriff against the indemnitor, that the real owner had asserted his claim, and that what the sheriff has paid he was compelled to pay by legal proceedings, but it is not evidence that the claimant against the sheriff was the real owner of the property, unless the obligor in the indemnity bond had notice of the suit and an opportunity to make defense in it.[319]

§ 574. Persons Responsible Over.

"The rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he

[316] Rapelye v. Prince, 4 Hill (N. Y.), 119, 40 Am. Dec. 267. See Drennan v. Bunn, 124 Ill. 175, 16 N. E. Rep. 100.

[317] Reed v. Orton (Pa.), 6 Atl. Rep. 869. See Taylor v. Barnes, 69 N. Y. 430.

[318] King v. Norman, 4 C. B. 884.

[319] Burrill v. West, 2 N. H. 190; Lovejoy v. Murray, 3 Wall. 1; Miller v. Rhoades, 20 Ohio St. 494; Boynton v. Morrill, 111 Mass. 4; Stewart v. Thomas, 45 Mo. 44.

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has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not." [320] For example, where the person injured by the escape of an imprisoned debtor has recovered judgment against the sheriff for his damages sustained by reason of such escape, and the sheriff in turn sues the county, claiming damages on the ground that the escape would not have occurred if the county had fulfilled its duty in providing a jail, the record of the former judgment is admissible in evidence for the purpose of showing the amount the sheriff had been compelled to pay.[321] So a judgment on the merits against an assignee, based upon matter prior to the assignment, the assignor having been notified so that he might litigate, is a bar to a subsequent suit by the assignor.[322] So when an indorsee of a promissory note sues the maker, and notifies the indorser of the pendency of the suit, or advises him of any defense interposed, this will make the verdict conclusive against the indorser, if the maker is discharged, and it cannot be controverted when the indorser is sued.[323] Again, where the liability of a surety is contingent, and to be ascertained by an assessment of damages, a transcript of the judgment and proceedings against him, with proof of payment of the amount recovered, is competent, at least *prima facie*, evidence in a suit by him against the principal to recover the money so paid, even though the principal was not joined in the suit or notified of it.[324]

[320] Davis v. Smith, 79 Me. 351, 10 Atl. Rep. 55. Other cases holding this rule are Veazie v. Railroad, 49 Me. 124; Hardy v. Nelson, 27 Me. 530; Boston v. Worthington, 10 Gray, 498; Littleton v. Richardson, 34 N. H. 187, 66 Am. Dec. 759; Spencer v. Dearth, 43 Vt. 106; Shrewsbury v. Boylston, 1 Pick. 105; Prichard v. Farrar, 116 Mass. 218; Salle v. Light, 4 Ala. 700, 39 Am. Dec. 317; Clark v. Carrington, 7 Cranch, 322; Hamilton v. Cutts, 4 Mass. 353, 3 Am. Dec. 222; Bond v. Ward, 1 N. & McC. 201; Kip v. Brigham, 6 Johns. 158; Walker v. Ferrin, 4 Vt. 523; Mehaffy v. Lytle, 1 Watts, 314; Tyree v. Magness, 1 Sneed, 276.

[321] Commissioners of Brown Co. v. Butt, 2 Ohio, 348.

[322] Tyree v. Magness, 1 Sneed. 276.

[323] Hagerthy v. Bradford, 9 Ala. 567; Brown v. Chaney, 1 Kelly (Ga.), 410; Morgan v. Simmons, 3 J. J. Mar. 611.

[324] Bone v. Torrey, 16 Ark. 83; Snider v. Greathouse, *Id.*, 72.

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In ascertaining the application of this rule, two very important limitations must be borne in mind. In the first place, the fact that notice of a pending suit has been given to a third person does not determine the question whether or not such person *is in fact responsible over* to the defendant, nor, generally, can that question be put in issue in the first suit, but it must be established as an independent fact in the subsequent action. Thus if one carrier is sued for the loss of goods, and notifies a second carrier, to whom he delivered the same for transportation, of the pendency of the suit, and requires him to defend the same, the judgment against the first is not conclusive as to the question of the liability of the second. It is only conclusive on such privies as are liable over, and then only as to the fact that the judgment was recovered, and that it was for the value of the goods lost; but the judgment is not so far conclusive of the question of privity as to fix the liability of the person served with notice.[555]

In the second place, the scope of the estoppel created by the first judgment cannot be extended beyond the points and issues necessarily determined by it. Nor is the person responsible over precluded by it from setting up any defenses which, from the nature of the action or the pleadings, he could not have interposed in the first litigation had he been a formal party to it. Thus a shipper against whom a judgment has been rendered for failure to deliver goods as agreed, by an assignee of the bill of lading, cannot maintain an action on such judgment against the carrier who had issued the bill of lading, although the carrier was notified of the pendency of the action and requested to defend, since the latter could not, had he been a

[555] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 217. In this case, Walker, J., observed: "Whether such a relation exists as to make the notice an estoppel, to that extent, is an open question that may always be contested; but when it is shown that the relation does exist, and that a recovery over may be had against the person on whom the notice was served, then he is estopped to deny that the judgment was recovered against his privy, that the wrong was perpetrated, or [to allege] that the recovery was too large. In that case, the judgment may be read in evidence to show that there had been a recovery against the person first sued, and the amount he has been compelled to pay, as fixing the measure of damages, but the judgment is evidence for no other purpose."

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party to the action, have set up the defenses available as against the shipper.[326] This point is further illustrated by the case of *Churchill* v. *Holt*,[327] before the supreme judicial court of Massachusetts, wherein it appeared that A. was the occupant of a building connected with which there was a hatchway in the street leading into the basement; that the hatchway was once left open and unguarded; and that M., a passenger in the street, fell into it and was injured. M. sued A. for damages, and recovered a judgment, which A. paid. A. then sued B. for indemnity, alleging that the dangerous condition of the hatchway, on that occasion, was due to the negligent act of B.'s servant. It was held that the judgment in the suit of M. against the plaintiff was not conclusive against his right to maintain this action. The court said: "Under the pleadings in that suit, the judgment may have been rendered on the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action."[328]

§ 575. Judgment against City as Evidence in Action against Person Liable Over.

It is a well established rule, and one which has been recognized and enforced in a number of noteworthy cases, that a judgment recovered against a municipal corporation, for injuries caused by a defect or obstruction in the highway, is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over, and who was notified of the first suit.[329] To illustrate,

[326] Garrison v. Babbage Transp. Co., 94 Mo. 180, 6 S. W. Rep. 701.

[327] 127 Mass. 165, 34 Am. Rep. 355.

[328] See also St. John v. St. John's Church, 15 Barb. 346.

[329] Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759; Veazie v. Railroad, 49 Me. 119; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Seneca Falls v. Zalinski, 8 Hun, 571; Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735; Robbins v. Chicago, 4 Wall. 657; Boston

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—in one of the cases cited it appeared that defendant was the owner of a building, the lower story of which he had leased for shops and portions of the upper story for various purposes, himself remaining in possession of the residue of the building; that there was an awning erected along the whole front of the building, for the benefit of the shops, but it was defective, and fell, injuring one Day who was passing beneath. Day brought his action for damages against the town, and the town gave notice of the action to defendant, requesting him to defend the same and stating that he would be held responsible if the town was adjudged liable. Day recovered judgment against the town, and the latter then brought the present action. It was held that the verdict and judgment against the town were conclusive evidence of the existence of a defect in the highway, the injury to the individual while he was in the exercise of due care, and the amount of the damages.[330] Contrary to the usual rule, some of the cases manifest a strong disposition to waive the important requirement of *notice* in these cases. The federal supreme court holds that it is not necessary that express notice should have been given to such third person to defend the suit against the municipal corporation, in order to make the judgment conclusive upon him, but it is sufficient if he *knew* that the suit was pending and could have defended it. "The legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit."[331] But this view is not to be commended. It exhibits too wide a departure from the well settled rules which apply to all the cases where a third person, not a party or privy to a judgment, is sought to be concluded by it. The better reason, as it seems to us, is with the decisions holding that, while such notice is not essential to the *right of action* against the person liable over, yet it is necessary to the conclusiveness of the judgment; that is, that the plaintiff in the second suit will be obliged to prove all the facts upon which his case depends, including those which, had he given

v. Worthington, 10 Gray, 496; Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550.

[330] Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735.

[331] Robbins v. Chicago, 4 Wall. 657; Chicago v. Robbins, 2 Black, 418.

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the notice, would have been conclusively established by the judgment.[333] But in any case it is necessary for the municipality to prove that the defendant in its action was the author of the act whereby the individual was injured.[333] And further, the judgment does not preclude all possible defenses. Thus it is said: "A judgment obtained against a municipal corporation for injuries received on account of defects in a street caused by third persons, would, in a suit by such corporation, brought to recover back what it had been compelled to pay, be conclusive as to the right of the injured party to recover, and as to the amount which the municipal corporation would be entitled to recover. But the party against whom the municipal corporation might seek to recover would be entitled to show that it was under no obligation to keep the street in safe condition, or that it was not in fault, or that the accident was caused by the negligent conduct of both parties, in which event no recovery could be had, for the reason that one of two joint wrong-doers cannot have contribution from the other."[334] In other words, while the indemnitor could not show that the injured individual was guilty of negligence, for that defense would be concluded by the former judgment, yet it might show contributory negligence (in common with itself) in the *city*, for that was not and could not have been litigated before.

[332] Village of Port Jervis v. First National Bank, 96 N. Y. 550. In this case, Chief Justice Ruger observed: "The liability of the author of the act which occasions the injury does not depend upon the fact of his receiving notice of the action brought by the injured party against the municipality. . . . . The only object of notice in such a case is to enable the corporation to avail itself of its right to impose the burden of defense upon the party ultimately liable, and to estop the author of the injury, by the judgment recovered, from again contesting the facts upon which such judgment depends. The omission to give notice in such case does not go to the right of action, but simply changes the burden of proof, and imposes upon the party against whom the judgment was recovered the necessity of again litigating and establishing all of the actionable facts. But if the party who is ultimately responsible has notice of the pendency of an action against his indemnitee, and is given an opportunity to defend, and neglects it, he is still bound by the result of the action and estopped from controverting, in an action subsequently brought against him by such indemnitee, the facts which were litigated in the original action."

[333] City of Cohoes v. Morrison, 42 Hun, 216.

[334] Western & Atlantic R. Co. v. Atlanta, 74 Ga. 774.

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§ 576. Intervening Claimants.

Where a third person intervenes in a pending action, for the purpose of claiming the fund or the chattel in controversy as his own, he is concluded by the judgment in that action, and cannot afterwards sue on the same claim, at least in respect of any title acquired prior to the intervention.[326] But he must actively and substantially make himself a party, in order to be bound. Thus, where one claiming personal property attached in an action against another appeared in such action, and took time to file a petition of intervention, but withdrew without filing such petition, it was held that he was not bound by any subsequent proceedings in the action.[327]

§ 577. Landlord and Tenant.

Although the case of landlord and tenant forms one of the typical examples of privity in estate, yet the authorities are by no means harmonious in regard to the proper application, to parties standing in that relation, of the principles of estoppel by judgment. In some of the states it is held that, where ejectment is brought against the tenant in possession, and he gives due and legal notice to his landlord, and the latter has an opportunity to come in and defend, the landlord is bound by the judgment against the tenant.[328] But in other jurisdictions the doctrine is that the lessor is not estopped or concluded by the judgment in a former action against his tenant, whereby the title was adjudged to be in the claimant, notwithstanding he was duly notified of the action, and even although he put his title in issue and defended it, *unless* he was made a party

[326] Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. Rep. 616; Richardson v. Watson, 23 Mo. 84; Richardson v. Jones, 16 Mo. 177; Shelton v. Brown, 22 La. Ann. 162; Aleix v. Derbigny, 22 La. Ann. 385; Stoddard v. Thompson, 31 Iowa, 80; Markham v. O'Conner, 23 La. Ann. 688; State v. Spikes, 33 Ark. 801. Compare Dilley v. McGregor, 24 Kans. 361.

[327] Wilson v. Trowbridge, 71 Iowa, 845, 32 N. W. Rep. 373.

[328] Chambers v. Lapsley, 7 Pa. St. 24; Ryerss v. Rippey, 25 Wend. 432; Harvie v. Turner, 46 Mo. 444; Valentine v. Mahoney, 37 Cal. 389; Chant v. Reynolds, 49 Cal. 213; McCreery v. Everding, 54 Cal. 168; Van Alstine v. McCarty, 51 Barb. 326; Hanson v. Armstrong, 23 Ill. 442.

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of record in that litigation.[338] The ground of this doctrine is that the lessor does not claim through or under the lessee, and therefore is not, in that sense, his privy. But however this may be, it seems to be conceded that when an action is brought against a tenant by a stranger to recover possession of the premises, *without notice* to the landlord, and judgment is rendered for the stranger, the possession is adversely and completely changed by virtue of the judgment, and the landlord is so far bound by the judgment notwithstanding his want of notice, although he is not concluded as to the title or future right of possession.[339] A judgment and execution in an action of ejectment cannot affect a person in possession of the premises when the suit is commenced, unless he is made a defendant to the action; but if a tenant of the defendant in such action has taken possession with actual notice of the pendency of the action, he will be estopped by the judgment as though a party.[340]

In regard to actions brought *by* a tenant, it is held that the conclusiveness of the judgment, upon the points in issue, will inure equally to the benefit and protection of the landlord. Thus, for example, a judgment recovered by a tenant in an action against a trespasser, who justified under a void tax sale of the premises, is conclusive against the same defendant, on the question of the validity of the tax sale, when interposed in another action brought by the

[338] Boles v. Smith, 5 Sneed, 105; Stout v. Tall, 71 Tex. 438, 9 S. W. Rep. 329; Orthwein v. Thomas (Ill.), 13 N. E. Rep. 564; Smith v. Gayle, 58 Ala. 600; Brush v. Cook, Brayt. (Vt.) 89; Bennett v. Leach, 25 Hun, 178; Kent v. Lasley, 48 Wis. 257, 4 N. W. Rep. 28. In Samuel v. Dinkins, 12 Rich. 172, 75 Am. Dec. 729, it was said: "A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against the landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still if the landlord was no party on the record, it cannot appear from the recovery against the tenant that the landlord had the full opportunity for defense which as a party he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded. His being a party might have caused change in the jury or in the admissibility of evidence, or in the conduct of parties or counsel, which would have altered the result."

[339] Stridde v. Saroni, 21 Wis. 178; Read v. Allen, 58 Tex. 380; Chant v. Reynolds, 49 Cal. 213.

[340] Fogarty v. Sparks, 23 Cal. 142; Bradley v. McDaniel, 3 Jones, 128.

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reversioner to recover for the injury to the inheritance.[341] But it does not follow that a recovery by or against the tenant will bar an action by the landlord upon the same acts or facts. For they may sue in respect to entirely distinct and individual rights. Thus, in a case in Massachusetts, it appeared that, in consequence of a leak in the main pipe of the defendant gas company, an explosion occurred, whereby damage was done to the plaintiff's house. In plaintiff's action against the company for negligence, defendant offered in evidence a judgment in its favor in an action formerly brought by plaintiff's tenant, who was in possession of the house at the time, in which the latter had claimed damages for injury to his person and property caused by the same explosion. But it was held that the plaintiff and his tenant were not in privity as respects this case, and consequently such former judgment was not evidence against the plaintiff. "The plaintiff's right to recover for the destruction of his building," said the court, "is entirely independent of the tenant's claim for the personal injury. The landlord does not claim by, through, or under his tenant. The former judgment therefore was not between the same parties or their privies, nor was the cause of action the same; no right or title to the demised premises was involved." [342]

§ 578. Principal and Agent.

Although, as a general principle, it is undoubtedly true that there is no privity of estate between principal and agent, yet there are particular cases where a judgment for or against the one may be evidence for or against the other. Thus it is held that where, in replevin for goods in the hands of an agent, the defendant pleads property in his principal, and the plaintiff obtains a verdict, the principal is concluded from disputing the title of the plaintiff in a subsequent action against the principal, at least if the latter had notice of the first suit and an opportunity to defend.[343] So where the plaintiff

[341] Freer v. Stolenbur, 2 Abb. App. Dec. 189.

[342] Bartlett v. Boston Gas Light Co., 122 Mass. 209.

[343] McKinzie v. Railroad, 28 Md. 161; Warfield v. Davis, 14 B. Mon. 40.

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sues the agent and is defeated, and then sues the principal, the latter may take advantage of the estoppel against the plaintiff.[344] But a judgment against a principal for damages caused by the negligence of his agent, while it is evidence to show the quantum of damages in an action by the former against the latter to recover for the damages sustained by the principal, is not admissible to show that the alleged damages were attributable to the agent's negligence.[345] So an action by an agent for a conversion of property, in which the jury found the title to be in the principal and therefore gave the agent nominal damages, is no bar to an action by the principal.[346] But in a case where a cause of action against a carrier for negligence is of such a character that it may be prosecuted either by the owner of the property or by his agent, on account of an express contract between the agent and the carrier, a judgment in favor of the carrier, in a suit brought by the owner, is a bar to a subsequent suit brought by the agent.[347]

§ 579. Master and Servant.

Where one appears in a suit and defends the same, upon an allegation that the defendant acted as his servant or agent in the

[344] Emma Silver Mining Co. v. Emma Mining Co. of New York, 7 Fed. Rep. 401. In delivering the opinion in this case, Choate, D. J., stated the doctrine as follows: "The weight of authority is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both. Castle v. Noyes, 14 N. Y. 329; Emery v. Fowler, 39 Me. 329, and cases cited."

[345] Baynard v. Harrity, 1 Houst. 200.

[346] Pico v. Webster, 12 Cal. 140.

[347] Green v. Clark, 5 Denio, 497; s. c. 12 N. Y. 343.

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transaction which forms the basis of the suit, or where he has a right and opportunity to so intervene, because the relation of master and servant does in reality exist, or where it is his duty to appear and assume the defense, in consequence of his implied obligation to save his servant harmless in the commission of the acts which he has directed, in either such case he is bound by the verdict and judgment, as being in privity with the nominal defendant.[348] Similarly, it is held that where a judgment has been rendered for the defendant in trespass against a master, this will bar a subsequent action against his servant for the same acts of trespass; because, it is argued, the servant would be allowed to show that he acted by the lawful command of his master, or that satisfaction had been obtained out of the master, and therefore, by analogy, he ought to be allowed to prove that a former suit against his master for the same acts was defeated on the merits.[349]

§ 580. Officer and Deputy.

There is in general no privity between an officer and his deputy. Thus a sheriff, having possession of property under a writ of attachment, is not bound by the judgment in a replevin suit to which he was not a party, and in which he was not served with process and did not appear, and which he did not defend, although his undersheriff was a party to the suit.[350] On the same principle, where one has brought trespass against a deputy sheriff for goods taken, and has recovered judgment, such judgment, though remaining unsatisfied, cannot be made the basis of an action against the sheriff. For the two cannot be considered joint trespassers, on their mere relation to each other, so as to subject them to a joint action, or to give the plaintiff a right to sue one on a judgment recovered against the other.[351]

[348] Castle v. Noyes, 14 N. Y. 329.

[349] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627. But this last position has been denied, on the ground of a want of privity between master and servant. See Alexander v. Taylor, 4 Denio, 302.

[350] Geekie v. Kirby Co., 106 U. S. 379, 1 Sup. Ct. Rep. 315.

[351] Campbell v. Phelps, 1 Pick. 62. But compare Morgan v. Chester, 4 Conn. 387.

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§ 581. Bailor and Bailee.

Either the general owner of property or a bailee having a special interest in it can maintain trover or case for an injury to it or conversion of it; and where the owner brings the action and there is judgment against him on the merits, it is a bar to a suit by the bailee.[352] And conversely, either the bailor or bailee having the right to maintain a suit against a stranger for injury to the goods, a recovery and satisfaction by either may be pleaded in bar of any subsequent suit by the other, for the damages or loss resulting from the same injury; although it is said that the suit by the general owner cannot be barred by a recovery and satisfaction by the bailee in a suit commenced *after* the suit by the general owner.[353] A judgment determining that the property involved belongs to the plaintiff is conclusive on a warehouseman with whom plaintiff's adversary has stored it, and cannot be contradicted in an action to recover the possession of the property.[354]

§ 582. Successors in Office.

According to the generally accepted doctrine, the incumbent of an office stands in a relation of privity with his predecessor in the same office; that is, they are connected by successive relationship to the same rights of property. Consequently the incumbent is concluded by a judgment for or against his predecessor in any suit touching the powers or privileges of the office.[355] And if the title to the office is controverted, the decision will of course be conclusive upon any person claiming under the contestant.

§ 583. Corporation and Stockholders.

Where proceedings are taken, under a statute, to enforce upon the stockholders of a corporation a personal liability for its debts, what

[352] Green v. Clarke, 12 N. Y. 343.
[353] Steamboat Farmer v. McCraw, 26 Ala. 189, 62 Am. Dec. 718; s. c. 31 Ala. 659; Story on Bailm. § 94.
[354] Hughes v. United Pipe Lines (N. Y.), 23 N. E. Rep. 1042.
[355] Bounker v. Atkyns, Skin. 15.

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effect is to be given, as evidence, to a judgment previously recovered against the corporation? In Massachusetts, by a long and uniform course of decisions, it has been settled that such judgment is final and conclusive evidence; that it estops the stockholders from denying the existence or validity of the original claim; and that the merits of the judgment cannot be inquired into.[356] "Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it."[357] This doctrine has also the sanction of the United States supreme court;[358] and is approved and accepted in many of the states,[359] as well as in England.[360] A recent text-writer has placed the rule upon a basis of reasoning which appears impregnable, in the following language: "A judgment obtained against the corporation is certainly conclusive (until reversed for error or impeached for fraud) in a suit to charge the stockholders upon their unpaid subscriptions; and by analogy it should also be held conclusive in a suit to charge them upon their additional individual liability to creditors. It must be borne in mind that a corporation is composed of its stockholders, and that a judgment obtained against the corporation is in reality a judgment obtained against the stockholders in their corporate capacity. There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice,—once in a suit against the corporation through the corporate agents, and again in a suit brought to charge them individually. If the judgment against the corporation was obtained by fraud or through collusion with the company's agents, the stockholders may obtain relief through equitable proceed-

[356] Brewer v. New Gloucester, 14 Mass. 216; Gaskill v. Dudley, 6 Met. 546, 39 Am. Dec. 750; Lane v. School District, 10 Met. 462; Holyoke Bank v. Goodman Paper Co., 9 Cush. 576; Farnum v. Ballardvale Machine Shop, 12 Cush. 507; Johnson v. Somerville Dyeing Co., 15 Gray, 216; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Thayer v. New England Lithographic Co., 108 Mass. 523.

[357] Gaskill v. Dudley, 6 Met. 546, 39 Am. Dec. 750.

[358] Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. Rep. 739.

[359] Came v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 529; Merrill v. Suffolk Bank, 31 Me. 57; Donworth v. Coolbaugh, 5 Iowa, 300; Wilson v. Pittsburgh Coal Co., 43 Pa. St. 424; Thompson, Liab. of Stockh. § 329 *et seq.*

[360] Bank of Australasia v. Nias, 16 Q. B. 717.

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ings."[361] There are, however, two qualifications upon the application of this rule. In the first place, it seems that the organization and existence of the corporation must be proved as an independent fact in the suit against the stockholders; that matter is not conclusively established by the first judgment.[362] And in the second place, if the statute only provides that the stockholders shall be personally liable for a specified class of debts or to a specified class of creditors, it may be permissible to inquire, independently of the judgment, whether the original claim belonged to the class contemplated by the law.[363]

In some few of the states a modified form of the above rule is in force. In those jurisdictions, it is considered that a judgment against the corporation is *prima facie* evidence of indebtedness in an action against the stockholders, and can be questioned only on the ground of fraud or mistake; the stockholders not being mere sureties for the corporation, but primarily and jointly liable with it. "It is not strictly *res judicata* against the stockholders, but such strong evidence of the indebtedness that it can only be questioned on the ground of fraud or mistake."[364] If this means that the judgment is conclusive on the merits (though open to the imputation of fraud), it is practically equivalent to the rule as elsewhere held. Otherwise the position is certainly untenable. For, on well known principles, a judgment is either conclusive evidence or it is not admissible at all. It cannot be "strong" or persuasive evidence.

In the state of New York this matter has long been a vexed question. For fifty years the course of the decisions exhibits the utmost confusion, vacillation, and uncertainty. It would be tedious and unprofitable to review the cases at this point, but they are all collected in the foot-note, to which we refer the reader who may have occasion to inquire further into the law of that state.[365] The final

[361] Morawetz on Priv. Corp. § 619.

[362] Hudson v. Carman, 41 Me. 84.

[363] Wilson v. Stockholders, 43 Pa. St. 424; Conant v. Van Schaick, 24 Barb. 87; Larrabee v. Baldwin, 85 Cal. 135.

[364] Merchants' Bank v. Chandler, 19 Wis. 434; Grund v. Tucker, 5 Kans. 70; Berger v. Williams, 4 McLean, 577.

[365] Slee v. Bloom, 20 Johns. 669; Moss v. Oakley, 2 Hill, 265; Moss v. McCullough, 5 Hill, 131; s. c. 7 Barb. 279; Hoagland v. Bell, 36 Barb. 57; Miller v. White, 59 Barb. 434; Hall v. Sigel, 13 Abb. Pr. N. S. 178; Lowry v. Inman, 46 N. Y. 119; Belmont v. Coleman, 21 N. Y. 96; Conkling v. Furman, 8 Abb. Pr. N. S. 161; Strong v. Wheaton, 38 Barb. 616; Wheeler v. Miller, 24 Hun, 541;

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result appears to be that, in that jurisdiction, the judgment is not conclusive and not even *prima facie* evidence against the stockholders,[366]—a conclusion which is equally opposed to the almost universal opinion elsewhere and to sound legal reason.

The liability of a stockholder for the debt of the corporation is extinguished by the recovery of a judgment thereon against the corporation, if he was not summoned to appear in the suit and ceased to be a stockholder before the recovery of the judgment.[367] So a stockholder in an insolvent insurance company is not liable to an action on an assessment made on his stock-notes by the court in a proceeding by the creditors against the company in which a receiver was appointed, on the petition of the receiver and creditors, where he was not made a party to such proceeding.[368]

§ 584. Municipal Corporation and Tax-Payers.

"A judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof though not made parties defendant by name. This, we think, is so both on principle and authority; for, in suits of the character mentioned, the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on as a tax-payer to contribute his proper proportion to liquidate the demand which a judgment may establish." [369] Thus, where a county issued bonds in aid of a railroad, and a suit was brought, by certain citizens and tax-payers of the county, against the officers of the county, to enjoin the issue of the bonds and declare them invalid, and judgment was given against the validity of

Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Stephens v. Fox, 83 N. Y. 313.

[366] McMahon v. Macy, 51 N. Y. 155. This case contains a somewhat extended review of the New York authorities.

[367] Handrahan v. Cheshire Iron Works, 4 Allen, 396.

[368] Lamar Ins. Co. v. Gulick, 102 Ill. 41.

[369] State v. Rainey, 74 Mo. 229; Clark v. Wolf, 29 Iowa, 197; Sauls v. Freeman (Fla.), 4 South. Rep. 525.

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the bonds, such judgment is conclusive in a suit against the county by any holder of the bonds who took with notice of the pendency of the former suit.[370] And conversely, a judgment upon the merits dismissing an action brought by certain tax-payers of a county against the county commissioners, to enjoin the issue of railroad aid bonds, is an estoppel to a subsequent action, after the bonds have been issued, brought in the name of the state upon the relation of certain other tax-payers of the same county, against the commissioners, the railroad, and purchasers of the bonds, to have the bonds adjudged illegal and void.[371] But it is held that a judgment in favor of A., setting aside an assessment for a local improvement, binds only the parties to the suit in which it was rendered, and does not prevent B. from maintaining an action to restrain the collection of the same assessment.[372] And so a previous judgment declaring the assessment under which a tax sale was made absolutely void, is not binding on the purchaser at such sale, if he was not a party to the suit in which the judgment was rendered.[373]

§ 585. Trustee and Cestui Que Trust.

The general rule is, that in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and *cestui que trust* are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein.[374] But whether, in a suit to redeem or to foreclose a mortgage of the trust estate, it is necessary that all

[370] Scotland County v. Hill, 112 U. S. 183, 5 Sup. Ct. Rep. 93. Compare Atchison, T. & S. F. R. Co. v. Comm'rs of Jefferson Co., 12 Kans. 127. And see Laird v. De Soto, 22 Fed. Rep. 421.

[371] State v. Chester & L. R. Co., 18 S. Car. 290; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. Rep. 161.

[372] Zink v. Buffalo, 13 N. Y. Supreme Ct. 611.

[373] State v. Batt, 40 La. Ann. 582, 4 South. Rep. 495.

[374] Bifield v. Taylor, 1 Mol. 198; Adams v. St. Leger, 1 Ball. & Bea. 184; Morse v. Sadler, 1 Cox Ch. 352; Calverley v. Phelp, 6 Madd. 229; Caldwell v. Taggart, 4 Pet. 190, 202; Platt v. Oliver, 2 McLean, 267; Fish v. Howland, 1 Paige, 20; Schenck v. Ellingwood, 3 Edw. Ch. 175; Whelan v. Whelan, 3 Cow. 537; Stillwell v. McNeely, 2 N. J. Eq. 305; Dunn v. Seymour, 11 N. J. Eq. 220; Collins v. Lofftus, 10 Leigh, 5, 34 Am. Dec. 719; Helm v. Hardin, 2 B. Mon. 231; Sprague v. Tyson, 44 Ala. 338; Harris v. Mebane, 66 N. Car. 334.

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the *cestuis que trust* should be joined as parties, is not fully settled. The English cases apply the general rule in this instance.[375] But the majority of the American cases hold that in such cases the trustee may represent the beneficiaries, and the latter will be bound by the decree, in the absence of fraud.[376] An exception to the general rule exists in cases where the *cestuis que trust* are so numerous that it would be impossible or extremely inconvenient to bring them all before the court. Under such circumstances, they need not all be made parties to the suit, but if a sufficient number join in the action, and a reasonable constructive notice be given to the others, the latter are considered as virtually represented in the proceedings, and are therefore bound by the final adjudication.[377] But a few of the beneficiaries cannot be allowed to represent the rest, unless there is one general right in all, *i. e.*, unless their beneficial interests are entirely homogeneous; otherwise they must all be made parties in order to be bound.[378]

§ 586. Principal and Surety.

According to the civil law, the obligation of a surety being dependent upon that of the principal, the surety is regarded as identified with the principal, in respect to whatever is decided for or against him. And hence if the demand against the principal has been dismissed (upon grounds not personal to himself), the surety, in case he is afterwards sued, may oppose the *exceptio rei judicatæ* to the creditor. And conversely, when the judgment is against the principal, the creditor may avail himself of the same exception as against the

[375] Henley v. Stone, 3 Beav. 355; Lowe v. Morgan, 1 Bro. Ch. 368; Palmer v. Carlisle, 1 Sim. & Stu. 423; Calverley v. Phelp, 6 Madd. 229; Thomas v. Dunning, 5 De G. & Sm. 618.

[376] New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Willink v. Canal Co., 4 N. J. Eq. 377; Johnson v. Robertson, 31 Md. 476; Van Vechten v. Terry, 2 Johns. Ch. 197.

[377] Piatt v. Oliver, 2 McLean, 267; Kerr v. Blodgett, 48 N. Y. 62; Van Vechten v. Terry, 2 Johns. Ch. 197; Egberts v. Wood, 3 Paige, 517, 24 Am. Dec. 236; Thompson v. Brown, 4 Johns. Ch. 619; Willink v. Canal Co., 4 N. J. Eq. 377; Shaw v. Railroad, 5 Gray, 170.

[378] Evans v. Stokes, 1 Keen, 24; Newton v. Egmont, 4 Sim. 574; Richardson v. Larpent, 2 Y. & Coll. Ch. 507; Long v. Yonge, 2 Sim. 385; Bainbridge v. Burton, 2 Beav. 539.

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surety.[879] And this view of the conclusiveness of the judgment upon the surety has been adopted in some of our own courts in cases where the surety, though not a party to the suit, had notice of the proceedings.[880] But the general tendency of the English and American jurisprudence is to hold, in ordinary cases of suretyship, that a judgment against the principal is not conclusive upon the surety, unless the latter was made a defendant to the action.[881] Thus, although a judgment is rendered against the estate of the deceased maker of a promissory note in such form as to show that the claim was presented to the court within two years from the grant of administration, it is held that a surety on the note, not a party to the judgment, may show that the claim was not in fact so presented.[882] And in New York, the authorities even go so far as to hold that a mere surety for a debt will not be bound by a judgment against his principal, even though the suit was conducted, on the part of the principal, exclusively by the surety as his agent.[883] But still there are many cases which sustain the doctrine that the judgment against the principal is at least *prima facie* evidence against the surety, though liable to be impeached for fraud, collusion, mistake, or payment.[884] On the whole, the best rule which can be deduced from the authorities is, that the judgment is conclusive upon the surety *only* in cases where the principal may be considered as the former's agent in the particular transaction, and where, upon a fair construction of the contract of indemnity, it may be construed as binding the surety to a responsibility for the conduct or result of the suit in which the judgment is rendered; otherwise the judgment proves only the fact of its own existence.[885] For the purpose of our further discussion of this subject it will be

[879] 1 Pothier on Obl. (Evans) p. 562. See the French law followed and applied, in this respect, in Brush v. Wilson, 2 Lower Canada, 249.

[880] Stoops v. Wittler, 1 Mo. App. 420.

[881] King v. Norman, 4 C. B. 884; Douglass v. Howland, 24 Wend. 85; Beall v. Beck, 3 Har. & McH. 242; McKeller v. Rowell, 4 Hawks, 84; Lartique v. Baldwin, 5 Mart. 193.

[882] Curry v. Mack, 90 Ill. 606.

[883] Jackson v. Griswold, 4 Hill (N. Y.), 522; Moss v. McCullough, 5 Hill (N. Y.), 131.

[884] Drummond v. Prestman, 12 Wheat. 515; Bradwell v. Spencer, 16 Ga. 578; Haddock v. Perham, 70 Ga. 572; Berger v. Williams, 4 McLean, 577; Respublica v. Davis, 3 Yeates, 128, 2 Am. Dec. 366; Jacobs v. Hill, 2 Leigh, 393; Baker v. Preston, 1 Gilm. 235; Munford v. Overseers, 2 Rand. 313.

[885] 1 Wharton on Ev. § 770; Brandt on Suretyship, § 524; Drummond v. Prest-

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convenient to divide the different varieties of suretyship into a few leading classes. And we proceed next to consider the case of sureties on bonds or undertakings required as a part of the practice of the courts.

§ 587. Sureties on Bonds given in the Course of Legal Proceedings.

As already remarked, where the obligation of the surety is simply to pay money if the principal fails to do so, there is no such privity between them as will make a judgment against the principal evidence against the surety. But the case is different with regard to sureties on bonds given in the course of a suit or other proceeding; for in the latter instance the surety submits himself to the acts of the principal and to the judgment, as itself a legal consequence, falling within the suretyship.[386] On this principle, a judgment against a defendant is conclusive upon his *bail*, to the extent that it will preclude them from questioning its merits or its amount, or alleging that it would not have been rendered but for the fault or negligence of the principal, although they may show fraud or collusion.[387] But in an action against the surety on a recognizance for the good behavior of the principal, a verdict and judgment in a civil suit on the same recognizance against the principal, in favor of the state, is not admissible in evidence.[388] So a surety on a *claim*-bond is sufficiently a party to the claim-case to be bound by the verdict and judgment therein for damages and costs.[389] And so a judgment in favor of the plaintiff in *replevin* is conclusive upon the defendant's sureties in the redelivery bond, so that, in an action against them on the bond, they can-

man, 12 Wheat. 515; Stovall v. Banks, 10 Wall. 583; Towle v. Towle, 46 N. H. 432; Parkhurst v. Sumner, 23 Vt. 538; Way v. Lewis, 115 Mass. 26.

[386] Giltinan v. Strong, 64 Pa. St. 242. Compare Macready v. Schenck (La.), 6 South. Rep. 517. See Pasewalk v. Bollman (Nebr.), 45 N. W. Rep. 780.

[387] Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Way v. Lewis, 115 Mass. 26, citing Heard v. Lodge, 20 Pick. 53; Tracy v. Goodwin, 5 Allen, 409; Tracy v. Maloney, 105 Mass. 90; Cutter v. Evans, 115 Mass. 27. See also Riddle v. Baker, 18 Cal. 295; Keane v. Fisher, 10 La. Ann. 261.

[388] Respublica v. Davis, 3 Yeates, 128, 2 Am. Dec. 366.

[389] Harvey v. Head, 68 Ga. 247.

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not set up any defense which could with reasonable diligence have been interposed in the replevin action.[390] And a judgment against a surety in a replevin bond is *prima facie* evidence of the measure of damages to which the surety is entitled against his principal.[391] Again, upon a bill in equity for an *injunction*, where the court required the plaintiff to execute a bond with sureties to indemnify the defendant against all damages that might be occasioned to him in case the suit should be determined against the plaintiff, which was done, and, the court having given judgment for the defendant, he brought suit on the bond against the plaintiff and the sureties, to recover damages for a breach of its condition, it was held that both the obligor and sureties were concluded by the final decree in equity, so far as the same matters came in question.[392] In the absence of fraud or collusion, a judgment against the defendant in an action is conclusive evidence of the debt both against him and a surety on a bond to dissolve an *attachment*.[393] Again, the sureties on a bond to perform a decree are bound by a decree which is binding on their principal, in the absence of collusion.[394] Sureties on a guardian's bond for the sale of real estate are concluded by the order of the court on the guardian's accounting, as to the amount due from him to the ward, where the guardian was duly cited and the sureties appeared at the hearing, and probably the result would be the same without such appearance on their part.[395]

§ 588. Sureties of Sheriffs and Constables.

Upon the question of the effect to be given to a judgment against a sheriff or constable recovered by a person injured by his wrongful act or negligence, as evidence in a subsequent action against the sureties on the official bond, the authorities are much divided. It is held in some of the cases that such judgment will not be evi-

[390] Boyd v. Huffaker (Kans.), 20 Pac. Rep. 459; Craig v. Herring, 80 Ga. 709, 6 S. E. Rep. 283; Thomson v. Joplin, 12 S. Car. 580.

[391] Lyon v. Northrup, 17 Iowa, 314.

[392] Towle v. Towle, 46 N. H. 431; Methodist Churches of N. Y. v. Barker, 18 N. Y. 463.

[393] Cutter v. Evans, 115 Mass. 27; Tapley v. Goodsell, 122 Mass. 176.

[394] Riddle v. Baker, 13 Cal. 295.

[395] Shepard v. Pebbles, 38 Wis. 373.

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dence of any fact which it was necessary to find in order to warrant the judgment, if the sureties were not joined as parties in the action.[396] But it is maintained by some of the other authorities that the judgment is entitled to be received as *prima facie* evidence against the sureties.[397] In one of the cases cited it was said: "The contract of the surety on an official bond has reference to the general conduct of the officer within the sphere of his office, and not to his particular conduct in cases and transactions that should arise in the discharge of his official duties, and therefore they have no concern or interest to protect in an action brought against such public officer by one aggrieved by his misconduct. The law presumes that a judgment recovered against the principal rests on sufficient grounds of proof, but allows that presumption to be rebutted by proper evidence. It does not appear that any evidence rebutting such presumption was submitted to the jury in the present case, and therefore it was competent to rest the verdict on such judgment as proof of official misconduct." [398] But in Pennsylvania and some other states, the cases go so far as to hold that the judgment against the principal, in the absence of fraud or collusion, will be *conclusive* evidence against the sureties.[399] Without committing themselves to a generalization upon

[396] Governor v. Shelby, 2 Blackf. 26; White v. State, 1 Blackf. 557; Lucas v. Governor, 6 Ala. 826 (distinguishing McClure v. Colclough, 5 Ala. 65, which was the case of a summary judgment under a statute, and was ruled as it was in order to carry out the supposed legislative intention); Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Carmichael v. Governor, 3 How. (Miss.) 236; Carmack v. Commonwealth, 5 Binn. 184. A judgment against a principal, for his embezzlements as officer of a company, is not evidence against his surety either of the fact of the embezzlement or the amount embezzled. Fireman's Ins. Co. v. McMillan, 29 Ala. 147.

[397] Crawford v. Word, 7 Ga. 445; Taylor v. Johnson, 17 Ga. 521; Graves v. Bulkley, 25 Kans. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kans. 439; Mullen v. Scott, 9 La. Ann. 173; Treasurers v. Temples, 2 Spears, 48; Treasurers v. Bates, 2 Bailey, 362; Atkins v. Baily, 9 Yerg. 110; Munford v. Overseers, 2 Rand. 313; Lowell v. Parker, 10 Met. 309, 43 Am. Dec. 436; State v. Cason, 11 S. Car. 392.

[398] State v. Cason, 11 S. Car. 392.

[399] Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Evans v. Commonwealth, 8 Watts, 398, 34 Am. Dec. 477; Eagles v. Kern, 5 Whart. 144; Snapp v. Commonwealth, 2 Pa. St. 49; Musselman v. Commonwealth, 7 Pa. St. 240; McMicken v. Commonwealth, 58 Pa. St. 213; Dane v. Gilmore, 51 Me. 544; McBroom v. Governor, 4 Port. 90; Tracy v. Goodwin, 5 Allen, 409; Dennie v. Smith, 129 Mass. 143; Tute v. James, 50 Vt. 124.

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the subject, some of the courts are disposed to make the question rest upon the further inquiry whether the bond is joint or several. Thus, in a case in Massachusetts, it was decided that a judgment recovered without fraud or collusion against a constable for a wrongful attachment of the goods of a third person on a writ, is conclusive evidence, in an action against him and the sureties upon his bond, executed jointly and not severally.[400] And this view has much plausibility and good legal reason to commend it.

We come now to the case of a bond given by a deputy sheriff to his principal, and the effect to be given, as evidence, to a judgment recovered against the sheriff for the fault or misconduct of the deputy, in the sheriff's subsequent action against the deputy and his sureties on such bond. And the authorities on this point, though less numerous, are more harmonious, as they rest the determination of the question upon the wording of the bond. Thus in a case in New York, where the defendants were sureties in a bond to the sher-

[400] Tracy v. Goodwin, 5 Allen, 409. In this case it was said: "Judicial reasonings and decisions having thus far left the question involved in much doubt, we have to decide it by a reference to the general principles which appear to be applicable to it. We must regard it as settled in this case that the judgment is competent evidence against the sureties; and it appears that the bond in suit is joint and not several. As to the constable, who is one of the defendants, the judgment proves conclusively the wrongful taking of the plaintiff's property and the amount of damages sustained by him. The execution of the bond and the taking of the property by color of his office being proved by other evidence, it follows that this joint bond was given for the purpose, among others, of securing the plaintiff against this tortious act of the officer. If no part of the judgment has been paid, the amount of it is the amount due from him on the bond. And the sureties have so made their bond that a joint judgment must be rendered in this suit against all the defendants. If they were permitted to open the matter and show that the plaintiff ought not to have recovered his judgment, in whole or in part, their defense must enure to the benefit of their principal as well as to theirs. We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guaranty to the plaintiff for such amount as he has legally established to be due to himself from the constable, and that, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages. If the bond had been several as well as joint, there would have been less embarrassment in treating the evidence as *prima facie*, and permitting the sureties to offer rebutting evidence. We do not understand the presiding judge to have decided that the judgment was conclusive beyond these points."

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iff that their principal should "well and faithfully in all things perform and execute the duties of deputy sheriff, without fraud, deceit, or oppression," and a judgment was recovered against the sheriff for the alleged misconduct of such deputy, in a suit of which the deputy had notice, with a request to defend, but his sureties had no notice, it was held, in an action on the bond against the sureties, that the judgment was conclusive evidence of its own rendition, but not of the liability of the defendants, and they were at liberty to prove facts which would have constituted a good defense in the action against the sheriff.[401] But on the other hand, where the bond is conditioned that the deputy shall faithfully perform the duties of his office and shall "save and keep harmless and indemnified the said sheriff from all actions," etc., on account of any misfeasance or non-feasance of the deputy, the sureties are conclusively bound by a judgment recovered against the sheriff for the fault or neglect of the deputy.[402] The point of the distinction between these two cases is, that in the latter, the recovery of judgments against the obligee is the very thing stipulated against, while in the former, it is only the general conduct of the deputy in respect to his duties that falls within a fair interpretation of the bond. It remains to be added that the sureties of a sheriff can avail themselves of a former judgment *in favor* of their principal, although not parties to that action.[403]

§ 589. Sureties of Executors and Administrators.

When a judgment has been recovered against an executor or administrator as such, and subsequently the creditor brings suit upon the defendant's official bond, what weight is to be attributed to the judgment as evidence against the sureties on such bond? In a majority of the states the doctrine is well settled that such judgment is final and conclusive upon the sureties in the absence of fraud or

[401] Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619. See the same case in 35 N. Y. 120.

[402] Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690; Hand v. Taylor, 4 Ind. 409; Wilkins v. Dingley, 29 Me. 73; Fay v. Ames, 44 Barb. 327. See Jacobs v. Hill, 2 Leigh, 393.

[403] Brown v. Bradford, 30 Ga. 927; Inhabitants of Lower Alloways Creek v Moore, 15 N. J Law, 146.

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collusion.[404] Thus it is not competent for the surety to impeach the judgment by merely showing that the administrator had paid the debt before the judgment was rendered.[405] But of course the surety is not concluded as to the *factum* of the bond, or its sufficiency in law, or as to any other defenses personal to himself.[406] And where the administrator collusively or negligently suffers judgment to be taken against him in an action barred by the statute of limitations, his sureties, when sued on their bond, are not estopped by the judgment to set up the statute.[407] On the same general principle, "the amount found due from an administrator or executor to the estate, on the settlement of his accounts in the probate court, is, in the absence of fraud or collusion, binding, not only upon him, but also upon his sureties in an action upon the administration bond, unless

[404] Stovall v. Banks, 10 Wall. 588; Heard v. Lodge, 20 Pick. 53, 32 Am. Dec. 197; White v. Weatherbee, 126 Mass. 450; Willey v. Paulk, 6 Conn. 74; Baggott v. Boulger, 2 Duer, 160; Casoni v. Jerome, 58 N. Y. 315; Garber v. Commonwealth, 7 Pa. St. 265; Shelton v. Cureton, 3 McCord, 412; Williamson v. Howell, 4 Ala. 693; Ragland v. Calhoun, 36 Ala. 606; Perkins v. Moore, 16 Ala. 9; Jones v. Ritter, 56 Ala. 270; Martin v. Tally, 72 Ala. 28; Holley v. Acre, 23 Ala. 603; Ferguson v. Glaze, 12 La. Ann. 667; McCalla v. Patterson, 18 B. Mon. 201; Hobbs v. Middleton, 1 J. J. Mar. 176; Governor v. Shelby, 2 Blackf. 29; Goodwin v. Wilson, 1 Blackf. 344; Salyer v. State, 5 Ind. 204; Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; Housh v. People, 66 Ill. 178; State v. Holt, 27 Mo. 340, 72 Am. Dec. 273; Taylor v. Hunt, 34 Mo. 205; State v. Donegan, 12 Mo. App. 190; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125. In the case last cited, Sanderson, C. J., in delivering the opinion of the court, observed: "As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are, that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the probate court. The account must be rendered to and settled by the court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the court, and the undertaking of the sureties is that their principal will do all this."

[405] Boyd v. Caldwell, 4 Rich. 117.

[406] Martin v. Tally, 72 Ala. 28.

[407] Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80; Robinson v. Hodge, 117 Mass. 222.

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an appeal has been taken, or the judgment has been reversed upon a proceeding in error." [408]

Notwithstanding the general consensus of opinion is as above stated, it is possible to adduce a very respectable body of authorities which hold that the sureties of an executor or administrator are not bound by a judgment against their principal, unless they were made parties to the action or given an opportunity to contest it, and that the judgment is at best but *prima facie* evidence against them.[409] As in the parallel case of a sheriff's sureties, a judgment *in favor* of an administrator is a bar to an action upon the same subject-matter against his sureties.[410]

§ 590. Sureties of Guardians.

Upon the final settlement of the accounts of a guardian, the sureties on his bond are definitely concluded by the judgment or decision of the court, as to the amount due from their principal, and cannot be heard, in the absence of fraud, to question its correctness or ask a re-examination of the accounts.[411] This general rule, however, is modified in some of the states by the addition of the proviso that the sureties shall have been made parties to the accounting or afforded an opportunity to be heard in that proceeding.[412] And in North Carolina, a late case holds that a judgment rendered against the guardian is not conclusive in an action on the bond against the

[408] Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. Rep. 675.

[409] Annett v. Terry, 35 N. Y. 256; Hayes v. Seaver, 7 Me. 237; Iglehart v. State, 2 Gill & J. 235; Lyles v. Caldwell, 3 McCord, 225; Craddock v. Turner, 6 Leigh, 116; Hobson v. Yancey, 2 Gratt. 73; Armistead v. Harramond, 4 Hawks, 341; Norton v. Wallace, 1 Rich. 507; Ordinary v. Condy, 2 Hill (S. Car.), 313; Simkins v. Cobb, 2 Bail. 60; Bennett v. Graham, 71 Ga. 211; Means v. Hicks, 65 Ala. 241; Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; Verret v. Belanger, 6 La. Ann. 109; Canal Co. v. Brown, 4 La. Ann. 545; Fauntleroy v. Lyle, 5 T. B. Mon. 266; Seat v. Cannon, 1 Humph. 470.

[410] State v. Coste, 36 Mo. 437.

[411] Hailey v. Boyd, 64 Ala. 399; Commonwealth v. Rhoads, 37 Pa. St. 60; McCleary v. Menke, 109 Ill. 294; Ream v. Lynch, 7 Ill. App. 161; Gravett v. Malone, 54 Ala. 19; Braiden v. Mercer, 44 Ohio St. 339; Corbin v. Westcott, 2 Demarest, 559; McWilliams v. Kalback, 55 Iowa, 110, 7 N. W. Rep. 463.

[412] State v. Hull, 53 Miss. 626; Brodrib v. Brodrib, 56 Cal. 563. See Weaver v. Thornton, 63 Ga. 655; *In re* Scott, 36 Vt. 297; McKellar v. Bowell, 4 Hawks, 34.

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surety, although, by the code, it is made "presumptive" evidence.[413] So in Louisiana, the surety is not concluded by a judgment against the tutor, though it is *prima facie* evidence against him.[414]

§ 591. Actions between Sureties for Contribution.

Where, in a suit against one of two sureties, judgment is fairly obtained against him, and no collusion existed between him and the party recovering the judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given his co-surety, the latter stands virtually in privity with him against whom the judgment has been obtained. The co-surety in such case is bound to avail himself of any defense which he may have, and he will not be permitted afterwards, in a suit for contribution brought against him by his co-surety who has paid and satisfied the judgment, to set up any defense which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defense to the action. Having failed to do so, though he had full notice of the pendency of the action, he waives all defenses he might have had, and in the suit for contribution the matter is *res judicata*.[415]

§ 592. Principal and Guarantor.

According to the best authorities, the general rule is, that in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios acta*. Where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, if the guarantor have notice of the suit against the

[413] Moore v. Alexander, 96 N. Car. 84, 1 S. E. Rep. 536.

[414] Fuselier v. Babineau, 14 La. Ann. 764.

[415] Gibson v. Love, 2 Fla. 598; Preslar v. Stallwarth, 87 Ala. 402; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 96.

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principal, he is not obliged to concern himself in its defense, but may await a suit against himself, and then insist upon the right to contest the whole ground.[416] Thus, the owner of a judgment assigned it to another person, with a written guaranty of its payment in case the assignee should fail to collect it after prosecuting the debtor to insolvency. The assignee brought suit on the judgment against the debtor, who set up the defense of payment, and judgment went for the defendant on that issue. No notice of this suit was given to the assignor. Afterwards the assignee brought suit upon the contract of guaranty, and issue was taken upon the question whether the assigned judgment was, at the time, a valid and subsisting obligation or had been paid. It was held that the record of the former suit was not conclusive upon the guarantor, in the absence of notice to him.[417] As in the case of principal and surety, a guarantor may avail himself of a judgment which makes for the benefit of his principal. Thus a decree in equity against the holder of a note, declaring it to be void as against one signer thereof, is the same in legal effect, between the holder and one who guaranties the collection, as a judgment for the defendant would be in a suit by the holder against that signer.[418] When one of several guarantors is sued for the debt, and suffers judgment, and pays the same, such judgment is not conclusive in an action against a co-guarantor for contribution, but the latter may make every defense which could have been presented in the original suit.[419]

§ 593. Conclusiveness of Judgment against Garnishee.

It is held by a considerable body of authorities that a judgment against the garnishee merges the original indebtedness, and therefore, even though unsatisfied, will bar an action by the defendant in the attachment against the garnishee for the same debt.[420] But in

[416] Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Spencer v. Dearth, 43 Vt. 98, 106; Robinson v. Lane, 14 Sm. & Mar. 161; Douglass v. Howland, 24 Wend. 35; Ayres v. Findley, 1 Pa. St. 501.

[417] Woodward v. Moore, 13 Ohio St. 186.

[418] Sterns v. Marks, 35 Barb. 565.

[419] Kramph v. Hatz, 52 Pa. St. 525.

[420] King v. Vance, 46 Ind. 246; Coburn v. Currens, 1 Bush, 243; Sessions v.

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numerous other cases it is considered that such a judgment is merely a lien on the fund in the garnishee's hands, and nothing but payment of the judgment will protect the garnishee against a subsequent claim of the defendant.[421] But however this may be, it is universally agreed that when a judgment is recovered against the garnishee by the attaching creditor and *paid*, such judgment may be pleaded by the garnishee in bar of any action against him for the same debt brought by the principal defendant, up to the amount which the garnishee has paid.[422] Or, as the rule is expressed by a well-known writer on this subject, "when, by a court having jurisdiction of the action and of the garnishee, judgment is rendered against him, and he has satisfied it in due course of law, such judgment is conclusive, against parties and privies, of all matters of right and title decided by the court, and constitutes a complete defense to any subsequent action by the defendant against the garnishee for the amount which the latter was compelled to pay."[423] Where the court has regularly obtained jurisdiction of the garnishee, and there is no answer on his part, the law and practice of some of the states allow the taking of a default judgment against him, and in such case it ought to protect the garnishee, at least if no defense on the merits could have been

Stevens, 1 Fla. 233, 46 Am. Dec. 339; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; Noble v. Merrill, 48 Me. 140.

[421] Meriam v. Rundlett, 13 Pick. 511; Farmer v. Simpson, 6 Tex. 303; Cook v. Field, 8 Ala. 53, 36 Am. Dec. 436; Brown v. Somerville, 8 Md. 444; Brannon v. Noble, 8 Ga. 549; Hammett v. Morris, 55 Ga. 644; Lowry v. Lumbermen's Bank, 2 W. & S. 210.

[422] Killsa v. Lermond, 6 Me. 46; Ladd v. Jacobs, 64 Me. 347; Brown v. Dudley, 33 N. H. 511; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Perkins v. Parker, 1 Mass. 117; Dole v. Boutwell, 1 Allen, 286; Foster v. Jones, 15 Mass. 185; Holmes v. Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581; Moore v. Spackman, 12 Serg. & R. 287; Coates v. Roberts, 4 Rawle, 100; Anderson v. Young, 21 Pa. St. 443; Noble v. Thompson Oil Co., 69 Pa. St. 409; Morgan v. Neville, 74 Pa. St. 52; Hitt v. Lacey, 8 Ala. 104, 36 Am. Dec. 440; Ross v. Pitts, 39 Ala. 606; Mills v. Stewart, 12 Ala. 90; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Chesirs v. Slaten, 3 Humph. 101; Balt. & Ohio R. Co. v. May, 25 Ohio St. 347; Barton v. Allbright, 29 Ind. 489; Greenman v. Fox, 54 Ind. 267; Canady v. Detrick, 63 Ind. 485; Allen v. Watt, 79 Ill. 284; Wigwall v. Union C. & M. Co., 37 Iowa, 129; Hirth v. Pfeifle, 42 Mich. 32, 3 N. W. Rep. 239; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[423] Drake on Attachm. § 706. In a later section of the same work (§ 711) the author says: "When a payment under a judgment against a garnishee is relied on as a defense to a suit by the attachment defendant, it is important to observe the rules upon which it

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made.[424] But this rule is not universal.[425] And in one state it is held that an order to pay money made by the court on a garnishee, after his failure to appear in the garnishment proceeding, is not a judgment against him, so as to preclude him from setting up any defense to a suit by the attaching creditor for the garnished debt that he might have made before garnishment.[426] Before leaving the question of jurisdiction, it is necessary to remark that the judgment in a garnishment proceeding will be valid and binding so far as regards the disposition of the fund attached, if the court had jurisdiction of the *res*, although, for want of jurisdiction of the person of the debtor, it would not be binding upon him as a judgment *in personam*.[427] It is certainly necessary that the judgment should be valid, but it is not at all essential to its conclusive effect that it should be free from errors or irregularities. Like any other adjudication, a judgment against a garnishee, no matter how erroneous, is final and binding until it is reversed or set aside.[428] To take up now the converse case, —when judgment is entered *against* the plaintiff, the defendant is not thereby precluded from suing the garnishee in respect of the same subject-matter, because the defendant "has not had his day in court."[429] So where, after the institution of the garnishment suit, but before its final determination, an action is commenced by the

will be sustained. They may be compendiously stated as follows: 1. The judgment against the garnishee, under which he alleges he made the payment, must be proved. . . . . 2. It must have been a valid judgment. . . . . 3. The payment must not have been voluntary. . . . . 4. The payment must be actual, and not simulated or contrived. . . . . 5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-matter and the parties. . . . . 6. Though the court have jurisdiction of the parties, and its judgment be valid as against the garnishee, yet if the law require the plaintiff, as a condition precedent to obtaining execution, to do a particular act, and without performing the condition he obtain execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which, his payment is regarded as voluntary."

[424] Scamahorn v. Scott, 42 Iowa, 529; Abell v. Simon, 49 Md. 318; Gracy v. Coates, 2 McCord, 224; Jones v. Tracy, 75 Pa. St. 417; Laughlin v. January, 59 Mo. 383.

[425] Hibernia Society v. Superior Court, 56 Cal. 265.

[426] Pinyan v. Berry (Ark.), 12 S. W. Rep. 241.

[427] Powell v. Geisendorff, 25 Kans. 538.

[428] Webster v. Lowell, 2 Allen, 128.

[429] Ruff v. Ruff, 85 Pa. St. 333.

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principal defendant against the garnishee and prosecuted to final judgment, the result being in favor of the garnishee, such judgment is not conclusive upon the plaintiff in the earlier suit upon the question of the garnishee's discharge.[430] In regard to the scope of the estoppel created by such a judgment, it must be noted that it can only be made to cover the points actually and necessarily decided by the court. It is said that a judgment against a garnishee is not evidence for him in an action by his creditor for any other purpose than to show the amount for which he was charged.[431] Perhaps this statement of the rule, if taken literally, is somewhat too narrow. But an order, for example, discharging a person as garnishee of a judgment-debtor is no bar to an action against the same person to set aside as fraudulent a conveyance to him by the judgment-debtor, and to subject the property to a judgment against the grantor.[432] And even where there has been a recovery against the garnishee, on his disclosure that he was indebted to the principal defendant for the purchase-money of land, this will not estop the creditor from subsequently showing that the conveyance of such land was fraudulent and void as against creditors.[433] A defendant who seeks to avail himself, as a matter of defense, of a prior attachment by himself of the plaintiff's debt in his own hands, must show the existence of the original debt on which the judgment in the attachment was rendered; the record of the judgment is not even *prima facie* evidence in such action.[434]

[430] Webster v. Adams, 58 Me. 317.

[431] Puffer v. Graves, 26 N. H. 256.

[432] Boyle v. Maroney, 78 Iowa, 70, 35 N. W. Rep. 145.

[433] Wadsworth v. Marsh, 9 Conn. 481. "The plaintiff," said the court, "has done nothing which was not induced by the disclosure of the defendant. If his disclosure was false, is the plaintiff to be estopped by it? Such a consequence cannot be admitted. On the contrary, if the defendant, by a false disclosure, has contracted contradictory obligations, and subjected himself to superadded liabilities, the fault and the misfortune are both his own; but no person can be estopped by an act which is the result either of duress or the fraud or falsehood of another."

[434] Moyer v. Lobengeir, 4 Watts, 390, 28 Am. Dec. 723.

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§ 594. Not Conclusive as to Amount of Debt.

A judgment against the garnishee in an attachment proceeding is not conclusive as to the amount owing by the garnishee to the attachment defendant; and in a suit by the latter for the debt, the judgment on the garnishee process is not an absolute bar to the action, though, as a credit to the extent of the sum paid, it cannot be disputed.[435] The reason for this rule is easily discernible and rests on grounds of necessity. For, were it otherwise, "it would be in the power of a garnishee, by confessing in his answer a smaller indebtedness than actually existed, to practise an irremediable fraud upon his creditor." [436]

§ 595. Right of Garnishee to Question Legality of Prior Proceedings.

In an interesting and well considered case in Illinois the question arose, whether a garnishee, who sued out a writ of error to reverse a judgment rendered against him, might inquire into the legality and regularity of the previous proceedings against the defendant in attachment. "In one respect," said the court, "he unquestionably can. In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may

[435] Barton v. Allbright, 29 Ind. 489; Tams v. Bullitt, 85 Pa. St. 308; Groves v. Brown, 11 Mass. 334; Brown v. Dudley, 33 N. H. 511; Puffer v. Graves, 26 N. H. 256; Drew v. Towle, 27 N. H. 412; Carpenter v. McClure, 37 Vt. 127.

[436] Drake on Attachm. § 707.

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for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that too in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment."[437] And in this doctrine the authorities generally agree.[438]

§ 596. As between Garnishee and Assignee of Claim.

It is a well established rule that if the garnishee, before making his disclosure, is duly notified that the claim had been assigned to a third person before service was made on him, it is his duty to disclose such assignment in his answer, in order that the assignee may be cited to appear in protection of his own interests. And if the garnishee neglects to so disclose the fact of the assignment, his being charged as garnishee and paying the amount found due, on execution, will not protect him from being compelled to make a second payment of the same to the assignee.[439] If the garnishee *does* make a full and fair disclosure of all the facts in his knowledge, and uses all reasonable exertions to protect the rights of the assignee (he being a stranger to the proceedings and absent), it is probable that a judgment holding the garnishee liable would be accounted a sufficient protection to him against the claims of the assignee, notwithstanding the proceedings would be *inter alios* as respects the latter. But if the garnishee makes only a partial disclosure, so that the court has no opportunity to judge of the real merits of the case, and especially if there are any indications of collusion between him and the creditor, it is clear that the judgment will furnish him no protection whatever.[440] If the

[437] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405.

[438] Earl v. Matheney, 60 Ind. 202; Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 8; Whitehead v. Henderson, 4 Sm. & Mar. 704; Matheney v. Galloway, 12 Sm. & Mar. 475; St. Louis Ins. Co. v. Cohen, 9 Mo. 421; Schoppenhast v. Bollman, 21 Ind. 285.

[439] Bunker v. Gilmore, 40 Me. 88; Larrabee v. Knight, 69 Me. 320; Milliken v. Loring, 37 Me. 408; Drake on Attachm. § 717, and cases cited. See McPhail v. Hyatt, 29 Iowa, 137; Anderson v. Young, 21 Pa. St. 443.

[440] Seward v. Heflin, 20 Vt. 144.

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assignment is made after the institution of the garnishment proceedings, the case is different. Thus where A., the debtor of B. upon a promissory note not due, was summoned by C., the creditor of B., to answer upon process of garnishment, and B. subsequently transferred the note to D. with express notice of the pendency of the garnishment, it was held that a judgment against A. in favor of C. might be pleaded in bar of the suit of D. as assignee.[441] And if the garnishee has *no notice* or knowledge of the assignment before the rendition of the judgment against him, he will be fully protected against the assignee.[442] It is therefore the duty of the assignee, whenever the garnishment proceeding comes to his knowledge, to notify the garnishee, so that the latter, when called upon to answer the interrogatories, may be enabled to disclose the whole matter to the court, and unless he does this, he will afterwards be estopped from enforcing his claim.[443] The duty of a garnishee who receives notice of the assignment after he has filed his answer but before the rendition of judgment, is not entirely clear. It has been held that if the garnishee, after answering that he owes negotiable notes, has notice that they were assigned before the garnishment, he must amend his answer by stating the assignment; otherwise he is not protected against the assignee by the recovery in the garnishment proceeding, but subjects himself to double payment of the debt.[444] On principles similar to the foregoing, the authorities hold that where two successive attachments are levied on the same fund in the garnishee's hands at the suit of different creditors, it is the duty of the garnishee to give notice to the prior attaching creditor of the issuance of the second attachment, and to plead the pendency of the first attachment in bar of the second; and if he neglects to do this, and a judgment is recovered against him under the second attachment, which he satisfies, he will not be protected from the claims of the prior attaching creditor, but will have to pay him also; because the latter cannot be divested of his superior lien by a judgment in a cause to which he was not a party and of which he had no notice.[445]

[441] Glanton v. Griggs, 5 Ga. 424.
[442] King v. Vance, 46 Ind. 246.
[443] Wood v. Partridge, 11 Mass. 488.
[444] Lewis v. Dunlop, 57 Miss. 130.
[445] Farmers' Bank v. Beaston, 7 Gill & J. 421, 28 Am. Dec. 226.

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§ 597. As between Garnishee and Stranger.

A judgment for or against a garnishee, in an action of attachment by one creditor is not binding upon another creditor in an attachment suit by him against the same garnishee, and the record of the judgment in the former case is not admissible in evidence on the trial of the latter.[446] So a judgment against the garnishee is not conclusive in a subsequent action by the trustees in insolvency of the defendant in the attachment against the garnishee, because the creditors, whom the trustees represent, were not parties.[447] But it is held that an attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an indorsee then being the owner and holder of the note, followed by a judgment of condemnation on the attachment, will protect the maker (garnishee) in a subsequent action, brought on the same note, by a subsequent indorser receiving the paper without notice.[448] And so the recovery of a debt in a *scire facias* against a garnishee, upon a judgment in a foreign attachment, is a bar to a recovery of the same debt from the garnishee by a person who took defense on the trial of the *scire facias*, provided such recovery was not the result of misrepresentation, fraud, or neglect on the part of the garnishee, or of collusion between him and the plaintiff.[449] Again, the judgment as between an attaching creditor and the garnishee is not *res inter alios* in the main contention between debtor and creditor. "As respects the principal debtor, he cannot be regarded as a stranger to the suit, being necessarily a party and having an opportunity to contest the claim against him. These cases, like a judgment to show the amount that a surety has been compelled to pay for his principal, or a principal for the default of his agent, are exceptions to the general rule."[450]

[446] Strauss v. Ayres, 87 Mo. 348; Wheeler v. Aldrich, 13 Gray, 51; Lewis v. Tams, 4 Phila. 276; Breading v. Siegworth, 29 Pa. St. 396; King v. Faber, 51 Pa. St. 387; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[447] Tams v. Bullitt, 35 Pa. St. 308.

[448] Somerville v. Brown, 5 Gill, 399.

[449] Coates v. Roberts, 4 Rawle, 100.

[450] Ockington v. Richey, 41 N. H. 275.

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§ 598. Foreign Judgment against Garnishee.

It is well settled that a judgment fairly rendered against a garnishee by a lawful court in a foreign country or in a sister state, having jurisdiction of the person and subject-matter, will be equally conclusive and final, in a subsequent proceeding for the recovery of the same debt, as if rendered in the state where the second contention arises.[451] But the pendency of a foreign attachment in one state, upon which a judgment has been rendered, and an injunction granted by the court of chancery upon the garnishee, forbidding him to pay to the defendant in the attachment, is not the subject of a *plea in bar* in another state, in an action by the original creditor against the debtor, but the defendant can only avail himself of it by plea in *abatement*. Under such circumstances, nothing short of an actual payment of the money by the garnishee, or levy of his goods upon an execution, can be pleaded in bar.[452]

§ 599. Effect of a Judgment as between Co-Defendants.

As a general rule, parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they were adversary parties in the original action. That is to say, a judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities, *as against each other*, in their own subsequent controversy.[453] "Where two parties are sued in the same action," says the supreme court of Indiana, "and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his co-defendant, such co-defendant cannot, under our code of practice, demur or reply to or join issue in any

[451] Meriam v. Rundlett, 18 Pick. 511; Hull v. Blake, 13 Mass. 153; Wilkinson v. Hall, 6 Gray, 568; Barrow v. West, 23 Pick. 270; Taylor v. Phelps, 1 Har. & G. 492.

[452] Lowry v. Lumbermen's Bank, 2 Watts & S. 210.

[453] McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Buffington v. Cook, 85 Ala. 312, 78 Am. Dec. 491; Montgomery v. Road, 34 Kans. 122, 8 Pac. Rep. 253; Gardner v. Raisbeck, 28 N. J. Eq. 71; McCrary v. Parks, 18 Ohio St. 1; Cox v. Hill, 8 Ohio, 412; Duncan v. Holcomb, 26 Ind. 378.

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manner upon such separate answer. And in such a case the finding and judgment of the court, on an issue joined on such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendants as between themselves."[454] Thus, where the makers of a note are sued and judgment rendered against them, but the question of the suretyship of one of them is not raised in that action, the judgment will not preclude that one from showing that he in fact signed the note as surety only, in a subsequent action by him against the other maker to recover the amount of the judgment paid by him.[455] But it is held that a judgment obtained by the holder of a note against all the indorsers is conclusive in a subsequent action, by an indorser, who paid the judgment, against a prior indorser, and as much so as if he had claimed subrogation upon it. For all the points which the second indorser would have to prove as against the prior indorser must have been established in the suit brought by the holder.[456] An exception to the general rule arises in the case where conflicting claims to the ownership of property are affirmatively made and set up in their answers by several defendants in an action. Here a court of equity (and also, under the code practice, a court of mixed powers) may by its judgment determine the rights of such defendants among themselves, and such judgment will be equally conclusive, as between the defendants who appeared and litigated their claims, as in the case of a similar issue between the plaintiff and the defendants.[457] Thus where, in an action to quiet title, two defendants answer separately, each claiming title in himself, and the court finds that the property is owned by one of such defendants, and enters a decree quieting the title in him as against the plaintiff, such decree is also an adjudication of the question of title as between the defendants, and constitutes a bar to any future claim to the property against the

[454] Harvey v. Osborn, 55 Ind. 585.

[455] Lockhart v. Gillis (Tex.), 20 Reporter, 477; McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Joyce v. Whitney, 57 Ind. 550; Dent v. King, 1 Ga. 200, 44 Am. Dec. 688; Harvey v. Osborn, 55 Ind. 585.

[456] Lloyd v. Barr, 11 Pa. St. 41.

[457] Goldschmidt v. Mills, 37 Minn. 49, 33 N. W. Rep. 544; Leavitt v. Wolcott, 95 N. Y. 213.

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successful party, or those claiming through him, by his co-defendant.[488]

§ 600. Judgments do not bind Strangers.

Hitherto we have discussed the situation of parties and privies with reference to the estoppel created by a verdict and judgment, and it has appeared that they and they alone are concluded by the adjudication. In a broad and general sense all other persons are "strangers" to the judgment and, as such, exempt from its effect as evidence or as an estoppel. But if we wish to use this word in a perfectly accurate and technical sense, it is necessary to make a reservation of the case of those persons who, though not strictly parties nor privies, are so connected with the litigation or its subject-matter as to be bound by the result. Such are warrantors, indemnitors, and others responsible over, who have due notice, and, in some instances, sureties or bail. But in this narrower sense, and with the further exception of certain especial cases which will be noticed in the succeeding sections, it is a universal rule that all who are neither parties to a judgment nor privies to such parties are wholly free from the estoppel of the judgment. This principle was well known in the Roman law,[489] and indeed is nothing less than a canon of general jurisprudence. That the rule is firmly imbedded in our own law is attested by a multitude of decided cases.[490] It was said, in the leading

[488] Devin v. Ottumwa, 53 Iowa, 461, 5 N. W. Rep. 552.

[489] "*Res inter alios judicata neque emolumentum afferre his qui judicio non interfuerunt neque prejudicium solent irrogare.*" Cod. 7, 56, 2. This is closely akin to the familiar maxim, *Res inter alios acta alteri nocere non debet.* Wingate's Max. 372; Broom's Max. 954.

[490] Duchess of Kingston's Case, 20 How. St. Tr. 355; Chirac v. Reinecker, 11 Wheat. 280; Aspden v. Nixon, 4 How. 467; Mutual Ben. Life Ins. Co. v. Tisdale, 91 U. S. 244; Humes v. Scruggs, 94 U. S. 22; Lenox v. Notrebe, 1 Hempst. 251; Jackson v. Myrick, 29 Me. 490; Sheldon v. White, 35 Me. 233; Putnam School v. Fisher, 34 Me. 172; Lawrence v. Haynes, 5 N. H. 33, 20 Am. Dec. 554; Stevens v. Thompson, 17 N. H. 103; Wright v. Hazen, 24 Vt. 143; Nason v. Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Hood v. Hood, 110 Mass. 463; Andrews v. Herring, 5 Mass. 210; Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Denison v. Hyde, 6 Conn. 508; Burton v. Hazzard, 4 Harringt. 100; Lawrence v. Hunt, 10 Wend. 80, 25 Am. Dec. 539; Morrison v. Mullin, 34 Pa. St. 12; Mackey v. Coates, 70 Pa. St. 350; Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688; McClellan v. Kennedy, 8 Md. 230; Niller v. Johnson, 27 Md. 6; Frazier v. Frazier, 2 Leigh, 642; Downer v. Morrison,

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case on this subject: "What has been said at the bar is certainly true as a general principle, that a transaction between two parties, in a judicial proceeding, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the deposition of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."[461] And in another case: "It contravenes the first principles of justice to hold a man bound by a judgment against which he has neither an opportunity to defend, or notice in any way that he was to be directly involved in its consequences."[462] So again: "No person can be divested of title to his property in a suit between other parties of which he has no legal notice, and a judgment rendered in such a suit is not binding upon him, and is not admissible in evidence against him in any future proceeding in which the title to the property is in controversy."[463] The same rule holds good in chancery as well as at law. Strangers to a decree are not bound by it.[464] From the foregoing quotations, as also from our previous discussion of the question, who are to be considered parties and privies, it will be possible to derive a sufficiently

2 Gratt. 250; Bennett v. Holmes, 1 Dev. & Bat. 486; Koogler v. Huffman, 1 McCord, 495; Mays v. Compton, 18 Ga. 269; Brock v. Garrett, 16 Ga. 487; Marvin v. Hampton, 18 Fla. 131; McLelland v. Ridgway, 12 Ala. 482; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Moore v. Cason, 1 How. (Miss.) 53; Mestier v. Railroad, 16 La. Ann. 354; Lefebvre v. Montilly, 1 La. Ann. 42; Morrison v. Loftin, 44 Tex. 16; Hardin v. Blackshear, 60 Tex. 132; Black v. Black, 62 Tex. 296; Marshall v. Rough, 2 Bibb, 628; Newson v. Lycan, 3 J. J. Mar. 440, 20 Am. Dec. 156; Simpson v. Jones, 2 Sneed, 36; Maple v. Beach, 48 Ind. 51; Norcross v. Hudson, 82 Mo. 227; Dugge v. Stumpe, 73 Mo. 518; Cameron v. Cameron, 15 Wis. 1, 82 Am. Dec. 652.

[461] Duchess of Kingston's Case, 20 How. St. Tr. 355, s. c. 2 Smith's Lead. Cas. *424.

[462] Morrison v. Mullin, 84 Pa. St. 12.

[463] Foster v. Powers, 64 Tex. 247.

[464] McCall v. Harrison, 1 Brock. 126; Bailey v. Robinson, 1 Gratt. 4, 42 Am. Dec. 540; Loop v. Summers, 3 Rand. 511; Manigault v. Deas, 1 Bail. Ch. 283; Buford v. Rucker, 4 J. J. Mar. 551; Brown v. Wynkoop, 2 Blackf. 230; Rowland v. Day, 17 Ala. 681; Lang v. Waring, 17 Ala. 145; Cockey v. Milne, 16 Md. 200. The decree made in a cause does not bind one who was originally a party but was permitted to withdraw during the suit. Owens v. Alexander, 78 N. Car. 1.

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accurate idea of the tests which are to be applied in ascertaining whether or not a given person must be regarded as a stranger to a given litigation. The authorities hold that when a person is a mere volunteer at the trial of a cause, and has no legal right to control the proceedings in the action, or to make any defense, or examine the witnesses, or prosecute proceedings in error from the rulings and judgment in the case, such person is to be considered as a stranger to the cause, and is not concluded by the judgment rendered therein.[465] "No party can ever be estopped or in any way prejudiced by any judgment or decree, if the record in the first suit on its face shows that he had no opportunity to be heard in opposition to the entry of such judgment or decree."[466] But in ordinary cases it can never be difficult to determine, by the application of the rules already given in this chapter, whether the person sought to be bound was a real or nominal party to the former action, or in privity with either of the parties, or responsible for the result of the litigation, or strictly a stranger. Before proceeding further, it may be useful to adduce some illustrations of the rule under consideration. A tax purchaser of real estate, for example, who was not a party to an action to enjoin the officials from issuing a deed, and did not appear in that action, is not bound by the decree.[467] A judgment in favor of one partner, in a suit in which he alone is served and made a party, is no bar or evidence of payment in another suit by the same plaintiff, against another partner, on the same cause of action.[468] So a judgment in a suit determining the existence or non-existence of a co-partnership relation between the parties thereto, is not binding on or admissible in evidence against strangers to the proceeding.[469] And as an adjudication is not conclusive against a stranger, so neither can a stranger take advantage of it. Thus a plaintiff will not be allowed to introduce in evidence a judgment obtained against the defendant in another case, to which the plaintiff was not a party, to prove fraud in the defendant.[470] It is immaterial that the United

[465] Wilkie v. Howe, 27 Kans. 518; Hale v. Finch, 104 U. S. 261.

[466] McCoy v. McCoy, 29 W. Va. 794, 2 S. E. Rep. 809.

[467] Helprey v. Redick, 21 Nebr. 80, 31 N. W. Rep. 256.

[468] McLelland v. Ridgway, 12 Ala. 482.

[469] McDonald v. Matney, 82 Mo. 358.

[470] Winston v. Starke, 12 Gratt. 317.

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States was a party to the suit in which the former judgment was rendered, if the parties in the second action are different; because privity to the government must appear from the facts, as well as privity to individuals.[471]

§ 601. Exception; Courts of Exclusive Jurisdiction.

Several important exceptions to the general rule that judgments are not conclusive upon strangers remain to be noted. In the first place, it is said 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."[472] But it is not believed that this doctrine could have any proper application except in the case of judgments *in rem*, or judgments determining matters of public right or of police.

§ 602. Exception; Judgments in Rem.

A second important exception to the general rule is found in the case of judgments *in rem*. Adjudications of this character, for certain special reasons which will appear later, are held to be binding and conclusive, not only upon the immediate parties to the litigation, but upon all persons who may be interested in the *res*. As the subject is one of much importance and of a distinctive character, it is reserved for consideration in a future chapter.

§ 603. Exception; Principle of Stare Decisis.

According to the doctrine of the best cases, a title previously passed upon, although in a suit between different parties, will not be again examined and adjudicated, in a case proceeding upon the same state

[471] Barton v. Long (N. J.), 14 Atl. Rep. 565.

[472] Rhoades v. Selin, 4 Wash. C. C. 715.

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of facts and presenting precisely the same question, in the absence of a showing that the former decision was manifestly erroneous.[473] This, however, is not strictly upon the ground that the matter is *res judicata*, but rather upon those settled principles which induce the courts to abide by their own former decisions, that is, the rule of *stare decisis*. In the case cited the court of appeals of Maryland said: "We may concede, for the sake of the argument, that, technically and strictly speaking, this suit is not *res judicata*, because the parties are different, and the present parties should not be held conclusively bound by the decision in that case, in which they had no opportunity to be heard. We may also concede that the judgment in that case is not what may properly be termed a judgment *in rem* and binding on the world. We may also further concede the power of the court to reverse its own decision. But notwithstanding all this, we think that both sound reason and the authority of adjudged cases will amply justify us in a refusal to reopen this question of title." But on the other hand, it is held, in Texas, that the fact that a stranger to a suit has been induced to locate certain land by reason of a decision of the supreme court, which declared that the title of a party to the suit was void, will not estop such party from asserting his title to the property in a subsequent action brought by such stranger to try title.[474] These cases, however, are not strictly germane to our immediate subject, the discussion of which we now resume.

§ 604. Judgment as Evidence of its own Existence.

A judgment is always admissible and conclusive evidence, even against strangers, of the fact of its own rendition and of its necessary legal consequences. In other words, "the record of a verdict and judgment is always admissible to prove the fact that such judgment was rendered, or such verdict returned, in any case where the fact of such verdict or judgment, or the nature or amount of such

[473] Kolb v. Swann, 68 Md. 516, 13 Atl. Rep. 379.

[474] Groesbeck v. Golden (Tex.), 7 S. W. Rep. 362.

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judgment, becomes material."[475] This important principle is more fully explained in an opinion of the supreme court of Vermont, from which we quote as follows: "A verdict or judgment is offered either to establish the mere fact of its own rendition, and those legal consequences which result from the fact, or is offered with a view to a collateral purpose,— that is, to prove not only the fact that such a verdict has been rendered, or such judgment pronounced, and so let in all the necessary and legal consequences, but as a medium of proving some fact as found by the verdict, or upon whose supposed existence the judgment is based. For the first of these purposes, that is, for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact. The mere fact that such a judgment was given can never be considered as *res inter alios acta*, neither can the legal consequences of a judgment be so considered. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, and consequently may or may not be evidence according to circumstances, considering the nature of the facts themselves and the parties."[476] Hence, while records may be admitted in evidence in suits not between the same parties or privies, where, upon the facts of the trial and the recoveries in such records, the interests of others hang as incidents or consequences, and the production of such a record is proof that the suit was brought and the recovery had as therein set forth, yet the consequences to others, resulting from those facts apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense.[477] The record of the judgment, for example, is the only legitimate evidence

[475] Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759; Smith v. Chapin, 31 Conn. 530; Ansley v. Carlos, 9 Ala. 973; Taylor v. Means, 73 Ala. 468; McCamant v. Roberts, 66 Tex. 260, 1 S. W. Rep. 260; Stephens v. Jack, 3 Yerg. 403, 24 Am. Dec. 588; Maple v. Beach, 43 Ind. 51; Koren v. Roemheld, 7 Brad. (Ill.) 646.

[476] Spencer v. Dearth, 43 Vt. 98, 105.

[477] Key v. Dent, 14 Md. 86.

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of the termination of a cause.[478] And so when the money sought to be recovered under a count for money paid has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the fact of the judgment and the amount so recovered.[479] Where the plaintiff in ejectment claims through the heir of a decedent, the record of a partition suit between the heirs of such person, which showed that there had been a final decree of the court for a partition of the land, is admissible in evidence.[480] A judgment against a sheriff, on a rule by a judgment-creditor for failing to make money, is evidence, in a subsequent action by a junior judgment-creditor not a party to the former rule, only of the fact that such a judgment was rendered and of its amount.[481] It is also held that a judgment obtained under the mechanics' lien law is conclusive, as to the facts recited therein, in determining the priority of such judgment over another judgment against the same debtor.[482] So, when the action is by a receiver, he may give in evidence, even against a stranger, the decree by which he was appointed, for the purpose of showing his right to sue as receiver and that the subject of the present litigation was committed to him in his character of receiver.[483] But as already stated, the judgment is not admissible evidence, against strangers, of the grounds on which the recovery was had. It is only the *fact* of the adjudication which can be thus proved. Hence, for example, the record of a conviction for an assault and battery committed by a husband upon his wife, is evidence, in an action by the wife for a divorce, only of the fact of the conviction, and not that the assault and battery alleged was actually committed.[484] So again, one who is not a party to a suit in which it is decided that his vendor made a fraudulent sale to him is not thereby precluded from showing, in a subsequent action, that he

[478] Baker v. Dellesseline, 4 McCord, 372.

[479] Gibson v. Love, 2 Fla. 598, 616. See also Walsh v. Ostrander, 22 Wend. 178.

[480] Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 106.

[481] Anderson v. Bright, 12 Ala. 478.

[482] Naylor v. Mettler (N. J.), 11 Atl. Rep. 859. Compare Hartman v. Weiland, 36 Minn. 223, 30 N. W. Rep. 815.

[483] Hardwick v. Hook, 8 Ga. 354; Goodhue v. Daniels, 54 Iowa, 19, 6 N. W. Rep. 129.

[484] Quinn v. Quinn, 16 Vt. 426.

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purchased the property from his vendor in good faith and for a full consideration, and had exclusive possession before other creditors obtained a lien.[485] But it is held that a judgment that A. is entitled to a certain fund is an adjudication that other claimants were not entitled to an injunction which they had obtained to prevent him from suing for the fund.[486]

As a general rule, when a judgment is offered in evidence as an estoppel, or to prove a particular judicial result, it is essential that the whole record should be shown. That is, not merely the entry of the judgment, but all the preliminary conditions to its rendition, must be made part of the offer.[487] But there are cases where this rule will be relaxed, so far as to admit a part only of the record, where the mere existence of that part is the one fact sought to be established by its production. Thus, where a record is offered in evidence to show the fact that there *is* a judgment, the object being to support an execution under such judgment, it is not necessary that the entire record should be put in evidence; a transcript of so much of the record as will show the existence of the judgment under which the execution issued may be received in evidence, in cases of this character.[488]

§ 605. Judgment as Evidence of Relation of Debtor and Creditor.

One of the most important applications of the rule giving a qualified admissibility to a judgment as evidence against strangers, is in the case where it is invoked as proof of the relationship of debtor and creditor between the parties. It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of the indebtedness of the judgment-debtor, and it cannot be collaterally impeached by third persons in a subsequent suit

[485] Snyder v. Berger (Pa.), 9 Atl. Rep. 147.

[486] Heyman v. Landers, 12 Cal. 107.

[487] 1 Wharton on Ev. § 824.

[488] Lee's Admrx. v. Lee, 21 Mo. 581; 1 Wharton on Ev. § 828. See Young v. Harrison, 21 Ga. 584; Whitmore v. Johnson, 10 Humph. 610.

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where such indebtedness is called in question.[489] Thus, in an action against two defendants to set aside a deed of land from one to the other as a fraud upon the plaintiffs as creditors of the vendor, the record of a recovery by the plaintiffs against such grantor is conclusive evidence against him that he owed the amount of it when the suit was brought; and it is *prima facie* evidence of the same fact against the vendee, upon proof being made of the facts stated in the complaint in such action, as the cause of action therein.[490] So the judgment recovered in an attachment suit is admissible in evidence in a suit brought against the sheriff, as proof of the existence of the debt of the attaching creditor.[491] And a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and amount of the indebtedness of the latter.[492] Where a person has been compelled

[489] Strong v. Lawrence, 58 Iowa, 56, 12 N. W. Rep. 74; Candee v. Lord, 2 N. Y. 269; Voorhees v. Seymour, 26 Barb. 569; Mowry v. Davenport, 6 Lea, 80; First Nat. Bank v. Oldham, 6 Lea, 718; Cox v. Thomas, 9 Gratt. 323; Raymond v. Richmond, 78 N. Y. 351; Sidensparker v. Sidensparker, 52 Me. 481.

[490] New York & Harlem R. Co. v. Kyle, 5 Bosw. 587; Vogt v. Ticknor, 48 N. H. 242; Church v. Chapin, 35 Vt. 231; Inman v. Mead, 97 Mass. 310; Goodnow v. Smith, 97 Mass. 69. *Per contra*, Troy v. Smith, 33 Ala. 469.

[491] Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324.

[492] Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294. In this case, in delivering the opinion of the court, Gardiner, J., observed: "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala fide*. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently neither a creditor nor stranger can interfere in the *bona fide* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors. Where, however, fraud is established, the creditor does not claim *through* the debtor but adversely to him, and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped. It follows from he principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon de-

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by a judgment or decree to pay over moneys in his hands, the record of the judgment or decree may be given in evidence by him, in a subsequent suit against him, for the recovery of the same money, by one who was not a party to the former proceeding, for the purpose of proving that he has so paid over such money by order of a competent tribunal.[493]

§ 606. Judgment as Evidence of Facts Provable by General Reputation.

"It is true as a general rule that a judgment or decree only binds parties and privies, and that, as against strangers, the record is only evidence of the fact that the judgment or decree has been pronounced, and of the legal consequences resulting from that fact. But there is a class of cases in which the judgment or decree is *prima facie* evidence against third persons of a fact that was necessarily found thereby. Where a fact may be established by proof of general reputation, such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding the same fact is *prima facie* evidence thereof against third persons. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation." [494] For example, it is competent to prove by general reputation that a person is dead; and hence a decree against the unknown heirs of such person, since it could not have been made without proof of his death, is admissible evidence of that fact.[495] On the same ground, the judgment is competent when

fault, confession, or after contestation, is upon all questions affecting the title to his property conclusive evidence against his creditors to establish, first, the relation of creditor and debtor, between the parties to the record, and second, the amount of the indebtedness."

[493] Barkaloo v. Emerick, 18 Ohio, 268.

[494] Pile v. McBratney, 15 Ill. 314; Brisco v. Lomax, 8 Ad. & El. 198; Evans v. Rees, 10 Ad. & El. 151; Patterson v. Gaines, 6 How. 599; Chirac v. Reinecker, 2 Pet. 613; Corbley v. Wilson, 71 Ill. 209; Reed v. Jackson, 1 East, 355; Pim v. Curell, 6 Mees. & W. 266; Carnarvon v. Villebois, 13 Mees. & W. 313; 1 Starkie on Ev. 251; 1 Greenleaf on Ev. § 555; 1 Wharton on Ev. § 200. But although verdicts and judgments are, upon authority, admitted as proof of reputation, the rule does not extend to *awards*. Evans v. Rees, 10 Ad. & El. 151.

[495] Pile v. McBratney, 15 Ill. 314.

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the issue turns upon a question of pedigree.[496] Again, a right of ferry is a matter in which the public are interested, and as to which, for that reason, reputation is evidence, and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties.[497] A former judgment in an action by the same plaintiff against a third person is admissible in evidence as tending to establish the plaintiff's right of free warren in a copyhold estate, where that question was at issue in the former action.[498] So also, in a case where the matter in controversy was the freedom or slavery of the plaintiff, it was held unobjectionable to receive in evidence the record of a judgment between strangers to the present action, establishing the right to freedom of a maternal aunt of the plaintiff; because hearsay evidence of that fact would have been competent and admissible.[499]

§ 607. Judgment as Link in Chain of Title.

A judgment at law or decree in equity, when it constitutes a link in a chain of title, is competent and admissible evidence, in that character and for that purpose, not only against the parties to the record but against all the world.[500] Thus a decree of the court, authorizing the marshal to make a deed of the land in question, is admissible in evidence for a stranger to that proceeding when a necessary link in his chain of title.[501] So in ejectment by a sheriff's vendee, a judgment in favor of the vendee against the defendant as whose property the land was sold, is pertinent testimony, because it shows the manner in which the sheriff was paid for the land.[502] Again, on a trial touching the right to lands, decrees in chancery between other parties, concerning the same lands, are admissible in evidence to

[496] Chirac v. Reinecker, 2 Pet. 613.

[497] Pim v. Curell, 6 Mees. & W. 234.

[498] Carnarvon v. Villebois, 13 Mees. & W. 313.

[499] Vaughan v. Phebe, 1 Mart. & Yerg. 1, 17 Am. Dec. 770.

[500] Webb v. Den, 17 How. 577; Fowler v. Savage, 3 Conn. 90; Chamberlain v. Bradley, 101 Mass. 188, 3 Am. Rep. 331; Martin v. Rutt (Pa.), 17 Atl. Rep. 993; Baylor v. Dejarnette, 13 Gratt. 152; Cravens v. Jameson, 59 Mo. 68.

[501] Masters v. Varner, 5 Gratt. 168, 50 Am. Dec. 114.

[502] Hartman v. Stahl, 2 Penr. & W. 223.

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show the character in which the possessor holds the premises.[503] But this exception to the general rule must be carefully confined to its legitimate boundaries. Not every judgment affecting the title to land is admissible evidence in a suit between strangers. To have that quality the adjudication must constitute an actual and necessary part of the chain of title alleged by the party who offers it. Thus, in a writ of entry, the plaintiff cannot, for the purpose of rebutting the defendant's evidence, introduce in evidence the verdict and judgment in an action of trespass, relative to the same land, brought by a person through whom the plaintiff does not derive title, in which action judgment was rendered against the same defendant.[504] So again, where A. and B. are the only parties to a suit affecting the title to *one* of several tracts of land conveyed by a quitclaim, a judgment in that suit declaring the deed to be void is, as to C. and D., neither of the latter being privies with A. or B., simply *res inter alios acta*, and in a suit by C. against D. to quiet title to *another* of the tracts covered by the quitclaim, it is not binding as *res judicata*.[505]

§ 608. Judgment as an Admission.

Strictly speaking, a judgment against a party, since it proceeds *in invitum*, cannot properly be considered as his admission. Yet there are cases where a stranger may put forward the record of a judgment against his antagonist, and rely upon it as evidence in his own favor, not on the ground of any of the rules above mentioned, but because, in the circumstances, it partakes of the character of an admission. Statements and allegations made in the pleadings of a party will furnish a familiar illustration of this principle, but these fall without the scope of our present discussion, as we are only concerned with final adjudications. However, it is well settled upon the authorities, that a judgment by default, since it confesses the material facts well pleaded in the declaration, may be received in evidence, in behalf of a third person, as a species of admission of

[503] Davies v. Lowndes, 1 Bing. N. C. 597, 607.

[504] Fogg v. Plumer, 17 N. H. 112.

[505] McClung v. Steen, 32 Fed. Rep. 873.

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such facts, whenever proper and relevant.[506] But in such case it is *not conclusive*, possessing no other weight or dignity than attaches to any other kind of admission.

PART V. WHAT POINTS AND QUESTIONS ARE CONCLUDED.

§ 609. Scope of the Estoppel.

It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein.[507] Before proceeding to consider this rule in detail, it will be profitable to select from the multitude of cases on the subject some typical examples of its practical application. In a case in Texas, where the action was for the recovery of damages for breach of an alleged contract for the sale of land, the defendant pleaded that in an action brought by him against the plaintiff and others to quiet his title to the land in question, the said plaintiff, for an equitable defense, set up the contract in question and prayed for a specific performance, and that judgment was rendered against him; it was held that the judgment was conclusive against the plaintiff.[508] So the questions involved in a suit brought to establish a will as a lost or destroyed will, and in a subsequent action of partition between the same parties where such will is sought to be so established by one

[506] Ellis v. Jameson, 17 Me. 235; Cragin v. Carleton, 21 Me. 492; St. Louis Mut. Ins. Co. v. Cravens, 69 Mo. 72; Central R. R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353. In the case last cited it was said: "It may be true that where two persons are sued as partners, a judgment by default on personal service may, in a subsequent action against them by a stranger, be competent as an admission of the partnership. In such a case, it is competent only as an admission, and is received on the same grounds as other admissions." But the court added: "The effect of an admission cannot be accorded to a judgment when the liability is denied and controverted in the suit."

[507] McClung v. Condit, 27 Minn. 45, 6 N. W. Rep. 399; Morse v. Elms, 131 Mass. 151; Allis v. Davidson, 23 Minn. 442; *supra* § 504, and cases there cited.

[508] Parnell v. Hahn, 61 Tex. 131.

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claiming under it, are identical. The same proof is required, to establish the will, in either case, and the question having been once passed upon by a competent tribunal must be deemed at rest and the former judgment conclusive.[509] Again, in a suit upon an appeal-bond given by the defendant to a landlord's action to recover the premises for non-payment of rent, a judgment in said action for possession, and that a certain amount of rent is in arrear, is conclusive upon the tenant as to the amount then due.[510] A conditional judgment on a writ of entry to foreclose a mortgage is conclusive evidence of the amount then due on the mortgage, in a subsequent suit in equity to redeem the land.[511] So again, where a husband is induced to execute a deed of certain property to his wife, on account of the marital relations between them, and afterwards the wife, on evidence furnished by herself, secures an annulment of the marriage on the ground that the husband was insane at the time the marriage contract was entered into, she cannot deny the insanity of the husband in an action brought to set aside the deed on account of such insanity.[512] For the application of the rule before us, it is immaterial whether the scope of the former action was wider or narrower than of the present suit. For instance, the fact that, in the former action, additional property was involved, does not affect the conclusiveness of the judgment upon the property involved in the suit on trial.[513] Nor does it in the least affect the case that the party comes to the second trial armed with additional or different evidence upon the same question, which he did not present when it was before in controversy. If the point was once in issue, and was actually determined by a competent court, that is enough; he is estopped.[514]

[509] Harris v. Harris, 36 Barb. 88. See also Vaughn v. Drewry, 79 Ga. 761, 4 S. E. Rep. 879.

[510] Morris v. Horrell, 35 Mo. 467. See further Sipe v. Holliday, 62 Ind. 4.

[511] Sparhawk v. Wills, 5 Gray, 423; Burke v. Miller, 4 Gray, 114. See Jamaica, etc., Co. v. Chandler, 121 Mass. 1.

[512] Warfield v. Warfield (Iowa), 41 N. W. Rep. 383.

[513] Rucker v. Steelman, 97 Ind. 222.

[514] Du Bois v. Phila., etc., R. Co., 5 Fish. Pat. Cas. 208. In this case (a suit for infringement of patent), the defendant put in issue the novelty of plaintiff's invention, but it was sustained; upon the trial of a second suit between the same parties, he offered additional evidence upon the same issue, including certain English patents not referred to in the first case; but he was held precluded by the former judgment from denying the novelty of the invention.

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But where a second action between the same parties is upon a claim or demand different from that involved in the first action, the judgment in such first action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered.[515] For example, a verdict and judgment in an action for the erection of a nuisance are not conclusive evidence of the plaintiff's right to recover in a subsequent action against the same defendant for the continuance of the same nuisance. For it cannot be assumed that there has been no change in the condition of affairs in the interval. The plaintiff must first show that the nuisance still continues, and then the record will be conclusive.[516] So again, that a question could have been litigated in a former controversy between the same parties is enough to settle it by the judgment rendered in that case as to all the property involved in that litigation; but, to settle the question as to other property, it must appear that it was actually litigated, not only that it might have been. Thus a waiver of exemption applicable to cotton, as well as other personalty, may be urged to condemn the cotton after the other property has been adjudicated exempt, although the waiver might have been, but was not, urged to subject the other property.[517]

§ 610. The Four Identities.

What, then, are the conditions under which a judgment rendered in one action will be receivable as conclusive evidence in a subsequent action? According to a certain line of authorities, "in order to make a matter *res judicata* there must be a concurrence of the four conditions following, namely: 1. Identity in the thing sued for [or subject-matter of the suit]. 2. Identity of the cause of action. 3. Identity of persons and of parties to the action. 4. Identity of the quality in the persons for or against whom the claim is made." [518]

[515] Geneva Nat. Bank v. Independent School Distr., 25 Fed. Rep. 629; Duncan v. Holcomb, 26 Ind. 378; Spurlock v. Missouri Pac. R. Co., 76 Mo. 67; People v. Johnson, 37 Barb. 502; Burdick v. Post, 12 Barb. 168; Scully v. Lowenstein, 56 Miss. 652.

[516] Shepherd v. Willis, 19 Ohio, 142.

[517] Sloan v. Price (Ga.), 10 S. E. Rep. 601. See Hoisington v. Brakey, 31 Kans. 560, 3 Pac. Rep. 353.

[518] Bouvier's Law. Dict., tit. *Res Judicata;* State v. Jumel, 30 La. Ann. 861; Benz v. Hines, 3 Kans. 397.

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As to the last two of these "identities" there can of course be no question. That a judgment is in general conclusive only between parties and privies,[519] and that it binds a person only in the character in which he appears,[520] are principles which have been stated and illustrated in an earlier part of this chapter. But in regard to the two former requisites, as above enumerated, the decisions exhibit considerable doubt and ambiguity. This arises, in part at least, from a failure to properly observe the very important distinction already pointed out, between the case of a judgment offered as evidence of some *particular question* which was adjudicated in a former controversy, and the case where a judgment is set up as a *bar* to the maintenance of the action or as a merger of the cause of action. In the latter case, it is undoubtedly correct to say that there must be an identity of the subject-matter, for it is precisely because the cause of action *is* the same that it cannot be tried a second time. But it often happens that some one point (such as the employment of an agent) may be put in issue in two suits between the same parties, in which, nevertheless, the causes of action are as widely different as it is possible to imagine them; and the first judgment will be held conclusive of *that point* in the second suit. It is therefore necessary to amend the statement of what is requisite to the rule of *res judicata* in order to adapt it to the case of a judgment produced as evidence of a particular proposition, which is the subject of the present chapter. Instead of the first two "identities" above mentioned, we propose, for the present purpose, to substitute the following: There must be an identity of *issues*.[521] And by this is meant that the issue raised in the second suit, upon which the evidential force of the former judgment is to be directed, must be identical with the issue (or one of the issues) raised and determined in the first action. We are thus brought down to the leading question for the present sub-division of our subject, viz: what are these "matters in issue" upon which the former judgment is conclusive? But before attempting a direct answer to this question, it will be advisable to narrow the field of inquiry as

[519] *Supra*, § 534.

[520] *Supra*, § 536; Huyghe v. Brinkman, 34 La. Ann. 1179.

[521] See Cromwell v. Sac County, 94 U S. 351.

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much as possible. And so we shall be led to see, in the first place, that we are to exclude all such matters as come only incidentally or collaterally into the controversy and such as can only be deduced by a process of argument and inference from the form or character of the judgment.

§ 611. Matters Incidentally Considered.

The rule has always been regarded as well settled, from the earliest authorities down to the present time, that the judgment, either of a court of concurrent jurisdiction or of a court of exclusive jurisdiction, is not conclusive of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment.[522] "The estoppel of a judgment extends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon."[523] "The principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the litigation."[524] For example, upon an application by an executor or administrator to the probate court for an order to sell land for the payment of debts, which application is contested by the heirs or devisees, the liability of the personal representative himself to the estate, for the rent of lands before or after

[522] Duchess of Kingston's Case, 20 How. St. Tr. 538; Hopkins v. Lee, 6 Wheat. 109; Howard v. Kimball, 65 Me. 308; Hotchkiss v. Nichols, 3 Day, 138; Kennedy v. Scovil, 14 Conn. 61; Dickinson v. Hayes, 31 Conn. 417; Eastman v. Cooper, 15 Pick. 276, 26 Am. Dec. 600; Gilbert v. Thompson, 9 Cush. 348; Jennison v. West Springfield, 13 Gray, 544; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Lawrence v. Hunt, 10 Wend. 80, 25 Am. Dec. 539; Stephenson v. Kleppinger, 5 Watts, 420; Blackmore v. Gregg, 10 Watts, 222, 36 Am. Dec. 171; Lentz v. Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Forcey's Appeal, 106 Pa. St. 508; Brady v. Pryor, 69 Ga. 691; Watts v. Rice, 75 Ala. 289; Land v. Keirn, 52 Miss. 341; Shall v. Biscoe, 18 Ark. 142; Wahle v. Wahle, 71 Ill. 510; Wilson v. Stripe, 4 Greene (Iowa), 551, 61 Am. Dec. 138; Haight v. Keokuk, 4 Iowa, 199; Ridgley v. Stillwell, 27 Mo. 128; Fish v. Lightner, 44 Mo. 268; Henry v. Davis, 13 W. Va. 230; Fulton v. Hanlow, 20 Cal. 450.

[523] Lewis & Nelson's Appeal, 67 Pa. St. 153.

[524] Horton v. Hamilton, 20 Tex. 606.

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the death of the decedent, may become matter of controversy on the trial, as affecting the amount of assets liable for debts, since the existence of such liability, if shown, would be evidence of personal assets primarily chargeable with the debts. Yet this is not the matter in issue in such controversy; it is merely incidental or collateral matter, within the rule above stated, and the decree is not conclusive as to that question on final settlement of the executor's account.[525] So again, where A., in January, sold to B. a city lot, and in March sold him an adjoining lot, and, in an action to recover the purchase-money under the agreement of March, the defense of payment was set up, and as evidence of this a deed of both lots was offered and a delivery of the deed sought to be established, and the jury found for the defendant, it was held that the delivery of the deed was not in issue in that case within the meaning of the rule, so as to require the court, in an action of covenant on the agreement of January, to take from the jury the question of delivery of the deed.[526] To take another illustration, a verdict and judgment in an action of trespass *de bonis asportatis*, where the plea was not guilty and the ownership of the goods depended upon the title to land, is no estoppel to an action for the possession of the same land between the same parties.[527] So where, in an action for damages for trespass to land, the plaintiff relies for title upon certificates of purchase issued by the state, and the defendant puts in issue the plaintiff's title, if the plaintiff recovers judgment, it is no bar to an action by the defendant against the plaintiff to determine which of them has the better right to purchase the land from the state.[528] An important analogy to the rule under consideration is found in the case of opinions of the appellate courts considered as authoritative statements of the law. A point may be considered and passed upon by the court which comes only incidentally in question and is not necessary to the determination of the case. In that event, the decision, so far as concerns that point, is merely *obiter dictum* and not entitled to the weight of a precedent. But where the record in an action of which the court has

[525] Ford v. Ford's Admr., 68 Ala. 141.
[526] Cavanaugh v. Buehler, 120 Pa. St. 441, 14 Atl. Rep. 891.
[527] Potter v. Baker, 19 N. H. 166.
[528] Bosquett v. Crane, 51 Cal. 505.

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jurisdiction fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be considered as an *obiter dictum*, and the judgment is authoritative on both points.[529]

§ 612. Inferences from the Judgment.

The second branch of the rule in question,—that a prior adjudication is not conclusive as to matters which can only be inferred by argument from the judgment,—is not illustrated by so great a number of decisions as the former part, but it is not less important nor less firmly established.[530] A decree of distribution of an estate, for example, necessarily involves the determination of the fact that all the distributees are living, but only incidentally so, as the basis of the decree; the decree is therefore not conclusive of such fact, but it may be proved by any one whose interest warrants it that one or more of the distributees were dead at the date of the decree, and it makes no difference that the decree recites their presence.[531] So where the first suit was for necessaries furnished to a wife, and the second was for boarding the wife and child, and the record of the first suit did not show whether the husband and wife were cohabiting at the time, it was held that, since that fact was not directly in issue in that suit, and could only be inferred by argument from the judgment, the record could not be used in the second suit to prove that the husband had turned away his wife.[532] The same principle furnished the rule for the decision in *Williams* v. *Williams*,[533]—a case which seems to push the doctrine as far as it can be legitimately extended. There a woman brought an action for divorce against A., alleging that they had been "duly and lawfully married" at a time and place named, and setting up desertion as a ground for the divorce. The defendant did not answer, and a decree was made for

[529] Hawes v. Water Co., 5 Sawy. 287.

[530] See Crandall v. Gallup, 12 Conn. 365; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194; Evans v. Birge, 11 Ga. 272.

[531] Sawyer v. Boyle, 21 Tex. 28; Eans v. Sawyer, 27 Tex. 448.

[532] Lentz v. Wallace, 17 Pa. St. 412, 55 Am. Dec. 569.

[533] 63 Wis. 58, 23 N. W. Rep. 110, 53 Am. Rep. 253.

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the plaintiff. In the mean time she had contracted a marriage with B., and after B.'s death, brought suit to recover dower in his lands. This was resisted, on the ground that she was the wife of A. at the time of her pretended marriage to B., and to show this the record of the divorce suit was put in evidence. But it was held that she was not estopped, by that record, from showing by other evidence that there never was any legal marriage between A. and herself, because, at the time of their supposed marriage, he had no capacity to contract marriage, having another wife living. The decision was based on the ground that the decree of divorce did not actually pass upon the validity of the marriage, and that its validity, so far as it entered at all into that decree, was a matter only incidentally cognizable or inferrible by argument from the judgment.

§ 613. Necessary Conditions to the Adjudication.

The rule stated in the preceding section cannot be fully comprehended and accurately applied unless we take into account the very important distinction between possible or probable inferences from the judgment and the necessary conditions to the adjudication. Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. "The estoppel is not confined to the judgment," says the supreme court of Massachusetts, "but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."[534] For example, where a plaintiff has recovered in an action of trespass *quare clausum fregit*, such recovery is conclusive, as between the

[534] Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733. See also Duncan v. Bancroft, 110 Mass. 267; Dorris v. Erwin, 101 Pa. St. 239; Hayes v. Shattuck, 21 Cal. 51; Perkins v. Walker, 19 Vt. 144; Tuska v. O'Brien, 68 N. Y. 446; School District v. Stocker, 42 N. J. L. 115.

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parties, that the plaintiff's possession, before the trespass in that suit complained of, was peaceable, and prior to the defendant's, and of such a character as to entitle the plaintiff to retake it if it could be done peaceably.[535] So where, on the distribution of the proceeds of a sheriff's sale of property under a confessed judgment, a creditor of defendant urges that such judgment was fraudulent as to him, that question is involved in the proceeding, and an award of the proceeds to the plaintiff, on the ground that his judgment was the prior lien, is conclusive on the question in a subsequent attachment by the creditor against the former plaintiff as garnishee.[536] So one who had unsuccessfully opposed the discharge of a person as a bankrupt is thereby estopped, in a suit afterwards brought by him against such person to recover his debt, to which the bankrupt pleads his discharge, from showing that the discharge was fraudulently obtained.[537]

§ 614. What Constitutes the "Matter in Issue."

We have now seen that the estoppel of a judgment does not extend to such matters as come only incidentally or collaterally into the controversy, but only to points actually and necessarily adjudicated. In other words, that a former judgment is conclusive only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered.[538] But what is the "matter in issue" within the meaning of this rule? Is the test to be furnished solely by the issues framed in the suit, or also by the course and nature of the evidence? Suppose that a question arises on the trial which, *per se*, has nothing to do with the cause of action and is not mentioned in the pleadings, but which materially affects the stated issue and must be determined before the issue can be found either way. Suppose further that such question, thus becoming necessary to the decision of the cause, is controverted between

[535] Illinois Coal Co. v. Cobb, 83 Ill. 188.

[536] Wetherald v. Van Stavoren (Pa.), 17 Atl. Rep. 450.

[537] Wales v. Lyon, 2 Mich. 276.

[538] Smith v. Ontario, 4 Fed. Rep. 886.

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the parties, and is made the subject of evidence, argument, and instructions, and that its resolution in effect determines the verdict of the jury. Now is the question to be considered *res judicata* between the parties or not? Unfortunately, the authorities are in conflict upon this subject, and the matter rests in much doubt and confusion. There are cases holding that, in order that a former adjudication upon a particular point should be available as an estoppel, the fact determined must have been in issue on the face of the pleadings in the former proceeding.[539] This, however, is not good doctrine. For it frequently happens that the pleadings are so general as not to disclose the precise point litigated, and then, as we shall presently see, parol evidence is admissible to identify the issues really tried and determined. The most strict and technical view of the subject was taken in the case of *King* v. *Chase*,[540] where it was held that the matter in issue includes only that upon which the plaintiff proceeds in his action and which the defendant controverts by his pleadings, and not facts offered in evidence to establish the matters in issue, though they may be the only points controverted.[541] This rule would of course exclude a case such as that above supposed. But we cannot concede its justice or policy, or even its technical correctness. The doctrine of *res judicata* does not rest upon

[539] Towns v. Nims, 5 N. H. 259, 20 Am. Dec. 578; Sintzenick v. Lucas, 1 Esp. N. P. 43; Blackham's Case, 1 Salk. 290; Newell v. Carpenter, 118 Mass. 411.

[540] 15 N. H. 9, 41 Am. Dec. 675.

[541] See also Sanderson v. Peabody, 58 N. H. 116; Vaughan v. Morrison, 55 N. H. 580; Western M. Co. v. Virginia Coal Co., 14 W. Va. 250; Lentz v. Wallace, 17 Pa. St. 413; Garwood v. Garwood, 29 Cal. 521. In King v. Chase, *supra*, Parker, C. J., stated and explained the doctrine in the following terms: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue, with-

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the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried,—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question, the turning-point in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment, as if it stood alone as the issue in the case.[542] For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. Numerous cases incline to this view,[543] and many attempts have been made to formulate a satisfactory statement of the true rule. Thus it has been said that the matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated.[544] Again it is held that if a particular matter which was not necessarily involved in the issue, but which the issue was broad enough to cover, actually arose and was determined,

in the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseisin*, or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact the one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary of itself to the finding of the issue. It may be made so by the parties." King v. Chase, 15 N. H. 9.

[542] This is the line of reasoning adopted, in this connection, by Mr. Bigelow in his excellent treatise on Estoppel (3d edn.), p. 112.

[543] Wood v. Jackson, 8 Wend. 9; Bissell v. Kellogg, 60 Barb. 617; Railroad v. Schulte, 103 U. S. 143; Chamberlain v. Gaillard, 26 Ala. 504; Sherman v. Dilley, 8 Nevad. 21; Lee v. Kingsbury, 18 Tex. 68, 62 Am. Dec. 546; Trayhern v. Colburn, 66 Md. 277, 7 Atl. Rep. 459.

[544] Smith v. Ontario, 4 Fed. Rep. 386.

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it may be connected with the record by evidence *aliunde*.[545] In a well considered case in Nevada the court thought it was not necessary that the particular point "should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. But when the fact is not directly put in issue by the pleadings, and it was not a fact necessary to be passed upon before judgment could be rendered, then parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action. If this be not done, the judgment would, as evidence, be conclusive of nothing but the material facts directly put in issue by the pleadings, or such as it was necessary to pass upon in finding the verdict or rendering the judgment."[546] "It is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment."[547] Further, there are expressions to be found in the books to the effect that a judgment is conclusive not only upon the questions actually contested and determined, but upon all matters which, under the issues, *might* have been litigated and decided in that suit.[548] But this statement is true only in the case where the prior judgment is offered as a bar to a second suit upon the same cause of action, not where the subject-matter of the two controversies is different. "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judg-

[545] Chamberlain v. Gaillard, 26 Ala. 504.

[546] Sherman v. Dilley, 3 Nevad. 21, 24.

[547] Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Oldham v. McIver, 49 Tex. 556, 572; Pray v. Hegeman, 98 N. Y. 351; Trayhern v. Colburn, 66 Md. 277, 7 Atl. Rep. 459.

[548] Phelan v. Gardner, 43 Cal. 306; Rogers v. Higgins, 57 Ill. 244; Chesapeake & Ohio Canal Co. v. Gittings, 36 Md. 276; Shepardson v. Cary, 29 Wis. 34; Petersine v. Thomas, 28 Ohio St. 596.

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ment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." [549]

§ 615. Points Necessary to Warrant the Judgment.

A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered.[550] In other words, it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further.[551] For example, an action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the crops grown by the tenant upon the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such crops, or to any after action brought by either party.[552] In some states, however, a more liberal rule prevails, and it is held that if a question of title was decided in a former suit, although it was not strictly necessary for the court to have passed upon the question, yet if the point was distinctly raised by the pleadings, fully argued by counsel, and distinctly passed upon by the court, it is *res judicata*.[553] In further illustration of the rule, it is held that where a verdict and judgment, in an action involving two issues of fact, are consistent with a finding either way as to one of such issues, the same is not to be regarded as conclusively settled between the parties.[554] The same principle extends, by analogy, to the decisions of the appellate courts.

[549] Cromwell v. Sac County, 94 U. S. 351.

[550] Leonard v. Whitney, 109 Mass. 265.

[551] Town v. Lamphere, 34 Vt. 365; Hunter v. Davis, 19 Ga. 418; Church v. Chapin, 35 Vt. 223. See Palmer v. Hussey, 87 N. Y. 303; Burlen v. Shannon, 14 Gray, 433; Withington v. Warren, 12 Met. 114; Burns v. Monell, 7 N. Y. Supp. 624; McIntyre v. Storey, 80 Ill. 127.

[552] Waite v. Teeters, 36 Kans. 604, 14 Pac. Rep. 146.

[553] Almy v. Daniels, 15 R. I. 312, 4 Atl. Rep. 758.

[554] Bergeron v. Richardott, 55 Wis. 129, 12 N. W. Rep. 384.

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They are authoritative only upon the points necessary to be decided in order to reach the given conclusion. Adjudged cases, it is said, can be relied upon as precedents only as to points actually in issue between the parties, and not as to such as may be deemed extrajudicial, unless, indeed, in relation to the latter, they may have ripened into law by various and successive decisions.[555]

§ 616. Points in Issue but not Decided.

It appears to be the generally accepted doctrine that the judgment of a court of competent jurisdiction is conclusive as to all questions within the issue, whether formally litigated or not,[556] and that it cannot be explained away, as to any such question, by testimony of jurors who tried the cause, that that question was not considered by the jury.[557] Thus, where an action is brought upon several promissory notes, each note being described in a separate count, and upon a reference a general award is made in favor of the plaintiff and a general judgment entered thereon, the plaintiff cannot afterwards show by parol that one of the notes sued on was not passed upon by the referee and bring action on such note.[558] But on the other hand, where a former judgment was pleaded as an estoppel to proving certain facts in a subsequent case, and it appeared that in the former suit the facts had been set up, but it did not appear that any proof had been offered in support of such facts, nor on what ground the defense rested or the verdict proceeded, it was considered that the former judgment was no bar to a second inquiry into the same facts.[559] This conclusion follows also, on even stronger reasons, when the record shows that the particular point or question was *excluded* from the consideration of the jury.[560]

[555] Lewis v. Thornton, 6 Munf. 87.

[556] Barrett v. Failing, 8 Oreg. 152.

[557] Underwood v. French, 6 Oreg. 66, 25 Am. Rep. 500. See also Schmidt v. Zahensdorf, 30 Iowa, 498; Sicard v. Buffalo, etc., R. Co., 15 Blatchf. 525.

[558] Blodgett v. Dow (Me.), 16 Au Rep. 660.

[559] Colwell v. Bleakley, 1 Abb. App. Dec. 400.

[560] Thomas v. Hite, 5 B. Mon. 590.

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§ 617. Points not in Issue.

If a particular point was *not in issue* in the suit,—either in the technical sense of an issue framed by the pleadings, or in the sense of being the decisive question in the case and the one actually litigated and determining the result,—it is not conclusively established by the judgment therein, for the purposes of a subsequent suit upon a different cause of action, although it may be expressly or tacitly involved in the judgment.[561] For example, in an action to procure the cancellation of a mortgage as having been paid, the pleadings put in issue the fact but not the amount due. It was determined that the mortgage was not paid, but the sum of $2754 was due thereon, and the complaint was dismissed. This adjudication is conclusive upon the parties only of the fact that something was due, but not of the amount.[562] So a judgment by default upon one of several notes, founded upon one and the same illegal consideration,—no issue upon the fact of consideration being tendered by the complaint,—does not estop the defendant from setting up in a second action, upon another of said notes, the defense of illegality of consideration.[563] Again, a bailee having converted goods on which he had bestowed labor and acquired a lien, the owner brought trover, and recovered a judgment for the conversion; afterwards the bailee sued for his work and labor. It was held that the former judgment raised no presumption that the lienor's claim was adjudicated and allowed in estimating damages.[564] So again, a judgment in a suit for interest (as on a bond), particularly when evidenced by a distinct obligation, (as a coupon), is not *res judicata* as to the principal contract, unless, in such suit, the validity of the original contract itself was adjudicated upon.[565] A

[561] Burton v. Barlow, 55 Vt. 434; Commonwealth v. Sutherland, 109 Mass. 342; Matthews v. Duryee, 45 Barb. 69; Sweet v. Tuttle, 14 N. Y. 465; Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Howe v. First Nat. Bank (Pa.), 1 Atl. Rep. 787; Stoddard v. McIlwain, 9 Rich. 451; Davidson v. Shipman, 6 Ala. 27; Rake's Admr. v. Pope, 7 Ala. 161; Coulter v. Davis, 13 Lea, 451; Bentley v. O'Bryan, 111 Ill. 53; Meredith v. Santa Clara Min. Ass'n, 56 Cal. 178; Applegate v. Dowell (Oreg.), 16 Pac. Rep. 651.

[562] Campbell v. Consalus, 25 N. Y. 613.

[563] Adams v. Adams, 25 Minn. 72.

[564] Longstreet v. Phile, 39 N. J. Law, 63.

[565] Louisiana State Bank v. Orleans

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judgment dismissing a complaint, which alleged the obstruction of a road over which the plaintiff had a right of way in gross, is not an adjudication that will defeat a second action alleging the obstruction of the same road to the detriment of the plaintiff's right of way appendant or appurtenant.[566] For another illustration, where a plaintiff, declaring on an account stated, offers certain promissory notes as evidence to prove the fact of an accounting, but the evidence is rejected and judgment given against the plaintiff, this will not bar a future action by him on the notes.[567] Of course, a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered.[568] So the conclusive effect of a judgment does not extend to references made by a party in his pleadings to matter not involved in the controversy, such references being made merely for the purpose of elucidating the points really at issue.[569] And although a decree in express terms professes to affirm a particular fact, yet if such fact was immaterial to the issue and the controversy did not turn upon it, the decree will not conclude the parties in reference to such fact.[570] But still, if the former suit, upon the trial of it, had a wider range than the pleadings in it indicated, such fact might, under appropriate issues, be shown by parol proof.[571]

§ 618. Matters which could not have been Adjudicated.

A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleadings, could not have been adjudicated in the former suit. "There can be no bar if the demand to which, by their evidence, the parties directed the attention of the court, and which the court rejected, was not within the issue and consequently could not have been allowed. The estoppel does not depend upon technicalities, but

Navigation Co., 3 La. Ann. 294, 312. This is also the doctrine of the Roman law on this point. Dig. 44, 2, 23.

[566] Whaley v. Stevens, 24 S. Car. 479.

[567] Lindell v. Liggett, 1 Mo. 432, 16 Am. Dec. 298.

[568] Mitchell v. French, 100 Ind. 334.

[569] Hobbs v. Parker, 31 Me. 143.

[570] People v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770.

[571] Indianapolis & Cin. R. Co. v. Clark, 21 Ind. 150.

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rests in broad principles of justice, and it can apply only when the party has had his day in court and an opportunity to establish his claim. The fact that a suit has been instituted and evidence produced is of no importance whatever, if in fact the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor."[572] Thus, in an action of debt for money lent and other causes, the defendant pleaded in bar a former recovery by the plaintiff of the same claim, had in a suit on a promissory note and for work and labor. But it was held that the plea was bad, inasmuch as the plaintiff, in the former suit, could not have given evidence of money lent, and consequently the present demand could not have been proved.[573]

§ 619. Judgment on Matters not Presented.

We have elsewhere shown that if the court assumes to pass judgment upon a point or question not submitted to its arbitrament by the parties in their pleadings, nor drawn into controversy by the course of the evidence, the judgment, to that extent, is without jurisdiction and consequently null.[574] It follows that the judgment of a court upon a subject of litigation within its general jurisdiction, but not brought before it by any statement or claim of the parties, is not conclusive of that matter in any subsequent controversy, by reason of its invalidity.[575]

[572] Fifield v. Edwards, 39 Mich. 264, per Cooley, J. See also Teal v. Terrell, 48 Tex. 491; Jenkins v. Harrison, 66 Ala. 345; Baker v. Rand, 13 Barb. 152; Harding v. Hale, 2 Gray, 399.

[573] Athearn v. Brannan, 8 Blackf. 440.

[574] *Supra*, vol. 1, § 242.

[575] Spoors v. Cowen, 44 Ohio St. 497, 9 N. E. Rep. 182.

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§ 620. Claims Withdrawn or Withheld.

According to the general doctrine of the cases, where a former judgment is set up as a bar, or as conclusive evidence of a particular fact or matter, the plaintiff may avoid the estoppel by showing that such matter, though involved in the prior litigation, was distinctly withdrawn or withheld from the consideration of the jury and therefore constituted no part of the verdict or judgment.[876] Thus if a plaintiff sues for several distinct causes of action, and, by leave of court, withdraws one of them, and proceeds to judgment for the others, it is no bar to a subsequent action for the claim so withdrawn.[877] So where it appears on the very face of the judgment that the plaintiff's demand was not passed upon by the court, but that the plaintiff applied for a discontinuance, and on its being refused, he declined giving any evidence, and the court merely considered the counterclaim of the defendant, and gave a judgment in his favor for the amount, the plaintiff may bring another suit for the demand which he declined to submit for adjudication in the former action.[878] But this rule must not be taken for more than it is worth. It applies only to cases in which the claim reserved is a distinct and independent matter and legally capable of being detached from the rest of the plaintiff's case. It is therefore a complementary part of the rule that the plaintiff must ask for all he is entitled to in the first action, and anything is barred which might and *should* have been presented as an inseparable part of his demand.[879] The rule, as thus understood, applies equally to matters of *defense* first set up and then withdrawn. For instance, a judgment for the plaintiff in an action for use and occupation of land, in which the defendant alleged that he was in possession under a contract to purchase the land, but afterwards struck out the allega-

[876] Seddon v. Tutop, 6 Term, 607; Croft v. Steele, 6 Watts, 373; Smith v. Talbot, 11 Ark. 666; Haas v. Taylor (Ala.), 2 South. Rep. 633; Patrick v. Comm'rs' Court (Tex.), 6 S. W. Rep. 626. Compare Barrett v. Failing, 8 Oreg. 152; Glenn v. Savage, 14 Oreg. 567, 13 Pac. Rep. 442.

[877] Killion v. Wright, 34 Pa. St. 91; Steelman v. Sites, 35 Pa. St. 216; Wood v. Corl, 4 Met. 203; Boston Blower Co. v. Brown (Mass.), 21 N. E. Rep. 803; Louw v. Davis, 13 Johns. 227.

[878] Jones v. Underwood, 35 Barb. 211.

[879] Thompson v. Myrick, 24 Minn. 4.

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tions in regard to the contract, does not bar the defendant from claiming, in a subsequent action in ejectment for the same land, for improvements made while in possession under said contract, as improvements made while in possession under color of title.[560] But to admit a suit for a matter once offered to be proved as a set-off and rejected, there must be clear proof that it was withdrawn by the party.[561]

§ 621. Entire Demands cannot be Severed.

Growing out of the rule which forbids the splitting up of an indivisible claim or demand,[562] there is a corollary or subsidiary rule which has a most important bearing upon the doctrine now under consideration. It may be expressed as follows: When the cause of action upon which a judgment is rendered is *entire*, and therefore insusceptible of severance or apportionment, the estoppel will extend to the whole, and it cannot be shown, even on the clearest evidence, that any part was withheld from the decision.[563] Thus where a recovery has been had in a suit in which the plaintiff counted for an entire demand, the record of such recovery is a conclusive bar to another suit brought on the same contract, to recover a sum which was included in the declaration in the first suit, and the plaintiff will not be permitted to prove that no evidence was given to the former jury in support of the latter claim.[564] But where the cause of action is severable in its nature, or where several distinct causes of action were set forth in the same declaration, although it will still be presumed that the judgment includes the whole, yet this presumption may be rebutted by clear evidence that it extends only to part.[565]

[560] Finnegan v. Campbell, 74 Iowa, 158, 37 N. W. Rep. 127.

[561] Muirhead v. Kirkpatrick, 2 Pa. St. 425.

[562] *Infra*, § 734.

[563] Brockway v. Kinney, 2 Johns. 210; Farrington v. Payne, 15 Johns. 432; Hess v. Heeble, 4 Serg. & R. 246; Carvell v. Garrigues, 5 Pa. St. 152; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Duffy v. Lytle, 5 Watts, 120; Miller v. Manice, 6 Hill, 114; Ramsey v. Herndon, 1 McLean, 450; O'Neal v. Brown, 21 Ala. 482; Warren v. Comings, 6 Cush. 103; Converse v. Colton, 49 Pa. St. 346.

[564] Hess v. Heeble, 6 Serg. & R. 57.

[565] Brown v. King, 10 Mo. 56; Goddard v. Selden, 7 Conn. 521; Smith v. Talbot, 6 Eng. 666; Webster v. Lee, 5 Mass. 334; Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611; Croft v. Steel, 6 Watts,

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§ 622. Facts Assumed or Admitted.

A former judgment or decree between the same parties is conclusive evidence only of the facts which were in issue and decided, and not of facts which were assumed or admitted for the purposes of the former suit.[566] In the case cited, where a bill had been filed praying that a will might be declared void on the ground that, though duly executed, its provisions were in conflict with the statute, and some of the defendants had admitted in their answer that the will, if duly executed, was nevertheless void, and the bill was dismissed on the ground that the will was not in its terms in conflict with the statute, the question of its execution not being passed upon, it was held, in a subsequent suit, that the defendants who had so answered were not thereby estopped from denying the due execution of the will. The doctrine of the English cases is practically in harmony with the views just stated. In one of the cases it was said by Parke, B., that the estoppel of a judgment extends to "the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it." But he added: "The statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it would seem, to be treated as confessions of the truth of the facts stated."[567]

§ 623. Evidence to Identify Points Adjudged.

It has been held in a few cases (principally very early decisions) that the record of a judgment in a former suit between the same parties, to constitute an estoppel, must show that the same subject-matter had been passed upon and adjudicated in that suit. In other words, that an estoppel cannot be created by parol evidence helping out a record; but to constitute an estoppel by a former judgment,

373; Converse v. Colton, 49 Pa. St. 346; Paine v. Schenectady Ins. Co., 12 R. I. 440.

[566] Mason v. Alston, 9 N. Y. 28, 59 Am. Dec. 515.

[567] Boileau v. Rutlin, 2 Exch. 665.

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the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the *record alone*.[588] But this doctrine, so far as concerns the kind of evidence admissible to identify the points adjudicated, is now generally repudiated.

§ 624. Parol Proof Admissible.

It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial.[589]

[588] Sintzenick v. Lucas, 1 Esp. N. P. 43; The Vincennes, 3 Ware, 171; Church v. Leavenworth, 4 Day, 281; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Jackson v. Wood, 3 Wend. 27; Davis v. Talcott, 14 Barb. 611; Manny v. Harris, 2 Johns. 29, 3 Am. Dec. 386; Clemens v. Murphy, 40 Mo. 121.

[589] Ricardo v. Garcias, 12 Cl. & Fin. 368; Langmead v. Maple, 18 C. B. N. S. 255; Aspden v. Nixon, 4 How. 467; Russell v. Place, 94 U. S. 606; Wilson's Exr. v. Deen, 121 U. S. 525, 7 Sup. Ct. Rep. 1004; Dunlap v. Glidden, 84 Me. 519; Rogers v. Libbey, 85 Me. 200; King v. Chase, 15 N. H. 9; Aiken v. Peck, 23 Vt. 255; Post v. Smilie, 48 Vt. 185; Gage v. Holmes, 12 Gray, 428; Burton v. Shannon, 99 Mass. 200; Hood v. Hood, 110 Mass. 483; Supples v. Cannon, 44 Conn. 424; Snider v. Croy, 2 Johns. 227; Stowell v. Chamberlain, 3 Thomp. & C. 374; Tams v. Lewis, 42 Pa. St. 402; Follansbee v. Walker, 74 Pa. St. 306; Richmond v. Hays, 3 N. J. Law, 492; Hughes v. Jones, 2 Md. Ch. 178; Whitehurst v. Rogers, 38 Md. 503; Gist v. McJenkin, 1 Speers, 157; Newton v. White, 47 Ga. 400; Rake's Admr. v. Pope, 7 Ala. 161; Robinson v. Lane, 22 Miss. 161; Foster v. Wells, 4 Tex. 101; Gates v. Bennett, 38 Ark. 475; Bottorf v. Wise, 58 Ind. 32; Barger v. Hobbs, 67 Ill. 592; George v. Gillespie, 1 Greene (Iowa), 421; Amsden v. Railroad, 32 Iowa, 288; Sweet v. Maupin, 65 Mo. 65; Driscoll v. Damp, 16 Wis. 106. In the case of Russell v. Place, *supra*, it was said by Field, J.: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the rec-

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That is, "it is not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover or the validity of the defense depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested and that it was referred to the decision of the jury."[590] The ancient rule must therefore be regarded as modified by the later decisions, so as to assume the following form: The record must show that the same matter *might* have come in question on the former trial, and then the fact that it *did* come in question may be shown by extrinsic proof.[591] For example, where, in an action of ejectment, the defendant, to defeat the action, introduced and read in evidence the record of a judgment in a former action of ejectment between the same parties for the same premises, by which it appeared that a verdict was rendered for the defendant and a judgment entered thereon, it was held that the plaintiff might prove by a person present what title the defendant set up and established on the former trial, and on what questions the suit was litigated and decided, those facts not appearing by the record.[592]

ord leaves the matter in doubt, such evidence is admissible." And in Hickerson v. City of Mexico, 58 Mo. 61, the rules on the subject are thus summarized: "It is undoubtedly true that in some of the earlier cases, it was decided that a judgment was conclusive as to all facts arising upon the record which were or might have been passed upon. But it is now generally if not universally conceded that parol evidence may be received for the purpose of showing whether a question was determined in a former suit. The record may first be put in evidence and then it may be followed by such parol evidence as may be necessary to give it effect, or show on what issue it was grounded. When a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. In order to show by evidence *aliunde* that the matter is *res judicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination. If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where matters could have been proved in the former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown."

[590] Washington Steam Packet Co. v. Sickles, 24 How. 333.

[591] Young v. Rummell, 2 Hill, 478, 38 Am. Dec. 594.

[592] Briggs v. Wells, 12 Barb. 567.

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Further, if the record is silent or ambiguous, as to the points at issue and the grounds of the decision, parol evidence is not only *competent* to identify the questions adjudged, but it may become *necessary* in order to insure the effect of the judgment as an estoppel. "If it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."[593] A good illustration of this rule is found in the case of *McDowell* v. *Langdon*,[594] where it was held that a verdict and judgment for the defendants, in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty and a specification of defense denying both the plaintiff's right and any injury thereof, were no bar to a suit in equity to restrain such obstruction, where, upon the record of the former action, it was doubtful (and was not shown by extrinsic evidence) whether the defendants in that case prevailed on the ground that they had the right which they claimed in their specification of defense, or on the ground that they had done no acts in violation of the plaintiff's rights.

§ 625. Record cannot be Contradicted.

It is very necessary to be borne in mind, in connection with the rules just stated, that the averments or disclosures of the record, in respect to the matters decided, cannot be controverted by any extraneous evidence. They may be explained, when ambiguous. They may be made specific, when generally expressed. But they cannot be contradicted. When it is apparent on the face of the proceedings in the former action that the question in controversy was litigated therein, the mere production of the record will be enough.[595] "If the record of the former trial shows that the verdict could not have been

[593] Chrisman v. Harman, 29 Gratt. 494, 26 Am. Rep. 387; Russell v. Place, 94 U. S. 606; Clark v. Blair, 14 Fed. Rep. 812; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[594] 8 Gray, 513.

[595] Lander v. Arno, 65 Me. 28; 2 Smith's Lead. Cas. 668.

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rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."[596] Where the declaration in the first suit states a particular matter as the ground of action, and issue is taken thereon by the defendant, parol proof is not admissible to show that a different subject was litigated upon the trial.[597]

§ 626. Parol Evidence not Admissible to Enlarge the Estoppel.

It is held that parol evidence is not admissible to show that a judgment was founded upon matters not presented by the pleadings. "The record is conclusive evidence," says the supreme court of Maine, "that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties. The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues."[598] But by recurring to a former section, in which we discussed the meaning of the phrase "the matter in issue," it will be seen that the most approved doctrine makes the judgment conclusive of any matter which, though not technically and statedly at issue on the pleadings, became the actual turning-point of the case and the actually decisive question.[599] Hence we must state the present branch of the main rule somewhat as follows: Parol evidence is not admissible to enlarge the estoppel beyond the limits of those points or questions which, from the face of the pleadings, *might* have become the vital issue in the former trial.

§ 627. General Declaration or General Pleas.

The ancient rule of law, that in order to constitute a judgment an estoppel, it was necessary that it should appear from the record itself that the precise point was in issue and decided, could only refer,

[596] Packet Co. v. Sickles, 5 Wall. 580.
[597] Campbell v. Butts, 3 N. Y. 173.
[598] Jones v. Perkins, 54 Me. 393. See also Manny v. Harris, 2 Johns. 24, 3 Am. Dec. 386.
[599] *Supra*, § 614.

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and could only be practically applied, to instances of special pleading, where there is a precise averment on one side and an equally precise denial on the other. But such cases are comparatively rare. Under the modern systems, admitting general declarations and general pleas, it can but seldom appear from the record what was the precise subject-matter of the suit or the precise point litigated. Here, then, according to all the best authorities, parol evidence is always admissible to show such subject-matter or point controverted; and when it is thus clearly shown, the judgment is equally as conclusive as if the record itself showed the same fact.[600] "The modern mode of declaring in most general use is to insert several general counts, and when in such case the general issue is pleaded, a vast variety of different claims may be put in issue and tried,—so various, indeed, that in most cases it is found necessary to call in the assistance of the court previously to the trial, to require the plaintiff to give in a bill of particulars or specifications of the claims which he means to give in evidence, in order to apprise the defendant of the actual claims relied on, which the declaration does not do, to enable him to go to trial with any safety. When such a judgment is pleaded in bar, it seems to be liberal enough, and going as far in support of a judgment as experience will warrant, to consider it as *prima facie* evidence of a prior adjudication of every demand which might have been drawn into controversy under it, leaving it, like other *prima facie* evidence, to be encountered and controlled by any other competent evidence tending to show that any particular demand was not offered or considered."[601] In point of fact, as was remarked in another case, independent of evidence as to the points in issue upon the trial, the record of a judgment upon a general declaration only shows that there was once a law-suit about the property, in which something was decided, and such evidence would be inadmissible for want of materiality.[602] But still, in an action where there are numerous

[600] Miles v. Caldwell, 2 Wall. 35; Perkins v. Walker, 19 Vt. 144; Atwood v. Robbins, 35 Vt. 530; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518; Merritt v. Morse, 108 Mass. 270; Supples v. Cannon, 44 Conn. 424; Stedman v. Patchin, 34 Barb. 218; Haller v. Pine, 8 Blackf. 175, 44 Am. Dec. 762.

[601] Bridge v. Gray, 14 Pick. 55, 25 Am. Dec. 358. See also Hungerford's Appeal, 41 Conn. 322.

[602] Taylor v. Dustin, 43 N. H. 493.

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issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every fact at issue, though parol proof will be received to show which issue was tried.[603] For instance, in an action of trespass *q. c. f.*, the defendant pleaded a former recovery; the record of the former suit showed that the pleas were (1) not guilty, and (2) a special plea of right of way over the land on which the trespass was assigned, and that there was a general verdict and judgment for defendant; it was held that parol evidence was admissible to show that the former trial was had on only one of the said pleas.[604]

§ 628. Parol Evidence to Escape the Estoppel.

Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground.[605] "It is a well settled rule of law that if a verdict, award, or judgment of a court of competent jurisdiction, has apparently, but not necessarily, covered the very ground on which a second action is brought, though this would be, perhaps, *prima facie* evidence that the matter had passed *in rem judicatam*, yet it may still be averred, and proved by parol testimony, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided, in the former case." [606] So it is competent to prove that a former action was decided solely on one particular ground, although there was another ground of defense concerning which evidence was offered on both sides.[607] Where a plea of former recovery is put in, and the

[603] Hall v. Zeller (Oreg.), 21 Pac. Rep. 192.

[604] Aiken v. Stewart, 4 Week. Notes Cas. 180. See also Fendall v. United States, 14 Ct. of Cl. 247.

[605] Johnson v. Smith, 15 East, 213; Whittemore v. Whittemore, 2 N. H. 26; Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Parker v. Thompson, 3 Pick. 429; Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Coleman's Appeal, 62 Pa. St. 252; Swayne v. Lyon, 67 Pa. St. 436; Southside R. Co. v. Daniel, 20 Gratt. 363; Allebaugh v. Coakley, 75 Va. 628; Dunlap v. Edwards, 29 Miss. 41; Bottorff v. Wise, 53 Ind. 32; State v. Morton, 18 Mo. 53; Sweet v. Maupin, 65 Mo. 65.

[606] Cunningham v. Foster, 49 Me. 68.

[607] Perkins v. Parker, 10 Allen, 22.

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plaintiff is permitted to show that the matters now in controversy were not litigated in the former suit, the defendant must also be allowed to give evidence to show that the same matters were in fact passed upon and decided, and the refusal of the court to allow this privilege to the defendant, while granting it to the plaintiff, is reversible error.[608]

§ 629. Burden of Proof.

On the general principle that the party who relies upon an estoppel must establish it as a fact, it is held that, where parol evidence is introduced to show that the matters now in controversy were adjudicated and settled by a former judgment between the parties, the burden of proof is on the party setting up the estoppel.[609] Thus, where an action is brought for goods sold and on a note, and the defendant pleads a former recovery and gives in evidence the record of a former suit in which the claim was upon an account for goods sold, the burden is on the defendant to show that the *note* was included in the former judgment.[610] So a plaintiff claiming damages for flowage, and setting up a judgment as an estoppel to show that the flowage was wrongful, and relying upon facts not necessarily involved in the judgment, has the burden of proof on the question whether such facts formed the basis of the judgment.[611] But a difficulty arises in connection with those cases where the record shows that numerous issues were involved, or numerous questions litigated, in the former action, and the judgment does not clearly indicate whether one or more or all of them formed the basis of the decision. Here it is obviously necessary that the matter should be cleared up by extraneous evidence. But which of the parties must assume this duty? Several well considered cases hold that when a case is submitted to a jury, involving two or more issues, with evidence tending to sustain them all, and a general verdict is returned, such verdict is *prima*

[608] Haak v. Breidenbach, 6 Binn. 12.

[609] Pruitt v. Holly, 73 Ala. 369; Hanchey v. Croskrey, 81 Ala. 149, 1 South. Rep. 259; McKnight v. Dunlap, 4 Barb. 36; Doty v. Brown, 4 N. Y. 71; Bennett v. Holmes, 1 Dev. & Bat. 486; Smalley v. Edey, 19 Ill. 207; Russell v. Place, 94 U. S. 606; Van Valkenburg v. Milwaukee, 43 Wis 574.

[610] Cummings v. Colgrove, 25 Pa. St. 150.

[611] Morgan v. Burr, 58 N. H. 470.

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facie evidence that all the issues were found in favor of the prevailing party. And when, for example, a judgment on such verdict is presented by the defendant to defeat a recovery in a subsequent suit brought on the same cause of action, the burden is on the plaintiff to show that the issue *now* in controversy was not in fact settled by the former judgment, and therefore is not *res judicata*.[612] But this doctrine is opposed by some of the best authorities in the books. According to these decisions, if it appears from the record that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.[613] And this appears to be the better rule.

§ 630. What Species of Evidence Receivable.

Under the rule admitting extrinsic evidence to identify the points decided by a former judgment, any proper and satisfactory proof will be receivable for that purpose. Often the party relies upon the record alone to furnish the required testimony, and in that case he should generally put the whole record in evidence, or at least so much of it, beside the judgment, as will show the litigation and decision of the question now at issue. If he introduces the summons, to show the institution of the former action, and the judgment, to show its result, and it does not appear from these that the subject of the present suit was there involved and determined, the evidence is not conclusive.[614] To show a matter to be *res judicata* in the court of chancery, an exemplification of the bill, answer, and decree is sufficient evidence in a court of law without showing an actual enrollment of the decree.[615] In determining what has been adjudged, courts will regard the decree, and in case of ambiguity, but not otherwise,

[612] White v. Simonds, 33 Vt. 178, 78 Am. Dec. 620; Hollis v. Morris, 2 Harr. (Del.) 128; Day v. Vallette, 25 Ind. 42; Rockwell v. Langley, 19 Pa. St. 502.

[613] Russell v. Place, 94 U. S. 606; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518; Chrisman v. Harman, 29 Gratt. 494.

[614] Miller v. Deaver, 30 Ind. 371.

[615] Winans v. Dunham, 5 Wend. 47.

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will be governed by an accompanying opinion.[616] But if the decree does not show upon which of several points in litigation it was based, but refers to the opinion of the trial judge, filed in the case, to explain what was determined and the reasons therefor, such opinion becomes a part of the record and must be looked to to determine the scope of the estoppel.[617] Where the answer of the defendant sets up the same defense as the answer in the former suit, *admissions by counsel*, in connection with the offer of the record as evidence, that testimony upon both defenses of the former action was admitted and went to the jury, relieves the uncertainty in the record and shows the prior determination of the present question.[618] But the briefs of counsel are not an unerring indication of the basis upon which the judgment was rendered, and their rejection, when offered to prove that the judgment was not a determination of the merits, is not necessarily error.[619] While the issues litigated at the trial may be shown by the testimony of persons who were present,[620] yet it is not generally permissible to give evidence, for that purpose, of what went on in the jury-room. "The secret deliberations of the jury," says the supreme court of the United States, "or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it. The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict."[621]

§ 631. Question of Law or Fact.

Upon a plea of former adjudication, the identity of the present with the former cause of action is a question of fact for the jury, to

[616] New Orleans, M. & C. R. Co. v. New Orleans, 14 Fed. Rep. 873.

[617] Legrand v. Rixey, 83 Va. 862, 3 S. E. Rep. 864.

[618] Merchants' International Steam Boat Line v. Lyon, 12 Fed. Rep. 63.

[619] Greenlee v. Lowing, 35 Mich. 63.

[620] Briggs v. Wells, 12 Barb. 567.

[621] Packet Co. v. Sickles, 5 Wall. 580. See also Rockwell v. Langley, 19 Pa. St. 503.

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be determined by them upon the evidence adduced.[622] If, however, the question is determinable by inspection of the record alone, without the aid of extrinsic evidence, it is then a matter of law and is for the court. "What has been adjudicated in a prior suit is often a question of fact, which, on account of the looseness of our pleadings, has to be subjected to parol evidence and referred to a jury; but when it is determinable by the pleadings, it is always a question of law for the court."[623] Where there is no question raised on the second trial as to the identity of the matters in controversy in the two suits, but the only question is as to the effect which ought to be given to the former judgment, it should not be submitted to the jury to determine whether the matter in issue in the second suit was passed upon in the former.[624]

§ 632. Inconsistent Positions in Litigation.

Before leaving this branch of the general subject it is necessary to notice a rule of law which, although it is not strictly a part of the doctrine of estoppel by judgment, is founded on principles closely analogous to those we have been considering. It is the rule which forbids a party to assume successive positions, in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory.[625] To illustrate,—where, in an action for the specific performance of a contract for the sale of real estate, a judgment is rendered on the merits in favor of the defendant, this judgment will bar another action to reform the contract and to enforce it as reformed; for where a party elects to sue upon a written contract as executed, and the action proceeds to trial and judgment, he is bound by his election and cannot thereafter bring an action to reform the contract.[626] So where the

[622] Amsden v. Dubuque & S. C. R. Co., 82 Iowa, 288; Tutt v. Price, 7 Mo. App. 194.

[623] Bitzer v. Killinger, 46 Pa. St. 44; Finley v. Hanbest, 30 Pa. St. 190; Coulter v. Davis, 18 Lea, 451; Tutt v. Price, 7 Mo. App. 194.

[624] Ehle v. Bingham, 7 Barb. 494.

[625] Lilley v. Adams, 108 Mass. 50; Hanley v. Foley, 18 B. Mon. 519; Louisiana Levee Co. v. Louisiana, 31 La. Ann. 250; Himmelmann v. Sullivan, 40 Cal. 125.

[626] Thomas v. Joslyn, 36 Minn. 1, 29 N. W. Rep. 344. See also Martin v.

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plaintiffs in a proceeding against the owner and contractor to foreclose mechanics' liens on a building, towards the erection of which they had furnished work and materials, pleaded that they had done so under a sub-contract with the contractor, it was held that the judgment in that proceeding, deciding that the plaintiffs had furnished such work and materials at the request of the contractor, was a bar to a subsequent action by them against the owner to recover for the same work and materials upon the allegation that they had been furnished at the owner's request.[627] For another example,—in an action by the payee of a note against the maker, the defendant pleaded that the note had been indorsed by the payee, and that the indorsee had sued the defendant on the note, but it appeared that in that suit the maker objected to the title of the indorsee, or to some defect in the indorsement, in consequence of which no recovery was had on the note. It was accordingly held that the plea was no bar, and that the defendant could not in this suit set up the indorsement as good, which he had in a former suit shown, or attempted to show, to be bad.[628] But it is held in some of the cases that a party who alleges, but *fails to establish*, a certain state of facts, is not estopped in a subsequent suit, between the same parties and concerning the same subject-matter, from alleging a different and inconsistent state of facts.[629]

Part VI. Conclusiveness of Probate Adjudications.

§ 633. Probate Decrees Binding.

In most, if not all, of the states it is now a well settled rule that the judgments or orders of the probate court, when acting within the scope of its peculiar jurisdiction, are final and conclusive upon the parties and privies (and when the adjudication is *in rem*, then upon all persons), until reversed or set aside by some appropriate proceeding, and not open to collateral attack or re-examination in the same

Boyce, 49 Mich. 122, 13 N. W. Rep. 386; Buckmaster v. Grundy, 8 Gilm. 626.

[627] Toope v. Prigge, 7 Daly, 208.

[628] McDonald v. Rainor, 8 Johns. 442.

[629] McQueen's Appeal, 104 Pa. St. 595, 49 Am. Rep. 592. See Chaffe v. Morgan, 30 La. Ann. 1307.

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or any other court.[630] Thus in Pennsylvania, the orphans' court is a court of record of equal dignity with the common law tribunals, and its decrees, as to matters within its jurisdiction, are conclusive upon parties and privies against all collateral impeachment except for fraud.[631] So in Georgia, the probate courts are courts of original, general, and exclusive jurisdiction with respect to the estates of decedents, and not of special or limited jurisdiction.[632] The character of conclusiveness is attached to their judgments by the decisions in Maryland.[633] So in South Carolina, the court of probate, though of limited jurisdiction, is a court of record with very large powers, and as to proceedings clearly within its jurisdiction, it is not to be regarded

[630] Canjolle v. Ferrie, 18 Wall. 465; Simpson v. Norton, 45 Me. 281; Bryant v. Allen, 6 N. H. 116; Spofford v. Smith, 59 N. H. 366; Simmons v. Goodell, 63 N. H. 458, 2 Atl. Rep. 897; Adams v. Adams, 22 Vt. 50; Lawrence v. Englesby, 24 Vt. 42; Jennison v. Hapgood, 7 Pick. 1, 19 Am. Dec. 258; Paine v. Stone, 10 Pick. 75; Sever v. Russell, 4 Cush. 513, 50 Am. Dec. 811; Crippen v. Dexter, 13 Gray, 330; Cummings v. Cummings, 123 Mass. 270; Bush v. Sheldon, 1 Day, 170; Goodrich v. Thompson, 4 Day, 215; Gates v. Treat, 17 Conn. 388; Dickinson v. Hayes, 31 Conn. 417; Kellogg v. Johnson, 38 Conn. 269; Blake v. Butler, 10 R. I. 133; Roach v. Martin, 1 Harr. (Del.) 548, 28 Am. Dec. 746; Seymour v. Seymour, 4 Johns. Ch. 409; Chipman v. Montgomery, 63 N. Y. 236; Thompson v. McGaw, 2 Watts, 161; McPherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Lex's Appeal, 97 Pa. St. 289; Brinton's Estate, 10 Pa. St. 408; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Connolly v. Connolly, 32 Gratt. 652; Harris v. Colquitt, 44 Ga. 663; Davie v. McDaniel, 47 Ga. 195; King v. Smith, 15 Ala. 264; Herbert v. Hanrick, 16 Ala. 581; Arnett v. Arnett, 33 Ala. 273; Duckworth v. Duckworth, 35 Ala. 70; Morrow v. Allison. 39 Ala. 70; Hutton v. Williams, 60 Ala. 107; Turner v. Malone, 24 S. Car. 398; Bailey v. Dilworth, 10 Sm. & Mar. 494, 48 Am. Dec. 760; Fort v. Battle, 13 Sm. & Mar. 133; McKee v. Whitten, 25 Miss. 81; Ward v. State, 40 Miss. 108; Womack v. Womack, 23 La. Ann. 351; Dooley v. Dooley, 14 Ark. 122; Osborne v. Graham, 30 Ark. 67; Gordon v. Kennedy, 36 Iowa, 167; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276; Sheetz v. Kirtley, 62 Mo. 417; Dayton v. Mintzer, 22 Minn. 398; Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[631] McPherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642. This is the leading case in Pennsylvania, and has been followed in innumerable decisions since its date (1824), and its principles became statute law by Act of Mar. 29, 1832. See Musselman's Appeal, 65 Pa. St. 485, for remarks upon it, and for a review of the history of the orphans' court in that state.

[632] Davie v. McDaniel, 47 Ga. 195.

[633] Cecil v. Cecil, 19 Md. 72, 79, 81 Am. Dec. 626. In this case it was said: "In regard to the decrees and sentences of courts exercising any branches of ecclesiastical jurisdiction, the same general principles govern which we have already stated. The principal branch of this jurisdiction in existence in the United States is that which relates to matters of probate and administration.

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as an inferior court in respect to the dignity of its records.[634] In California, the probate court is regarded as an inferior court, and it cannot take jurisdiction or administer remedies except as provided by statute;[635] yet its adjudications upon matters which *are* within its jurisdiction, are binding and conclusive.[636] And that the same doctrine obtains in a great majority of the other states, however much their laws may differ as to the rank of this court or the scope of its jurisdiction, is abundantly testified by the authorities already cited.

But it must always be remembered that in order to the conclusiveness of a probate decree,—as in the case of a sentence emanating from any other tribunal,—it is absolutely necessary that the court should have possessed jurisdiction. There must be jurisdiction of the subject-matter of the proceeding;[637] and the court must have acquired jurisdiction of the persons to be affected, by service or publication of notice, or otherwise according to the statute.[638] Whether the validity of the decree will be sustained by the presumptions of jurisdiction and regularity which are extended to the judgments of ordinary courts of record, or whether the proceedings must show jurisdiction on their face in order to be accounted valid, will depend upon the further question whether, in the particular state, the probate court is ranked as a technically "inferior" court or otherwise. The principles of this distinction have already been examined.[639] It is further to be remarked that in many of the states statutes have been enacted which materially change the common law rules as to the parties who are bound by probate decrees, or which provide a

And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court and whether a decree or judgment has directly been passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignments of dower and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law."

[634] Turner v. Malone, 24 S. Car. 398.

[635] Grimes v. Norris, 6 Cal. 621, 65 Am. Dec. 545.

[636] Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[637] Gordon v. Kennedy, 36 Iowa. 167.

[638] Michael v. Hicks, 19 Kans. 578, 27 Am. Rep. 161; Crosley v. Calhoon, 45 Iowa. 557.

[639] *Supra*, vol. 1, §§ 270, 282–284.

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certain period during which the probate shall be open to contest, or prescribe cases in which it may be revised in chancery, or require certain persons to be cited in, or that public notice be given. Our observations in this connection are subject to modification according to the tenor of such statutes where they exist. But since this is largely a matter of practice it is not deemed necessary to enter upon an extended discussion of these enactments.

§ 634. When Impeachable for Fraud.

It was stated in an earlier section [640] that the question whether the judgment of a competent court can be collaterally impeached by parties or privies on the ground of fraud practised in its procurement, must be regarded as still unsettled upon the authorities. The adjudications of probate courts, in this respect, stand upon a somewhat peculiar footing. The attempt to overthrow them collaterally is usually made in invoking the aid of a court of equity. In England it has been held from early times that the court of chancery has no power to set aside or disregard a lawful decree of the probate court even on the ground of fraud; [641] although the opinion has been intimated that equity might afford relief in a case where the fraud alleged had been practised in procuring the probate of a will, as distinguished from fraud practised upon the testator.[642] In this country we have a few rulings and some *dicta* to the effect that fraud may be collaterally alleged against the order or judgment of a probate court.[643] But where a party relies upon fraud, it is said, it ought to be distinctly and positively alleged, and not merely inferred from circumstances.[644]

[640] *Supra*, vol. 1, §§ 290–295.

[641] Meadows v. Duchess of Kingston, Ambl. 756; Noell v. Wells, Lev. 235; Allen v. Macpherson, 1 H. L. Cas. 191; Hindson v. Weatherill, 5 De G., M. & G. 301; Jones v. Gregory, 2 De G., J. & S. 88; Barnesley v. Powell, Ambl. 102.

[642] Barnesley v. Powell, 1 Ves. Sr. 284; Kennell v. Abbott, 4 Ves. 802; Bigelow on Est. pp. 157–160.

[643] President of Orphans' Court v. Groff, 14 Serg. & R. 181; McPherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Tebbets v. Tilton, 24 N. H. 120.

[644] President of Orphans' Court v. Groff, 14 Serg. & R. 181.

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§ 635. Probate of a Will.

The action of a probate court having jurisdiction, in admitting a will to probate or in rejecting it, is in the nature of a proceeding *in rem*, and so long as it remains in force, it is conclusive as to the due execution and the validity of the will, both upon all the parties who may be before the court and upon all other persons whatever, in all proceedings arising out of the will or where the parties claim under or are connected with it.[645] "The proceeding," says the supreme court of Vermont, "is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the *status* of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be."[646] Among the points or questions settled by the admission of the will to probate, is first to be reckoned the capacity of the testator. Thus, the decision of the probate court upon the will of a married woman is conclusive as to her capacity to make a will, and as to its due execution, and as to the

[645] Noell v. Wells, Lev. 235; Allen v. Dundas, 3 T. R. 125; Plume v. Beale, 1 P. Wms. 388; Allen v. Macpherson, 1 H. L. Cas. 191; Archer v. Mosse, 2 Vern. 8; Potter v. Webb, 2 Me. 257; Woodruff v. Taylor, 20 Vt. 65; Parker v. Parker, 11 Cush. 524; Carpenter v. Cameron, 7 Watts, 51; Holliday v. Ward, 19 Pa. St. 485, 57 Am. Dec. 671; Lovett v. Mathews, 24 Pa. St. 330; Loy v. Kennedy, 1 Watts & S. 396; Hegarty's Appeal, 75 Pa. St. 503; Whitaker's Estate, 10 Week. Not. Cas. 106; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335; Ballow v. Hudson, 13 Gratt. 682; Norvell v. Lessueur, 33 Gratt. 222; Wills v. Spraggins, 8 Gratt. 555; Sawyer v. Dozier, 5 Ired. 97; Anderson v. Green, 46 Ga. 361; Deslonde v. Darrington, 29 Ala. 92; Brock v. Frank, 51 Ala. 85; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Moore v. Tanner, 5 T. B. Mon. 42, 27 Am. Dec. 35; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Hubbard v. Hubbard, 7 Oreg. 42.

[646] Woodruff v. Taylor, 20 Vt. 65.

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assent of the husband where such assent is necessary to give it effect.[647] So also the probate is conclusive of the sanity of the testator,[648] and of all other questions affecting his competence. Again, the probate is conclusive as to the due execution of the will. The decree of a probate court, for example, declaring a will of personal property to be duly executed, is conclusive evidence of such execution, in a collateral action, notwithstanding it be shown that there was but a single subscribing witness to the will.[649] So the decision of the probate court as to the sufficiency of a revenue stamp attached to a testamentary document and depending on the value of the estate, is final and cannot be questioned collaterally.[650] Next, the probate is conclusive of the genuineness of the instrument passed upon. A judgment admitting a will to probate cannot be attacked collaterally although the will was *forged;* and a payment to the executor named therein of a debt due the decedent will discharge the same, notwithstanding the spurious character of the instrument probated.[651] It has also been held that, upon an indictment for forging a will, the probate of the paper in question is conclusive evidence in the defendant's favor of its genuine character.[652] But this particular point has lately been ruled otherwise.[653] It is also approved doctrine that the sentence of probate in the proper tribunal of the testator's domicil is, in the absence of statutory provisions, conclusive *everywhere* as to the capacity of the testator and the due execution and validity of the will, as regards personalty; and though ancillary probate may be necessary to enable the will to operate in another jurisdiction, it will be granted as a matter of right, when the original probate is shown to have been granted by a court of competent jurisdiction, and it is properly authenticated.[654]

But, as in every other case of an estoppel by judgment, the probate

[647] Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330. See Barnes v. Vincent, 5 Moore, P. C. 201.

[648] Roach v. Martin, 1 Harr. (Del.) 548, 28 Am. Dec. 746.

[649] Vanderpoel v. Van Valkenburgh, 6 N. Y. 190. But compare Robertson v. Caw, 3 Barb. 410.

[650] Satterlee v. Bliss, 36 Cal. 489.

[651] Moore v. Tanner, 5 T. B. Mon. 42, 27 Am. Dec. 35; Roach v. Martin, 1 Harr. (Del.) 548, 28 Am. Dec. 746; Noell v. Wells, Lev. 235; Allen v. Dundas, 3 T. R. 125.

[652] Rex v. Vincent, 1 Strange, 481.

[653] Rex v. Butterly, Russ. & Ry. 342.

[654] Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13.

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is conclusive of such matters *only* as are necessarily involved in it, or necessary to be determined in order that the decree might be made. The probate is conclusive evidence that the will "was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. But the probate decides nothing beyond this. The legal effect of the will or of its various provisions, its construction and operation, do not come in question and cannot be passed upon on an application to admit the will to probate. It makes no difference that there is but one devise in it. The probate does not assume to determine the validity of such devise, but only that the instrument presented for probate was executed as his last will and testament by the testator, in the manner prescribed by statute, and that he was legally competent to make a will."[655] Further, letters testamentary and the proof of a will before a probate court are only evidence in proceedings arising out of the will, or where the parties claim under or are connected with it. Thus, in an action for the admeasurement of dower, a surrogate's record of probate of the last will and testament of the husband of the plaintiff is not competent evidence to prove the death of the husband. A widow's right of dower has no connection with, and is not affected by, the will of her deceased husband or by the adjudication of the surrogate thereon. Proof of the probate of the will, therefore, is entirely immaterial in such an action, and does not tend to establish *prima facie* the fact of death.[656]

§ 636. Conclusiveness of Probate as to Realty.

By the common law of England, the probate of a will by the proper ecclesiastical court was conclusive as to the personalty, but it was not evidence at all in respect to the real estate, inasmuch as the court had no jurisdiction except over wills of personal property.[657] "There was in fact no such thing as a probate of wills of land, properly

[655] Greenwood v. Murray, 26 Minn. 269, 2 N. W. Rep. 945.

[656] Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144.

[657] Doe v. Calvert, 2 Camp. 389; Tompkins v. Tompkins, 1 Story, 547.

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speaking. The probate was not evidence of title to land. The will alone is evidence, and that must be proved, on the occasion, in the same manner as any other muniment of title."[658] And this distinction was recognized and applied, in early times, in some of our states. Thus in Pennsylvania it was a well settled rule of law until 1856.[659] But in that year a statute was passed making the probate of a will of real estate conclusive, unless, within five years from the date of probate, the validity of the will should be contested in the manner pointed out in the statute.[660] And now in many of the states there are laws giving to courts of probate the same power over the probate of wills of realty as of personal estate, and in such case their decrees are equally conclusive on the validity and due execution of such wills.[661] But a judgment admitting a will to probate in one state is not conclusive of its validity as a testament devising realty in another state, unless permitted by the laws of the latter state. For real estate is governed by the *lex loci rei sitæ*, and all questions concerning it, including the validity of a will by which it is devised, must be determined by that law.[662]

§ 637. Effect of Rejection of Will.

"When a will has been propounded by a party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence, therefore, against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments *in rem*, which, being adjudications upon the subject-matter,

[658] Rowland v. Evans, 6 Pa. St. 435, per Lowrie, J.

[659] Asay v. Hoover, 5 Pa. St. 21, 45 Am. Dec. 713; Spangler v. Rambler, 4 Serg. & R. 192; Smith v. Bonsall, 5 Rawle, 86; Rowland v. Evans, 6 Pa. St. 435.

[660] Folmar's Appeal, 68 Pa. St. 432; Act Pa. Apr. 22, 1856.

[661] Parker v. Parker, 11 Cush. 519, 524; Judson v. Lake, 3 Day, 318; Scott v. Calvit, 3 How. (Miss.) 148; Brock v. Frank, 51 Ala. 85; Norvell v. Lessueur, 33 Gratt. 222; Dublin v. Chadbourn, 16 Mass. 433.

[662] Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. Rep. 407. See also Story, Confl. of Laws, § 474.

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are regarded as final and conclusive, not only in the courts in which they are pronounced, but in all others in which the same question arises. . . . . It is true there is a marked distinction between a sentence for and a sentence against a will, where it is propounded *ex parte* for probate in the first instance. In the former case, the sentence is binding and effectual for all legal purposes while it remains in force, but it is liable to be set aside by a proceeding in chancery provided by our statute, and in it nothing is concluded by the sentence of probate." [663]

§ 638. Parties bound by Probate.

In respect to the parties concluded by a decree admitting a will to probate or rejecting it, there was, at common law, a very important distinction founded on the question whether the document was probated in "common form" or in "solemn form." Probate in common form was where the will was admitted to probate in proceedings to which the executor alone was a party, and this was conclusive only upon the executor and those in privity with him. Legatees claiming under the will are in privity with the executor, and consequently, if the will was rejected, it could not be re-propounded by either the executor or legatees. But heirs and devisees are not in privity with the executor, and not concluded by probate in this form. Hence, if the will was rejected, a devisee might still maintain ejectment on it. Probate in solemn form was where the executor had called in the parties interested, by a summons "to see proceedings" and to take part therein as they may see fit, and this was conclusive upon all parties summoned, whether they appeared or not, and regardless of their privity or want of privity with the executor. It conclusively established the validity and due execution of the will, at least so far as regards the personal estate.[664] This distinction appears to be still preserved in a few of our states.[665] But as a general rule, in this

[663] Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335. See also Laughton v. Atkins, 1 Pick. 535.

[664] Redmond v. Collins, 4 Dev. 430, 27 Am. Dec. 208.

[665] Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147. By the Georgia Code (1882), § 2425, probate of a will in common form, if unattacked for seven years, is conclusive upon all parties in interest

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country and at this day, the statutes so completely regulate the matter of proving wills as to leave but little to be determined by the rules or principles of the ancient law. And these statutes (notwithstanding some differences of detail) are generally so framed as to make the proceeding for proving a will, which they provide, practically equivalent to the probate in "solemn form." Notice is given to all persons concerned, usually by newspaper publication, to appear and take part in the proceedings. And on account of this constructive service, and also because the proceeding is regarded as being *in rem*, the probate is conclusive upon all persons, as may be seen by the authorities cited in preceding sections. A judgment *in rem* is commonly said to be binding on "all the world." This, however, is a very vague phrase. As applied to probate proceedings it must be understood to mean "all persons interested in the will, who, being constructively notified to appear at the probate, might have come in, and who, had they come in, might have been heard for or against the will." A defendant who was not a party to a proceeding in a probate court upon a will, in any such sense that he might be heard or take an appeal, is not concluded by the adjudication.[666] It is true that a probate decree is *in rem;* but the practical importance of that fact lies in this,—that it dispenses with the necessity of *personal* notice to all parties concerned.

But it is further necessary to inquire how the case stands in respect to persons under legal disabilities. In Pennsylvania it is held that the probate of a will, unless contested within the time and in the manner provided by statute, is conclusive upon *all* persons, including infants, married women, and lunatics.[667] And probably the same doctrine obtains in some other states, although the opinion has been expressed that an infant would not be bound by the probate unless duly represented by a guardian, and this although the statute is silent on the subject.[668] But most commonly the statutes favor such

except minor heirs at law. Anderson v. Green, 46 Ga. 361.

[666] Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. Rep. 265.

[667] Folmar's Appeal, 68 Pa. St. 482; Warfield v. Fox, 53 Pa. St. 382.

[668] O'Dell v. Rogers, 44 Wis. 136, 173. On the general subject of the validity of judgments against persons under disabilities, see *supra*, vol. 1, §§ 188–205.

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persons with a limited period, after the removal of their disabilities, within which they may appear and contest the adjudication. It is further to be remarked that a proceeding to contest a will already probated, brought under a statute allowing such action within a certain time after the act of probate, is a different thing from the probate itself. Such a proceeding, in general, binds only the parties to it; and although such parties, as between themselves, are estopped from setting up a will when it has once been set aside by such a proceeding, yet, as to all other persons in interest, it is to be regarded as a still subsisting will, and their rights stand wholly unaffected by the judgment.[669]

§ 639. Appointment of Administrator.

The granting of letters of administration is a matter resting within the exclusive jurisdiction of the probate court, and its action therein is conclusive and binding, and its legality cannot be questioned in any other court, nor collaterally impeached for irregularity.[670] Thus, where a state statute provides that administration of an intestate estate shall be granted by the county court, when the intestate "at or immediately before his death, was an inhabitant of the county," etc., the decision of that court upon the question of inhabitancy, properly presented for its adjudication, is not open to examination in a subsequent proceeding in a federal court.[671] But on the other hand, it is held that an appointment of an administrator, not followed by his qualification or acceptance of the duties of the position, does not adjudicate the question of assets in the county so as to bind the parties in interest on a subsequent petition for the appointment of another person as administrator.[672]

[669] Holt v. Lamb, 17 Ohio St. 374; Valsain v. Cloutier, 3 La. 170, 22 Am. Dec. 179.

[670] McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325; Lawrence v. Englesby, 24 Vt. 42; Naylor v. Moffatt, 29 Mo. 126; Savage v. Benham, 17 Ala. 119; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41.

[671] Holmes v. Oregon & Cal. R. Co., 9 Fed. Rep. 229.

[672] *In re* Shaw's Estate (Me.), 16 Atl. Rep. 662.

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§ 640. Grant of Administration no Proof of Death.

There is one important exception to the rule of conclusiveness attaching to a decree of the probate court appointing an administrator. The grant of letters of administration is not conclusive, even between parties and privies, of the fact of the *death* of the alleged decedent. The letters amount only to *prima facie* proof of the title of the administrator, but may be invalidated by showing that the person is not in fact dead.[673] The supreme court of the United States holds that letters of administration are not admissible as evidence, in proof of death, in a suit brought by a plaintiff in his individual character, and not as administrator, to recover a claim on a policy of life insurance, the right of action depending on the death of the third person whose life the policy insured.[674] And whereas it was suggested, in the case cited, that it was a judgment *in rem*, the court replied: "The probate court has never adjudicated that A. was dead. Death was not the *res* presented to it. Shall B. receive letters of administration?—was the *res*, and upon that only has there been an adjudication."[675] In New York, alone, this doctrine is not fully accepted. It is there held that the inquiry by the surrogate as to the death of the person upon whose estate administration is applied for, is judicial in its nature; that the surrogate has jurisdiction to determine it upon sufficient evidence; and that letters issued by him upon due proof are conclusive evidence of the authority of the administrator to act, until the order granting them is reversed on appeal, or the letters are revoked or vacated, so far at least as to protect innocent persons acting upon the faith of them.[676]

[673] Clayton v. Gresham, 10 Ves. 288; Thompson v. Donaldson, 3 Esp. 63; Moons v. De Bernales, 1 Russ. 301; Newman v. Jenkins, 10 Pick. 515; Jochumsen v. Bank, 3 Allen, 87; Cunningham v. Smith, 70 Pa. St. 458; French v. Frazier, 7 J. J. Mar. 425; English v. Murray, 18 Tex. 866; Tisdale v. Ins. Co., 26 Iowa, 170, 96 Am. Dec. 186; Lancaster v. Ins. Co., 62 Mo. 121.

[674] Mutual Benefit Ins. Co. v. Tisdale, 91 U. S. 238.

[675] See 1 Wharton on Ev. § 810; 2 Phillips on Ev. 93.

[676] Roderigas v. East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555.

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§ 641. Allowance or Rejection of Claims.

In a few states it appears to be settled law that the action of a probate court upon a claim against the estate, presented for its consideration, is not in the nature of a judgment and therefore not conclusive.[677] But it is most generally the rule that the allowance of a claim against the estate of a decedent is a judicial act, and has all the force and effect of a judgment; that is, it is final and conclusive, as between the parties, until reversed or set aside, and cannot be attacked collaterally.[678] Thus a decree of the probate court, in the matter of an insolvent estate, giving the preference to the individual creditors over the partnership creditors of a deceased partner, is conclusive on the firm creditors, and cannot, in the absence of fraud or other special cause for equitable interposition, be overhauled in chancery.[679] So

[677] State v. Bowen, 45 Miss. 347; Levering v. Levering, 64 Md. 399, 2 Atl. Rep. 1. In the case last cited it was said: "The orphans' court can pass upon claims against the estates of decedents, but its determination is not final or conclusive. If the claim is disallowed, the claimant is not precluded from seeking his remedy in a court of law or equity. If the claim is allowed, the executor or administrator may refuse to pay it. The decision of the orphans' court is only *prima facie*, and if the claim is allowed, only operates as a protection extended to the executor in the event of its liquidation by a disbursement of the funds held by him in his representative capacity" (citing Owens v. Collinson, 3 Gill & J. 87; Lee v. Lee, 6 Gill & J. 321; Stevenson v. Schriver, 9 Gill & J. 324; Stockett v. Jones, 10 Gill & J. 276; Hesson v. Hesson, 14 Md. 8; Code Md. art. 93, § 101).

[678] Campbell v. Strong, Hempst. 265; Neill v. Hodge, 5 Tex. 489; Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118; Giddings v. Steele, 28 Tex. 756; Cannon v. McDaniel, 46 Tex. 309; Swan v. House, 50 Tex. 650; Shoemaker v. Brown, 10 Kans. 383; Dooley v. Watkins, 5 Ark. 705; Cossitt v. Biscoe, 12 Ark. 97; Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219; Jones v. Brinker, 20 Mo. 87; Tutt v. Boyer, 51 Mo. 425; Price v. Dietrich, 12 Wis. 626; Jarneson v. Barber, 56 Wis. 630, 14 N. W. Rep. 859; Deck's Estate v. Gehrke, 6 Cal. 666; Beckett v. Selover, 7 Cal. 239, 68 Am. Dec. 237; Estate of Schroeder, 46 Cal. 319. But in an action against the survivor of two joint makers of a note, where the defendant pleaded that the note had been presented to the administrator of the deceased maker and allowed as a claim against his estate, it was held no defense. The court said: "Even admitting that the rule now applies here, that a judgment against one of joint obligors merges the debt as to all, the allowance of the claim in the probate proceedings, while *prima facie* it determines its validity, is not conclusive as against parties interested in the estate, and is not a final adjudication against the estate which could be held to release the co-obligors." Louis v. Triscony, 58 Cal. 304.

[679] Coffin v. McCullough, 30 Ala. 107.

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also the rejection of a claim by the probate court is final and has all the attributes of a judgment.[660] As to the parties concluded by such an order, it is to be observed that the proceeding is strictly *inter partes*, and therefore will be an estoppel only upon those immediately affected by it. Whether the claim is allowed or rejected, the order is certainly conclusive and binding on the creditor, and will be a bar to any action brought upon it in any other court.[661] And on the principle of mutuality of estoppels, it will be conclusive also on the executor or administrator and on the legatees. But as it is not a proceeding *in rem*, it is not conclusive on any but parties and privies; so it would not bind heirs, next of kin, or devisees, in respect of the realty,[662] for these, as we have already seen, are not in privity with the personal representatives.[663] Where an allowance of a claim by a probate judge has been procured by fraud, or without notice to the executor, or by mistake, it is liable (although not open to *collateral* impeachment) to be reversed on appeal, or set aside on motion, or relieved against in equity (the practice varying in the different states), on the application of a proper party.[664] But the rule that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against the decedent himself, and not to expenses or disbursements of the administrator; the latter are not conclusively settled until final judgment by the probate court upon the settlement of the administrator's accounts after legal notice to the parties interested.[665]

[660] McKinney v. Davis, 6 Mo. 501; Wyatt v. Burr, 25 Ark. 476; Yoes v. Moore, 29 Ark. 121; State v. Ramsey County Probate Ct., 25 Minn. 25; Moerchen v. Stoll, 48 Wis. 309, 4 N. W. Rep. 352; Dullard v. Hardy, 47 Mo. 403; State v. Reigart, 1 Gill, 1, 39 Am. Dec. 628.

[661] Dooley v. Watkins, 5 Ark. 705; State v. Ramsey County Probate Ct., 25 Minn. 25; Stone v. Wood, 16 Ill. 177; Neill v. Hodge, 5 Tex. 487; Eccles v. Daniels, 16 Tex. 136; McDougald v. Rutherford, 30 Ala. 253.

[662] Beckett v. Selover, 7 Cal. 228, 68 Am. Dec. 237; Stone v. Wood, 16 Ill. 177; Sumrall v. Sumrall, 24 Miss. 258; Marshall v. Rose, 86 Ill. 376.

[663] *Supra*, § 560.

[664] Neill v. Hodge, 5 Tex. 487; Bell v. Ayres, 24 Ind. 92; Propst v. Meadows, 13 Ill. 157; Higgins v. Curtis, 82 Ill. 28; Jones v. Brinker, 20 Mo. 88; Lewis v. Williams, 54 Mo. 200; Groner v. Hield, 22 Wis. 200.

[665] Deck's Estate v. Gehrke, 6 Cal. 666; Gurnee v. Maloney, 38 Cal. 88, 99 Am. Dec. 352.

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§ 642. Order for Sale of Land.

If regular and legal notice be given to the heirs and all concerned of an application to the probate court for an order for the sale of the decedent's real estate, the order directing such sale is regarded as a judgment of a court of competent jurisdiction, and it legally imports a necessity for such sale, nor can such judgment be collaterally impeached, or the facts on which it is founded be controverted.[656] Much more is this the case when the administrator's application for an order to sell lands for the payment of debts is contested by the heirs or devisees. For it then becomes an adversary suit *inter partes*, and the decree rendered, whether it grants or refuses the application, is conclusive between the parties in any subsequent suit or contest, as to the matters then in issue and determined, viz., the *status* of the estate, and the sufficiency of the personal assets for the payment of debts.[657] A judgment of a probate court ordering a re-sale of property sold by an administrator, for failure of the purchaser to pay the purchase-money, is conclusive on the purchaser, and estops him as to all matters which might have been litigated therein.[658] But a decree for the sale of a testator's lands cannot affect the interest of a party in possession, claiming adversely to the testator, and not made a party to the decree, and he cannot be removed from such possession until his title is adjudged defective in the regular and established course of judicial proceedings.[659] A decree in chancery confirming an administrator's sale, and declaring that by such sale all the decedent's right, title, and interest in the lands vested in the purchaser, and ordering the heirs to convey, etc., is conclusive of the rights and title of the heirs. And if any objection existed to such administrator's sale, they should have made it at the trial on the bill, and having failed to do so, they

[656] McDade v.. Burch, 7 Ga. 559, 50 Am. Dec. 407; Merrill v. Harris, 26 N. H. 142, 57 Am. Dec. 359; Davie v. McDaniel, 47 Ga. 195; Thomson v. Blanchard, 2 Lea, 528; Doe d. Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334. Compare Snyder's Lessee v. Snyder, 6 Binn. 483, 6 Am. Dec. 493.

[657] Ford v. Ford's Admr., 68 Ala. 141.

[658] Brummagim v. Ambrose, 48 Cal. 366.

[659] Tongue v. Morton, 6 Har. & J. 21.

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are estopped from insisting upon it in another suit concerning the same land.[690]

§ 643. Decree of Distribution.

A decree of distribution made by a probate court after such notice as is prescribed by the statute (or, if the statute does not explicitly require notice, then after such notice as the court in its discretion shall think proper to order), is so far conclusive as to protect an administrator, acting in good faith, in conforming to it.[691] In New Jersey, it is considered that the proceedings for obtaining such a decree are of the nature of proceedings *in rem*, in which a decision between the parties before the court settles the rights of all parties to the property in question.[692] Perhaps it is not generally necessary to go as far as this, but it is not usually disputed that persons actually taking part in the proceedings will be concluded. Thus, where a judge of probate has, by a decree, allowed a widow her distributive share in her husband's estate, the accuracy of the decree, as to the amount by law allowable to her, cannot be called in question collaterally.[693] So a decree, on a bill in equity filed by the executor of a will against residuary legatees to determine their distributive shares, fixing the amount of an advancement to a legatee and the amount of his share, is conclusive evidence of such amounts in a suit for partition of real estate devised to them by the will.[694] In Wisconsin, however, it is held that the order or judgment of a probate court, distributing and assigning the estate of a decedent, is no bar to a subsequent action to recover from the assignee land so assigned, brought by one who had no notice, actual or constructive, of the application for such order; and the mere giving of the statutory notice of the application for probate of the will is not sufficient to render a judgment of assignment a bar against the heir who was not before the court and had no other notice of the proceeding.[695] A decree

[690] Kelly v. Donlin, 70 Ill. 378.
[691] Loring v. Steineman, 1 Met. 204; Bradshaw's Appeal, 8 Grant (Pa.), 109.
[692] Exton v. Zule, 14 N. J. Eq. 501.
[693] Judge of Probate v. Robins, 5 N. H. 246.
[694] Torey v. Pond, 102 Mass. 355.
[695] Ruth v. Overbrunner, 40 Wis. 238.

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making a partial distribution of an estate is conclusive only as to the disposition of the funds then distributed.[695]

§ 644. Settlement of Accounts.

A decree of the probate court settling an executor's or administrator's final account and discharging him from his trust, after due legal notice, and in the absence of fraud, is conclusive upon all matters or items which come directly before the court, until reversed; and it will be presumed that it was founded upon proper evidence, and that every prerequisite to a valid discharge was complied with; nor can the decree be impeached in any collateral proceeding.[697] In New York, it is laid down as the rule, that so long as there is authority on the part of a surrogate to call an administrator to account, and his decree made upon such accounting does not indicate a corrupt intent, or show upon its face that the court has been perverted to accomplish a fraudulent and illegal purpose, and the decree remains unrevoked, it cannot be pronounced fraudulent and void, in a collateral proceeding, however mistaken the surrogate may have been in his view of the facts or the law.[698] The decree, however, is conclusive only as to the matters embraced in the account. It is no bar to the claims of creditors or heirs which did not in any manner form the subject of it.[699] And in some of the states there is strong authority for the rule that one *not a party* to a settlement of an administrator's account (even though it be a final account) is not bound thereby, but may disregard it and resort to equity to cite the administrator to an account.[700] Thus, where the widow has no notice of the proceedings,

[695] Kline's Appeal, 86 Pa. St. 363.

[697] Sparhawk v. Buel, 9 Vt. 41; Jones v. Chase, 55 N. H. 234; Bulkley v. Andrews, 39 Conn. 528; McPherson v. Hamilton, 2 Yeates, 40; App v. Dreisbach, 2 Rawle, 287, 21 Am. Dec. 447; McFadden v. Geddis, 17 Serg. & R. 336; McLenachan v. Commonwealth, 1 Rawle, 357; Burd v. McGregor, 2 Grant (Pa.), 353; Hartzell v. Commonwealth, 42 Pa. St. 453; Hatcher v. Dillard, 70 Ala. 343; Slatter v. Glover, 14 Ala. 648, 48 Am. Dec. 118; Shackleford v. Cunningham, 41 Ala. 203; Stubblefield v. McRaven, 5 Sm. & Mar. 130, 43 Am. Dec. 502; Shoemaker v. Brown, 10 Kans. 383; Ringgold v. Stone, 20 Ark. 526; Holden v. Lathrop, 65 Mich. 562, 32 N. W. Rep. 879.

[698] People v. Townsend, 37 Barb. 520.

[699] Durham v. Williams, 32 La. Ann. 968.

[700] Clarke v. Perry, 5 Cal. 58, 63 Am. Dec. 82; Belloc v. Rogers, 9 Cal. 129;

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other than such constructive notice as arises from the publication of the statutory notice, and is not heard, she is not concluded by the settlement or decree of distribution, as between her and the legatees and distributees.[701] So a legatee is not concluded by the executor's settlement in the probate court, to which he is not a party, in which the executor is credited with the payment of the legacy.[702] Where the court, at the time it fixes the commissions to be allowed to administrators, also determines, upon due notice, the proportions in which they shall be divided, and records its determination on the account, the action of the court amounts to a judgment, and will not be changed except upon a showing of fraud or mistake.[703]

What has been said of the settlements of executors and administrators applies, with proper modifications, to decrees of the probate court upon the settlement of the final accounts of guardians, where that matter is confided to its exclusive jurisdiction. Its judgments in such cases cannot be collaterally questioned, but are conclusive and binding upon the parties until reversed or set aside.[704] Similarly, the decree of a judge of probate, allowing a trustee's account, after proper and reasonable notice to all persons interested, by publication, is conclusive, if not appealed from, in the absence of fraud, as to the amount with which he is chargeable.[705] But an adjudication of the probate court, allowing the account of a trustee, in which the trustee had credited himself with a sum as paid and applied towards the discharge of his debt against the *cestui que trust*, is extrajudical and void as against an assignee for value of the income of the *cestui que trust*, who had merely notice by publication of the probate proceedings, but no personal notice.[706]

Deck v. Gehrke, 12 Cal. 433, 73 Am. Dec. 555; Townsend v. Gordon, 19 Cal. 189; Butterfield v. Smith, 101 U. S. 570; Ritchey v. Withers, 72 Mo. 556.

[701] Adams v. Adams (N. J.), 17 Atl. Rep. 775.

[702] McCullough v. Montgomery, 7 Serg. & R. 17; Sparhawk v. Buel, 9 Vt. 41.

[703] Mount v. Slack (N. J.), 17 Atl. Rep. 297.

[704] Brodrib v. Brodrib, 56 Cal. 563; Garton v. Botts, 73 Mo. 274; Shackleford v. Cunningham, 41 Ala. 203; Commonwealth v. Gracey, 96 Pa. St. 70.

[705] Abbott v. Bradstreet, 3 Allen, 587.

[706] Abbott v. Foote, 146 Mass. 333, 15 N. E. Rep. 773.

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§ 645. Appointment of Guardian.

The action of the proper court in making an appointment of a guardian is also invested with the character of conclusiveness. Thus, in Ohio, plenary and exclusive original jurisdiction is given by law to the probate courts in the matter of appointing guardians, and that jurisdiction attaches in any given case whenever application is duly made for its exercise therein. Such proceedings are not *inter partes* or adversary in their character, but are properly proceedings *in rem*, and the order of appointment, made in the exercise of jurisdiction, binds all the world; and, the record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it.[707] So in Louisiana, the correctness or regularity of the judgment of a competent court, making the appointment of an under-tutor, cannot be questioned or reviewed collaterally, even by the court which made it.[708]

§ 646. Order for Partition.

In those states where the probate court is invested with jurisdiction to make partition of land between the heirs of an estate, its decree, awarding or confirming a partition, is necessarily as conclusive of the right as a judgment of partition rendered by a court of common law.[709] Thus a decree awarding the property to one of the heirs is conclusive of the title against all parties claiming under the decedent or his heirs.[710] But a proceeding in partition, by which real estate is confirmed to one of the heirs at a valuation, is not conclusive of a question of title to the land confirmed to the heir, as between him and another heir who claimed adversely and disavowed the proceedings.[711] And in general it may be said that a partition by the

[707] Shroyer v. Richmond, 16 Ohio St. 455.

[708] Succession of Keller, 39 La. Ann. 579, 2 South. Rep. 553.

[709] Herr v. Herr, 5 Pa. St. 428; Burghardt v. Van Deusen, 4 Allen, 374.

[710] Merklien v. Trapnell, 34 Pa. St. 42, 75 Am. Dec. 634.

[711] Mehaffy v. Dobbs, 8 Watts, 363.

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probate court is binding only upon those parties who are before the court or those whom they virtually represent.[712] But the person entitled to the first estate of inheritance may virtually represent those who may claim in remainder or reversion after him; and so the decree may cut off the possible rights of persons not *in esse* at the time of the partition.[713] The decree is conclusive only as to the lands actually embraced in it.[714] And, in jurisdictions where the probate court has no equity powers, it is not conclusive of equities between the parties.[715]

Part VII. Distinctive Rules as to Ejectment and Other Real Actions.

§ 647. Common Law Rules as to Real Actions.

To the student of the common law, none of its peculiarities appear more striking or significant than the great number and complexity of the forms of action provided for trying the various species of rights and interests in land. As a result of this extremely involved system, the rules for the application of the principle of *res judicata* to the different varieties of real actions were technical in the highest degree, though not so complicated as might at first appear, since they all rested on one simple fundamental principle. It is to be remembered that, at the common law, actions concerning real property were of various grades and natures, some involving the mere possession, others the right of possession, and others the right of property itself. And it was an established principle that a verdict and judgment in an action of one grade would not operate as a bar to an action of a higher grade. For while the former action would be conclusive of the matters actually determined by it, yet those matters would not include the questions involved in the action of a higher nature. Thus a judgment might be conclusive of the right of possession, and yet no bar to a suit concerning the right of property.[716] As was remarked

[712] Cryer v. Andrews, 11 Tex. 170.

[713] Wills v. Slade, 6 Ves. 498; Nodine v. Greenfield, 7 Paige, 544.

[714] Ihmsen v. Ormsby, 32 Pa. St. 198.

[715] Caperton v. Hall, 83 Ala. 171, 3 South. Rep. 234.

[716] Ferrer's Case, 6 Co. 7; Mattox v. Helm, 5 Litt. 185; Arnold v. Arnold, 17

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by Lord Ellenborough in a leading case: "A judgment in each species of action is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is, in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land than the other." [717] So, on the authority of Roscoe, "in real actions, if a man is barred by judgment in one action, he may bring another of a higher nature and try the same right again. If barred in an assise of *novel disseisin*, yet, upon showing a descent or other special matter, he may have an assise of *mort d'ancestor*, a writ of *aiel* or *besaiel*, or of entry *sur disseisin* to his ancestor. So if a man is barred in a formedon in *descender*, yet he may have a formedon in *reverter* or in *remainder*, for that is an action of a higher nature, and in which the fee simple is to be recovered." [718] These distinctions, as will appear from some of the following sections, are not without their practical importance at the present day.

§ 648. Common Recovery.

A judgment in common recovery, notwithstanding the highly fictitious character of the proceeding, was accounted as conclusive, for its own purposes, as in any other form of action. It could not be impeached collaterally except for fraud, or as in other real actions, because the defendant was not a tenant of the freehold.[719]

Pick. 4; Viner's Abr. "Judgment" Q; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

[717] Outram v. Morewood, 3 East, 346, 357.

[718] Roscoe, Real Actions, 213.

[719] Ransley v. Stott, 26 Pa. St. 126; 2 Bl. Comm. 362.

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§ 649. Writ of Entry.

At common law, the writ of entry was a merely possessory action, "serving only to regain that possession whereof the demandant or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims." It decided nothing with respect to the right of property.[720] This remedy has survived, in a few of our states, in a greatly modified form, in so much that it may now be made the means of trying the title to the land. Thus, in Massachusetts, it is held that judgment for the tenant in a writ of entry is conclusive evidence of the title in a subsequent action of trespass by the demandant against the tenant for breaking and entering the same close. But it is not a *bar* to such action; because, in the one case, title is in dispute, and in the other, possession; and one may be entitled to the possession, and so able to maintain trespass, though he be not the owner.[721] In the same state it is held that judgment in a writ of entry is not conclusive as to the extent of the land recovered, unless the land is described in the writ or judgment with great certainty.[722]

§ 650. Ejectment at Common Law.

At the common law,—and equally under our own systems, except where the common law has been changed by a statute,—a verdict and judgment in ejectment are not final or conclusive upon the question of title in any other action between the same parties, nor a bar to any number of successive actions of the same kind for the same land.[723] Such actions might be continued indefinitely, unless equity interfered, after a sufficient number of trials had taken place

[720] 3 Bl. Comm. 180.

[721] Stevens v. Taft, 8 Gray, 419. Compare Batchelder v. Robinson, 6 N. H. 12.

[722] Melvin v. Proprietors, 5 Met. 15, 38 Am. Dec. 384.

[723] Atkins v. Horde, 1 Burr. 114; Doe v. Harlow, 12 Ad. & El. 40; Doe v. Thomas, 1 Tyrwh. 410; Miles v. Caldwell, 2 Wall. 35; Rogers v. Haines, 3 Me. 362; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 148; Bradford v. Bradford, 5 Conn. 127; Bailey v. Fairplay, 6 Binn. 450; White v. Kyle, 1 Serg. & R. 515; Brown v. Nickle, 6 Pa. St. 390; Eldridge v. Hill, 2 Johns. Ch. 281; Van

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to determine fairly the validity of the title, and by injunction, directed to the unsuccessful litigant, compelled him to cease from harassing his opponent by useless litigation.[724] The reasons for this apparently anomalous rule were well stated by the supreme court of Pennsylvania, in a decision from which we quote as follows: "Originally an ejectment was only an action of trespass by a lessee against one who had ousted him of his term. The plaintiff recovered damages, not possession. The freehold was not in controversy, certainly not directly. It was not until about the reign of Edward IV that courts of law began to give judgment that the plaintiff should recover his term as well as damages. Still it was only a term which he recovered, for the action was always founded on the assertion of an existing lease. Indeed the declaration negatived the ownership of the freehold by the plaintiff. Of course the very structure of the record rendered it impossible to plead a former recovery in bar of a second ejectment. The plaintiff was only a fictitious person, and as the demise might be laid in any number of ways, it never could appear that the second ejectment was for the same thing as the first. Indeed the second ejectment supposed a new demise. For the same reason a verdict and judgment in trespass *quare clausum fregit*, upon any plea, could not operate as an estoppel in ejectment. Such having been the original nature of the action, any number of successive ejectments could be brought, and the tenant in possession could never protect himself by the result of a former trial." [725] The case might be different where the judgment in ejectment was offered as evidence in a different kind of action—that is, not another ejectment. It was said at an early day in New York that a judgment in ejectment was of the same binding force and efficacy as any other judgment, *except* in a second action of ejectment.[726] And the New Jersey court of

Blarcom v. Kip, 26 N. J. Law, 351; Chapman v. Armistead, 4 Munf. 382; Pollard v. Baylors, 6 Munf. 433; Mitchell v. Robertson, 15 Ala. 412; Jones v. De Graffenreid, 60 Ala. 145; Camp v. Forrest, 13 Ala. 114; Kummel v. Benna, 79 Mo. 62; McKenzie v. Renshaw, 55 Md. 299; Troutman v. Vernon, 1 Bush, 492; Hawkins v. Hays, 3 Harr. (Del.) 489; Crockett v. Lashbrook, 5 T. B. Mon. 531, 17 Am. Dec. 98; Hinton v. McNeil, 5 Ohio, 209, 24 Am. Dec. 315.

[724] Miles v. Caldwell, 2 Wall. 35.

[725] Stevens v. Hughes, 31 Pa. St. 381, 384.

[726] Van Wyck v. Seward, 1 Edw. Ch. 327.

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chancery held that it would look at the questions which were really involved in the ejectment suit, and if the legal question as to the title, which was raised by the bill in equity, was decided by the court of law, and the party had by the judgment and process of the court been put in possession, equity could not require better proof of legal title.[727] So, in another state, "although the judgment in ejectment is not conclusive evidence upon the question of title, it is evidence to some extent, in a subsequent action, where the parties are substantially the same and the same matter is involved in the issue between them. But not being conclusive, it can only be regarded as *prima facie* evidence, liable to be counterbalanced and controlled by the other testimony in the cause, if it be sufficiently satisfactory to produce that result."[728] But according to the strict common law doctrines, the judgment in ejectment does not appear to have been conclusive, or even admissible, in any other proceeding, save only in the subsidiary action for mesne profits, of which we shall speak presently.

In a great majority of the states, this common law doctrine has been abrogated or changed by the statutes. But in at least one state,—Missouri,—it still remains in full force and vigor. It was there said, quite recently, "that a judgment in ejectment is no bar to a second action for the same property, between the same parties, whether the titles and defenses in both actions be the same or not, has been so long established in this state as to have become a universally recognized rule in the tenure of real property, and will not be departed from by this court."[729] And another case declares that this rule "is based on legislation peculiar to this state, and constitutes a rule of property not to be disturbed save by legislative enactment."[730]

[727] Obert v. Obert, 10 N. J. Eq. 98.

[728] Cecil v. Johnson, 11 B. Mon. 85. See also Troutman v. Vernon, 1 Bush, 482.

[729] Avery v. Fitzgerald, 94 Mo. 207, 7 S. W. Rep. 6. Earlier cases holding the same rule are Slevin v. Brown, 32 Mo. 176; Holmes v. Carondelet, 38 Mo. 551; Foster v. Evans, 51 Mo. 39; Kimmel v. Benna, 70 Mo. 52; Ekey v. Inge, 87 Mo. 493; Hogan v. Smith, 11 Mo. App. 314.

[730] St. Louis v. Schulenburg Lumber Co. (Mo.), 12 S. W. Rep. 248.

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§ 651. Ejectment upon an Equitable Title.

In Pennsylvania, an important early case laid down the rule that an action of ejectment brought to compel the specific performance of a contract for the sale of lands (familiarly known in that state as an "equitable ejectment"), is a mere substitute for a bill in equity for the same purpose, and a judgment in such action is equivalent to a decree for specific performance; and since a decree is conclusive between the parties, *one* judgment in this kind of action is conclusive also; and it was further held that the statute making two concurrent verdicts and judgments in ejectment conclusive upon the title, had no application to actions of ejectment brought to compel the payment of money or the specific performance of a contract of sale, or generally on an equitable title.[731] And this rule has ever since been recognized as settled law in that state.[732] And conversely, where a defendant in ejectment defends on an equitable title, if he has before submitted his title to a court of equity of competent jurisdiction, on a bill praying specific performance of a contract which he claims vested in him the equitable title, and the bill has been dismissed, he cannot afterwards assert it either by way of action or defense.[733] But the rule applies only where the action is to be regarded as a bill in equity and not as a possessory ejectment at common law.[734] And in order to give the judgment this effect, it must be shown distinctly that the equitable title was directly in issue and decided upon.[735] A similar rule has also been announced in Missouri. It is there held that if, to an ejectment suit, the defendant sets up an equitable defense, and the cause is tried and plaintiff has judgment, such equitable defense is *res judicata*, and defendant cannot thereafter recover by a proceeding to establish his equitable title so passed on in the former suit.[736]

[731] Seltzinger v. Ridgway, 8 Watts, 496.

[732] Peterman v. Huling, 31 Pa. St. 432; Meyers v. Hill, 46 Pa. St. 9; Taylor v. Abbott, 41 Pa. St. 352; Aurick v. Oyler, 25 Pa. St. 506; Winpenny v. Winpenny, 92 Pa. St. 440. See also Nelson v. Nelson, 117 Pa. St. 278, 11 Atl. Rep. 61.

[733] Sparks v. Walton, 4 Phila. 93.

[734] Taylor v. Abbott, 41 Pa. St. 352.

[735] Meyers v. Hill, 46 Pa. St. 9.

[736] Preston v. Chadwick, 91 Mo. 320, 2 S. W. Rep. 793; Chouteau v. Gibson,

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§ 652. In Action for Mesne Profits.

A recovery in ejectment is conclusive evidence, in a subsequent action of trespass for the mesne profits, as to the plaintiff's right to such profits accruing after the date of the demise laid in the declaration in ejectment.[737] The origin and reasons of this rule have been thus explained: "A recovery in ejectment, while the action was founded on a fiction, did not at first estop the defendant in trespass for the mesne profits, brought in the name of the plaintiff's lessor, from contesting his title to the possession during the time in which the profits had accrued, because the lessor was not a party on the record, and therefore could not have the benefit of an estoppel of it. Neither was he concluded by a judgment against his lessee, who was the legal plaintiff; and therefore it was, and not for anything peculiar to the nature of an action for land in the abstract, that the loser might renew the contest *toties quoties*. But as regards the action for mesne profits, it afterward came to be settled by Lord Mansfield, in *Aslin* v. *Parkin*, 2 Burr. 667, that the technical effect of the fiction is to be disregarded, and the lessor of the plaintiff treated as the legal party. The consequence was, that though a discomfited defendant might resort to another ejectment for the determination of the title prospectively, he was not at liberty to contest his adversary's title to the mesne profits, which accrued during the period of the demise laid in the previous suit, whether the action for those profits were brought in the claimant's own name, or in that of the fictitious lessee."[738]

76 Mo. 58; Emmel v. Hayes (Mo.), 12 S. W. Rep. 521.

[737] Aslin v. Parkin, 2 Burr. 668; Chirac v. Reinicker, 11 Wheat. 280; Postens v. Postens, 3 Watts & S. 182, 38 Am. Dec. 752; Drexel v. Man, 2 Pa. St. 271, 44 Am. Dec. 195; Man v. Drexel, 2 Pa. St. 202; Kille v. Ege, 82 Pa. St. 102; Graves v. Joice, 5 Cow. 261; Lion v. Burtis, 5 Cow. 408; Van Alen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113; Baron v. Abeel, 3 Johns. 481, 3 Am. Dec. 515; Benson v. Matsdorff, 2 Johns. 369; Leland v. Tonsey, 6 Hill, 328; Den d. Bray v. McShane, 13 N. J. Law, 55; Whittington v. Christian, 2 Rand. 353; Poston v. Jones, 2 Dev. & Bat. 295; Brothers v. Hurdle, 10 Ired. 490, 51 Am. Dec. 400; Shumake v. Nelms, 25 Ala. 126; Brewer v. Beckwith, 35 Miss. 467; Crockett v. Lashbrook, 5 T. B. Mon. 531, 17 Am. Dec. 98; Clark v. Boyreau, 14 Cal. 634; Avery v. Superior Court, 57 Cal. 247; 3 Bl. Comm. 205.

[738] Postens v. Postens, 3 Watts & S. 182, 38 Am. Dec. 752.

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It makes no difference, in this respect, whether the judgment is rendered upon contestation or not. A judgment by default in an action of ejectment, followed by a writ of possession, is evidence of the right and title of the plaintiff as against the tenant in possession.[739] But it is held, by the English cases, that the judgment in ejectment is not conclusive of the plaintiff's title, though admissible evidence, in trespass for the mesne profits, with a plea of not possessed, unless it is replied by way of estoppel.[740] As to the time covered by the estoppel of the judgment, it is "conclusive of the right of possession, and of the title to the mesne profits from the time of the demise laid in the declaration. That time must always be laid at or subsequent to the period when the plaintiff's right accrued. If laid before, he would fail in the ejectment." [741] But while the record is conclusive evidence that the defendant was in possession at the time the ejectment was brought, and also as to the title during the whole time laid in the demise, it is not evidence of the length of time that the defendant was in possession.[742] And now in England, since the Common Law Procedure Act of 1852, the judgment in ejectment is not conclusive, in a subsequent action for mesne profits, of the plaintiff's title from the day of the demise, but only of his title at the date of the writ.[743] At common law the recovery of mesne profits is not barred by the fact that the plaintiff might and did recover damages in the ejectment. "The damages are nominal, and are not given in satisfaction of the mesne profits, which have long been the subject of a distinct action. They are necessary only to entitle the plaintiff to recover costs, and certainly cannot preclude him from a recovery of the mesne profits any more than the entry of a *remittitur* upon a judgment by default against the casual ejector. The latter is an express release of the damages upon record, and the former is such by inference only. Both are forms, and do not affect the substantial rights of the parties." [744] But where the statute allows a recovery of mesne profits in an action

[739] Wilkinson v. Kirby, 15 C. B. 430.
[740] Matthew v. Osborne, 13 C. B. 919.
[741] Van Alen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 118.
[742] Bailey v. Fairplay, 6 Binn. 450, 6 Am. Dec. 486.
[743] Harris v. Mulkern, L. R. 1 Ex. Div. 81.
[744] Van Alen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 118.

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of ejectment, and prohibits a second action therefor, the plaintiff in ejectment may recover damages for trespasses committed before the judgment, and a recovery in ejectment, omitting such trespasses, will bar a subsequent action for them.[745]

§ 653. Confession of Judgment in Ejectment.

In some of the states it is considered that the fact of a judgment in ejectment being rendered against the defendant upon confession does not alter the rule of the inconclusiveness of adjudications in that species of action.[746] But in Pennsylvania, a confession of judgment in ejectment is conclusive in a subsequent ejectment for the same land between the same parties or their privies. "If he may confess his guilt in a capital case, he may surely confess his want of title in ejectment." [747] A similar effect has been attributed to the defendant's disclaimer of title. This, it is said, admits the plaintiff's title to the land, and, nothing further appearing, the plaintiff is entitled to judgment for the land and defendant to judgment for his costs; and in a subsequent action between the plaintiff, or those claiming under him, and the defendant, as to title to the same land, the defendant is estopped by his disclaimer in the former suit, unless he can show that he has since acquired title.[748]

§ 654. Successive Judgments in Ejectment made Conclusive by Statutes.

In some of the American states the legislatures have made an attempt to simplify the trial of title to real estate, and establish a reasonable rule for the finality of adjudications respecting it, but have been partially restrained by a sort of superstitious reverence for land as land, which is no doubt a survival of the common law theories. The result has been the enactment of statutes which provide either

[745] Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. Compare Pacquette v. Pickness, 19 Wis. 219.

[746] Botts v. Shields, 3 Litt. 82; Hawkins' Lessee v. Hayes, 3 Harr. (Del.) 489.

[747] Secrist v. Zimmerman, 55 Pa. St. 446.

[748] Wooters v. Hale, 67 Tex. 518, 3 S. W. Rep. 725.

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(1) that two concurrent verdicts and judgments for the same party in ejectment shall end the litigation and be conclusive of the title, or (2) that two successive judgments for the defendant shall bar a new ejectment upon the same title, or (3) that the defeated party shall be entitled to one new trial as of course,—all of which provisions amount to much the same thing.[749] Some remarks upon these statutes are indispensable to a full consideration of our subject. In Pennsylvania, where the character of finality attaches to "two concurrent verdicts and judgments in favor of the same party," the rule is applied with some strictness. Thus, in an early case, an action of ejectment was brought and verdict and judgment were for the plaintiff; an ejectment was then brought by the former defendant, and he recovered verdict and judgment, but the judgment was reversed by the supreme court; in another ejectment brought by this last party it was held that the verdict and judgment in the first and reversal of judgment in the second were not a bar to the third ejectment.[750] It will be observed that, under this statute, the effect of *one* judgment in ejectment remains precisely as at common law.[751] Hence, where two ejectments had been brought for parts of the same land, in one of which a verdict and judgment was rendered for the undivided moiety of a certain lot, and in the other for the whole of the tract, the two verdicts and judgments are conclusive as to the moiety only, and are not a bar to a third ejectment between the same parties for the remainder of the land, because such remainder is covered by the estoppel of only *one* judgment.[752] The Code of Alabama provides that "two judgments in favor of the defendant in an action of ejectment . . . . is a bar to any action for the recovery of the land." This, it is held, does not operate to exclude the record of one judgment for the plaintiff in ejectment as evidence in an action by the defendant to recover for the crops grown on the land; and the judgment cannot be excluded as evidence, under the rule that a prior judgment in ejectment is not admissible in a subsequent

[749] Code Civil Proc. Colo. § 254; Code Ala. (1886), § 2714; Genl. Stats. Minn. (1878), c. 75, § 12; Drexel v. Man, 2 Pa. St. 271, 44 Am. Dec. 195.

[750] Mercer v. Watson, 1 Watts, 330.

[751] Drexel v. Man, 2 Pa. St. 271, 44 Am. Dec. 195.

[752] Kinter v. Jenks, 43 Pa. St. 445.

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suit between the parties, as that rule applies only to a subsequent suit in ejectment.[753] It is provided by statute in Minnesota that the judgment in a second ejectment for the same land "shall be a final determination of the rights of the parties." Upon this statute the supreme court of that state remarks: "It only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit, until arrested by a decree of the court of chancery. The statute limits this right to two trials, and declares the second judgment final,—that is, final so far as to bar another action for the same cause; but like all other final judgments it may be reviewed for errors committed on the trial." [754] This statute does not apply to an action to set aside a conveyance of real estate on the ground of fraud.[755] Finally, where the effect of a judgment, or of successive judgments, in ejectment is regulated by a state statute, such enactment establishes a rule of property in lands within the state, and is binding on the federal courts sitting within the state.[756] And conversely, the courts of Pennsylvania, under the statute already noticed, consider themselves bound by two concurrent verdicts and judgments of the federal court in ejectment between the same parties.[757]

§ 655. Modern Actions Corresponding to Ejectment.

In many of the states, statutes have been enacted which free the action of ejectment from the fictions and artificialities which formerly surrounded it, and make it in reality a plain and simple remedy for the recovery of real property, prescribing also, either expressly or by necessary inference, that the judgment shall have the same conclusive effect as in any other species of suit. In other states, the adoption of a code of practice has abolished all forms of action, and the modern innominate action for the recovery of realty resem-

[753] Carlisle v. Killebrew (Ala.), 6 South. Rep. 756.

[754] Baze v. Arper, 6 Minn. 220, 233, (Gil. 142.)

[755] Somerville v. Donaldson, 26 Minn. 75, 1 N. W. Rep. 808.

[756] Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. Rep. 291; Equator Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. Rep. 128; Miles v. Caldwell, 2 Wall. 35.

[757] Strayer v. Johnson, 110 Pa. St. 21, 1 Atl. Rep. 222.

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bles the old suit in ejectment only in respect to its object. The action being brought by and against the real claimants, and all other fictions being abolished, it correlates in all respects with the purely personal actions, and, as a necessary consequence, the judgment has the character of finality. It follows that in all these states the judgment is conclusive of the points and questions actually litigated and determined,—that is, the titles put in issue and tried, and the right of possession,—and will bar any subsequent action between the same parties or their privies for the same land. The decisions show that this is now the settled rule in the states of Vermont,[758] New York,[759] North Carolina,[760] Georgia,[761] Mississippi,[762] Arkansas,[763] Kentucky,[764] Illinois,[765] Iowa,[766] California,[767] Oregon,[768] and Nevada,[769] and probably in some others not here enumerated. The modern rule is therefore correctly stated in the following language by the supreme court of Illinois: "A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon

[758] Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Edwards v. Roys, 18 Vt. 473; Hunt v. Payne, 29 Vt. 172; Hodges v. Eddy, 52 Vt. 434; Marvin v. Dennison, 1 Blatchf. 159.

[759] Dawley v. Brown, 79 N. Y. 390; Sheridan v. Andrews, 3 Lans. 129; Castle v. Noyes, 14 N. Y. 329; Kelsey v. Ward, 38 N. Y. 83; Campbell v. Hall, 16 N. Y. 575.

[760] Johnson v. Pate, 90 N. Car. 334; Benton v. Benton, 95 N. Car. 559.

[761] Sims v. Sims, 19 Ga. 124; Dickerson v. Powell, 21 Ga. 143; McCurry v. Robinson, 23 Ga. 321; Glover v. Stamps, 73 Ga. 209, 54 Am. Rep. 870 (unless the jury find for the plaintiff less than the fee, Parker v. Stambaugh, 71 Ga. 735; Lamar v. Knott, 74 Ga. 379; Craig v. Watson, 68 Ga. 114).

[762] Moring v. Ables, 62 Miss. 271.

[763] Sturdy v. Jackaway, 4 Wall. 174.

[764] Troutman v. Vernon, 1 Bush, 482.

[765] Barger v. Hobbs, 67 Ill. 592; Regan v. West, 115 Ill. 603, 4 N. E. Rep. 365; Hawley v. Simons, 102 Ill. 118; Octgen v. Ross, 54 Ill. 79.

[766] Soberz v. Beiler, 28 Iowa, 235.

[767] Marshall v. Shafter, 32 Cal. 176; Amesti v. Castro, 49 Cal. 325; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

[768] Hill v. Cooper, 8 Oreg. 254; Code Civil Proc. Oreg. § 329.

[769] Sherman v. Dilley, 3 Nevada, 21. In this case, the court said, in effect: The common law doctrine that a judgment in ejectment cannot be pleaded in bar or given in evidence by way of estoppel arises from the fact that this action, at common law, is between fictitious persons, and has no applicability to our action for the possession of real property, which is more like the writ of entry or assise than the old action of ejectment. Our action, though called ejectment, seems to combine the properties of a writ of assise, of entry, and of right, and as such, a judgment in the action is an estoppel in regard to all titles litigated therein. See also Sims v. Sims, 19 Ga. 124.

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by the court, which the court had power and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again."[770] But the judgment is conclusive *only* as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties.[771] The fact that, by reason of lapse of time, a judgment for the recovery of real property can no longer be enforced by execution, will not affect its force as an estoppel against the unsuccessful party.[772]

§ 656. After-Acquired Title not Barred.

A judgment in ejectment is not conclusive except as against defenses actually made, or legal defenses which might have been made on the trial. It does not deprive a party of the right to acquire a new and distinct title, and, having done so, to assert it without prejudice from the former suit.[773] Thus a judgment recovered against a demandant who has an equitable title only, will not estop him if he afterwards acquires the legal title.[774] "There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar, in another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies

[770] Hawley v. Simons, 103 Ill. 115.
[771] Dawley v. Brown, 79 N. Y. 390.
[772] Bazille v. Murray (Minn.), 41 N. W. Rep. 238.
[773] Barrows v. Kindred, 4 Wall. 399; Woodbridge v. Banning, 14 Ohio St. 328; Mann v. Rogers, 35 Cal. 316; Mahoney v. Van Winkle, 33 Cal. 448; Emerson v. Sansome, 41 Cal. 552; McLane v. Bovee, 35 Wis. 27.
[774] Brown v. Roberts, 24 N. H. 181.

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are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession." [775]

§ 657. Judgment in Trespass.

As in every form of personal action, a judgment in trespass is conclusive of the points actually litigated and determined. If issue is joined upon the particular question of a right of entry in the land at the time of the alleged trespass, the judgment will prove the same point in a subsequent action of trespass between the same parties concerning the same land.[776] But "a judgment for the defendant in an action of trespass *quare clausum* does not necessarily settle anything beyond the particular facts of the trespass sued for. It may be rendered upon failure of the plaintiff to prove the acts alleged, or upon his failure to prove his right of possession. Either would be sufficient to sustain the judgment for the defendant. If the proofs should make it appear that the issue by which the case had been determined was upon the right of possession, still the judgment would only determine the right of possession at the time of the commission of the trespass set forth in that case. It is not conclusive upon the title, because the right of possession only, and not the title, is involved in an action of trespass." [777] Thus, in an action for obstructing a way claimed by the plaintiff as appurtenant to his land, a verdict and judgment on the general issue pleaded do not conclude the parties in regard to the title; [778] although such judgment may be admissible (not conclusive) evidence to show that the plaintiff has a right to the way.[779] And since, in trespass or case for an injury to land, although the plaintiff may allege a title in fee, he is only bound to prove a possession, a judgment in his favor, or a plea of the general issue, will be conclusive evidence only of such possession.[780]

But the trial of an action of trespass *may* turn upon the question of *title*, and if either of the parties puts his title in issue and it is

[775] Thrift v. Delaney, 69 Cal. 188, 10 Pac. Rep. 475.
[776] Pleak v. Chambers, 7 B. Mon. 565.
[777] Morse v. Marshall, 97 Mass. 519.
[778] Standish v. Parker, 2 Pick. 20, 13 Am. Dec. 393.
[779] Parker v. Standish, 3 Pick. 288.
[780] Parker v. Hotchkiss, 25 Conn. 321.

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tried and passed upon, the verdict and judgment in that suit will be conclusive evidence in favor of (or against) such title, at least in a subsequent action of trespass.[781] Thus judgment for the plaintiff, when put in evidence in a subsequent action against the same defendant for trespass upon the same premises, is conclusive evidence of the plaintiff's title, where such title was drawn in question and litigated in the former suit; but the defendant may show that he has acquired title since the former action, or that the plaintiff's title has terminated.[782] So where the defendant pleads soil and freehold, setting forth his claim by metes and bounds, and there is a verdict upon that plea in his favor, the record is conclusive evidence of his title in a subsequent action of trespass to try title brought by him against the plaintiff for the land included in the plea.[783] According to the doc-

[781] Outram v. Morewood, 3 East, 346; Parker v. Leggett, 13 Rich. 171; Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Small v. Haskins, 26 Vt. 209; Dunckle v. Wiles, 5 Denio, 296; Illinois & S. R. Co. v. Cobb, 82 Ill. 183; Campbell v. Cross, 39 Ind. 155. In Stevens v. Hughes, 31 Pa. St. 381, 385, it was said: "The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, not to the character of the subject-matter of the controversy. The apparent exception nowhere else exists. That there is no charm about land as land which relieves it from the operation of the general rule that a judgment between the same parties or their privies, directly upon the same matter, is the end of controversy,—that it is an estoppel against future litigation of the same question,—is evident from the fact that a fine, a common recovery, a simple judgment in a writ of right, and indeed judgments in any real action, have always been held to be conclusive. Whatever, therefore, may be the rule in regard to ejectments, there is neither reason nor authority for the position that a judgment upon a traverse of a plea of *liberum tenementum* in trespass does not estop a party to it, or his privy, from again asserting or denying the same freehold in a subsequent action of trespass." So again, in White v. Chase, 128 Mass. 158, Morton, J., observed: "It is true that an action of tort in the nature of trespass *quare clausum fregit* does not necessarily involve anything more than the right of possession, that the title or seisin may not be in issue, and that the judgment in such action is conclusive only upon the matter adjudged, which is the right of possession. Johnson v. Morse, 11 Allen, 540; Morse v. Marshall, 97 Mass. 519. But the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury or court or a referee, the verdict or finding, and the judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel. Eastman v. Cooper, 15 Pick. 276; Dutton v. Woodman, 9 Cush. 255; Sawyer v. Woodbury, 7 Gray, 499; Burlen v. Shannon, 99 Mass. 200."

[782] Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402.

[783] Parker v. Leggett, 13 Rich. 171.

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trine of a majority of the cases, it is necessary, in order to make a judgment in trespass conclusive of the title, that the title should have been expressly put in issue by plea of *liberum tenementum* or some other equivalent plea; it is not sufficient that it came in controversy under the general issue.[784] As stated in a Massachusetts decision, "an action of tort in the nature of trespass does not bind the title as between the parties, unless it appears by special plea or particular specification of defense, or in some other mode, that the particular fact which is claimed to be settled was adjudicated upon by the tribunal to which it was presented."[785] But there is also authority for the proposition that it is alone necessary that the title should have been actually and fully litigated and passed upon, and that, in that case, the judgment will be conclusive upon that question, although it may have arisen upon the general issue and not under a special plea.[786] And this rule seems to us to be more in harmony with the best accepted doctrines in regard to the identification of the "matter in issue" and the scope of the estoppel.[787]

§ 658. Whether Judgment in Trespass is Conclusive in Subsequent Ejectment.

In the preceding section we considered the effect of a judgment in trespass when offered as a bar or estoppel in another action of trespass. But whether the judgment in trespass, title having been drawn in question and determined, will be conclusive in a subsequent *ejectment* or other action for the recovery of the land itself is a controverted point. It is held in the affirmative in some few states.[788] But it is denied in Pennsylvania;[789] although it is thought, in that state, that the judgment in trespass might be admissible as "per-

[784] Potter v. Baker, 19 N. H. 166; Standish v. Parker, 2 Pick. 20, 13 Am. Dec. 393; Parker v. Hotchkiss, 25 Conn. 321; Stevens v. Hughes, 31 Pa. St. 381; Dunckle v. Wiles, 5 Denio, 296. See also Rogers v. Ratcliff, 3 Jones L. 225.

[785] Stapleton v. Dee, 132 Mass. 279.

[786] Shettlesworth v. Hughey, 9 Rich. 387.

[787] See *supra*, § 614.

[788] Campbell v. Cross, 39 Ind. 155; Hargus v. Goodman, 12 Ind. 629; Rice v. King, 7 Johns. 20; McKnight v. Dunlop, 4 Barb. 36; Parker v. Leggett, 18 Rich. 171.

[789] Kerr v. Chess, 7 Watts, 367; Sabins v. McGhee, 36 Pa. St. 453.

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suasive" evidence in favor of the successful party.[790] But if conclusive at all, it is conclusive only upon *the* title litigated. Thus where, to an action of trespass, the defendant pleaded the general issue and *lib. ten.*, which were found for the plaintiff, it was held that in an ejectment brought by the same plaintiff against the same defendant, for the same land, the former finding did not estop the defendant from denying the plaintiff's title, for that title was not put in issue by the pleadings, but only the defendant's title.[791] In Massachusetts it is held that where the trial of an action of trespass turns upon the question of title, and the title is put in issue and passed upon, the verdict and judgment in that action are competent evidence of that fact in a subsequent writ of entry between the same parties, though not conclusive by way of estoppel.[792] In Michigan, principally for reasons drawn from the statute law of that state, the courts refuse to give a conclusive effect to a judgment in trespass when offered in a subsequent ejectment.[793]

§ 659. Trespass to Try Titles.

The action of trespass to try titles is a remedy provided by statute in a number of the states for the recovery of realty. Its object

[790] Hoey v. Furman, 1 Pa. St. 295, 44 Am. Dec. 129.

[791] Stokes v. Fraley, 5 Jones (N. Car.), 577.

[792] White v. Chase, 128 Mass. 158; Eastman v. Cooper, 15 Pick. 276, 26 Am. Dec. 600; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518. See Arnold v. Arnold, 17 Pick. 4; Johnson v. Morse, 11 Allen, 540.

[793] Keyser v. Sutherland, 59 Mich. 455, 26 N. W. Rep. 865. In this case it was said: "A judgment in trespass cannot, in our opinion, under any circumstances, be a bar to a subsequent ejectment suit for the same premises, even though the parties in both suits are the same. If the contrary doctrine was supported by the common law, it would not be in harmony with the laws of this state, but inconsistent with our statutes in relation to the actions of ejectment and trespass. A party is entitled to but one trial, as a matter of right, in this state, in an action of trespass, while in ejectment, upon payment of costs of the first trial, he has an absolute right to another trial, of which no court can debar him. How. Stat. § 7822; Dennison v. Genesee Circuit Judge, 37 Mich. 285. A single judgment in ejectment is not necessarily final for any purpose. Rice v. Auditor General, 30 Mich. 13. A judgment in trespass, on the contrary, is final unless set aside by the trial court or reversed by an appellate one. If a judgment in trespass, therefore, was permitted to be a bar to a subsequent action of ejectment by the same parties, and involving the title to

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being to provide a convenient and efficacious method for the settlement of disputed questions of title, it is generally provided that the result shall be final and conclusive on the losing party.[794] But this is not always the case, especially where this action is merely given as an allowable substitute for ejectment, and, under the laws of the particular state, a judgment in ejectment is not conclusive.[795] It does not bar an after-acquired title. Where there is a recovery against the defendant in an action of trespass to try title, and he subsequently acquires title by taking out a grant and re-enters, the recovery in the first is not an estoppel in a second action for the same land.[796]

§ 660. Judgment in Partition.

At the common law, partition was regarded as a mere possessory action, not involving the title to the property, but only determining upon the possession. And therefore it could at most bar an action of equal grade, that is, a possessory action; but it could not stand in the way of a subsequent action of a higher grade or dignity, *e. g.*, a writ of right.[797] But nevertheless the action of partition forms no exception to the general rule that a judgment is conclusive of every

the same premises, the statutory right of new trial, granted in ejectment, could easily be nullified. The plaintiff, at liberty to choose his form of action, would bring trespass and settle his title in one trial. Under the decisions in the state of New York, holding a judgment in trespass *quare clausum* a bar to an action of ejectment, we find it 'quite common for a party claiming the title to land and the right of possession, and who desires to avoid the delays consequent upon the statutory right to new trials in an action of ejectment, to bring his action in trespass and so establish his right to the title and possession upon a single trial.' Shumway v. Shumway, 42 N. Y. 145. We do not feel justified in thus rendering the right, granted by the law-making power, to a new trial in ejectment abortive and ineffective, as has been done in our sister state. We should hesitate thus to annul the statute, even if the well-settled rule of the common law authorized the bar contended for in this case."

[794] Fisk v. Miller, 20 Tex. 579; Dyson v. Leek, 5 Strobh. 141.

[795] Mitchell v. Robertson, 15 Ala. 412; Camp v. Forrest, 13 Ala. 114.

[796] Bank of South Carolina v. Bridges, 11 Rich. 87.

[797] Mallett v. Foxcroft, 1 Story, 474; Pierce v. Oliver, 13 Mass. 211; Nash v. Cutler, 16 Pick. 500; Groundie v. Northampton Co., 7 Pa. St. 238; McClure v. McClure, 14 Pa. St. 136; Richman v. Baldwin, 21 N. J. Law, 398; Nicely v. Boyles, 4 Humph. 177, 40 Am. Dec. 638; Whitlock v. Hale, 10 Humph. 63; Freem. Cotenancy, § 529.

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matter which is actually and necessarily involved in its determination. And hence, if the title of the property comes in issue, it is bound by the judgment.[798] And now, in most of the American states, partition has ceased to be regarded as a mere possessory action, and has come to involve the right of property as well as the possession; and in such cases the judgment is conclusive upon every right or title which either of the parties presented, or might have put in issue, in the litigation.[799] "Title to real estate may be put in issue, tried, and determined in partition proceedings, and when so put in issue, tried, and determined, the judgment rendered is binding upon all the parties to the issue." [800] The rule in New York is, that a judgment in an action for partition is binding and conclusive upon all the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided, as incident to or essentially connected with the subject-matter of the litigation within the purview of the action, either as matter of claim or defense.[801] On these principles, where the plaintiff in an ejectment suit claims premises which had been set off to the party under whom the defendant claims by a judgment rendered in a suit for partition to which the plaintiff was a party, the latter is estopped from setting up title against the judgment.[802] The judgment therefore establishes the title of the parties to the land partitioned, and is conclusive as to any adverse claim of title or of possession on their part existing at the time of its rendition.[803] It is conclusive evidence upon the parties and their privies that the land set

[798] Foxcroft v. Barnes, 29 Me. 128; Burghardt v. Van Deusen, 4 Allen, 375; Herr v. Herr, 5 Pa. St. 428, 47 Am. Dec. 416; Ihmsen v. Ormsby, 32 Pa. St. 200; Dixon v. Warters, 8 Jones (N. Car.), 449; Rabb v. Aiken, 2 McCord Ch. 125.

[799] Whittemore v. Shaw, 8 N. H. 393; Clapp v. Bromagham, 9 Cow. 569; Jenkins v. Fahey, 73 N. Y. 355; Short v. Prettyman, 1 Houst. 334; Stean v. Anderson, 4 Harringt. 209; Mills v. Witherington, 2 Dev. & Bat. 433; Muse v. Edgerton, Dud. Eq. 179; Reese v. Holmes, 5 Rich. Eq. 540; Dabney v. Manning, 3 Ohio, 321, 17 Am. Dec. 597; Doolittle v. Don Maus, 34 Ill. 457; Telford v. Barney, 1 Greene (Iowa), 575; Forder v. Davis, 38 Mo. 107; Pentz v. Kuester, 41 Mo. 450; Hart v. Steedman (Mo.), 11 S. W. Rep. 993; Hancock v. Lopez, 53 Cal. 362; Morenhout v. Higuera, 32 Cal. 295; Linehan v. Hathaway, 54 Cal. 251; Freem. Cotenancy, § 531.

[800] Fleenor v. Driskill, 97 Ind. 27.

[801] Jordan v. Van Epps, 85 N. Y. 427.

[802] Doolittle v. Don Maus, 34 Ill. 457.

[803] Bobb v. Graham, 89 Mo. 200, 1 S. W. Rep. 90.

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off to the petitioner, together with a spring of water situated thereon, was formerly held by the parties in common.[804] But while the judgment in partition is conclusive as to the title under which the parties hold in common, it does not invest them with any new title, nor have the effect of changing their title, its only legal effect being to sever the unity of possession.[805] Hence a judgment in partition, assigning a share of the land to one for life, who is really seised of the share in fee simple, gives the share in fee, having the effect merely to part the land, without otherwise affecting the title, unless an issue had been made and directly decided as to the title.[806] In some few states, the rules hitherto stated do not apply, or are accepted only with considerable modifications. Thus, in Pennsylvania, "it is settled that partition operates merely on the lines of division, leaving the title unaffected. Where, therefore, partition is not followed by actual occupancy of the purpart, or the verdict is adverse to the demandant, there is nothing to bar a subsequent ejectment to try a disputed title."[807] So in Texas, a decree of partition of the land of a testator, and confirmation of the commissioner's report, made by a probate court, do not estop a devisee, who is a party to the proceedings, to set up a claim to the land otherwise derived, as the probate court has no authority to determine title to land.[808] A petitioner for partition will be barred or estopped by a judgment on a former petition, if the parties and the title put in issue or necessarily decided are the same; but where the former petition was of part only of the land held in common, and all the co-tenants were not made parties to the suit, the judgment will not be a bar or estoppel to a subsequent petition for partition of the whole land held in common and to which all the co-tenants are made parties.[809]

§ 661. Parties Bound by Partition.

A judgment in partition is conclusive upon all persons having any interest, contingent or otherwise, who are made parties, and convey-

[804] Edson v. Munsell, 12 Allen, 600.

[805] Cristy v. Spring Valley Water Works, 68 Cal. 73, 8 Pac. Rep. 849; Fleesor v. Driskill, 97 Ind. 27.

[806] Kenney v. Phillipy, 91 Ind. 511.

[807] Ross v. Pleasants, 19 Pa. St. 168.

[808] Mayo v. Tudor's Heirs (Tex.), 12 S. W. Rep. 117.

[809] Colton v. Smith, 11 Pick. 311, 22 Am. Dec. 375.

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ances upon sale under the judgment are a bar in law and equity as against all such parties or their representatives.[810] And when proceedings in partition are properly taken to bind "unknown owners," the judgment not only concludes such persons in respect to any interest they may have as tenants in common, but precludes them afterwards from showing that they had a paramount title in severalty to any part of the partitioned premises.[811] And where such proceedings are regularly prosecuted, and there is no showing of any fraud or collusion, a person who was cited only in the class of "unknown owners" is concluded, although in reality, at the time, he was in possession claiming in severalty; because, by his silence, he admits the tenancy in common and the right of the petitioners to have partition.[812] According to the English rule, the possible or contingent interests of reversioners or remaindermen (including persons not *in esse*) may be cut off by a decree in partition, if they were virtually represented by the presence on the record of the person entitled to the first estate of inheritance.[813] In New York, this can be done only when the judgment provides for and protects such interests, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests.[814]

§ 662. Action for Use and Occupation.

The action for "use and occupation" is a species of *assumpsit*, which lies when one has used another's realty under a contract, express or implied, to pay therefor, and for the value of which an action for rent cannot be maintained, as for want of a lease, or of an

[810] Jenkins v. Fahey, 73 N. Y. 355.

[811] Kane v. Rock River Canal Co., 15 Wis. 179, citing Kester v. Stark, 19 Ill. 328; Foxcroft v. Barnes, 29 Me. 128; Rogers v. Tucker, 7 Ohio St. 417; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Reese v. Holmes, 5 Rich. Eq. 540; Blakely v. Calder, 15 N. Y. 617; Mead v. Mitchell, 17 N. Y. 210; Croghan v. Livingston, 17 N. Y. 218.

[812] Cook v. Allen, 2 Mass. 461.

[813] Wills v. Slade, 6 Ves. 498; Gaskell v. Gaskell, 6 Sim. 643. See Goodess v. Williams, 2 Y. & Col. 595.

[814] Monarque v. Monarque, 80 N. Y. 320. See also Nodine v. Greenfield, 7 Paige. 544; Mead v. Mitchell, 17 N. Y. 210; Cheeseman v. Thorne, 1 Edw. Ch. 629.

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agreement to pay a specified sum.[815] A judgment recovered by the plaintiff in this action is admissible in evidence against the defendant, on the trial of a writ of entry brought against him by the plaintiff in the former action to recover possession of the same real estate, though probably not conclusive.[816]

§ 663. Forcible Entry and Detainer.

"A judgment in an action of forcible entry and detainer cannot be pleaded as a bar to an action of ejectment, for the reason that the questions involved in the two proceedings are different. The object of the action of ejectment is to try the title to property, while in an action of forcible entry and detainer the immediate right of possession is all that is involved, and the title cannot be inquired into for any purpose." [817] "It is plain that in a proceeding for a forcible entry and detainer, it is the mere naked possession in fact which is put in issue, and of course the judgment in such case can be no evidence in an action of ejectment, in which the right of entry is the point in issue." [818] Nor does the judgment furnish any evidence of a right in the plaintiff to recover in an action for mesne profits.[819] But notwithstanding its inconclusiveness upon the title, the judgment in this species of action is final and binding as to all questions actually and necessarily litigated and determined. It is evidence of the right and extent of the plaintiff's possession, and the defendant is estopped from contesting the same.[820] So also, in a special statutory class of actions called by this name, the judgment is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over, and these issues cannot be again tried under color of a suit in chancery.[821] A verdict

[815] Hurley v. Lamoreaux, 29 Minn. 138, 12 N. W. Rep. 447.

[816] Cobb v. Arnold, 12 Met. 39; Jones v. Reynolds, 7 Car. & P. 335.

[817] Riverside Co. v. Townsend, 120 Ill. 9, 9 N. E. Rep. 65; Mattox v. Helm, 5 Litt. 185, 15 Am. Dec. 64; Fish v. Benson, 71 Cal. 428, 12 Pac. Rep. 454; Williams v. Newcomb, 16 Mo. App. 185; Harvie v. Turner, 46 Mo. 444; Dale v. Doddridge, 9 Nebr. 188, 1 N. W. Rep. 999.

[818] Mattox v. Helm, 5 Litt. 185, 15 Am. Dec. 64.

[819] Casey v. McFalls, 3 Sneed, 115.

[820] Mitchell v. Davis, 23 Cal. 381.

[821] Norwood v. Kirby, 70 Ala. 397.

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and judgment of restitution in an action of forcible entry and detainer for a tract of land, part of a larger tract, all of which is claimed by the defendant under the same alleged title, is conclusive, in a subsequent ejectment between the same parties, upon the question of the right of possession at the date of the forcible entry, not only as to the tract actually detained by the defendant but as to the whole.[822] But judgment for the defendant is not sufficient to bar a second suit, without extrinsic proof that the cause of action was the same in the prior as in the second suit. Where the only demand of possession shown appears to have been made after the determination of the first suit, the judgment for the defendant therein cannot be held a bar to a second action brought after such demand.[823]

§ 664. Action to Quiet Title.

In an action to quiet title, all matters affecting the title of the parties to the action may be litigated and determined, and the judgment therein is final and conclusive.[824] A general finding of title in the plaintiff, and consequently of no title in the defendant, is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time of the finding and judgment.[825] When a decree, on a bill to correct a mistake in the description of land in a deed, finds that the place at which the survey was commenced was not the correct one, but the survey should have commenced at another point, in an action of ejectment between the parties the question of boundary is *res judicata*, and the decree conclusive upon them as to its correctness.[826]

§ 665. Dower Proceedings.

In a proceeding for dower, where the land is treated by the parties and recognized by the court as belonging to the estate of the deceased

[822] Bradley v. West, 68 Mo. 69.

[823] Merrin v. Lewis, 90 Ill. 505.

[824] Indiana, B. & W. R. Co. v. Allen, 113 Ind. 308, 15 N. E. Rep. 451; Starr v. Stark, 1 Sawy. 275; Doyle v. Hallam, 21 Minn. 515; Davis v. Lennen (Ind.), 24 N. E. Rep. 885.

[825] Board of County Commissioners v. Welch (Kans.), 20 Pac. Rep. 483; Burton v. Huma, 37 Fed. Rep. 738.

[826] Mueller v. Henning, 102 Ill. 646.

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husband, and the title as being in his heirs, the judgment rendered is conclusive between the parties and those claiming under them, and hence the widow in such case will be estopped from setting up title in herself to the land embraced in the proceeding.[827]

§ 666. Foreclosure Suits.

An action to foreclose a mortgage does not ordinarily involve a consideration of the question of title. But the title may be put in issue in such a suit, and if it is put in issue and actually passed upon and determined, the decree adjudicating it will be as binding and conclusive upon the parties as if rendered in any other species of action.[828]

§ 667. Award of Arbitrators upon Title to Land.

An award of arbitrators, although it cannot of itself transfer the title of real estate, may decide in whom the title is; and it will conclude the party against whom it is made, and those claiming under him, from again contesting such title, and the party in whose favor the title is determined may avail himself of the award, in a subsequent action, by way of estoppel.[829] According to the supreme court of Pennsylvania, "It is certain that an award cannot make an actual transfer of the title to land, and therefore it appears in some of the old cases an inference was falsely drawn that it was not conclusive on the title. Supposing that in strict law it was so, it did not follow that equity would not decree a specific performance, after which the award would become conclusive. No agreement short of a conveyance can make a transfer of land, yet it is the daily business of chancery to compel the performance of such agreements; and with

[827] Sigmon v. Hawn, 86 N. Car. 310; Gay v. Stancell, 76 N. Car. 369.

[828] Bundy v. Cunningham, 107 Ind. 360, 8 N. E. Rep. 174; Ulrich v. Drischell, 88 Ind. 354.

[829] Shelton v. Alcox, 11 Conn. 240; Carey v. Wilcox, 6 N. H. 177; Porter's Lessee v. Matthews, 2 Harr. (Del.) 80; Sellick v. Adams, 15 Johns. 197; Cox v. Jagger, 2 Cow. 638, 14 Am. Dec. 522; Murray v. Blackledge, 71 N. Car. 492; Loring v. Whittemore, 13 Gray, 229; Girdler v. Carter, 47 N. H. 305.

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us, who have no chancery, a decree for specific performance is considered as made in all cases where a chancellor would make it. No satisfactory reason has been given why the proprietors of land should not have as much power to bind the title by an award as the title to personal property. The same policy which permits one is applicable to the other, and indeed the fluctuation of sentiment on this subject seems at length to have settled down into an opinion conformable to common sense,—that the owners of property, either real or personal, may submit the title to the decision of arbitrators, whose award shall be conclusive." [830]

§ 668. Bankruptcy Proceedings.

Where the title to land has been passed upon by the federal court in proceedings in bankruptcy, in which the court had jurisdiction of the parties and property, the judgment is conclusive on the same parties in the state court.[831]

Part VIII. Judgments in Actions Concerning Chattels.

§ 669. Trespass.

A recovery in trespass for a wrongful taking of property, where damages are given for the taking only, is no bar to an action of trover for a subsequent conversion to recover the value.[832] But if the defendant have judgment in an action of trespass, this will preclude the plaintiff from afterwards maintaining his action to recover the value of the same goods.[833] A plea of not guilty, in an action of trespass for taking and carrying away chattels, does not put in issue the question of the right of property; it is merely a traverse of the alleged wrongful taking.[834] In general, the judgment in this species of action will not be conclusive upon the question of ownership,

[830] Davis v. Havard, 15 Serg. & R. 165, 16 Am. Dec. 537.

[831] Smith v. Walker, 77 Ga. 289, 3 S. E. Rep. 256.

[832] Stewart v. Martin, 16 Vt. 397.

[833] Rice v. King, 7 Johns. 20; Johnson v. Smith, 8 Johns. 383.

[834] Harris v. Miner, 28 Ill. 135.

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unless it appears that that was the issue actually litigated and passed upon. Thus in an action of trover to recover certain property, between the claimant of title thereto and the person in possession of the same, who had purchased it at a constable's sale, the defendant offered in evidence the record of a judgment in favor of the sureties on the constable's bond in an action of trespass against them for his alleged wrongful levy on the same property and the sale of it to the present defendant. But it was held that the judgment was not evidence. For the verdict in trespass, in favor of the sureties, may not have involved the title to the property, but may have turned on very different issues.[835]

§ 670. Trover.

A judgment in an action of trover against the defendant's warrantee, rendered upon a trial involving only the defendant's title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendant himself, involving the same issue and to be supported by the same testimony.[836]

§ 671. Replevin.

Generally speaking, the one fact established by a judgment in replevin, is the right of the successful party to the immediate possession of the property in question, and upon that point the judgment is conclusive.[837] But "while it is true that in the action of replevin, ordinarily, the only question is the right of possession, yet if the party interested in the subject-matter of the controversy interposes and sets up special matter to defeat the claim, that matter is concluded by that litigation."[838] The question of title is not necessarily in issue in replevin, and where it is not put in issue by the pleadings, an adjudication thereon is extrajudicial and void; and evidence, otherwise admissible, that a chattel mortgage on the property remains unpaid, is not rendered inadmissible by the adjudication in such

[835] Greaves v. Middlebrooks, 59 Ga. 240.

[836] Atkinson v. White, 60 Me. 396.

[837] Allen v. Butman, 138 Mass. 586.

[838] Missouri Pac. R. Co. v. Levy, 17 Mo. App. 501.

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case.[839] In order that the judgment may be conclusive upon the question of ownership, it must clearly appear that that was the issue actually determined. Thus, where, under the plea of *non detinet*, the jury found that the defendant "did unlawfully detain the goods," and was silent as to the property therein, and the judgment was "that the plaintiff do have and retain the goods," it was held that the only matter here adjudicated was the right to retain and possess the goods merely at the time, and that the question of title was not concluded.[840] A defendant in replevin is not estopped by a judgment for the return of a certain deed from asserting title to the real estate therein described.[841] It is well settled that issues tried and determined in a replevin suit cannot be again presented in an action on the replevin bond.[842] And if the question of ownership was actually in issue and decided in the plaintiff's favor in the replevin suit, the judgment will estop the defendant and his sureties from asserting, in an action on the replevin bond, that the defendant was the owner of the property.[843] But if the finding merely decides that the plaintiff is entitled to the possession of the property, evidence showing that he is not the owner is competent for the defendant, on the question of damages.[844] And a finding of title in the plaintiff is not conclusive, in a subsequent action on the bond, as to the fact of the ownership of the goods at a date prior to that on which the suit was brought.[845] As to the *parties* concluded by a judgment in replevin, but little need be added to the rules previously given in relation to the persons bound by judgment estoppels. Such adjudication is equally binding on an intervening claimant as on either of the primary parties.[846] But a judgment in replevin against the carrier of goods, replevied while in transit, does not estop the consignee, who was not a party to the action, and in nowise participated therein, from setting up his claim to the goods.[847] If goods have been taken

[839] McFadden v. Ross, 108 Ind. 512, 8 N. E. Rep. 161.

[840] Emmons v. Dowe, 2 Wis. 322.

[841] Daggett v. Daggett, 143 Mass. 516, 10 N. E. Rep. 311.

[842] Denny v. Reynolds, 24 Ind. 248.

[843] McFadden v. Fritz, 110 Ind. 1, 10 N. E. Rep. 120.

[844] Hawley v. Warner, 12 Iowa, 42; Buck v. Rhodes, 11 Iowa, 348.

[845] Henry v. Ferguson, 55 Mich. 399, 21 N. W. Rep. 381.

[846] Witter v. Fisher, 27 Iowa, 9.

[847] Frank v. Jenkins, 23 Ohio St. 597.

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by replevin from an attaching officer, a judgment in favor of the plaintiff in the replevin suit is conclusive evidence of title in him, as against the attaching plaintiff, and also as against a person who, after the replevin, and having notice thereof, has caused a further attachment of the goods to be made.[848] At the common law, and unless changed by statute, the rule is that a judgment of nonsuit in an action of replevin is not a bar to a second replevin.[849] As to the operation of a recovery in this action as a bar to a subsequent controversy, between the same parties, it will depend entirely upon the identity of the causes of action. Thus, if one brings replevin and loses his case, he cannot afterwards bring trespass for the same taking of the same goods.[850] On the other hand, where plaintiff sued defendant in replevin for furniture which the latter had taken from plaintiff's house, under a chattel mortgage which had ceased to have any legal validity, and recovered the property and also damages for its detention; and afterwards the plaintiff sued the same defendant in trespass for breaking into her house and removing said furniture and offering her personal indignities, it was held that the judgment in the replevin suit was not a bar to the action of trespass, though the record might be offered in mitigation of damages.[851]

§ 672. Detinue.

The action of detinue proceeds upon the ground of property in the plaintiff at the time of action brought, and therefore the recovery in that action proves no more than that, at the time of its institution, the right of property, either absolute or special, was in the plaintiff; and it does not conclude the parties as to the title or right to the property at a time antecedent to the action.[852]

[848] Carlton v. Davis, 8 Allen, 94.
[849] Daggett v. Robins, 2 Blackf. 415, 21 Am. Dec. 752.
[850] Ewald v. Waterhout, 87 Mo. 602.
[851] Briggs v. Milburn, 40 Mich. 512. See Robinson v. Kruse, 29 Ark. 575.
[852] Hughes v. Jones, 2 Md. Ch. 178; Wittick v. Traun, 25 Ala. 317.

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CHAPTER XIX.

FORMER RECOVERY AS A BAR.

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PART I. GENERAL PRINCIPLES.

§ 673. Estoppel by Former Judgment.

It has already been shown that there is an important difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action; or in other words, between the principle of estoppel by former recovery and the rule of the conclusiveness of a judgment upon a particular point litigated and decided. This difference is chiefly noticeable as respects the identity of the subject-matter in the successive suits, and as respects the scope of the estoppel, as to the matters decided by it.[1] Using this distinction as a principle of classification, we have proceeded, in a former chapter, to discuss in detail the doctrine of *res judicata* in its application to the finality of an adjudication upon the points or matters in issue. We are now brought to a consideration of the other branch of the general subject, viz., the doctrine of merger, or of estoppel by former recovery. The main rule deducible from the multitude of authorities upon this subject may be expressed as follows: A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties, or their privies, upon the same cause of action, so long as it remains unreversed.[2] This is no arbitrary rule. It rests both upon acknowledged technical principles, and upon sound considerations of public policy. For first, the law admits no retrogression in its processes, and if a right or remedy of an inferior nature has been merged in one of a higher rank or dignity, it forbids the prosecution of an action or other proceeding upon the claim of lower order. And secondly, centuries of

[1] *Supra*, § 506; Cromwell v. Sac Co., 94 U. S. 351

[2] *Supra*, § 504, and cases cited.

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wisdom have approved the familiar maxim, *Nemo debet bis vexari pro una et eadem causa.*[3] The peculiarity of this rule, it will be observed, is that it goes to the whole cause of action. A judgment may be offered as evidence in a subsequent suit upon some particular point in controversy, and may finally dispose of that question, and yet not overthrow the whole case. But when a former recovery is pleaded in bar, it must, if established, destroy the entire cause of action. In order to produce this result, it is said, the judgment must be shown to be between the same parties acting in the same character or quality, and to be founded on the same cause of action and demand.[4]

Now an examination of the possible cases in which a former judgment may be relied on as a bar will show that they may all be classified under the following heads:—

1. The defendant pleads that the plaintiff formerly recovered judgment against him upon the very same cause of action upon which he now sues. The plea is good, upon the principle of merger.

2. The defendant pleads that the same plaintiff formerly sued him upon the identical cause of action now set up, but he, the defendant, then recovered judgment. This plea also is good.

3. The defendant pleads a set-off or counterclaim. To this the plaintiff replies that the identical set-off or counterclaim was formerly made the basis of an action against him by the present defendant (or was formerly set up by the present defendant as a set-off to another suit between the same parties), and that, in such former controversy, said defendant recovered judgment (or was defeated) or had his set-off allowed (or rejected.) In either of these cases, the former judgment is well pleaded.[5]

4. The plaintiff's cause of action is a judgment which he formerly recovered against the same defendant. Here the latter is precluded from setting up any defense on the merits which he made or might have made in the original action.

[3] 5 Co. 61.

[4] Slocomb v. Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740.

[5] A judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by way of set-off. Jones v. Richardson, 5 Met. 247.

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In this enumeration we have not specifically mentioned the case where the plaintiff is barred of his action because his claim constitutes part of an entire and indivisible demand and therefore ought to have been included in the former suit; nor the case where the defendant's set-off is rejected because he ought to have set it up in the former action. But these are in reality corollaries to the rules already mentioned. Of the four typical cases given above, we are concerned, in this chapter, with the first three. The fourth will find a more appropriate place for its discussion in the chapter concerning suits on judgments.

§ 674. Doctrine of Merger.

Merger is the extinction of a lower right or remedy consequent upon its legal transformation or absorption into one of a higher force or dignity. For our present purpose, it may be defined as the consumption of a right of action by the recovery of a judgment upon it. "No principle is better settled than that a judgment or decree establishes in the most conclusive manner the sum due upon the claim sued upon. The cause of action is merged in the judgment, and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect."[6] Thus, where a judgment is recovered for a debt due by a bond, the debt is thereby changed into a matter of record and merged in the judgment, and the plaintiff's remedy is upon the latter security while it remains in force.[7] So where judgment is recovered on a note, it is merged and extinguished, and a second judgment cannot be had thereon between the same parties.[8] So where a judgment has been obtained against a corporation for the

[6] Ries v. Rowland, 11 Fed. Rep. 657; Cooksey v. Kansas City, etc., R. Co., 74 Mo. 477.

[7] Grant v. Burgwyn, 88 N. Car. 95, citing Higgen's Case, 6 Co. 45; King v. Hoare, 13 Mees. & W. 494.

[8] Schuler v. Israel, 27 Fed. Rep. 851; Conn. Mut. L. Ins. Co. v. Jones, 8 Fed. Rep. 303. But it is no defense to an action by an indorsee against the maker of a note that a prior indorsee, while the holder, and before the plaintiff took it, recovered judgment against the defendant and the payee. McLennan v. McMonies, 23 U. C. Q. B. 114; Tarleton v. Allhusen, 2 Ad. & El. 32.

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price of goods sold, an action cannot be maintained against it for fraud in obtaining a credit for the goods; the judgment for the purchase-price is as complete and full a remedy as would be a judgment for damages because of the fraud, and two judgments cannot be obtained against the defendant as an indemnity for the same loss.[9] But in order that the principle of merger may apply, it is necessary that the identical cause of action should have passed into judgment, in a litigation between the same parties or their privies, and that the plaintiff should have had a full and complete opportunity to recover his whole demand. In a case in Arkansas, it was held that a judgment against a steamboat,—that being a judgment *in rem* and not enforceable against the property of the owners,—if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners of the boat on the same contract. In reaching this conclusion, the court said it was evident that a judgment against the vessel was not even substantially a judgment against the owners, and consequently that the former recovery relied on was no bar to the present action.[10]

§ 675. Merger by Decree in Equity.

A decree in equity for the payment of money, merges the original debt in the same manner and to the same extent as a judgment at law. Thus, to an action upon a bond a plea was filed, setting forth that before the bringing of the action, a decree for deficiency had been made in a suit for foreclosure of a mortgage given for the same debt, and it was held that the plea was good.[11] "The view of the pleader," said the court in the case cited, "was that the recovery by way of a decree under the statute was a bar against any other action upon the original cause of action. The notion of plaintiff's counsel is that a decree is not a judgment in a sense that implies a merger of the original cause of action, and that, therefore, the bond is still suable. The point made is that no action will lie on a decree, as it will upon a judgment, and that therefore a decree has not the qualities of a judgment in respect to its effect in extinguishment of the

[9] Caylus v. Railroad, 76 N. Y. 609.
[10] Toby v. Brown, 11 Ark. 308.
[11] Mutual Life Ins. Co. v. Newton (N. J.), 14 Atl. Rep. 756.

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original ground of the suit." But without admitting that this contention was correct, the learned judge proceeded to say: "The denial of a right of action upon such ground would not, in my judgment, render such a decree less conclusive in bar of another suit for the same cause of action; for the question is whether the decree amounts to a determination of the rights of the parties in respect to the identical matter involved in the present action. If so, it is a bar. The doctrine of *res judicata* is plain and intelligible, and amounts simply to this: that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either by the same or any other tribunal. And this is true whether the first adjudication is in a court of law or equity. A decree in chancery may be given in evidence between the same parties, or those claiming under them; for their judgments must be of authority in those cases where the law gives them jurisdiction; for it were very absurd that the law should give them jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof. Hence it is settled that a verdict and judgment of a court of record, or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. If the decree is final, then its result is to merge the original cause of action."

§ 676. Foreign and Sister State Judgments.

In studying the doctrine of merger it becomes important to inquire as to the effect, in this respect, of judgments rendered in foreign states and countries. The modern doctrine in England and America, as will be shown more fully hereafter, is that a judgment recovered in the courts of a foreign nation does *not* merge the original cause of action, and therefore will not prevent a new suit upon it in the home courts.[12] But a judgment recovered in a court of record of any one of the United States will merge the original claim or demand and may be pleaded in bar of a new suit on such claim or demand in any

[12] See *infra*, § 847.

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other state. If the plaintiff desires to have execution of his recovery in a second state, he must sue upon the judgment.[13]

§ 677. New Debt created by the Judgment.

One of the most important results of the merger of a cause of action in the judgment recovered upon it is that thereby a new debt is created. Thenceforth the original claim or demand is extinguished, or is transformed into a new obligation. But whether the nature of the new debt is affected by the nature of the old claim,—whether the judgment is independent of the characteristics of the cause of action which it has absorbed,—whether two judgments must be differently considered and differently enforced on account of a diversity in the nature of the demands on which they are severally founded,—these are questions upon which the authorities exhibit much variety of opinion. For instance, does a cause of action sounding in tort become metamorphosed into a contract by the recovery of a judgment upon it? It seems to be settled, upon the very highest authority, that a judgment founded upon an action of tort cannot be considered as a contract within the meaning of that clause of the federal constitution which prohibits the states from passing any law "impairing the obligation of contracts."[14] Yet it has also been held that, under a statute authorizing claims *ex contractu* to be offered in set-off, a judgment may be so offered, notwithstanding it was rendered in an action of tort.[15] Again, it is said that although the original contract was tainted with usury, this blemish does not follow it into judgment, and the new debt created by the judgment is not affected thereby.[16] In an early case in Ohio, the action was upon a judgment recovered in another state upon a forfeited recognizance, taken in consequence of an alleged violation of the penal laws of the latter state; and it

[13] See *infra*, § 864.

[14] Garrison v. New York, 21 Wall. 196; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211; Black, Constitutional Prohibitions, § 131. See *supra*, vol. 1, §§ 9–11.

[15] Taylor v. Root, 4 Keyes, 335. A *verdict* in an action of tort does not convert the tort into a debt; it does not become a debt until it is merged in a judgment. Stauffer v. Remick, 37 Kans. 454, 15 Pac. Rep. 584.

[16] Thatcher v. Gammon, 12 Mass. 268.

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was contended for the defendant that "the courts of one state will not enforce the penal laws of a sister state." But the court said: "The suit is for the recovery of a sum of money. It is founded on judgments obtained in the supreme court of the state of Connecticut, and not on the penal laws of that state." [17] As another illustration of this transforming power of a judgment, we may mention that where an administrator recovers judgment on a debt due to his intestate, the new debt thereby created is due to *him*, and consequently he may sue upon it in the courts of another state, although, as administrator, he could not have sued upon the original claim outside of the state which granted his letters.[18] On the other hand, it has been broadly declared that "whenever justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt." [19] Thus, a judgment will merge a mortgage as a cause of action, but will not destroy its lien.[20] So property fraudulently conveyed may be subjected to the creditor's claim, and the grantee charged as a trustee, although the original debt is transformed into a judgment, and the judgment is rendered after the conveyance.[21] Again, the holder of a note, who, after the maker's voluntary assignment, obtains judgment on it, is not debarred from filing a claim for the amount of the judgment against the estate, since the debt is not so merged in the judgment as to make a new debt lacking the old one's incidental right to share in the assets.[22] So in a case where the defendant applied to the court to have an execution against him stayed and the judgment satisfied, by reason of a certificate of discharge in insolvency proceedings, it was held that the court had a right to go behind the judgment and examine the pleadings, and where they showed that the original claim was created by fraud, and therefore not barred by the discharge, it was not so merged in the

[17] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

[18] Biddle v. Wilkins, 1 Pet. 686; Talmadge v. Chapel, 16 Mass. 71; Slauter v. Chenowith, 7 Ind. 211; Young v. O'Neal, 8 Sneed. 55; Hall v. Harrison, 21 Mo. 227; Allen v. Lyman, 27 Vt. 20; Trecothick v. Austin, 4 Mason, 16.

[19] Donald v. Kell, 111 Ind. 1, 11 N. E. Rep. 782; Madison Tp. v. Dunckle (Ind.), 16 N. E. Rep. 593.

[20] Curtis v. Gooding, 99 Ind. 45; Pence v. Armstrong, 95 Ind. 191; Manns v. Bank, 73 Ind. 243.

[21] Stout v. Stout, 77 Ind. 537; Bump, Fraud. Conv. 498.

[22] Second Nat. Bank v. Townsend, 114 Ind. 534, 17 N. E. Rep. 116.

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judgment as to create a new debt subject to be discharged by the insolvency certificate.[23]

§ 678. Estoppel by Election.

It is held that when a party has elected to sue upon a written contract as it is, and has suffered a defeat, he is bound by that election, and cannot thereafter bring an action to reform the contract; but the former judgment may well be pleaded in bar against him.[24]

Part II. What Judgments Operate as a Bar.

§ 679. Constitution of the Court.

In order that a judgment should operate as a merger of the cause of action, or as a bar to a subsequent suit between the same parties, it is first of all necessary that it should have proceeded from a lawful court of justice. Without this, it is of no avail whatever as *res judicata* or as an estoppel to a second action. We have already discussed in detail the character and constitution of the court, with reference to the validity of its judgments, and the rules and authorities applicable to the present subject may be seen at large in our earlier sections.[25]

§ 680. There must be a Valid Judgment.

Supposing the sentence relied on as a bar to have emanated from a lawfully organized court, it is necessary, in the next place, that it should be in the nature of a *judgment*. For example, an order of a probate court that a return of sale of land made by a guardian be recorded, under the statute, is simply a ministerial act, and does not conclude the parties in interest from investigating the conduct of the

[23] Carit v. Williams, 74 Cal. 183, 15 Pac. Rep. 751; Murphy v. Manning, 184 Mass. 488.

[24] Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655. For similar rulings see, *supra*, § 632.

[25] See *supra*, vol. 1, § 173, and vol. 2, § 516.

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guardian in making the sale.[26] Again, it is generally necessary that the adjudication should have been made in adversary proceedings. Thus, petitions for laying out and discontinuing highways are not proceedings wherein a former adjudication may be asserted as working an estoppel, as in an ordinary action at law, since such petitions are of necessity addressed largely to the discretion of the court.[27] But further, it is imperatively necessary that there should be a *valid* judgment. A judgment or decree rendered by a court or magistrate having no jurisdiction is a mere nullity and is no bar to a subsequent suit for the same cause of action.[28] A judgment, for instance, rendered by a justice of the peace, where the subject-matter of the suit was not within his statutory jurisdiction, cannot operate as an estoppel in another suit between the same parties.[29] So where the record shows that the court had no jurisdiction of one of the parties, such record is not admissible in evidence against such party.[30] It will be observed that a void judgment does not *merge* the cause of action. Hence, if a plaintiff recovers judgment on his demand, but, because of want of jurisdiction in the court, the same is entirely void, there is nothing to prevent him from bringing a second suit upon the same cause of action.[31] So a judgment which is ineffectual, by reason of a mistake in the name of one of the plaintiffs, will not preclude them from bringing a new suit to recover upon the original demand.[32] On the same principle, a judgment recovered by default in one state, by an administrator appointed in another state, on a demand due to the intestate from a citizen of the first state, is no bar to a suit on the same demand by an administrator of the same intestate duly appointed in the first state, although execution on the first judgment was levied on the debtor's property and returned satisfied.[33]

[26] Holbrook v. Brooks, 33 Conn. 347.

[27] Ferguson v. Sheffield, 52 Vt. 77.

[28] Reading v. Price, 3 J. J. Mar. 61, 19 Am. Dec. 162; Clark v. Stroud, 1 Swan, 274; Semple v. Bank, 5 Sawy. 394; Yon v. Baldwin, 76 Ga. 769.

[29] Kintz v. McNeal, 1 Denio, 436; Wamsley v. Robinson, 28 La. Ann. 793; Basom v. Taylor, 39 Mich. 682.

[30] Rhoades v. Delaney, 50 Ind. 468.

[31] Briscoe v. Stephens, 2 Bing. 213. Nor is it necessary that the former judgment should first be reversed; it is a mere nullity. Green v. Clawson, 5 Houst. 159.

[32] Wixom v. Stephens, 17 Mich. 518.

[33] Pond v. Makepeace, 2 Met. 114.

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§ 681. Erroneous or Irregular Judgments.

But although there must be jurisdiction in the court in order to make its judgment a bar, it is not necessary that it should be free from reversible errors. A former adjudication, remaining unreversed, will constitute a bar to any other suit between the parties founded upon the same cause of action, where it is not absolutely void, although it may abound in errors and irregularities.[34] Thus a decree which grants relief in excess of that asked for is none the less a bar to a subsequent suit upon the same matters; it is at most irregular and not subject to collateral impeachment.[35] Again, where an improper set-off has been admitted in a cause in a justice's court and tried, the record in that action is a bar to another action brought on the subject of such set-off.[36] On the same rule, where a prisoner is brought before a court or judge having jurisdiction of the person and subject-matter, on *habeas corpus*, and is discharged, the discharge, even though it may be erroneous, is final and conclusive, and the prisoner cannot be again arrested and committed on the same charge.[37]

§ 682. Verdict without Judgment no Bar.

A verdict, without a judgment entered upon it, is of no validity, either as an estoppel or as evidence.[38] It has been thought, however, in some cases, that this is only because the verdict is liable to be set aside, or to be rendered ineffectual by the granting of a new trial, or of a motion in arrest of judgment, and consequently, when these reasons do not exist, that there is no longer any objection to the giving

[34] Phillips v. Lewis, 109 Ind. 62, 9 N. E. Rep. 395; Kelley v. Mize, 3 Sneed, 59; *supra*, § 514.

[35] McCrillis v. Harrison Co., 68 Iowa, 592, 19 N. W. Rep. 679.

[36] McLean v. Hugarin, 13 Johns. 184.

[37] *Ex parte* Jilz, 64 Mo. 205, 27 Am. Rep. 218.

[38] Needham v. Bremner, L. R. 1 C. P. 583; Reed v. Proprietors, 8 How. 274; Smith v. McCool, 16 Wall. 560; Whitaker v. Bramson, 2 Paine, 209; Saylor v. Hicks, 86 Pa. St. 392; Lorillard v. Clyde, 48 N. Y. Superior Court, 409; Humphreys v. Browne, 19 La. Ann. 158; Dunlap v. Robinson, 12 Ohio St. 530; Gurnea v. Seeley, 66 Ill. 500; Schurmeier v. Johnson, 10 Minn. 319, (Gil. 250;) McReady v. Rogers, 1 Nebr. 124; Benson v. Post, 2 Dak. 220, 9 N. W. Rep. 684; Estate of Holbert, 57 Cal. 257. Compare Kane v. Dulex, 3 E. D. Smith, 127.

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of a conclusive operation to the mere verdict. Thus where the statute required a justice of the peace to enter judgment upon the findings of the jury, allowing him no discretion whatever in the way of granting a new trial or arresting the judgment, it was held that the verdict would bar a second suit upon the same cause of action, although the justice omitted to enter judgment upon it.[39] This view derives indirect support from the authorities which hold that the acquiescence of the parties in the verdict, as evidenced by positive acts, will obviate the necessity of entering judgment upon it to make it a bar. Thus in Pennsylvania, the record of a verdict for damages, to be released on the performance of a certain act by the defendant, where no motion for a new trial or in arrest of judgment is made, but judgment is not entered on the verdict, in consequence of the performance of the required act by the defendant, is conclusive as to the same matters coming directly in question in another suit, unless obtained by fraud or collusion.[40] So where the defendant obtains a verdict for costs, which the plaintiff pays, this constitutes an acquiescence in the verdict and a renunciation of the right to further prosecute the claim adjudicated in that suit, and will bar another action thereon, even though no formal judgment be entered on the verdict.[41] The same principles which prevent a verdict without a judgment from becoming a bar, in the generality of cases, also apply to certain parallel cases. Thus, "a master's report is not evidence as an adjudication between the parties until it has been accepted and judgment rendered upon it."[42] So also it is held that special findings of a jury in an action at law, not confirmed by a judgment of the court, nor essential to nor involved in the general verdict, are not conclusive of the facts found, on either party, in another trial of the same cause.[43]

§ 683. Judgment Reversed or Vacated.

The reversal of a judgment throws the whole matter open and destroys its effect as an estoppel; the judgment no longer effects a

[39] Felter v. Mulliner, 2 Johns. 181.
[40] Estep v. Hutchman, 14 Serg. & R. 436.
[41] Pollitz v. Schell, 80 Fed. Rep. 421.
[42] Nash v. Hunt, 116 Mass. 249.
[43] Hawks v. Truesdell, 99 Mass. 557.

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merger of the cause of action, and it does not bar a second action on the same demand.[44] Thus, where a judgment by confession is reversed on appeal, for the reason that the power was insufficient, and is remanded to the court below for further proceedings, it is no longer a bar to a second suit for the same cause of action.[45] In a recent case, the plaintiff sued the defendants in a state court and recovered judgment, but the appellate court, reviewing the case, decided the points of law involved in it against the plaintiff, set aside the judgment for error in the ruling of the court below, and sent the case back for a new trial; the plaintiff then became nonsuit, and brought his action in the United States circuit court on the same demand. It was held that he was not estopped.[46] In another case, it appeared that the defendant company was sued for damages on a contract to furnish free switching privileges. It pleaded as *res judicata* a decree against it and another railroad. The decree had been appealed to the supreme court by the other company and there reversed. It was against this defendant to make certain switch connections, and against the other company to allow them to be made. It was held that, as the decree was of such a joint character, if reversed as to one it was reversed as to both, and could not avail the defendant as a bar, although it did not appeal from it.[47] Again, where a particular point was adjudicated on the trial of an action, and an appeal was taken from the judgment, but on the appeal the court above entirely omitted to consider that point, it was held that it was not *res judicata* when it came up in a subsequent suit; for the taking the appeal vacated the judgment, and the point was not determined again above.[48] But a secondary or dependent judgment may in some cases stand, although the original or principal judgment falls. Thus, a decree confirming the title of a purchaser of land at

[44] French v. Edwards, 4 Sawy. 125; Goodrich v. Bodurtha, 6 Gray, 328; Fries v. Penna. R. Co., 98 Pa. St. 142; Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Borden Manuf. Co. v. Barry, 17 Md. 419; Fleming v. Riddick, 5 Gratt. 272, 50 Am. Dec. 119; Taylor v. Smith, 4 Ga. 133; Clodfelter v. Hulett, 92 Ind. 426; Edgar v. Greer, 10 Iowa, 279; Atkison v. Dixon, 96 Mo. 582, 10 S. W. Rep. 163.

[45] Edgar v. Greer, 10 Iowa, 279.

[46] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. Rep. 974.

[47] Pittsburgh, Ft. W. & C. R. Co. v. Reno, 128 Ill. 278, 14 N. E. Rep. 195.

[48] Turley v. Turley, 85 Tenn. 251, 1 S. W. Rep. 891.

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execution sale is conclusive against the parties and their privies, although the judgment on which the execution was issued is afterwards reversed on writ of error.[49] What happens when a judgment is reversed, generally happens also when it is opened, vacated, or set aside by the court which rendered it,—it is no longer conclusive or a bar.[50] And the verdict of a former jury in the same cause, which has been set aside by the court, is not evidence.[51]

§ 684. Effect of Granting New Trial.

In some of the states it is held that where a verdict has been given, but a motion for a new trial is pending, the former verdict is conclusive in a suit begun in the interval on the same cause of action.[52] But in Illinois, where the plaintiff in ejectment, after judgment against him, obtains a new trial under the statute, and by amendment makes a new party defendant, and before a second trial dismisses his suit, the former judgment is no bar to a second action brought by him against such new defendant. The effect of the new trial, it is argued, is to vacate and render wholly inoperative the prior judgment, and leave the parties as they stood before the trial, except that the plaintiff cannot claim a second new trial under the statute in the same suit. And thereafter such prior judgment cannot be pleaded or given in evidence for any purpose in any subsequent suit.[53] So in Texas, where a judgment on a verdict against one and in favor of the other defendants, who are jointly and severally sued, is set aside, and a new trial granted on the motion of the former, such judgment is not *res judicata* as to the latter defendants.[54]

[49] Gould v. Sternburg (Ill.), 21 N. E. Rep. 628.

[50] Small's Appeal (Pa.), 15 Atl. Rep. 807. After a judgment by confession is opened, the confession may be given in evidence as an admission of the amount due, but may be overcome by other evidence, and is not an estoppel. Earnest v. Hoskins, 100 Pa. St. 551.

[51] Ridgely v. Spenser, 2 Binn. 70.

[52] Casebeer v. Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Young v. Brehi, 19 Nevada, 379, 12 Pac. Rep. 564; Chase v. Jefferson, 1 Houst. 257.

[53] Sheldon v. Van Vleck, 106 Ill. 45; Preachers' Aid Society v. England, 106 Ill. 125.

[54] Gulf, C. & S. F. R. Co. v. James (Tex.), 10 S. W. Rep. 744.

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§ 685. Pendency of Appeal.

According to the doctrine accepted in some of the states, upon the recovery of a judgment the cause of action is destroyed by merger, and the granting of an appeal does not revive it so that another suit may be maintained on it, nor does it impair the judgment, but the latter continues to subsist until reversed and set aside. In such case the defendant, if sued again during the pendency of the appeal, may plead a former recovery in bar.[55] Reasonable as this view appears, it must be admitted that it is opposed by a settled line of decisions in numerous other states.[56]

§ 686. Effect of Discontinuance.

In New York, the discontinuance of an action destroys all its effect and throws the whole matter at large. Thus, the plaintiff began a foreclosure on a mortgage, and having obtained the usual judgment, and also a judgment that the defendant was liable for a deficiency, he did not proceed to a sale, but obtained an order of discontinuance and began an action on the bond. The trial court held that the adjudication in the foreclosure case absolutely estopped the defendant from giving any evidence to defeat or diminish the plaintiff's recovery. But on appeal, it was held that this was error; that by the discontinuance of an action, it is as if it had never been.[57] In Pennsylvania, on the other hand, if the plaintiff, after suit brought, enters on the docket "ended and debt and costs paid," it is held equivalent to an entry of satisfaction and may be pleaded in bar of a new suit for the same cause of action.[58] In the absence of a formal entry of judgment, it is difficult to see how this entry (or the other usual formula "settled and discontinued") could operate as a bar on the strict principle of estoppel by former recovery. For it is the judgment alone which merges the cause of action, and even a verdict,

[55] Cloud v. Wiley, 29 Ark. 80.
[56] *Supra*, § 510, and cases there cited.
[57] Loeb v. Willis, 100 N. Y. 231, 3 N. E. Rep. 177.
[58] Phillips v. Israel, 10 Serg. & R. 391; Rose v. Turnpike Co., 3 Watts, 46.

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without a judgment upon it, is no bar. But such an agreement of record would no doubt produce the same effect if pleaded and given in evidence as proof of a compromise and settlement.

§ 687. Decision of Court without Jury.

It is true that a verdict without a judgment upon it is no bar to another suit, but the converse of this would not be true. On the contrary, when a case is legally and properly tried by the court alone, without the aid of a jury, its judgment is just as binding and conclusive upon the parties as if based upon a verdict.[59] And the fact that the court's decision was *wrong* does not give the injured party a right to bring another suit upon the same claim, for he might have appealed and had the error corrected.[60] But while "it is the general duty of the court trying a case to find upon all the issuable facts, yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment."[61] Where the parties to an action at law are entitled to an inquiry of damages by a jury, and are deprived of that right by the action of the court in transferring the action to equity, they will not be precluded by the decree.[62]

§ 688. Awards.

A valid award of arbitrators, upon a matter duly and properly submitted to their decision, effects a merger of the cause of action, which is thereupon completely extinguished, and the award will constitute a bar to the prosecution of an action, at law or in equity, upon the same demand. If the award is made conditional upon a payment or performance, the condition must be fulfilled before the

[59] Bassett v. United States, 9 Wall. 38; Dauchy v. Goodrich, 20 Vt. 127; Bissell v. Kellogg, 60 Barb. 617; Kibbee v. Howard, 7 Wis. 150.

[60] Beall v. Pearre, 12 Md. 550.

[61] Mitchell v. Insley, 33 Kans. 654, 7 Pac. Rep. 201; Auld v. Smith, 23 Kans. 65.

[62] Creager v. Walker, 7 Bush, 1.

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character of finality will attach. But otherwise it is conclusive whether performed or not.[63]

§ 689. Judgment in Summary Proceedings.

The judgments rendered in summary proceedings under statutes are generally conclusive. Thus an adjudication in a landlord and tenant case is a final determination as to the rights of the parties to the premises under the lease or contract existing between them, and the tenant cannot afterwards set up any claim relating to the holding which he might have had.[64] So where a statute provides that judgments or final orders may be obtained on motion by clients against attorneys for the recovery of money or property collected by them, an adjudication denying a motion, under this law, estops the plaintiff from subsequently bringing an action to recover the amount claimed.[65]

§ 690. Lis Pendens and Priority of Decision.

The pendency of another suit, upon the same cause of action, in another court of concurrent jurisdiction, cannot be pleaded in bar, although it is good in abatement.[66] "While it is certainly true that the pendency of a suit in one court is not a defense, although it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but when the matter is pleaded in due time, and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be

[63] Brazill v. Isham, 12 N. Y. 9; *supra*, § 526.

[64] Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. Rep. 497.

[65] Hawk v. Evans (Iowa), 41 N. W. Rep. 868.

[66] Whitaker v. Bramson, 2 Paine, 209; Wilcox v. Kassick, 2 Mich. 165.

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held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered."[67] It is not the priority in the commencement of one action that renders a judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment when given, whether in the action commenced first or last, extinguishes the original cause of action and gives to the plaintiff in lieu thereof one of a higher nature.[68]

§ 691. Judgments on Motions.

According to the doctrine of the earlier cases (and some more recent decisions), the determination of a motion or summary application is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the more regular form of an action.[69] Thus a party is not estopped from bringing an action to set aside a judicial sale made without authority, by the fact that the court may have overruled a motion to set aside the order confirming such sale.[70] So where a motion to open a judgment rendered on a warrant of attorney is refused, the party may resort to equity, and the denial of such motion is not such a prior adjudication as to bar him.[71] But it is now said that this rule no longer obtains in its former strictness; and regard is now had less to the form of the proceeding, and more to the substance and condition of the decision.[72] Further, there is a distinction to be noted between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights and from which an appeal lies. The latter are *res judicata* and binding upon the par-

[67] Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. Rep. 648; Estes v. Chicago, etc., R. Co., 72 Iowa, 235, 33 N. W. Rep. 647; Andrews v. Varrell, 46 N. H. 17; Bank of North America v. Wheeler, 28 Conn. 433.

[68] Bank of United States v. Merchants' Bank, 7 Gill, 415.

[69] Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419, 23 N. W. Rep. 854; Simpson v. Hart, 14 Johns. 75; Dickenson v. Gilliland, 1 Cow. 495; Acker v. Ledyard, 8 Barb. 514; Dryden v. Railroad, 23 Kans. 525; Easton v. Pickersgill, 75 N. Y. 599.

[70] Wills v. Chandler, 2 Fed. Rep. 273.

[71] Wistar v. McManes, 54 Pa. St. 318, 93 Am. Dec. 700; Ashton's Appeal, 78 Pa. St. 153.

[72] Wilson County v. McIntosh, 30 Kans. 234, 1 Pac. Rep. 572.

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ties, unless reversed or modified by an appellate tribunal.[73] Following these principles, it is held that when a motion to set aside a verdict is overruled and judgment rendered thereon, a similar motion in a subsequent suit between the same parties, or their privies in estate, to set aside a verdict settling the same questions in the same way, must be overruled.[74] So, to a complaint by a judgment-defendant to have a judgment declared satisfied, it is a good answer on the part of the judgment-plaintiff that the same matters alleged in the complaint were set up in answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated.[75] In Louisiana, it is held that if the form of procedure by a rule, instead of an injunction, to arrest an execution, has been adopted without objection, and a decision rendered thereon after issue joined on the merits, the defendant in execution, by whom the rule was taken, cannot afterwards renew the litigation by resorting to an injunction.[76]

§ 692. Renewal of Motion in the Same Case.

The doctrine of *res judicata*, in its strict sense, does not apply to incidental or interlocutory orders made in the progress of a cause. The court may, on a proper state of facts, allow a renewal of such a motion once decided, but such leave will not be granted unless a new state of facts has arisen since the former hearing, or the facts were not then presented by reason of surprise or excusable neglect.[77] And even when the second motion is founded on grounds not raised on the first, it will be denied, if such grounds might have been ascertained and presented by the exercise of due diligence.[78] In a case in New Hampshire, the plaintiff presented a petition to the court of common pleas praying that an action might be brought forward upon

[73] Spitley v. Frost, 15 Fed. Rep. 299.

[74] Page v. Esty, 54 Me. 319; Grier v. Jones, 54 Ga. 154.

[75] Reeves v. Plough, 46 Ind. 350.

[76] Trescott v. Lewis, 12 La. Ann. 197.

[77] Ford v. Doyle, 44 Cal. 635; Chichester v. Cande, 3 Cow. 39, 15 Am. Dec. 238. See Easton v. Pickersgill, 75 N. Y. 599; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. Rep. 228; Wings v. Hooper, 98 N. Car. 482, 4 S. E. Rep. 463; Roulhac v. Brown, 87 N. Car. 1; Nachtsheim v. Turner (Wis.), 36 N. W. Rep. 637.

[78] Nat. Bank of Port Jervis v. Hansee, 15 Abb. New Cas. 488.

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the docket, and that a certain judgment rendered therein against him might be vacated, but the petition was dismissed on hearing. He subsequently preferred another petition in the same court, containing the same allegations in substance, depending upon the same state of facts, and praying for the same relief. It was held by the supreme court that the former proceedings had in the cause barred the second petition.[79]

PART III. OF THE RULE THAT THE JUDGMENT MUST HAVE BEEN UPON THE MERITS.

§ 693. Merits must be Adjudicated.

The general rule is, that a former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceedings and judgment in the first case involved an investigation (or afforded full legal opportunity for an investigation) and determination of the *merits* of the suit.[80] Or, as otherwise expressed, the judgment must be upon the merits in a competent action, the plaintiff having sued in his proper character, and the pleadings having been correct.[81] "If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."[82] Hence a plea of former recovery which discloses

[79] Claggett v. Simes, 25 N. H. 402. See also Bangs v. Strong, 4 N. Y. 315.

[80] Hughes v. United States, 4 Wall. 232; Gould v. Railroad, 91 U. S. 526; Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125; Sayles v. Tibbitts, 5 R. I. 79; People v. Barrett, 1 Johns. 66; Vaughan v. O'Brien, 39 How. Pr. 515; Stowell v. Chamberlain, 60 N. Y. 272; Heikes v. Comm., 26 Pa. St. 513; Agnew v. McElroy, 10 Sm. & Mar. 552, 48 Am. Dec. 772; Wethered v. Mays, 4 Tex. 387; Houston v. Musgrove, 35 Tex. 594; Birch v. Funk, 2 Met. (Ky.) 544; Kendal v. Talbot, 1 A. K. Mar. 321; Thomas v. Hite, 5 B. Mon. 590; Cannon v. State, 17 Ark. 365; Vanlandingham v. Ryan, 17 Ill. 25; Carson v. Clark, 1 Scam. 113, 25 Am. Dec. 79; Delaney v. Reade, 4 Iowa, 292; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Verhein v. Stickbein, 57 Mo. 326; Wells v. Moore, 49 Mo. 230; Tucker v. Rohrback, 13 Mich. 73; Gray v. Dougherty, 25 Cal. 266.

[81] Johnson v. White, 21 Miss. 584.

[82] Hughes v. United States, 4 Wall. 232.

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the fact that the former judgment was not on the merits, is bad on demurrer.[83] The universality and importance of this rule are attested by the supreme court of Pennsylvania in the following forcible terms: "It has been held an acknowledged principle that when it can be gathered from the record that the merits of the controversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit. A contrary rule would be founded in such rank injustice as to be insupportable, and had such an one been even entertained in the earlier ages of the law, when reason and truth were but too often made to give way before the fancied force of technical subtleties and hair-drawn distinctions, it must long since have succumbed to the enlightened wisdom which tolerates litigation only as a means of administering uniform justice."[84] We must not, however, lose sight of the fact that a judgment, although not upon the merits, and therefore not conclusive in respect to the very cause of action, may still be final as to the precise point upon which the determination was based. This will appear more fully hereafter. And further, although a judgment was rendered on technical grounds, or by dismissal, or generally not on the merits, yet the admissions made by a party in his pleadings in that suit may be received as evidence against him (though not conclusive) in a subsequent action between the same parties.[85]

§ 694. Meaning of the Term "Merits."

What, then, is the meaning of the term "merits"? What precise significance are we to attach to the phrase when it is said that a given judgment is or is not "on the merits"? The lexicographers define the merits of a case as the real or substantial grounds of the action, in contradistinction to any technical or collateral matter which has been raised in the course of the suit.[86] And a learned writer is

[83] Perkins v. Moore, 16 Ala. 9.

[84] Carmony v. Hoober, 5 Pa. St. 305, Bell, J.

[85] Bore v. Quierry, 4 Mart. 545, 6 Am. Dec. 718.

[86] Holthouse, Brown, Anderson, & c.

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of opinion that "judgment proceeds upon the merits when the very cause of action is decided upon."[87] Now in the first place, it is clearly not intended that the judgment must be meritorious in the ethical sense.[88] It is not required that the decision be *righteous*. Courts are to administer justice, and yet a judgment may be "on the merits" although an unerring intelligence and infallible sense of moral right might perceive that it worked wrong. In the next place, it is not meant that the sentence must be even *legally* right. A judgment may abound in errors and irregularities, and yet, if not absolutely void, it stands as a final adjudication until reversed or set aside, and is just as much a bar to a subsequent suit as one that should be free from the suspicion of a flaw or blemish. And again, it is not considered necessary that there should have been an actual trial and canvassing of the facts of the case. For a judgment entered upon confession without action is as conclusive as any other. But on the other hand, it *is* necessary that the ultimate right of action should have been in some way involved in the decision. If the judgment goes off on an objection to the jurisdiction, or on a showing that the plaintiff has mistaken the form of action, or by reason of a defect of parties, or because the suit is premature,—in any such case it needs no argument to show that the merits have not been reached. On the whole, then, we conclude that a judgment is "upon the merits" when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions. But it is far less easy to frame an unexceptionable definition of this rather vague term, than to enumerate the various instances in which a judgment may be rendered that is *not* on the merits. And these different cases will be taken up singly in the following sections. In the mean time, however, the general doctrine may be made more clear by the citation of some illustrative cases. Where a mortgagor files a complaint for the purpose of obtaining relief and to have the mortgage cancelled, and the com-

[87] Bigelow on Est. p. 30.

[88] Parkes v. Clift, 9 Lea, 524, 531.

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plaint is dismissed on the ground that, upon the pleadings and proof, he is not entitled to the relief demanded, he is thereby estopped, in a subsequent suit to foreclose, from denying the validity of the mortgage.[89] A decision that the subject-matter of the suit has already been determined by a valid and subsisting judgment between the parties, is a decision upon the "merits" of the case.[90] On the other hand, in a recent case it appeared that after a general demurrer to a petition had been overruled, the defendant answered, setting up matter which constituted no valid defense. The case was tried by the court, and the petition was dismissed, no reason for the decision being given. On appeal this decision was affirmed, on the ground that the petition did not state a cause of action. It was held that this judgment was no bar to another suit on the same demand, the case not having been determined upon its merits.[91] Where judgment was rendered in a suit "that the plaintiff from having and maintaining his action should be barred, and that the defendant recover his costs," this was considered to be a judgment on the merits of the action.[92]

§ 695. Judgment must be Final.

In order to bar a second action, the judgment must be *final*. "It is only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An interlocutory order is not such a judgment. It is not a judgment at all."[93] Thus a judgment declaring a party guilty of contempt is not a judgment upon the merits, and does not constitute an adjudication of the rights of the litigants.[94]

[89] Hamilton Building Assn. v. Reynolds, 5 Duer, 671.

[90] Buck v. Spofford, 35 Me. 526.

[91] Pepper v. Donnelly (Ky.), 8 S. W. Rep. 441.

[92] Dixon v. Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

[93] Webb v. Buckelew, 82 N. Y. 555.

[94] Proctor v. Cole, 104 Ind. 373, 3 N. E. Rep. 106.

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§ 696. Judgment upon Plea in Abatement.

On the principle that the judgment must be final, and not one that turns upon a preliminary question, it is held that when a former action between the parties was dismissed upon some matter pleaded in abatement, the decision is not a bar to a second action upon the merits.[95] But under the code system of pleading, where the defendant is authorized to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action together with other defenses on the merits, and the issues as to both are found for the defendant, but the judgment is apparently entered for the defendant upon the finding upon the merits, the matter upon the merits will be *res judicata*, and the parties will be estopped from further litigating the merits, even though the issue upon the matter in abatement is also found in favor of the defendant, and the judgment might have rested upon that issue.[96]

§ 697. Judgment by Default.

A final judgment taken by default is conclusive, by way of estoppel, in respect to all such matters and facts as were well pleaded and properly raised and material to the case made by the declaration, or other pleadings, and such issues cannot be re-litigated in any subsequent action between the parties or their privies.[97] "The general rule is that a default is only conclusive as to such matters as are

[95] Jordan v. Siefert, 126 Mass. 25; Atkins v. Anderson, 68 Iowa, 739, 19 N. W. Rep. 823; Garrett v. Greenwell, 92 Mo. 120, 4 S. W. Rep. 441; Clark v. Young, 1 Cranch, 181; Griffin v. Seymour, 15 Iowa, 30; Birch v. Funk, 2 Met. (Ky.) 544.

[96] The 420 Mining Co. v. Bullion Mining Co., 3 Sawy. 634; Sheldon v. Edwards, 35 N. Y. 279.

[97] Leonard v. Simpson, 2 Bing. N. C. 176; Derby v. Jacques, 1 Cliff. 425; Gaskill v. Dudley, 6 Met. 546, 39 Am. Dec. 750; Briggs v. Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Thatcher v. Gammon, 12 Mass. 268; Newton v. Hook, 48 N. Y. 676; Brown v. Mayor, 66 N. Y. 385; Jarvis v. Driggs, 69 N. Y. 143; McCalley v. Wilburn, 77 Ala. 549; Ellis v. Mills, 28 Tex. 584; Dunn v. Pipes, 20 La. Ann. 276; Ligon v. Triplett, 12 B. Mon. 283; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78; Fletcher v. Holmes, 25 Ind. 458; Doyle v. Hallam, 21 Minn. 515; Van Valkenburgh v. Milwaukee, 45 Wis. 574; Kittridge v. Stevens, 16 Cal. 381; *supra*, vol. 1, § 87.

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properly averred or charged in the complaint."[98] Hence a defendant, by not answering the complaint, does not admit that the plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief as is authorized by the facts properly alleged.[99] In regard to the conclusiveness of a default judgment upon defenses which *might* have been presented, there is apparently some uncertainty in the decisions. According to the English rule, a defendant is not estopped from setting up a particular defense to an action, by the fact that, in a former action between the same parties, such defense would have been available, but he omitted to present it and suffered judgment by default.[100] But this doctrine is too sweeping to be accepted by our courts. And in fact there are cases going to the opposite extreme, and holding that the judgment is conclusive as to all defenses which might have been urged against the plaintiff's demand.[101] Probably, however, it is necessary to distinguish between matter which would go in *avoidance* of the action and such as would *bar* it. Take, for example, the case of a part payment which the defendant omitted to set up and which was not allowed in the judgment. It was held at one time that the default judgment would not estop him from afterwards maintaining an action to recover back the amount.[102] But the cases so holding have been overruled, and it may now be regarded as settled that in any case where the defendant neglects a legal opportunity to set up a partial payment, he cannot afterward seek credit for it by a new suit.[103] On the other hand, a judgment for rent due under a lease, rendered upon default, without release pleaded, is not conclusive evidence, in an action for subsequently accruing rent, that the term had not been surrendered and the tenant released from liability prior to the commencement of the first action; for, the release not having been set up, that question was not involved in the judgment.[104]

[98] Barton v. Anderson, 104 Ind. 573, 4 N. E. Rep. 420.

[99] Argall v. Pitts, 78 N. Y. 239.

[100] Howlett v. Tarte, 10 C. B. & S. 813.

[101] McCalley v. Wilburn, 77 Ala. 549.

[102] Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14; Smith v. Weeks, 26 Barb. 463.

[103] Fuller v. Shattuck, 13 Gray, 70; Binck v. Wood, 43 Barb. 315. And see *infra*, § 758.

[104] Hanham v. Sherman, 114 Mass. 19. And see Cromwell v. Sac, 94 U. S. 351.

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Thus far we have spoken of final judgments by default. The case is different with an interlocutory default judgment. The latter merely admits a cause of action, and while the precise character of the cause of action, and the extent of the defendant's liability, remain to be determined by a hearing in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby.[105] Yet the judgment by default will preclude the defendant from using, for the purpose of reducing the damages, any testimony which would have defeated the action had a plea in bar been put in.[106] The same general principles apply to the parallel case in equity. An order taking a bill *pro confesso* for want of an answer dispenses with proof at the hearing, and is conclusive that the matter of the bill is true, as if the same were confessed in an answer.[107]

§ 698. Judgment upon Confession.

A judgment entered upon confession without action is as conclusive as any other judgment, and is equally protected against collateral attack or impeachment; and, like a judgment rendered after a contestation of the merits, it operates as a merger of the cause of action, and while it remains in force, the plaintiff cannot maintain an action for the same claim or demand.[108] When a defendant offers to confess judgment for a part of the plaintiff's claim, and the plaintiff enters judgment for the amount so tendered, and proceeds to execution, he cannot recover the balance of the claim.[109] So a judgment by con-

[105] Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Whitaker v. Bramson, 2 Paine, 209.

[106] Garrard v. Dollar, 4 Jones (N. Car.) 175, 67 Am. Dec. 271. See *supra*, vol. 1, § 91.

[107] Attorney-General v. Carver, 12 Ired. 231.

[108] Whitaker v. Bramson, 2 Paine, 209; Barney v. Goff, 1 D. Chip. 304; Sheldon v. Stryker, 34 Barb. 116; Neusbaum v. Keim, 24 N. Y. 325; Kirby v. Fitzgerald, 31 N. Y. 417; Braddee v. Brownfield, 4 Watts, 474; Secrist v. Zimmerman, 55 Pa. St. 446; Weikel v. Long, 55 Pa. St. 238; Dean v. Thatcher, 32 N. J. Law, 470; State v. Mangum, 6 Ired. 369; Goff v. Dabbs, 4 Baxt. 300; Jeffries v. Morgan, 1 Ark. 169; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Sherman v. Christy, 17 Iowa, 322; Twogood v. Pence, 22 Iowa, 543.

[109] Dodds v. Blackstock, 1 Pittsb. 46.

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fession entered when the cause is at issue and ready for trial in an appellate court, upon appeal from a justice's court, is conclusive upon the defendant in a subsequent action to enforce further payments upon the same contract.[110] The rule of the English cases is different in this respect from ours. It is there held that a judgment entered by confession before the formation of an issue is not conclusive of the facts on which the plaintiff's right of action depends.[111]

§ 699. Nonsuit no Bar.

It is a settled and inflexible rule that a judgment of nonsuit is not a judgment upon the merits, and therefore it is no bar to another suit upon the same cause of action.[112] Thus, in an action for claim and delivery, where the answer set up, as new matter, that in another action by defendant against plaintiff to recover the same property, a judgment of nonsuit had been rendered against him, it was held that this was no defense to the present action and that such matter was sham and irrelevant.[113] So a nonsuit in an action against a deputy sheriff for the wrongful attachment of property is no bar to an action

[110] Orr v. Mercer Ins. Co., 114 Pa. St. 387, 6 Atl. Rep. 696.

[111] Goucher v. Clayton, 11 Jur. N. S. 107.

[112] Homer v. Brown, 16 How. 354; Manhattan Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. Rep. 99; Haldeman v. United States, 91 U. S. 584; Hammergen v. Schurmeier, 8 Fed. Rep. 77; Evans v. White, 1 Hempst. 296; Derby v. Jacques, 1 Cliff. 425; Greely v. Smith, 1 Wood. & M. 181; Knox v. Waldoborough, 5 Me. 185; Brett v. Marston, 45 Me. 401; Haynes v. Jackson, 66 Me. 93; Jay v. Carthage, 48 Me. 353; Holton v. Gleason, 26 N. H. 501; Eaton v. George, 40 N. H. 258; Morgan v. Bliss, 2 Mass. 111; Jones v. Howard, 3 Allen, 223; Marsh v. Hammond, 11 Allen, 483; Clapp v. Thomas, 5 Allen, 158; Bridge v. Sumner, 1 Pick. 370; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Wheeler v Ruckman, 51 N. Y. 391; Audubon v. Ins. Co., 27 N. Y. 216; Bate v. Fellowes, 4 Bosw. 638; Reynolds v. Garner, 66 Barb. 310; Blair v. McLean, 25 Pa. St. 77; Haws v. Tiernan, 53 Pa. St. 192; Vought v. Sober, 78 Pa. St. 49; Fisher v. Longnecker, 8 Pa. St. 410; Wortham v. Commonwealth, 5 Rand. 669; Beadle v. Graham, 66 Ala. 99; Allinet v. Creditors, 15 La. Ann. 130; Baudin v. Roliff, 1 Mart. N. S. 165, 14 Am. Dec. 181; Dana v. Gill, 5 J. J. Mar. 242, 20 Am. Dec. 255; Holland v. Hatch, 15 Ohio St. 464; Miller v. Mans, 28 Ind. 194; Holmes v. Chicago & A. R. Co., 94 Ill. 439; Gibbs v. Jones, 46 Ill. 319; Howes v. Austin, 85 Ill. 306; Ellington v. Crockett, 13 Mo. 72; Cheeny v. Cooper, 14 Nebr. 415, 16 N. W. Rep. 471; Wood v. Ramond, 42 Cal. 648; Gates v. McLean (Cal.), 9 Pac. Rep. 938.

[113] Fleming v. Hawley, 65 Cal. 492, 4 Pac. Rep. 494.

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against the sheriff for the same cause.[114] If the plaintiff in an action of detinue suffers a voluntary nonsuit, the judgment is not conclusive on him, in a subsequent action on the bond, as to the question of ownership.[115] The dismissal of an action of ejectment at the instance of the plaintiff settles no rights of the parties, is not an admission of any right or title in the defendant, and is not a bar to, and cannot be shown in evidence in, a second action.[116] So a nonsuit suffered by the appellee, on appeal from a justice to a circuit court, is no bar to a bill in chancery founded upon the same cause of action.[117] Where a judgment is reversed and the cause remanded for further proceedings, and the plaintiff in the court below then voluntarily becomes nonsuit, he is not estopped from bringing a new action.[118]

It is further to be observed, in respect to the application of this important rule, that it makes no difference that the nonsuit was *involuntary;* it is still no adjudication of the merits of the cause, and hence no bar to a new suit.[119] As observed by the supreme court of Maine, "in ordering a nonsuit on account of the insufficiency of the plaintiff's evidence, the court simply declares the law applicable

[114] Clapp v. Thomas, 5 Allen, 158.

[115] Savage v. Gunter, 32 Ala. 467.

[116] Van Vliet v. Olin, 1 Nev. 495.

[117] Crawford v. Summers, 8 J. J. Mar. 300.

[118] Holland v. Hatch, 15 Ohio St. 464.

[119] Howes v. Austin, 35 Ill. 396; Wood v. Ramond, 42 Cal. 644; Bournonville v. Goodall, 10 Pa. St. 133; National Water Works Co. v. School District, 23 Mo. App. 227; Gummer v. Trustees of Village of Omro, 50 Wis. 247, 6 N. W. Rep. 885. In the case last cited, Orton, J., delivering the opinion of the court, said: "We conclude that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same cause. This rule in respect to involuntary nonsuits is not only sustained by the authorities but by reason, and is evidently recognized generally, by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect in barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of the jury, or of the court, if a jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court on the plaintiff's case, and if he fails in his motion, to then go to a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision on the motion, the plaintiff should not be; and if the rule is adopted that a nonsuit granted upon the motion of the defendant is a bar to another action, then the correlative rule should be adopted also, that a decision against the motion operates as a judgment for the plaintiff."

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thereto. It says the facts proved by the plaintiff fail to cast any legal liability upon the defendant; but it does not attempt to determine the actual facts of the case, nor can it do so, for the law has imposed that duty elsewhere, and as the facts of the case are not determined, it does not follow that the plaintiff in some future suit may not be able to produce more and better evidence of his claim, which he is at liberty to do. This view is in full accord with the cases adjudged by courts that proceed according to the course of the common law."[120] But a compulsory nonsuit ordered by a justice of the peace is held, in some of the states, to be a bar to another action; because, as the justice has no power, in those jurisdictions, to enter any such judgment, it must be taken as equivalent to a judgment that the plaintiff has no cause of action.[121] It does not exempt a case from the operation of the principal rule to show that the judgment of nonsuit was entered upon an agreed statement of facts. According to the supreme court of the United States, "it is not only for a non-appearance, or for delays or defaults, that a nonsuit may be entered. The plaintiff's proceeding in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may agree to take it from the jury with the view to submit the law of the case to the court, upon an agreed statement of facts, with an agreement that the plaintiff shall be non-prossed if the facts stated are insufficient to maintain the right which he claims. The court in such case will order a nonsuit if it think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same as if he had been non-prossed for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent."[122]

Wherever we find the essential characteristics of a judgment of

[120] Pendergrass v. York Manuf. Co., 76 Me. 509, citing Morgan v. Bliss, 2 Mass. 111.

[121] Gould v. Crawford, 2 Pa. St. 89; Lawver v. Walls, 17 Pa. St. 75; Gillilan v. Spratt, 8 Abb. Pr. N. S. 13. See also Moreland Tp. v. Gordner, 109 Pa. St. 116.

[122] Homer v. Brown, 16 How. 354. To the same effect, Knox v. Waldoborough, 5 Me. 185; Derby v. Jacques, 1 Cliff. 432.

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nonsuit, whatever may be the language employed in the record-entry, the same trait of inconclusiveness attaches to the adjudication. Thus, for example, the entry of "neither party" (proceeds further with the action) is no evidence of an adjudication of the merits, and no bar to a future action; it is merely equivalent to a nonsuit and default by consent.[123] So where the record shows that the plaintiff failed to appear and his writ was "abated and dismissed," the defendant recovering five dollars and costs, this amounts to no more than a nonsuit, and will not bar a second action.[124] Again, a judgment simply dismissing the demand of an intervenor, on the ground that he was absent and not represented at the trial of the cause, cannot support the plea of *res judicata*. "The judgment is strictly one of nonsuit."[125] So in suits in equity where the plaintiff has a right to have his bill dismissed, and does so, because he is not ready for trial, the order of dismissal is in the nature of a nonsuit, and is no bar to another bill.[126] So where a judgment is reversed on appeal upon technical grounds not involving the merits, a simple judgment of reversal constitutes no bar to a second action for the same demand, but has the same effect as a judgment of nonsuit. And where the ground of reversal does not appear, the burden of proof is on the party who, in a subsequent suit, relies upon the adjudication as a bar.[127]

§ 700. Judgment on Retraxit.

"A *retraxit* is the open, public, and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered thereon by the defendant, the plaintiff's right of action is forever gone."[128] "A *retraxit* differs from a nonsuit in that the one is positive and the other negative; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in

[123] Marsh v. Hammond, 11 Allen, 483.
[124] Haws v. Tiernan, 53 Pa. St. 192.
[125] Bourg v. Gerding, 33 La. Ann. 1369.
[126] Kempton v. Burgess, 136 Mass. 192.
[127] Vaughan v. O'Brien, 57 Barb. 491.
[128] Cunningham v. Schley, 68 Ga. 105.

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court, and by this he forever loses his action." [129] It is well settled, therefore, that a *retraxit* is a present and perpetual release of all right of action for the subject-matter of the suit, and a judgment upon it estops the retractor from ever afterwards contesting the same matter.[130] It is the admission by the plaintiff, on the record, that he has no cause of action, which constitutes the bar and operates as an estoppel.[131] But it must be done after declaration filed; otherwise it is a mere discontinuance or nonsuit, and no bar, because no cause of action is disclosed on the record.[132] A judgment entered upon motion of defendant's attorney of record, with the consent of plaintiff's attorney, that "it appearing that the subject-matter in this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be, and the same is hereby, dismissed," is held to be a judgment on the merits, final in form and nature, being in the nature of a judgment on *retraxit*, and therefore a bar to a subsequent suit against the defendant on the same cause of action.[133] But where a judgment in ejectment was entered in favor of the plaintiff, on condition that he should enter a *remittitur* for certain interfering surveys specifically described, such a *remittitur* is not a *retraxit*, and is not a bar to another suit.[134] And the entry of a nonsuit as to one of two co-obligors in an action on a bond is not a *retraxit* as to him.[135] A nominal plaintiff, assignor of a chose in action, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action. This, it is said, would certainly not be a *retraxit*, and if it were, it would not avail the parties, being procured by fraud.[136]

[129] 3 Bl. Comm. 296.

[130] Beecher v. Shirley, Cro. Jac. 211; Cunningham v. Schley, 68 Ga. 105; Thomason v. Odum, 31 Ala. 108; Harris v. Preston, 10 Ark. 201; Lambert v. Sandford, 2 Blackf. 137; Evans v. McMahan, 1 Ala. 45; Coffman v. Brown, 7 Sm. & Mar. 125, 45 Am. Dec. 299; Lowry v. McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

[131] Coffman v. Brown, 7 Sm. & Mar. 125, 45 Am. Dec. 299.

[132] Lowry v. McMillan, 8 Pa. St. 157, 49 Am. Dec. 501.

[133] United States v. Parker, 120 U. S. 89, 7 Sup. Ct. Rep. 454.

[134] Gibson v. Chouteau, 7 Mo. App. 1.

[135] Crawford v. Glass, 11 Ired. 118.

[136] Welch v. Mandeville, 1 Wheat. 233.

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§ 701. Discontinuance.

At the common law, "a discontinuance is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist." [127] But in modern practice this is not the sole application of the term. "The word is also frequently used to indicate that 'the plaintiff discontinues his action.' The judgment in such case is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party." [128]

§ 702. Judgment of Non Pros.

A judgment of *non pros.* is exactly similar in its effects to one of nonsuit,—that is, it is no bar to a new suit on the same cause of action. This subject was discussed in *Howes* v. *Austin*,[129] where, according to the account of the case given by the court in its opinion, "the plaintiff was called and defaulted for want of a replication to the defendant's plea to the first and second counts of the declaration. The plaintiff had failed to reply within the time required by a rule of the court. A judgment was entered that the defendant, as to those counts, go hence without day. This presents the question as to the effect of this judgment. It is contended by plaintiff in error that this judgment is a bar to a future recovery on the cause of action described in those counts, whether in the same or a different action." But after quoting from 3 Bl. Comm. 296, and Archbold's Pr., vol. 2, p. 229, the court continued: "If, as Blackstone says, it is a judgment of nonsuit, or, as Archbold says, it is a final judgment for costs only, there can be no pretense that it operates to bar a future recov-

[127] 3 Bl. Comm. 296.
[128] Muse v. Farmers' Bank, 27 Gratt. 252. See also Gibson v. Gibson, 20 Pa. St. 9.
[129] 35 Ill. 396, 412.

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ery in that or any other action. Its only effect is to turn the plaintiff out of the court, on the cause of action non-prossed, leaving him at liberty to proceed for its recovery precisely as though the declaration or count non-prossed had never been filed." On the same principle, a *nolle prosequi* to the whole declaration is nothing more than a discontinuance, and therefore constitutes no bar to a future action.[140]

§ 703. Dismissal of Complaint.

In those states where the code system of pleading and practice obtains, the authorities hold generally that the mere dismissal of a complaint in an action at law, even after the plaintiff has put in his evidence on the trial, has no more force than a nonsuit at common law, and does not bar a subsequent action for the same cause.[141] As there may be various sorts of nonsuits, considered with reference to the stage of the cause at which entered, and in respect to the question of the plaintiff's acquiescence, so will it be with judgments of dismissal. And in the first place, it is perfectly evident that a judgment entered upon the dismissal of a complaint because of the plaintiff's failure to appear, where there was no trial of the action and no consideration of its merits, cannot be a bar to a subsequent suit.[142] And when it appears from the record that the court never determined the merits of the controversy nor rendered any judgment affecting the same, but simply dismissed the plaintiff's action, without trial and without evidence, such judgment does not support a plea of former adjudication.[143] But again, the dismissal may be *voluntary* on the part of the plaintiff. Thus, where an action has been tried and a verdict for the plaintiff set aside by the court, and a new trial granted, the plaintiff has a right to dismiss or discontinue his action the same as if no trial had ever been had, and such dismissal will be

[140] Lambert v. Sandford, 2 Blackf. 137, 18 Am. Dec. 149.

[141] Mechanics' Assn. v. Maripoosa Co., 7 Rob. (N. Y.) 225; Dexter v. Clark, 35 Barb. 271; Coit v. Beard, 33 Barb. 357; Wheeler v. Ruckman, 51 N. Y. 391; Smith v. Ferris, 1 Daly, 18; Bond v. McNider, 3 Ired. 440; Fisk v. Parker, 14 La. Ann. 491; Crews v. Cleghorn, 18 Ind. 438. But see Bostwick v. Abbott, 40 Barb. 331; People v. Smith, 51 Barb. 360.

[142] Miller v. McGuckin, 15 Abb. New Cas. 204; Hibler v. Shipp, 78 Ky. 64.

[143] Hughes v. Walker, 14 Oreg. 481, 13 Pac. Rep. 450.

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no bar to another suit for the same cause of action.[144] A judgment of dismissal may also be asked for, on the trial, at the conclusion of the plaintiff's evidence in chief. And the granting of such a motion can have no greater effect upon the cause of action than an involuntary nonsuit entered at the same stage. In point of fact the two are identical. Hence the cases hold that the dismissal by the court of an action at law, while the same is on trial and "before its final submission," upon the ground that the plaintiff has failed to establish his cause of action, is not a final determination on the merits, and therefore not pleadable against another action for the same cause.[145] Indeed, in New York, the cases go so far as to hold that where, upon the trial of a legal action, at the close of the testimony upon *both* sides, the complaint is dismissed, this is no bar to another action for the same cause.[146] But the general disposition of the authorities is to hold that while a judgment of dismissal, where there has not been a hearing upon the merits, is not a bar to another action,[147] yet such a judgment, *after* a hearing on the merits, is conclusive on the plaintiff as to all facts involved in the issue.[148] In Louisiana, a judgment dismissing the plaintiff's demand without any qualification of language or reservation (such as the ordinary phrase "as in case of nonsuit"), when such judgment is rendered after a trial on the issues made in the case, will be considered final and definitive, and a bar to a second action on the same subject-matter.[149]

[144] Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. Rep. 273.

[145] Craver v. Christian, 34 Minn. 397, 26 N. W. Rep. 8; Andrews v. School District, 35 Minn. 70, 27 N. W. Rep. 303.

[146] Wheeler v. Ruckman, 51 N. Y. 391. In this case it was said: "Under the practice prior to the code, it was held that a plaintiff could be nonsuited after all the evidence on both sides had been received and both parties had rested. In this case it appears that after evidence had been given by both parties in the prior suit, the court dismissed the complaint because the plaintiff failed to produce evidence enough to maintain the issue on his part. The dismissal was for the same cause for which a nonsuit might have been granted, and I see no reason for not treating it in the same way and giving it the same effect. The prior judgment was not therefore a bar to the recovery in this action. If that had been an action for equitable relief, the rule would have been otherwise."

[147] Philpott v. Brown, 16 Nebr. 387, 20 N. W. Rep. 288.

[148] Amory v. Amory, 26 Wis. 152; Brothers v. Higgins, 5 J. J. Mar. 658; Best v. Hoppie, 3 Colo. 137.

[149] Granger v. Singleton, 32 La. Ann. 898.

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§ 704. Judgment in Test Case.

There is one possible exception to the rule of the inconclusiveness of a nonsuit, viz., where the parties have agreed to abide by the decision that may be rendered in a test case. Thus, where several ejectments were pending between one claiming title and persons having only the naked possession of lands, and an agreement was made between all the parties that the suits should be stayed and should await the event of a suit between other parties in which the same questions arose, it was held that a judgment in that suit would operate as an estoppel between the parties to the agreement, even although the judgment was one as in case of nonsuit.[150]

§ 705. Agreed Judgments.

In regard to the conclusiveness of agreed judgments there is some difference of opinion. But the majority of cases in this country hold that a judgment is none the less effective as a bar because its merits were determined in whole or in part, by the agreement of the parties.[151] Thus, in New Jersey, it is said to be immaterial "whether the decree was obtained by consent or by a decision of the court upon the points in controversy. The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon demurrer or verdict."[152] So in Massachusetts, an agreed statement may be the proper foundation of such

[150] Brown v. Sprague, 5 Denio, 545.

[151] Nashville, etc., R. Co. v. United States, 113 U. S. 261, 5 Sup. Ct. Rep. 460; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Chamberlain v. Preble, 11 Allen, 370; Brown v. Sprague, 5 Denio, 545; French v. Shotwell, 5 Johns. Ch. 555; Richmond, etc., R. Co. v. Shippen, 2 Pat. & H. 327; Hoover v. Mitchell, 25 Gratt. 387; Jarboe v. Smith, 10 B. Mon. 257, 52 Am. Dec. 541; Wynne v. Spiers, 7 Humph. 394; Dunn v. Pipes, 20 La. Ann. 276; Greenwood v. New Orleans, 12 La. Ann. 426; Fletcher v. Holmes, 25 Ind. 458.

[152] Gifford v. Thorn, 9 N. J. Eq. 702, 722.

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a judgment as will constitute a bar to a new suit between the same parties for the same cause of action.[153] So in California, a judgment entered upon a stipulation of the parties after issue joined, has the same effect as an estoppel as if the action had been tried on the merits.[154] In Indiana it is held that the judgment will bind those by whose agreement it has been entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment.[155] A contrary rule, however, prevails in England, and has been maintained in a few cases in this country.[156] The doctrine of these cases is that nothing can be considered *res judicata*, except a matter upon which the court has exercised its judicial mind, coming to a conclusion that one side is right, and pronouncing a decision accordingly, and that when a judgment or decree is rendered by consent, or is the result of compromise, it cannot be admitted under this description. The argument is not without weight. And perhaps the estoppel created by such a judgment ought rather to be rested on the voluntary undertaking of the parties to abide by the result than on the strict principle of *res judicata*.

§ 706. Dismissal of Suit "Agreed."

By general agreement of the authorities it is now well settled that a judgment dismissing a suit "agreed" is a bar to any further action for the same cause.[157] Says the court in Virginia: "The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in *retraxit*, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of his suit

[153] Derby v. Jacques, 1 Cliff. 425.

[154] McCreery v. Fuller, 63 Cal. 80.

[155] Fletcher v. Holmes, 25 Ind. 458.

[156] Jenkins v. Robertson, L. R. 1 H. L. Scotch, 117; Wadhams v. Gay, 73 Ill. 415; Lamb v. Gatlin, 2 Dev. & B. Eq. 37; Egerton v. Muse, 2 Hill (S. Car.) Ch. 51.

[157] Bank of the Commonwealth v. Hopkins, 2 Dana, 395; Jarboe v. Smith, 10 B. Mon. 257, 52 Am. Dec. 541; Merritt v. Campbell, 47 Cal. 542; Phillpotts v. Blasdell, 10 Nevad. 19; Hoover v. Mitchell, 25 Gratt. 387; Wohlford v. Compton, 79 Va. 333. See, *per contra*, Hoffman v. Porter, 2 Brock. 156. And compare Allison v. Hess, 28 Iowa, 388.

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by the plaintiff, as in a nonsuit; it is the concurrent action of both parties. It is a representation by the plaintiff to the court that the suit has been agreed, which is assented to by the defendant, and thereupon the suit is dismissed agreed by the judgment of the court, without costs to either party. To say that a suit is agreed by the parties is, in effect, to say that the cause of the suit has been agreed. It is a declaration of record, sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves in their own way, and that the suit is dismissed agreed." [158] The exact position taken by these cases is still further defined by the supreme court of California in the following language: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement on his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect; but only that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterward brought upon the same cause of action." [159] And if the parties are bound, so also are their privies. Thus a stipulation, by which all the parties to a suit involving the title to certain land compromised and dismissed the action, is a bar to a suit involving the title to the same property by a grantee of one of the parties who purchased with knowledge of the agreement.[160]

§ 707. Judgment on Demurrer.

There can be no doubt that a judgment rendered upon a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer as would be a verdict and judgment finding the same facts.[161]

[158] Hoover v. Mitchell, 25 Gratt. 387.
[159] Merritt v. Campbell, 47 Cal. 542.
[160] Crossman v. Davis (Cal.), 21 Pac. Rep. 963.
[161] Johnson v. Pate, 90 N. Car. 334; Nispel v. Laparle, 74 Ill. 306; Jordan v. Faircloth, 34 Ga. 47.

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But a judgment on a demurrer, based on merely formal and technical defects, is *no bar* to a suit on an amended declaration correctly setting forth a good cause of action.[162] For example, an action having been brought against S. individually, he pleaded in bar that he had executed the contract in question, not on his own account, but in behalf of a certain company and in his capacity of director and agent of the company and not otherwise. The plaintiff demurred, and the court gave judgment against S. for want of an averment in his plea of an authority from the company to execute the contract. It was held that this decision was not conclusive as to the question of the personal responsibility of S. on the contract, because it turned merely upon the question of special pleading and was not on the merits.[163] So again, a former judgment on demurrer between the same parties, wherein the plaintiff claimed damages of the defendant for injury to his estate in consequence of the laying and operating a railroad in the street on which his estate abutted, the plaintiff not claiming to be the owner of the fee in the soil to the middle of the street, is not a bar to a second suit upon the same cause of action, when the new declaration supplies that important averment.[164] But on the other hand, a judgment on a demurrer which *goes to the merits*, disposing of the whole cause of action, is affirmed by all the authorities to be a bar to a subsequent suit upon the same claim or demand,—as completely so as though the action had been submitted to a jury and a verdict and judgment had thereon.[165] The United States supreme

[162] Gilman v. Rives, 10 Pet. 298; Aurora City v. West, 7 Wall. 99; Chapin v. Curtis, 23 Conn. 388; Commonwealth v. Goddard, 13 Mass. 456; Foster v. Commonwealth, 8 Watts. & S. 77; Crumpton v. State, 43 Ala. 31; Nickelson v. Ingram, 24 Tex. 630, Birch v. Funk, 2 Met. (Ky.) 544; Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396.

[163] Skinner v. Dayton, 19 Johns. 513, 10 Am. Dec. 286.

[164] Florida Southern Ry. Co. v. Brown (Fla.), 1 South. Rep. 512.

[165] Gould v. Evansville, etc., R. Co., 91 U. S. 533; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. Rep. 495; St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt. 294, 7 Atl. Rep. 277; Bouchaud v. Dias, 3 Denio, 238; Gray v. Gray, 34 Ga. 499; Carey v. Giles, 10 Ga. 9; Perkins v. Moore, 16 Ala. 17; City Bank v. Walden, 1 La. Ann. 46; Parker v. Spencer, 61 Tex. 155; McLaughlin v. Doane, 40 Kans. 392, 19 Pac. Rep. 853; Estep v. Larsh, 21 Ind. 190; Wilson v. Ray, 24 Ind. 156; Vanlandingham v. Ryan, 17 Ill. 25; Keater v. Hock, 16 Iowa, 23; Felt v. Turnure, 48 Iowa, 397; Coffin v. Knott, 2 Greene (Iowa), 582, 52 Am. Dec. 537; Robinson v. Howard, 5 Cal. 428; Terry v. Hammonds, 47 Cal. 32.

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court, investigating the whole subject with care and thoroughness, has reached the conclusion that the authorities establish the two following propositions: "First. That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same parties or those in privity with them. Second, that if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. . . . . But it is equally well settled that if the plaintiff fails on demurrer in his first action for the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." [166] We may cite a few cases in illustration of the practical working of these rules. Where a demurrer challenges the validity of the contract which forms the basis of the plaintiff's claim, and is sustained, it is a bar to a subsequent action on the contract.[167] So a decree dismissing a bill on demurrer, on the ground of lapse of time or laches, is on the merits and will bar another suit upon the same cause.[168] So an order of court in these words, "Upon motion of defendant's counsel, ordered that this cause be dismissed upon the ground that the allegations in the petition do not make a case upon which the plaintiffs can recover," is held to be a judgment upon demurrer to the declaration, and operates as a

[166] Gould v. Evansville, etc., R. Co., 91 U. S. 526.

[167] Robinson v. Howard, 5 Cal. 428.

[168] Parkes v. Clift, 9 Lea, 524.

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complete bar to a second suit for the same cause of action.[169] But on the other hand, where the declaration in the second suit, by reason of *new averments*, is not objectionable to the demurrer in the first, the issue is changed and the latter suit is not barred.[170] It matters not to which of the pleadings the demurrer is interposed, or which of the parties demurs; the rules are the same. Thus a judgment on demurrer to an answer setting up a good defense, given in favor of the party pleading it, is a bar to a subsequent suit upon the same claim.[171] But in order to have this conclusive effect, it is necessary that a judgment should have been rendered upon the decision of the demurrer. Where the court has announced a decision sustaining a demurrer, which in effect defeats the plaintiff's action, and the entry of demurrer sustained has been made on the docket, but has not been followed by formal judgment for the defendant, the plaintiff may dismiss or discontinue his suit, and bring another on the same cause of action.[172] The same general principles apply in equity as well as at law. A decree dismissing a bill in chancery, rendered on a demurrer which embraces the whole merits of the case, will support a plea of *res judicata*.[173] But where it amounts merely to a decision that the complainant has not shown facts entitling him to relief, and not to a decree upon the merits, it is no bar to a subsequent proceeding upon the same cause of action.[174]

§ 708. General Demurrer to Declaration.

From a consideration of the authorities cited in the preceding section, we are prepared to find that a judgment sustaining a general demurrer to the declaration is a bar to a new suit upon the same state of facts. And so the cases hold. "A general demurrer admits the facts alleged in the petition, and there is no good reason why a

[169] Kimbro v. Virginia & Tenn. R. Co., 56 Ga. 185.

[170] Spicer v. United States, 5 Ct. of Cl. 34; Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. Rep. 799.

[171] Wilson v. Ray, 24 Ind. 156; Bissell v. Spring Valley Township, 124 U. S. 225, 8 Sup. Ct. Rep. 495.

[172] State v. Staylor (Md.), 17 Atl. Rep. 392.

[173] City Bank v. Walden, 1 La. Ann. 46.

[174] Detrick v. Sharrar, 95 Pa. St. 521.

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final judgment sustaining it should not be as conclusive of the same cause of action as if the plaintiff had proved these facts, and a judgment had been then rendered against him."[175] Still it is held that a judgment on general demurrer to the complaint leaves the plaintiff at liberty to present his complaint in another action *so amended* in form or in substance as to be no longer open to the attack made in the former suit, and such a judgment cannot be pleaded in bar to a good complaint for the same cause of action.[176]

§ 709. Demurrer to Cause of Action Stated.

In many of the states, especially those following the code practice, a statutory and much used ground of demurrer is "that the complaint does not state facts sufficient to constitute a cause of action." A decision upon a demurrer of this kind is an adjudication upon the merits, so far as the complaint goes, and is final and conclusive. In the language of the United States supreme court, "a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties

[175] Bomar v. Parker, 68 Tex. 435, 4 S. W. Rep. 599; Perkins v. Moore, 16 Ala. 17; Brown v. Kirkbride, 19 Kans. 588; Carlin v. Brackett, 38 Minn. 307, 37 N. W. Rep. 342; Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 277. In the case last cited, it was said by Deady, J.: "On a demurrer to a complaint, every material matter well pleaded therein is confessed, and if judgment is given thereon, the same is as conclusive and binding on the parties to the action as though it was given on an issue arising on a denial of the allegations of the complaint; and if a final judgment is given for the plaintiff, on a demurrer to the answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the truth of the material allegations in the complaint, and may be pleaded as an estoppel in any other action between them."

[176] Los Angeles v. Mellus, 59 Cal. 444; Gilman v. Rives, 10 Pet. 298; Wilbur v. Gilmore, 21 Pick. 250.

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which can be pleaded in bar to any other suit for the same cause of action." [177] Still, there are numerous cases which hold that a decision on a demurrer, interposed on this ground, will not bar a suit on a new declaration which contains the averments for want of which the former complaint was held not to state a cause of action.[178] The position taken by these cases was explained by the court in Kentucky, in a case wherein it was said of a former adjudication of that sort, "that judgment merely pronounced the former petition insufficient. It decided that the case presented by that petition was without merit, and to that extent only can it be said to have been a decision upon the merits. But the facts set out in the subsequent case have never been litigated or passed upon in any way, and it is therefore illogical and an abuse of terms to say that the judgment relied upon is a judgment upon the merits of the present case, and for that reason must operate as a bar to any relief." [179] But if the decision was on account of some inherent vice or defect in the case shown by the complaint, rather than for any lack of proper allegations, it is difficult to resist the conclusion that the judgment would be a complete bar to any further suit upon the same transaction or state of facts.

§ 710. Demurrer Based on Several Grounds.

When the record shows that a demurrer presented two grounds of objection to the petition, and was sustained, but without stating upon which ground, and such record is offered in bar of a subsequent action on the same cause, it will be presumed that the decision of the court was based upon that ground which would be fatal to the action, that is, necessarily compel the plaintiff to abandon it. Where one of the grounds of demurrer was a misjoinder of parties, and the other involved the merits, or the right of the plaintiff to recover on his cause

[177] Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. Rep. 495. See, to the same effect, Baker v. Frellsen, 32 La. Ann. 822; Lamb v. McConkey (Iowa), 40 N. W. Rep. 77, City of Los Angeles v. Mellus, 58 Cal. 16.

[178] Moore v. Dunn, 41 Ohio St. 62; Gould v. Evansville, etc., R. Co., 91 U. S. 526; Gilman v. Rives, 10 Pet. 298; Wells v. Moore, 49 Mo. 229; Stowell v. Chamberlain, 3 Thomp. & C. 374; Grotenkemper v. Carver, 4 Lea, 375; Gerrish v. Pratt, 6 Minn. 53 (Gil. 14).

[179] Birch v. Funk, 2 Met. (Ky.) 544.

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of action, it will be presumed that the court sustained it upon the former ground alone. For it is natural to suppose that if the court saw an objection to the action sufficient to necessitate its dismissal, it would not after that proceed to an investigation of the merits.[180]

§ 711. Demurrer to Bill for Want of Equity.

Where a demurrer is filed to a bill for want of equity, and is overruled, the decision thereon is conclusive until properly reviewed and reversed. "The equity of the bill was thus *res judicata* in the cause, and could not be disputed, if the facts alleged in it were proved on the hearing."[181]

§ 712. Demurrer to Evidence.

On a demurrer to the evidence, a judgment in favor of the demurrant is a bar to any future suit on the same cause of action. "The only difference between a special verdict and a demurrer to evidence is, that the one admits every allowable deduction from the facts, the other ascertains and reports the opinion of the jury on the same facts. The judgment of the court against the plaintiff is as conclusive in the one case as in the other. If, in the one case, the plaintiff, instead of suffering a nonsuit, permits a verdict to be found, a judgment against him on the verdict will, until reversed, bar his action; so in the other case, if he submits the decision on the facts to the court, a judgment against him is equally conclusive. And in either case, he can reserve the chance of another suit on the same cause of action in no other way than by waiving his evidence [taking nonsuit] and thus evading a trial."[182]

§ 713. Dismissal for Want of Jurisdiction.

Where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit, or of the parties,

[180] Griffin v. Seymour, 15 Iowa, 30; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. Rep. 495. Compare People v. Stephens, 51 How. Pr. 235.

[181] Kilpatrick v. Strozier, 67 Ga. 247.

[182] Hunt v. Terril, 7 J. J. Mar. 67, per Robertson, C. J. See also Seckler v. Delfs, 25 Kans. 159.

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this is of course no adjudication of the merits and no bar to another action for the same cause.[183] Thus the dismissal of an action by a federal court on the ground that jurisdiction of the defendant, a non-resident, had not been acquired, no attachment of his property being disclosed by the record, is not a bar to an action in the state court, commenced by attachment, for the same cause of action.[184] So again, in an action of right to recover the possession of real estate, brought by the party holding the legal title, the defendant set up a defense impeaching the patent under which the plaintiff claimed, and the court decided against the defendant, on the ground that his defense was equitable merely, and could not be set up against the legal title in that action. Subsequently the defendant brought a suit in chancery to set aside the patent of the former plaintiff on the ground of fraud. It was held that the judgment in the former suit was not an adjudication of the validity of the patent.[185] A judgment of a justice (who is required to transfer to another court any cause before him so soon as it appears to involve the question of title to lands) does not operate as a bar to a subsequent suit upon a cause of action involving title, merely because such cause of action might have been introduced before the justice, in which case it would have become his duty to certify the cause to another court for trial.[186] Although a court of law declines to determine a question of set-off, yet this is not *res judicata* so as to preclude an inquiry in a court of equity having concurrent jurisdiction of the matter.[187]

§ 714. Dismissal of Action Prematurely Brought.

The dismissal of a suit, or judgment for the defendant, on the ground that it was prematurely brought, the cause of action not hav-

[183] Walden v. Bodley, 14 Pet. 156; Hughes v. United States, 4 Wall. 232; Smith v. McNeil, 109 U. S. 426, 3 Sup. Ct. Rep. 319; Gist v. Davis, 2 Hill Ch. 335, 29 Am. Dec. 89; Smith v. Adams, 24 Wend. 585; Lamaster v. Lair, 1 Dana, 109; Waddle v. Ishe, 12 Ala. 308; Mosby v. Wall, 28 Miss. 81, 55 Am. Dec. 71; Schindel v. Suman, 18 Md. 310; Cauhape v. Parke, 46 Hun, 306; Roberts v. Hamilton, 56 Iowa, 688, 10 N. W. Rep. 236.

[184] Weyand v. Atchison, T. & S. F. R. Co., 75 Iowa, 573, 39 N. W. Rep. 899.

[185] Arnold v. Grimes, 2 Iowa, 1. See also Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. Rep. 449.

[186] Goenen v. Schroeder, 18 Minn. 68, (Gil. 51).

[187] Hackett v. Connett, 2 Edw. Ch. 78.

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ing yet accrued, is universally held to be no bar to another action on the same demand after time has removed the objection.[188] It is no adjudication of the merits; the most it decides is that the claim or demand was not *then* due or matured. For example, if the vendor of goods sold upon a credit sues before the purchase-money is due, and for that reason fails upon a trial under the general issue, the judgment is no bar to a subsequent suit brought after the purchase-money becomes due.[189] So where a purchaser of land sued to recover back the purchase-money before he had been evicted, and for that reason was defeated, the judgment in that action will not bar a subsequent suit brought for the same object after eviction.[190] A judgment for the defendant in an action upon a guaranty of a promissory note, which recites the ground upon which it is based to be that the cause of action has not yet accrued, because the plaintiff has not exhausted his legal remedy against the maker of the note, does not constitute an adjudication upon the validity of the guaranty which can be pleaded in bar of another action thereon after execution against the maker has been returned unsatisfied.[191] So a judgment in favor of the indorser of a note, on a verdict which was rendered on the ground that the action had been brought before notice was given to him, is no bar to another action commenced after the giving of notice.[192] Where a former action failed as to one part of the plaintiff's demand, because prematurely brought, the judgment is no bar to a subsequent action by the same plaintiff on that part of the demand, after the same has matured.[193] And although there

[188] Clark v. Young, 1 Cranch, 181; New England Bank v. Lewis, 8 Pick. 113; Wilcox v. Lee, 1 Rob. (N. Y.) 855; Quackenbush v. Ehle, 5 Barb. 469; Ezzell v. Maltbie, 6 Ga. 495; Hurst v. Means, 2 Sneed, 546; McCelvey v. Noble, 13 Rich. 330; Estill v. Taul, 2 Yerg. 466, 24 Am. Dec. 498; Pasley v. McConnell, 40 La. Ann. 609, 4 South. Rep. 501; Kirkpatrick v. Stringley, 2 Carter (Ind.), 269; McFarlane v. Cushman, 21 Wis. 401; Gray v. Dougherty, 25 Cal. 266; Brackett v. People, 115 Ill. 29, 8 N. E. Rep. 723; Rivers v. Rivers, 65 Iowa, 568, 22 N. W. Rep. 679; Dillinger v. Kelley, 84 Mo. 561.

[189] New England Bank v. Lewis, 8 Pick. 113; Kirkpatrick v. Stringley, 2 Carter (Ind.), 273; 1 Greenl. Ev. § 530.

[190] Hurst v. Means, 2 Sneed, 546.

[191] Boyer v. Austin, 54 Iowa, 402, 6 N. W. Rep. 585; McCelvey v. Noble, 13 Rich. 330.

[192] New England Bank v. Lewis, 8 Pick. 113. See also Tracy v. Merrill, 103 Mass. 280.

[193] Oleson v. Merrihew, 45 Wis. 397.

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may have been a general verdict for the plaintiff, yet he may show that the subject-matter of his second suit, which was included in the former action and presented to the court or jury, was disallowed because not yet due or matured.[194] The same principles govern the case of a claim or demand presented by way of set-off, instead of being made the basis of a suit. Thus, where, in an action before a justice, the answer contained an alleged set-off, and the justice, in rendering judgment in the action, refused to consider or allow the demand, upon the ground that it was not due at the commencement of the action, and therefore not a legitimate set-off, it was held that in a subsequent action brought to recover the amount of the set-off the former judgment was no bar.[195]

§ 715. Dismissal of Misconceived Action.

A judgment given against the plaintiff on the single ground that he has mistaken his remedy or form of action, is no bar to his subsequent suit brought in the proper form.[196] "A bar in a wrong action brought is not any bar when a right action is brought; as where one delivers goods to keep, and brings trespass against the bailiff for these goods, and is barred by verdict or demurrer, that shall not be a bar unto him in bringing detinue or accompt."[197] So when goods, taken from their owner by a sheriff on an execution against another person, have been replevied by the owner, and the sheriff has recovered judgment for their value, in the replevin suit, on the ground that replevin was not the legal remedy for such a case, the owner may then recover their value from the sheriff in trover.[198] So also, the fact that mortgage creditors brought replevin for mortgaged chattels which had been taken under execution, and that judgment was rendered against them, under a statute which forbade such an action in

[194] Kane v. Fisher, 2 Watts, 246.

[195] Krapp v. Eldridge, 33 Kans. 106, 5 Pac. Rep. 372.

[196] Ferrers v. Arden, 2 Cro. Eliz. 668; Hitchin v. Campbell, 2 Wm. Bl. 779; Wyman v. Dorr, 3 Me. 185; Walker v. Davis, 1 Gray, 506; Livermore v. Herschell, 3 Pick. 33; Sager v. Blain, 44 N. Y. 445; Foster v. Wells, 4 Tex. 101; 5 Bac. Abr. 440, *Pleas*, 1, 13; 1 Smith's Lead. Cas. 673.

[197] Ferrers v. Arden, 2 Cro. Eliz. 668.

[198] Kittredge v. Holt, 58 N. H. 191.

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such a case and provided a remedy by "claimant's issue," does not preclude them from thereafter maintaining a bill to foreclose.[199] Where one holding an estate in lands brings an action for partition against those claiming adversely, such person is not thereby precluded, by the dismissal of his bill, from bringing ejectment against the same persons for the same estate.[200] So again, where a party, mistaking his remedy, attempts to enforce a claim by presenting it as a set-off, but against a wrong party and in a suit where it is not and cannot be available, this does not debar him from afterwards suing the right person on such claim.[201]

§ 716. Dismissal on Technical Grounds.

In general, a judgment dismissing a suit on account of any technical defect, irregularity, or informality, is not on the merits and therefore no bar to a subsequent suit. Thus, in an action against a sheriff for the default of his deputy, judgment was for the defendant, on the ground of a variance between the notice and the receipts of the officer in the description of the claims. It was held that the judgment would not bar a subsequent proceeding against the deputy.[202] So the dismissal of an action of replevin for informality in the replevin bond,[203] or because the plaintiff failed to make and prove a lawful demand,[204] or on account of a defect in the affidavit,[205] is not on the merits and no bar to a new suit. So again, the dismissal of a suit for failure to file security for costs is not a bar to another suit brought afterwards on the same cause of action.[206] And so if a suit is dismissed on account of a failure of the plaintiff to submit himself to examination.[207]

[199] Conn v. Bernheimer (Miss.), 7 South. Rep. 845.

[200] Bigley v. Jones, 114 Pa. St. 510, 7 Atl. Rep. 54.

[201] Bertrand v. Bingham, 18 Tex. 266. See also Watson v. Cowdrey, 28 Hun, 169.

[202] Witcher v. Oldham, 4 Sneed, 220. See Crosby v. Baker, 6 Allen, 295.

[203] Morton v. Sweetser, 12 Allen, 134; Walbridge v. Shaw, 7 Cush. 560.

[204] Roberts v. Norris, 67 Ind. 386.

[205] Stockwell v. Byrne, 23 Ind. 6.

[206] Dean v. Ridgway (Miss.), 6 South. Rep. 236.

[207] Cheney v. Stone, 29 Fed. Rep. 885.

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§ 717. Failure of Evidence.

It is held that where an action is defeated because, in an incidental matter, not affecting the merits of the controversy, the case made by the plaintiff is defective, the judgment is not a bar to another action for the same cause.[208] And even, as it appears, a judgment dismissing a complaint for failure of evidence to sustain one of its material allegations, is no more in effect than a judgment of nonsuit, which will not support a plea of *res judicata*.[209] In a case in Pennsylvania, it was shown that a tenant had received due notice to quit at the end of his term, and proceedings were commenced by the landlord before a justice to obtain possession, but the justice dismissed the proceedings on the ground that the landlord had extended the term. In ejectment by the latter for the same premises, it was held that these proceedings, being merely a finding that the complaint was not sustained by sufficient evidence, and not a judgment for the defendant, could not prevent a recovery in a subsequent ejectment on a good title.[210]

§ 718. Defects in the Pleadings.

In accordance with the general principles we have been considering, it is well settled that a judgment rendered on the ground of formal defects in the pleadings does not touch the merits of the controversy and is no bar to a second action.[211] Or, as stated in an early case, a former judgment is no bar if it was given upon the *manner* of pleading in the action rather than upon the *matter* of the plea.[212] This rule applies as well to collateral or interlocutory decisions as to final judgments dismissing the suit. Thus, a motion having been denied for irregularity in the papers on which it was founded, a new motion, regularly made, for the same purpose, is not barred, although no

[208] Brackett v. Holtt, 20 N. H. 257.

[209] Whaley v. Stevens, 24 S. Car. 479. See also White v. Whiting, 8 Daly, 185.

[210] McLaughlin v. McGee, 79 Pa. St. 217.

[211] Lampen v. Kedgewin, 1 Mod. 207; Wells v. Moore, 49 Mo. 229; Smalley v. Edey, 19 Ill. 207; Kendal v. Talbot, 1 A. K. Mar. 321.

[212] Ingram v. Bray, 2 Levinz, 210.

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formal leave to renew be obtained.[213] And the same rule governs the case of similiar adjudications in equity. Where a bill is dismissed on demurrer, merely in consequence of the omission of an essential allegation, which is supplied in a second suit, the dismissal cannot be considered as on the merits, and hence the second action is not barred.[214] So a decree, under a rule in equity, dismissing the complainant's bill because of his failure to reply to a plea or set it down for argument, is not conclusive, because not on the merits.[215] It is to be observed, however, that a judgment is not the less conclusive because the matter settled thereby was improperly pleaded, if no objection was made at the time, and provided such matter was not beyond the jurisdiction. Thus, where matter is improperly pleaded as a set-off, but timely objection is not taken, such matter becomes *res judicata* upon the rendition of judgment.[216]

§ 719. Dismissal for Defect or Want of Parties.

A verdict and judgment for the defendant, or an order dismissing the suit, rendered solely on the ground of a misjoinder, non-joinder, or defect of parties, or because the plaintiff is not the proper party to sue, can have no greater effect than to terminate that particular action; it does not affect the merits and will not bar a subsequent suit on the same cause.[217] For example, where a party dealing with an agent brings suit against agent and principals jointly, and in consequence of a misnomer of the principals fails to secure a valid judgment against them, he is not thereby estopped from bringing a second action against such principals.[218] So where it affirmatively appears on the face of the record, in an action against several parties in which different matters of relief are sought, that the court dis-

[213] Corwith v. Bank, 15 Wis. 289.

[214] Gilmer v. Morris, 80 Fed. Rep. 476.

[215] Keller v. Stolzenbach, 20 Fed. Rep. 47.

[216] Thompson v. Wineland, 11 Mo. 243.

[217] St. Romes v. Levee Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. Rep. 1335; Vaughan v. O'Brien, 57 Barb. 491; Robbins v. Wells, 1 Rob. (N. Y.) 666; Wheeler v. Ruckman, 7 Rob. (N. Y.) 447; Fleming v. Ins. Co., 12 Pa. St. 391; Nicholson v. Ingram, 24 Tex. 630; Miller v. Langworthy, 3 Greene (Iowa), 347; McCall v. Jones, 72 Ala. 368.

[218] Tierney v. Abbott, 46 Wis. 329, 1 N. W. Rep. 94.

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missed the plaintiff's claim for relief in respect to one of such matters on the ground that, as it affected only one of the defendants, it was not determinable in that action, the plaintiff will not thereby be precluded from obtaining such relief in a subsequent action, although the order of dismissal was not in terms stated to be without prejudice.[219] To take another illustration,—in an action upon a marine policy, the defendants insisted that the action was brought in the wrong name and that the plaintiff had not proved his interest in the policy. The judge instructed the jury to find a verdict for the defendants on the latter point, which they did. The court in banc sustained both points, and judgment was entered for the defendants. It was held that this adjudication was no bar to a subsequent suit properly brought.[220] In equity, however, the rule is somewhat different. While it is error to dismiss a bill absolutely for want of sufficient parties defendant, and the decree ought to reserve the complainant's rights, and he can procure its reversal on appeal, yet if he fails to do so, it is as conclusive against him as a decree on the merits.[221] The rule first above given applies not only to the case of a misjoinder or non-joinder of parties, but also where the successful contention of the defendant is that the plaintiff has not legal capacity to sue. Thus, where an assignee of a mortgage fails in a suit brought to foreclose the same from a defect in the assignment, the judgment of dismissal is no bar to another action brought by him for the same purpose after he has perfected his assignment.[222] A judgment dismissing a supplemental complaint, filed by the representative of a plaintiff who has died since the filing of the original complaint, given solely upon the ground that such representative has no legal capacity to sue, is not a bar to further proceedings by the proper person.[223]

[219] Smith v. Auld, 31 Kans. 262, 1 Pac. Rep. 626.

[220] Fleming v. Ins. Co., 12 Pa. St. 391.

[221] Thompson v. Clay, 8 T. B. Mon. 359, 16 Am. Dec. 108.

[222] Mitchell v. Cook, 29 Barb. 243. See also Miller v. Langworthy, 8 Greene (Iowa), 347.

[223] Robbins v. Wells, 1 Rob. (N. Y.) 666.

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§ 720. Dismissal of Bill in Equity.

It is a well established rule that a final decree in chancery regularly dismissing a bill on the merits, when the matters of the bill have been passed upon, and without any reservation of the complainant's right to sue thereafter, is a bar to any new bill between the same parties upon the same matter.[224] In the language of the supreme court of Alabama: "The decree of a court of chancery, dismissing a bill absolutely and unconditionally, on a hearing on pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any future litigation of the same matters between the parties or their privies. A decree of that kind, not made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude future suit, such as that the dismissal is *without prejudice*. If the case is of that character that such a reservation ought to be made, and it is omitted, on appeal the error will be corrected. . . . . When, however, the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties."[225] Thus a final decree that "the cause being submitted to the court upon bill, answer, and replication, and having been duly considered, the court finds, adjudges, and decrees that the equities are with the defendant," and dismissing the bill, is an adjudication

[224] Durant v. Essex Co., 7 Wall. 107; Doe d. Parrish v. Ferris, 2 Black (U. S.), 606; Case v. Beauregard, 101 U. S. 688; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Lewis v. Lewis, 106 Mass. 309; Blackinton v. Blackinton, 118 Mass. 231; Perine v. Dunn, 4 Johns. Ch. 140; Kelsey v. Murphy, 26 Pa. St. 78; Evans v. Tatem, 9 Serg. & R. 261, 11 Am. Dec. 717; Holliday v. Coleman, 2 Munf. 162; Taylor v. Yarbrough, 13 Gratt. 183; Jenkins v. Johnston, 4 Jones Eq. 149; Black v. Black, 27 Ga. 40; Pugh v. Holt, 27 Miss. 461; Thompson v. Clay, 8 T. B. Mon. 359, 16 Am. Dec. 108; Moss v. Ashbrooks, 12 Ark. 369; Wilcox v. Balger, 6 Ohio, 406; Garrick v. Chamberlain, 97 Ill. 620; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. Rep. 581; Scully v. Railroad, 46 Iowa, 528.

[225] Tankersly v. Pettis, 71 Ala. 179. See also Strang v. Moog, 73 Ala. 460.

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upon the merits and bars a second suit upon the same matters.[226] And hence when a decree has been passed by the court upon a formal hearing, dismissing the bill, a second bill, alleging facts, which, if established, would entitle the plaintiff to the same measure of relief as the facts set forth in his former bill would entitle him to, will be dismissed upon a plea in bar.[227] Decree dismissing a bill on the ground that the deed under which the complainant claimed was fraudulent, is a bar to another original bill to try the validity of the same deed.[228] And so, where, in a suit in equity for specific performance of a contract to convey land, the bill was dismissed generally for non-payment of the purchase-money, the decree is a bar to a future proceeding upon the same contract.[229]

But to make a decree dismissing a bill on the merits a bar to another suit, it must be an absolute decision upon the same point or matter, and the new bill must be brought by the same plaintiff who filed the original bill, or his representatives, against the same defendant or his representatives.[230] And the decree must have been ordered upon a hearing of the parties or on the merits of the cause.[231] But when the cause has been set down for hearing after replication and an order closing the proofs, a decree dismissing the bill is a bar to a subsequent suit for the same cause between the same parties, although no proofs were in fact taken and such decree was taken by default at the hearing.[232] And such a decree is none the less a bar because the record shows that it was passed by a divided court.[233] And the dismissal of a bill by a federal court, appearing by the record to have been ordered upon the merits, is a bar to a subsequent action in a state court, although the plaintiff's attorneys in the federal court had withdrawn their appearance.[234] A decree in terms dismissing an amended bill for want of equity, dismisses the original

[226] Lyon v. Perin Manuf. Co., 125 U. S. 698, 8 Sup. Ct. Rep. 1024.

[227] Jenkins v. Johnston, 4 Johns Eq. 149; Black v. Black, 27 Ga. 40.

[228] Holliday v. Coleman, 2 Munf. 162.

[229] Wilcox v. Balger, 6 Ohio, 406.

[230] Neafie v. Neafie, 7 Johns. Ch. 1, 11 Am. Dec. 380; Pugh v. Holt, 27 Miss. 461.

[231] Sarchet v. The Sloop Davis, Crabbe, 185.

[232] Ogsbury v. La Farge, 2 N. Y. 113.

[233] Durant v. Essex Co., 8 Allen, 103, 85 Am. Dec. 685.

[234] Scully v. Railroad, 46 Iowa, 528.

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bill as amended, and such decree is therefore conclusive as to the claim made by the plaintiff in the original bill.[225]

Before leaving the subject it is necessary to call the reader's attention to two matters closely connected with the rule under consideration. In the first place, where the complainant in equity is allowed to have his bill dismissed, before the hearing, upon his own motion, and upon the payment of costs, this settles nothing as to the merits of the cause, and is no bar to a second bill upon the same matters.[226] It can, in the nature of things, have no greater or higher effect than a voluntary nonsuit in an action at law. In the second place, the dismissal of a bill seeking equitable relief in respect to a cause of action or an instrument upon which the party can sue at law, is no bar to an action at law upon the same instrument, although the decree does not state the dismissal to have been without prejudice.[227] The decree does indeed determine that the plaintiff has no claim to equitable relief, but it by no means follows that he has not a good right of action at law.

§ 721. Dismissal "Without Prejudice."

Where a bill in equity is dismissed "without prejudice," the effect of the reservation is to prevent the decree from constituting a bar to another suit brought upon the same subject-matter.[228] The purport of a decree so framed is that such dismissal shall not operate as a bar to a new suit which the party may institute; it does not debar the defendant of any defense which he might be entitled to make in the new suit, and confers no privilege on the complainant; and it will not have the effect of excepting from the time prescribed by the

[225] Bradish v. Grant, 119 Ill. 606, 9 N. E. Rep. 332.

[226] Walden v. Bodley, 14 Pet. 160; Badger v. Badger, 1 Cliff. 241.

[227] Beere v. Fleming, 18 Ir. C. L. 506; Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, 36 Ohio St. 471.

[228] Durant v. Essex Co., 7 Wall. 109; Thurston v. Thurston, 99 Mass. 39; Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Wanzer v. Self, 30 Ohio St. 378; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609; Magill v. Mercantile Trust Co., 81 Ky. 129; Fisk v. Parker, 14 La. Ann. 491; Crews v. Cleghorn, 13 Ind. 438; English v. English, 27 N. J. Eq. 579; Ballentine v. Ballentine (Pa.), 15 Atl. Rep. 859; Gunn v. Peakes, 36 Minn. 177, 30 N. W. Rep. 466.

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statute of limitations the time of the pendency of that suit.[239] In fact, the effect of the reservation is merely to prevent the decree from constituting a bar to another suit brought upon the same title, but it by no means compromits the court as a judicial determination in favor of that title.[240] Nor does it alter the case that the court erred, by dismissing the bill "without prejudice," when it ought to have been dismissed finally upon the merits. If the decree is absolutely void for want of authority to make such a reservation, there is no valid adjudication to stand in the way of a new suit. And if it is merely irregular or erroneous, it must be corrected on appeal, and until that is done, it must stand as rendered and cannot be impeached collaterally.[241] Conversely, if the reservation is omitted, where it ought to have been inserted, the error will be corrected in the court above.[242]

§ 722. Presumption that Merits were Considered.

It will not be presumed, from the mere fact that a bill was dismissed, that the merits were not reached. On the contrary, according to the great majority of the decisions, it must appear in specific terms on the record that the dismissal was "without prejudice," or else the decree will operate as a bar to a subsequent suit.[243] Where, upon hearing, a decree is made which contains the following recital, "And it appearing that there is no equity in complainant's bill, the same is therefore dismissed," this must be considered a decree upon the merits, even though there was a demurrer to the bill for want of jurisdiction.[244] There are a few cases, however, which have refused

[239] Nevitt v. Bacon, 33 Miss. 212, 66 Am. Dec. 609.

[240] Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533.

[241] Wanzer v. Self, 30 Ohio St. 378.

[242] Durant v. Essex Co., 7 Wall. 107.

[243] Durant v. Essex Co., 7 Wall. 107; Gove v. Lyford, 44 N. H. 525; Foote v. Gibbs, 1 Gray, 412; Thurston v. Thurston, 99 Mass. 39; Bigelow v. Winsor, 1 Gray, 301; Borrowscale v. Tuttle, 5 Allen, 377; Cochran v. Couper, 2 Del. Ch. 27; Kelsey v. Murphy, 26 Pa. St. 78; Taylor v. Yarbrough, 13 Gratt. 183; Curts v. Bardstown, 6 J. J. Mar. 536; Wilcox v. Balger, 6 Ohio, 406; Scully v. Railroad, 46 Iowa, 528; Adams v. Cameron, 40 Mich. 506; Edgar v. Buck, 65 Mich. 356, 32 N. W. Rep. 644.

[244] Williams v. Hollingsworth, 5 Lea, 358.

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to recognize this rule, or have even applied an opposite rule. Thus in *Chase's Case*,[245] it was held that a decree dismissing a bill is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is *res judicata*. And in certain decisions of the supreme court of Ohio, a distinction is made between cases dismissed on a hearing and those put out of court before the hearing on the merits. Where the question is whether a bill was dismissed upon the merits or for want of prosecution, and the ground of dismission is not stated, and nothing is found in the record from which it might be discovered by inference, according to these authorities there is no presumption either way. The consequence of which is, that, as it must be established that the dismissal was upon the merits, and that fact cannot be presumed, there is no bar unless it is affirmatively shown. But where it appears that the dismissal was upon a *hearing* of the case, it is to be inferred that it was upon the merits.[246] It is further held, in that state, that where, in an action at law, a former decree in chancery, dismissing a bill generally, is relied upon as an estoppel *per se* as to the matters set up in the bill, and it appears from the record that the bill may well have been dismissed for want of jurisdiction, the decree will not estop the plaintiff therein from proving, in the suit at law, the matter relied on in the bill.[247]

§ 723. Dismissal for Want of Prosecution.

Where a bill in equity is dismissed, not on its merits, but because the complainant declines further prosecution of it, the decree of dismissal is no bar to a subsequent suit founded on the same matters. The dismissal for want of prosecution has no greater effect than a nonsuit at law.[248] Thus, where a temporary injunction is issued, and the bill is subsequently dismissed for want of prosecution, the injunction cannot have the effect of *res judicata*, so as to bar the right to

[245] 1 Bland Ch. 206, 17 Am. Dec. 277.

[246] Loudenback v. Collins, 4 Ohio St. 251.

[247] Lore v. Truman, 10 Ohio St. 45.

[248] Porter v. Vaughn, 26 Vt. 624; Rosse v. Rust, 4 Johns. Ch. 300; Loudenback v. Collins, 4 Ohio St. 251; Story, Eq. Plead. § 791.

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question, in any other suit in equity, the validity of the proceedings which the bill was brought to annul.[249]

§ 724. Evidence to Show Consideration of Merits.

Leaving the special topic of the dismissal of bills in equity, and returning to the general subject, we may observe that it is frequently a matter of some difficulty to determine whether a former judgment was upon the merits or not. How, then, shall this be made clear? In the first place, the record must be searched, and if necessary its different parts must be compared, for evidence to show an adjudication of the merits. Thus an order made by a court which, on its face, purports first to be a judgment on demurrer to a complaint, and then shows, by a comparison of the recitals of the order and what appears in the pleadings in the case, that it was founded on facts which accrued after the filing of the complaint and were only made to appear by the answer, and when there was no trial or admission of the truth of these facts by the plaintiff, cannot be held to be a judgment on the merits so as to bar another action.[250] But if nothing can be discovered from the record, it will be presumed (although not conclusively) that the judgment was rendered on the merits.[251] Hence, when a party to an action seeks to avoid the estoppel of a former judgment, by alleging that such judgment was not given upon the merits, if the judgment itself is general in its terms, and does not disclose the ground upon which it was rendered, the burden is upon the party to make good his allegation, and to that end he may introduce parol evidence.[252] But where the subject-matter of an action has been confessedly in litigation in a former suit, and a party relies on the fact that the merits were not passed upon in the former action, the evidence ought to show that fact clearly; it "ought to exclude all other hypotheses."[253] The testimony of the justice of the peace by whom the judgment was rendered may be admitted to show that the

[249] Chamberlain v. Sutherland, 4 Ill. App. 494.

[250] Gibson v. Miln, 1 Nevada, 526.

[251] National Bank of Monticello v. Bryant, 13 Bush, 419. Compare Estep v. Larsh, 21 Ind. 190.

[252] Dear v. Reed, 37 Hun, 594.

[253] Baxter v. Aubrey, 41 Mich. 13, 1 N. W. Rep. 897.

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cause was dismissed, and not tried on its merits, because the claim was not due at the time the suit was brought.[254]

Part IV. What Causes of Action are Barred.

§ 725. Causes of Action must be the Same.

When a former judgment is offered in evidence in a subsequent suit between the same parties, as conclusive upon a particular point or question in controversy, it is not necessary that the two actions should be founded upon the same cause. The record will be admissible, however widely the two causes of action may differ, provided only that the special point sought to be concluded was actually a matter in issue in the earlier suit and was there litigated and decided.[255] But when a former judgment is pleaded *in bar* of another action, the case is different. The general rule is that it will not be available as a bar unless the cause of action alleged in the second suit is the same identical cause of action which was set up and litigated in the former action.[256] An exception to this rule, or rather, a necessary part of it, is that any claim or demand is barred by the former recovery which *ought* to have been included in the first suit, as constituting an inseparable part of the plaintiff's cause of action, although in fact it was omitted. So familiar and so unbending is the general rule that the books exhibit but few cases of a bold and obvious attempt to sue twice upon the same cause of action. In almost every instance, there is some apparent or substantial shade of difference relied on to save the bar, or the ingenuity of the pleader is exercised in disguising the grounds of the claim so that it may pass muster as a new cause of action. Hence it requires some nicety of discrimination, as well as familiarity with precedent, to determine in what cases the rule should apply. But at this day the ground has been so thoroughly explored as to leave but little uncertainty in the principles and rules which should govern.

[254] Wood v. Faut, 55 Mich. 185, 20 N. W. Rep. 897.

[255] *Supra*, §§ 504, 506.

[256] Parr v. Greenbush, 42 Hun, 282; McGee v. Overby, 12 Ark. 164.

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The point to be regarded is always the identity of the two claims. The reasons, the theories, the arguments, by which the contention is supported, are generally immaterial and not to be taken into account. According to the court in Texas: "It is of no consequence if the reasons urged to sustain the issue presented in this suit may not be precisely those relied upon, or in the mind of the pleader, when framing the petition in the first case. The applicability of the plea [of former recovery] depends upon the identity of the cause of action or matter of defense in issue, and not the identity or similarity of the points or grounds urged to support or maintain the action or matter of defense; otherwise litigation would only end when the ingenuity of counsel could not suggest additional grounds in support of the issue, though the gist of the issue may have been more than once considered and decided by the court."[257] But on the other hand, we must not forget that the same transaction or state of facts may give rise to distinct causes of action. It is not necessarily the identity of the *subject-matter* which determines the question. For example, the judgment rendered in an action by two to enjoin the enforcement of a joint judgment against them is no bar to a separate action by one of them to enjoin the enforcement of the same judgment against him, on grounds personal to himself and in which his co-defendant has no interest.[258] And again, the cause of action may be different, although the same relief be asked. Thus the dismissal of a bill to redeem pledged property, on the ground of staleness and the statute of limitations, is no bar to another bill seeking to redeem the same property under a pledge made four years after the first one.[259] In a case in California, the plaintiff brought replevin against the defendants to recover certain property, and obtained a judgment for its restitution and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought trover to recover the value of the property, and defendants pleaded the former recovery as a bar. But the court said: "The judgment in replevin constitutes no bar to this action, unless it be shown that it has been satisfied. The cause of action was in both cases the

[257] Girardin v. Dean, 49 Tex. 248.
[258] Bilsland v. McManomy, 82 Ind. 139.
[259] Gilmer v. Morris, 85 Fed. Rep. 682.

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same, but the object was essentially different. In the one case the plaintiff sought to recover a specific personal chattel which was wrongfully detained; in the other, the value of such chattel, when, owing to the acts of defendants, it was not in his power to procure a return. . . . . The judgment in the action of replevin was, as between the parties, conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value."[260] So again, when land is purchased at a tax-sale by the owner's agent, ejectment by the owner against such agent to establish the validity of the tax-title, will not bar a suit between the same parties to declare a resulting trust in favor of such owner.[261]

§ 726. Identification of Causes of Action.

For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action.[262] "Unquestionably the judgment in the former action is well pleaded as a bar in this suit, provided the cause of action is the same, although the form of action has been changed. The cause of action is said to be the same when the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former."[263] But it must also be observed that "if the testimony offered in the second suit is suffi-

[260] Nickerson v. California Stage Co., 10 Cal. 520. See also Vinal v. Continental Const. Co., 6 N. Y. Supp. 595.

[261] O'Connor v. Irvine, 74 Cal. 435, 16 Pac. Rep. 236.

[262] Lawrence v. Vernon, 3 Sumn. 20; Gates v. Goreham, 5 Vt. 317, 26 Am. Dec. 308; Riker v. Hooper, 35 Vt. 457; Smith v. Whiting, 11 Mass. 445; Percy v. Foote, 36 Conn. 102; Miller v. Manice, 6 Hill, 114; Stowell v. Chamberlain, 60 N. Y. 272; Marsh v. Masterson, 50 N. Y. Super Ct. 187; Crockett v. Routon, Dudley, 254; Gayer v. Parker, 24 Nebr. 643, 39 N. W. Rep. 845; Taylor v. Castle, 42 Cal. 367; Dawley v. Brown, 79 N. Y. 390; Marsh v. Pier, 4 Rawle, 273; Motley v. Harris, 1 Lea, 577; Martin v. Kennedy, 2 Bos. & P. 69.

[263] Taylor v. Castle, 42 Cal. 367.

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cient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action for which he attempted to recover in the first suit."[264] This last rule may be illustrated by the case where the former action was dismissed because it was brought prematurely. Here the evidence on the merits, though amply sufficient to authorize a recovery in the second suit, could not have given the plaintiff a judgment in the first action, and therefore it is no bar.

§ 727. In Criminal Cases.

The test of identity described in the preceding section is understood to apply equally to cases of successive prosecutions for the same criminal offense.[265] "The true test," says the supreme court of Pennsylvania, "to determine whether a plea of *autrefois acquit* be a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."[266] The test, therefore, of the sufficiency of a plea of former conviction or acquittal is whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first. The two offenses must be the same, identical in law and in fact, or an acquittal or conviction of the one is not a bar to a prosecution for the other.[267]

§ 728. Certainty Required in Estoppels.

It is of the very essence of an estoppel that it be certain. And this applies with special force to estoppels by former recovery. "According to Coke, an estoppel must be certain to the very intent, and if, upon the face of a record, anything is left to conjecture as to what is necessarily involved and decided, there is no estoppel in it

[264] Stringer v. Adams, 98 Ind. 539, citing Kirkpatrick v. Stingley, 2 Ind. 269; Indianapolis, etc., R. Co. v. Clark, 21 Ind. 150; Hargus v. Goodman, 12 Ind. 629.

[265] Wharton, Crim. Law (7th edn.), § 551.

[266] Heikes v. Commonwealth, 26 Pa. St. 513.

[267] Gordon v. State, 71 Ala. 315.

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when pleaded, and nothing conclusive in it when offered in evidence."[268] Thus, where, in a suit for the infringement of a patent, the bill is dismissed because of failure to show any infringement, this will not estop the plaintiff from again suing the same defendant for infringing the same patent. In order to make a judgment available as a technical estoppel in a case, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined.[269]

§ 729. Estoppel cannot be Avoided by Varying Form of Action.

It is a well-settled rule, and one that is supported by a multitude of authorities, that a party cannot, by varying the form of action, or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies.[270] Historically, this important rule is as old as the time of the Roman jurists,[271] and rests upon broad foundations of justice and expediency.

[268] Russell v. Place, 94 U. S. 606.

[269] Steam-Gauge & Lantern Co. v. Meyrose, 27 Fed. Rep. 218.

[270] Routledge v. Hislop, 2 El. & El. 549; Hancock v. Welsh, 1 Stark. 347; Outram v. Morewood, 3 East, 346; Marine Ins. Co. v. Young, 1 Cranch, 332; Lawrence v. Vernon, 3 Sumn. 20; Case v. Railroad, 2 Woods, 236; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565; Bunker v. Tufts, 57 Me. 417; Brown v. Moran, 42 Me. 44; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Spencer v. Dearth, 43 Vt. 98; Lindsey v. Danville, 46 Vt. 144; Livermore v. Herschell, 3 Pick. 33; Merriam v. Woodcock, 104 Mass. 326; Blackinton v. Blackinton, 113 Mass. 231; Norton v. Doherty, 3 Gray, 372, 63 Am. Dec. 758; Smith v. Way, 9 Allen, 472; Goodrich v. Yale, 97 Mass. 15; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Gardner v. Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Collins v. Bennett, 46 N. Y. 490; Brown v. Mayor, 66 N. Y. 385; Baker v. Rand, 13 Barb. 152; Rice v. King, 7 Johns. 20; Cist v. Zeigler, 16 Serg. & R. 282, 16 Am. Dec. 573; Marsh v. Pier, 4 Rawle, 273, 26 Am. Dec. 131; Harryman v. Roberts, 52 Md. 64; Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719; Ferguson v. Carter, 8 Ga. 524; Perry v. Lewis, 49 Mass. 443; Agnew v. McElroy, 18 Miss. 552, 48 Am. Dec. 772; Owens v. Rawleigh, 6 Bush, 656; State Bank v. Rude, 23 Kans. 143; Walker v. Fuller, 29 Ark. 448; Covington Bridge Co. v. Sargent, 27 Ohio St. 233; Bell v. McColloch, 31 Ohio St. 397; Sewell v. Scott, 35 La. Ann. 553; Kreuchi v. Dehler, 50 Ill. 176; Cole v. Favorite, 69 Ill. 457; Railroad v. Traube, 59 Mo. 355; Barker v. Cleveland, 19 Mich. 230; Taylor v. Castle, 42 Cal. 367; 1 Wharton on Ev. § 779.

[271] Dig. 44, 2, 5. See Pothier on Obl. pt. 4, c. 3, § 3, art. 4, § 4.

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That it has prevailed from very early times in the English law will appear from *Slade's Case*,[273] wherein "it was resolved that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt is a good bar in an action on the case on *assumpsit*." And to quote from a much later decision: "That the remedy sought, or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if, upon those facts, he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek a different remedy upon the same facts or cause of action."[274] Under this principle, we may cite the familiar rule that one who has been defeated, on the merits, in an action at law, cannot afterwards resort to a bill in equity upon the same facts for the same redress. And so also, where a claim has been once interposed by way of set-off, whether it was allowed or rejected, if it was considered on the merits, the judgment will bar any independent suit on the same claim.[274] But the cases most frequently calling for the application of this rule are those in which a party attempts to found two separate actions upon a transaction which justifies but one suit. For example, in a case in Minnesota, it appeared that the plaintiff had formerly brought trover against the defendant to recover damages for the alleged wrongful conversion of certain personalty, and now, upon the same state of facts, he sued to recover possession of the specific property itself. In each case he predicated his right to recover upon his general ownership and right of possession of the property, the wrongful possession of the defendant, and his refusal to return it upon the rightful claim of the plain-

[273] 4 Co. 94*b*. See also Y. B. 12 Edw. 4, 18*a*.

[274] Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. Rep. 773. And see Miller v. Manice, 6 Hill, 114, 122.

[274] Eastmure v. Laws, 5 Bing. N. C. 444.

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tiff. The only difference was in the relief prayed for. It was held that the subject-matter and cause of action in both cases were the same, although the form of action and relief sought were different, and therefore the judgment in the first action was a bar to a recovery in the second.[275] So a recovery in an action of trespass for taking away the plaintiff's wife is a bar to a recovery in an action on the case for enticing her away.[276] Upon the same principle, "in all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect, is upon principle a bar to the other."[277] For instance, plaintiff sued defendant in covenant for breach of a sealed agreement in respect to the making and delivery of a chattel, alleging certain defects; defendant pleaded accord and satisfaction, and judgment was in his favor; plaintiff then brought another action against him, in form *ex delicto*, based upon the deceit practised in concealing the same defects; defendant set up the former recovery, and it was held a good bar.[278] So where plaintiff brought *assumpsit* on an open account for moneys advanced to a third person which it was claimed the defendant was liable to pay, and was defeated, and subsequently brought an action of deceit against the same defendant, offering precisely the same evidence that was used on the former trial to sustain the declaration, it was held that the former judgment was a bar.[279] So again, where a proceeding by attachment for contempt is instituted as a means of private redress, and results in satisfaction, it may be pleaded in bar of a subsequent action of trespass between the same parties, founded on the same subject-matter.[280] Further, if the facts are the same, an unsuccessful attempt to secure relief or redress of a higher or more complete nature will often preclude a party from seeking a lower or lesser remedy. Thus it is held

[275] Hatch v. Coddington, 32 Minn. 92, 19 N. W. Rep. 393.

[276] Gilchrist v. Bale, 8 Watts, 355, 34 Am. Dec. 469.

[277] Norton v. Doherty, 3 Gray, 372, 63 Am. Dec. 758; Prince v. City of Quincy (Ill.), 21 N. E. Rep. 768; Ware v. Percival, 61 Me. 391.

[278] Cutler v. Cox, 2 Blackf. 178, 18 Am. Dec. 152. See also Newby v. Caldwell, 54 Iowa, 102, 6 N. W. Rep. 154.

[279] Duncan v. Stokes, 47 Ga. 593.

[280] Walker v. Fuller, 29 Ark. 448.

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that a judgment upon the merits against the wife, in an action for absolute divorce on the ground of cruelty, is a bar to any subsequent action by her for a limited divorce on the same grounds.[221]

§ 730. Limitations of this Rule.

The rule stated in the preceding section is subject to certain important qualifications, which, without detracting from its proper force, serve to limit the field for its legitimate application. Thus, in the first place, if the plaintiff has misconceived his remedy and his suit is dismissed solely on that ground, it is no bar to a subsequent action rightly brought. It is true that the cause of action remains the same, but the first judgment was not upon the merits.[222] So, in the next place, there are sometimes cases in which a party, proceeding upon a certain theory as to the legal effect of a given transaction or state of facts, finds himself unable to substantiate his view of the case, but afterwards, without any change in the facts, but acting upon a different theory, renews the litigation in a different form. Here we must apply the test generally agreed upon as the proper means of ascertaining the identity of the causes of action, viz., whether the same evidence would support both suits. If not, there is no bar arising from the former judgment. For example, a judgment-creditor who has been defeated in a suit to have conveyances made in payment of indebtedness by an insolvent debtor declared fraudulent and void, is not estopped from subsequently bringing another suit to have such conveyances declared to be a part of a general assignment made by the debtor.[223] So where a suit to recover a sum of money claimed as a legacy has been dismissed on general demurrer, it cannot be pleaded in bar to a bill by the same party for the same sum claiming under a trust.[224] So an action on the case for a deceit in falsely representing that a farm contained a certain number of acres, is not a bar to an action of *assumpsit* upon a guaranty that the land

[221] Wagner v. Wagner, 36 Minn. 239, 30 N. W. Rep. 766.

[222] *Supra*, § 715.

[223] Elgin Watch Co. v. Meyer, 29 Fed. Rep. 225.

[224] Woodland v. Newhall's Admr., 31 Fed. Rep. 434.

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was of that extent.[235] And in the next place, it must be remembered that the same act or fact may very possibly give rise to two or more distinct causes of action. And of course a judgment upon one of these does not preclude a recovery upon the other. Thus it is held that a judgment in trespass is no bar to trover for the same goods.[236] And similarly, in an action of trover, it was held that a judgment in detinue recovered by the plaintiff against the defendant for the same goods, which judgment remained unsatisfied, was no bar.[237]

§ 731. Judgment Conclusive of Whatever might have been litigated.

In connection with the principle which forbids a second litigation of the same cause of action, we are now to consider the important rule that the parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action, as well as all their evidence and all necessary parts of their case or defense, on pain of being barred in a subsequent controversy. There are many general expressions in the books to the effect that the judgment of a court of competent jurisdiction is final and conclusive upon the parties not only as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause and might have had determined.[238] In this form the statement is too sweeping, as will presently appear. But with proper restrictions it points out an important and well recognized principle. In the first place, it means that the parties must bring forward, in one trial, all the evidence and all the reasons which

[235] Schriver v. Eckenrode, 87 Pa. St. 218.

[236] Putt v. Rawstern, 3 Mod. 1.

[237] Elliott v. Porter, 5 Dana, 299, 30 Am. Dec. 689. But see Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159. And compare Union R. & T. Co. v. Traube, 59 Mo. 355.

[238] Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Lindsley v. Thompson, 1 Tenn. Ch. 272; Bates v. Spooner, 45 Ind. 489; Bailey v. Bailey, 115 Ill. 551, 4 N. E. Rep. 394; Nelson v. Couch, 15 C. B. N. S. 99; Henderson v. Henderson, 3 Hare, 100. In the case last cited Vice-Chancellor Wigram said: "I believe I state the rule of the court correctly when I say that when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circum-

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are extant and can be adduced in support of their respective cases. A litigant cannot experiment with the trial of his cause. After one determination of a suit on the merits, the controversy cannot be re-opened to hear an additional reason, which before existed and was within the knowledge of the party, in support of the same cause of action.[289] For example, in an action against the commissioners of a county to enjoin the assessment of the costs and expense of a road improvement, on the ground that the commissioners had no jurisdiction to order the improvement to be made, it was determined, upon a trial on the merits, that the commissioners had such jurisdiction. Afterwards the same parties brought an action against the commissioners to enjoin the same assessment for want of jurisdiction in the commissioners, for a reason not stated in the former action. But it was held that the question of jurisdiction was conclusively settled by the judgment in the first action.[290] So a judgment at law, for the defendant, is conclusive of the rights of the parties on a subsequent bill in equity, even if the complainant commenced and tried the action at law before he discovered or obtained all the evidence establishing alleged fraudulent acts of the defendant.[291] In the next place, the rule means that when a party has a fair legal opportunity to present and enforce his claim, he must avail himself of it. Where, for instance, in an action to enforce a lien on land, it appears that the plaintiff was made a party and might have enforced his lien in a prior suit or proceeding by the administrator to sell said land, but failed to do so, the judgment in the first proceeding is a bar to the latter.[292] Finally, a party must present his *whole* case. He must extend his claim so as to embrace everything which properly constitutes a part

stances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[289] Rogers v. Higgins, 57 Ill. 244.

[290] Martin v. Roney, 41 Ohio St. 141.

[291] Price v. Dewey, 11 Fed. Rep. 104.

[292] Vail v. Rinehart, 105 Ind. 6, 4 N. E. Rep. 218.

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of his cause of action. Thus a party failing to assert a claim or allowance in a suit in equity, in which it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit, unless his failure to do so in the first was caused by the fraud of his adversary and was not attributable to his own negligence.[293]

§ 732. Restrictions of Foregoing Rule.

The generality of the terms in which the foregoing rule is usually announced has led the courts, in some of the cases, to see the necessity of laying stress upon its restrictions and limitations. "It is sometimes vaguely said that a judgment or decree is conclusive of everything that might have been litigated and settled in the action, but the statement is far too broad, unless it be taken as applying to the particular issue or matter actually litigated and determined, and such matters and things as are necessarily implied by them." [294] In another case it is said to be applicable to such matter only as might have been used as a defense in the former action against an adverse claim therein.[295] It does not include matters which, though affecting the ultimate rights of the parties as between themselves, were not material to the actual issues before the court or to the relief to be administered.[296] In fact, the rule "is limited in its application to those matters which the parties, under their pleadings and the issue joined in the former action, might legitimately have controverted and have had decided by the verdict and judgment, and has never been so extended as to compel one party, having several different causes of action against another, to join them in one action because they were of such a character that the law would permit their union." [297]

§ 733. Second Action Proceeding on Different Theory.

As we have already intimated, cases not infrequently arise in which a party, acting upon a certain theory as to his legal rights, or as to

[293] Stewart v. Stebbins, 30 Miss. 66; Burford v. Kersey, 48 Miss. 643.

[294] Williams v. Clouse, 91 N. Car. 322.

[295] Maloney v. Horan, 12 Abb. Pr. N. S. 289.

[296] Fairchild v. Lynch, 99 N. Y. 359, 2 N. E. Rep. 20.

[297] Eastman v. Porter, 14 Wis. 39. See also Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454.

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the legal effects of a given state of facts or transaction, brings his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case, the former judgment is no bar to the second action. It is true the subject-matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts. Further, the evidence necessary to sustain the second action could not, if offered in the first, have altered the result. And this, as we have seen, is the one recognized test of identity. It will be expedient to illustrate this rather obscure principle by some examples from the reports. In a case in New York it appeared that the defendant company used the property of the plaintiffs in its business, under the belief of its managing agent that the company had purchased it, and the plaintiffs left the same in the possession of the company because it was their intention to sell it to the company, and they expected the company would pay for it. The plaintiffs first brought suit against the defendant to recover the value of this property as upon a *sale* thereof, but judgment went for the defendant on the ground that there was no sale and delivery. Then the plaintiffs sued to recover for the *use* of the property. And it was held that they were not barred by the former judgment.[298] So again, plaintiff brought an action alleging partnership with the defendant and asking for an accounting. A referee found that no partnership had existed, and dismissed the complaint. Plaintiff then brought another action, alleging a hiring by the defendant, and that he was to have half the profits as wages. Defendant set up the former action in bar; but it was held to be no bar, because the causes of action alleged in the two suits were not the same.[299] So money paid under a mistake of fact may be recovered back in an action brought for that purpose, notwithstanding an adverse judgment in a prior action to recover

[298] Rider v. Union India Rubber Co., 28 N. Y. 379.

[299] Marsh v. Masterson, 101 N. Y. 401, 5 N. E. Rep. 59.

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back the same money on the ground of fraud on the part of the defendant.[300] Again, a judgment for defendant in an action at law to recover a partnership debt from defendant, as a general partner, based on the claim that defendant failed to contribute his capital in cash and that he fraudulently withdrew the assets from the firm, is not a bar to a creditors' bill by the same plaintiff for an accounting by defendant, as a special partner, for the assets withdrawn by him, the causes of action not being identical, and it not appearing that the question of the improper withdrawal of assets was involved and determined therein in defendant's favor.[301] A judgment on demurrer in an action in which it was sought to hold the indorsers of a note liable on the ground that due diligence had been used in the prosecution of an unsuccessful suit against the maker, is no bar to a second suit in which it is sought to hold the indorsers liable on the ground of demand and notice.[302]

§ 734. Rule against Splitting Causes of Action.

When a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and made the basis of as many separate suits, but a recovery for one part will bar a subsequent action for the whole, the residue, or another part.[303]

[300] Belden v. State, 103 N. Y 1, 8 N. E. Rep. 368.

[301] Bell v. Merrifield, 109 N. Y. 202, 16 N. E. Rep. 55.

[302] Keater v. Hock, 16 Iowa, 23.

[303] Fetter v. Beale, 1 Salk. 11; Barwel v. Kensey, 3 Lev. 179; Bagot v. Williams, 3 Barn. & C. 235; Bartels v. Schell, 16 Fed. Rep. 341; Hayward v. Clark, 50 Vt. 612; Avery v. Fitch, 4 Conn. 362; Goodrich v. Yale, 97 Mass. 15; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Willard v. Sperry, 16 Johns. 121; Farrington v. Payne, 15 Johns. 432; Miller v. Covert, 1 Wend. 487; Colvin v. Corwin, 15 Wend. 557; Clark v. Jones, 1 Denio, 519, 43 Am. Dec. 706; Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60; Stevens v. Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Staples v. Goodrich, 21 Barb. 317; Ingraham v. Hall, 11 Serg. & R. 78; Logan v. Caffrey, 30 Pa. St. 196; Alcott v. Hugus, 105 Pa. St. 350; Sykes v. Gerber, 98 Pa. St. 179; Carvill v. Garrigues, 5 Pa. St. 152; Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719; Bates v. Quattleborn, 2 Nott & McC. 205; Oliver v. Holt, 11 Ala. 578, 46 Am. Dec. 228; O'Neal v. Brown, 21 Ala. 485; Erwin v. Lynn, 16 Ohio St. 539; Stein v. Prairie Rose, 17 Ohio St. 475, 93 Am. Dec. 631; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Beck v. Devereaux, 9 Nebr. 109, 2 N. W. Rep. 365; Herriter v. Porter, 23 Cal. 385; Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525; Baird v. United States, 96 U. S. 430.

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"The general rule," says the supreme court of Pennsylvania, "is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant and expose him to double costs. This is so far modified that where claims are distinct, though all might have been recovered in the first action, it will not bar a second for one which was not demanded or proved in the first. But where the contract is entire, and there is a recovery upon such contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy."[304] "The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious grievances."[305] In point of fact, this rule is not even a product of modern jurisprudence, but was well known in the Roman systems.[306] When the plaintiff, therefore, has an entire demand, he cannot divide it into distinct parts and bring separate actions for each; as, on an entire contract of sale of goods, he cannot maintain an action for one part of the goods sold and another action for another part.[307] And so he cannot divide an entire contract for the payment of a sum of money (a promissory note), exceeding the amount cognizable before a justice of the peace, into several smaller demands, and bring a distinct action before a justice upon each; and if an entire demand has been divided in this manner, and the justice renders judgment for the plaintiff in each of the actions, all the judgments will be reversed.[308] When an action is brought on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded in bar of the other.[309] Nor can the party, by assigning a part of his claim to another, divide an entire cause of action, so as to sustain more than one suit upon it.[310] Where a plaintiff brought suit upon a mechan-

[304] Sykes v. Gerber, 98 Pa. St. 179.
[305] Dutton v. Shaw, 35 Mich. 431.
[306] Dig. 44, 2, 7.
[307] Smith v. Jones, 15 Johns. 229.
[308] Willard v. Sperry, 16 Johns. 121.
[309] Hughes v. Dundee Mortgage Co., 26 Fed. Rep. 831.
[310] Ingraham v. Hall, 11 Serg. & R. 78.

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ic's claim in the district court, and withdrew one item of the claim on the trial, it was held that he could not afterwards bring a separate suit for the same item of charge, and that the former recovery was a bar to the second action.[211]

§ 735. What Demands are Inseverable.

As a general rule, one single contract or agreement gives rise to one single cause of action and no more. And where an action is brought on a contract, all claims arising under the same and then due constitute an entire and indivisible cause of action, and a judgment therein is a bar to any further action founded on such claims.[212] "So where there are breaches of several covenants contained in one instrument, and a suit is brought for damages for some of the breaches, and subsequently a second suit is brought for damages claimed under other breaches, all of the causes of action being in existence at the beginning of the first suit, the first action may be used as a defense against the second."[213] If a lessor to whom rent is payable quarterly brings an action and recovers judgment for a part of a quarter, he cannot afterwards sue for the residue.[214] But on the other hand, in an action on a bond to indemnify against outstanding debts of a partnership, the defendant pleaded that there had been a former recovery on the same bond by the same plaintiff. But it appeared that the second suit was for breaches of the bond not embraced in the first suit, and that the former judgment was not for the penalty of the bond but merely for damages for certain breaches thereof. And it was held that several suits could be maintained on the same bond for different breaches, and that the former judgment constituted no bar to the second action.[215] A recovery by an attorney in one of two suits brought on different portions of a bill for fees, for the purpose of bringing it within a justice's jurisdiction, will bar a recovery in the other.[216] The rule against splitting up causes of

[211] Smedly v. Tucker, 3 Phila. 259.

[212] O'Beirne v. Lloyd, 43 N. Y. 248; Rosenmueller v. Lampe, 89 Ill. 212, 31 Am. Rep. 74.

[213] Joyce v. Moore, 10 Mo. 271.

[214] Warren v. Comings, 6 Cush. 103.

[215] Orendorff v. Utz, 48 Md. 298; Ahl v. Ahl, 60 Md. 207.

[216] Lucas v. Le Compte, 42 Ill. 303.

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action is applied with great strictness in actions upon book-accounts, as will appear from the recent case of *Buck* v. *Wilson*.[217] There the defendant offered in evidence the record of a former recovery by the same plaintiff against him on the same book-account. When the first suit was brought, the whole of the account was due, but the plaintiff answered this by showing that at the institution of that suit he held defendant's promissory notes for part of the account, and at the trial he had only claimed and obtained a verdict for that part of the account not covered by such notes. These notes were not received as payment, but merely placed in the plaintiff's hands. It was held that the former recovery was a bar to the present action. A judgment for the plaintiff in an action on an attachment bond will bar any future action for damages accruing subsequent to the first; the cause of action in such case is one and indivisible, and if he brings his action too soon it is his own fault.[218] A recovery of the consideration money and interest, in a suit on a covenant in a conveyance that the grantor is the lawful owner of the premises, is a bar to a subsequent suit based on a covenant of warranty of title contained in the same deed.[219] In a suit in the nature of ejectment, the plaintiff recovered judgment for the premises in controversy and a nominal sum for damages; subsequently he brought an action against the same party for rents which accrued previous to the judgment; it was adjudged that the action could not be maintained.[220] So a recovery for use and occupation, in an action to recover the possession of real property, is a bar to a subsequent action for injury to the estate during the same period of occupation.[221] A *judgment* also is a single and indivisible cause of action. Where plaintiff was the assignee of a part of a judgment, and the other part, remaining unpaid, was assigned to a third person, and the plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a *scire facias*, and to obtain an independent right to process for its collection, it was held that the undivided judgment could not

[217] 113 Pa. St. 423, 6 Atl. Rep. 97.
[218] Davis v. Milburn, 4 Iowa, 246.
[219] Leggett v. Lippincott (N. J.), 14 Atl. Rep. 577. And see Osborne v. Atkins, 6 Gray, 423.
[220] Stewart v. Dent, 24 Mo. 111.
[221] Pierro v. St. Paul & N. P. R. Co., 37 Minn. 314, 34 N. W. Rep. 38.

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be so separated into distinct and independent parts.[323] Where a suit is brought in the name of a judge of probate, against an executor on his probate bond, to recover money in his hands which should be paid out in legacies and other claims, the plaintiff, though a trustee for different claimants, has the sole legal interest in the cause of action, and he has no more right to multiply suits, and unnecessarily to divide one cause of action into many, than any other plaintiff, and hence parties whose claims were due but were not taken into account in the suit are barred by the judgment.[324]

§ 736. Action on Running Account.

According to the doctrine of a majority of the best considered cases, a continuous running account, for goods sold, money lent, work and labor, or the like, is an entire demand, not susceptible of division, and cannot be split up into several causes of action. And where suit has been brought for part of the items of such an account, omitting other items of the same account which were due at the time, and judgment has been recovered therefor, such judgment is a bar to another action afterwards brought to recover for the items so omitted.[324] This rule, however, has not passed unchallenged, and it is repudiated in an important and able decision of the supreme court of Massachusetts.[325] But the reasoning in that case, though forcible,

[323] Hopkins v. Stockdale, 117 Pa. St. 365, 11 Atl. Rep. 368.

[324] Pinney v. Barnes, 17 Conn. 420.

[324] Guernsey v. Carver, 8 Wend. 492; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Oliver v. Holt, 11 Ala. 574, 46 Am. Dec. 228; Bunnel v. Pinto, 2 Conn. 431; Lane v. Cook, 3 Day, 255; Ingraham v. Hall, 11 Serg. & R. 78; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Memurer v. Carey, 30 Minn. 458, 15 N. W. Rep. 877.

[325] Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611. In this case, Wilde, J., in delivering the opinion of the court, observed: "The defendant next contends that a running account for goods sold, money paid, etc., is an entire demand, incapable of being split up for the purpose of bringing separate suits, and the case of Guernsey v. Carver, 8 Wend. 492, is relied on in support of this position, and if that case was rightly decided, we think it would maintain the present defense. But we know of no principle of law, nor of any other decided case, on which the decision in that case can be sustained. It is said that the law abhors a multiplicity of suits, and this seems to be the only ground of the decision in that case. But that reason would apply to notes of hand and other demands unquestionably several and independent. If any

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is not conclusive, and the courts generally adhere to the rule as stated. But a former recovery in an action on book-account will not bar a subsequent suit of the same nature for articles delivered previous to such recovery, but not adjudicated upon on the ground that the time of payment had not then elapsed.[226] So where one brings an action of book debt and afterwards another action of the same nature before another court, for an account which accrued subsequently to the commencement of the first action, and recovers therein, such recovery is no bar to the first action.[227]

§ 737. Claims Omitted by Mistake.

It is generally held that a party who inadvertently, or by his own negligence or mistake, and without fault or fraud of the adverse party, takes judgment for a sum less than his actual claim, is estopped to bring a second action to recover the residue.[228] Thus, where one has recovered judgment for the amount of a promissory note, with the interest thereon, he is barred from again suing on the same cause of action on the ground that there was a mistake in assessing the proper amount of interest due.[229] Some cases, however, principally in virtue of the peculiar circumstances on which they were founded, have allowed a new action to be brought for demands inadvertently omitted from the former recovery.[230] In

evils should arise from multiplying suits which might be joined, it is for the legislature to provide a remedy. There is already a law on this subject, by which a plaintiff who brings several actions on demands which may be joined is restricted in the recovery of his costs, and if the provisions of this law are not sufficient, it is for the legislature to supply the deficiency. As the law is, we think it cannot be maintained that a running account for goods sold and delivered, money loaned, or money had and received at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement or understanding may be inferred." But this decision was criticised and refuted, and Guernsey v. Carver upheld and approved in Bendernagle v. Cocks, *supra*.

[226] McLaughlin v. Hill, 6 Vt. 20; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448.

[227] Avery v. Fitch, 4 Conn. 362.

[228] Ewing v. McNairy, 20 Ohio St. 315; Stockton v. Ford, 18 How. 418; Hayes v. Reese, 34 Barb. 151; Keokuk County v. Alexander, 21 Iowa, 377.

[229] Wickersham v. Whedon, 33 Mo. 561.

[230] See Stevens v. Damon, 29 Vt. 521; Phillipps v. Bossard, 35 Fed. Rep. 99; Byrket v. State, 3 Ind. 248.

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a case in Connecticut, where the plaintiff, in presenting his demand, credited the defendant with a certain part of the general claim for which the latter had given an order on a third person, and recovered judgment, and afterwards discovered that the order had never been accepted or paid, it was held that he was not precluded from maintaining his suit for the amount so credited on the order.[331] As in the case of mistakes of the parties, so also where the court commits errors or gives erroneous rulings, the judgment is nevertheless conclusive as to all that might and ought to have been recovered. Thus, where, in an action of covenant, the plaintiff was entitled to recover both present and prospective damages, but the court instructed the jury not to allow damages beyond the time of trial, in consequence of which the plaintiff recovered only his present damages, it was held that the judgment would nevertheless bar another action by him on the same covenant; for his remedy was by taking proper steps in the original cause to correct the error of the court.[332] And the same result follows where the inadequacy of the first judgment was due to an error made by the referee.[333] And so where, upon a confession of judgment before a justice, he makes an error in entering up the amount, all other proceedings being regular, no suit can be maintained for the omitted sum.[334] But the rule prohibiting a multiplicity of suits has no reference to a case where the party has no knowledge of his means of redress; and a former recovery does not bar claims of which the plaintiff was ignorant, although they existed at the time and might have been joined.[335]

§ 738. Entire Claims Founded on Tort.

In respect to the rule against splitting up an entire and indivisible cause of action, there is no difference between actions founded on tort and those based on contracts. An entire claim arising from a single tort cannot be divided and made the subject of several suits, however numerous the items of damage may be. A judgment upon the mer-

[331] Kane v. Morehouse, 46 Conn. 300.
[332] Winslow v. Stokes, 3 Jones (N. Car.), 285, 67 Am. Dec. 242.
[333] Bancroft v. Winspear, 44 Barb. 209.
[334] Town v. Smith, 14 Mich. 348.
[335] Moran v. Plankinton, 64 Mo. 337.

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its in respect to any part will be available as a bar in other actions arising from the same cause.[336] Thus, for a single and completed trespass upon and injury to an entire tract of land several actions for damages cannot be maintained. A recovery of damages in respect to a part of the land will bar a subsequent recovery in respect to another part of the tract, the cause of action being entire.[337] So also if several chattels be taken at the same time and by the same tortious act, the right of action is single, and a recovery for any of them, either in trover or trespass, merges the whole cause of action and bars any subsequent suit for the residue.[338] Nor is this rule altered by the fact that the articles forming the subject of the second suit would have been included in the first but for the fraud of the defendant;[339] nor even by the fact that, of the aggregate of the chattels, the plaintiff was holding a part in his own right and part as trustee for the benefit of others, if all were included in the same act of trespass.[340] An interesting example of the application of the main rule is found in a case recently ruled in Massachusetts, where it appeared that cinders from a locomotive of the defendant railroad company had set fire to the grass of the plaintiff's intestate and burned the grass and wood in two lots owned by him; defendant was sued for the injury, one count of the declaration alleging injury to both lots, and judgment was rendered for the plaintiff. Two years later the defendant was sued for the injury to one of the two lots by the fire, plaintiff claiming that in the first suit damages were only recovered for injuries to the other lot. But it was held that, the damages to both

[336] Wichita & W. R. Co. v. Beebe, 39 Kans. 465, 18 Pac. Rep. 502; Saddler v. Apple, 9 Humph. 342.

[337] Pierro v. St. Paul & N. P. R. Co., 39 Minn. 451, 40 N. W. Rep. 520. See also Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611.

[338] Union R. Co. v. Traube, 59 Mo. 355; Farrington v. Payne, 15 Johns. 432; O'Neal v. Brown, 21 Ala. 482.

[339] McCaffrey v. Carter, 125 Mass. 330.

[340] O'Neal v. Brown, 21 Ala. 482. "The principle is," said the court in this case, "that where a tort is committed by taking several chattels at one time, it gives but one cause of action, if they belong to one person, and the chattels were in his possession at the time, and he cannot be allowed to split it up and bring separate suits for separate articles. Nor can it make any difference that he was possessed of some as trustee, and of others in his own right, for the legal title to all and the possession was in him, and there being but one tort to the possession of one person, it gives, and indeed it can give him, only one cause of action, and that is merged when a recovery has been had upon it."

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lots being the result of one single act of the defendant, the former judgment was a bar to the latter suit, although the plaintiff might have omitted to prove in that action all the damages he suffered.[341] So if the declaration in an action contains but one count, setting forth various trespasses, upon real estate, accompanied by particular acts of injury, a judgment therein for a portion of such acts is a bar to a subsequent action to recover damages for others of the same acts, because the cause of action is single and inseverable.[342] Furthermore, it is well settled that if the cause of action arises from one single tortious act, the plaintiff must recover *all* his damages in one action. If the wrong be continuous or recurring, every fresh injury will give ground for a fresh suit. But if the act complained of is single, completed, and not repeated, both present and prospective damages must be sought in a single action, and the recovery therein will bar any subsequent suit brought on the same tort, however unforeseen or aggravated may be the new injuries attributable to the old act.[343] This principle is strikingly illustrated in an English case, where the plaintiff recovered damages against the defendant in an action for assault and battery, and afterwards, as a consequence of the original trespass, a piece of his skull came out, whereupon he brought a new action for fresh damages. The defendant pleaded the former judgment in bar, and it was held a good plea. Said Holt, C. J.: "Here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial."[344] It is further to be observed that the law sometimes compels a party to make his election whether to proceed in tort or upon contract, and when he has thus elected he must abide by his choice. "A party cannot divide his cause of action, recover compensation in *assumpsit* by waiving the tort, and then, having received such compensation, resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived. He

[341] Knowlton v. New York & N. E. R. Co., 147 Mass. 606, 18 N. E. Rep. 580. See also Trask v. Railroad, 2 Allen, 331.

[342] Goodrich v. Yale, 8 Allen, 454.

[343] Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Hodsoll v. Stallebrasse, 11 Ad. & El. 301; Whitney v. Clarendon, 18 Vt. 252; Watson v. Van Meter, 43 Iowa, 76.

[344] Fetter v. Beale, 1 Salk. 11.

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cannot waive all wrong-doing and recover compensation upon that basis, and then, treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles." [345] On the same rule, a judgment for the defendant in an action of trover for a chattel is a bar to an action of trespass for the forcible taking of the same chattel, because, by bringing trover, plaintiff waives the trespass. If he had brought trespass, he might have recovered both the value of the property and damages for the violence used. And since he must recover all the damages he can in respect to the same act or transaction in one suit, the case comes within the rule against dividing an inseverable cause of action.[346]

§ 739. Recovery in Malicious Prosecution bars Action for Slander.

On the principle that all damages for one wrong must be recovered in one action, it is held that a judgment in an action for malicious prosecution will bar a subsequent suit for the defamation of character involved in the false charge. "In an action for malicious prosecution," says the court of appeals of New York, "the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expenses of his defense, but for the injury to his fame and character by reason of the false accusation. The latter indeed is, in many cases, the *gravamen* of the action. An accusation of crime, made under the forms of law, or on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action for malicious prosecution. The injured party cannot be entitled to two recoveries for the same cause, and a recovery in that form must therefore be a bar to a subsequent action of slander for the same identical accusation." [347]

[345] Ware v. Percival, 61 Me. 393, 14 Am. Dec. 565. See also Smith v. Way, 9 Allen, 472.

[346] Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719. And see Union R. & T. Co. v. Traube, 59 Mo. 355.

[347] Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301. See also Jarnigan v.

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§ 740. Distinct Injuries from Same Tortious Act.

We have seen that, as a rule, only one cause of action can arise from one tort. But there are exceptional cases in which the same act may occasion several distinct injuries, and these may be made the basis of as many separate suits. Thus damage to goods and injuries to the person, although caused by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action; and therefore the recovery of compensation for the damage to the goods is no bar to an action subsequently commenced for the personal injury.[348] And again, the rights of different persons, or of the same person in different capacities, may be violated by the same tortious act. A judgment, for example, in an action by a partnership for injuries to property by the operation of an elevated railroad, is no bar to a subsequent action by one of the partners for personal injuries resulting from the same unlawful acts of the company.[349] So again, an action by a parent against a corporation, for the loss of services of his child occasioned by an injury to the child through the negligence of a servant of the corporation, is not barred by the fact that the child, by his parent as next friend, has already recovered damages against the corporation for the same injury.[350] And a former recovery by the father, for loss of the child's services, is no bar to a recovery by him, as administrator, of such damages as the child himself might have recovered, including exemplary damages.[351]

§ 741. Distinct Trespasses.

In view of what has been said concerning inseverable demands arising *ex delicto*, it is important to add that distinct trespasses or other torts, although they may be more or less connected, will give

Fleming, 43 Miss. 724; Rockwell v. Brown, 86 N. Y. 207; Townshend, Slander and Libel, § 251.

[348] Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141.

[349] Taylor v. Manhattan Ry. Co., 6 N. Y. Supp. 488.

[350] Wilton v. Middlesex R. R., 125 Mass. 130.

[351] Bradley v. Andrews, 51 Vt. 525; Karr v. Parks, 44 Cal. 46.

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rise to distinct causes of action.[352] Thus where there are distinct trespasses, committed consecutively, but in different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second suit for the other act.[353] So a judgment for defendants in an action for the trespassing of their cattle on the plaintiff's land, is not a bar to a subsequent action for similar trespasses, occurring prior to those alleged in the former action.[354] A judgment of a court of admiralty upon a libel filed against the master of a vessel by one of the crew, complaining of an assault and imprisonment alleged to have been committed on the high seas, is not a bar to an action by the mariner against the master in a court of common law for an assault and imprisonment on shore in a foreign port in the course of the voyage.[355]

§ 742. Continuing Damages from Tort.

A former recovery in an action for a nuisance is no bar to a subsequent action between the same parties for a continuance of the nuisance.[356] Thus, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction for the trespass, it was held that after notice to the defendants to remove the buttresses and their refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.[357] According to the generally accepted doctrine, in an action for the continuance of a trespass or nuisance, a former proceeding upon the same cause of action and between the same parties or those under whom they claim, wherein judgment was recovered by

[352] Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Missouri Pac. Ry. Co. v. Scammon (Kans.), 21 Pac. Rep. 590.

[353] White v. Moseley, 8 Pick. 356.

[354] De La Guerra v. Newhall, 55 Cal. 21.

[355] Adams v. Haffards, 20 Pick. 127.

[356] Smith v. Elliott, 9 Pa. St. 345.

[357] Holmes v. Wilson, 10 Ad. & El. 503. Compare Clarke v. Yorke, 47 L. T. N. S. 881.

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the plaintiff, is conclusive of the rights of the parties; the defendant is estopped to deny the existence or character of the nuisance or the plaintiff's right to recover, and the latter need only prove that the nuisance remains in the same condition as before, or in a more or less damaging condition.[358] But this rule is not universally acknowledged. In some few states it is held that such former judgment is *prima facie* but not conclusive evidence of the plaintiff's right to recover.[359] If a conclusive effect is to be given to the former verdict for the plaintiff, the same consequences should attend a verdict given for the defendant. And this indeed appears to be the rule. Thus, where the plaintiff, in a former action against the same defendant, sought to recover on account of the obstruction of an alleged natural watercourse, and one of the necessary questions in that case was whether the alleged watercourse was really such in contemplation of law, or only a way of escape for surface-water, and there was a general verdict for defendant and judgment accordingly, it was held that the question was adjudicated against the plaintiff, and he could not maintain another action against the defendant for the obstruction of the same alleged stream, although in the new action he alleged that the obstruction had been made wider and higher.[360] But where the plaintiff might, without any new act on the part of the defendant after the former suit was commenced, have sustained damage between the time of bringing that suit and the time of bringing the present suit, and such damage might have resulted from the same positive acts complained of in the former suit, by reason of the longer continuance of the state of facts which those acts established, a verdict for defendant in the former suit is not conclusive upon the plaintiff in the latter.[361]

[358] Smith v. Elliott, 9 Pa. St. 345. Schoch v. Foreman, 3 Brewst. 157; Long v. Trexler (Pa.), 8 Atl. Rep. 620; Plate v. New York Central R. Co., 37 N. Y. 472.

[359] Richardson v. Boston, 19 How. 263; Standish v. Parker, 2 Pick. 20; Courtland v. Willis, 19 Ohio, 142; Nivin v. Stevens, 5 Har. (Del.) 272.

[360] Hahn v. Miller, 68 Iowa, 745, 28 N. W. Rep. 51. See Smith v. Inhabitants of Brunswick, 80 Me. 189, 13 Atl. Rep. 890.

[361] Jones v. Lavender, 55 Ga. 228.

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§ 743. Distinction between Permanent and Recurring Trespass or Nuisance.

In the class of cases now under consideration, it is important to inquire into the character of the injury complained of, with reference to its being of a periodical and recurring nature or permanent and unalterable. The rule is, that for trespasses or nuisances that are not of a permanent character, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, and every repetition of the trespass or continuance of the nuisance is a fresh injury giving a right to a new suit; but as to trespasses and nuisances that are of a permanent character, a single recovery may and must be had for the whole damage resulting from the act, and no second action will lie.[362] "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause except human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means in his power to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury, to be compensated in a suit, is only the damage that has happened."[363] In the Massachusetts reports we find a passage which at once states and illustrates the rule, in the following language: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land.

[362] Denver City Irrigation Co. v. Middaugh (Colo.), 21 Pac. Rep. 565; Chicago & Alton R. Co. v. Maher, 91 Ill. 312; Omaha & R. V. R. Co. v. Standen, 22 Nebr. 843, 35 N. W. Rep. 183; Stodghill v. C. B. & Q. R. Co., 53 Iowa, 341, 5 N. W. Rep. 495; Troy v. Cheshire R. R., 23 N. H. 83; Fowle v. New Haven, etc., Co., 107 Mass. 352.

[363] Troy v. Cheshire R. R., 23 N. H. 83.

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For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause."[364] So again, a recovery of damages for the deterioration in the value of the plaintiff's premises by the erection and maintenance of gas-works in the vicinity, polluting the water of the plaintiff, is a bar to any farther prosecution for the same cause, and it is error to refuse proof of such former recovery in a second action for a continuance of the injury.[365] A recent decision of the supreme court of Illinois, without abandoning the established rule, pushes the definition of transient nuisances, as distinguished from permanent, to a point which the facts of the case scarcely seem to warrant. It was held that a former judgment for damages to plaintiff's land by overflows of a stream, caused by the defendant's railroad bridge, *which was improperly and negligently constructed and maintained*, was no bar to a recovery for other injuries to the land sustained subsequent to the former suit by a continuance of such bridge.[366]

§ 744. Plaintiff not Required to Join Distinct Demands.

While a party is not allowed to split up an entire and inseverable cause of action and prosecute it by piecemeal, nor to present only a portion of the grounds on which relief is sought, and save the rest for a second suit if the first fail, yet this rule does not require that distinct causes of action, each of which by itself would authorize independent relief, should be presented in a single suit, although they exist at the same time and *might* be considered together.[367] In the language of the court in New York: "It is entire claims only which cannot be divided within this rule, those which are single and

[364] Fowle v. New Haven, etc., Co., 107 Mass. 352. See also Stodghill v. C. B. & Q. R. Co., 53 Iowa, 341, 5 N. W. Rep. 495; Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792.

[365] Decatur Gas Light Co. v. Howell, 92 Ill. 19.

[366] Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. Rep. 289.

[367] Stark v. Starr, 94 U. S. 477; Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Railroad v. Castello, 50 Ala. 12; Flaherty v. Taylor, 35 Mo. 447; Eastman v. Porter, 14 Wis. 39.

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indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions."[368] On this principle, the holder of several overdue promissory notes, all against the same parties, may bring a separate action upon each, and a recovery in one action is no bar to the others; and further, the fact that the notes were all given upon settlement of one identical demand does not make each a part of the original demand so as to compel the holder to join them all in one suit.[369] So where defendant had agreed to receive four certain bonds held by the plaintiff and pay a certain sum for the same, it was held that the latter might tender any one of the bonds and demand its proportionate share of the purchase price, and a judgment for such share of the money due, for one bond, was no bar to an action for the price of the others.[370] On the same rule, each claim presented to and rejected by a board of supervisors constitutes a distinct and separate cause of action, and a judgment obtained on one will not bar an action for the recovery of the others.[371] So the entry of a decree of foreclosure and sale of mortgaged premises does not bar another action of foreclosure upon a junior mortgage of the same premises.[372] To exhibit the application of the rule under somewhat different circumstances, we may cite a case from Wisconsin,[373] in which it was held that a cause of action for goods

[368] Secor v. Sturgis, 16 N. Y. 548.
[369] Nathans v. Hope, 77 N. Y. 420.
[370] Mills v. Garrison, 3 Abb. App. Dec. 297.
[371] Hughes v. Mendocino Co. (Cal.), 4 Pac. Rep. 236.
[372] Bache v. Purcell, 51 How. Pr. 270.
[373] Kronshage v. Chicago, M. & St. P.

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destroyed by fire while in defendant's hands as a *carrier*, and a cause of action existing at the same time in favor of the same person against the same defendant for goods destroyed by fire while in such defendant's hands as a *warehouseman*, need not be joined, and a judgment upon one is no bar to a subsequent action on the other. "In the former action," said the court, "the defendant was liable though not negligent; in this action the defendant is not liable unless the loss was caused by its negligence. Hence the two causes of action are entirely different, and require different lines of proof to maintain them. Under all the authorities, the claims in the two actions do not constitute one entire and indivisible cause of action, but separate and distinct claims, for which separate suits may be maintained."

§ 745. Causes of Action Distinct though Founded on Same Facts.

The rules thus far given mutually limit and explain each other. But the chief difficulty in making a right application of them is found in cases where separate and distinct causes of action are alleged to arise out of the same transaction or state of facts. That such cases do really occur in practice is apparent from even the most cursory review of the authorities. But it is not always easy to extract and formulate the general principles which should govern them. We may say, however, in the first place, that ordinarily a judgment is not conclusive of the rights of the parties which accrue subsequent to the institution of the suit, although they grow out of the same subject-matter.[874] But this must be limited by the rule that for a single and unrepeated act of trespass, or a permanent nuisance, the plaintiff must recover *all* his damages, present and prospective, in one suit, as already explained.[875]

Again, it by no means follows that two claims are identical, or inseparably connected, because they grow out of the same instrument. A recovery in one action of covenant is no bar to another on the

R. Co., 45 Wis. 500. But see Bassett v. Conn. River R. Co. (Mass.), 22 N. E. Rep. 890.

[874] Morrison v. Beckey, 6 Watts, 349.

[875] *Supra*, §§ 738, 743. See Whitney v. Clarendon, 18 Vt. 252.

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same instrument, claiming for another and distinct breach.[376] Thus, where a lease contained seven distinct and independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build 125 rods of fence during the term, it was held that a former action by the lessor, upon the last covenant, for not building the fence, was not a bar to an action subsequently brought upon the covenant to repair, the two covenants being distinct and having no connection with each other, except that they were contained in and evidenced by the same instrument.[377] Yet on recovery of judgment for breach of covenant, no action will lie for other breaches of the same covenant which had occurred when the first action was brought.[378] It may also prove, on examination, that two claims are supported by distinct promises or implied agreements, though growing out of a state of facts apparently homogeneous. Thus, where a railroad passenger having a valise containing apparel and a trunk containing merchandise, of which fact he informed the agent on applying for checks, had paid extra for transportation of the latter, and recovered of the company for loss of the former, it was held that this did not preclude his recovery in a separate action for loss of the latter, evidence thereof having been excluded at the first trial.[379]

In the next place, it often happens that the same transaction or state of facts gives distinct rights of action to or against *different persons*, or to the parties mutually against each other. For example, a joint judgment obtained by partners in a suit for slander is no bar to a several suit by one of the partners on the same cause of action. "This action is for a personal injury to the character of the plaintiff, and the former suit was for a joint injury to the trade and business of the firm of D. & K. The members of the firm could have no legal interest whatever in the personal character of each other."[380] Again, where A. sued B. for assault and battery

[376] Insurance Co. v. Alges, 81 Pa. St. 446; Givens v. Peake, 1 Dana, 225. See Robinson v. Crowninshield, 1 N. H. 76; Andrew v. Schmitt, 64 Wis. 664, 26 N. W. Rep. 190.

[377] McIntosh v. Lown, 49 Barb. 550.

[378] Coggins v. Bulwinkle, 1 E. D. Smith (N. Y.), 434.

[379] Millard v. Railroad Co., 20 Hun, 191. See also Harding v. Hale, 2 Gray, 399.

[380] Duffy v. Gray, 52 Mo. 528.

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and recovered judgment, which B. paid, and B. subsequently sued A. for an assault and battery on him, committed at the same time and in the same fight, the former judgment was held to be no bar, because *non constat* but that each might have an independent right of action growing out of the same transaction.[381] So a recovery against a sheriff for money had and received by him in his official capacity is no bar to an action on his bond, against the sureties, for the same money.[382] And a judgment against the principal, on the contract guarantied, will not bar an action against him and another, on the contract of guaranty, executed by both of them jointly.[383]

In the next place, the same act or transaction may give rise to two separate actions of tort, or to one of tort and one of contract. Under some circumstances, the plaintiff will be required to make his election between remedies. But this is not always so; sometimes he may pursue them all to judgment, obtaining, however, only one satisfaction. Thus, a judgment giving actual and exemplary damages for malicious prosecution and for forcibly taking away plaintiff's property, containing the statement that it is not based on the value of the property, will not bar a pending action for the recovery of the property.[384] A judgment in favor of the claimant, on a trial of the right of property in goods seized on execution, is not a bar to an action for the tort committed by taking the property under such execution.[385] A judgment against a carrier for breach of contract in selling the goods, such judgment being for their value but not satisfied, is no bar to an action of trover against the vendee.[386] So also the recovery of judgment on a contract is no bar to a separate action for the deceit originally practised upon the plaintiff to induce him to become a party to it.[387] An action against the vendor upon a warranty in the sale of personal property, in which the plaintiff is defeated on the

[381] Cade v. McFarland, 48 Vt. 47.

[382] Jones v. Oswald, 2 Bailey, 214.

[383] White v. Smith, 33 Pa. St. 186, 75 Am. Dec. 589.

[384] Pishaway v. Runnells, 71 Tex. 352, 9 S. W. Rep. 260. See also Turner v. Brock, 6 Heisk. 50.

[385] Lenoir's Admr. v. Wilson, 36 Ala. 600. See Greenfield v. Wilson, 18 Gray, 384.

[386] Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 506.

[387] Wanzer v. De Baun, 1 E. D. Smith (N. Y.), 261; Morgan v. Skidmore, 3 Abb. New Cas. 92.

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ground that there was no warranty, is not a bar to an action against the vendor's agent, by whom the sale was made, for fraud therein.[388]

Principles similar to those explained with reference to civil issues obtain in criminal cases with equal force. Thus, for example, an acquittal or conviction on a charge of assault and battery is no bar to a subsequent prosecution for kidnapping, although the two offenses were committed by the same act.[389]

§ 746. Actions on Collateral Securities.

It is a generally accepted rule that an action is not barred by the fact that collateral security was given for the debt sought to be recovered and that the plaintiff has already recovered judgment on such security.[390] Thus a judgment against the indorser of a note only extinguishes and merges the cause of action arising upon his contract of indorsement, leaving in full force the contract obligation of the debtor to pay the debt.[391] So where a creditor receives a draft on a third party, indorsed by the debtor, as collateral, a judgment in favor of the debtor in an action on the draft is not a bar to an action on the debt.[392] The converse of this rule is also good law. The recovery of a judgment against a principal debtor on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal, unless such judgment has been satisfied.[393]

§ 747. Successively Arising Causes of Action.

Where several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as

[388] Gutchess v. Whiting, 46 Barb. 139.

[389] State v. Stewart, 11 Oreg. 52, 4 Pac. Rep. 128. See also Methard v. State, 19 Ohio St. 363.

[390] Drake v. Mitchell, 3 East, 251; Fairchild v. Holly, 10 Conn. 475; Chipman v. Martin, 13 Johns. 240. Compare Sykes v. Gerber, 98 Pa. St. 179. See Vanuxem v. Burr (Mass.), 24 N. E. Rep. 773.

[391] Howell v. McCracken, 87 N. Car. 399.

[392] Betterton v. Roope, 3 Lea, 215.

[393] McCullough v. Hellman, 8 Oreg. 191; White v. Smith, 33 Pa. St. 186, 75 Am. Dec. 589; Fisher v. Fisher, 98 Mass. 303; Brandt on Suretyship, 340.

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each liability accrues. But in this case it has been held that if no action is brought until more than one is due, all that are due must be included in one action. And if an action is brought when more than one is due, a recovery in that suit will be a bar to a second action brought to recover the other claims that were due when the first was brought.[304] Thus, upon a contract of employment at a fixed salary, payable at stated periods, an action and recovery for one of such periods is no bar to a subsequent action to recover salary becoming due subsequent to the commencement of the first action.[305] So a party holding mortgage notes due at different times may institute a suit to foreclose as to only one note, which has fallen due, and a judgment of foreclosure in such a suit, which judgment is paid without a sale of the mortgaged premises, is no bar to a subsequent suit on the mortgage to enforce payment of another of the notes; the notes are so many successive mortgages and causes of action.[306]

The nature of the contract, however, may be such that, instead of a series of actions, only one suit can be brought upon it. And as to the means of determining between these two cases, the authorities leave us in some doubt. In the language of Judge Thompson:[307] "Between the cases in which there may be successive recoveries upon successive claims arising out of the same contract, and those in which a single recovery for a breach puts an end to all further liability on that contract, it is sometimes very difficult to distinguish." Citing an earlier decision of the same court,[308] the learned judge expresses the opinion that "the test question generally is, whether the subsequent suit is for a breach of the same or a different *undertaking* from that upon which the first suit was maintained. Thus in the case of a lease for a year, with the rent payable monthly, although the contract is a unit, yet there is a separate undertaking for the payment of each month's rent. The lessor, therefore, having recovered judgment for one month's delinquency, may yet sue and recover for the non-payment of a succeeding month's rent. *Kerr* v.

[304] Union R. & T. Co. v. Traube, 59 Mo. 355.

[305] McEvoy v. Bock, 87 Minn. 402, 84 N. W. Rep. 740.

[306] Crouse v. Holman, 19 Ind. 30; Bliss v. Weil, 14 Wis. 35, 80 Am. Dec. 766.

[307] Priest v. Deaver, 22 Mo. App. 276.

[308] Kerr v. Simmons, 9 Mo. App. 376.

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Simmons [9 Mo. App. 376] is itself an illustration of the other class of cases. The lessee had covenanted for a surrender of the premises at the end of the term, otherwise to pay double rent for every day he should hold over. He held over for one month; thereupon the lessor sued and recovered the double rent for that month. He held over another month, at the expiration of which the lessor sued again. It was held that he could not recover, because the *gravamen* of the action was, not the several undertaking to pay double rent for each month (which constituted only an agreed measure of damages), but the breach of the single undertaking to surrender possession; and as this breach had been the subject of one recovery, there could not be another for the same cause."

But the principle is well established that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract.[399] This doctrine

[399] Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611. In this important and well-reasoned case, Wilde, J., expressed himself as follows: "With respect to the first point, it is undoubtedly true that only one action can be maintained for the breach of an entire contract, unless by the terms of it, it is in its nature divisible. But if one contracts to do several things at several times, an action of *assumpsit* lies upon every default; for although the agreement is entire, the performance is several, and the contract is divisible in its nature. Thus, on a note, or other contract, payable by instalments, *assumpsit* lies for non-payment after the first day; or where interest is payable annually, the payment of the principal being postponed to a future time, *assumpsit* lies for non payment of interest, before the principal becomes due and payable. In all such cases, although the contract is in one sense entire, the several stipulations as to payment and performance are several, and are considered in respect to the remedy as several contracts. This principle has long been well settled, although the law in this respect has been very much modified by modern decisions. Still, however, the law seems to remain unchanged in respect to obligations to pay money by instalments, so that debt will not lie until all the days of payment are past. A distinction has been made between a contract to pay five sums of £20 each on five different days, and a contract to pay £100 by five sums of £20 on different days,—a distinction, as Lord Loughborough remarks, in the case of Rudder v. Price, 1 H. Bl. 550, which is merely verbal, the substantial meaning being the same in each. After the action of *assumpsit* was introduced, a more liberal construction of contracts not under seal was adopted. But at first it was held that although when the contract was to pay by instalments, *assumpsit* would lie on default of the first payment, yet the plaintiff was obliged to demand his whole damages, although only one of the several instalments was payable, on the ground that the

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may be made more clear by the citation of a few illustrative cases. Thus, for example, where A. sold ice to B., at so much per ton, to be paid in cash on the delivery of each load, and A. did not exact payment upon delivery, it was held that the several deliveries did not constitute one transaction, and the fact that A. had recovered judgment for some of the ice delivered did not bar him from recovering for ice previously delivered.[400] So where a promissory note which, according to its face, runs for several years, contains a proviso that the interest shall be payable annually, and "if the interest is not so paid, the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, in any such sense as will preclude a recovery for each year's interest as it shall accrue, in successive suits therefor.[401] Again, where one accepts an order to

contract was entire and that no new action could be maintained. In the case of Peck v. Redman, Dyer, 113, the judges were equally divided. It was *assumpsit* on a contract to deliver twenty quarters of barley annually during the lives of the contracting parties. The breach was for non-delivery of the twenty quarters of barley for three years, and the question was whether the plaintiff was entitled to damages in recompense of the whole bargain, as well for the time to come as for the past. The case does not appear to have been decided. The whole doubt and difficulty arose from considering the contract entire and indivisible. This doubt does not appear to have been finally removed until the case of Cooke v. Whorwood, 2 Saund. 337, where the court determined that in *assumpsit* to perform an award whereby the defendant was awarded to pay the plaintiff several sums of money *at several times*, an action might be maintained for such sum only as was due at the time when the action was brought; and that the plaintiff should recover accordingly and have a new action as the other sums became due, *toties quoties*. In the case of Rudder v. Price, before cited, the cases on this point are reviewed by Lord Loughborough in a very able opinion, and I am not aware that any question has since been made as to the law in this particular. So that the principle is well established that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract." In further illustration of these principles, see Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Perry v. Harrington, 2 Met. 368, 37 Am. Dec. 98; Hanham v. Sherman, 114 Mass. 19; Burritt v. Belfy, 47 Conn. 328.

[400] Stifel v. Lynch, 7 Mo. App. 326.

[401] Wehrly v. Morfoot, 103 Ill. 183; Dulaney v. Payne, 101 Ill. 325, 40 Am. Rep. 205; Sparhawk v. Wills, 6 Gray, 163. See also Andover Savings Bank v. Adams, 1 Allen, 28; Kempner v. Comer (Tex.), 11 S. W. Rep. 194.

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pay a given sum out of the first money of the drawer which he shall receive on account of a certain business, this binds him to pay from time to time, on reasonable request, as the money is received by him, and a judgment recovered against him for a part of the sum, upon demand therefor and refusal, does not bar a subsequent action for a further sum received by him after the commencement of the first action.[402]

Leaving now the special topic of stipulations in a contract to do several things at several times, we may next observe that, as a general rule, a former judgment constitutes no defense to a cause of action accruing, between the same parties and upon the same subject-matter, *after* its rendition.[403] And by an extension of this principle, when a defendant, who has obtained a judgment in his favor, admits, after the rendition thereof, the justice of the claim sued upon, and promises to pay the same, the former judgment is no bar to an action on such new promise.[404] Every continuation of an illegal imprisonment being a new trespass, a recovery in an action commenced during the continuance of the imprisonment, is no bar to another action brought after it has ceased, for an assault and battery and imprisonment; and if so pleaded, the plaintiff may newly assign, for the continuance of the imprisonment.[405] But a previous suit in trespass, for flowing lands, between the same parties, for the same cause of action, which resulted in a verdict and judgment for the defendant, is a bar to the plaintiff's recovery, unless a different title or different circumstances are shown from those introduced upon the former trial.[406]

§ 748. Breach of Continuing Covenant.

A judgment recovered for a breach of a continuing covenant,—as, to "maintain and keep in repair" a certain structure,—is no bar to a

[402] Perry v. Harrington, 2 Met. 368, 37 Am. Dec. 98.

[403] Jones v. Petaluma, 36 Cal. 231; McKissick v. McKissick, 6 Humph. 75; State v. Torinus, 28 Minn. 175, 9 N. W. Rep. 725; University of N. Car. v. Maultsby, 2 Jones Eq. 241; Knott v. Stephens, 5 Oreg. 235.

[404] Cook v. Vimont, 6 T. B. Mon. 284, 17 Am. Dec. 157.

[405] Leland v. Marsh, 16 Mass. 389.

[406] Dick v. Webster, 6 Wis. 481.

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suit for a subsequent breach of the same covenant.[407] But here, as before, we must be careful to distinguish the case of an entire contract such as that a total breach completely ends it and gives a right of action for the whole damages. Thus, in a case in New York, it appeared that, by a contract made in 1822, defendant covenanted that the plaintiff should have a continuous supply of water for his mills from the defendant's dam; that there was a total breach of the covenant in 1826; that in 1835 the plaintiff brought his action for the breach and recovered the damages sustained by him up to that time; and that the present action was for damages accruing since the last named date. It was held that the former recovery was a bar to the maintenance of the suit. Said the chief justice: "He now claims to recover from that time to the commencement of this action, insisting that the covenant is a continuing one, and the liability to performance on the part of the covenantor and his representatives perpetual. I cannot assent to this construction. It is true the covenant stipulated for a continued supply of water to the plaintiff's mills, and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it, in the former suit. To allow a recovery again would be splitting up an entire cause of action, in violation of established principles." [408]

§ 749. Actions for Instalments.

As a general rule, where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and thus they may all be recovered in successive actions; nor will a recovery of one such instalment bar an action for another which falls due *after* the commencement of the first action.[409] But, under the

[407] Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369.

[408] Fish v. Folley, 6 Hill (N. Y.), 54.

[409] Hamm v. Beaver, 81 Pa. St. 58; Armfield v. Nash, 31 Miss. 361; Priest v. Deaver, 22 Mo. App. 276; Weiler v. Henarie (Oreg.), 13 Pac. Rep. 614. At common law, with respect to instalments of money due at successive days under the same contract, if the action be debt, it must be brought for the whole (Rudder v. Price, 1 H. Bl. 550);

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rule against splitting causes of action, a recovery in an action on a contract which entitles the plaintiff to several sums maturing at different times will be an effectual bar to a second action brought to recover claims that were due when the first action was brought.[410] A recovery in a suit upon a contract for the sale of goods payable in instalments, in which suit the plaintiff counted for an entire sum, is a conclusive bar to another suit brought on the same contract to recover a sum which was included in the former declaration.[411] But where the plaintiff sued for two instalments of purchase-money, one of which was due at the institution of the suit, and the other not, and the jury found for the plaintiff a certain sum "due at the institution of the suit," such recovery is not a bar to a subsequent action for the instalment not therein allowed.[412] In covenant for instalments of money, a former recovery between the same parties on the same instrument is no bar, where breaches for the instalments now demanded were not specifically assigned in the former suit, and evidence is admissible to show that the instalments now demanded had not fallen due and were not included in the former recovery.[413]

§ 750. Judgment in One Such Action as Evidence in the Next.

A former judgment for the plaintiff, in one of a series of actions for money due by instalments or other successive causes of action, may be evidence (and conclusive so far as it goes) of the rights of the parties in another of the same series of suits, on the principle that a judgment is final as to all points and questions actually litigated and determined by it.[414] Thus, where, in an action on one of a series of notes given for the purchase price of land, the defendant

but if it be covenant or *assumpsit*, the action may be for each successive instalment as it falls due (Cooke v. Whorwood, 2 Saund. 337; Badger v. Titcomb, 15 Pick. 409; Ashford v. Hand, Andr. 370). Bendernagle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448.

[410] Reformed Church v. Brown, 54 Barb. 191; Union R. & T. Co. v. Traube, 59 Mo. 355; Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79; Jex v. Jacob, 7 Abb. New Cas. 452. Compare Andover Savings Bank v. Adams, 1 Allen, 28.

[411] Corbet v. Evans, 25 Pa. St. 310.

[412] Kane v. Fisher, 2 Watts, 246.

[413] Sterner v. Gower, 3 Watts & S. 136.

[414] Love v. Waltz, 7 Cal. 250; Haskin v. Mayor of New York, 11 Hun, 436.

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sets up a defense going to the whole of the original consideration,—such as an undisclosed incumbrance on the estate, consequent rescission of the contract, etc.,—and it is adjudged against him, such judgment will estop him from setting up the same facts in defense to a subsequent suit on another of the notes.[415] But if the judgment proceeds upon a ground of defense relating merely to the particular instalment in suit, it does not follow that it will be an estoppel in a later suit upon another instalment or upon the whole principal sum. Thus a decision adverse to the defendant, in an action involving the validity of coupons of a bond, given solely on the ground that the plaintiff was an innocent holder for value, does not necessarily estop the defendant from setting up the invalidity of the bond itself in a subsequent action upon it.[416] It is otherwise if the defense to the subsidiary claim involves the validity of the principal debt or obligation. Where a defendant is sued for interest due on his note, and defends on the ground of fraudulent alteration, and judgment is rendered against him, such judgment concludes him from setting up the same defense to an action on the note itself.[417] It is by no means clear that this principle applies where the former judgment was taken by *default*. For a default, as we have already seen,[418] admits only the material facts well pleaded in the declaration. It is held that a judgment by default upon one of several promissory notes, founded upon one and the same illegal consideration,—no issue upon the fact of consideration being tendered by the complaint,—does not preclude the defendant from setting up in a second action, upon another of such notes, the defense of illegality of consideration.[419] But this view does not appear to be accepted by the later decisions in New York, at least in respect to the defense of usury.[420] It is also very necessary to carefully distinguish between cases where the two

[415] Trescott v. Barnes, 51 Iowa, 409, 1 N. W. Rep. 660. See also French v. Howard, 14 Ind. 455; Bank v. Edwards, 10 Gray, 387; Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255; De Wolf v. Crandall, 84 N. Y. Superior Ct. 14. See *per contra* Bernard v. Hoboken, 27 N. J. Law, 412.

[416] Nesbit v. Independent School Distr., 25 Fed. Rep. 635.

[417] Edgell v. Sigerson, 26 Mo. 583.

[418] *Supra*, § 697.

[419] Adams v. Adams, 25 Minn. 72; Hughes v. Alexander, 5 Duer, 488.

[420] Newton v. Hook, 48 N. Y. 676.

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causes of action are vitally allied and grow out of the same transaction, and cases where they are really distinct and independent, having no such inner connection, although they may be characterized by a certain similarity or consecutiveness. To illustrate, an injunction against a city, prohibiting it from collecting taxes levied for the years 1863–1865, will not necessarily bar a suit to recover taxes levied on the same property for the years 1867–1871. "Each year's taxes," said the supreme court of Iowa, "constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no farther than the taxes of the years then in question. . . . . The taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." [421]

§ 751. Successful Defense to One of a Series of Actions.

The converse of the rule stated in the last section is equally true. A successful defense to one of a series of actions founded on the same transaction or subject-matter, if it went to the merits of the whole, is a complete estoppel in any subsequent actions of the series. "If it appears that the first judgment involved the whole claim or extended to the whole subject-matter, and settled the entire defense to the whole of a series of notes or claims, and adjudicated the whole subject-matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect to other claims and defenses thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole. Unless, however, it is made to appear that the defenses pleaded to the first claim or demand involved the whole title, or extended to the whole subject-

[421] City of Davenport v. Chicago, R. I. & P. R. Co., 88 Iowa, 633. See also State v. Jumel, 30 La. Ann. 861.

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matter of the controversy between the parties, so as to litigate and determine the defendant's liability in respect to the whole transaction, then the judgment is a finality only as to so much of the claims and defenses as were actually litigated in the first suit."[422] Thus a final judgment for the defendant in an action against a municipal corporation to recover on coupons attached to bonds purporting to have been issued by the corporation, entered on demurrer to an answer setting up facts showing that the bonds were never executed by the municipality, concludes the plaintiff in a subsequent action against the same defendant to recover on other coupons cut from the same bonds.[423] So where, in the course of a single transaction, an agent, under a mistaken belief that he was required, by his contract with his principals, to guaranty notes taken by him in their favor, indorsed three such notes as surety, it was held that a judgment in his favor, upon the ground of such mistake, in an action upon one of the notes, was decisive of his liability upon the others, and that as the mistake was common to all, the matter was *res judicata*.[424]

§ 752. Suits for Wages.

If a servant or agent wrongfully dismissed from service elects to sue for the breach of contract, before the termination of the period

[422] Kilander v. Hoover, 111 Ind. 10, 11 N. E. Rep. 796; Cromwell v. Sac Co., 94 U. S. 351; Goble v. Dillon, 86 Ind. 327; Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454; Bouchaud v. Dias, 3 Denio, 238; Danziger v. Williams, 91 Pa. St. 234; Rake v. Pope, 7 Ala. 161; Furneaux v. First Nat. Bank, 39 Kans. 144, 17 Pac. Rep. 854; Goodenow v. Litchfield, 59 Iowa, 226, 13 N. W. Rep. 86; Hazen v. Reed, 30 Mich. 331.

[423] Bissell v. Spring Valley Township, 124 U. S. 225, 8 Sup. Ct. Rep. 495.

[424] Aultman v. Mount, 62 Iowa, 674, 18 N. W. Rep. 306. In this case the court observed: "To constitute a prior adjudication there must have been something more than an adjudication of a common question of law. There must have been an adjudication respecting some common thing. Does the answer show that there was such adjudication in the former action? In our opinion it does. The defendant, as we have seen, was acting under a written contract. The real question in dispute between the parties in the outset, we apprehend, was as to the construction of that contract. The answer is not very full upon this point, but it is full enough, we think, to warrant us in this conclusion. It contains an averment that the defendant's acts concerning the notes *were but one transaction*. The demurrer admits this. Taking this to be true, there were not properly three mistakes, but only one. There must then have been some com-

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for which he was hired, and recovers, such recovery will be a bar to any subsequent action on the same contract.[425] "A servant unlawfully discharged may treat the contract as rescinded and sue on a *quantum meruit* for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit. . . . . If the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it is his folly or his misfortune. He cannot sever them, and recover part in one action and the residue, when discovered, in another."[426] But where the plaintiff sued for damages for an alleged wrongful dismissal from defendant's employment before the expiration of the stipulated term, it was held that the judgment was no bar to a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the wrongful dismissal; for the two claims constituted separate and independent causes of action, upon which separate actions were maintainable.[427]

mon mistake lying behind the three acts by which the different indorsements were made. If the original contract between the defendant and C. Russell & Co. [his principals] obligated him to guaranty the notes, then his indorsement of such guaranty, though consisting of three acts, would be essentially one transaction; and the same would be true if the indorsement was made under a mistaken supposition that the contract created such obligation, whether the mistake arose from a wrong construction of the contract or forgetfulness of its provisions. Taking the averments above set out to be true, we think that the point adjudicated in the former action must have been that the contract did not create an obligation to guaranty the notes. That contract, then, constituted the common thing respecting which there has been an adjudication, and a court cannot, as between the same parties, properly be asked to make an adjudication respecting it again."

[425] Booge v. Railroad, 83 Mo. 212, 82 Am. Dec. 160; Dunn v. Murray, 9 B. & C. 780; Landsberg v. Lewis, 6 N. Y. Supp. 561; Kahn v. Kahn (Nebr.), 40 N. W. Rep. 135. And see Liddell v. Chidester, 84 Ala. 508, 4 South. Rep. 426.

[426] Soursin v. Salorgne, 14 Mo. App. 486.

[427] Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 668.

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§ 753. Plaintiff can have but one Satisfaction.

In connection with the subject of recurring liabilities, continuing damages, successive rights of action founded on the same transaction or state of facts, and the like, it is important to remember that the plaintiff can have no more than one full satisfaction for his whole demand. For example, where, upon a submission to arbitration, defendant gives a bond in a sum agreed on as stipulated damages, conditioned to abide by the award, and the arbitrators find in favor of the plaintiff, the latter has his election whether to sue on the bond or on the award; but if he sues on the award and recovers, the bond is thereby satisfied and cannot be made the basis of a new suit.[428] So where plaintiff's goods were attached as the debtor's property, and in the special statutory action which plaintiff brought against the sheriff and the attaching creditor he obtained a judgment for a return of the goods, such judgment is a bar to another action, against the sheriff, attaching creditor, and sureties on the indemnity bond, to recover damages for the trespass.[429]

Part V. Defenses and Counterclaims Concluded by Former Judgment.

§ 754. Defenses Concluded by Judgment for Plaintiff.

It is a general rule that a valid judgment for the plaintiff definitely and finally negatives every defense that might and should have been raised against the action; and this is true, not only with respect to further or supplementary proceedings in the same cause, but for the purposes of every subsequent suit between the same parties, whether founded upon the same or a different cause of action.[430] "A party

[428] Nolte v. Lowe, 18 Ill. 437. See also Peerce v. Athey, 4 W. Va. 22; Bird v. Randall, 1 W. Bl. 373.

[429] Dawson v. Baum, 3 Wash. Ter. 464, 19 Pac. Rep. 46.

[430] Brooks v. O'Hara, 8 Fed. Rep. 529; Marshall v. Aiken, 25 Vt. 328; State v. Brown, 64 Md. 199, 1 Atl. Rep. 54; Bond v. Billups, 8 Jones (N. Car.) 423; Mattair v. Card, 19 Fla. 455; Crawford v. Simonton, 7 Port. 110; Mervine v. Parker, 18 Ala. 241; Hill v. Lancaster (Ky.),

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cannot re-litigate matters which he might have interposed, but failed to do, in a prior action between the same parties or their privies in reference to the same subject-matter. And if one of the parties failed to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so. If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity, the law will not aid him."[431] Thus, for example, the validity of a contract must be litigated when the contract is brought directly in issue by an action upon it, and not in a subsequent action in the nature of a creditors' bill, for the purpose of satisfying the judgment obtained in the first action.[432] So, also, matters which would have constituted a defense to an action for the foreclosure of a mortgage, and if true would have prevented an absolute decree of foreclosure, but which were not pleaded, will not be available as a defense to an action for the possession of the property under the foreclosure sale, or in other subsequent proceedings.[433] So in a suit brought for the amount due under a charter-party, the defense was a breach of the covenant of seaworthiness of the vessel. This point, however, had been litigated and finally decided against the defendants, in an action brought by the defendants as libelants against

11 S. W. Rep. 74; Kelly v. Donlin, 70 Ill. 378; Ruegger v. Indianapolis & St. L. R. Co., 103 Ill. 449; Lawrence Savings Bank v. Stevens, 46 Iowa, 429.

[431] Covington & Cinti. Bridge Co. v. Sargent, 27 Ohio St. 233.

[432] Decker v. Decker, 108 N. Y. 128, 15 N. E. Rep. 307. But see Jacobson v. Miller, 41 Mich. 90, 1 N. W. Rep. 1013, in which case it appeared that, in an action for rent under a lease, the defendant pleaded the general issue, without denying under oath the execution of the lease, whereby, under a rule of court, he was precluded from disputing such execution in such suit, and judgment was ordered for the plaintiff; it was held that such judgment was not conclusive as to the actual execution of the lease, but that in a subsequent suit upon the same instrument, for other rents accruing under it, its actual execution by the defendant might be litigated. In the course of a well-reasoned opinion, Judge Cooley said: "Where one is sued in respect to one subject-matter, must he bring forward all his defenses, at the peril, if he fails to do so, of being debarred of them in any subsequent litigation which may involve the same questions, though relating to a different subject-matter? We think not."

[433] Mally v. Mally, 52 Iowa, 654, 3 N. W. Rep. 670; Ludeling v. Chaffe, 40 La. Ann. 645, 4 South. Rep. 586; Murrell v. Smith, 51 Ala. 301.

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the plaintiffs. It was held that this adjudication was binding upon the parties, and the issue could not be again raised.[434] A very strong illustration of the application of this rule is afforded by the case of *Homer* v. *Fish*.[435] It there appeared that the defendants procured the plaintiff to insure a vessel for them, upon which there was a loss. They sued him and recovered judgment for the amount of the loss and obtained satisfaction upon execution. He afterwards commenced an action against them to recover back the money, upon the ground that they knew of the loss at the time the insurance was made, but concealed the knowledge of it from him, and that the fraud was not discovered until after the execution was satisfied. Nevertheless it was held that the former judgment was a bar to the present action; because the fraud was matter which could have been pleaded in defense to the action on the policy. By an extension of the same principle, where facts are pleaded in defense to an action, and a final judgment rendered therein necessarily deciding the merits of such defense, the same facts cannot thereafter be made the basis of an action between the same parties arising out of the same transaction, although in the former suit the facts were pleaded as a defense only and no claim made thereon for affirmative relief.[436] And if a defense is set up in an action which is good and sufficient and should legally be allowed, but the same is improperly rejected by the court and judgment goes against the defendant, he is bound by the decision, and his relief from it should be sought, not by a new suit on the subject-matter of the defense, or by an attempt to re-litigate the matter in another action, but by a correction of that error in the same suit.[437]

§ 755. Same; Adverse Title.

On the principle that one is bound to bring forward all his available defenses at a proper opportunity, it is held that in a petitory action the defendant must plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff

[434] Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. Rep. 334.

[435] 1 Pick. 435, 11 Am. Dec. 218.

[436] Bierer v. Fretz, 37 Kans. 27, 14 Pac. Rep. 558.

[437] Collins v. Bennett, 46 N. Y. 490.

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may be pleaded as *res judicata* against any title which the defendant was possessed of at the time but omitted to plead.[438] Thus a recovery by the plaintiff in trespass to try title is conclusive as against every title to the *locus in quo* which the defendant had at the time of the trial.[439] So when, in a suit involving title to a large tract of land, judgment is recovered, the unsuccessful party cannot, in a subsequent proceeding, litigate his right against the successful party to a homestead on a portion of the land, claim to which as a homestead had not been asserted in the first suit.[440]

§ 756. Same; Fraud.

Proceedings having been taken for the foreclosure of a mortgage and a decree made, the question of fraud in the execution of the mortgage and of payment thereof are concluded, whether those considerations were actually brought before the court by way of defense or not; because any matter necessarily involved in the adjudication, whether raised or not, is concluded "and especially so if the party denying the adjudication knew of the matter and could have interposed it at the previous trial, either in support of a claim or as a defense." [441] Evidence that a mortgage and bond had been procured through fraud is not admissible in an ejectment for property sold under the mortgage, when the same defense had been ineffectually set up in a prior *scire facias* on the mortgage and on a rule to open the judgment entered on the bond.[442]

§ 757. Same; Agreement to Compromise.

It is held that a debtor, with whom his creditor has agreed to compromise on certain conditions, who fails to set up that agreement, after the conditions are performed, in an action on the debt, and suffers judgment for the full amount, is not estopped to sue on the agreement, since that was collateral, and, being merely executory, could

[438] Shaffer v. Scuddy, 14 La. Ann. 575.
[439] Caston v. Perry, 1 Bail. L. 533, 21 Am. Dec. 482.
[440] Nichols v. Dibrell, 61 Tex. 539.
[441] Ruff v. Doty, 26 S. Car. 173, 1 S. E. Rep. 707. See also Flint v. Bodge, 10 Allen, 128.
[442] Lewis v. Nenzel, 88 Pa. St. 223.

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not operate as a payment or satisfaction *pro tanto* of the debt.[443] But on the other hand, where a creditor agrees in writing to accept from his debtors a less sum than is actually due, and then assigns the entire debt, and the debtors, though aware of the assignment, consent to the entry of judgment against them in favor of the assignee for such entire amount, and there is proof that they so consented in order to prevent other creditors from attaching, they cannot afterwards fall back on the agreement with their creditor to defeat the rights of the assignee.[444]

§ 758. Same; Payment.

There are some few cases in the reports in which it has been adjudged that, after a judgment by default for the full amount of a debt, the defendant might maintain an action to recover back partial payments which were not set up or credited in the former suit.[445] But these decisions have been overruled.[446] And it is now fully settled upon the authorities that a partial payment, like any other defense, must be set up at the proper time or else be forever concluded by the judgment; and if a defendant omits to plead and insist upon such a payment, when he has a legal opportunity so to do, but suffers judgment to be taken for the whole original amount, he can never afterwards maintain a suit against his original creditor for the amount of the payment.[447] Thus a judgment by default in a summary proceeding against a tax-collector and the sureties on his official bond, is

[443] Hunt v. Brown, 146 Mass. 253, 15 N. E. Rep. 587.

[444] Smith v. Chilton, 84 Va. 840, 6 S. E. Rep. 142.

[445] Smith v. Weeks, 26 Barb. 463; Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14.

[446] Binck v. Wood, 43 Barb. 315; Fuller v. Shattuck, 13 Gray, 70; Sacket v. Loomis, 4 Gray, 148.

[447] Cadaval v. Collins, 4 Ad. & El. 858, 867; Fuller v. Eastman (Me.), 17 Atl. Rep. 67; Tilton v. Gordon, 1 N. H. 33; Corey v. Gale, 13 Vt. 639; Baker v. Stinchfield, 57 Me. 363; Loring v. Mansfield, 17 Mass. 394; Loomis v. Pulver, 9 Johns. 244; Binck v. Wood, 43 Barb. 315; Walker v. Ames, 2 Cow. 428; Davis v. Murphy, 3 Rich. 560, 45 Am. Dec. 749; Broughton v. McIntosh, 1 Ala. 103; Mitchell v. Sanford, 11 Ala. 695; Bobe's Heirs v. Stickney, 36 Ala. 482; Williams v. Jones, 10 Sm. & Mar. 108; Kirklan v. Brown, 4 Humph. 174, 40 Am. Dec. 635; Wright v. Leclaire, 3 Iowa, 221; Doyle v. Reilly, 18 Iowa, 108, 85 Am. Dec. 582; Greenbaum v. Elliott, 60 Mo. 25, 40 Am. Dec. 635; 1 Whart. on Ev. § 789.

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conclusive as to the amount then due from the collector to the state, and neither he nor the sureties can, in any future litigation with the state, claim credits which might have been set up in defense of that suit.[448] So where judgment has been recovered on a note for its full amount, the debtor is precluded by the judgment from maintaining an action to recover back the illegal interest which he alleges to have been included in the note.[449] We must here call attention to a case decided in Wisconsin,[450] wherein it is attempted to draw a distinction which, if sound, would materially modify the application of the above rule. In the case referred to it appeared that a sum of money had been delivered by the obligor of a bond to the obligee, to be credited by the latter upon the bond as a part payment, but the obligee neglected to indorse or apply the payment, and afterwards sued for and recovered from the obligor the whole amount of the bond. It was held that he was liable to the obligor in an action for money had and received for the amount so delivered to him and which he failed to apply upon the bond. The court admitted that if the obligor had set up such part payment as a defense in an action on the bond, and had failed to sustain it, for want of proof or other cause, he could not afterwards recover the amount back, but they thought the circumstances made this case different. They announced as the rule: "Where the prosecution of an action will impeach a former judgment, it cannot be maintained; but where the claim does not impeach the former judgment, but arises out of the fraud, breach of trust, or neglect of the party, the action may be maintained." The circumstances, however, seem to be scarcely sufficient to except a case of this character from the general, salutary, and well-established rule.

§ 759. Same; Usury.

A judgment-defendant is estopped from alleging that usurious interest was included in the judgment, in a subsequent suit to recover treble the amount of such interest. For the usury, if in fact it existed,

[448] State v. McBride, 76 Ala. 51.
[449] Footman v. Stetson, 32 Me. 17, 52 Am. Dec. 634.
[450] Woodward v. Hill, 6 Wis. 143.

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could have been pleaded in defense to the former action, and whether it was set up or not, the judgment is conclusive against that allegation.[451] On the same principle, where judgment is entered on a judgment-note which includes usurious interest, and afterwards a new judgment-note is given in satisfaction of the former judgment, and the judgment on the new note is opened and the defendant let in to defend, he cannot set up the usury in the former judgment as a defense *pro tanto*.[452]

§ 760. Same; Discharge in Bankruptcy.

Where a judgment has been obtained against one who might have set up his discharge in bankruptcy or insolvency in bar, he cannot avail himself of that discharge in any subsequent proceeding founded on the judgment.[453] The rule in this respect merely conforms to the general principle requiring all available defenses to be brought forward and supported at the proper opportunity. Thus, as observed by the supreme court of California, the defendant "was entitled to plead his discharge in insolvency in bar of the action by supplemental answer. If that fact was pleaded, the judgment of the court is conclusive that the plaintiff was entitled to his judgment notwithstanding the alleged discharge in insolvency. If he omitted to plead the discharge in insolvency, the judgment is equally conclusive upon him as it would be had his defense been accord and satisfaction, payment, etc., which he had neglected to plead." [454]

§ 761. Matter Available as a Set-Off.

While it is true that a defendant is bound to bring forward and establish any *defense* to the plaintiff's cause of action which he may have, or be debarred of urging it in any subsequent litigation, this does not always hold good with respect to an independent claim against the plaintiff, or one which, though connected with the same

[451] Heath v. Frackleton, 20 Wis. 320.
[452] Montague v. McDowell, 99 Pa. St. 265.
[453] Marsh v. Mandeville, 28 Miss. 122.
[454] Rahm v. Minis, 40 Cal. 421.

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transaction, is of such a nature that it could be made the basis of a separate suit or would authorize affirmative relief to the defendant. In fact, as a general rule, when the defendant has a claim which he *might* use as a set-off or counterclaim, he is at liberty to set it up in the first suit or not, as he may choose; and if he does not plead it in that action, he is not precluded from afterwards maintaining a separate action upon it against the plaintiff.[455] This rule, however, bends to circumstances in certain special cases. Thus, in some states it is held that if the defendant in ejectment has a claim against the plaintiff for buildings or other improvements put by him upon the land, he must assert it in that action, and if he omits to do so, he cannot afterwards bring an independent suit for the value of such improvements or be relieved in equity.[456] And in some jurisdictions the rule is changed by statute, the law providing that if the demand or cross-claim arises out of the transaction set forth in the complaint as the foundation of the plaintiff's action, or is connected with the subject of the action, the defendant must present it as a set-off, or forfeit his right to claim relief upon it.[457] But difficulty would sometimes arise in cases where the amount claimed in set-off exceeded the jurisdiction of the court—*e. g.*, a justice's court—in which the action was brought. Here the statutes do not impose this limitation upon the defendant's rights except in regard to cross-claims on which an independent suit might have been maintained in the same court.[458] In some other states, while the common law rule has not been abrogated, yet, with a view to consolidating litigation as much as possible, the statutes provide that a party shall not be entitled to costs when he recovers on a cause of action which he might have used as a set-off in a former suit. But for the most part the rule still subsists as above stated. It has been said that the law will presume that matters of set-off to a judgment, which occurred before its rendition,

[455] Davis v. Hedges, L. R. 6 Q. B. 687; Davenport v. Hubbard, 46 Vt. 200; Robbins v. Harrison, 31 Ala. 160; Axtel v. Chase, 83 Ind. 546; Robinson v. Wiley, Hempst. 88; Hobbs v. Duff, 23 Cal. 596; Fairfield v. McNairy, 37 Iowa, 75; Savery v. Sypher, 39 Iowa, 675.

[456] Doak v. Wiswell, 33 Me. 355; Gaines v. Kennedy, 53 Miss. 103.

[457] Code Civil Proc. Cal. §§ 438, 439.

[458] Herring v. Adams, 5 Watts & S. 459; Code Civil Proc. Cal. §§ 855, 856.

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were included in the judgment, though such presumption may be removed by proof to the contrary.[459] But probably this statement must be restricted to cases in which the matter of set-off grew out of the same transaction or state of facts with the plaintiff's demand, and was so intimately connected therewith that its examination would seem to have been necessary to a thorough investigation of the cause of action stated.

It is a matter of course that if the defendant does present his claim by way of set-off, then, whether it is allowed or found against him, he cannot afterwards use it as a separate cause of action. And conversely, if one sues on a given demand and is defeated, he cannot afterwards plead the same demand in set-off.[460] But it appears that if a fact or state of facts be set up in the first action merely as a defense, and not as the foundation of a claim for affirmative relief, this will not prevent the same from being used as a counterclaim in a subsequent suit. Thus, in a recent case in Minnesota, a chattel mortgage was given to secure two promissory notes; the mortgagee sued the mortgagor to recover possession of the mortgaged property; the defendant alleged, as a defense only, that there was a failure of consideration for the notes and mortgage, and the verdict was in his favor. It was held that this was no bar to a counterclaim based on such failure of consideration, in an action on the notes brought by the same plaintiff against the same defendant.[461] Again, some of the authorities countenance the view that some of the items of a counterclaim may be withheld from consideration, and afterwards used as a cause of action or set-off. According to the court in Maine, judgment in a suit wherein a set-off account has been filed is conclusive upon that account, unless some of its items had been previously with-

[459] Carter v. Hanna, 2 Ind. 45.

[460] Campbell v. Mayhugh, 15 B. Mon. 142.

[461] Osborne v. Williams, 39 Minn. 353, 40 N. W. Rep. 165. The court, by Gilfillan, C. J., said: "The matters showing a want of consideration were pleaded for the purpose of showing that the mortgage was void, and that therefore the plaintiff was not entitled to the possession of the property, merely as a defense, and not for the purpose of recovering affirmative relief by reason of the breach of warranty. So that, conceding, what is not entirely clear, that the counterclaim might have been set up and litigated in that action, it is enough to say it was not." But compare Patrick v. Shaffer, 94 N. Y. 423; O'Connor v. Varney, 10 Gray, 231.

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drawn. "But if an adjustment took place between the parties and a writing was executed by them showing the mode of adjustment, and items charged in the account in set-off were expressly excluded, and judgment was rendered accordingly, it was a withdrawal of such items."[462]

§ 762. Submission of All Matters in Difference.

In case of a submission to arbitration of "all matters in difference" between the parties, the more reasonable view is that both parties are required to bring forward all their claims and demands against each other, and neither is at liberty to reserve any available claim or demand to be afterwards used as a set-off or cause of action. On this point Lord Ellenborough expressed himself as follows: "Here is a reference of all matters in difference, and it appears that the subject in respect of which the deduction is now claimed was a matter in difference at the time and within the scope of the reference; notwithstanding which the defendant contends that he was not obliged to bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore, without deciding against the authority of *Golightly* v. *Jellicoe*, [4 Term 147 n] or the case cited from the civil law,[463] I think that where all matters in difference are referred, the party, as to every matter included within the subject of such reference, ought to come forward with the whole of his case."[464] But as already shown,[465] this doctrine is questioned, if not positively denied, by many respectable authorities.

§ 763. One Claim cannot be used both as Set-Off and as Cause of Action.

If the defendant in a suit has a cause of action against the plaintiff which he can use as a counterclaim, and he does set it up by way

[462] Smith v. Berry, 37 Me. 298.

[463] A response of Scaevola, reported in Dig. 4, 8, 43.

[464] Smith v. Johnson, 15 East, 218.

[465] *Supra*, §§ 526, 688.

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of counterclaim, he must then exhibit his whole damage, for he cannot afterwards maintain a separate action on the matter so used as a set-off or any part of it.[466] Thus, to an action on a promissory note given in payment for goods sold, the defendant pleaded want of consideration by reason of false representations of the payee concerning the value of the goods, and the plaintiff recovered judgment for a part only of the note. It was held that the defendant was barred of an action to recover further damages for such false representations.[467] So also "the defendant having elected to avail himself of his claim against the plaintiff for damages by means of a separate action, and having brought his action and prosecuted it till a verdict was rendered, could not also avail himself of the same claim in mitigation of damages in this suit."[468] A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such non-performance. "He cannot use the same defense first as a shield and then as a sword."[469] And by an even stronger reason, when a verdict is found against the defendant on a plea of set-off, he is estopped from suing the plaintiff for the demand specified in the plea of set-off.[470]

§ 764. Counterclaim not Adjudicated.

If the defendant in his answer sets up and claims a set-off, but the record shows that, on the trial of the action, the court excluded all evidence of the demand sought to be set off and gave judgment for the plaintiff, that judgment cannot be pleaded or claimed as an estoppel in an action afterwards brought by the defendant to enforce the same claim.[471] Hence the rejection of a demand offered as a

[466] Thompson v. Schuster (Dak.), 28 N. W. Rep. 858; Simes v. Zane, 24 Pa. St. 242; Inslee v. Hampton, 18 N. Y. Supreme Ct. 156; Nave v. Wilson, 33 Ind. 294. Compare Wright v. Anderson, 117 Ind. 349, 20 N. E. Rep. 247.

[467] Burnett v. Smith, 4 Gray, 50. See also Sargent v. Fitzpatrick, 4 Gray, 511.

[468] Stevens v. Miller, 13 Gray, 283.

[469] O'Connor v. Varney, 10 Gray, 231.

[470] Eastmure v. Laws, 5 Bing. N. C. 444.

[471] Hobbs v. Duff, 23 Cal. 596; Garrott v. Johnson, 11 Gill & J. 173, 35 Am. Dec. 272; Niday v. Hawey, 9 Gratt. 454. But if, in the trial of an action, the defendant offered evidence in support of an account filed by him in set-off, and

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set-off in a former action, is no bar to a subsequent suit for its recovery, if such demand could not legally have been allowed as a set-off, the defect arising not from failure of proof but from the nature of the claim.[472] And so a debt which, when not due, the debtor has unsuccessfully endeavored to use as a set-off, may, when it becomes due, be recovered by the creditor.[473] In an action before a justice of the peace, the defendant set up a counterclaim for unliquidated damages greatly exceeding in amount the justice's jurisdiction. But he attempted to divide his claim, putting in so much as would fall within the jurisdiction, and expressly reserving the balance for a future action. It was held that the justice had no jurisdiction to pass upon the merits of defendant's claim, in whole or in part, and that the course pursued by defendant would not preclude him from presenting his demand for such damages in a subsequent suit between the same parties.[474]

§ 765. Voluntary Allowance of Credit or Counterclaim.

Where the plaintiff recovers judgment by default against the defendant upon an account annexed to his writ, in which account defendant is credited for certain goods, the judgment is no bar to an action by defendant against plaintiff for the same goods, if they were not credited at their full value in the first suit.[475] So where a plaintiff gives a credit in his statement, and the defendant thereupon confesses judgment, and subsequently sues the plaintiff for a cause identical in name with the credit allowed in the first suit, he is not barred by the former judgment, although the burden is on him

the question of its allowance or disallowance was submitted to and passed upon by the jury, he is precluded from again offering proof in support of the same account in another suit, although the jury may have decided in the former suit not to allow it. Baker v. Stinchfield, 57 Me. 368.

[472] Beebe v. Bull, 12 Wend. 504, 27 Am. Dec. 150; De Graaf v. Wyckoff (N. Y.), 22 N. E. Rep. 1118; Haas v. Taylor, 80 Ala. 459, 2 South. Rep. 633.

[473] Crabtree v. Welles, 19 Ill. 55.

[474] Lancaster Manuf. Co. v. Colgate, 12 Ohio St. 344. In this case the court said: "We see no reason why an abortive attempt to invoke a jurisdiction not possessed by the justice should forever preclude the party from all right to redress in another action."

[475] Minor v. Walter, 17 Mass. 237; McEwen v. Bigelow, 40 Mich. 215.

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to show that the credit in the first suit did not cover all his claim.[476] But a judgment by default, upon an account in which the defendant is credited with the *full value* of certain items, will bar an action by him for the same items.[477] Hence if, in an action at law, a credit is offered to be allowed to the defendant, and judgment is rendered on the verdict for the balance of plaintiff's demand, the defendant will be barred of another action to recover the amount of that item for which credit was given.[478]

§ 766. Equitable Defenses not Concluded by Judgment at Law.

If a defendant has a *legal* defense to an action at law, he must present it in that action, or he will be concluded, and equity will not relieve him unless he was prevented from making the defense by the fraud of the other party, or by accident, and without fault in himself. But where the defense is *equitable*, and beyond the cognizance of a court of law, the defendant will not be concluded by his failure to plead it there, but may assert the same by bill in equity after judgment.[479] But in those states where, under the code practice, the defendant is authorized, though not explicitly required, to offer as many defenses as he may have, equitable as well as legal, to any civil action, it may be made a question whether he will be precluded by the judgment in respect to an equitable defense which he might have set up but omitted to present. In several of these states, the party is conclusively presumed to have made use of all his equitable defenses in the one action, and is not suffered to urge them in a subsequent action or to make them the basis of a claim for equitable relief against the judgment.[480] In other words, the statute affording him an *opportunity* to avail himself of his equitable defense, it becomes his *duty* to avail himself of it, on pain of being afterwards

[476] Kauff v. Messner, 4 Brewst. 98.

[477] Briggs v. Richmond, 10 Pick. 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Hudelmeyer v. Hughes, 18 Mo. 87.

[478] Abbott v. Stevens, 117 Mass. 340.

[479] Waters v. Perkins, 65 Ga. 33; Mosby v. Wall, 23 Miss. 81; Nims v. Vaughn, 40 Mich. 356.

[480] Tuttle v. Harrill, 85 N. Car. 456; Winfield v. Bacon, 24 Barb. 154; Foot v. Sprague, 12 How. Pr. 355.

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estopped from relying upon it. In California, on the other hand, it is held that the defendant need not bring forward a defense of this character, if he prefers to reserve it for future use. "He may let the judgment go at law, and file his bill in equity for relief. Our practice, while it enlarges the field of remedy, does not take away pre-existing remedies by implication."[481] And in the same state it is held that where, in an action, an equitable defense is dismissed without being presented to the court, the judgment therein is no bar to a subsequent action, begun in due time, embracing the subject-matter of such defense.[482]

§ 767. Cross-Actions.

The rule constantly insisted on in the foregoing sections, that every matter of defense is concluded by the judgment which might and should have been presented in the action, sometimes comes into apparent conflict with the equally important rule that a matter of set-off or recoupment, not inconsistent with the plaintiff's claim, need not be so presented, but may be reserved as the basis of a future action. The doubt arises in cases where it is uncertain whether the same transaction gives to each party an independent cause of action, or in cases where the defendant's contention is both a defense to the plaintiff's claim and a ground for the recovery of damages. But it is believed that all such ambiguous cases may be solved by the application of the following rule: Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judg-

[481] Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 309; Hills v. Sherwood, 48 Cal. 386.

[482] McCreary v. Casey, 45 Cal. 128.

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ment affirms to be true. But if, out of the same transaction or state of facts, *each* party may acquire a right of action,—so that the facts on which the plaintiff recovered may very well be true, and yet the facts on which the defendant seeks to recover may be equally true,—then the former judgment is not a bar to the maintenance of the present suit. For example, a judgment in favor of a carrier, in an action by him to recover freight, is a bar to an action by the owner of the goods shipped to recover damages for destruction of the property, caused by a failure on the part of the carrier to perform his contract of transportation. Where goods are so destroyed, the shipper is excused from freight, and a recovery of damages therefor would be inconsistent with the carrier's right to recover freight.[483] On the other hand, where the defendant contracted to dig a cellar and lay a wall for the plaintiff by a certain time at a certain price, but did not complete it at the given time, whereby the plaintiff suffered damage; and after the job was finished the defendant sued the plaintiff for the balance of the contract-price, and recovered judgment by default; and afterwards plaintiff brought his action for damages for breach of contract, it was held that the former recovery was no bar.[484] In another case, a purchaser of goods, having paid for them partly in cash and partly by his note, discovered that he had paid for more than he had received, but nevertheless suffered the vendor to recover judgment against him on the note, without objecting any want of consideration. He then brought an action to recover back the amount overpaid, and the action was sustained; for giving the note being a payment, a cause of action accrued to him immediately, which was independent of the judgment upon the note.[485]

§ 768. Action for Price of Goods and Cross-Action for Breach of Warranty.

In an important English case,[486] the rule was laid down that in all actions for goods sold and delivered with a warranty, or for work and

[483] Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570.

[484] Davenport v. Hubbard, 46 Vt. 200, 14 Am. Rep. 620. See also Foster v. Milliner, 50 Barb. 385.

[485] Whitcomb v. Williams, 4 Pick. 228.

[486] Mondel v. Steel, 8 Mees. & W. 858.

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labor, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract or warranty; and to the extent that he obtains, or is capable of obtaining, an abatement of the price on that account, he must be considered as having received satisfaction for the breach, and he is precluded from recovering in another action to that extent, *but no more*. A later decision in the Queen's Bench repeats this doctrine, while carrying it so much further as to hold that the vendee need not recoup his damages in the first action, but may reserve his whole claim to be made the basis of a separate action; or, as intimated in *Mondel* v. *Steel*, he has his option to divide his cause of action, using as much of it as practicable in reduction of the vendor's recovery, and afterwards suing for the residue.[487] To a certain

[487] Davis v. Hedges, L. R. 6 Q. B. 687. In this case it was said by Hannen, J.: "It is clear that *before* any action is brought for the price of an article sold with a warranty, or of work to be performed according to a contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons why he should not. It appears from the passages above cited from the judgment in Mondel v. Steel, that the present practice of allowing the defense of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle that the statutes of set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralize it, if the defendant were not allowed an option in the matter. The hypothesis is that the plaintiff for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done; and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which a breach of warranty or breach of contract may afford a defense is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable, therefore, that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the day of payment has arrived. Surely the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the

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extent the American decisions follow the English rule thus established, but not to its extreme position. In one of the recent cases, where the vendee of a machine brought his action against the vendor for damages for breach of a warranty made upon the sale, and the defendant pleaded a judgment recovered by him against the plaintiff upon some of the notes given for the purchase price, it was held that such judgment was no bar to the present action. The court said: "The facts constituting the cause of action in this case were not involved in the former action upon the notes, and could only have been properly presented for adjudication therein by affirmative allegations and proof on the part of the defendant in such action, in the nature of counterclaim or recoupment. Formerly, in such an action, the practice allowed a full recovery of the purchase price and left the vendee to seek his remedy by a cross-action.[488] Now the vendee has his election to plead the breach of contract of warranty in reduction of damages, in an action brought by the vendor for the price, or to bring a cross-action, as was done in this case. Such action is not barred by the former recovery of the price."[489] In some of the states the courts hold that a judgment *by default* for the price of an article sold is no bar to an action for damages for breach of the warranty.[490] But the view advanced by the English cases above cited—that the vendee may use *part* of his claim in reduction of the vendor's recovery and sue for the balance in a separate action—has not found favor in any of our courts. For the most part he is given his election as to which course he will pursue, but he cannot split up one entire demand. Hence he may sue for the breach of warranty, notwithstanding a former recovery of the price, *only* in cases where he did not interpose the breach of warranty as a counterclaim or ground of recoupment in the first suit.[491] And if he elects to recoup

contracting party in the wrong had or had not issued a writ for the price."

[488] Citing Mondel v. Steel, 8 Mees. & W. 858, and Rigg v. Banbridge, 15 Mees. & W. 598.

[489] Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. Rep. 156, citing Davis v. Hedges, L. R. 6 Q. B. 687; Bodurtha v. Phelon, 13 Gray, 413; McKnight v. Devlin, 52 N. Y. 399; Barker v. Cleveland, 19 Mich. 230; Benj. Sales (3d edn.) 894–899.

[490] Parker v. Roberts, 63 N. H. 431; Bascom v. Manning, 52 N. H. 132; Bodurtha v. Phelon, 13 Gray, 413.

[491] Barth v. Burt, 43 Barb. 628; Cook v. Moseley, 13 Wend. 277; Earl v. Bull, 15 Cal. 421.

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his damages, for the breach of warranty, when sued for the price, a decision against him in that form will be a bar to another action brought upon the warranty.[492] But even the privilege of reserving his claim for damages, to be made the foundation of a separate action, is not universally conceded to the vendee. In at least two states, as appears from the reported cases, when the vendee sues for breach of warranty of the goods sold, or for failure of manufactured articles to correspond with the contract, the seller may fully rely upon a judgment previously recovered by him for the price, as a complete bar to the action.[493] Whatever may be the rule, a parallel doctrine should be applied in cases where the two suits occur in the inverse order to that hitherto supposed. That is, when the purchaser of goods begins the litigation by suing for damages caused by the failure of the articles to correspond with the contract stipulations or the warranty, the vendor should have the same option granted to the vendee, viz., the right either to claim the purchase-price by way of set-off or recoupment, or to reserve it as the basis of a subsequent action. And so the authorities hold.[494]

§ 769. Action for Services and Cross-Action for Negligence.

A question closely analogous to that discussed in the preceding section is presented in cases where an action for damages for the negligent performance of given services is met by a plea of a former recovery of the value of such services. In New York it is held that such a plea is a complete bar. Thus, where a physician sued a party for services rendered by him in treating a broken limb, and the defendant appeared and pleaded a general denial, it was held that the fact of performance of plaintiff's contract was impliedly averred and denied by the pleadings, and that a judgment in favor of the plaintiff, for the services as claimed, necessarily included the fact of due performance by the plaintiff, and that the question of malpractice

[492] Timmons v. Dunn, 4 Ohio St. 680.
[493] Davis v. Tallcot, 12 N. Y. 184; Gilson v. Bingham, 43 Vt. 410.
[494] Barker v. Cleveland, 19 Mich. 230.

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was involved in the issue and concluded by the judgment, so that the patient could not thereafter sue upon that cause of action.[495] And a similar rule has been applied in Massachusetts (though the services were of an entirely different nature), where defense was taken to the first action on the ground of negligence, but without seeking to recoup the damages.[496] But these cases have been vigorously criticised and resolutely denied, in decisions rendered in other states, which seem to us to be much better supported by legal reason and the best considerations of convenience and justice. This may be illustrated by the judgment in the case of *Ressequie* v. *Byers*,[497] where, after an action was commenced against a physician for malpractice in attendance upon a certain case, he instituted a suit before a justice of the peace for the value of his services for such attendance, in which suit the defendant interposed a general denial as to the value of the services, but afterwards failed to appear at the trial, and judgment was given for the physician for the amount he claimed. It was held that such judgment was no defense to the action for malpractice, and a supplemental answer setting it up as a plea in bar thereto was demurrable.[498] In order, however, to complete the discussion of this topic, it is necessary to add that if, in an action for the services, the employer *does* allege negligence or want of skill and seeks to recoup his dam-

[495] Bellinger v. Craigue, 31 Barb. 534; Edwards v. Stewart, 15 Barb. 67; Gates v. Preston, 41 N. Y. 113; Blair v. Bartlett, 75 N. Y. 150. See also White v. Merritt, 7 N. Y. 352.

[496] Merriam v. Woodcock, 104 Mass. 326.

[497] 52 Wis. 650, 9 N. W. Rep. 779, 38 Am. Rep. 775.

[498] The court said: "The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defense before the justice that the defendant's services were of no value, in order to save his rights. He had his election either to recoup his damages *pro tanto* in the justice's court or go for his entire claim in this. It seems to us that this is the better and more convenient rule to lay down upon the subject. If the plaintiff were compelled to make his defense in the justice's court, that the professional services were of no value, and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely defeating the claim for services, or limit his damages to $200, the extent of the jurisdiction of the justice. We are not inclined to adopt a rule that would lead to any such inconvenient consequences." See also Sykes v. Bonner, 1 Cincin. (Ohio) 464; Minnaugh v. Partlin (Mich.), 34 N. W. Rep. 717.

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ages arising therefrom, a judgment rendered against him for the full amount of the plaintiff's claim, will bar any subsequent action which he may bring for the recovery of such damages.[499] Thus, to a suit against two surgeons for malpractice, a separate answer by one that he had sued the plaintiff before a justice, to recover for his services in the same matter, and that there was an answer that the services were worthless, and a trial and judgment for the amount of the claim sued for, which remains in force, is a good plea.[500] And of course the defense of malpractice is barred by a judgment on the merits rendered for the surgeon in a suit against him by the patient for the same alleged malpractice.[501]

Part VI. Who may take Advantage of the Bar.

§ 770. Joint Contractors.

In one of the early decisions of the United States Supreme Court the position was taken by Chief Justice Marshall that a recovery in an action against one of the obligors on a joint bond, without satisfaction, was no bar to a subsequent action against a co-obligor.[502] But this ruling has been much criticised, and although the case may never have been explicitly overruled, yet the doctrine which it announced has been completely abandoned by that court, and the later utterances of the same tribunal have sanctioned an exactly opposite view.[503] The opinion that such a judgment does not merge the cause of action against the other obligor appears to be still adhered to in one of our states.[504] But this stands as an exception

[499] South & North Alabama R. Co. v. Henlein, 56 Ala. 368; Howell v. Goodrich, 69 Ill. 556.

[500] Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308.

[501] Haynes v. Ordway, 58 N. H. 167.

[502] Sheehy v. Mandeville, 6 Cranch, 253.

[503] Mason v. Eldred, 6 Wall. 231; Sessions v. Johnson, 95 U. S. 347; United States v. Ames, 100 U. S. 35. In Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293, the opinion is expressed that the decision in Sheehy v. Mandeville was calculated to do perfect justice between the parties concerned in it, but was entirely erroneous in principle and has been repeatedly disapproved.

[504] Collins v. Lemasters, 1 Bail. (S. Car.) Law, 348, 21 Am. Dec. 469; Treasurers v. Bates, 2 Bail. (S. Car.) Law, 362; Union Bank v. Hodges, 11 Rich. 480.

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to the universal consensus of opinion in England and America, and the rule is now established, by nothing less than a multitude of authorities, that where the contract or obligation sued on is *joint*, a recovery against one of the joint contractors merges the entire cause of action and bars any subsequent suit on the same obligation against the other debtors or any of them.[505] "It is perfectly well settled," says the supreme court of Wisconsin, "that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment therein against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and being indivisible it cannot be merged or cancelled as to one and existing and operative as to another joint debtor."[506] According to another learned court, "a separate judgment taken against one of several joint makers of a note, in a suit to which the others are not parties, or in which steps are not taken to preserve the right to a subsequent judgment against such others, may be pleaded as a bar to a subsequent suit against those not included in the first suit or judgment."[507] In the leading English case on this subject it was well said by Baron Parke: "The distinction between the case of a joint and several contract is very clear. It is argued that each party

[505] King v. Hoare, 13 Mees. & W. 494; *Ex parte* Higgins, 3 De Gex & J. 33; Kendall v. Hamilton, L. R. 4 App. Cas. 504; Mason v. Eldred, 6 Wall. 231; Sessions v. Johnson, 95 U. S. 347; United States v. Ames, 100 U. S. 35; Willings v. Consequa, 1 Pet. C. C. 301; Trafton v. United States, 3 Story, 646; Ward v. Johnson, 13 Mass. 148; Gibbs v. Bryant, 1 Pick. 118; Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227; Penny v. Martin, 4 Johns. Ch. 567; Olmstead v. Webster, 4 N. Y. 413; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 264; Smith v. Black, 9 Serg. & R. 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. 11, 33 Am. Dec. 684; Brown v. Johnson, 13 Gratt. 644; Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293; Elliot v. Porter, 5 Dana, 299, 30 Am. Dec. 689; Pfau v. Lorain, 1 Cincin. 73; Clinton Bank v. Hart, 5 Ohio St. 33; Taylor v. Claypool, 5 Blackf. 557; Barnett v. Juday, 38 Ind. 86; Root v. Dill, 38 Ind. 169; Crosby v. Jeroloman, 37 Ind. 264; Robinson v. Snyder, 74 Ind. 110; Wilson v. Buell, 117 Ind. 315, 20 N. E. Rep. 231; Wann v. McNulty, 2 Gilm. 355, 43 Am. Dec. 58; Moore v. Rogers, 19 Ill. 348; Mitchell v. Brewster, 28 Ill. 163; People v. Harrison, 82 Ill. 84; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

[506] Lauer v. Bandow, 48 Wis. 638, 4 N. W. Rep. 774; Bowen v. Hastings, 47 Wis. 232, 2 N. W. Rep. 301.

[507] Kennard v. Carter, 64 Ind. 81.

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to a joint contract is severally liable; and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of paper or parchment, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee."[508]

And if it is true that a judgment in an action upon a joint contract brought against one of the debtors will bar a subsequent suit against any other of them on the same obligation, it is no less true that such judgment may be pleaded in bar to an action afterwards brought against *all* the contractors together.[509] But where two joint makers of a note are sued, and one claims to be released because a former judgment rendered on such note is still subsisting against his co-maker, the burden is upon him to establish the fact.[510] It may be here mentioned that indorsers before delivery to the payee are jointly liable, not severally, as there is no express agreement for a several liability, and hence a judgment against one bars suits against the others.[511] So strictly is the main rule applied that it has recently been held in England that a judgment against two persons who had borrowed money from the plaintiff (though the judgment remains unsatisfied) is a bar to another action by the same plaintiff against a third person who is *afterwards discovered* to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money was borrowed.[512]

In a few cases, however, the strict application of this rule has been relaxed, in view of circumstances which would render its operation too harsh and inequitable. Thus it has been held that where one of two joint debtors is dead, a judgment recovered against the survivor (which remains unsatisfied) is not a bar to proceedings on the original claim against the estate of the other.[513] This decision may per-

[508] King v. Hoare, 13 Mees. & W. 494.

[509] Reynolds v. Pittsburgh, etc., R. Co., 29 Ohio St. 602; *Ex parte* Higgins, 3 De Gex & J. 33.

[510] Robinson v. Snyder, 97 Ind. 56.

[511] Brady v. Reynolds, 13 Cal. 31.

[512] Kendall v. Hamilton, L. R. 4 App. Cas. 504.

[513] Devol v. Halstead, 16 Ind. 287. See also Weyer v. Thornburgh, 15 Ind. 124.

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haps be sustained on the theory that the death of the one debtor in some way severed their joint relationship, or because the plaintiff could not choose whether to sue them jointly or severally, and therefore should not be taken as having released the estate of the one not joined. In another case, A., B., and C. were joint obligors in a bond to D. On a breach of the condition, D. sued the obligors, and by the fraudulent statements of A. and B. he was led to discontinue the suit as to them and take judgment against C. alone. D. then sued A. and B. on the bond (the judgment against C. remaining unsatisfied), and they pleaded the former judgment in bar, to which D. replied their fraud, and they demurred to the replication. It was held that the judgment was no bar.[514] But we are unable to discover any ground, good in law, on which this ruling can be sustained. We must also be careful to distinguish actions on the original debt from actions on subsidiary or collateral obligations. Thus, where one of three joint covenantors gave a bill of exchange for part of the debt secured by the covenant, on which bill judgment was recovered, it was held to be no bar to an action of covenant against the three, such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction or to have produced it in fact.[515] And it is also necessary, before applying the rule in question, to be sure that the parties supposed to be jointly liable really occupy that relation. For example, the insurers of a vessel and the owners of another vessel, which injures the first in a collision, are not jointly liable in any such sense that a decree in admiralty, awarding damages against the vessel in fault, which does not produce complete satisfaction, can be pleaded in bar to an action against the insurers for the balance of the loss. There is no such privity between the indemnitor and a third person who may be liable for the same damages, as that between joint trespassers or joint contractors.[516]

[514] Ferrall v. Bradford, 2 Fla. 506, 50 Am. Dec. 293.

[515] Drake v. Mitchell, 3 East, 251.

[516] Dunham v. New England Mut. Ins. Co., 1 Lowell, 253.

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§ 771. One Joint Contractor a Non-Resident.

Courts have not hesitated to set aside the rule just considered in cases of absolute necessity. And such a case arises when one of the joint debtors is a non-resident. Here it is plainly impossible for the plaintiff to secure a valid judgment against them both in one action. And therefore his election to sue the one who is within the jurisdiction is not an implied release of the other. Accordingly it is well settled that an unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the state and consequently beyond the reach of legal service; in such case it stands in the same situation as where judgment has been rendered in a suit against one party to a joint and several contract.[517] On the same principle, where a suit was brought in New York against two joint debtors, one of whom was not served with process and did not appear in the suit, and judgment was rendered in form against both; it was held that an action brought subsequently in Michigan, against the two, was properly brought upon the original demand instead of upon the judgment.[518]

§ 772. Effect of Joint Debtor Acts.

In several of the states statutes have been enacted—commonly called "joint debtor acts"—which provide that where an action is brought upon a joint contract or obligation, and some of the persons named as defendants are not served with process, judgment may be entered against *all* the defendants, if the joint liability is found as alleged, to be enforced against joint property of all and the individual property of those served. And further clauses in these stat-

[517] Dennett v. Chick, 2 Me. 191, 11 Am. Dec. 59; Rand v. Nutter, 56 Me. 339; West v. Furbish, 67 Me. 17; Olcott v. Little, 9 N. H. 259, 32 Am. Dec. 357; Burt v. Stevens, 22 N. H. 232; Tibbetts v. Shapleigh, 60 N. H. 487; Tappan v. Bruen, 5 Mass. 193; Odom v. Denny, 16 Gray, 114; Brown v. Birdsall, 29 Barb. 549; Campbell v. Steel, 11 Pa. St. 394; Yoho v. McGovern, 42 Ohio St. 11; Merriman v. Barker (Ind.), 22 N. E. Rep. 992.

[518] Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

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utes have been construed as declaring that the individual liability of one not served continues to exist notwithstanding the rendition of such a joint judgment. Hence these acts materially modify the common law rule. In point of fact, they make all contracts several in their legal effect, although joint in form. And consequently, after such a judgment is recovered, a defendant who was not served in the first action may be sued upon the original claim and held to a personal liability.[519] In some other states, although a separate action against a defendant in that position is not allowed, yet the statutes authorize a proceeding by which, after due notice and an opportunity to be heard, a defendant who was not served in the original action may be *connected* with the judgment therein, so as to be personally liable for its satisfaction. The effect of these statutes is explained by the supreme court of Wisconsin in a recent case, from which we quote as follows: "At the common law, if the plaintiff in an action on a joint obligation failed to obtain service of process on one of the joint debtors, and proceeded to judgment against those served, his remedy was gone against the debtor not served, because the obligation was indivisible and had become merged in the judgment, and there was nothing left upon which he could predicate another action. The statute was enacted to give the plaintiff a remedy in such a case against the joint debtor not served. It does not give an action on the original joint obligation, because that is merged in the judgment against the joint debtor or debtors served with process; but it gives a proceeding in the nature of *scire facias* against the joint debtor not served, which may result in holding him bound by the judgment in the same manner as if he had been originally summoned. But if the obligation is several, as well as joint, it is divisible, and the judgment upon it against one debtor does not merge the several obligation of another debtor not summoned. That remains, and the plaintiff may bring another action upon it against the latter; but in such a case the statute does not give the plaintiff the remedy therein prescribed, in addition to his common law right of action on the orig-

[519] Oakley v. Aspinwall, 4 N. Y. 515; Rufty v. Claywell, 93 N. Car. 306; Ells v. Bone, 71 Ga. 466; Wooters v. Smith, 56 Tex. 198; Smith v. Coopers, 9 Iowa, 376.

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inal debt. In short, the joint debtors of the statute are those who are jointly and not severally liable for the same debt."[520]

§ 773. Successful Defense by one Joint Debtor.

A successful defense made by one of the joint debtors in an action against him, if it was not on a ground purely personal to himself, will bar a future action by the same plaintiff on the same obligation against another of the debtors. "If a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to be a necessary corollary (if the deduction be not *a fortiori*) that a verdict and judgment *against* the plaintiff in the former action, upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against that defendant, would be admissible as a bar to a subsequent action against another so jointly bound."[521] At common law, a verdict and judgment against the plaintiff, in his action against all the debtors jointly, since it might be based merely on the ground of his having failed to establish a joint liability, would not be necessarily conclusive in an action afterwards brought by him against one of the former defendants, alleging a several liability. But where the statute provides that, in an action on a joint contract, judgment may be rendered against one or more of the defendants individually, if it should turn out upon the trial that only one or more of them is liable upon the contract, a judgment on the merits in favor of all the defendants in such action is a bar to a subsequent action, by the same plaintiff on the same alleged promise, against one of the defendants in the former suit. For the several liability of that defendant was no less involved in the determination of the first action than was his joint liability, it being as much the right of the plaintiff in that case to litigate and enforce the one as the other. And "if he availed himself of his right to a several judgment against the defend-

[520] Dill v. White, 52 Wis. 456, 9 N. W. Rep. 404. See also Yoho v. McGovern, 42 Ohio St. 11; Erwin v. Scotten, 40 Ind. 389.

[521] Brown v. Johnson, 13 Gratt. 644; Phillips v. Ward, 2 Hurl. & C. 717; Neville v. Hancock, 15 Ark. 511; Hill v. Morse, 61 Me. 541; Hunt v. Terril, 7 J. J. Mar. 67.

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ant in that [former] action, the question at issue in this [latter] case has been adjudicated; if he did not, it was his own fault, for he had the opportunity to do so; and the result in either case is the same." [522]

§ 774. Joint and Several Contractors.

If the contract or obligation put in suit is joint and several, it is not merged in a judgment recovered against one of the contractors, and such a judgment, so long as it remains unsatisfied, will not bar an action against another of the contractors.[523] As was remarked in the case first cited, a joint and several bond, "though on one piece of paper or parchment, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." And this rule has been extended by analogy to cases where two or more parties are jointly and individually liable, though not upon bond or contract. Thus, where a plaintiff recovered judgment against a sheriff's deputy, for default in his official duty, and took his body in execution, it was held that he was not thereby barred of his remedy against the sheriff for the same default. Said the court: "Although the causes of action are not precisely identical, yet the sheriff is subjected equally with his deputy to a responsibility for his official neglect or misconduct. The relation between them, in point of effect, produces the same consequences as that between joint and several promissors or joint trespassers; the judgment recovered against one does not extinguish the right of action against the rest, but this consequence merely results from satisfaction made to the creditor." [524] But the parties to a bill of exchange or promissory note, that is, the maker and indorser, or drawer, acceptor, and indorser, as the case may be, cannot be regarded as joint parties,

[522] Roby v. Rainsberger, 27 Ohio St. 674.

[523] King v. Hoare, 13 Mees. & W. 494; United States v. Price, 9 How. 83; Townsend v. Riddle, 2 N. H. 448; Sawyer v. White, 19 Vt. 40; Hawkes v. Phillips, 7 Gray, 284; Benson v. Paine, 2 Hilton, 552; Day v. Hill, 2 Speers L. 628, 42 Am. Dec. 390; Hix v. Davis, 68 N. Car. 233; Clinton Bank v. Hart, 5 Ohio St. 33; Kirkpatrick v. Stingley, 2 Ind. 269; Moore v. Rogers, 19 Ill. 348; Harlan v. Berry, 4 Greene (Iowa), 212; Armstrong v. Prewitt, 5 Mo. 476, 32 Am. Dec. 338; McLaurine v. Monroe, 30 Mo. 462; McReady v. Rogers, 1 Nebr. 124.

[524] Morgan v. Chester, 4 Conn. 387.

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unless there is an express stipulation to that effect. And consequently a recovery by the holder against one of them, without satisfaction, is no bar to his action against another on the same instrument.[525] Thus, in an early case, it was adjudged that if the indorsee of a bill of exchange, on default of payment by the acceptor, recovers against the drawer, but does not take out execution, this recovery cannot be pleaded in bar to a second action on the same bill by the same indorsee against the last indorser.[526] But it must be remarked that full payment and satisfaction of a judgment for the whole debt against one of several persons jointly and severally liable for such debt operates as a discharge of all.[527]

§ 775. Joint Judgment on Joint and Several Contract.

While it is true that where the contract or obligation is joint and several, the promisee or obligee may elect to sue the debtors jointly *or* severally, yet "even in that case, the rule is subject to the limitation that, if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately; for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered a judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy."[528] In other words, "it is essential to the idea of election that a man cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature."[529] According to the doctrine obtaining in Pennsylvania, the plaintiff is understood to have chosen his remedy as soon as he brings a joint action against all the debtors. And the result is that if he does not

[525] Railroad v. National Bank, 102 U. S. 14; Allen v. Union Bank of La., 5 Whart. 420; Russell & Erwin Manuf. Co. v. Carter, 5 Hun, 162; Gilman v. Foote, 22 Iowa, 560.

[526] Claxton v. Swift, 2 Shower, 441.

[527] Jameson v. Barber, 56 Wis. 630, 14 N. W. Rep. 859.

[528] Sessions v. Johnson, 95 U. S. 347.

[529] United States v. Price, 9 How. 83. To the same effect, see *Ex parte* Rowlandson, 3 P. Wms. 405; Clinton Bank v. Hart, 5 Ohio St. 33; Williams v. McFall, 2 Serg. & R. 280.

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in that suit recover against the whole number of them, he cannot afterwards maintain separate actions against those not included in the first judgment.[530] But in Ohio, the election of the creditor, whether to treat the obligation as joint or several, is not conclusively determined by the commencement of a joint action, but becomes fixed only upon the recovery of judgment against all the joint makers of the instrument. And therefore the institution of a joint action against all the makers of such an instrument, in which process is only served upon a part, and judgment against but one, is no bar to a separate action against one not served with process.[531] The rule that the recovery of a joint judgment upon a joint and several obligation merges the debt and prevents any subsequent separate action, has been directly denied in Illinois. In that state it has been said: "Where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained."[532] But this doctrine is opposed both by the weight of judicial reason and by the decided preponderance of authority. But it does not necessarily follow that a judgment in such a joint action *against* the plaintiff will be conclusive in a subsequent separate action. Thus, in a case in Indiana, "the former suit was upon a joint and several obligation of K., B., and P., against all three. The judgment upon the issue made determined that K. and P. were not jointly liable with B., but did not determine that K. was not severally liable upon the note described in the declaration, which is the question now at issue. The point is quite different. He might be liable alone and yet not jointly. The judgment is not, in a legal sense, between the same parties nor upon the same contract."[533]

[530] Beltzhoover v. Commonwealth, 1 Watts, 126.

[531] Clinton Bank v. Hart, 5 Ohio St. 33.

[532] People v. Harrison, 82 Ill. 84, citing Wann v. McNulty, 2 Gilm. 355; Thompson v. Emmert, 15 Ill. 415; Moore v. Rogers, 19 Ill. 347; Mitchell v. Brewster, 28 Ill. 163. See also Charles v. Haskins, 11 Iowa, 329. The case of United States v. Cushman, 2 Sumn. 426, which favored this view, was overruled in United States v. Price, 9 How. 83.

[533] Kirkpatrick v. Stingley, 2 Ind. 269.

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§ 776. Judgments against Partners.

On the principle that a judgment against one of two joint obligors or contractors bars an action against the other, a former recovery against one partner for a firm debt is a bar to a recovery against the other members of the firm in another suit for the same debt.[534] And this is so even where the plaintiff was at first ignorant that the persons whom he afterwards pursues were members of the firm. Thus, where a party brought his suit against S. and S. as partners under the firm name of S., S., & Co., and makers of a promissory note, and recovered a judgment, which remained unsatisfied, and afterwards discovered that P. and V. were also partners in the firm at the time the note was given, and brought an action against the four as makers of the same note, it was held that the judgment previously recovered was a bar.[535] Where a party sues three partners on a note, obtains judgment against two of them, continuing the case as to the third, and afterwards, amending the complaint, abandons the note and sues upon the original indebtedness represented thereby, such third partner may set up in bar of the action against him the judgment recovered against the other two.[536] But in some of the states, under statutes which make all liabilities of partners joint and several, a judgment against one partner, not satisfied, is not a bar to an action against the other.[537]

§ 777. Joint Tort-Feasors.

The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently a judgment recovered

[534] Wann v. McNulty, 2 Gilm. 355, 43 Am. Dec. 58; Smith v. Black, 9 Serg. & R. 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. 11, 33 Am. Dec. 684; Sloo v. Lea, 18 Ohio, 279; Candee v. Clark, 2 Mich. 255; Nichols v. Burton, 5 Bush, 320; *Ex parte* Higgins, 3 De Gex & J. 33.

[535] Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227; Smith v. Black, 9 Serg. & R. 142, 11 Am. Dec. 686; Scott v. Colmesnil, 7 J. J. Mar. 416. *Per contra*, Watson v. Owens, 1 Rich. 111.

[536] Exchange Bank v. Ford, 7 Colo. 314, 3 Pac. Rep. 449.

[537] Hyman v. Stadler, 63 Miss. 362.

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against one of two joint tort-feasors, remaining unsatisfied, is no bar to an action against the other for the same tort.[538]

§ 778. Joint Trespassers; English Rule.

In England the rule has now become firmly established that persons jointly engaged in the commission of a trespass are not jointly and severally liable in any such sense that successive actions may be prosecuted against each of them; but a judgment against one of the joint trespassers, even though unsatisfied, may be pleaded in bar of another action against a co-trespasser.[539] This doctrine appears to have been first advanced in the case of *Brown* v. *Wootton*.[540] This was an action of trover for certain plate. The defendant pleaded that the plaintiff had already brought his action for the same property against one J. S., supposing the conversion to have been by him, and had recovered judgment for his damages, and averred that it was for the same goods and for the same trover and conversion. It was argued that the plea was ill, for no satisfaction of that judgment was alleged. "But all the court," says the report, "held the plea to be good; for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatam* and to certainty, which takes away the action against the others; and therefore Popham said, if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action

[538] Lovejoy v. Murray, 3 Wall. 1; Sessions v. Johnson, 95 U. S. 347; American Bell Telephone Co. v. Albright, 32 Fed. Rep. 287; Preston v. Hutchinson, 29 Vt. 144; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Elliott v. Hayden, 104 Mass. 180; Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330; Atlantic Dock Co. v. Mayor, 53 N. Y. 64; Elliott v. Porter, 5 Dana, 299, 30 Am. Dec. 689; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214; Knott v. Cunningham, 2 Sneed, 204; Turner v. Hitchcock, 20 Iowa, 310; Williams v. Sutton, 43 Cal. 65.

[539] King v. Hoare, 13 Mees. & W. 494, 504; Brown v. Wootton, Cro. Jac. 73; Lendall's Case, 1 Leon. 19; Day v. Porter, 2 Moo. & Rob. 151; Buckland v. Johnson, 15 C. B. 145; Brinsmead v. Harrison, L. R. 7 C. P. 547.

[540] Cro. Jac. 73. This case is also reported in Yelv. 67, under the name of Broome v. Wooton.

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for this trespass." But this decision was not immediately accepted as good law. In fact, for a considerable period, judicial opinion on the point underwent much fluctuation.[541] But in the latest case on the subject, the court, while professing to entertain "the highest respect for the American jurists" (who, in the mean time, had strongly contended for the opposite view), has concluded to follow the earlier rulings; and it is now settled law, in that country, that one joint trespasser can plead in bar a judgment recovered against his co-trespasser, for the same cause of action, even though no satisfaction of such judgment be alleged or shown.[542]

[541] In the important case of Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330, Chief Justice Kent explained the relation of the earlier and later English authorities to the decision in Brown v. Wootton, in the following manner: "This case of Brown v. Wootton was clearly introductory of a new rule. It is laid down in Brooke, Judgment, pl. 98, that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot plead that the plaintiff hath recovered against the other for the same trespass and taken him in execution. And in Morton's Case, Cro. Eliz. 30, it was even made a question by one of the judges whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser, but the court held it reasonable that it should be a bar. And many cases subsequent to that of Brown v. Wootton seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in Cocke v. Jenner, Hob. 66, the court held that if trespassers be sued in several actions, the plaintiff may make choice of the best damages, but that when he has taken one satisfaction, he can take no more, and if he attempt it, an *audita querela* will lie. Again, in the case of Corbet v. Barnes, Wm. Jones, 377, the court said that for one assault the plaintiff can have several actions and recover, but when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of Bird v. Randall, 3 Burr. 1345, Lord Mansfield advanced the same doctrine, and observed that, in case of a joint trespass, the defendants were all liable to the plaintiff and he might proceed against any or all of them as he pleased, yet he shall have but one satisfaction from them all. I am therefore inclined to question the extent of the decision in Brown v. Wootton, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must at least be an execution thereon, to bring a case within the facts on which that decision was founded, and that, perhaps, may be deemed an election by the plaintiff *de melioribus damnis*, and sufficient to conclude him."

[542] Brinsmead v. Harrison, L. R. 6 C. P. 584. This case was also heard in the Exchequer Chamber, on error to the Common Pleas, and was affirmed. See s. c. L. R. 7 C. P. 547.

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§ 779. Joint Trespassers; American Rule.

A very few of the American decisions adhere to the rule just stated to be established in England.[543] But it is settled by the vast preponderance of authority in this country, that where several persons engage in the commission of a trespass, their liability is not merely joint, but joint and several, and the plaintiff may maintain his action against one or more or all of them; and consequently a judgment recovered against one of the joint trespassers, but not satisfied, is no bar to other actions for the same trespass against the others.[544] "That each joint trespasser is answerable for the act of all," says the court in Ohio, "and that the plaintiff may pursue his remedy against one or all, is unquestioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are *quasi* collateral security for each other, until the plaintiff has obtained satisfaction. It would seem to follow from this doctrine that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another. If a judgment against

[543] Hunt v. Bates, 7 R. I. 217, 82 Am. Dec. 592; Wilkes v. Jackson, 2 Hen. & M. 355.

[544] Lovejoy v. Murray, 3 Wall. 1; Collard v. Delaware, L. & W. R. Co., 6 Fed. Rep. 246; Smith v. Rines, 2 Sumn. 338; Jones v. Lowell, 35 Me. 541; Sanderson v. Caldwell, 2 Aik. 195; Chamberlin v. Murphy, 41 Vt. 110; Sprague v. Waite, 19 Pick. 455; Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Elliott v. Hayden, 104 Mass. 180; Savage v. Stevens, 128 Mass. 254; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Ayer v. Ashmead, 31 Conn. 453, 83 Am. Dec. 154; Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330; Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234; Marsh v. Berry, 7 Cow. 344; Floyd v. Browne, 1 Rawle, 125, 18 Am. Dec. 602; Allen v. Craig, 13 N. J. Law, 294; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Griffie v. McClung, 5 W. Va. 131; Whitaker v. English, 1 Bay, 14; Hawkins v. Hatton, 1 Nott & M. 318, 9 Am. Dec. 700; Brooks v. Ashburn, 9 Ga. 297; Blann v. Cocheron, 20 Ala. 320; Du Bose v. Marx, 52 Ala. 506; Wallace v. Miller, 15 La. Ann. 449; McGehee v. Shafer, 15 Tex. 198; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214; Elliott v. Porter, 5 Dana, 299, 30 Am. Dec. 689; Knott v. Cunningham, 2 Sneed, 204; Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529; Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Brady v. Ball, 14 Ind. 317; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Page v. Freeman, 19 Mo. 421; Turner v. Hitchcock, 20 Iowa, 310.

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one of several joint trespassers is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plaintiff of his right of bringing several suits, and of his election *de melioribus damnis*, as each defendant, except in the suit first tried, may plead *puis darrein continuance* the recovery in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried."[545] On this principle, a judgment against an agent for a fraud committed while acting within the scope of his agency, while it remains unsatisfied, is no bar to an action against his principal for the same fraud.[546]

§ 780. Election between Joint and Several Action.

The plaintiff who is injured by a tortious act shared in by several must elect whether he will prosecute them all in a joint action, or sue one or more separately. He cannot do both. "Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly and has judgment, he cannot afterwards sue any one of them separately; or if he sues any one of them separately and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy."[547]

§ 781. Successful Defense by one Joint Trespasser.

In actions of tort, where the wrong is joint and several, and the plea of one of the defendants is such as shows that the plaintiff could have no cause of action against any of them, if the plea is found against the plaintiff, it operates to the benefit of all the defendants.[548]

[545] Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529.

[546] Maple v. Railroad Co., 40 Ohio St. 313, 48 Am. Rep. 685.

[547] Sessions v. Johnson, 95 U. S. 347; Smith v. Rines, 2 Sumn. 348. Compare Davis v. Caswell, 50 Me. 294.

[548] Williams v. McGrade, 13 Minn. 46, (Gil. 39).

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But of course it would be otherwise where one defendant, sued separately, obtained a verdict on a defense purely personal to himself.

§ 782. Satisfaction of Judgment against One.

The plaintiff can have but one satisfaction for a joint wrong. And therefore if he recovers a judgment against one of the joint tort-feasors and *obtains satisfaction*, this operates as a discharge of the others.[549] And if judgment is obtained in one action and satisfied, while the others are pending, such judgment and satisfaction may be pleaded in bar of any further prosecution of such other actions, and in that case the plaintiff will not be entitled to judgments for nominal damages and costs, but judgment must be given for the defendants.[550] If the plaintiff has actually recovered separate judgments for the same tort, it is the prevalent opinion that they cannot all be enforced, but he will be required to elect which one he will enforce (in other words, make his election *de melioribus damnis*) and the satisfaction of one will satisfy the other.[551] Hence the rule, accepted by many of the authorities, that the suing out of execution on a judgment recovered against one of the wrong-doers, whether it results in satisfaction or not, will release the others.[552] But it must be added that numerous other decisions are opposed to this view, holding that nothing short of actual satisfaction received will produce this result.[553] And in one case it is held that a plea setting forth a former recovery against a co-trespasser and a voluntary payment of the damages and costs to the clerk in open court by the defendant in that judgment, without averring that the plaintiff accepted such pay-

[549] Mathews v. Lawrence, 1 Denio, 212, 43 Am. Dec. 665; Smith v. Singleton, 2 McMull. 184, 39 Am. Dec. 122; Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727; Karr v. Barstow, 24 Ill. 580; Savage v. Stevens, 128 Mass. 254; Sessions v. Johnson, 95 U. S. 347; Luce v. Dexter, 135 Mass. 23.

[550] Savage v. Stevens, 128 Mass. 254; Mitchell v. Libbey, 33 Me. 74.

[551] Putney v. O'Brien, 53 Iowa, 117, 4 N. W. Rep. 891.

[552] White v. Philbrick, 5 Me. 147, 17 Am. Dec. 214; Boardman v. Acer, 13 Mich. 77; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Allen v. Wheatley, 3 Blackf. 382; Smith v. Singleton, 2 McMull. 184, 39 Am. Dec. 122.

[553] Lovejoy v. Murray, 3 Wall. 1; Sheldon v. Kibbe, 3 Conn. 214; Page v. Freeman, 19 Mo. 421; Knott v. Cunningham, 2 Sneed, 204.

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ment in satisfaction of his recovery, is bad on demurrer.[554] A recovery in replevin with a return of the goods bars an action of trespass against the same and other parties for damages, whether the damages awarded in the replevin suit have been paid or not, because the return is a satisfaction for the trespass.[555] But it appears that where separate actions are prosecuted to judgment against joint tort-feasors, *partial* execution of the judgment against one is not such satisfaction as will release the other.[556] And if, while separate suits are pending against several joint trespassers, one suit is settled and the defendant therein discharged, although it was the intention of both parties that the discharge should affect only the cause of action against the defendant, and that it should not affect the plaintiff's right of recovery in the other suits, it will yet operate as a discharge of the entire cause of action against all, and there can be no recovery in the other suits, either of nominal damages or of costs.[557]

PART VII. PLEADING AN ESTOPPEL OF RECORD.

§ 783. Necessity of Pleading Prior Adjudication.

Upon the question, whether a party who intends to rely upon a former adjudication as conclusive of the matters presently in issue must plead it as an estoppel, on pain of being deprived of its benefit as a claim or defense if he omits to do so, or whether he may simply introduce the record in evidence, with the same final effect as if it had been pleaded,—the authorities are by no means in harmony. In England, one of the most important cases contains a *dictum* to the effect that a former judgment between the same parties is "as a plea, a bar, and as evidence, conclusive."[558] But notwithstanding this, another leading case decides that a prior adjudication is not conclusive by way of estoppel unless pleaded; that if it is merely given in evidence under the general issue, it amounts to no more than a mat-

[554] Blann v. Cocheron, 20 Ala. 320.
[555] Karr v. Barstow, 24 Ill. 580.
[556] McVey v. Marratt, (Iowa), 45 N. W. Rep. 548.
[557] Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154.
[558] Duchess of Kingston's Case, 20 How. St. Tr. 478.

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ter of argument or inference, and the jury are at liberty to find according to the truth of the matter; and this rule is undoubtedly sustained by the preponderance of authority in that country,[559] and in Canada.[560] In the United States there has been great contrariety of opinion. Numerous cases, in accordance with the English rule, hold that the benefit of an estoppel by record is waived unless it is seasonably interposed by plea.[561] In one state it is said that if the circumstances and course of proceedings admit, a defendant who relies upon a former judgment must plead it, so as to give the plaintiff an opportunity to set up any objection he may have to its validity.[562] In another, "it is the settled rule of pleading that where a party makes a judgment of a court the foundation of his action or defense, he must make the record of such judgment, or a transcript of it, a part of the pleading setting it up, as in case of written instruments. Former recovery cannot be given in evidence under the general denial."[563] In Arkansas, "where it is necessary to plead a former judgment in bar of an action, it cannot be given in evidence unless pleaded, because of the general rule that the proof must correspond with the allegations."[564] So in equity, a former decree, to be a defense, must be pleaded or relied on in the answer as a bar, and it is not enough to read it at the hearing.[565] But these views, as we shall presently show, are not supported by the majority of the decisions of the American courts. On the contrary, the general tendency is to attach the same final and conclusive effect to a prior adjudication wherever and whenever it is set up, whether that be done by plea or in the course of the evidence.

[559] Vooght v. Winch, 2 Barn. & Ald. 662; Hannaford v. Hunn, 2 Car. & P. 148; Dimes v. Grand Junction Canal Co., 9 Q. B. 469; Magrath v. Hardy, 4 Bing. N. C. 782; Outram v. Morewood, 3 East, 346; Doe v. Huddart, 2 C. M. & R. 316.

[560] Hughes v. Rees, 9 Ontario, 198.

[561] Fowler v. Hait, 10 Johns. 111; Derby v. Yale, 13 Hun, 273; Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 323; Smith v. Elliott, 9 Pa. St. 345; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Wann v. McNulty, 2 Gilm. 355, 43 Am. Dec. 58; State v. Board of Commissioners, 12 Nevada, 17.

[562] Murray v. Murray, 6 Oreg. 26.

[563] Brady v. Murphy, 19 Ind. 258.

[564] State v. Spikes, 33 Ark. 801.

[565] Lyon v. Tallmadge, 14 Johns. 501; Turley v. Turley, 85 Tenn. 251, 1 S. W. Rep. 891.

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§ 784. Where there is no Opportunity to Plead.

A former recovery in which the same matter was tried and determined upon the merits, may be given in evidence without being specially pleaded, wherever the party, plaintiff or defendant, had *no opportunity* to plead the judgment specially, and its effect, in such case, is equally conclusive as if it had been pleaded.[566] "Conceding the general rule to be as claimed by appellant, that estoppel by former judgment must be specially pleaded, it does not apply where no opportunity to plead the estoppel is given. In such case the record may be given in evidence with the same conclusive effect as if it had been specially pleaded." [567] For example, the defendant may give the prior adjudication in evidence under the plea of "not guilty" in ejectment and trover, no other plea being allowed in those actions; and the plaintiff may give the judgment in evidence in answer to any matter of defense which was not specially pleaded, for he had no opportunity to reply the estoppel.[568] So a former judgment may be given in evidence under the general issue when such judgment was rendered subsequent to the entry of the plea of general issue.[569]

§ 785. When Admissible under General Issue.

Before the question of the conclusiveness of a former judgment which has not been pleaded can be finally determined, it is necessary to furnish an answer to another question, viz., in what cases such prior adjudication is *admissible* as evidence under the plea of the general issue. In some of the states there seems to be no

[566] Regina v. Haughton, 1 El. & B. 501; Chase v. Walker, 26 Me. 555; Dame v. Wingate, 12 N. H. 291; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Perkins v. Walker, 19 Vt. 144; Beebe v. Elliott, 4 Barb. 457; Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 323; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Young v. Rummell, 2 Hill (N. Y.), 478, 38 Am. Dec. 594; Dows v. McMichael, 6 Paige, 189; Ward v. Ward, 22 N. J. Law, 699; Sheldon v. Patterson, 55 Ill. 507; Flandreau v. Downey, 23 Cal. 354.

[567] Clink v. Thurston, 47 Cal. 21.

[568] Young v. Rummell, 2 Hill (N. Y.), 478, 38 Am. Dec. 594.

[569] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627.

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restriction whatever in this regard. Whether conclusive or not, the judgment is always receivable as evidence. "The defense of former recovery or adjudication can be as well taken advantage of under the general issue as by a special plea in bar. This seems now to be the more liberal practice."[570] In Massachusetts, under the statutes, if the judgment be a fact relied upon in avoidance of the action, it must be set forth in the answer. Such a judgment, of a peculiar nature, is a discharge in bankruptcy or insolvency. But if the judgment be an adjudication between the same parties, and against the plaintiff, of issues which tend directly to disprove the allegations contained in the declaration, then it is admissible in evidence under an answer denying those allegations.[571] But the rule generally followed at common law—independent of special statutes and of the changes wrought by the introduction of the code practice in several of the states—is thus given: "The defendant may give the judgment in evidence under the general issue in those cases where other matters in discharge of the action can be proved under that issue; as in ejectment, *assumpsit*, and actions on the case, or where he is sued for an act done as a public officer, and is not, therefore, required to plead specially."[572] There is no doubt, for example, that in the action of *assumpsit*, the record of a former judgment between the parties may be given in evidence under the general issue.[573] In the

[570] George v. Gillespie, 1 Greene (Iowa), 421. See also Renkert v. Elliott, 11 Lea, 235, 250; Fowlkes v. State, 14 Lea, 14.

[571] Foye v. Patch, 132 Mass. 105; Genl. Stat. Mass. c. 129.

[572] Young v. Rummell, 2 Hill (N. Y.), 478, 38 Am. Dec. 594.

[573] Stafford v. Clark, 2 Bing. 377; Young v. Black, 7 Cranch, 565; Bartels v. Schell, 16 Fed. Rep. 341; Miller v. Manice, 6 Hill, 124; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Carvill v. Garrigues, 5 Pa. St. 152; Finley v. Hanbest, 30 Pa. St. 190; Cook v. Field, 8 Ala. 53, 36 Am. Dec. 436; Lampton v. Jones, 5 T. B. Mon. 235; Cook v. Vimont, 6 T. B. Mon. 284, 17 Am. Dec. 157; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459 (overruling Inman v. Jenkins, 8 Ohio, 271); Wann v. McNulty, 2 Gilm. 355, 43 Am. Dec. 58; Young v. Rummell, 2 Hill (N. Y.), 478, 38 Am. Dec. 594. In the case last cited it was admitted that Fowler v. Hait, 10 Johns. 111, was to the contrary, but the court suggested that that case was virtually overruled in Wilt v. Ogden, 13 Johns. 56, and Sill v. Rood, 15 Johns. 230. In Coles v. Carter, 6 Cow. 691, it was held that a former recovery could not be given in evidence under the general issue; but the action was trespass, where all matters of defense which admit the original wrong must be specially pleaded. As to actions on contract, compare Blackwell v. Dibbrell (N. Car.), 9 S. E. Rep. 192.

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language of the supreme court of the United States: "It has been long since established that under *non assumpsit* the defendant may give in evidence anything which shows that no debt was due at the time when the action was commenced, whether it arise from an inherent defect in the original promise or a subsequent discharge and satisfaction. And the precise point now in controversy has been adjudged to be completely within the rule. If the former judgment had been for the plaintiff, there would be no doubt that it would have extinguished the demand, and it is no less conclusive because it was for the defendant." [574] Similar principles are applicable to an action of *case*. As Lord Mansfield said: "An action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore a former recovery, release, or satisfaction need not be pleaded but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only." [575] So also an estoppel may be given in evidence under the general issue in *ejectment*, at least in jurisdictions where special pleading is not allowed in that action, and for that reason there is no opportunity to set up the judgment by way of plea.[576] It is also held that a former recovery may be given in evidence under the plea of *nil debet* in an action of debt.[577] And in a trial upon a writ of *audita querela*, a prior judgment for the defendant, for the same cause of action, may be either pleaded in bar as an estoppel or given in evidence under the plea of "not guilty." [578] But it is otherwise in the action of *trespass*.[579]

[574] Young v. Black, 7 Cranch, 565.

[575] Bird v. Randall, 3 Burr. 1353; Gilchrist v. Bale, 8 Watts, 355, 34 Am. Dec. 469; Jones v. Weathersbee, 4 Strobh. 50, 51 Am. Dec. 653.

[576] Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 608.

[577] Welsh v. Lindo, 1 Cranch C. C. 508.

[578] Mussey v. White, 58 Vt. 45, 3 Atl. Rep. 319.

[579] Coles v. Carter, 6 Cow. 691; Jones v. Lavender, 55 Ga. 228; Briggs v. Milburn, 40 Mich. 512.

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§ 786. Waiver of Estoppel by Failure to Plead.

It is next to be observed that, even conceding that a former judgment is conclusive when merely given in evidence, cases will sometimes arise in which the party will lose the benefit of the estoppel unless he so frames his pleadings as to bring it within the issues. Thus, for example, in an action on the case for the continuance of a nuisance caused by the erection of a dam, a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, will be conclusive evidence. But in such action, in order to avail himself of this conclusiveness, the plaintiff must take care not to waive it by his manner of pleading. As, if the defendant pleads a license, and the plaintiff does not, in his replication, rely upon the estoppel of the former judgment, but replies "no license," then the jury are not precluded from inquiring into the truth of the case.[559]

§ 787. Conclusiveness of Judgment when not Pleaded.

Supposing the particular action to be such that the record of a former adjudication between the same parties will be admissible in evidence, although it has not been specially pleaded, and that the benefit of the estoppel has not been waived as indicated in the preceding section, it remains to inquire whether or not the judgment, when so offered, will be *conclusive* upon the issues to which it is relevant. On this question, as we have already stated, there exists the greatest contrariety of opinion. On the one hand, the majority of the English decisions, together with a large number of authorities in this country, are positive in declaring that where a party has an option whether to plead a former recovery or to give it in evidence under the general issue (as is the case in *assumpsit*), and chooses the latter course, it will not be conclusive, but only persuasive evidence, and the jury will be at liberty to find according to the truth of the

[559] Kilheffer v. Herr, 17 Serg. & R. 319, 17 Am. Dec. 658.

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matter.[561] But on the other hand, both the preponderance of authority, in this country, and the weight of sound legal reason sustain the doctrine that the former judgment, if admissible under the general issue, is just as conclusive when so presented as if it had been specially set up by a plea in bar.[562] Certain other cases, without going to the same lengths with the authorities last cited, have favored the rule that, aside from the question whether a former judgment is con-

[561] Vooght v. Winch, 2 B. & Ald. 662; Redmond v. Coffin, 2 Dev. Ch. 437; Ferguson v. Miller, 5 Ohio, 460; Cooley v. Brayton, 16 Iowa, 10; Cleaton v. Chambliss, 6 Rand. 86; Blandy v. Griffith, 3 Fish. Pat. Cas. 609; Wann v. McNulty, 2 Gilm. 355, 43 Am. Dec. 58; Jackson v. Wood, 8 Wend. 27; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 608; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Smith v. Elliott, 9 Pa. St. 345. In the case of Miller v. Manice, 6 Hill, 114, 124, Chancellor Walworth said: "It appears to be pretty well settled that in actions of *assumpsit*, where anything which shows that the plaintiff has no subsisting right of action may be given in evidence under the general issue, a former verdict and judgment may be given in evidence without being pleaded. Young v. Black, 7 Cranch, 565; Kilheffer v. Herr, 17 Serg. & R. 322; Wood v. Jackson, 8 Wend. 9. But it does not appear to be perfectly settled in England that the former recovery, when given in evidence under the general issue in *assumpsit*, where it might have been pleaded, is conclusive as a flat bar, as it would have been if pleaded in bar of the second suit. See Stafford v. Clark, 1 Car. & P. 403, 9 J. B. Moore, 724. The cases in which the courts in this state and in England have held the former verdict and judgment conclusive as a bar, when given in evidence without being pleaded, are those in which the party insisting upon the estoppel has had no opportunity to plead it, as in an action of ejectment, where special pleading is not allowed (Wood v. Jackson, 8 Wend. 35), or in cases where the plaintiff's own title is by estoppel, and the defendant, by his pleading, does not give him an opportunity to reply the estoppel. Wright v. Butler, 6 Wend. 284; Burt v. Sternburgh, 4 Cow. 559. The general rule, however, unquestionably is, that where the party in whose favor the former verdict and judgment were rendered wishes to rely on them as a conclusive bar, or as an estoppel, he must plead such former judgment in bar, if he has an opportunity to do so. And if he neglects to set it up by pleading, and puts the same matter again in issue to be tried, the jury may decide such issue according to the right and justice of the case as it appears to them from the evidence, notwithstanding the verdict and judgment in the former suit. Trevivan v. Lawrence, 1 Salk. 276; Outram v. Morewood, 3 East, 346; Howard v. Mitchell, 14 Mass. 241; Kilheffer v. Herr, 17 Serg. & R. 319."

[562] Duchess of Kingston's Case, 20 How. St. Tr. 538; Bird v. Randall, 3 Burr. 1353; Adams v. Barnes, 17 Mass. 365; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Beebe v. Elliott, 4 Barb. 457; Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 328; Gardner v. Buckbee, 3 Cow. 120, 15 Am. Dec. 256; Burt v. Sternburgh, 4 Cow. 559, 15 Am. Dec. 402; Niles v. Totman, 3 Barb. 594; White v. Coatsworth, 6 N. Y. 137; Marsh v. Pier, 4 Rawle, 288, 26 Am. Dec. 131; Westcott v. Edmunds, 68 Pa. St. 34; Beall v. Pearre, 12 Md. 550; Jones v. Weathers-

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clusive as a *bar*, if not pleaded, it is certainly admissible as *evidence of the same facts* arising in another suit. On this point, they say, there is no difference of opinion. "A party is not required to disclose his evidence by his pleadings." [683]

§ 788. Arguments on the Question.

The best legal reason, as well as the soundest considerations of public policy, apparently require that the same attribute of conclusiveness should attach to the judgment however it may be presented. The chief arguments in support of this view were clearly and forcibly stated in an early Pennsylvania decision, from which we quote as follows: "The propriety of those decisions which have admitted a judgment in a former suit to be given in evidence to a jury on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment because it was not pleaded, may well be questioned. The maxim, *nemo debet bis vexari si constat curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the benefit and protection of the party, he may therefore waive it, and unquestionably, so far as he individually is concerned, there can be no rational objection to his doing so. But then it ought to be recollected that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual in order to gratify vindictive and litigious feelings. Hence it would seem to follow that wherever, on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claim-

bee, 4 Strobh. 50, 51 Am. Dec. 653; Cannon v. Brame, 45 Ala. 262; Warwick v. Underwood, 8 Head, 238, 75 Am. Dec. 767; Gavin v. Graydon, 41 Ind. 559; Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Offutt v. John, 8 Mo. 120, 40 Am. Dec. 125; Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Garton v. Botts, 78 Mo. 274; Flandreau v. Downey, 23 Cal. 354.

[683] Krekeler v. Ritter, 62 N. Y. 372; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43; Bell v. Raymond, 18 Conn. 91; Walker v. Chase, 53 Me. 258.

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ing under them, is properly given in evidence to the jury, it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *expedit reipublicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness. The result, among other things, would be that the tribunals of the state would be bound to give their time and attention to the trial of new actions, for the same causes tried once or oftener in former actions between the same parties or privies, without any other limitation than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally, of other causes which never have passed *in rem judicatam*. The effect of the judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, etc., which may or may not be enforced at the election of the other party; because whatever the parties have done by compact they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed." [884] For another consideration, "it has been well remarked that it appears inconsistent that the authority of a *res judicata* should govern the *court*, when the matter is referred to them by pleading, but that a *jury* should be at liberty altogether to disregard it, when

[884] Marsh v. Pier, 4 Rawle, 273, 288, 26 Am. Dec. 131.

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the matter is referred to them in evidence; and that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions. And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position that when a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel." [565]

§ 789. Under Code Practice.

In those states which have adopted the code system of pleading, the rules concerning the admissibility of a judgment not specially pleaded have been materially changed. Thus in New York, "prior to the code, a former suit and recovery for the same cause of action could be given in evidence under the plea of the general issue, in actions like ejectment and trover, in which special pleas were not allowed. But now the answer of the defendant, in every case, must contain a statement of 'any new matter constituting a defense.' Hence a former recovery, whether obtained before or after the joining of the issue, cannot be given in evidence, in any action whatever, under a general denial of the allegations in the complaint, or under an allegation, in the answer, of the pendency of the action wherein the recovery was had." [566] And the rule is the same in California.[567] In Indiana, where the statute provides that "under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove," it is held that the record of a former recovery is not admissible as evidence, under a plea of general denial, unless proof of the former suit be necessary under the averments of the complaint.[568] In Georgia, the code directs that "matter in avoidance" shall be specially pleaded. It is held that a former recovery comes within this rule and is not admissible under the general issue.[569] In Ohio, when an

[565] 1 Greenleaf on Ev. § 531. See also Chamberlain v. Carlisle, 26 N. H. 540.

[566] Hendricks v. Decker, 35 Barb. 298; Brazill v. Isham, 12 N. Y. 9.

[567] Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

[568] Norris v. Amos, 15 Ind. 365.

[569] Greaves v. Middlebrooks, 59 Ga. 240.

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answer sets up new matter, and the plaintiff relies upon the estoppel of a former judgment, involving the determination of such matter, he should plead such prior adjudication; it is not admissible in evidence under a general or special denial of the new matter contained in the answer.[590] But in California, upon this particular point, the rule is otherwise, there being there no replication to the answer.[591]

§ 790. Requisites of Plea of Former Judgment.

In regard to the degree of strictness and technicality required in pleading an estoppel by record, it is important to observe the distinction between the case where the former judgment is relied on *in bar* of the present action, and the case where it is put forward as a conclusive determination of some of the *issues*. As stated by the supreme court of the United States, "when the record of a former judgment is set up as establishing some collateral fact involved in a subsequent controversy, it must be pleaded strictly as an estoppel, and the rule is that such a pleading must be framed with great certainty, as it cannot be aided by any intendment. But when a former judgment is set up in bar of an action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading of the opposite party."[592] But a plea of former recovery which contains neither a recital of the term of the court at which the judgment relied on as a bar was recovered, nor the date of its rendition, is bad on demurrer.[593] It is especially necessary that the plea should show the identity of the causes of action or matters in litigation in the two actions. It does this sufficiently, it is held, if it alleges that the former action was "for the same identical debts and causes of action as are set forth in the case at bar, the same identical debts and causes of action being pleaded in the complaint as were pleaded in the com-

[590] Fanning v. Ins. Co., 37 Ohio St. 344, 41 Am. Rep. 517.

[591] Wixson v. Devine, 67 Cal. 341, 7 Pac. Rep. 776.

[592] Aurora City v. West, 7 Wall. 82.

[593] Mount v. Scholes, 120 Ill. 394, 11 N. E. Rep. 401. See also Wortham v. Commonwealth, 5 Rand. 669.

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plaint in the action first brought, and none others."[894] In case the issues in the two suits might have been different, though they concerned the same subject-matter, the pleader must see to it that he excludes this hypothesis. For instance, in trover for the conversion of chattels, a plea of former recovery in detinue, not alleging that the question of ownership entered into the issue in the former trial and was then decided, and not negativing the idea that the recovery in that case was because of a failure to prove the defendant's possession, is fatally defective.[895] Again, in pleading a former judgment in bar, it should be averred that there was a trial on the merits, the merits involved in the former proceeding should be set forth, and definite facts should be pleaded showing their determination against the adverse party.[896] But the plea sufficiently shows that the former case was tried upon its merits by averring that it came on for trial before the court and a jury sworn in said cause, "whereupon the jury, on their oaths, rendered a verdict in favor of him the said defendant, against him the said plaintiff, and the court rendered a judgment accordingly against the plaintiff for all the costs of the suit."[897] According to the practice now prevailing in some of the states, in a pleading to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by fraud (if such be the case), without stating the facts which constitute the fraud.[898]

§ 791. Judgment Recovered after Institution of Second Suit.

The fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defense, without regard to the order of time in which the suits were commenced.[899] Hence it even follows that a prior judgment

[894] Wilson v. Buell, 117 Ind. 315, 20 N. E. Rep. 231. See Wythe v. Salem, 4 Sawy. 88; Rynearson v. Parkhurst, 88 Ind. 264.

[895] Gilbreath v. Jones, 66 Ala. 129. See also Crandall v. Gallup, 12 Conn. 365.

[896] Philipowski v. Spencer, 63 Tex. 604; Fowlkes v. State, 14 Lea, 14.

[897] Ellis v. Staples, 9 Humph. 238.

[898] Edgell v. Sigerson, 20 Mo. 494.

[899] Jones v. Ellison, 10 Week. Not. Cas. 205; Finley v. Hanbest, 30 Pa. St. 190; Marble v. Keyes, 9 Gray, 291;

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upon the same cause of action sustains the plea of a former recovery although the judgment is in an action commenced subsequent to the one in which it is pleaded.[600] According to the practice in Georgia, "former recovery or pendency of another suit for the same cause of action and between the same parties, is matter in abatement, and must be taken advantage of at the first term, or if occurring afterwards, in the progress of the trial, so soon as may be after it occurs."[601]

Stevens v. Briggs, 14 Vt. 44, 39 Am. Dec. 209.

[600] Duffy v. Lytle, 5 Watts, 120.

[601] Merritt v. Bagwell, 70 Ga. 578.

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CHAPTER XX.

JUDGMENTS IN REM.

§ 792. Definitions.
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§ 792. Definitions

Between judgments *in personam* and judgments *in rem* there are radical and important differences. Hitherto we have treated of the former class of adjudications and their various characteristics and effects; we come now to consider the latter species of decrees. While the fundamental distinctions between these two varieties of judgments are easily apprehended, well worked out in the books, and practically very well understood, it has always been found difficult to formulate a satisfactory definition of the term "*in rem*." As a matter of scientific accuracy it is to be regretted that the phrase does not admit of a definition at once comprehensive and exact. But since the authorities are substantially agreed as to what particular proceedings *are* of this nature and what are not (as will appear from the following

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pages), we shall be content to quote some of the best definitions in the books, indicating the various criticisms to which they are open.

Chief Justice Marshall once observed that he had always understood that "where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding *in rem*, to which all the world are parties."[1] But this is not so much a definition as a test, having reference solely to the question of jurisdiction. Besides, it leaves out of view the important classes of cases in which the proceeding is not taken against a specific object of property, but has for its purpose an adjudication upon *status*. A nearer approach to a complete definition was made by the supreme court of Vermont, in the following terms: "A judgment *in rem* I understand to be an adjudication pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is, in form as well as substance, between the parties claiming the right, and that it is so *inter partes* appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment *in rem* is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be."[2] But this definition also is too narrow. It does not specifically include the class of cases particularly described in the definition first quoted, nor proceedings such as those frequently taken for the enforcement of municipal tax-liens and the like. The same objection avails against the definition given by Mr. Smith, which is substantially the same as the last, viz., "an adjudication upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose, ... a solemn

[1] Mankin v. Chandler, 2 Brock. 125. [2] Woodruff v. Taylor, 20 Vt. 65.

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declaration proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon, which very declaration operates accordingly upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be." [3] If we enlarge this description so as to make it include the class of adjudications above mentioned, it will probably make as close an approach to a complete definition as the nature of the subject admits.

§ 793. Judgments Quasi in Rem.

Much of the uncertainty and confusion in the definitions of proceedings *in rem* has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely *in rem*, although they exhibit some points of analogy or resemblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings *in rem* and proceedings *quasi in rem*. The latter are assimilated to the former in some particulars,—as, in respect to the manner of acquiring jurisdiction,—but are not always attended by the same consequences—in respect, for example, to the persons bound by the adjudication. To make this more plain, we extract the following description of the two classes from a well considered opinion of the United States supreme court: "Actions *in rem*, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the

[3] 2 Smith's Lead. Cas. 585. Those who desire to seek further for a satisfactory definition of this term may consult the following authorities: 2 Phillips on Ev. p. 5; 1 Wharton on Ev. § 815; Bigelow on Est. p. 10 *et seq.*; Freeman on Judgm. § 606; 1 Greenleaf on Ev. §§ 525, 541. Cross v. Armstrong, 44 Ohio St. 628; The Sabine, 101 U. S. 388; Pennoyer v. Neff, 95 U. S. 734; Windsor v. McVeigh, 93 U. S. 279; Freeman v. Alderson, 119 U. S. 187, 7 Sup. Rep. 165; The J. W. French, 18 Fed. Rep. 916; Lord v. Chadbourne, 42 Me. 429, 442, 66 Am. Dec. 290.

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subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."[4] The distinction may be further illustrated by some examples taken from the books. Thus partition proceedings, it is held, are analogous to proceedings *in rem*; wherefore publication of notice by advertisement is sufficient to apprise a party of the proceeding and bind his interest.[5] So, in a proceeding by a railroad company to acquire the right to use the track of another company for the purposes of its business, the applicant will be concluded by a former adjudication against its corporate existence, had on a like application as to a third corporation.[6] So it is said that the determination of an assignee for the benefit of creditors, that a creditor is entitled to participate in the fund, is a judgment *in rem*, definitely fixing the *status* of the plaintiff towards the property.[7] But on the other hand, "a decree declaring the invalidity of a patent is in no sense a proceeding *in rem*, and does not prevent the same or a different plaintiff from prosecuting a suit against another defendant, and establishing its validity upon different or even upon the same evidence."[8]

[4] Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. Rep. 165.

[5] Pillsbury v. Dugan, 9 Ohio, 117, 34 Am. Dec. 427. Compare Childs v. Hayman, 72 Ga. 791.

[6] *In re* Brooklyn, etc. R. Co., 19 Hun, 314.

[7] Eppright v. Kauffman, 90 Mo. 25, 1 S. W. Rep. 786.

[8] Consolidated Roller-Mill Co. v.

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§ 794. Jurisdiction.

It is a distinguishing peculiarity of a proceeding *in rem* that the jurisdiction of the court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The *res*, being brought within the jurisdiction of the court, becomes subject to its adjudication, and all parties interested are supposed to be duly apprised of the proceedings, by the mere taking of the property, or by the usual proclamation or published notice.[9] This jurisdiction empowers the court to adjudicate upon the *status* of the *res*, or to order it to be disposed of in a given way, according to the object of the action. Of course it does not authorize the fastening of a personal liability upon any individual not personally served. The jurisdiction is over the thing itself, and only the thing itself can be disposed of, though the rights of owners or claimants may be incidentally affected. Hence also, in proceedings of this character, exclusive jurisdiction, for the purposes of its own suit, is acquired by the court which first takes possession of the *res*.[10] But where the proceeding is not strictly *in rem*, but belongs to the class of actions which are only *quasi in rem*, the court cannot render a judgment which shall be valid against the rights of third persons, unless it is shown that such third persons have voluntarily appeared and become parties to the suit, or have had legal notice of the pendency of the suit and an opportunity to be heard therein.[11]

§ 795. Effect of Adjudications in Rem.

A judgment *in personam*, as we have already seen, is conclusive and binding only upon the parties to the action and those in privity with them, but not upon strangers. A judgment *in rem*, on the other hand, is conclusive and binding, not only upon parties and privies,

Smith Co., 40 Fed. Rep. 805, citing Ingersoll v. Jewett, 16 Blatchf. 378.

[9] The Globe, 2 Blatchf. 427.

[10] Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. Rep. 135.

[11] Martin v. Darling, 78 Me. 78, 3 Atl. Rep. 118.

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but also upon strangers,—upon all persons interested.[13] It is commonly said that such a judgment binds "all the world." It is more accurate to say that the judgment is conclusive against any person, in any subsequent controversy, where the grounds of the adjudication, or the fact of its rendition, or any of its legal consequences, become relevant and material facts. But it must be noted that this broad conclusiveness belongs only to judgments strictly *in rem*. In those proceedings which we have designated as *quasi in rem*, the adjudication is, in general, conclusive only upon the persons directly and immediately concerned, or who were made parties by service of process. This will more fully appear, in connection with particular instances, in the following sections. And further, a judgment *in rem* of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another action.[14] It has also been held that a judgment against a vessel (that being a judgment *in rem* and not enforceable against other property of the owner), if unsatisfied, cannot be pleaded as a bar to a subsequent suit against the owner of the vessel on the same contract.[15]

§ 796. Decrees in Admiralty.

Decrees rendered by the courts of admiralty come within the strictest definition of judgments *in rem*. When pronounced by a lawful court, which has duly acquired jurisdiction of the *res*, such a sentence is universally admitted to be binding and conclusive upon all persons who have or may claim an interest in the property, the supposition being that the seizure or arrest of the thing affords notice of the proceeding to all persons concerned.[16] But, as in all other

[13] Cammell v. Sewell, 8 H. & N. 646; The Rio Grande, 23 Wall. 458; Noble v. Thompson Oil Co., 79 Pa. St. 354; State v. Cent. Pac. R. Co., 10 Nevad. 80; Street v. Augusta Ins. Co., 12 Rich. 13, 75 Am. Dec. 714; 2 Smith's Lead. Cas. 661; Bailey v. Sundberg, 48 Fed. Rep. 61.

[14] Durant v. Abendroth, 97 N. Y. 132.

[15] Toby v. Brown, 11 Ark. 308; *supra*, § 674.

[16] Averill v. Smith, 17 Wall. 95; The Propeller Commerce, 1 Black (U. S.), 580; The Mary Anne, 1 Ware, 104.

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cases, the conclusiveness of the judgment does not extend beyond the matters actually decided by it. Thus a decree on a libel *in rem* against a ship, for supplies furnished her, does not necessarily determine the title to the vessel, and therefore is not competent in a subsequent action as evidence of the ownership of the supplies so obtained, without other proof of the title to the ship.[16] A suit to enforce a maritime lien, being a proceeding *in rem*, is not barred by a personal judgment previously recovered for the same debt.[17]

§ 797. Judgments in Prize Cases.

The most familiar, as well as the most perfect, example of a judgment *in rem*, pure and simple, is the decree of a court of admiralty condemning a vessel as prize. Such an adjudication is final and conclusive evidence, both as to the fact of the legality of the seizure and as to the grounds of condemnation, upon all persons whatever. "The sentence of a court of admiralty, or of appeal, in questions of prize, binds all the world as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive as to all persons." [18] The books contain much learning upon this point, but as the question of the binding character of such sentences has almost invariably arisen in cases where the judgment was one pronounced by a foreign tribunal, we shall postpone the detailed consideration of the subject to the chapter on foreign judgments.[19]

§ 798. Judgments in Collision Cases.

Decrees in admiralty rendered in cases of collisions between vessels, ascertaining where the fault lay and awarding damages, stand upon the same footing with prize sentences in respect to their conclusiveness. Thus, in an action on a policy of insurance for loss

[16] Van Vechten v. Griffiths, 4 Abb. App. Dec. 487. See also Andrews v. Brown, 3 Cush. 130.

[17] The Odorilla v. Balzley (Pa.), 18 Atl. Rep. 511. See also Providence Washington Ins. Co. v. Morse, 35 Fed. Rep. 368.

[18] Penhallow v. Doane, 3 Dall. 54, 86. See also Croudson v. Leonard, 4 Cranch, 434; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600; Hughes v. Cornelius, 2 Show. 232.

[19] See *infra*, §§ 813–817.

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occasioned by a collision at sea between another vessel and the one insured, a libel and decree against the vessel insured, in a proceeding *in rem* in the admiralty court for damage done to the other vessel by the collision, was held to be sufficient evidence as well of the collision as of the negligence of the master and crew of the vessel insured.[20]

§ 799. Condemnation of Goods Seized under Excise or Revenue Laws.

A judgment rendered by a competent court, declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is strictly *in rem*, and is binding and conclusive upon all persons, so that the legality of the seizure cannot be again contested in any proceeding, nor will trespass lie against the officer who took the goods, for the purpose of trying the question anew.[21] In one of the English cases it appears that the action was for the price of liquor sold by the plaintiff, and the defense was interposed that the liquor was adulterated, to prove which fact the defendant offered in evidence the record of its condemnation in the Court of Exchequer. It was held that the record was admissible, as that proceeding was *in rem*.[22] But it has been held that proceedings under the confiscation acts of Congress, while in the nature of proceedings *in rem*, operated only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture did not divest or affect the title of third persons originating prior to the seizure or of the real owner not proceeded against.[23] According to the federal supreme court, "the jurisdiction acquired by the seizure [of property in a proceeding *in rem* for its condemnation for alleged forfeiture] is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to

[20] Street v. Augusta Ins. Co., 12 Rich. 13, 75 Am. Dec. 714.

[21] Scott v. Shearman, 2 W. Bl. 977; Whitney v. Walsh, 1 Cush. 29, 48 Am. Dec. 590; Buchannan v. Biggs, 2 Yeates, 282; Gelston v. Hoyt, 13 Johns. 561.

[22] Hart v. McNamara, 4 Price, 154, note.

[23] Risley v. Phœnix Bank, 83 N. Y 318, 38 Am. Rep. 421. See also Dean v. Chapin, 22 Mich. 275.

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its owner and parties interested to appear and to be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensable." [24]

§ 800. Acquittal of Goods Seized.

A sentence of acquittal of goods seized for an alleged breach of the excise or revenue laws, or other cause of forfeiture, is likewise conclusive of the illegality of the seizure and bars any further examination of that question. This point was ruled by Chancellor Kent in the case of *Gelston* v. *Hoyt*.[25] "The law is to be understood," he said, "as settled clearly, uniformly, and definitely, that if goods are seized by a custom-house officer, and are libelled, tried, and *condemned* in the exchequer, district, or other court having cognizance of the forfeiture, and the seizing officer be afterwards sued in trespass for taking the goods, he may plead that condemnation in bar of the action. So far we have proceeded with perfect assurance. The next question then is, suppose the goods to be seized, tried, and *acquitted* in the district court, and the officer be then sued for seizing the goods, can the officer contest the legality of the seizure over again, or can the owner, in his turn, set up the sentence of acquittal as a bar to that inquiry? This is the very point and pith of the controversy, and I entertain no doubt it is equally well settled as the other, and that if the condemnation is a bar to the action on the one hand, the acquittal is a bar to the defense on the other. It would be monstrously unjust and repugnant to all principle if the rule were not so. Ought not the parties to be placed upon equal ground? And if the sentence of condemnation be conclusive in favor of the seizing officer, ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every

[24] Windsor v. McVeigh, 93 U. S. 274. [25] 13 Johns. 561. See also Cooke v. Shall, 5 T. R. 255.

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man of common understanding that the rule, to be just, should be equal and impartial in its operation." This case was carried to the United States supreme court, where an instructive opinion was delivered by Judge Story, and the ruling of the court below was affirmed.[26]

§ 801. Attachment Proceedings.

A proceeding by attachment of property, though often spoken of as a proceeding *in rem*, and though it does to some extent partake of the characteristics of that species of actions, cannot be admitted to come within the strict meaning of the term. It shares also in the character of a purely personal action, and instead of binding all the world, the judgment is conclusive only upon the actual parties to the litigation and those in privity with them.[27] "The difference between proceedings by attachment and proceedings *in rem*, properly so called, arises from the fact that while the latter are directed primarily against things themselves, and only operate incidentally on the rights of parties, the former use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin."[28] And as remarked by the supreme court of Mississippi, "such suits are also proceedings *in personam*, since it is the personal obligation of the defendant owner which is the foundation of the suit, and it is not necessary that the property seized should have had any sort of connection with the contract sued on. The property seized is not the debtor to the plaintiff, but stands in the suit in which it is attached as the representative of its owner the defendant. The right to attach is simply the right to seize the property of the debtor and to deal with it as his representative. By the seizure of the thing the right becomes initiate, and is consummated by the recovery of the judgment against the owner."[29]

[26] Gelston v. Hoyt, 3 Wheat. 246.

[27] Cooper v. Reynolds, 10 Wall. 316; Maxwell v. Stewart, 22 Wall. 77; Megee v. Beirne, 89 Pa. St. 50; Breading v. Siegworth, 29 Pa. St. 396; Childs v. Digby, 24 Pa. St. 23; Mankin v. Chandler, 2 Brock. 125; Woodruff v. Taylor, 20 Vt. 65. See Peterson' v. Willard, 17 La. Ann. 93.

[28] 2 Smith's Lead. Cas. 690.

[29] Sale v. French, 61 Miss. 170.

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§ 802. Inquisitions of Lunacy.

It would appear that an inquisition upon a writ *de lunatico inquirendo* should be considered in the strictest sense a proceeding *in rem*, since its sole and essential object is to obtain an adjudication upon *status*, that is, upon the condition of the person with reference to his sanity. Yet the courts are all agreed in holding that the finding made upon such an inquisition, especially if retrospective, is not conclusive evidence, though it may be *prima facie*, against persons who were not specifically made parties to the proceeding.[20] Thus a finding that, at the time of the execution of a deed, the grantor was of unsound mind, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under the deed.[21]

§ 803. Decrees of Divorce.

A proceeding in divorce is in some sense and for some purposes *in personam*. But since its prime object is to dissolve the marital relation heretofore subsisting between the parties, and thereby to adjudicate upon their *status*, it is strictly and truly a proceeding *in rem*. Important consequences flow from this doctrine. For first, the proceeding being *in rem*, it is evident that jurisdiction of the *res* will in itself be sufficient to authorize the sentence pronounced, without personal service of process upon the defendant. And secondly, in so far as the judgment determines the *status* of the applicant, it is a judgment that is operative and conclusive as to all the world.[22] In practice, the opportunity to apply these principles has chiefly arisen in connection with decrees of divorce emanating from the courts of foreign countries or of a sister state, and hence the subject

[20] Rogers v. Walker, 6 Pa. St. 378, 47 Am. Dec. 470; Den d. Aber v. Clark, 5 Halst. 217, 18 Am. Dec. 417 (citing Sergeson v. Sealey, 2 Atk. 412; *Ex parte* Barnesley, 3 Atk. 184; Hall v. Warren, 9 Ves. 608; Faulder v. Silk, 3 Camp. 126); Thomasson v. Kercheval, 10 Humph. 322; Hughes v. Jones (N. Y. Ct. of App.), 22 N. E. Rep. 446.

[21] Van Deusen v. Sweet, 51 N. Y. 378.

[22] Pennoyer v. Neff, 95 U. S. 714; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 3 Gray, 387; Smith v. Smith, 13 Gray, 209; 2 Bishop Mar. & Div. § 755.

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properly belongs to a later portion of our work.[33] It must be here observed, however, that it is *only* in the character of an adjudication upon *status* that a decree of this character can have universal validity or be supported upon the kind of jurisdiction above indicated. In so far as it transcends these limits and undertakes to determine incidental or collateral matters, it is purely *in personam* and to be tested and governed by the rules ordinarily applying to that species of judgments. This also will more fully appear in the later discussions concerning foreign and sister state judgments.

§ 804. Orders of Naturalization.

Under the naturalization laws of the United States, the record of the admission of an alien to citizenship in any court authorized to perform the act, reciting the facts which entitle the alien to such judgment, is a record which imports absolute verity, and its recitals cannot be questioned or contradicted in any collateral proceeding.[34] The cases establishing this rule may not expressly declare such a judgment to be a judgment *in rem*, but they implicitly hold it to be such, inasmuch as they give it precisely the effect of an adjudication of that character. And this conforms to legal reason, since the purpose of the proceeding is to change the party's *status* from that of alienage to that of citizenship.

§ 805. Settlement of a Pauper.

Under the English poor laws, and similar statutes existing in some of our states, an order made by the proper authority for the removal of a pauper, finding his legal settlement to be in such a place, is a judgment *in rem* and is conclusive upon all the world as to the fact of such settlement.[35] In Vermont, such an order is conclusive not only of the facts directly in issue and decided but also of all facts

[33] See *infra*, §§ 822, 924–933.

[34] McCarthy v. Marsh, 5 N. Y. 263; State v. Hoeflinger, 35 Wis. 393; State v. Penney, 10 Ark. 621.

[35] Regina v. Hartington, 4 El. & B. 780; Rex v. Cirencester, Burr. Sett. Cas. 18; Rex v. Bentley, *Id.* 426; Cabot v. Washington, 41 Vt. 168; West Buffalo v. Walker Tp., 8 Pa. St. 177.

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necessary to the decision reached. As, where an illegitimate child was removed to the defendant town, and the order was not appealed from, and afterwards the mother was removed to the same town, on an appeal from the last removal it was held that, as by the statute the settlement of the child followed that of the mother, the settlement of the mother was an essential fact in establishing the settlement of the child on the former order, and the decision and order in the child's case was conclusive as to the settlement of the mother in the case at bar, she having acquired no subsequent settlement.[36] In Pennsylvania, an order of removal of a pauper, when confirmed, is conclusive against the appellant in favor of all the world; when discharged, it is conclusive between the parties litigant; when quashed, it is conclusive on neither.[37] In Connecticut, however, these rules do not apply. In that state, a judgment in an action by one town against another for supplies furnished to a pauper claimed to belong to the defendant town, in which the settlement of the pauper is declared to be in that town, is not a judgment *in rem*, and is binding only on the parties to that suit and those in privity with them.[38]

§ 806. Questions of Identity, Legitimacy, and Pedigree.

It is held that a decree, foreign or domestic, establishing a pedigree, is a decree *in rem* and binding and conclusive upon all the world as to the matters which are thereby adjudicated.[39] Similarly, a question of identity of the defendant, contested in a former suit and found against him, cannot be re-examined.[40] But on the other hand, a judgment finding the illegitimacy of a son is not evidence in another suit to show the non-marriage of the mother or the illegitimacy of her other children.[41] So also, although the condition of slavery was in the strictest sense a *status*, the highest court in this country held that a judgment establishing the freedom of a given person was not *in rem*,

[36] Pittsford v. Chittenden, 58 Vt. 49, 3 Atl. Rep. 323.

[37] West Buffalo v. Walker Tp., 8 Pa. St. 177.

[38] Bethlehem v. Watertown, 47 Conn. 237.

[39] Ennis v. Smith, 14 How. 400.

[40] Verneuil v. Harper, 28 La. Ann. 898.

[41] Kearney v. Denn, 15 Wall. 51.

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but bound only parties and privies.[42] But in the case of a child claiming to be free and not a slave, because her mother, in a suit wherein the same person was a party claiming the services of both, was adjudged free, on an allegation appearing on the record that the mother was free when the child was born, it was held that the judgment was conclusive as to the freedom of the child. The decision was put on the ground that the child was "privy in blood" to the mother, and privy in estate so far as regarded the mother's condition of servitude or otherwise.[43] But we think the court, in either of these cases, might well have held the judgment to be strictly *in rem*.

§ 807. Bankruptcy and Insolvency.

A decree of the court having jurisdiction under the bankrupt law, upon a petition in involuntary proceedings, whereby the debtor is adjudged and declared a bankrupt, is in the nature of a decree *in rem*, since it determines his legal *status* in that respect, and is therefore notice, of itself, to all creditors, and is conclusive evidence that all the facts necessary to sustain the decree were proved before the court.[44] Similarly, an adjudication of insolvency partakes of the nature of a judgment *in rem;* it binds all persons, whether parties or otherwise, and whether notified or not, as to the particular matter determined.[45] So also, the record of the discharge of an insolvent debtor is conclusive as to the fact of his having complied with all things required by law to entitle him to a discharge, and cannot be inquired into in a collateral action.[46] In a later chapter we shall be called upon to consider the important subject of the extra-territorial effect of decrees in bankruptcy and the question of the conclusiveness of foreign adjudications upon domestic creditors.

[42] Davis v. Wood, 1 Wheat. 215.

[43] Alexander v. Stokeley, 7 Serg. & R. 299.

[44] Shawhan v. Wherritt, 7 How. 627; *In re* Wallace, Deady, 433; Morse v. Godfrey, 3 Story, 391; Rayl v. Lapham, 27 Ohio St. 452; Lewis v. Sloan, 68 N. Car. 557; Thornton v. Hogan, 63 Mo. 143; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. Rep. 726.

[45] Brown v. Smart, 69 Md. 320, 14 Atl. Rep. 468; Merriam v. Sewall, 8 Gray, 316.

[46] Sheets v. Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486.

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§ 808. Probate Adjudications.

We have already seen that decrees of probate, or decrees made in the granting of letters of administration, are considered as being *in rem* and conclusive upon all persons.[47] So a suit to test the validity of a will is a proceeding *in rem* and binding upon all the parties in interest whether parties to the issue or not.[48] On the other hand, it has been decided that a suit for the construction of a testamentary writing is not in the nature of a proceeding *in rem*.[49]

§ 809. Judgments for Taxes and Assessments.

State laws not infrequently provide that taxes and assessments shall be collected by proceedings taken primarily against the land which is liable, with publication of notice to owners and claimants. And in some jurisdictions, a proceeding of this character is regarded as strictly *in rem*. Thus in California, "the general revenue act of 1861 provides that real estate shall be listed to the owner, if known; if not known, to him as 'unknown owner.' If not paid, the assessment roll passes into the hands of the district attorney, who is authorized and directed to sue the person assessed, the real estate, and 'all owners or claimants to the same, known or unknown.' Process is to be served upon the real estate, the owner, and 'all owners and claimants' in the manner therein provided. This being done, the court acquires jurisdiction over the persons of all owners and claimants, known or unknown, and the subject-matter. Such being the case, the judgment, when rendered, is conclusive and binding upon all the world until reversed on appeal or set aside by some direct proceeding brought for that purpose."[50] But more commonly the judgment is considered to be binding only upon parties brought in by actual notice and those in privity with them, and in some cases, not even upon the owner unless he appeared and con-

[47] *Supra*, §§ 635, 688, and cases cited.

[48] Fry v. Taylor, 1 Head, 594; Patton v. Allison, 7 Humph. 320.

[49] Brown v. Brown, 2 Pickle, 277, 7 S. W. Rep. 640.

[50] Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595.

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tested the application for judgment.[51] In Wisconsin, the owner of a city lot, not being made a party to a proceeding by *mandamus* to compel the common council of the city to levy a special tax or assessment thereon, is not bound by the judgment in such proceeding.[52] A judgment in favor of a tax-sale purchaser, enforcing by *mandamus* against the sheriff his right to a deed, is not a judgment *in rem*, and is not admissible evidence against one neither party nor privy to the proceeding.[53]

§ 810. Foreclosure of Liens.

Proceedings to foreclose a lien are, generally speaking, proceedings *in rem*, and therefore personal service on absent parties is not essential to give the court jurisdiction.[54] So a judgment for the foreclosure of a mortgage, although in the commencement of the action it be in form *in personam*, yet as it awards a special execution against the premises described in the mortgage, and directs damages to be recovered by a sale of the same, is properly a judgment *in rem* or *quasi in rem*.[55]

§ 811. Decrees of Sale.

In Louisiana, a judgment confirming and homologating a judicial sale of realty has the force of *res judicata* so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether before or after judgment."[56] On similar principles, a decree for the sale of the estate of a lunatic, for the payment of debts, is a decree *in rem*, and the creditors are bound by it though not parties to the

[51] See Gage v. Bailey, 102 Ill. 11; Belleville Nail Co. v. People, 98 Ill. 399; People v. Brislin, 80 Ill. 423; Job v. Tebbetts, 5 Gilm. 376; Mayo v. Foley, 40 Cal. 281; Jamison v. New Orleans, 12 La. Ann. 346; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. Rep. 136; Black on Tax Titles, §§ 54-58; Cooley, Taxn. 527.

[52] Rork v. Smith, 55 Wis. 67, 12 N. W. Rep. 408.

[53] Waters v. Spofford, 58 Tex. 115.

[54] Oswald v. Kampmann, 28 Fed. Rep. 86.

[55] Russell v. Brown, 41 Ill. 184; Williams v. Ives, 49 Ill. 512; White's Admr. v. Williams, 3 N. J. Eq. 376.

[56] Jeter v. Hewitt, 22 How. 352; Montgomery v. Samory, 99 U. S. 482.

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proceeding, and a purchase of the property, with notice of the decree, at a sale under an execution at law issued after the entry of such decree, will be set aside.[57]

§ 812. Establishment of Roads and Boundaries.

A proceeding had in the proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world.[58] So also the judgment of a competent court upon the report of a committee appointed under the provisions of a state statute empowering such court to establish the disputed boundary line between two adjoining towns, is a judgment *in rem* and conclusive upon all persons.[59]

[57] Latham v. Wiswall, 3 Ired. Ch. 294.
[58] Millcreek Tp. v. Reed, 29 Pa. St. 195.
[59] Pitman v. Albany, 34 N. H. 577.

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CHAPTER XXI.

FOREIGN JUDGMENTS.

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PART I. FOREIGN JUDGMENTS IN REM.

§ 813. Conclusiveness of Foreign Judgments in Rem.

A "foreign" judgment, as the term is used in the English books, means a judgment rendered by any court outside of England, including the courts of the British colonies. As used by American judges, the term has not a very precise signification. For sometimes it includes all judgments rendered by courts beyond the particular state,—in which sense a judgment pronounced in New York may be called a foreign judgment in Pennsylvania,—and sometimes it is restricted to judgments coming from without the limits of the United States. The latter usage is the better. For, in our law, there are important differences between judgments rendered in a sister state and those which are foreign in the strict sense, and the practice of indiscriminately grouping them under one general designation tends to obscure these distinctions and introduce misleading ideas. In this work, therefore, when speaking of the rulings of the American courts, we shall always use the phrase "foreign judgment" to designate one emanating from the courts of a country foreign to the United States, while the term "sister state judgment" will indicate one pronounced in one of the several states of the Union and used as a cause of action or defense in another. The former species of judgments will form the subject of the present chapter. And it will further be necessary to subdivide foreign judgments into judgments *in rem* and judgments *in personam*, these two classes being distinguished by certain important differences which will fully appear in the sequel. We proceed then to the consideration of the effect of judgments which are strictly foreign and *in rem*.

It has been the express doctrine of both the English and American courts from early times that a foreign judgment *in rem* is bind-

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ing and conclusive on all the world, and not re-examinable on the merits, provided the court had jurisdiction and there was no fraud in procuring the sentence.[1] "We should treat the judgment of a foreign court, acting *in rem*, within its appropriate power and jurisdiction, with the same respect and concede to it the same consequence that we would to similar judgments of the courts of our sister states. We should allow the party contesting its validity to show that it was procured by fraud, or that it is void on its face, or void by the local law, *fori rei judicatæ*. But such party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice prescribed by the local law was not given, thereby proving the judgment to be void by that law. . . . . Nor can the party be allowed to show that there are errors in law on the face of the judgment, for that would compel our courts to sit in review on the adjudications of the foreign tribunal. When the foreign judgment produced in evidence appears to be regular in form, and to contain the essential parts of an adjudication of the controversy made between proper parties, the burden of showing its invalidity rests upon the party who desires to impeach it."[2] Thus, for example, where the matter in controversy is land or other immovable property, a judgment pronounced in the *forum rei sitæ* is of universal obligation as to all the matters of right and title which it professes to decide in relation thereto, and absolutely conclusive; while, on the other hand, a judgment in any foreign country (foreign to the *situs* of the *res*), touching such immovables, will be held of no obligation.[3]

§ 814. Decrees in Admiralty.

The most familiar examples of foreign judgments *in rem* are the adjudications of admiralty courts in cases of prize, collision, forfeiture, and the like. And these decrees, by the unanimous and emphatic voice of courts and jurists, are declared to be binding and

[1] Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, 2 Dougl. 574; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Wellborn v. Carr, 1 Tex. 468; Monroe v. Douglas, 4 Sandf. Ch. 126.

[2] Monroe v. Douglas, 4 Sandf. Ch. 126, 183.

[3] Story, Confl. of L. § 591; Monroe v. Douglas, 4 Sandf. Ch. 126, 179. See also Cammell v. Sewell, 5 H. & N. 728.

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conclusive all over the world. Thus the sentence of a foreign court of admiralty, having jurisdiction under the law of nations, condemning a vessel and cargo as good and lawful prize, is conclusive upon all persons and in all courts, and cannot be disregarded or contradicted in any subsequent proceeding.[4] How firmly this principle is settled, and how faithfully the courts adhere to it, even in the most exceptional circumstances, might be proved by many interesting cases to be found in the books. For instance, in the case of *The Helena*,[5] the vessel was captured by a corsair belonging to the Dey of Algiers, and was taken into a port of that country and condemned and sold. The former owner contended that the seizure was piratical and not a lawful capture, and that the subsequent proceedings had no formality or regularity. But the court held that the property in the vessel had passed by the sale. Sir Wm. Scott observed: "Although their notions of justice to be observed between nations differ from those which we entertain, we do not on that account venture to call in question their public acts. As to the mode of confiscation which has taken place on this vessel, whether by formal sentence or not, we must presume it was regularly done *in their way* and according to the established custom of that part of the world." An even stronger illustration is furnished by the case of *Armroyd* v. *Williams*,[6] in which the sentence of a French prize court was held to be conclusive, although every consideration appeared to militate against the propriety of applying the established rule. But the court declared that, whatever might be done by foreign tribunals in reference to the settled principles of international law on the subject of the conclusiveness of prize adjudications, the courts of this country would not, for purposes of retaliation, depart from those principles. This was a strong position to take, considering the nature of our relations with France at that date (1811). The court, even in holding the

[4] Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, 2 Dougl. 574; Stringer v. Ins. Co., L. R. 4 Q. B. 676; Croudson v. Leonard, 4 Cranch, 434; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600; Ocean Ins. Co. v. Francis, 2 Wend. 64, 19 Am. Dec. 549; Lumly v. Quarry, 7 Mod. 9; Williams v. Armroyd, 7 Cranch, 423; Brown v. Union Ins. Co., 4 Day, 179, 4 Am. Dec. 204; Walton v. Bethune, 2 Brev. 453, 4 Am. Dec. 597; Cucullu v. La. Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199.

[5] 4 Ch. Rob. 3 (1801).

[6] 2 Wash. C. C. 506.

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sentence of condemnation conclusive, denounced it as "a daring outrage upon our neutral rights." The case was appealed to the supreme federal court, and it was there held that the sentence was none the less conclusive because it was given under an edict which was unjust in itself and in direct and flagrant violation of the law of nations, and which had been so declared by the United States government.[7] The converse of this rule also holds good. A sentence of *acquittal* pronounced by a foreign court acting *in rem*, in cases of prize, forfeiture, etc., is conclusive, in the absence of fraud or want of jurisdiction.[8]

The *reasons* why our courts accept such adjudications as final and conclusive are founded partly on the consideration that prize courts exist and discharge their functions under the recognition of the law of nations,—being thus, in some sense, a species of international tribunals, exercising an authority which must be respected by all countries which give their adherence to the *jus gentium*,[9]—and partly on

[7] Williams v. Armroyd, 7 Cranch, 423.

[8] Magoun v. New England Marine Ins. Co., 1 Story, 157; The Bennet, 1 Dodson, 175.

[9] This principle was clearly and convincingly stated in the case of Brown v. Union Ins. Co., 4 Day, 179, 4 Am. Dec. 204. Swift, J., in delivering the opinion of the court, remarked: "I apprehend our acknowledgment of the authority of the law of nations, and our adoption of the marine law, have established principles decisive of this question. The law of nations is a rule of conduct obligatory on sovereign independent states; and the right of capture on the high seas by nations at war is clearly a part of that law. The decrees of judicial tribunals proceeding according to the law of nations must be conclusive, as far as that law is recognized, for the same reason that judgments of courts proceeding according to municipal law are conclusive, as far as that law extends. In all civilized states, courts are constituted that have jurisdiction of questions of prize, and are to decide according to the law of nations. In these cases the proceedings are *in rem*, and every person interested is supposed to be a party to them. Whenever, then, a court of admiralty in one country, acting as a prize court, decides on the question of prize and condemns captured property, such sentence or decree must be conclusive evidence, when the same question shall arise in any other country recognizing the law of nations, on the same principle that the judgment of a municipal court is conclusive between the same parties and their representatives, whenever the same question shall arise in another court in the same country where the judgment was rendered. As we have adopted the law of nations, we must take it with all its consequences; and we can have no more right to deny the conclusiveness of the sentence of a foreign court of admiralty, acting as a prize court according to the law of nations, when the same question arises before us, than we have to deny the conclusiveness of a judgment of a court in

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grounds of necessity and propriety. Thus the United States supreme court has declared that the law on this point rests on three very obvious considerations: "the propriety of leaving the cognizance of prize cases exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in the courts of common law; and the impropriety of revising the decisions of maritime courts of other nations whose jurisdiction is co-ordinate throughout the world." [10]

But the rule thus established is not confined to adjudications in prize cases. It extends generally to all admiralty decrees proceeding from a court having jurisdiction of the *res*. Thus, where a French court, having competent jurisdiction, in a proceeding *in rem*, delivered a judgment ordering the sale of a British ship then lying in the foreign port, under a lien for supplies furnished, it was held that the sale could not afterwards be impeached in England, in an action against the vendee, even though the person seeking to impeach it would, by the law of the latter country, have a preferential title to the chattel.[11] And the same principle applies to judgments on a maritime lien for damages caused by a collision,[12] and to adjudications ordering the sale of wrecks and property left derelict.[13] But it has been held that the parties in interest may avoid this conclusive effect of a foreign admiralty decree by an express stipulation to that effect made in advance. Thus, if a policy of insurance underwritten in Philadelphia contains a warranty of American property, "to be proved, if required, in this city and not elsewhere," the assured is

this state, when the same question arises between the same parties in another court, or than we have to deny any other principle of the law of nations. I should therefore deem the decree of the court of admiralty to be conclusive in this case, not on the authority of the decisions in Great Britain, but on the authority of the law of nations, which is a part of the common law of the land. At the same time, it is not improper to observe that the courts of Westminster Hall have uniformly paid such a sacred regard to principle in their decisions that they may be deemed good evidence, not only of national law, but of common law, and are entitled to the highest respect in all countries governed by the same general rules of jurisprudence." See also Williams v. Jones, 13 Mees. & W. 633; Godard v. Gray, L. R. 6 Q. B. 139.

[10] Croudson v. Leonard, 4 Cranch, 434.

[11] Castrique v. Imrie, L. R. 4 H. L. 414.

[12] The Propeller East, 9 Bened. 76; Harmer v. Bell, 7 Moore P. C. 267.

[13] Grant v. McLachlin, 4 Johns. 34.

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entitled to vindicate the truth of his warranty as against a foreign condemnation of the subject-matter as enemies' property.[14]

§ 815. Conclusive of Grounds of Sentence.

It is almost universally held in this country that the sentence of a foreign court of admiralty, proceeding *in rem*, after acquiring jurisdiction, whereby a vessel or cargo is condemned as lawful prize, is conclusive evidence, not only to change the property in the *res*, but also of all the facts upon which the condemnation was founded. Thus, in a subsequent action between the owners and the underwriters, such a sentence is conclusive evidence that the goods so condemned were enemies' property (if that was the ground of condemnation), and therefore that there has been a breach of the warranty of neutrality contained in the policy.[15] So, in a similar action, the sentence of a foreign admiralty court condemning the insured vessel for a breach of blockade, and specifying that as the ground of condemnation, is conclusive evidence of the fact of such breach of blockade.[16] The same rule holds good in England. "Since the judgment of the House of Lords in *Lothian* v. *Henderson*,[17] it may now be assumed as the settled doctrine of an English court of law that all sentences of foreign courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially." [18] New York, alone, forms an exception to this consensus of opinion. Its courts have adopted a different rule, "which must now be considered as the settled law of

[14] Calhoun v. Ins. Co., 1 Binn. 293.

[15] Walton v. Bethune, 2 Brev. 453, 4 Am. Dec. 597; Brown v. Union Ins. Co., 4 Day, 179, 4 Am. Dec. 204; Cucullu v. La. Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199; Blanque v. Peytavin, 4 Mart. 458.

[16] Croudson v. Leonard, 4 Cranch, 434; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600; Peters v. Warren Ins. Co., 3 Sumn. 389; Baxter v. N. E. Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Dempsey v. Ins. Co. of Pa., 1 Binn. 299, note; Stewart v. Warner, 1 Day, 143; Groning v. Union Ins. Co., 1 N. & McC. 537.

[17] 3 Bos. & Pul. 499.

[18] Bolton v. Gladstone, 5 East, 155. See also Baring v. Clagett, 3 Bos. & Pul. 201; Fernandez v. Da Costa, Park Ins. 170.

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this state. It is, that the sentence of a foreign court of admiralty, condemning the property as a good and lawful prize, according to the law of nations, is conclusive to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and in a collateral action, such evidence may be rebutted by showing that no such facts did in reality exist." [19] It is also held that a sentence of condemnation by a foreign court of admiralty, which appears on the face of the proceedings to have been founded on facts which did not warrant the judgment, will not be conclusive of the legality of the condemnation as between the insured and the underwriters of the vessel.[20]

§ 816. Grounds of Condemnation must Clearly Appear.

The rule just stated is subject to this qualification, that the sentence is conclusive in a collateral action of the grounds on which it proceeded only when those facts are clearly stated in the decree itself. If the ground of a judgment of condemnation does not appear on the face of it, it may be shown by other evidence; but if the sentence is ambiguous it will not be conclusive.[21] As stated by Chief Justice Tindal, "in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country." [22] Thus, when it is impossible to fix by the record of the foreign court whether a prize was found to be French or American, evi-

[19] Ocean Ins. Co. v. Francis, 2 Wend. 64, 19 Am. Dec. 549; Vandenheuvel v. United Ins. Co., 2 Johns. Cas. 450, 1 Am. Dec. 180; Francis v. Ocean Ins. Co., 6 Cow. 404; New York Ins. Co. v. De Wolf, 2 Cow. 56; Radcliff v. United Ins. Co., 9 Johns. 277. See also Bourke v. Granberry, Gilmer (Va.), 16, 9 Am. Dec. 589.

[20] Williamson v. Tunno, 1 Brev. 151, 2 Am. Dec. 654.

[21] Marsh. on Ins. 394; Bernardi v. Motteux, 2 Dougl. 575.

[22] Dalgleish v. Hodgson, 7 Bing. 495; Fisher v. Ogle, 1 Camp. N. P. 417; Calvert v. Bovill, 7 T. R. 523; Hobbs v. Heming, 17 C. B. N. S. 791.

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dence may be received to establish American ownership.[23] And so where a vessel and cargo were condemned for a rescue from the possession of a belligerent captor "or otherwise," the assured were permitted to give evidence disproving the alleged rescue.[24] But on the other hand, if a decree professes to condemn the property for a specified cause, such as breach of blockade "and for other sufficient causes," it will be conclusive of the existence of the ground specified.[25] An early American case held that if a decree of a foreign court of admiralty condemned a ship or cargo without assigning any reasons, the law of nations would presume they had gone upon just and proper grounds.[26]

§ 817. Not Conclusive of Collateral or Incidental Matters.

It is further to be observed that a foreign sentence in admiralty is conclusive only upon matters essential to the decree, and not as to matters which are merely incidental or collateral or not necessarily involved in the adjudication.[27] Upon this point a learned writer remarks: "Though the sentence of a foreign court of admiralty possesses such great authority in our courts that it is constantly received as conclusive evidence, as to the points which it professes to decide, yet it must be observed that its authority is confined to those points alone, and nothing but the matters expressly decided can be taken as incontrovertible. A fact, therefore, *recited* in such sentence, though it be a part of the premises on which the adjudication is founded, is not considered as *adjudged*, and therefore not conclusive."[28] And to

[23] Vasse v. Ball, 2 Dall. 270. See also Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185.

[24] Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114. "Where it does not appear by the decree itself on what particular ground the condemnation was had, the case is to be open to evidence as to all the points which it may be necessary for the parties in interest here to establish, except the fact of condemnation." *Id.*

[25] Baxter v. N. E. Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

[26] Campbell v. Williamson, 2 Bay, 237.

[27] Christie v. Secretan, 8 T. R. 192; Bernardi v. Motteux, 2 Dougl. 574; Calvert v. Bovill, 7 T. R. 523; Russel v. Union Ins. Co., 4 Dall. 421; Maley v. Shattuck, 3 Cranch, 458; Lambert v. Smith, 1 Cranch C. C. 361; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600; Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185.

[28] 1 Marsh. on Ins. 411.

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much the same effect is a decision of Lord Ellenborough, to the point that such a sentence is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.[29] A sentence of condemnation of a vessel as "enemy property," for example, is not necessarily conclusive of its nationality. For it is entirely consistent with such a sentence that the vessel might be in fact the property of a neutral, although, for some breach of the duties of a neutral, it should become liable to seizure as a prize.[30]

§ 818. Impeachable for Want of Jurisdiction.

In order that a foreign judgment *in rem* should be binding and conclusive, it is necessary that it should have been rendered by a lawfully constituted court, having jurisdiction of the cause, of the *res*, and of the parties (so far as the latter species of jurisdiction is essential to proceedings of this character), and these elements of its authority may always be inquired into when the sentence comes collaterally in question.[31] For instance, the court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures. Prize courts cannot adjudicate on a prize lying in a foreign port or out of the jurisdiction of the captor or his ally. And if they proceed to pass upon such a question when the subject-matter of their sentence is within the territory of a neutral power, such sentence is void, transfers no rights, and may be disregarded by the common law courts.[32] Further, "it must appear that there have been regular proceedings to found the judgment or decree, and that the parties in interest *in rem* have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation shall be pronounced before the party has an opportunity to be heard."[33] In one of the early

[29] Fisher v. Ogle, 1 Camp. 418.

[30] Maley v. Shattuck, 3 Cranch, 458.

[31] Rose v. Himely, 4 Cranch, 241; Cheriot v. Foussat, 3 Binn. 220; Story, Confl. of L. § 586.

[32] Wheelwright v. Depeyster, 1 Johns. 471, 3 Am. Dec. 345. See also The Flad Oyen, 8 T. R. 270.

[33] Story, Confl. of L. § 592; Sawyer v. Maine Ins. Co., 12 Mass. 291; Monroe

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cases in this country, the question was upon the effect of a decree of a court of admiralty in the island of Hayti, condemning a vessel and cargo belonging to American citizens for an alleged breach of blockade. It did not appear that any libel was filed, any monition issued,

v. Douglas, 4 Sandf. Ch. 180; Magoun v. N. E. Marine Ins. Co., 1 Story, 157; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600. In the case last cited, Story, J., delivered his opinion upon this point in the following forcible and convincing terms: "There is another element which, it seems to me, constitutes an essential ingredient in every case where the sentence of a foreign court *in rem* is sought to be held conclusive, as to the title to the property and as to the facts upon which it professes to be founded. That element is, that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offense, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, may know what is the offense with which they are charged, and may have an opportunity to defend themselves and to disprove the charge. It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—*castigatque, auditque.* It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem* that some specific offense is charged for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem* and attaching to the thing, so that the parties in interest may appear and make defense, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

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or any trial or hearing had. It was held that the decree was not conclusive of the fact charged.[34]

§ 819. Not Impeachable for Error.

As respects the conclusiveness of a foreign judgment *in rem*, it is no ground of objection to it that it is erroneous, even though the error appears on the face of the proceedings. The sentence cannot, for that reason, be impeached in any collateral action. In an important English case it was observed by Lord Colonsay: "It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."[35]

§ 820. Whether Fraud may be Shown.

Whether a foreign judgment *in rem* may be impeached on the ground of fraud practised in obtaining it, is a question which has not very frequently arisen, and one upon which the authorities are divided. In an early American decision it was said: "The question in this case is whether a sentence of condemnation of a foreign court of competent jurisdiction can be avoided on the ground of fraud practised in obtaining it, when thus called in question collaterally in this country; and the court are of opinion that such sentence cannot thus be called in question, but must remain in full force until avoided in some regular mode in the country where it was passed."[36] But on the

[34] Sawyer v. Maine Ins. Co., 12 Mass. 291.

[35] Castrique v. Imrie, L. R. 4 H. L. 414. And see Imrie v. Castrique, 8 C. B. N. S. 405; Castrique v. Behrens, 30 L. J. Q. B. 163; Williams v. Armroyd, 7 Cranch, 423.

[36] Stewart v. Warner, 1 Day, 142, 2 Am. Dec. 61.

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other hand, the late English cases seem to favor the view that if the judgment was fraudulent it may be overthrown on that ground.[37] And most of the text-writers appear to be of the same opinion.[38] We shall have more to say on this subject in connection with the grounds for impeaching foreign judgments *in personam*.[39]

821. Objections to Legality of Court.

In passing upon the effect to be given to a foreign judgment *in rem*, it is always competent to inquire whether the foreign court had lawful authority to act as such, and was a duly organized and constituted tribunal. If such was not the case, its sentences have no force or validity.[40] Thus the sentence of a court of a belligerent power set up within the territory of a neutral state is entitled to no authority, since it acts under an usurped and illegal power and one contrary to the law of nations. But if the court sits within the domains of an *allied* nation, its jurisdiction is rightful and its constitution legal.[41] The presumption, however, is in favor of the legitimacy of the foreign tribunal, at least when the authority under which it assumes to act is not made known and there are no circumstances to arouse suspicion. But it is said that if the source of the court's authority and the manner of its constitution are stated, it is proper to scrutinize them, and if the circumstances are unusual or apparently illegal, it devolves upon the party who would support the decree to vindicate the rightfulness of the court's existence and authority.[42] But a foreign court acting under the authority of those in whom the power of the country is for the time being vested must be deemed to have the jurisdiction of a legitimate court. It is sufficient that it is a court *de facto*.[43]

[37] Shand v. Du Boisson, L. R. 18 Eq. 283; Messina v. Petrococchino, L. R. 4 P. C. 144. And see a *dictum* to the same effect in Godard v. Gray, L. R. 6 Q. B. 139.

[38] Story, Confl. of L. §§ 592, 597; 1 Whart. on Ev. § 814; Bigelow on Est. (3d edn.) 195; Freem. on Judgm. § 591.

[39] See *infra*, § 844.

[40] Cucullu v. La. Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199; Snell v. Faussatt, 1 Wash. C. C. 271; The Griefswald, Swabey, 430; The Flad Oyen, 1 Ch. Rob. 135.

[41] 1 Marsh. on Ins. 388.

[42] Snell v. Faussatt, 1 Wash. C. C. 271.

[43] Bank of North America v. McCall, 4 Binn. 371.

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§ 822. Foreign Decrees of Divorce.

In England, the law respecting foreign judgments of divorce, or sentences on the validity of a marriage, has undergone considerable fluctuation. Lord Hardwicke once ruled that the sentence of a foreign court affirming the validity of a marriage was conclusive, if rendered by a court having jurisdiction and without fraud.[44] But the general disposition of the English courts has always been to deny that any valid sentence of divorce could be pronounced in any foreign country which should amount to a dissolution of a marriage celebrated in England between English subjects, at least so far as such a divorce is to have any force or operation in England.[45] Still, this doctrine has been elaborately discussed in several recent cases, and the grounds upon which it rests have been much shaken.[46] The rule, as it now stands, appears to have been stated with exactness in the recent case of *Shaw* v. *Gould*,[47] where it was held that a foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce *a vinculo* in the case of an English marriage between English subjects, *unless* the parties are, at the time of such decree pronounced, *bona fide* domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion. The English courts do not admit that the domicile of *one* party within the territory is sufficient to give jurisdiction.[48] In America it is generally held, and indeed almost universally, that as a proceeding in divorce is intended to affect the *status* of the parties, and is therefore essentially *in rem*, the judgment pronounced, whether in a foreign country or in a sister state, by a court having lawful jurisdiction of the cause, and in the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided

[44] Roach v. Garvan, 1 Ves. Sr. 157.

[45] Rex v. Lolley, 2 Russ. & R. C. C. 237; Sinclair v. Sinclair, 1 Hagg. Con. 294; Scrimshire v. Scrimshire, 2 Hagg. Con. 395; Connelly v. Connelly, 2 Eng. L. & Eq. 570; Shaw v. Attorney-General, L. R. 2 P. D. 161; Deck v. Deck, 2 Sw. & Tr. 90. See Story, Confl. of L. §§ 215–230, 579, where the whole subject is learnedly discussed.

[46] Dolphin v. Robins, 7 H. L. Cas. 390; Warrender v. Warrender, 2 Cl. & Fin. 541; Harvey v. Farnie, 8 App. Cas. 43.

[47] L. R. 3 H. L. 55.

[48] Le Suer v. Le Suer, L. R. 1 P. D. 139.

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the applicant was *bona fide* domiciled within the territorial jurisdiction of the court, although the other party, being a non-resident, was notified only by advertisement or some other species of constructive service.[49]

§ 823. Foreign Probate Decrees.

The adjudications of foreign courts in matters of probate jurisdiction, such as the proof of wills and the grant of administration or letters testamentary, are also recognized as being of ubiquitous authority and universally conclusive.[50] In a recent English case it appeared that, in a foreign court, upon the death of a person domiciled in the country where that court had jurisdiction, C. claimed to be the natural son of the decedent, and as such natural son to be entitled by the law of that country to inherit his father's property, and alleged that his father was of a particular station in society (which circumstance allowed of such a claim by his natural son), and that the father had died domiciled in the country, and had died intestate, and the foreign court found all these allegations in his favor. It was held that the probate court in England was bound by the judgment of the foreign court, and had therefore rightly admitted C. to be heard as contradictor to a will, set up in the latter country as having been made by the decedent disposing of his personal property there.[51]

§ 824. Foreign Adjudications in Bankruptcy.

According to the general doctrines of international law, the discharge of a contract by the law of the place where it is made is a discharge everywhere. Therefore if a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy

[49] Pennoyer v. Neff, 95 U. S. 714; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. 407; Burlen v. Shannon, 115 Mass. 438; Hood v. Hood, 110 Mass. 463; Wright v. Wright, 24 Mich. 180; Harding v. Alden, 9 Me. 140; Rush v. Rush, 46 Iowa, 648; 2 Bishop, Mar. & Div. §§ 155–164. See *infra*, §§ 924–983.

[50] Williams v. Saunders, 5 Cold. 60; Tompkins v. Tompkins, 1 Story, 547.

[51] Doglioni v. Crispin, L. R. 1 H. L. 301.

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has been obtained by the debtor resident there, the discharge will constitute a valid defense to the contract, wherever the creditor may be domiciled, or wherever the contract may be put in suit.[52] But in respect to contracts not made or to be performed within the country granting the discharge, it could of course have no extra-territorial validity, as against non-resident creditors, unless they came in and took part in the proceedings. And in a case in Pennsylvania, where the question was upon a judgment rendered by a Bavarian court in a proceeding in bankruptcy, allowing the claim of the plaintiffs against the bankrupt, but the latter being out of the country, the court never acquired jurisdiction of his person, it was held that an action of debt would not lie on the judgment.[53] But a foreign discharge in bankruptcy is *prima facie* evidence that all the proper steps were taken to obtain the discharge, and the party pleading it is not required to prove such facts in the first instance.[54]

Part II. Foreign Judgments in Personam.

§ 825. Conclusiveness on the Merits. Early English Cases.

In respect to the conclusiveness of foreign judgments *in personam*, the earlier cases in the English reports exhibit a decided hesitation in approaching the question and a great diversity of opinion as to its proper answer. On the one hand, we have an expression of opinion from Lord Nottingham, as far back as the time of Charles II, to the effect that a foreign sentence of divorce ought to be held conclusive. "It is against the law of nations," said he, "not to give credit to the sentences of foreign countries, till they are reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another?

[52] Potter v. Brown, 5 East, 124; Blanchard v. Russell, 13 Mass. 1; Smith v. Smith, 2 Johns. 235; Ory v. Winter, 4 Mart. N. S. 277; Sherrill v. Hopkins, 1 Cow. 103; Peck v. Hibbard, 26 Vt. 702; Marsh v. Putnam, 8 Gray, 551; Story, Confl. of L. § 340.

[53] Kuehling v. Leberman, 2 Week. Not. Cas. 616.

[54] Ohlemacher v. Brown, 44 U. C. Q. B. 366.

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And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences."[55] So there is a *dictum* of Lord Hardwicke that "when any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts."[56] And the same view was held, with more or less assurance, in certain other early cases.[57] On the other hand, a contrary opinion was entertained by Lord Mansfield, Chief Baron Eyre, and Justice Buller, and has been expressed in some later cases, viz., that while a foreign judgment in a personal suit was sufficient to give a ground of action, and amounted to *prima facie* evidence of debt, yet it was not conclusive, and the case might be re-examined on the merits.[58] In a case ruled in 1826, Best, C. J., quoted with apparent approval the statement in *Sinclair* v. *Frazer*, 20 How. St. Tr. 469, that "foreign judgments are *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to show that they are irregularly or unduly obtained."[59]

§ 826. Distinction between Foreign Judgment as a Cause of Action and as a Defense.

The progress of the English courts towards a satisfactory solution of the question of the conclusiveness of foreign judgments, was for a considerable period impeded by a suggestion which had been made, as to the difference between using such a judgment as a cause of action and presenting it as a plea in bar. Chief Justice Eyre had said: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to

[55] Kennedy v. Cassillis, 2 Swanst. 326, note.

[56] Boucher v. Lawson, Cas. temp. Hard. 89.

[57] Hamilton v. Dutch East India Co., 8 Brown Parl. Cas. 264.

[58] Walker v. Witter, 1 Dougl. 1, 6; Herbert v. Cook, Willes, 36, note; Hall v. Odber, 11 East, 118; Bayley v. Edwards, 3 Swanst. 703; Phillips v. Hunter, 2 H. Bl. 410; Galbraith v. Neville, cited 1 Dougl. 6, n. 3; Sinclair v. Frazer, 20 How. St. Tr. 469; Houlditch v. Donegal, 8 Bligh, 301; Don v. Lippman, 5 Cl. & Fin. 1.

[59] Arnott v. Redfern, 3 Bing. 353.

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enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise; we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us."[60] And this distinction was adopted and applied in numerous other cases before the English tribunals.[61] It also found its way to this country, and we may cite some of the earlier rulings of our own courts to the proposition that a foreign judgment, when sought to be enforced by a suit brought upon it, is only *prima facie* evidence and may be impeached for irregularity and rebutted by evidence, whereas, used as a defense, it is as conclusive to every intent as a domestic judgment.[62] A precisely similar distinction may be found established in the Scotch law.[63] And thus it is, or was at one time, well supported by authority. But the doctrine is sustained neither by principle nor by the best modern decisions. For if carried to its legitimate conclusions, it would produce consequences which the courts have distinctly refused to recognize. If one who has successfully defended a suit brought against him in a foreign court may set up the judgment as a conclusive bar to an action against him here, it ought to be equally true that he could rely implicitly upon a judgment *against* him in the foreign court. In other words, the foreign judgment should be held to merge the original cause of action. But then, if the cause of action is merged

[60] Phillips v. Hunter, 2 H. Bl. 402, 410.

[61] Burrows v. Jemino, 2 Strange, 733; Boucher v. Lawson, Cas. temp. Hard. 80; Tarleton v. Tarleton, 4 M. & S. 20; Woodburne v. Plummer, 1 B. &. C. 625; Reimers v. Druce, 23 Beav. 145. And see Story, Confl. of L. § 598; 2 Kent Comm. 119, 120.

[62] Taylor v. Phelps, 1 Har. & Gill, 492 (1827); Griswold v. Pitcairn, 2 Conn. 85 (1816); Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Buttrick v. Allen, 8 Mass. 237, 5 Am. Dec. 105.

[63] Erskine's Inst. bk. 4, tit. 3, § 4.

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in the foreign judgment, it is clearly necessary to hold that judgment final and conclusive when made the basis of a suit. But the courts, as we shall presently see, do not as yet hold that the cause of action is merged in the foreign judgment. There is an inconsistency here which tells equally in both directions. But it is sufficient for our present purpose to point out that it effectually destroys the reasonableness of the distinction taken by Chief Justice Eyre. So stands the case upon principle. As a matter of precedent, the doctrine has been gradually abandoned. Forty years ago Romilly, M. R., observed that "this distinction has certainly not been carried out to the extent laid down by Lord Chief Justice Eyre."[64] And since that time it has been altogether repudiated. For the settled rule in England, at the present day, and the strong tendency of the modern American cases, is to regard foreign judgments as equally conclusive and binding whether they are used as a cause of action or presented as a defense. This will more fully appear in the following sections.

§ 827. Later English Decisions.

Notwithstanding the fluctuations of opinion manifested in the earlier cases which we have cited, the English courts have finally determined upon the conclusiveness of foreign judgments *in personam*. And it must now be regarded as irrevocably settled, as a rule of English law, that such judgments when rendered by a court having jurisdiction of the subject-matter and the parties, and without fraud, and while still remaining in full force abroad, are binding and conclusive in the English courts, in all cases, and not open to impeachment or re-examination on the merits.[65] In one of the latest and most

[64] Reimers v. Druce, 23 Beav. 145.

[65] Bank of Australasia v. Nias, 16 Q. B. 717; Bank of Australasia v. Harding, 9 C. B. 661; Ferguson v. Mahon, 11 Ad. & El. 179; Guinness v. Carroll, 1 B. & Ad. 459; Patrick v. Shedden, 2 El. & B. 14; Scott v. Pilkington, 2 Best & S. 11; Paul v. Roy, 15 Beav. 433; Arnott v. Redfern, 3 Bing. 353; Doglioni v. Crispin, L. R. 1 H. L. 301; Godard v. Gray, L. R. 6 Q. B. 139; Ricardo v. Garcias, 12 Cl. & Fin. 368; Castrique v. Imrie, L. R. 4 H. L. 414; General Steam Nav. Co. v. Gouillou, 11 Mees. & W. 877; Simpson v. Fogo, 1 J. & H. 18; De Cosse Brissac v. Rathbone, 6 H. & N. 301; Tarleton v. Tarleton, 4 M. & S. 20; Martin v. Nicolls, 3 Sim. 458; Vanquelin v. Bouard, 15 C. B. N. S. 341; Messina v. Petrocochino, L. R. 4 P. C. 144.

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important cases on this subject, it is said that a foreign judgment is examinable and is only *prima facie* evidence of the debt, so far as to show that the foreign court had no jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by the fraud of the plaintiff; and any pleas which might have been pleaded to the original action cannot be pleaded to the action on the judgment.[66] This decision finally establishes the conclusiveness of such a judgment when used as a cause of action. And as respects its effectiveness as a defense, we have an equally positive ruling of the House of Lords, made in a case where the defendant pleaded in bar that the plaintiff had before brought his action against him in a French court upon the identical cause of action now presented, whereupon judgment had passed in the defendant's favor. It appearing that the former suit was tried upon the merits and that the same matters were involved, it was held that the action was barred.[67]

§ 828. Early American Decisions.

In this country in almost all the earlier cases in which the effect and conclusiveness of foreign judgments became a question, rulings were made to the effect that such judgments were only *prima facie* evidence of debt and that they were not conclusive on the merits.[68] It will be observed, however, that all these decisions rest upon the earlier English cases holding the same doctrine. The latter have

[66] Bank of Australasia v. Nias, 16 Q. B. 717.

[67] Ricardo v. Garcias, 12 Cl. & Fin. 368.

[68] Green v. Sarmiento, 1 Pet. C. C. 74; Burnham v. Webster, 1 Wood. & M. 172; Boston India Rubber Factory v. Hoit, 14 Vt. 92; Bartlett v. Knight, 1 Mass. 400, 2 Am. Dec. 36; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Pawling v. Bird, 13 Johns. 192; Hitchcock v. Aicken, 1 Caines, 460; Smith v. Lewis, 3 Johns. 157. 3 Am. Dec. 469; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Benton v. Burgot, 10 Serg. & R. 240; Pritchett v. Clark, 3 Harr. (Del.) 517; Taylor v. Phelps, 1 Har. & G. 492; Barney v. Patterson, 6 Har. & G. 182; Garland v. Tucker, 1 Bibb, 361; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430.

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now been overruled or repudiated, as we have just pointed out, but not until after the theory of the inconclusiveness of such judgments had come to be generally recognized by the American judges. Had the same cases been decided in the light of the recent English adjudications, the result would undoubtedly have been different, for the courts professed to be guided by the views obtaining in Westminster Hall. An idea of the manner in which foreign judgments were regarded, at that day, and the considerations which were deemed influential in determining their effect, can be gathered from the following remarks of Judge Woodbury, in a case where a decree from New Brunswick was concerned: "My own impressions in relation to foreign judgments are these: They do, like domestic ones, operate conclusively *ex proprio vigore* within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, *ex comitate*, treated with respect, according to the nature of the judgment and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus*. With these views, I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court and acting on that rather than the parties, I would consider it only *prima facie* evidence as between the parties to it."[69] But at the same time it is to be remembered, as was observed by the learned Story, speaking with special reference to the English cases, but in terms equally applicable to the American cases, that "it is admitted on all sides that in such cases [suits to enforce foreign judgments] the foreign judgments are *prima facie* evidence to sustain the action, and are to be deemed right until the contrary is established."[70] And further, in several of these earlier decisions in our own courts it is very clearly intimated that if the foreign judgment is only incidentally involved

[69] Burnham v. Webster, 1 Wood & M. 172.

[70] Story Confl. of L. § 608.

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in the controversy it will have the same degree of conclusiveness which attaches to domestic judgments.[71] And in this proposition, it is said in another case, all the American authorities are agreed.[72]

§ 829. Recent American Decisions.

Among the more recent American cases there are a few which still adhere to the old doctrine that foreign judgments are only *prima facie* evidence of debt and not conclusive.[73] But of the four cases cited it must be remarked that the first two, in so far as they touch this question, express an opinion which can only be regarded as *obiter dictum*, the real point at issue being the effect of a judgment rendered in a sister state, not a strictly foreign judgment. And as to the third, it was expressly rested upon the earlier English rulings, which, as we have seen, have since been overruled or abandoned and are no longer of any authority. The remaining case, *Rankin* v. *Goddard*, is commonly cited as a direct adjudication against the conclusiveness of foreign judgments, but a careful examination of the opinion will show that it does not in reality go to that length. For although it was stated to be the general doctrine of the American courts that such judgments were *prima facie* evidence but that they might be impeached, yet the court added, "the authorities here go to this extent, that the jurisdiction of the court and its power over the parties and the matters in controversy may be inquired into, and that the judgment may be impeached for fraud," neither of which objections, conceding them to be available, would be inconsistent with the conclusiveness of the judgment on the merits in a case where jurisdiction was present and fraud absent.

But the modern tendency of the decisions, in this country, is plainly and uniformly in the direction of holding foreign judgments *in personam*, rendered by courts having jurisdiction, to be binding and conclusive upon the parties and not re-examinable upon the

[71] Taylor v. Phelps, 1 Har. & G. 492; Barney v. Patterson, 6 Har. & G. 182.

[72] Cummings v. Banks, 2 Barb. 602.

[73] Middlesex Bank v. Butman, 29 Me. 19; Taylor v. Barron, 30 N. H. 79, 64 Am. Dec. 281; Burnham v. Webster, 1 Wood & M. 172; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718.

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merits.[74] In the state of New York, in more recent times, this opinion was at first advanced with some hesitation and with a disposition to go no further than was necessary in the particular case. Thus it was said: "The principle on which the rule is founded, namely, that the point has already been decided between the parties or their privies, by a court of competent jurisdiction, and that future litigation would be useless and vexatious, is just as applicable to foreign as to domestic judgments. But I do not know that it is necessary, in this case, to go the length of holding a foreign judgment to be conclusive, though, if it were, I should be inclined to hold that as the better opinion in this country as well as in England."[75] But some years later, in the case of *Lazier* v. *Westcott*,[76] the question arose squarely, in an action upon a judgment recovered in a Canadian court. It was said: "We think the rule adopted in England, holding the same doctrines as to foreign judgments and recognized in this state, should be adopted and adhered to here in respect to such foreign judgments, and that the same principles and decisions which we have made, as to judgments from the courts of other states of the Union, should be applied to foreign judgments." It was accordingly held that a judgment of a court of a foreign country duly proven, is conclusive between the parties, where there has been a trial upon the merits, and there has been no fraud or want of jurisdiction, and no mistake is shown or offered to be shown.[77] This decision has settled the law, at least for the courts of that state, and has been several times approved and followed. For instance, *Harrison* v. *Lowrie*[78] was an action on a judgment recovered in the English court of Queen's Bench. The opinion contains the following language: "The court in which the trial

[74] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Cincinnati, etc., R. Co. v. Wynne, 14 Ind. 385; Cummings v. Banks, 2 Barb. 602; Monroe v. Douglas, 4 Sandf. Ch. 126; Baker v. Palmer, 83 Ill. 568; Hilton v. Guyott, 42 Fed. Rep. 249.

[75] Cummings v. Banks, 2 Barb. 602.

[76] 26 N. Y. 146, 82 Am. Dec. 404.

[77] The court cited and relied upon Henderson v. Henderson, 6 Q. B. 288; Ferguson v. Mahon, 11 Ad. & El. 179, Ricardo v. Garcias, 12 Cl. & Fin. 368 Bank of Australasia v. Nias, 16 Q. B. 717; and also Taylor v. Bryden, 8 Johns. 173; Monroe v. Douglas, 4 Sandf. Ch. 126; Story Confl. of L. § 607; and disapproved King v. Van Gilder, 1 D Chip. 59.

[78] 49 How. Pr. 124 (N. Y. Superior Ct., 1875).

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was had and judgment entered having acquired jurisdiction of the person of the defendant, its adjudication upon the issues formed by the pleadings is conclusive in an action upon the judgment in the courts of this country, and the defendant is precluded from inquiring into, questioning, or defending upon the merits."[79] And a more recent decision in the same state holds that an indemnitor is bound by the judgment in a suit against the person to whom he is liable, in respect to the subject-matter of the guaranty, if he had notice of the action, and that a judgment rendered in Germany has the same effect in this respect as one pronounced by our own courts.[80]

Nor have the courts of other states, in which the same question has arisen, refused to follow the general current of authorities. In Louisiana, it is held not only that a foreign judgment is final and conclusive upon the merits, but even that it operates as a merger of the original claim, so that no new suit can be maintained in that state upon the claim or demand sued on abroad, but only upon the judgment recovered[81]—a position which, as we shall presently see, is far in advance of that yet reached by the majority of our courts. In a late case in Arkansas, the court observed, with reference to the once prevalent rule, that "when the English courts began to doubt its soundness, the current of American authority began to change, and since the English *dicta* were repudiated at home, their doctrine has been but little regarded here. . . . . A judgment, whether foreign or domestic, raises a binding obligation to pay the sum awarded by it, and the presumption as to its conclusiveness should follow the law of the forum in which the proceedings were had. . . . . It is not the policy of the law to encourage litigation, and where a court of competent jurisdiction, having the parties legally before it, has adjudicated the merits of their case, every reason favors holding them bound by the adjudication, wherever the judgment may be called in question, if there has been no fraud practised in obtaining it. This is now the accepted rule."[82]

Although the supreme court of the United States has not yet

[79] To the same effect, Shepard v. Wright, 59 How. Pr. 512.

[80] Konitzky v. Meyer, 49 N. Y. 571.

[81] Jones v. Jamison, 15 La. Ann. 35.

[82] Glass v. Blackwell, 48 Ark. 50, 2 S. W. Rep. 257.

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given an authoritative ruling upon this subject, the inferior federal courts have often been called upon to deal with the question, and invariably, in recent times, they have decided for the rule which holds foreign judgments conclusive. Thus in a case in the circuit court for the northern district of Ohio, it was held that the judgment of a court of competent jurisdiction in Canada, in a suit in which the defendant appeared by counsel, should be held conclusive in the absence of fraud; and that it was immaterial that the judgment was rendered in the defendant's absence and without his knowledge, when he did not deny the authority of the attorney to appear for him.[83] It was remarked by Ricks, J.: "I think the doctrine as maintained by the later English and American cases, to which reference has been made, has advanced the courts one stage in the process of simplifying the administration of justice. It is important that there should be a limitation to litigation, and that parties, as to matters upon which they had a full hearing in the court of original and competent jurisdiction, should not be permitted to open and retry issues once fairly determined, whenever and wherever they have an opportunity to do so, by defending against judgments rendered in a foreign country to which they were properly made parties." And a very recent decision of the circuit court for the southern district of New York holds that a foreign judgment *in personam*, rendered in a court of a civilized country having jurisdiction of the subject-matter, in a cause involving the consideration of ordinary mercantile transactions between the parties, and in which the defendant appeared and took part in the proceedings, cannot be impeached when sued on here, although, at the trial, the defendant was denied the benefit of our rules of evidence and procedure, and although the judgment was based on false testimony and was erroneous.[84]

From this review of the decisions it will have become apparent that, notwithstanding an occasional adverse *dictum* and perhaps one or two positive rulings, the general tendency of the more recent

[83] McMullen v. Richie, 41 Fed. Rep. 502. See also New York, L. E. & W. R. Co. v. McHenry (S. D. of N. Y.), 17 Fed. Rep. 414.

[84] Hilton v. Guyott, 42 Fed. Rep. 249 (April, 1890). The learned and very sensible opinion in this case, containing citations to numerous authorities, was written by Wallace, J.

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American cases has been steadily and uniformly towards the position finally reached by the English courts. Since our judges have had the benefit of the reasoning and authority of the later cases in the mother country, not a single decision has been made (if we except *Rankin* v. *Goddard*, *supra*,) in which the once generally recognized doctrine has not been repudiated. It is true these new rulings have been confined to a few states. But it does not appear that the question has arisen of late years in the others, and there is every reason to believe that all our courts will eventually agree in the new and better rule. Perhaps it cannot yet be said that the *status* of foreign judgments is irrevocably settled in this country. But it is a safe prophecy that the doctrine which makes them conclusive on the merits will receive the support of almost every fresh decision in the coming years.

§ 830. Arguments on the Question.

The chief argument in support of the thesis that full faith and credit should be given to the judgments of foreign tribunals is one which rests on grounds of convenience and necessity. Nowhere has it been presented with greater clearness or ability than by Mr. Justice Story in his learned treatise on the Conflict of Laws. "It is indeed very difficult to perceive," says he in the work referred to, "what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew in a suit upon the foreign judgment. Some of the witnesses may be since dead, some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation. Is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a

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case of covenant, or of debt, or of a breach of a contract, are all the circumstances to be re-examined anew? If they are, by what laws or rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex æquo et bono*? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side, for under such circumstances it would be equivalent to granting a new trial."[85]

§ 831. Reason of the Recognition of Foreign Judgments.

We may next inquire how, as a matter of municipal law, a judgment rendered in a foreign country comes to be available as a cause of action or as a defense. The earlier decisions, as well as many of the text-writers, sought to establish a juristic basis for this recognition of foreign judgments on the ground of the comity which subsists between nations and the mutual advantages to be secured by its exercise. Vattel thought that to undertake to examine the justice of a definitive sentence was an attack upon the jurisdiction of the sovereign who had passed it.[86] Bar has declared that "the majority of modern authors adhere to the view that *comitas* and the common interest of nations are the grounds of the recognition and of the execution of foreign judgments." The same writer feels constrained to "refer the recognition of foreign judgments, pronounced in accordance with foreign law, to the same grounds as those upon which we recognize foreign laws themselves. The admissibility of such a recognition rests upon the basis of friendly intercourse; but no state that desires to remain in such intercourse is in a position to

[85] Story Confl. of Laws, § 607.

[86] Vattel. bk. 2. c. 7. §§ 84, 85; Story Confl. of Laws, § 585.

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exclude the application of foreign laws at its pleasure."[87] But the later English decisions (which we have already cited) have placed the matter upon a basis which is at once more satisfactory and more secure. "These adjudications," it is said in a recent case, "ignore any considerations of comity as a factor in influencing the effect of foreign judgments. They rest wholly on the practical and sensible doctrine, which is applied to domestic judgments, that a litigant who has had a fair opportunity to try his cause before a competent tribunal, and has availed himself of it, should acquiesce in the result, and, if he has reason to complain, should pursue those means for correcting error provided by the jurisprudence of the tribunal, instead of resorting to another court. This is a much safer and more reasonable doctrine than that of the earlier adjudications, and if it works injustice in occasional instances, works less hardship generally, and promotes justice upon the whole."[88] From one of the decisions here referred to we quote the following statement of Baron Parke: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that judgments of foreign and colonial courts are supported and enforced."[89]

§ 832. Scotch Law of Foreign Judgments.

Before leaving the subject of the conclusiveness of foreign judgments, it may be profitable to see how the matter stands in some other countries besides England and the United States. Foreign jurisprudence often furnishes analogies or precepts which are of substantial aid in the solution of doubtful questions in our own courts. In the law of Scotland, it appears, a peculiar distinction is made between decrees sustaining the plaintiff's contention and such as refuse to support it. This distinction is explained by Lord Kames in the following terms: "A foreign decree sustaining the claim is not one of those universal titles which ought to be made effectual

[87] Bar, Private Internat. Law, § 125.
[88] Hilton v. Guyott, 42 Fed. Rep. 257.
[89] Williams v. Jones, 13 Mees. & W. 633.

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everywhere. It is a title which depends on the authority of the court whence it issued, and therefore has no coercive authority *extra territorium*. And yet, as it would be hard to oblige the person who claims on a decree to bring a new action against his party in every country to which he may retire, therefore common utility, as well as regard to a sister-court, have established a rule among all civilized nations, that a foreign decree shall be put in execution, unless some good exception be opposed to it in law or in equity; which is making no wider step in favor of the decree than to presume it just until the contrary be proved. . . . . A foreign decree which, by dismissing the claim, affords an *exceptio rei judicatæ* against it, enjoys a more extensive privilege. We not only presume it to be just, but will not admit any evidence of its being unjust. The reasons follow. A decreet-arbitral is final by mutual consent. A judgment-condemnator ought not to be final against the defendant because he gave no consent. But a decreet-absolvitor ought to be final against the plaintiff, because the judge was chosen by himself; with respect to him at least it is equivalent to a decreet-arbitral. Public utility affords another argument extremely cogent. There is nothing more hurtful to society than that law-suits be perpetual. In every law-suit there ought to be a *ne plus ultra*, some step that ought to be ultimate; and a decree dismissing a claim is in its nature ultimate."[90] This distinction is closely analogous to that attempted to be made by Lord Chief Justice Eyre,[91] and which at one time appeared to prevail in English law. But it is totally inconsistent with the settled doctrine of the latest cases, both there and in this country, by which a foreign judgment is equally conclusive whether used as a cause of action or presented as a defense.

§ 833. French Law.

In France, by the Ordinance of 1629, article 121, it was provided that "judgments rendered in foreign countries are not to be executed in France. French citizens against whom they are rendered may,

[90] 2 Kames Eq. (3d edn. 1778) p. 365.

[91] Phillips v. Hunter, 2 H. Bl. 410. See *supra*, § 826.

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notwithstanding such judgments, contest their rights anew, as untouched, before the French tribunals." The provisions of the codes mark an advance from this position, in that they make such judgments *susceptible* of execution upon being confirmed by a French court.[92] But in the opinion of the best writers, the new laws do not go to the extent of making the judgment conclusive upon the merits. The notion that the procedure contemplated involves no more than the issuing of an *exequatur* as of course, without any re-examination of the grounds of the controversy, is by them condemned as erroneous. Thus a learned author observes: "It seems to us that, after the decisions which we have just cited, which are all founded upon the great principle of the independence of nations, and of the absolute lack of power in the officers of a foreign sovereignty within the territory of another sovereignty,—we must regard our jurisprudence as irrevocably committed to the consequences of that principle, and that all judgments rendered in a foreign country, without exception, can have no execution in France until after they have been made executory, upon an examination of the cause, by a French tribunal, before which the parties must set up and contest, anew, the grounds upon which the action is founded."[93] But it must be added that between many of the countries of continental Europe there exist treaties providing for the recognition and enforcement of decrees rendered by their respective courts. And of course the foregoing rule has no application to the judgments of a nation with which France stands in a treaty relation of this character. As to the other European states, it is somewhat difficult to ascertain their practice in regard to the effect of foreign judgments. But it is said that the courts of Holland "are accustomed by the principle of reciprocity to give effect in their terri-

[92] Code Civil, art. 2123, provides that "L'hypothèque judiciaire [*i. e.*, lien] ne peut pareillement résulter des jugements rendus en pays étranger, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions contraires qui peuvent être dans les lois politiques ou dans les traités." See also the Code de Procedure Civile, art. 546.

[93] Toullier, Droit Civ. Franc., c. 6, § 8, no. 82–87. See also Merlin, Questions de Droit, "Jugement," § 14; Emerigon, Des Assur. bk. 1, c. 4, § 8. The whole subject of the French law of foreign judgments is discussed with learning and discrimination in 2 Kent's Comm. 121, note. See also Story, Confl. of L. §§ 615–617.

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tories to the judgments of foreign states which show the same comity to theirs." [94]

§ 834. Canadian Doctrine of Foreign Judgments.

The courts in Canada have adopted the principle, now generally prevalent in England and the United States, that a foreign judgment, duly proven, is conclusive when made the basis of a suit, in the absence of fraud, want of jurisdiction, or evident mistake.[95] So also it is said that a plea, by which it is alleged that a suit has already been brought and decided in a competent foreign tribunal (in this case the superior court of New York) by the same plaintiff against the same defendant, for the same cause of action, is a good plea, more especially if it sets up payment of the judgment by the defendant.[96]

§ 835. Jurisdiction may be Inquired into.

Leaving now the subject of the conclusiveness of foreign judgments, we proceed to inquire into the causes for which their validity may be challenged or impeached. And first, as to jurisdiction. It is now a settled and well recognized rule that a judgment of a foreign court is always open to impeachment on the ground of a want of jurisdiction over the cause or the parties.[97] At the same time, "a judgment of a foreign court, complete and regular upon its face, is *prima facie* valid. It follows that a complaint upon such foreign judgment need not allege that the court by which it was rendered had jurisdiction either of the cause or of the parties." [98] As it was said in another American

[94] Henry, Personal and Real Statutes, p. 76.

[95] Warrener v. Kingsmill, 8 U. C. Q. B. 407.

[96] Vaughan v. Campbell, 5 Low. Can. 431.

[97] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Novelli v. Rossi, 2 B. & Ad. 757; Don v. Lippman, 5 Cl. & Fin. 1; Ferguson v. Mahon, 11 Ad. & El. 179; Carleton v. Bickford, 13 Gray, 591, 74 Am. Dec. 652; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Andrews v. Herriott, 4 Cow. 524, note: Kerr v. Kerr, 41 N. Y. 272; Arnott v. Webb, 1 Dill. 362; Rose v. Himely, 4 Cranch, 241; Long v. Hammond, 40 Me. 204; Robertson v. Struth, 5 Q. B. 941.

[98] Gunn v. Peakes, 36 Minn. 177, 30 N. W. Rep. 466; Horton v. Critchfield, 18

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case, "it is an elementary rule that the jurisdiction of courts of general jurisdiction is to be presumed, and it follows that the judgments and decrees of such courts are in all cases of at least *prima facie* validity. In asserting such a judgment or decree as a cause of action, or as a ground of defense, the pleader need not state jurisdictional facts. . . . . And the presumptions in favor of jurisdiction are the same whether the judgment relied on is domestic, foreign, or from one of the sister states of this Union." [99] "A foreign judgment," says another learned court, "rendered without jurisdiction may be assailed in either a direct or collateral proceeding. Although the recitals contained in the judgment, that service was made, raise a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff [defendant] may show by extrinsic evidence, if he can, that no service was actually made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but if it is clearly shown that the defendant was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no value." [100]

§ 836. Judgments against Non-Residents.

The question of the right to impeach a foreign judgment for want of jurisdiction has almost always arisen in cases where the defendant was not a resident of the state or country in which the judgment was rendered. Our courts have been emphatic in declaring that a judgment rendered in a foreign country against a citizen of the United States, without personal service or notice or appearance, is a mere nullity.[101] And this is also the law in England. It was there recently held that a judgment of a foreign court, obtained against a defendant on default of an appearance, cannot be enforced in an English court where the defendant, at the time the suit was commenced, was not a subject of nor resident in the country in which the

Ill. 133, 65 Am. Dec. 701; Robertson v. Struth, 5 Q. B. 941.

[99] Bruckman v. Taussig, 7 Colo. 561, 5 Pac. Rep. 152.

[100] Thorn v. Salmonson, 37 Kans. 441, 15 Pac. Rep. 588.

[101] Bischoff v. Wethered, 9 Wall. 812; Battle v. Jones, 6 Ired. Eq. 567.

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judgment was obtained; for there existed nothing imposing on the defendant any duty to obey the judgment.[102] It is obvious that this question may assume many shapes, according as we consider whether the person to be affected was a citizen of the foreign country or an alien, whether he was a resident within its territory or not, whether or not he voluntarily submitted himself to the jurisdiction, whether the judgment professes to impose a personal liability or to operate only on property within the state. These and other questions may all affect the validity of the sentence. Out of all these possible cases, those in which the foreign tribunal may have lawful jurisdiction have been selected and stated by Mr. Justice Fry, in a recent case in the Chancery Division, in terms which are as clear as the discrimination is sound and accurate. "What are the circumstances," inquires the learned judge, "which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to that case[103] and to *Copin* v. *Adamson*,[104] they may, I think, be stated thus. The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained; and possibly, if *Becquet* v. *MacCarthy*[105] be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."[106] Something must be added as to the summoning of non-resident defendants by public proclamation, or posting up notices, or other varieties of constructive service. It has been justly remarked that "there is no pretense to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners who are non-resi-

[102] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Voinet v. Barrett, 55 Law Journ. Q. B. D. 39.

[103] Schibsby v. Westenholz, L. R. 6 Q. B. 155.

[104] L. R. 9 Ex. 345.

[105] 2 B. & Ad. 951.

[106] Rousillon v. Rousillon, L. R. 14 Ch. Div. 351, 371. See also General Steam Nav. Co. v. Gouillou, 11 Mees. & W. 877.

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dents and do not appear to answer the suit, whether they have notice of the suit or not. The effects of all such proceedings are purely local, and elsewhere they will be held to be mere nullities." [107] Thus, in a well known English case it was held that an action would not lie upon a judgment obtained by default in one of the colonies against a party who, upon the face of the proceedings, appeared only to have been summoned "by nailing up a copy of the declaration at the court-house door." [108] But in another case it was considered that suit would lie in the English courts on a Scotch judgment of horning rendered against a Scotchman born. The court, however, added: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected." [109] In the next place it is to be observed that proceedings are frequently taken against non-resident foreigners by the attachment of real or personal property belonging to them and found within the jurisdiction. "In such cases," says a learned writer, "for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem*, and not as personally binding on the party as a decree or judgment *in personam;* or, in other words, it only binds the property seized or attached in the suit, to the extent thereof, and is in no just sense a decree or judgment binding upon him beyond that property. In other countries it is uniformly so treated, and is justly considered as having no extra-territorial force or obligation." [110]

[107] Story, Confl. of L. § 546.
[108] Buchanan v. Rucker, 9 East, 192.
[109] Douglas v. Forrest, 4 Bing. 686.
[110] Story, Confl. of L. § 549; Burn v. Bletcher, 23 U. C. Q. B. 28; London & N. W. R. Co. v. Lindsay, 3 Macq. H. L. Cas. 99.

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§ 837. Extra-Territorial Service of Process.

It is sometimes attempted to obtain jurisdiction of a non-resident foreigner by the personal service of process upon him at his domicile. This, however, is admitted on all sides to be ineffectual. It can have no greater force or virtue than a purely constructive service. It has been well said: "No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exercise of authority of this sort, beyond this limit, is a nullity. . . . . A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated." [111]

§ 838. Plea Negativing Jurisdiction.

In defending against a suit on a foreign judgment on the ground of want of notice, or want of jurisdiction, the defendant must explicitly negative every fact or circumstance from which the jurisdiction of the court over his person might be inferred.[112] A good illustration of this rule is found in one of the English cases cited, where, the action being upon a decree obtained against the defendant in the Court of Session in Scotland, the latter pleaded that he was not, at the time of the commencement of the suit in the Scotch court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of the said court, nor was he, at any time before the making and pronouncing of the decree, in any manner, according to the course and practice of the said court, notified, nor did he then know

[111] Shepard v. Wright, 59 How. Pr. 512 (s. c. 35 Hun, 444, and affirmed by the Court of Appeals, 21 N. E. Rep. 724); McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Smith v. Grady, 68 Wis. 215, 31 N. W. Rep. 477.

[112] Cowan v. Braidwood, 1 Man. & Gr. 882; Reynolds v. Fenton, 3 C. B. 187; Smith v. Nicolls, 5 Bing. N. C. 208; Montreal Min. Co. v. Cuthbertson, 9 U. C. Q. B. 78; McLean v. Shields, 9 Ontario, 699; Addams v. Worden, 6 Low. Can. 287.

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of the proceedings, so that he could or might, by himself, his proctor, attorney, or agent, appear or plead, or in any way defend himself in the said action; nor did he appear to any of the proceedings; whereby the said decree was and is contrary to natural justice, and wholly inoperative and void. But it was held that the plea was insufficient. For, as remarked by Tindal, C. J., it contained no statement that the defendant was not resident in Scotland, or that he was not subject to the laws of that country during the time that these proceedings were had against him, or that he had no property in Scotland, or that he had no knowledge or notice of the proceedings,—for the allegation in regard to the latter point might mean merely that he had no such notice as he ought in strictness to have had.[113] In a case where the plaintiff declared in *assumpsit* on a foreign judgment against two defendants, and they pleaded that one of them had never been served with process, and had no notice whatever of the proceedings in the foreign court, it was held that the plea was bad, as setting up a matter of defense for both of the defendants which applied to one only.[114]

§ 839. Foreign Judgment in Summary Proceedings.

The reluctance of the courts to give effect to a foreign judgment which was taken in summary proceedings, or in derogation of the common law, or justified only by the local statutes, appears strongly in the recent case of *Anderson* v. *Haddon*.[115] This was an action brought by the liquidators of a Scotch bank against the defendant, a resident of New York, to recover the amount of a call, upon the shares of stock of said bank which were owned by him, imposed by a judgment or decree of the Court of Session or Lord Ordinary of Scotland. The call was imposed under the provisions of an English statute, providing for the incorporation, regulation, and winding up of trading corporations. It authorized the Scotch Court of Session, during session, and the Lord Ordinary on bills during vacation, "on production by the liquidators of such a company of a list, certified by them,

[113] Cowan v. Braidwood, 1 Man. & Gr. 882.

[114] Bacon v. McBean, 8 U. C. Q. B. 805.

[115] 38 Hun, 435.

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of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due and the date thereof, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date until payment, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest." At the time the decree was made, and ever since, the defendant was a resident of New York. It was held, "that inasmuch as the mode provided by the act of Great Britain of ascertaining the liability of the defendant is summary, in derogation of the common law, and in the nature of bankruptcy proceedings, it has no extra-territorial force, either by virtue of its own inherent elements or any provision contained in the act itself creating a personal responsibility which could be enforced in the manner adopted in this action," and consequently that the present action could not be maintained. This decision, it will be observed, was made in that state which has been the most liberal in recognizing and enforcing foreign judgments. But probably the ruling was justified by the peculiar circumstances.

§ 840. Repugnance of Judgment to Natural Justice.

Throughout the books there are many *dicta* to the effect that it is good ground for impeaching a foreign judgment, and avoiding its effect, that it is "repugnant to natural justice." The term is vague, and might at first sight seem to allow of an investigation of the moral rightness of the decree. But it has been explained that the repugnance to natural justice in respect to which a foreign judgment is impeachable in an action upon it, is an injustice in reference to the conduct or mode of procedure of the foreign court, as in cases where the judgment is given without any notice to the defendant or without affording him an opportunity for defense, but not in reference to the merits of the action.[116] And although the method of conducting

[116] Crawley v. Isaacs, 16 L. T., N. S., 529. See also Liverpool Marine Credit Co. v. Hunter, L. R. 8 Ch. App. 479.

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the trial, the rules of evidence applied, or other details of practice, may differ from those to which we have been accustomed in our own courts, we must not be too hasty in assuming that therefore the result is contrary to natural justice. "The methods of investigation in different countries," it has recently been said, "are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all *indicia* of the truth which do not fall within the class of those it regards as competent and safe, while in continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say nothing about the weightier matters of law, the wisdom of yesterday is the folly of to-day; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that of France, or that a French citizen, sued here, could not as justly complain of our rules of evidence, or of a bill of discovery which compels him to exhibit his case in advance to his adversary, as one of our citizens sued in a French court could of the methods of procedure there?" [117]

§ 841. Local or Police Regulations of Foreign Country not Enforced.

An important exception to the rule which requires faith and credit to be given to foreign judgments remains to be noticed. The local policy, the penal or revenue laws, and the police regulations of a country have no extra-territorial force. No other state or nation is bound to recognize or enforce them. No duty or obligation which they impose has validity beyond the state's own limits. And conse-

[117] Hilton v. Guyott, 42 Fed. Rep. 258.

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quently it follows that no foreign power can be expected to give recognition or effect to decrees or sentences founded on such laws or regulations.[118] For example, the sentence of a court of criminal jurisdiction in a foreign state, by which the exercise of the civil rights of men may be suspended or abridged, is limited in its operation to the state itself in which the sentence was rendered, and does not deprive an individual of his natural rights beyond that state. The enforcement of such a sentence by a foreign power would be a violation of the law of nations.[119] This principle also furnished the ground of the decision in the peculiar case of *De Brimont* v. *Penniman*.[120] It there appeared that the plaintiff, who was a citizen of France, had married the daughter of the defendant, an American citizen, and that there was issue of the marriage, and that the wife died. It was shown that a French statute provides that a father-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage survives. The defendant being temporarily resident in France, the plaintiff sued him, under this law, in a French court, and obtained a judgment for an annual allowance payable in monthly instalments. On this judgment an action was brought in a federal court in New York. But it was held that the suit could not be maintained. The court said that the laws of France upon which the decree was made, and such decree founded thereon, were not founded upon principles of universal application, but were local in their nature and operation, and in the nature of police regulations. They were designed to regulate the domestic relations of those who reside in that country and to protect the public against pauperism. They had, however, no extra-territorial significance, but must be executed upon persons and property within their jurisdiction.

§ 842. Mistake of Law as Ground of Impeachment.

Since, on the most general principles, no domestic judgment is ever open to collateral attack on the mere ground of its being errone-

[118] Ogden v. Folliott, 3 T. R. 733; The Antelope, 10 Wheat. 66, 123; Story, Confl. of L. §§ 620, 621.

[119] Addams v. Worden, 6 Low. Can. 237.

[120] 10 Blatch. 436.

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ous as a matter of law, and since, as we have seen, the modern tendency is to hold all foreign judgments conclusive on the merits, and since, further, it is almost wholly impracticable for one of our courts to review the decisions of a foreign tribunal in reference to the correctness of its interpretation and application of its own laws,—for these reasons it should be no ground for impeaching a foreign judgment that it is erroneous in law. And this view is taken in one of the best of the English cases.[121] It was there conceded that the judgment of a foreign court having jurisdiction over the subject-matter could not be questioned in a domestic tribunal, on the ground that the foreign court had mistaken the law of its own country, or had come, on the evidence, to an erroneous conclusion as to the facts. But the doctrine of certain other cases is that the proceedings in foreign courts must be presumed to be consistent with the foreign law until the contrary is distinctly shown, and the principles adopted by a foreign jurisdiction, for example in assessing damages, cannot be impugned, unless contrary to natural justice, or *proved* to be not conformable to the foreign law.[122]

§ 843. Mistaken Conception of Foreign Law.

The case is somewhat different, however, when the court which renders the judgment undertakes to interpret or apply the law of some foreign country, and the judgment afterwards comes to be relied on as a claim or defense in the country whose law was so applied. Is it then impeachable on the ground of a mistaken conception of such law? This question, so far as it has been adjudicated in this country, seems to have been answered in the affirmative. It has been held that where a foreign court, not of admiralty, has decided a case on different principles from those here recognized, and leading to a different result from what would be here arrived at, though professedly deciding according to our law, our courts are not concluded by such decision.[123] But a case has recently been decided in Eng-

[121] Scott v. Pilkington, 2 Best & S. 11.
[122] Alivon v. Furnival, 1 Cromp. M. & R. 277; Becquet v. MacCarthy, 2 B. & Ad. 951.
[123] Lang v. Holbrook, Crabbe, 179.

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land, in which the whole subject received the most careful and exhaustive attention, and conclusions were reached which have certainly settled the English law upon the point, and will undoubtedly go far to incline our own courts in the same direction. We refer to the case of *Godard* v. *Gray*.[124] It was there ruled that it is no bar to an action on a judgment *in personam* of a foreign court, having jurisdiction over the parties and the cause, that the foreign tribunal has put a construction upon an English contract which, according to English law, is erroneous. Mr. Justice Blackburn, in delivering the opinion of the court, spoke as follows: "We can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law, and that in consequence of that mistake judgment has been given for an amount probably greater than, or at all events different from, that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law. The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not and that the plaintiff is entitled to judgment." After examining with some care the grounds of the recognition of foreign judgments, the admissibility of pleas of want of jurisdiction and of fraud, and the modern doctrine of the conclusiveness of such judgments on the merits, the learned judge continued: "It is broadly laid down by the very learned author of Smith's Leading Cases, in the original note to *Doe* v. *Oliver*, that 'it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law,' it would not be conclusive. For this he cites *Novelli* v. *Rossi*,[125] which does not

[124] L. R. 6 Q. B. 139.

[125] 2 B. & Ad. 757. In this case it appeared that R., who had indorsed a bill over to N., brought an action in a French court, at the place of his residence, to secure himself against liability on the bill, alleging that the acceptance of the same had been cancelled. (This was true; but the banker's clerk who had inadvertently cancelled the acceptance, had immediately written opposite to it "cancelled by mistake.") To this action he made the drawer, the intermediate indorsers, and N. parties defendant. The judgment of the French court, which was affirmed on appeal, declared R. and the other parties discharged from liability. It was held that the French courts had mistaken the law of England as to the

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decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight, and accordingly it has been treated with respect. In *Scott* v. *Pilkington* [2 Best & S. 42], the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position and state it thus: If the judgment 'be founded on an *incorrect view* of the English law, *knowingly or perversely acted on*.' The doctrine thus qualified does not apply to the present case, and there is therefore no need to inquire how far it is accurate. But the doctrine as laid down by Mr. Smith does apply here, and we must express our opinion on it, and we think it cannot be suppported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of the foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake of the English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact. It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had

effect of the cancellation, and therefore R. was still liable at N.'s suit for the debt in respect of which the bill was given, notwithstanding the foreign judgment. Lord Tenterden said: "It is unfortunate for the defendant if the law of England compels him to pay this debt, while the sentence of the French court, confirmed on appeal, prevents his recovering the amount from the indorsers and drawers of the bill abroad. But this is the consequence of his own act."

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arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland, it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland and not in England. If indeed foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet if the foreign court itself admitted its blunder they would not then act; but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defense which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defense shall be admitted if it is easily proved, and rejected if it would give the court great trouble to investigate it. Yet on what principle can we admit as a defense that there is a mistake of English law apparent on the face of the proceedings, and reject a defense that there was a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which defendant avers that he can show did exist? The whole law was much considered and discussed in *Castrique* v. *Imrie* [L. R. 4 H. L. 414], where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was that the defendant's title derived under that sale was good, notwithstanding that mistake, Lord Colonsay pithily saying: 'It appears to me that we cannot enter into an inquiry as to whether the French

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courts proceeded correctly either as to their own course of procedure, or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship.' "

§ 844. Whether Impeachable for Fraud.

In the present state of the English authorities, it seems to be well settled that fraud may always be set up as a ground of impeachment against a foreign judgment, and that if it be shown that fraud was successfully practised in the concoction or procuring of the judgment, the courts will treat it as of no effect, and will refuse to recognize or enforce it.[126] And so far as the question has been considered by our own courts, this may be said to be also the prevailing doctrine in this country.[127] But the fraud must be practised in the very obtaining of the judgment. It is not enough that it lies back of that and taints the contract or obligation put in suit before the foreign tribunal. It is good cause, for instance, for attacking such a judgment to show that the judges who rendered it were persons who were interested in the property in dispute, and decided in their own favor, and if that be established, the judgment will be disregarded.[128] But it has also been held that inasmuch as fraud is available as a defense to an action at law upon such a judgment, chancery will not interfere with the suit, but will leave the defendant to make that defense at law.[129] In a recent English case, where the action was upon a judgment recovered by the plaintiff against the defendant in a Russian court, the

[126] Henderson v. Henderson, 6 Ad. & El. N. S. 288, 298; Reimers v. Druce, 23 Beav. 145; Price v. Dewhurst, 8 Sim. 279; Bank of Australasia v. Nias, 16 Q. B. 717; Godard v. Gray, L. R. 6 Q. B. 139; Ochsenbein v. Papelier, L. R. 8 Ch. 695; Cammell v. Sewell, 3 H. & N. 617; Bowles v. Orr, 1 Y. & C. Ex. 464; Aboulloff v. Oppenheimer, L. R. 10 Q. B. Div. 295; Story, Confl. of L. § 608.

[127] Rankin v. Goddard, 54 Me. 28, 92 Am. Dec. 718; Ward v. Quinlivin, 57 Mo. 425.

[128] Price v. Dewhurst, 8 Sim. 279.

[129] Ochsenbein v. Papelier, L. R. 8 Ch. 695.

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latter pleaded that the judgment was procured by the fraud and deceit of the plaintiff and by false representations and false evidence given to the court, and it was held that the defense was good and sufficient, and this notwithstanding the question of the alleged fraud had been investigated and negatived in the foreign court.[130] But in a late American case, where the same question arose, this ruling was disapproved, and it was stated that the doctrine of the English decision was not borne out by the cases cited in its support, and the opinion was expressed that false testimony and the suppression of the truth do not constitute the kind of fraud by which a judgment is vitiated and may be nullified.[131] In this country, it remains to be seen whether the growing tendency to place foreign judgments on the same level with those rendered in a sister state, and the increasing disfavor with which the courts regard a plea of fraud in an action upon a judgment of the latter species, will not have the effect to raise foreign judgments above collateral attack on this ground.

§ 845. Judgment must be Final.

In order that a judgment recovered in a foreign country may be effective as a bar to another action, or as a cause of action in itself, it must distinctly appear that it was final and conclusive in the country where rendered, according to the law of that place.[132] The same rule is recognized in this country. Thus, an interlocutory decree of an English court is not conclusive against the defendant in an action in New York by the same plaintiff and for the same relief as was granted by such interlocutory decree.[133]

§ 846. Effect of Pendency of Appeal.

A foreign judgment which is to be sued on or otherwise enforced "must be such as lays on the defendant a present duty to pay. If in its own country it cannot be executed pending the time allowed for

[130] Abouloff v. Oppenheimer, L. R. 10 Q. B. Div. 295.

[131] Hilton v. Guyott, 42 Fed. Rep. 252.

[132] Plummer v. Woodburne, 4 B. & C. 625; Smith v. Nicolls, 5 Bing. N. C. 208; Paul v. Roy, 15 Beav. 433; Frayes v. Worms, 10 C. B. N. S. 149.

[133] Munn v. Cook, 8 N. Y. Supp. 698.

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appealing, or pending an appeal, it cannot be enforced in England during the interval; but if there is no such stay of execution in its own country, the pendency of an appeal will not be a bar to an action in England, though it may afford ground for the equitable interposition of the English court to prevent the possible abuse of its process, and on proper terms to stay execution in the action."[134] It has also been said by a learned English judge: "I apprehend that every judgment of a foreign court of competent jurisdiction is valid, and may be the foundation of an action in our courts, though subject to the contingency that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But until that course has been pursued, the judgment remains in full force and capable of being sued upon."[135]

§ 847. No Merger of Original Cause of Action.

It is well settled in England that the recovery of a judgment in a foreign court by the plaintiff will not be treated as a merger of the original cause of action, and the plaintiff may sue thereon again in the domestic courts.[136] Such a judgment, it is said, is not technically a record, and consequently is not a security of a higher nature than the prior simple contract debt. Hence the principle of merger does not apply, and the judgment is not pleadable in bar of an action brought in England for the same cause. And the same doctrine prevails in America in regard to judgments rendered abroad (as distinguished from such as are rendered in a sister state); there is no merger.[137] "It is held in these cases," says the supreme court of Vermont, "that a foreign judgment when shown in evidence upon a matter within the jurisdiction of the court, and in which the court

[134] Westlake, Private Intern. Law, § 295; Scott v. Pilkington, 2 Best & S. 11.

[135] Vanquelin v. Bouard, 15 C. B. N. S. 341, 367.

[136] Bank of Australasia v. Nias, 16 Q. B. 717; Bank of Australasia v. Harding, 9 C. B. 661; Smith v. Nicolls, 5 Bing. N. C. 208; Hall v. Odber, 11 East, 118.

[137] Hays v. Cage, 2 Tex. 501; Wilson v. Tunstall, 6 Tex. 221; Frazier v. Moore, 11 Tex. 755; Turner v. Lambeth, 2 Tex. 365; Wood v. Gamble, 11 Cush. 8, 59 Am. Dec. 135; Lyman v. Browne, 2 Curtis C. C. 559; New York, L. E. & W. R. Co. v. McHenry, 17 Fed. Rep. 414.

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had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action." [138] An exception to the universal acceptance of this rule must be noted in the case of Louisiana, where the code gives the same effect to foreign judgments as to those coming from another state of the Union, with the consequence that the former, equally with the latter, operate as a merger of the original claim.[139] But it will further be observed that a plea of judgment formerly recovered in a foreign court and *payment* of the same by the defendant, will be a good bar to an action brought at home for the same cause.[140] As a necessary complement to these propositions it may be added that the rule is well recognized that it is no ground for staying proceedings in an action, or for a plea in bar, that proceedings are *pending* between the same parties for the same cause of action in the courts of a foreign country.[141] This last rule is also established in the French law and in the jurisprudence of Canada.[142]

§ 848. Form of Action on Foreign Judgment.

According to the rule now prevailing in England and the United States, an action upon a foreign judgment may be brought either in debt or *assumpsit*, the liability of the defendant arising upon the implied contract to pay the amount of the foreign judgment.[143] In

[138] Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665.

[139] Jones v. Jamison, 15 La. Ann. 85.

[140] Barber v. Lamb, 8 C. B. N. S. 95.

[141] Cox v. Mitchell, 7 C. B. N. S. 55; Scott v. Seymour, 1 Hurl. & C. 219; Bayley v. Edwards, 3 Swanst. 703.

[142] Russel v. Field, Stuart's Can. Rep. 558.

[143] Grant v. Easton, L. R. 13 Q. B. Div. 302; Mellin v. Horlick, 31 Fed. Rep. 865.

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Canada, however, the courts hold that *assumpsit* only, and not debt, is the proper form for an action on a judgment recovered abroad.[144]

§ 849. Pleading and Exhibiting Foreign Judgment.

In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal.[145] Sometimes it will happen that not all these means are available, and in that case the courts will be satisfied with the nearest approach that the circumstances permit to this typical method of proving the judgment. But if the foreign court possesses a seal, it must be used for the purpose of authenticating its judgment, even although it is so much worn as no longer to make a legible impression.[146] If the seal is used, there is no need of proof that the exemplification was compared with the original papers filed or the roll.[147] In an action in Canada, on a judgment recovered in the *tenth* judicial district of California, the plaintiff put in evidence an exemplification under a seal which purported by the impress to be that of the *fourteenth* district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court. It was held that the proof was insufficient.[148] Where a foreign judgment was authenticated by the signature of a person describing himself as "Secretary of State of Foreign Affairs," with the addition of a private seal, it was held not admissible.[149] But on the other hand, a copy of a judgment rendered in a Cuban court was received in evidence in

[144] McFarlane v Derbishire, 8 U. C. Q. B. 12.

[145] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Capling v. Herman, 17 Mich. 524; 1 Greenl. Ev. §§ 514, 515.

[146] Cavan v. Stewart, 1 Stark. 525.

[147] Warrener v. Kingsmill, 7 U. C. Q. B. 409.

[148] Junkin v. Davis, 23 U. C. Q. B. 369.

[149] Church v. Hubbart, 2 Cranch, 187.

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New York, upon proof that it was signed by the clerk of the court, that the court possessed no seal, that the seal used was that of the Royal College of Notaries, that the clerk's signature validated all the proceedings of the court, and that this was the usual method of authenticating records intended to be sent abroad.[150] In Vermont, at an early day, it was said that "exemplifications of the record of judicial proceedings in a foreign country must be considered *prima facie* as correct; if incorrect, the *onus probandi* lies on the opposite party."[151] A plea of *nul tiel record* to an action on a foreign judgment is bad. "The declaration would have been good without the traversed allegation ['as appears by the record'], and the plea does not amount to a denial of the judgment having been recovered, but only to a denial of the existence of such evidence of it."[152] Where an action is brought upon a foreign judgment, parol evidence is competent to show what matters were submitted to and passed upon by the court in ordering such judgment.[153]

§ 850. Plea of Statute of Limitations.

It is well settled that the statute of limitations of the country of the forum may be pleaded in bar of an action on a foreign judgment.[154] This follows necessarily from the doctrine that such judgments are not records. For if they possess no higher character than simple contract debts, it is obvious that they must be barred by the same period of limitations, which is that of the *lex fori*.

§ 851. Judgments of Foreign Courts of Inferior Jurisdiction.

The question of the effect to be given to a judgment of a foreign court of inferior jurisdiction arose in the case of *Forbes* v. *Scannell*,[155]

[150] Packard v. Hill, 7 Cow. 434.

[151] Woodbrige v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.

[152] Philpott v. Adams, 7 H. & N. 888.

[153] Schulenburg v. Merchants' Bank, 48 Mich. 102, 11 N. W. Rep. 826.

[154] Don v. Lippman, 5 Cl. & Fin. 1; McElmoyle v. Cohen, 13 Pet. 312; North v. Fisher, 6 Ontario, 206; Dupleix v. De Roven, 2 Vern. 540; Angell on Lim. § 83.

[155] 13 Cal. 242.

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where it concerned an adjudication made by a United States consul in China. The decision was held to be not conclusive. "We are not aware," said the court, "that the rule which accords the force of definitive exposition of the local law to the decisions and judgments of the courts of the local jurisdiction has ever extended so far as to give that sanction to the judgment of a subordinate tribunal of the municipality or territory. The decision of the consul is doubtless entitled to some weight; but we are not prepared to hold it as conclusive of the general question adjudicated by him."

§ 852. Foreign Garnishment Proceedings.

The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in any action in another country.[156]

[156] Gould v. Webb, 4 El. & B. 933; Le-Chevelier v. Lynch, 1 Dougl. 170; Messier v. Amery, 1 Yeates, 533, 1 Am. Dec. 316; Barrow v. West, 23 Pick. 270; Holmes v. Remsen, 20 Johns. 229, 11 Am. Dec. 269.

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CHAPTER XXII.

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PART I. CONCLUSIVENESS AND EFFECT.

§ 853. Before the Constitution.

For a long period in the history of our jurisprudence, judgments rendered in one of the states, when sought to be established or enforced in the courts of another state, were received with a much higher measure of respect, and were allowed a much greater degree of force and conclusiveness, than was accorded to judgments coming from foreign countries. Recent decisions, by elevating the rank of foreign judgments, in respect to their conclusive operation and their protection against collateral impeachment, have strongly tended to do away with this distinction. But it cannot yet be said to be entirely obliterated. And it was due—and so far as it still subsists, it is still due—solely to the provisions of the Federal Constitution and the legislation of congress, regulating the interstate effect of public acts, records, and judicial proceedings. Without the aid thus derived from constitutional and statutory provisions, the judgments and decrees of each state would be regarded as foreign judgments in the courts of every other state, and their effect would have to be determined by the principles of international law, by the preponderance of judicial opinion, or by such other considerations as are influential in fixing the *status* of judicial records brought from foreign

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lands.[1] "Prior to the adoption of the confederation and the constitution of the United States, the several states were considered entirely independent of each other, and the judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government; and whatever changes now exist in this respect must be sought for in the constitution and laws of the United States."[2] During the colonial period, the proper effect to be given to foreign judgments was so far from being settled that the English courts were pronouncing the most diverse and inconsistent opinions on the subject. The necessity of obviating this confusion in respect to the judgments of the sister states, and the wisdom and policy of giving them a higher standing than had yet been reached by purely foreign judgments, were early foreseen. "When our revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and persons that the former would no longer be foreign to each other in the sense that they had been, as dependent provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: 'Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.'"[3] Under this clause, in 1784, the court in South Carolina refused to inquire into the merits of a sentence of an admiralty court in North Carolina, in a prize case, both because it was an international court acting *in rem*, and because

[1] Buckner v. Finley, 2 Pet. 586; Thurber v. Blackbourne, 1 N. H. 242; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281; Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665; Smith v. Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 426; Dorsey v. Maury, 10 Sm. & Mar. 298; Pennywit v. Foote, 27 Ohio St. 600, 615, 22 Am. Rep. 340; Bonesteel v. Todd, 9 Mich. 371, 376, 80 Am. Dec. 90.

[2] Warren Manuf. Co. v. Ætna Ins. Co., 2 Paine C. C. 501, 507, per Thompson, J.

[3] McElmoyle v. Cohen, 13 Pet. 312, 325, per Wayne, J.

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the articles of confederation required that due faith and credit should be given to all its proceedings.[4]

§ 854. Constitutional and Statutory Provisions.

When the present constitution was framed, the language of the corresponding clause in the articles of confederation was adopted with some modifications. It is provided that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[5] In pursuance of the authority thus given, congress soon passed an act couched in the following terms: "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[6] A subsequent statute extended the provisions of this act to the "territories of the United States and the countries subject to the jurisdiction of the United States."[7]

§ 855. Early Cases on the Subject.

Soon after the promulgation of these provisions of the constitution and laws of the United States, there arose a great diversity of judicial opinion as to their proper construction. The conflicting views on the subject are thus stated by Shaw, C. J.:[8] "By some it was contended that congress did intend to declare, not only what should be deemed

[4] Jenkins v. Putnam, 1 Bay, 8, 1 Am. Dec. 594.

[5] Const. U. S., Art. 4, § 1.

[6] Act of May 26, 1790, 1 Stat. at L. 122, U. S. Rev. St. § 905.

[7] Act of March 27, 1804, 2 Stat. at L. 298.

[8] In Gleason v. Dodd, 4 Met. 333.

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conclusive proof of records of the judgments of one state in the courts of another, but their legal effect. They considered that the effect of this law was to put them in all respects on the same footing as domestic judgments, so that to an action of debt on such a judgment no plea would be admissible but that which denied the existence of the judgment, and nothing was put in issue but that fact, and that to be tried by the court by an inspection of the transcript of the record, authenticated in the manner required by the act of congress.[9] By others it was held that the act did nothing more than declare that the record of a judgment of another state, thus authenticated, should be conclusive evidence that such a judgment was passed by a court of such state; of the parties between whom, the nature of the action, and the other facts expressly stated in it; leaving the effect of such judgment to be ascertained by the rules of the common law. At common law, it seemed to be well understood that the legal effect of such foreign judgment was this: that it was *prima facie* evidence of debt, for which an action of debt, or *indebitatus assumpsit* as upon an implied promise, would lie; but like other *prima facie* evidence it might be controlled by proof showing that the judgment was irregular or erroneous, that the defendant had no opportunity to defend, or was not summoned, or that he had good ground of defense, or in short, by proof tending to outweigh the evidence arising from such judgment." One of the earliest cases holding the latter view was that of *Bartlett* v. *Knight*,[10] wherein Sewell, J., was of opinion that the constitutional and statutory provisions were confined to the sole purpose of directing the *mode* of authenticating records from one state to another, but did not prescribe their effect when so authenticated; while Sedgwick, J., thought that the statute meant that "they shall be incontrovertible and conclusive evidence of their own existence and of all the facts expressed in them. The act, however, stops short of declaring what shall be their effect." Similar rulings were made at an early day in the state of New York.[11] In Tennessee, it

[9] Citing Noble v. Gold, 1 Mass. 410, note. See also Armstrong v. Carson, 2 Dall. 302; Rogers v. Coleman, Hardin, 418, 8 Am. Dec. 783.

[10] 1 Mass. 400.

[11] Hitchcock v. Aicken, 1 Caines, 460. In Taylor v. Bryden, 8 Johns. 173, Kent, C. J., while holding to the doctrine of

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was said that a judgment was only *prima facie* evidence in another state, but if it appeared that it was rendered on a fair and full trial, a court of equity in the latter state would not disturb it.[12] In an early case in South Carolina it was held that *nul tiel record* could not be pleaded to an action of debt on a judgment recovered in another state; that the provision in the constitution had not invested congress with authority to change the character or enlarge the effect of the judgment, which was still to be regarded as a foreign judgment; and therefore the proper plea was *nil debet*.[13]

§ 856. Mills v. Duryee, and Later Decisions.

It was not long before the federal supreme court was called upon to put an authoritative construction upon the constitutional and statutory provisions governing the subject. In 1813 was decided the celebrated case of *Mills* v. *Duryee*.[14] The action being brought in a court of the District of Columbia, upon a judgment recovered in New York, the defendant pleaded *nil debet*, to which plea, it was held, a demurrer was rightly sustained. It was said by Mr. Justice Story, in delivering the opinion of the court: "It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it." With particular reference to the matter of the plea, the learned judge remarked: "But it is said that, admitting that the judgment is conclusive, still *nil debet* was a good

the case just cited, ruled that a judgment obtained in another state was at least *prima facie* evidence of a just debt, and that it was incumbent on the defendant to impeach the justice of it, or to show by positive proof that it was irregularly and unduly obtained.

[12] Winchester v. Evans, Cooke, 420.

[13] Hammon v. Smith, 1 Brevard, 110 (1802).

[14] 7 Cranch, 481.

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plea, and *nul tiel record* could not be pleaded because the record was of another state, and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when congress gave the effect of a record to the judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, however, is undoubted that an exemplification would in such case be decisive. The original need not be produced." In conclusion he observed: "Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declare a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." [15] The rule settled by this decision was not immediately accepted by all the state courts. Three years after its promulgation we find the supreme court of New York still adhering to its former doctrine, that "a judgment in another state is to be considered here as a foreign judgment in every respect, except in the mode of proving it, which is regulated by a statute of the United States. It is only *prima facie* evidence of a debt, and may be impeached, when attempted to be enforced here, as

[15] The doctrine of this case was soon afterwards re-affirmed in Hampton v. McConnel, 3 Wheat. 234.

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unjust, or unfair, or irregular."[16] And from the very beginning there was much doubt as to the *extent* of the rule laid down in *Mills* v. *Duryee*. In that same case Mr. Justice Johnson had expressed a dissenting opinion, fearing lest the acceptance of *nul tiel record* as a plea might at some future time be understood to preclude all inquiry into the jurisdiction of the court rendering the judgment. And indeed it was obvious that if that decision meant that *no* plea would be admissible under any circumstances, except a denial of the record, it would shut off any investigation of the validity of the judgment as dependent upon jurisdiction. It was in this way that some of the courts at first understood the decision.[17] But it was soon pointed out that the statements in *Mills* v. *Duryee* meant no more than that *nul tiel record* was the only proper form of the *general issue* in an action on a judgment of another state; that it did not go to the length of excluding such special pleas as a denial of the jurisdiction; and that, in point of fact, the question of jurisdiction was not raised in that case and not pertinent to the decision.[18] And it is on this basis, as we shall presently see, that the question has been finally settled. The leading case is authority for the proposition that a judgment of a sister state is conclusive on the merits; that, for purposes of pleading and evidence, it is entitled to the full dignity of a record; and that the defendant is not at liberty, when sued on the judgment, to deny the indebtedness which it ascertains and establishes, or to impeach its justice or deny its obligation. But beyond that the decision does not go. Jurisdictional inquiries are still permissible.

§ 857. Judgment Conclusive on the Merits.

It is now held by all the state courts, following the lead of the federal decisions, that a judgment rendered by a court of competent authority, having jurisdiction of the parties and subject-matter, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the mer-

[16] Pawling v. Bird, 13 Johns. 192.

[17] Commonwealth v. Green, 17 Mass. 515, 546.

[18] Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151.

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its cannot be inquired into.[19] Whatever might have been the disposition of the state courts, if left to settle this question for themselves, they have uniformly considered that they were bound to adopt the

[19] Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnel, 3 Wheat. 234; McElmoyle v. Cohen, 13 Pet. 312; Christmas v. Russell, 5 Wall. 290; Logansport Gas Co. v. Knowles, 2 Dill. 421. *Maine.* Cleaves v. Lord, 43 Me. 290; Sweet v. Brackley, 53 Me. 346. *New Hampshire.* Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281. *Vermont.* Hoxie v. Wright, 2 Vt. 269; Blodget v. Jordan, 6 Vt. 580. *Massachusetts.* Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Commonwealth v. Green, 17 Mass. 515; Brainard v. Fowler, 119 Mass. 265. *Connecticut.* Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683. *Rhode Island.* Rathbone v. Terry, 1 R. I. 73. *New York.* Rocco v. Hackett, 2 Bosw. 579; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Black v. Black, 4 Bradf. Surr. 174; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Wheeler v. Raymond, 8 Cow. 311. *Pennsylvania.* Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. 240; Baxter v. Linah, 16 Pa. St. 241; Rogers v. Burns, 27 Pa. St. 525; Wetherill v. Stillman, 65 Pa. St. 105. *New Jersey.* Chew v. Brumagim, 21 N. J. Eq. 520; Robert v. Hodges, 16 N. J. Eq. 299. *Delaware.* Pritchett v. Clark, 5 Harringt. 63. *Maryland.* Wernwag v. Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Duvall v. Fearson, 18 Md. 502; Zimmerman v. Helser, 32 Md. 274. *Virginia.* De Ende v. Wilkinson, 2 Pat. & H. 663. *West Virginia.* Stewart v. Stewart, 27 W. Va. 167. *North Carolina.* Walton v. Sugg, Phill. 98, 93 Am. Dec. 580; McLure v. Benceni, 2 Ired. Eq. 513, 40 Am. Dec. 437. *South Carolina.* Napier v. Gidiere, 1 Spears Eq. 215, 40 Am. Dec. 613. *Georgia.* McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Powell v. Davis, 60 Ga. 70. *Florida.* Braswell v. Downs, 11 Fla. 62. *Alabama.* Green v. Foley, 2 Stew. & P. 441; Gunn v. Howell, 27 Ala. 663, 42 Am. Dec. 785; Crawford v. Simonton, 7 Port. 110. *Mississippi.* Dorsey v. Maury, 10 Sm. & Mar. 298. *Louisiana.* West Feliciana R. Co. v. Thornton, 12 La. Ann. 736, 48 Am. Dec. 778. *Texas.* Cook v. Thornhill, 13 Tex. 293, 65 Am. Dec. 68. *Kentucky.* Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Delano v. Jopling, 1 Litt. 417; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143; Rankin v. Barnes, 5 Bush, 20. *Tennessee.* Topp v. Bank, 2 Swan, 184. *Kansas.* French v. Pease, 10 Kans. 51. *Arkansas.* Nunn v. Sturges, 22 Ark. 389. *Ohio.* Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615; Goodrich v. Jenkins, 6 Ohio, 43; Pelton v. Platner, 13 Ohio, 209, 41 Am. Dec. 197; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621. *Indiana.* Anderson v. Fry, 6 Ind. 76. *Illinois.* Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Smith v. Smith, 17 Ill. 482; Belton v. Fisher, 44 Ill. 32; Zepp v. Hager, 70 Ill. 223. *Iowa.* State v. Helmer, 21 Iowa, 370. *Missouri.* Destrehan v. Scudder, 11 Mo. 484; Barney v. White, 46 Mo. 137. *Michigan.* Wilcox v. Kassick, 2 Mich. 165. *Wisconsin.* Kellam v. Toms, 38 Wis. 592. *Minnesota.* Cone v. Hooper, 18 Minn. 351, (Gil. 476;) *California.* Weir v. Vail, 65 Cal. 466, 4 Pac. Rep. 422. *Oregon.* Swift v. Stark, 2 Oreg. 97, 88 Am. Dec. 463. *Nevada.* Phelps v. Duffy, 11 Nev. 80. *Nebraska.* Eaton v. Hasty, 6 Nebr. 419, 29 Am. Rep. 365; Creighton v. Murphy, 8 Nebr. 349, 1 N. W. Rep. 133.

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conclusions of the supreme federal tribunal upon the subject. As observed by the court in Massachusetts: "Upon all questions which involve the construction of the constitution of the United States, the supreme court of the United States is the only rightful ultimate tribunal, and its decisions on those questions cannot be withstood or disregarded by state courts, without a dereliction of duty and a violation of the cardinal principles of the federal government."[20] Accordingly, the courts of one state, when called upon to recognize and enforce a judgment from another state, must "admit not only that there is a record, and that it is what it purports to be, but also that it is just, that the money awarded to the plaintiff is legally due, and that he has a right to recover it without a re-investigation of his claim."[21]

§ 858. Chancery Decrees Equally Conclusive.

The rule that a judgment of a competent court in a sister state is conclusive on the merits extends equally to decrees in chancery.[22] Thus, where a court of equity of another state, having jurisdiction of the parties, has made a decree declaring a certain judgment to be void for fraud and enjoining the execution of it, such decree is binding and conclusive on the parties in every other state; not indeed as being an injunction (for in that aspect it could have no extra-territorial force, nor affect courts out of the jurisdiction), but as being the regular judgment of a court of a sister state, and therefore entitled to full faith and credit in all courts.[23]

§ 859. "Full Faith and Credit" to be Given.

The constitution requires that "full faith and credit" shall be given in each state to the records and judicial proceedings of every other state. Under this language, the *status* of a judgment rendered in one state and carried into another is peculiar. It is not in all

[20] Brigham v. Henderson, 1 Cush. 430, 48 Am. Dec. 610.

[21] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

[22] Nations v. Johnson, 24 How. 195.

[23] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152.

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respects a foreign judgment. For, as a matter of pleading and evidence, it is regarded as a record and conclusive. But neither is it in all respects a domestic judgment. For it is not a proper foundation for final process in the latter state, and besides, it may there be impeached for want of jurisdiction.[24] The true doctrine is, that such a judgment is to receive in all courts the same faith, credit, and respect that is accorded to it *at home*. It was recently held by the supreme court of New Hampshire that a judgment rendered in another state, and valid by the laws of such state, is not valid in New Hampshire unless it would have been valid if rendered in the last-named state and subject to the laws thereof. In other words, that the validity of a judgment from a sister state is to be tested by the laws of the state where it is put in suit, and tried by the same rules that would apply to a domestic judgment.[25] But, obviously, this is exactly the wrong view. The judgment, if valid at home, is valid everywhere else. It is to have the same force and validity which it has in the state where rendered, not the degree of validity which it would have under the laws of the foreign state. And in fact the decision referred to was reversed by the United States supreme court, in an opinion which holds the views last expressed.[26] The true note was struck in another recent case, where it was said that a judgment rendered and entered in Pennsylvania, in accordance with the laws of that state, and valid there, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form, and under like circumstances, in Kansas, would be utterly void.[27] On this principle it is held that, in a suit on a judgment recovered in a sister state, the defendant cannot assail its foundation by showing that the cause of action set forth in the complaint in the original action was such as could not be sued on in the courts of the state where the judgment is in suit.[28] And so "if it is proved by the law, practice, and usage of the state from whence a transcript of a foreign judgment comes, it is entitled to the faith and credit of a judg-

[24] Christmas v. Russell, 5 Wall. 290; Haggerty v. Amory, 7 Allen, 458.

[25] Wilbur v. Abbot, 60 N. H. 40.

[26] Renaud v. Abbot, 116 U. S. 277, 6 Sup. Ct. Rep. 1194.

[27] Ritter v. Hoffman, 35 Kans. 215, 10 Pac. Rep. 576.

[28] Phillips v. Godfrey, 7 Bosw. 150.

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ment, this court will give it the same force and effect, although it is insufficient to constitute a judgment under our laws and practice."[29] Citizens of one state who authorize a suit to be brought in another state, are personally liable for the costs adjudged against them upon their failure in such suit, although they may never have been in that state, and a judgment therefor may be enforced against them in the state of their residence.[30] A judgment rendered in one state, when sought to be enforced in another, is entitled to conclusive effect, not only against parties, but also against purchasers who bought pending the suit in which such judgment was pronounced, to the same extent as in the first state.[31] On the other hand, a court of equity will enjoin the collection of a judgment rendered by the courts of another state, in a proper case, as well as where rendered by the domestic courts.[32] The decision of a court of one state, in the interpretation and administration of its own laws in respect to property subject thereto and within its jurisdiction, is binding upon the courts of another state.[33] But on the other hand, the constitutional provision now under consideration "does not require that judgments in one state shall be followed by the courts of other states as matter of authority in other similar cases. The constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one state to follow those of another upon any question, whether upon the construction of local statutes or otherwise. There may, it is true, be cases in which a state law or decision has entered into and become a part of a contract in such a way as that a change of the law or a reversal of the decision would impair its obligation, but in those cases the federal question would arise under a different provision of the constitution. The duty of the courts of one state to follow those of another, upon questions arising upon the construction of statutes of the latter, is a duty resting alone upon *comity*, and not one imposed by the federal constitution."[34]

[29] Clemmer v. Cooper, 24 Iowa, 185, 95 Am. Dec. 720.

[30] Walton v. Sugg, Phill. (N. Car.) 93, 96 Am. Dec. 580.

[31] Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143.

[32] Stanton v. Embry, 46 Conn. 65.

[33] Haywood v. Daves, 81 N. Car. 8.

[34] Wiggins' Ferry Co. v. Chicago & A.

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§ 860. Validity and Effect how Ascertained.

We have seen that the constitutional clause under discussion means that the judgment must have the same force and effect, and its validity be tested by the same rules, in a sister state as in the state where rendered. But this force and effect depends upon the laws of the state rendering the judgment. Consequently, in order to give the judgment its due effect, the foreign court must be cognizant of those laws. In case of doubt, if there is no evidence of the law or practice of such state, how shall the question be resolved? According to one line of cases, the courts of one state cannot take judicial notice of the laws of another state; they must be proved as facts; and the rule is, that in the absence of all proof, the court will presume that the laws of a sister state are the same as its own. Hence, in the absence of proof, the laws of the latter state will be applied to the judgment for the purpose of determining its validity and effect, on the assumption that thus it will receive the same degree of efficacy which would be accorded to it at home.[35] But according to another line of authorities, in a case arising under this clause of the constitution, the domestic tribunal will take judicial notice of the local laws of the state from which the record comes; for the very sensible reason that their proceedings, in such a case, are subject to review in the supreme court of the United States, and since in that court the states are not regarded as foreign, and their individual laws are officially noticed, the same rule should obtain, under these circumstances, in the state courts. As remarked by a learned judge: "It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort we should take notice of the local laws of a sister state in the same manner the supreme court of the United States would do on a writ of error to our judg-

R. Co., 11 Fed. Rep. 881, per McCrary, C. J.

[35] Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Davis v. Headley, 22 N. J. Eq. 115; Thomas v. Pendleton (S. Dak.), 46 N. W. Rep. 180; Pelton v. Platner, 13 Ohio, 209.

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ment."[36] A third view has sometimes been advanced, viz., that a record from another state, in the absence of any showing as to the local law, should be tested by the rules and principles of the common law.[37] But this has not been supported by any considerable portion of the authorities. A case in North Carolina goes so far as to hold that it is not necessary to show by any extrinsic evidence that the judgment was warranted by the laws of the state in which it was pronounced, for the judgment itself is the highest evidence of that fact.[38]

§ 861. No Greater Effect to be Given than the Judgment has at Home.

We have seen that a judgment from a sister state is to receive the same faith and credit that it has at home. And consequently, if valid by the laws of the state where it was rendered, it must be accounted valid in the state where it is sought to be enforced, although a judgment pronounced in the latter state in the same form and manner, and under the same circumstances, might there be held void.[39] And it must have the same force and effect which it bears at home, notwithstanding that that be greater than would be accorded to a similar judgment rendered by the domestic courts. But on the other hand, "it is well settled that no *greater* effect is to be given to it than it would have in the state where it was rendered. It has no higher dignity in any other state than in the one where it was pronounced; and hence if, in the courts of the state where the judgment was rendered, it is inconclusive, or if it is inquirable into there during a particular period or on certain conditions, it will be open to investigation, to the same extent, everywhere else. So if a judgment operates in the state where it was rendered only *in rem*, it will not elsewhere be enforced *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment, in the state where it is

[36] State of Ohio v. Hinchman, 27 Pa. St. 479; Paine v. Ins. Co., 11 R. I. 411; Rae v. Hulbert, 17 Ill. 572; Butcher v. Bank, 2 Kans. 70; Carpenter v. Dexter, 8 Wall. 513.

[37] Hewson v. Wall, 20 Ala. 298.

[38] Davidson v. Sharpe, 6 Ired. L. 14.

[39] Ritter v. Hoffman, 35 Kans. 215, 10 Pac. Rep. 576.

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recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other state where it is endeavored to be enforced. It derives its obligation only from the laws of the state in which it is pronounced."[40]

§ 862. Judgment not Executory in Foreign State.

The clause of the constitution which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," applies only to such records as matters of pleading and evidence; it does not make them in all respects equal to domestic judgments, nor render them executory in another state.[41] Judgments obtained in one state are in another state only contract debts, and they do not *per se* authorize the issue of final process or the exercise of auxiliary jurisdiction; they do not have the force and operation of domestic judgments except for purposes of evidence.[42] They have no extra-territorial force as judgments, for no court can enforce its process or orders beyond the limits of the state which ordained and established it.[43] Hence the holder of a judgment, desiring to enforce it in another state, must sue upon it in the latter state, as the evidence of a debt, and recover a judgment upon it, which last judgment will be a judgment of the latter state, and as such will be enforced and executed there.[44] A judgment obtained in one state cannot be the foundation for a creditors' bill in another state.[45] Where certain creditors of a corporation organized under the laws of Missouri, having recovered judgments against it in that state, brought a suit in equity in the United States circuit court for the southern district of New York, against one S., to enforce

[40] Wood v. Watkinson, 17 Conn. 500, 505, 44 Am. Dec. 562. See also Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254.

[41] Claflin v. McDermott, 12 Fed. Rep. 875; McElmoyle v. Cohen, 13 Pet. 312; Joice v. Scales, 18 Ga. 725; Story, Confl. of L. § 609.

[42] Walser v. Seligman, 13 Fed. Rep. 415.

[43] Elizabethtown Savings Inst. v. Gerber, 34 N. J. Eq. 130.

[44] Claflin v. McDermott, 12 Fed. Rep. 875; Turley v. Dreyfus, 35 La. Ann. 510; Weaver v. Cressman, 21 Nebr. 675, 33 N. W. Rep. 478; Carter v. Bennett, 6 Fla. 214.

[45] Claflin v. McDermott, 12 Fed. Rep. 875.

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his liability as the holder of certain shares of unpaid capital stock of the corporation, it was held that the bill would not lie; for the Missouri judgments did not have the force of domestic judgments, outside that state, except for purposes of evidence, and would not authorize the exercise of auxiliary jurisdiction.[46] In an action on a judgment rendered in another state, on which an execution has there been returned satisfied in part only, the plaintiff can recover no more than the sum for which it was returned unsatisfied, although damages have been recovered against the officer who served it, for seizing and selling thereon property not liable thereto, the avails of which sale were included in the sum for which he returned it satisfied, and although by the law of the state in which the judgment was rendered, the plaintiff might for such cause obtain a new execution on *scire facias*. "For," said the court, "we cannot issue an execution on a judgment of a court of another state or country."[47] But a foreigr judgment is at all events a *debt*, for the recovery of which the creditor is entitled to all the remedies applicable to other debts. Hence it is not necessary to bring an action at law upon such a judgment before instituting a chancery suit to avoid a fraudulent conveyance by the debtor.[48]

§ 863. Rank and Priority.

Judgments of one state, when sought to be enforced in another, "enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments."[49] Consequently, there is nothing in the constitution or laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. And accordingly, in several of the states, such judgments have only the effect and rank of simple contract debts, and they are not put into the preferred class with domestic judgments.[50]

[46] Walser v. Seligman, 13 Fed. Rep. 415.

[47] Arnold v. Roraback, 8 Allen, 429.

[48] Watkins v. Wortman, 19 W. Va. 78.

[49] Story Confl. of L. § 609, citing McElmoyle v. Cohen, 13 Pet. 312.

[50] Harness v. Green, 20 Mo. 316; Brengle v. McClellan, 7 Gill & J. 434. See

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§ 864. Original Cause of Action Merged.

As between the several states of the American Union (contrary to the rule in regard to judgments from foreign countries), it is well settled that the recovery of a judgment in one state, in a court having jurisdiction, merges the original cause of action, so that it cannot thereafter form the basis of a fresh suit in another state.[51] And so, where the plaintiff, after commencing an action in one state, sues the defendant on the same claim in another state and obtains a valid judgment against him, that judgment will constitute a bar to the further prosecution of the action first begun. For, as the foreign judgment is entitled to the same credit as a domestic one, the plaintiff would have two judgments against the same defendant for the same cause of action.[52] But if the judgment is not ex-territorially valid for want of jurisdiction,—as where it has been obtained against a non-resident without service upon him or appearance,—such judgment, if unsatisfied, will constitute no bar to a subsequent action against him in the state of his domicile on the original demand.[53] But a judgment thus recovered in another state and partially satisfied will bar a recovery upon the original demand to the extent of the sum paid in such partial satisfaction, but no further.[54] And where joint debtors reside in different states, they may be sued separately, in the respective states having jurisdiction of their respective persons or property, and a judgment in such case against one in one state, is no bar to a recovery against the others in another state.[55] A report of a commissioner of insolvency in one state, in favor of an adminis-

also Cameron v. Wurtz, 4 McCord, 278.

[51] Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Bank of United States v. Merchants' Bank, 7 Gill, 415; McGilvray v. Avery, 30 Vt. 538; Green v. Starr, 52 Vt. 426; North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Child v. Eureka Powder Works, 45 N. H. 547; Baxley v. Linah, 16 Pa. St. 241, 55 Am. Dec. 494; Cleaves v. Lord, 43 Me. 290. Hogg v. Charlton, 25 Pa. St. 200; Barnes v. Gibbs, 31 N. J. Law, 317, 86 Am. Dec. 210. Compare Beall v. Taylor, 2 Gratt. 532, 44 Am. Dec. 398.

[52] North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Child v. Eureka Powder Works, 45 N. H. 547; Rogers v. Odell, 39 N. H. 452; Whiting v. Burger, 78 Me. 287, 4 Atl. Rep. 694.

[53] Whittier v. Wendell, 7 N. H. 257; Fitzsimmons v. Marks, 66 Barb. 333.

[54] Rangely v. Webster, 11 N. H. 299.

[55] Brown v. Birdsall, 29 Barb. 549.

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trator there, accepted and recorded by the probate court to which it is returned, and acquiesced in by the parties, is such a judgment that the same person as administrator in another state may plead it in bar to a suit by the same claimant upon the same cause of action.[56] Where a suit is brought in one state upon the same cause of action on which judgment has been recovered in another state, and such judgment is pleaded in bar to a recovery in the second suit, it is no sufficient answer to such plea to allege that a motion was filed by the defendant in the court in which the judgment was rendered to set the same aside, on the ground that he was not indebted to the plaintiff and that he had not been served with process, and that, for the purpose of pleading the said judgment in bar in the second suit, the defendant fraudulently consented to have the said motion overruled.[57] It has been held that where a judgment has been recovered in a court of competent jurisdiction in one state, upon a judgment previously recovered in another state, the latter judgment is merged in the former, all of its liens or priorities upon lands in the state of its rendition are abandoned, and the owner of such lands may enjoin a sale of the same upon an execution issued upon the original judgment.[58] But this view has been denied.[59] And indeed, as pointed out by Mr. Bigelow,[60] "it may be inconvenient that two judgments should subsist in the same state against the same person on the same demand; but no such inconvenience can exist in the case of judgments rendered in different states, and there is no sufficient reason for the application of the purely technical doctrine of merger, subversive of substantial justice as it would be in such cases."

§ 865. Lis Pendens in Another State no Bar.

It is well settled, upon the authorities, that the pendency of a suit in one state cannot be pleaded in bar or abatement of a second action in another state between the same parties and for the same cause of

[56] Lomas v. Hilliard, 60 N. H. 148.
[57] Harryman v. Roberts, 52 Md. 64.
[58] Gould v. Hayden, 63 Ind. 443.
[59] Weeks v. Pearson, 5 N. H. 324.
[60] Note to Story on Confl. of Laws (8th edn.), § 599a.

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action; nothing but a definitive judgment on the merits, merging the demand, can produce that result.[61] "The pendency of a prior suit in a foreign country cannot be pleaded in abatement of a suit for the same cause here, and it has been held that the states of the American Union stand in the relation of foreign states as regards this particular matter."[62] And *a fortiori* it is clear that the commencement of another suit for the same cause of action in a court of another state, since the last continuance, cannot be pleaded in abatement of the original suit. "A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse of the proposition is, in personal actions, never true."[63] The general rule, however, according to Lowell, J., "is modified by courts of equity and admiralty, who will require a plaintiff who has a suit pending elsewhere for the same cause, and with an equally advantageous remedy, to elect which he will prosecute." "I am much inclined to think," says the same learned judge, "that courts of law will hereafter hold that they may attain the same end through their power of postponing actions and suspending judgments."[64]

It has been broadly stated that the pendency of a suit in a state court does not generally prevent even the same suitor from seeking a remedy in a federal court.[65] And indeed both reason and authority support the view that the pendency of an action in a federal circuit court for a district *outside the state* in whose courts another action for the same cause is brought, between the same parties, cannot be pleaded in abatement of such second suit.[66] But on the other hand, it seems that such a plea is good if the federal court, having jurisdiction of

[61] White v. Whitman, 1 Curtis, 494; McGilvray v. Avery, 30 Vt. 538; Goodall v. Marshall, 11 N. H. 99, 35 Am. Dec. 472; Newell v. Newton, 10 Pick. 470; Hatch v. Spoffard, 22 Conn. 485, 58 Am. Dec. 433; Cook v. Litchfield, 5 Sandf. 342; Bowne v. Joy, 9 Johns. 221; Walsh v. Durkin, 12 Johns. 99; Smith v. Lathrop, 44 Pa. St. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 484; Cole v. Flitcraft, 47 Md. 312; Drake v. Brander, 8 Tex. 352; Salmon v. Wootton, 9 Dana, 422; Grider v. Apperson, 32 Ark. 332; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Wilcox v. Kassick, 2 Mich. 165. Compare Earl v. Raymond, 4 McLean, 233.

[62] Lowry v. Hall, 2 Watts & S. 129, 38 Am. Dec. 495.

[63] Renner v. Marshall, 1 Wheat. 215.

[64] Lynch v. Hartford Fire Ins. Co., 17 Fed. Rep. 627.

[65] Hurst v. Everett, 21 Fed. Rep. 218.

[66] Walsh v. Durkin, 12 Johns. 99; Cook v. Litchfield, 5 Sandf. 330. And see White v. Whitman, 1 Curtis, 494.

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the case, is in a district within the limits of the state where the second action is commenced.[67]

§ 866. Judgment for Defendant as a Defense.

If a plaintiff is defeated in a trial on the merits in an action in one state, he cannot afterwards maintain a suit on the same cause of action against the same defendant in any other state.[68] Hence where it appears at the trial that in a former suit between the same parties in a sister state, the plaintiffs might have insisted upon their right to recover, on every ground upon which they rely in the second suit, and the same proof offered in the second suit was properly introduced and considered, upon the merits, in the former suit, and judgment rendered for the defendant, such judgment will be a bar to the second suit.[69] Upon the same principle, a decree in equity dismissing the bill, rendered by a competent court having jurisdiction of the parties and subject-matter, is a bar to a subsequent suit in equity in another state, by the same complainant on the same state of facts.[70] A judgment against the plaintiff in one state on a demurrer to a plea of the statute of limitations, is a bar to a suit on the same cause of action in another state.[71] The judgment of a court of one of the states, that the plaintiff's action on a note was barred by the laws of another state, is a bar to an action on the same note in the latter state.[72]

[67] Smith v. Atlantic Ins. Co., 22 N. H. 21.

[68] Sweet v. Brackley, 53 Me. 346. And see Green v. Sanborn, (Mass.) 28 N. E. Rep. 224.

[69] Baker v. Rand, 18 Barb. 152.

[70] Low v. Mussey, 41 Vt. 393; Brown v. Lexington & Danville R. Co., 18 N. J. Eq. 191.

[71] Fulton Iron Works v. Riggin, 14 Mo. App. 321.

[72] Wernse v. McPike (Mo.), 18 S. W. Rep. 809.

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PART II. SISTER STATE JUDGMENT AS A CAUSE OF ACTION.

§ 867. Judgment must be Valid, Subsisting, and Final.

The question of the validity and conclusiveness of judgments of another state most commonly comes before the courts in the case of suits upon such judgments, prosecuted for the purpose of making them executory in the jurisdiction where the defendant or his property is found. We are therefore next to consider judgments of a sister state as a cause of action. And in the first place, a judgment, to be available for this purpose, must be a valid, subsisting, and final adjudication. It must be capable of enforcement, and fit to serve as the foundation for final process, in the state where it was rendered. Hence, for example, in an action on a judgment recovered in another state, if the defendant can show a decree granted to him by the same court which rendered the judgment, on its equity side, enjoining the plaintiff from further proceedings on the judgment, this will bar the plaintiff's action.[73] But the courts of Iowa hold that an action may be maintained in that state upon a judgment rendered by a court of record in another state, although it has become dormant under the laws of the latter state.[74] And in an action on a judgment of a sister state, it is not necessary to allege in the declaration that such judgment is "in full force and virtue;" it is sufficient to aver that the amount claimed is due thereon.[75] Further, the judgment is conclusive upon the parties only when it is a definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in another state.[76] And the rule of conclusiveness does not apply to a suit dismissed for alleged want of prosecution and never tried on its merits, because, under such circumstances, the cause of action remains unlitigated, and there is in fact no judgment.[77] Again, it seems that if the judgment is in the

[73] Palmer v. Palmer, 2 Miles (Pa.), 378.
[74] David v. Porter, 51 Iowa, 254, 1 N. W. Rep. 528.
[75] Blake v. Burley, 9 Iowa, 592.
[76] Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460.
[77] Rankin v. Barnes, 5 Bush, 20.

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alternative, no action can be maintained upon it in another state. Thus, an action of debt will not lie in one state upon a judgment rendered in a replevin suit in another state in the following words: "That the plaintiff return said goods to the defendants, and if he fail to do so, that the defendants recover of the plaintiff and his security in the replevin bond the value of the goods as found by the jury." The reason is, that in debt only a money judgment can be given, but the rendition of such a judgment would deprive the defendants of their alternative of returning the goods.[78] Where, under the laws of a given state, a summary judgment without notice is obtained by the sureties on a bond against their principal, such judgment can have no extra-territorial validity so as to authorize a recovery in another state.[79] When action is brought on a judgment rendered by a court of inferior jurisdiction in another state, which was there appealed and passed upon by the supreme court, the record of the latter court, being the final judgment in the cause, is the proper transcript to be presented.[80]

§ 868. Judgments upon Confession.

There is nothing in the character of a judgment entered upon confession without action to prevent it from being available as a cause of action in another state, equally as well as one rendered upon adversary proceedings. If any kind of a judgment,—for instance, one confessed before the prothonotary or clerk of the court in vacation,—is recognized and enforced as a "judicial proceeding" by the laws of the state from which it comes, it will be entitled to full faith and credit in the other states.[81] The sole question must be, what force and effect are accorded to the judgment in the state of its rendition. And to determine this, the court where the judgment is put in suit should inquire into the laws and practice of the state whence it comes.

[78] Thorner v. Batory, 41 Md. 593, 20 Am. Rep. 74.

[79] Sevier v. Roddie, 51 Mo. 580.

[80] McLaren v. Kehler, 28 La. Ann. 80, 8 Am. Rep. 592.

[81] Sipes v. Whitney, 30 Ohio St. 69; Coleman v. Waters, 18 West Va. 278; Nichols v. Farwell, 24 Nebr. 180, 38 N. W. Rep. 820.

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§ 869. Decrees in Chancery.

It is now the accepted rule in this country that an action may be maintained upon a decree in equity, rendered by a domestic court, which merely adjudges the payment of a definite sum of money.[82] In England the rule is otherwise. But even in that country the courts have always recognized the right to sue upon foreign or colonial decrees, inasmuch as there was no other appropriate method of enforcing their payment.[83] And in the United States we have numerous rulings to the effect that an action of debt will lie in the courts of one state upon a decree for the payment of money rendered by a court of chancery in a sister state.[84] This doctrine, in its application to judgments and decrees rendered in another state, does not appear to be questioned.

§ 870. Sentences imposing Penalties.

The federal constitution does not require a state to enforce the penal laws of any other state. Nor do its provisions on the subject of the interstate validity of judgments relate to sentences in criminal cases. Hence a provision in a state statute, declaring that a person who has been sentenced upon a conviction for a felony shall be incompetent as a witness, does not apply to a conviction had in another state; it has reference only to a conviction in the state enacting the law. It is not required by the constitution that personal disabilities imposed upon a person convicted of crime in one state should follow him and be enforced in other states.[85] Again, where a state statute provides that if any certificate or notice, given by the officers of certain corporations, shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are

[82] See *infra*, § 962.

[83] Sadler v. Robbins, 1 Camp. 253.

[84] Moore v. Adie, 18 Ohio, 430; Post v. Neafie, 8 Caines, 22; Dubois v. Dubois, 6 Cow. 494; Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Howard v. Howard, 15 Mass. 196; McKein v. Odorn, 3 Fairf. 94; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179.

[85] Sims v. Sims, 75 N. Y. 466.

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officers, it is held that the statute imposes a penalty, which cannot be enforced in another state, even though a judgment has first been obtained in the state where the statute exists.[86]

§ 871. Police Regulations of Another State not Enforced.

One state should not be called upon to enforce the local police regulations of another state. For example, statutes prescribing proceedings to enforce the support of bastard children by their fathers are of this character, and cannot be put in operation beyond the jurisdiction of the state by which they are enacted. But still it is held that where the local jurisdiction has attached, and the courts of the state have taken cognizance and rendered judgment for the penalty prescribed by such a statute, such judgment is entitled to full faith and credit in every other state. And the courts of another state will not inquire into the facts on which it was based, nor whether the cause of action would have been enforced by them.[87] On the same principle, the objection, that one state will not enforce the penal laws of another state, is not well taken where the action is upon a judgment rendered in such other state upon a forfeited recognizance taken for a violation of its penal laws.[88]

§ 872. Judgments affecting Land outside the State.

It is a well settled principle that real or immovable property is governed only by the law of its *situs*. Only the courts of the state or country within which it lies can have any jurisdiction over it. It cannot be directly affected by the judgment or decree of any foreign court. Nor are these rules abrogated by the constitutional provisions or the legislation of congress upon the interstate effect of judgments. Those provisions were not designed to extend the power and authority of any state over real property within the territory of

[86] Attrill v. Huntington (Md.), 16 Atl. Rep. 651.

[87] State of Indiana v. Helmer, 21 Iowa, 370. See also Healy v. Root, 11 Pick. 390.

[88] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

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another. Hence a decree of a court in one state for the sale of lands lying in another state is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable.[89] And it is beyond the power of a court to make a decree that a deed given for lands in another state is void, and it has no jurisdiction to decree a conveyance or delivery of possession founded on that decree.[90] Nor can the decree of a foreign court avail to determine the validity of a mortgage on realty situated outside its jurisdiction,[91] or to declare the existence of a lien upon it.[92] So a decree of one state, finding that an exchange of land owned by complainant in that state for land of defendant in another state was obtained by fraud, and directing reconveyances, does not operate, of itself, to divert the title to the land in the latter state from complainant to defendant.[93] And so a decree appointing a receiver for an insolvent corporation, and investing him with title to all its property, has no effect whatever on the title to lands situated in another state, nor does it give the receiver any right to claim such lands as against an attaching creditor.[94] In a case where lands devised were situated in the states of Pennsylvania and Illinois, and the courts of Pennsylvania had construed the will in a suit for the partition of the lands in that state, it was held that the judgment in that suit did not operate as an estoppel in a suit before the Illinois courts for a partition of the Illinois lands, and the Illinois court was not bound by the construction of the will adopted by the courts of Pennsylvania, although the testator was domiciled there.[95]

There is, however, an indirect way in which, in certain cases, the decree of a court of equity may affect the title to land lying in another state. A chancery court in one state, having acquired jurisdiction over the persons of the parties, may enforce a trust, or the specific performance of a contract, in relation to lands situate in another state. And although the decree in such case, or the deed of a mas-

[89] Price v. Johnston, 1 Ohio St. 390.
[90] Davis v. Headley, 22 N. J. Eq. 115.
[91] Pittsburgh & S. L. R. Co.'s Appeal, (Pa.), 4 Atl. Rep. 885.
[92] Short v. Galway, 88 Ky. 501.
[93] Fryer v. Meyers (Tex.), 18 S. W. Rep. 1025.
[94] City Ins. Co. v. Commercial Bank, 68 Ill. 348.
[95] McCartney v. Osburn, 121 Ill. 408, 9 N. E. Rep. 210.

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ter executed in pursuance thereof, cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and it concludes them in respect to all matters and things properly adjudicated and determined by the court. And when the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense, in the courts of the state where the land is situated. And it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud.[96] It is also held that a court of equity, having jurisdiction of the parties, has power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state.[97] On the same principle, if a title or power affecting lands in another state was obtained by duress or fraud, a personal decree may be had, upon proper averments, vacating such title or power. Or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or

[96] Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89.

[97] Remer v. Mackay, 35 Fed. Rep. 86. In this case Judge Blodgett reasoned as follows: "The demurrer to the bill proceeds upon several grounds. The first is that this court has no jurisdiction to adjudicate upon the title to property in another state, and especially has no jurisdiction to set aside or interfere with the judicial proceedings of the courts of a state. This is a proceeding in equity, and equity, as a rule, operates wholly *in personam*. It operates upon the conscience of the defendant by decreeing him to do or refrain from doing some special act; and the general effect and scope of a decree in a court of equity is aimed at the volition or conscience of the defendant. This court, having personal jurisdiction of the defendant in this case, can direct its decree upon him, and compel him to do what is equitable and right under the circumstances and the facts in the case; hence, it seems to me, there can be no doubt there is jurisdiction as between the parties to this controversy. The court is not asked to pass upon the title to this land, but only to say whether the defendant shall be compelled to release and discharge an apparent cloud upon title if the court shall find that he in equity ought to do so. The case made by the bill is not that of two conflicting titles, but is that the defendant has attempted to divest [complainant] of her title by a judicial proceeding which is void."

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in equity, as the nature of the accounts or the character of the relief may require.[98]

§ 873. Form of Action on Sister State Judgment.

A judgment of a court of a sister state is entitled, under the constitution and laws of the United States, to all the dignity of a record, in respect to matters of pleading and evidence. Consequently an action of *assumpsit* will not lie upon such a judgment. The declaration must be in debt, counting upon the judgment as a record.[99] A certain early case advanced the opinion that the action might be either debt or *assumpsit*, but could not be *case*.[100] But it must be perfectly apparent that the only proper form is debt.

§ 874. Requisites of Declaration.

A complaint declaring on a judgment of another state is sufficient in matter of description when it sets forth the court in which the judgment was rendered, the place where the court was held, the names of the parties, the date of the judgment, and the amount recovered.[101] The record of a judgment of a "court of common pleas" of a county, in another state, in the absence of evidence to the contrary, is to be regarded as a judgment of a court of general jurisdiction, and is entitled to every presumption in favor of its validity and regularity.[102] In regard to the question of how much of the record of the judgment sued on must be set out by the plaintiff in his declaration or in evidence, it has been asked: "May not the plaintiff bring his action upon an incomplete record; as, for instance, upon a transcript of the judgment only, or upon so much of the record as to show only that the court had jurisdiction of the person and matter, and that a judgment was rendered? It is much to be doubted whether the defendant could compel him to produce the remainder of

[98] Rose v. Gibson, 71 Ala. 35.

[99] Boston India Rubber Factory v. Hoit, 14 Vt. 92; Morehead v. Grisham, 13 Ark. 431.

[100] Garland v. Tucker, 1 Bibb, 361.

[101] Andrews v. Flack (Ala.), 6 South. Rep. 907; Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458.

[102] Pringle v. Woolworth, 90 N. Y. 502.

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the record or a copy of it. The defendant could plead any of the pleas permitted in such case, and thus perhaps compel the plaintiff to show the rest of the record as a matter of evidence. Thus the defendant could plead *nul tiel record;* or perhaps that the court had no jurisdiction of the person or matter, or that defendant was not served and did not appear; or that the judgment was obtained by fraud; and thus he might render it necessary for the plaintiff to produce other parts and even the whole of the record. The plaintiff can by pleading be compelled to show enough to prove a valid judgment recovered, but we cannot see that he can, by motion, be obliged to produce any particular part of the record." [103]

§ 875. Averring Jurisdiction.

It is a well settled rule that, in bringing suit on a judgment rendered by a court of record in another state, it is not necessary for the plaintiff to aver that the court had jurisdiction either of the person or subject-matter, or to set out the facts conferring jurisdiction; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defense to the action.[104] It is proper, however, and perhaps necessary, to allege that the court rendering the judgment was one of general jurisdiction, or a court of record, or to describe it in such terms that this fact may appear as a necessary inference.

[103] Johnson v. Butler, 2 Iowa, 535, 548.

[104] Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Butcher v. Bank, 2 Kans. 70, 83 Am. Dec. 446; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Reid v. Boyd, 13 Tex. 241, 65 Am. Dec. 61; Dunbar v. Hallowell, 34 Ill. 168; Rae v. Hulbert, 17 Ill. 572; Horton v. Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Graydon v. Justus, 24 La. Ann. 222; Mink v. Shaffer, 124 Pa. St. 280, 16 Atl. Rep. 805; Mills v. Stewart, 12 Ala. 90; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Scott v. Coleman, 5 Litt. 350, 15 Am. Dec. 71; Bank of United States v. Merchants' Bank, 7 Gill, 415; Phelps v. Duffy, 11 Nevad. 80. In the case of Karns v. Kunkle, 2 Minn. 313 (Gil. 268), it was said: "Judgments of sister states are regarded as foreign judgments,—at least so far as the question of jurisdiction is concerned. In regard to such, the rule is well settled that jurisdiction cannot be presumed but must be expressly alleged. It is as necessary a fact to be stated as that a judgment was obtained. Jurisdiction is a probative fact; if denied, it must be proved; but it cannot be proved unless alleged, for the plaintiff can only recover *secundum allegata et probata.*" But the fallacies of this reasoning are easily discoverable, and authority is all against it.

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Upon an averment of this kind, the plaintiff may, for the purposes of his pleading, rely upon the same presumption which would avail him if he were declaring upon the judgment in the same state in which it was rendered, and leave the defendant to plead and prove want of jurisdiction if he can.[105] In a case where the complaint alleged that, at a date named, "at Baltimore, in the state of Maryland, the Baltimore City Court, being a court of general jurisdiction, in an action therein pending between the above-named plaintiff and defendant, by its judgment duly given and made, adjudged that the plaintiff have and recover of the defendant the sum of $10,350," it was held that this was a sufficient averment of the jurisdiction of that court.[106] Again, where the judgment was alleged to have been rendered by the "Boone County circuit court in the state of Indiana," it was held unnecessary to allege in direct terms that such court was a court of general jurisdiction, for judicial notice would be taken of the fact that the circuit courts of a sister state were courts of that character.[107] If, however, it should appear from the record that the judgment was against a non-resident, it seems that an exception must be made to the general rule. Thus where, in a declaration on a judgment rendered by a court in Louisiana, the same being a court of general jurisdiction, it appeared that the defendants were residents of New Hampshire when the judgment was rendered, it was held that the failure of the plaintiff to allege that they were duly served with notice of the suit, or that they appeared and answered thereto, made the declaration demurrable.[108] And it is further to be observed that if the court rendering the judgment was one of limited, inferior, or statutory jurisdiction, or if the proceedings were in derogation of the common law, jurisdiction will not be presumed, but must be affirmatively shown by the face of the record or fully and distinctly pleaded and proved.[109] For even in the case of domestic judgments, as we have already seen, there can be no presumption in favor of the

[105] Tenney v. Townsend, 9 Blatch. 274.

[106] Meredith v. Santa Clara Mining Asso., 56 Cal. 178.

[107] Specklemeyer v. Dailey, 23 Nebr. 101, 36 N. W. Rep. 356.

[108] Wilbur v. Abbot, 6 Fed. Rep. 814.

[109] Gay v. Lloyd, 1 Greene (Iowa), 78, 46 Am. Dec. 499; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Commonwealth v. Blood, 97 Mass. 538.

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jurisdiction of such courts, unless all the facts necessary thereto appear on the face of the proceedings.[110]

§ 876. Authentication of Record.

The act of congress provides, "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."[111] The specific directions of this statute must be followed in authenticating a record from one state to another. Also it governs the admissibility of records from the state courts when pleaded or given in evidence in the federal courts.[112] It has been held that the legislature of a state may control the mode of authentication of the records and judicial proceedings of other states, within its own limits and in its own courts,—that the method of authentication prescribed by congress is not exclusive of any that the states may adopt in their own courts.[113] But the true doctrine appears to be that while any state, for the purposes of its own courts, may *dispense* with any element of the authentication directed by the act, so as to receive a record which is certified in a less formal or less complete manner than the statute contemplates, yet it has no power to *add* to the requirements of the law, so as to require a more formal or more detailed authentication than that prescribed; and if any record is authenticated in a manner which exactly complies with the act of congress, no state court could refuse to admit it, whatever might be the provisions of the state law.[114] Where an action is brought on a judgment of a sister state, and a transcript of the judgment is attached to the petition and made a part thereof, it is not necessary

[110] See *supra*, vol. 1, § 282.

[111] Act of May 26, 1790, 1 Stat. at L. 122, Rev. Stat. § 905.

[112] United States v. Biebusch, 1 Fed. Rep. 218.

[113] Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428.

[114] Kingman v. Cowles, 108 Mass. 288; Parke v. Williams, 7 Cal. 247; McMillen v. Lovejoy, 115 Ill. 498, 4 N. E. Rep. 772.

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that the transcript should be authenticated as prescribed by the act of congress or by the state laws. "As an exhibit," said the supreme court of Kansas in making this ruling, "it was not necessary that the copy of the judgment should be authenticated at all. The allegations of the petition answered the purpose for the time being of a due authentication of the judgment. If the judgment had been denied by a pleading verified by an affidavit, and if it had become necessary to prove the judgment, then it would have been necessary that the transcript of the judgment offered in evidence should be properly authenticated." [115] If a state should go out of the Union, so as to stand in the relation of a foreign government for a time, yet, upon its return to the Union again, all judgments rendered while it was in such position of a foreign government must be authenticated in the same way as other state records.[116]

§ 877. Completeness of Record.

It is necessary that the transcript produced should be a complete copy of the record in the case, and not merely a transcript of the minutes or of part of the record.[117] But if the clerk certifies that the transcript is "truly taken and correctly copied" from the records in his office, or uses words of similar import, it will be presumed that the transcript is a correct copy of the entire record.[118] The existence, loss, and contents of the petition and citation in the foreign action may be shown by the clerk of the court who issued the citation and the attorneys who prepared the petition.[119] Where the plaintiff sets out, by way of inducement, a judgment of a sister state and an affirmance thereof on error in the appellate court, and the defendant pleads *nul tiel record* to the judgment mentioned, without specifying which one, an exemplification of the judgment of the appellate court, which recites the record of the judgment below, is sufficient.[120]

[115] White v. Treon, 25 Kans. 484.
[116] Steere v. Tenney, 50 N. H. 461.
[117] Pepin v. Lachenmeyer, 45 N. Y. 27.
[118] Reber v. Wright, 68 Pa. St. 471; Ferguson v. Harwood, 7 Cranch, 408. See also Blair v. Caldwell, 3 Mo. 353.
[119] Bailey v. Martin (Ind.), 21 N. E. Rep. 346.
[120] Phipps v. Nye, 34 Miss. 330.

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§ 878. Attestation of Clerk, and Seal.

The general opinion appears to be that the act of congress only requires that the attestation of the clerk shall be in the form prescribed for the court in which the judgment was rendered, and that the certificate of the judge that the clerk's attestation is in due form is conclusive.[121] But in a case in New York, where the attestation was signed by a deputy clerk, instead of the clerk of the court, it was held that the defect was not cured by the certificate of the presiding magistrate that the attestation was in due form and authorized by the state law; for, said the court, it is immaterial that the attestation conforms to the law of the state, it must conform to the act of congress.[122] The record is not necessarily invalidated by the want of the attestation of the person who, at the date of the judgment, held the office of clerk of the court by which the judgment was rendered; for it may be proved by a copy attested by the clerk of another court, to whose custody the record has been by law transferred, and who is the proper officer to make and certify copies thereof.[123] When a copy of a judgment from another state, offered in evidence, is partly printed and partly written, but has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by inspection and examination of the papers.[124] It is not necessary for the judge to certify that the seal annexed to the record is the seal of the court. The seal is self-proving, and it will be presumed that it was affixed by the proper officer having the custody of it.[125] The statute is broad enough to cover the authentication of a record from

[121] Ferguson v. Harwood, 7 Cranch, 408; Andrews v. Flack (Ala.), 6 South. Rep. 907; Grover v. Grover, 80 Mo. 400.

[122] Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311.

[123] Folsom v. Blood, 58 N. H. 11; Thomas v. Tanner, 6 B. Mon. 52. In a case where the certificate to a record of a sister state judgment was defective for want of the signature of the clerk of the court, and the defendant pleaded *nil debet* and "payment with leave," it was held that, inasmuch as the plea of *nil debet* was a nullity, and the plea of "payment with leave" admitted the cause of action, the plaintiff was entitled to recover, notwithstanding the irregularity of the certificate. Curtis v. Hubbell, 8 Week. Not. Cas. 367.

[124] Goodrich v. Stevens, 116 Mass. 170.

[125] Ducommun v. Hysinger, 14 Ill. 249.

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a court which does not possess a seal. But if such is the case, it should be so stated, by either the clerk or the judge, in the certificate.[126] Where the clerk authenticated the record by his signature and private seal, stating in the same place that the court itself had no seal, it was held that the record was sufficiently authenticated; the private seal of the clerk was surplusage, and would not vitiate the certificate, which, without it, would be good and sufficient.[127]

§ 879. Certificate of Judge.

An objection to a transcript of a judgment from another state, that it contains no certificate of the presiding judge "that the attestation is in due form of law," must be specific.[128] This certificate is held to be indispensable.[129] And it must be annexed to the exemplification of the record, and cannot be on a separate piece of paper.[130] If the judge is clerk of his own court, he must first, as clerk, attest the record, and then as judge, certify that the attestation is in due form, in all respects the same as if the two offices were filled by distinct persons.[131] But it is not necessary that the official character of the judge certifying the record should be evidenced by the certificate of the governor under the great seal of the state, nor that the clerk of the court should certify under his hand and seal of office that the certifying judge is duly commissioned and qualified to act.[132] The record should not be rejected because the certificate does not show that the judge signing it is the sole judge or the chief judge of the circuit, unless from the record it affirmatively appears that there were other judges of such circuit.[133] But where a court comprises several judges, each of whom, in turn, acts as chief judge, on a system of rotation, it does not belong to *any* of them to certify a record

[126] Craig v. Brown, 1 Pet. C. C. 352; Kirkland v. Smith, 2 Mart. N. S. 497.

[127] Flourenoy v. Durke, 2 Brevard, 256.

[128] Dworak v. More (Nebr.), 41 N. W. Rep. 777.

[129] Hutchins v. Gerrish, 52 N. H. 205.

[130] Norwood v. Cobb, 20 Tex. 588.

[131] Bissell v. Edwards, 5 Day, 363, 5 Am. Dec. 166; Catlin v. Underhill, 4 McLean, 199.

[132] Kinsley v. Rumbough, 96 N. Car. 193, 2 S. E. Rep. 174; McAllister v Singer Manuf. Co., 64 Ga. 622.

[133] Keyes v. Mooney, 13 Oreg. 179, 9 Pac. Rep. 400.

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for use in another state, but only to the one who, at the time, is acting as chief judge.[124] In a case where the clerk's certificate to a record from an inferior court of another state, was authenticated by the signatures of five persons who all styled themselves "presiding justices" of the court, the court where the record was offered in evidence looked into the laws of that state, and found that the judges of that tribunal were apparently all equal, and that no one of them was president or chief of the court. And it was accordingly held that the mode of authentication, being adapted to the circumstances of the case, was within the meaning of the act of congress and was sufficient.[125]

§ 880. Amount of Recovery; Interest.

At the common law no judgments carried interest. In the absence of proof to the contrary, the common law is presumed to furnish the rule of decision in a sister state. And therefore, in an action on a judgment of a sister state, no interest can be allowed on the judgment, unless evidence is presented of a statute of that state changing the common law rule in this respect.[126] But in a case where the statute provided that interest on *any judgment* of any court should be allowed at the rate of six per cent. from the rendition of the judgment to payment, it was held that, in a suit on a sister state judgment such interest was properly allowed, although there was no proof of the statute in relation to interest in the state where the judgment was rendered.[127] And where a judgment in one state bears interest on the amount *by its terms*, such interest may be recovered in another state without showing that judgments ordinarily carry interest by the laws of the state where the particular judgment was rendered.[128]

[124] Shaw v. Hurd, 3 Bibb, 371.

[125] Arnold v. Frazier, 5 Strobh. 33.

[126] Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 250; Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227. But see *per contra*, Hopkins v. Shepard, 129 Mass. 600; Williams v. Bank, 4 Met. 317; Barringer v. King, 5 Gray, 9; Mahurin v. Bickford, 6 N. H. 567; Warren v. McCarthy, 25 Ill. 95.

[127] Shickle v. Watts, 94 Mo. 410, 7 S. W. Rep. 274.

[128] Hudson v. Daily, 18 Ala. 722.

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PART III. DEFENSES TO ACTION ON SISTER STATE JUDGMENT.

§ 881. Objections to Character of Judgment.

Since a judgment rendered in one of the states is entitled to the same faith and credit in every other state which it receives at home, it follows that, in an action upon such judgment, no defenses are admissible except such as could be set up in an action on the same judgment in the state of its rendition, and except the defense of want of jurisdiction and perhaps fraud. But we have seen that the judgment must be a valid one, and in full force and virtue, in order to constitute a cause of action. Hence the defendant may show that the judgment is absolutely void, or was rendered by an unlawful body assuming to be a court, or has been reversed or set aside, or that its collection has been enjoined, or that there is not enough to constitute a judgment, or any other circumstance negativing the existence of a legal and subsisting sentence. For instance, he may show that since the joining of the issue, the judgment sued on has been vacated.[139] It is also open to him to defend on the ground that the adjudication in question is merely interlocutory and not the proper foundation for a suit;[140] or that it was rendered upon a summary proceeding, in derogation of the common law, and not enforceable beyond the local jurisdiction;[141] or that it was given for a penalty or forfeiture, or upon a violation of the local police regulations of the state where rendered;[142] or that it purports to affect the title or right to real property situate beyond the territorial jurisdiction of the court.[143] These, and similar defenses, do not involve any impeachment of the judgment on its merits, which is really all that the constitution forbids.[144] So a defendant sued in Michigan on a judgment rendered in Ohio on a *cognovit*, may prove any defense which in the latter state would be a good ground for setting aside the judgment, or for an order to deliver up the *cognovit* to be cancelled.[145]

[139] Kinsey v. Ford, 88 Barb. 195.
[140] *Supra*, § 867.
[141] *Supra*, § 867.
[142] *Supra*, §§ 870, 871.
[143] *Supra*, § 872.
[144] *Supra*, §§ 856, 857.
[145] Giddings v. Whittlesey, 2 Mich. N. P. 240.

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§ 882. Pendency of Appeal.

If, by the law of the state in which a judgment is obtained, an appeal does not operate as a supersedeas or stay proceedings on the judgment in that state, the conclusiveness of the judgment is not thereby impaired, and the pendency of such appeal is no bar to an action on the judgment in another state.[146] And in order to ascertain the effect of an appeal in the state where the judgment was rendered, the court will examine the laws and practice of that state, or even take judicial notice of them when no evidence is produced.[147] But it is proper for the court to withhold final judgment until the appeal shall have been determined, or to order that no execution shall be issued on the judgment which it renders, the defendant giving bonds to satisfy the judgment and pay costs in case the appeal shall be determined adversely to him.[148]

§ 883. Defense cannot be Taken on the Merits.

The judgment of a competent court in another state, as we have already seen, is final and conclusive upon the merits. Consequently, in an action upon it, no defense can be heard which goes to the merits of the original controversy. In other words, no defense can be set up against a judgment from a sister state which might with proper diligence have been interposed in the action in which the judgment was rendered.[149] Pleas, for example, that the defendant was an infant, that he was not a partner as alleged, that he did not make the

[146] Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Clark v. Child, 136 Mass. 344; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Paine v. Schenectady Ins. Co., 11 R. I. 411; Union Trust Co. v. Rochester & P. R. Co., 29 Fed. Rep. 609; Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Rogers v. Hatch, 8 Nevada, 35; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Falkner v. Franklin Ins. Co., 1 Phila. 188.

[147] Paine v. Schenectady Ins. Co., 11 R. I. 411.

[148] Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Paine v. Schenectady Ins. Co., 11 R. I. 411.

[149] Snow v. Mitchell, 37 Kans. 636, 15 Pac. Rep. 224; Weir v. Vail, 65 Cal. 466, 4 Pac. Rep. 422; Powell v. Davis, 60 Ga. 70; Sharman v. Morton, 31 Ga. 34.

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note on which the judgment was rendered, that he had no interest in such note,—are all bad.[150]

§ 884. Nil Debet not a Good Plea.

In an action on a judgment recovered in a sister state, *nil debet* is not a good plea; for the judgment is entitled to the full dignity of a record, and such a plea, disregarding the conclusiveness of the adjudication, would throw open the merits of the controversy to a re-investigation; hence the only proper form of the general issue in such an action is *nul tiel record.*[151] Although this doctrine is fully established by the decisions of the federal courts, and recognized and accepted in a great majority of the states, there are still one or two jurisdictions in which, as a matter of local practice, *nil debet* is considered a good plea in debt on a judgment rendered in another state. In these states, however, under that plea, no inquiry is allowed to be made into the merits of the case, but only into the jurisdiction of the court, or matters in discharge of the judgment.[152] Theoretically, this practice does not comport with the dignity ascribed to the judgment as a record, although practically it does not enlarge the number or character of available defenses.

§ 885. Nul Tiel Record.

As stated in the preceding section, *nul tiel record* is the only proper form of the general issue in an action on a judgment rendered in a

[150] Sharman v. Morton, 31 Ga. 34.

[151] Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234; McElmoyle v. Cohen, 13 Pet. 312; Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 22 Wall. 77; Jacquette v. Hugunon, 2 McLean, 129; Westerwelt v. Lewis, 2 McLean, 511; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Brainerd v. Fowler, 119 Mass. 265; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. 240; Kemp v. Mundell, 9 Leigh, 12; Hensley v. Force, 12 Ark. 756; Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458; Buchanan v. Port, 5 Ind. 264; Lawrence v. Jarvis, 32 Ill. 304; Zepp v. Hager, 70 Ill. 223.

[152] Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins v. Union F. Ins. Co., 37 N. H. 470; Beale v. Berryman, 30 N. J. Law, 216.

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sister state. But where the suit is upon a decree in chancery, it is held that this is not a good plea. For proceedings in the courts of chancery are not regarded as records, at least at common law. In such a case, if the defendant means to deny the existence of the decree, he should frame his plea so as to meet the averment in the declaration, and the tender of issue should conclude to the country.[153]

§ 886. Incompleteness of Record.

The insertion in a transcript of a foreign record of matters which do not properly belong to the record is no ground for the suppression of the entire transcript. Nor will such transcript be suppressed on the ground that a material part of the record appears to have been fraudulently suppressed, when there is nothing in the record to show that the omitted part was attainable by the clerk. It will be presumed that the omitted papers had been lost or destroyed, rather than that they were fraudulently withheld.[154]

§ 887. Want of Jurisdiction.

It is well settled doctrine that if the court which renders a judgment has no jurisdiction over the parties or the subject-matter, it is always open to the defendant to show this fact when he is sued on the judgment in another state. In such a case he is not to be confined to the single plea of *nul tiel record*, but is at liberty to plead the want of jurisdiction specially. For instance, he can show that the attorney had no power or authority to confess judgment against him, and while such a plea is pending, it is error to render judgment on the plea of *nul tiel record*.[155] The whole subject of jurisdictional inquiries will be fully considered in the next division of this chapter.

[153] Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

[154] Gunn v. Howell, 85 Ala. 144, 73 Am. Dec. 484.

[155] Hindman v. Mackall, 3 Greene (Iowa), 170.

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§ 888. Personal Disability of Defendant.

As to whether the personal disability of the defendant, at the time the judgment was rendered against him, is a good defense to an action on such judgment in another state, the question depends upon the *status* of the judgment in the state of its rendition. Its validity must be tested by the laws of that state. If the coverture, infancy, or insanity is regarded, in the state where the judgment is rendered, as making the judgment absolutely void, that invalidity may undoubtedly be shown against it in any other jurisdiction. If on the other hand, the rendition of a judgment against such a person is regarded, in the state where it is given, as a mere irregularity or error in fact, having no greater effect than to make the judgment voidable on a proper direct proceeding for that purpose, then it will not be a good defense to an action on the judgment in another state.[156] This rule is illustrated by a case ruled in Iowa. The action was on a judgment rendered by a court of general jurisdiction in a sister state. The defendant answered that the judgment was void because rendered while he was a minor, upon a contract not made for necessaries; that he did not appear and defend said suit by guardian, but by an attorney, whom he had no power to appoint; that said court therefore acquired no jurisdiction over his person or property; and that upon arriving at his majority he disavowed the said judgment, the contract upon which it was founded, and the appointment of said attorney. The trial court sustained a demurrer to this answer, and on appeal the supreme court held that such action was right. Wright, C. J., observed: "The demurrer was properly sustained. Defendant's remedy was by writ of error *coram nobis* or other similar process in the court where the judgment was rendered. If there was an error in fact in permitting defendant to appear by attorney, when a minor, it was an irregularity, and as such no more affected the validity of the judgment than if it had been an error in law. In either case, the error, whether of law or fact, does not render a judgment void; but a party may have his remedy in the state where the judgment

[156] On the validity of such judgments, see *supra*, vol. 1, §§ 188, 198, 205.

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was rendered either in the same or in an appellate tribunal. The defense cannot prevail here; for, until set aside, the judgment would have full force and effect in Ohio, and is entitled to the same here. The error does not go to the jurisdiction of the court." [157]

§ 889. Error and Irregularity.

The courts will not assume to review or correct judgments rendered in other states. And it is therefore no good defense to an action on a sister state judgment that the same is erroneous or irregular, if not absolutely void.[158] Further, all reasonable presumptions will be indulged in favor of the regularity of such judgments. Thus, while ordinarily judgments can only be entered in term time, yet where the duly authenticated record of a court of general jurisdiction of a sister state shows a judgment entered in vacation, it will be presumed, in the absence of any showing to the contrary, that such a judgment was authorized by the laws of that state.[159] On the same principle, the objection that the judgment has not been signed by the judge is of no avail; for it will be presumed that by the law of the state where the judgment was rendered such signature was unnecessary.[160]

§ 890. Payment.

The defense of payment may be set up in an action on any judgment, domestic or foreign. But the fact that the plaintiff in the original judgment has taken out execution thereon and levied on and

[157] Milne v. Van Buskirk, 9 Iowa, 558. See also Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[158] Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Olds v. Glaze, 7 Iowa, 86; Struble v. Malone, 8 Iowa, 586; Rocco v. Hackett, 2 Bosw. 579; Hassell v. Hamilton, 88 Ala. 280; Conway v. Ellison, 14 Ark. 360; Crawford v. Simonton, 7 Port. 110.

[159] Dodge v. Coffin, 15 Kans. 277; McLendon v. Dodge, 82 Ala. 491.

[160] French v. Pease, 10 Kans. 51. In this case, Valentine, J., observed: "As such a judgment would be valid, and entitled to full faith and credit, in Kansas, if rendered here, it must be presumed *prima facie* that it is valid and entitled to full faith and credit in Connecticut. We cannot suppose without proof that what would be valid in our own state, if rendered here, would be void in any other state if rendered there. And in general, whenever a judicial record, which would be valid and binding if made in this state, comes properly

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advertised for sale the lands of the defendant situate within the jurisdiction in which the judgment was entered, affords no ground for a continuance of the suit upon such foreign judgment, as it shows no present defense to the action.[161]

§ 891. Adjudication in Bankruptcy.

If, by the laws and practice of one state, a discharge in bankruptcy is a good defense there to a judgment recovered after such discharge was obtained, but founded on a claim which existed before the commencement of the bankruptcy proceedings, the discharge will be a good defense to an action on the judgment in another state, although the rule in the latter state upon judgments recovered in that state may be different.[162] Where, pending a suit in a state court, the defendant pleaded that he had been adjudicated a bankrupt and prayed a stay of proceedings, but subsequently withdrew the plea and confessed judgment, such conduct amounted to a new promise to pay and an agreement that the judgment should bind him, and precluded him, in a subsequent suit on the judgment, from making any defense which arose prior to the confession, including the defense of bankruptcy; and under such facts, the plea of bankruptcy would not avail as a defense to a suit on the judgment in another state.[163]

§ 892. Statute of Limitations.

The statute of limitations of the state of the *forum* may be pleaded in defense to an action on a judgment of a sister state, if the statute is so framed as to include judgments.[164] And such an action will be

authenticated from another state, it will be presumed to be valid and binding in the state from which it comes until the contrary is shown; and until the contrary is shown, full faith and credit will be given to it here, and if any person controverts its validity, he must show its invalidity by proper evidence."

[161] Field v. Sanderson, 84 Mo. 542, 86 Am. Dec. 124.

[162] Haggerty v. Amory, 7 Allen, 458. See further, Bradford v. Rice, 102 Mass. 472; Revere Copper Co. v. Dimock, 90 N. Y. 33; Anderson v. Anderson, 65 Ga. 518, 38 Am. Rep. 797.

[163] Anderson v. Clark, 70 Ga. 362.

[164] McElmoyle v. Cohen, 13 Pet. 312; Napier v. Gidiere, 1 Spears Eq. 215, 40 Am. Dec. 618; Reid v. Boyd, 18 Tex. 241, 65 Am. Dec. 61.

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barred by the statute, when the prescribed period has elapsed since the rendition of the judgment, notwithstanding it appears that the judgment has been revived, in the court where it was rendered, in time to save the bar of the statute, when the revival was had upon merely *ex parte* proceedings, without any notice to the defendant, who was not a resident of the state. For the purpose of enforcing it beyond the jurisdiction of the state, such judgment of revival is a mere nullity.[165]

The statute of limitations to be applied is the statute of the state where suit is brought on the judgment, not that of the state where the judgment was rendered. "Remedies are to be regulated and pursued according to the *lex fori*, the law of the place where the action is instituted, and not by the *lex loci contractus*, or the law of the place where the contract was made or the judgment rendered." Hence in an action on a sister state judgment, it is quite immaterial what may be the period prescribed for suing on judgments by the statute of limitations of that state. If any limitation exists, it must be found in the laws of the state where the suit is brought. And if the statute of the latter state is restricted in terms to domestic judgments, then there is no limitation to a suit on a judgment from a sister state, except such as lies in the common law presumption against any judgment after twenty years.[166] It follows that although a judgment is barred, as a cause of action, by the statute of limitations of the state in which it was rendered, yet an action may be maintained upon it in the courts of another state, if the statute of the latter state has not run against it; in such cases it is the *lex fori* which governs.[167] But in at least one state (West Virginia), by the express terms of the code, a judgment obtained in another state is not barred, if not barred in the state where rendered.[168]

Which clause of the statute is to be applied to actions on foreign judgments, or whether its provisions embrace such causes of action at all, is a question which may sometimes cause no little embarrass-

[165] Kay v. Walter, 28 Kans. 111.
[166] Gulick v. Loder, 13 N. J. Law, 68.
[167] Miller v. Brenham, 68 N. Y. 88. See also Stewart v. Spaulding, 72 Cal. 264, 13 Pac. Rep. 661. 15 Z Cal, 6 27
[168] Watkins v. Wortman, 19 W. Va. 78; Code 1868, c. 104, § 13.

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ment. In an early New York case it was said: "The statute of limitations may be pleaded to all actions of debt upon simple contract; and the judgment upon which the suit is brought [one rendered in Connecticut] cannot, according to the settled doctrine of this court, be viewed in any higher light." [168] But the more approved rule is that such judgments do not come within the usual clause of the statute relating to actions "on contract or debt without specialty." The limitation must be looked for in the provisions of the statute specifically applicable to judgments and other debts of record.[170] The question will then be, whether such provisions are broad enough to cover the case of judgments from another state, or must be restricted to domestic judgments. And this must be determined, in each state, by the wording of its own statute. In Texas, a judgment of a court of record of a sister state is barred only by the space of time which would cut off a suit on a domestic judgment, viz., ten years.[171]

The statute is unconstitutional if its effect is to entirely prevent the enforcement of a judgment recovered in another state. This principle was clearly brought out in a case decided in California.[172] It appeared that a statute of that state provided that "an action upon any judgment, contract, obligation, or liability, for the payment of money or damages, obtained, executed, or made out of this state, can only be commenced within two years from the time the action has accrued or shall accrue." Giving to this statute a retrospective effect, as required by its terms, it would apply to the case at bar (a judgment recovered in another state), and would altogether cut off the remedy upon it, whereas the former statute of limitations had not yet run against it. The court said: "It is well settled that a judgment, in this sense of the constitution, is a contract," that is, in the sense of the prohibition against laws impairing the obligation of

[168] Hubbell v. Coudrey, 5 Johns. 132. This decision was rested upon Duplein v. De Rover, 2 Vern. 540, where the statute of limitations was pleaded to a suit in chancery on a judgment recovered in France, and Cowper, C. J., admitted the plea, and said that a judgment in France must be considered in England as a debt by simple contract.

[170] Patten v. Ray, 4 Cal. 287; Evans v. Cleary, 125 Pa. St. 204, 17 Atl. Rep. 440.

[171] Clay v. Clay, 18 Tex. 195; Spann v. Crummerford, 20 Tex. 216.

[172] Scarborough v. Dugan, 10 Cal. 305.

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contracts.[173] And since the entire denial of a remedy, by the enactment of a period of limitation which has already run, is equivalent to an impairment of the obligation of the contract,[174] it follows that the statute could not constitutionally apply to the present case.

The statute of limitations is available as a defense only against the judgment, not against the original cause of action. That is, in an action on a judgment rendered in another state, it is not a good defense that the original cause of action would have been barred by the statute of limitations of the state where such judgment is sued on; for prescription against the original cause of action would be governed by the limitation law of the state where the suit was originally brought, and must be interposed in that suit before judgment.[175] Further, a state statute which enacts that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit had been brought therein,"—is unconstitutional and void, as it destroys the right of a party, in certain cases, to enforce a judgment regularly obtained in another state, and is therefore in conflict with art. 4, § 1, of the constitution.[176] But it is held that where a note made in Wisconsin, the maker and holder of which were residents there, had been barred and the debt thus extinguished (by the laws of that state as interpreted by its courts), and the note was then sued upon in a court of Illinois, the defense upon the *lex loci contractus* if set up there would have been good, and a judgment upon such note, entered by confession upon warrant of attorney, would be set aside, or its collection enjoined, upon that ground, in the

[173] This proposition is open to very serious doubt. See *supra*, vol. 1, §§ 7–11. But the constitutional objection to such a statute may well be rested on the requirement that "full faith and credit" be given.

[174] Chapman v. Douglas County, 107 U. S. 348, 2 Sup. Ct. Rep. 62; Price v. Hopkin, 13 Mich. 318; Osborn v. Jaines, 17 Wis. 573; Auld v. Butcher, 2 Kans. 135; Black, Const. Prohib. § 152.

[175] Carter v. Adamson, 21 Ark. 287. See also Goodnow v. Stryker, 61 Iowa, 261, 14 N. W. Rep. 845.

[176] Christmas v. Russell, 5 Wall. 290; Dodge v. Coffin, 15 Kans. 277.

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Illinois court; and therefore the courts of Wisconsin may relieve against such judgment.[177] A judgment rendered in one state, based on the statute of limitations, where the court had jurisdiction of the parties and the cause of action, is a bar to a suit in another state on the same cause and between the same parties.[178]

§ 893. Affidavit of Defense Required.

Where the local statute authorizes judgment to be entered up by way of default if no affidavit of defense is filed, a judgment of a sister state is such a cause of action as will fall within this practice.[179]

Part IV. Jurisdictional Inquiries.

§ 894. Want of Jurisdiction Destroys Effect of the Judgment.

As a judgment or decree rendered without any jurisdiction of the person of the defendant is utterly void, so it is not capable of being enforced, nor entitled to recognition or to be received with "faith and credit," in any other state.[180] "The judgment or decree of a sister state is, as a general rule, conclusive as to the rights of the parties, unless there be a want of jurisdiction in the court pronouncing it, or fraud has been practised in its procurement, or there has not been any, or only constructive, service of process on the defendant, and the proceedings have been carried on without his appearance."[181] Thus, a judgment *in personam* upon an obligation for the payment of money, rendered by a court of one state and under the laws thereof, is not valid as against a citizen of another state, who has never been served with process nor appeared to the suit, nor had any other knowledge or notice of it; and such judgment cannot be enforced

[177] Brown v. Parker, 28 Wis. 21.

[178] Sweet v. Brackley, 53 Me. 346; Weeks v. Harriman (N. H.), 18 Atl. Rep. 87.

[179] McCleary v. Faber, 6 Pa. St. 476.

[180] Gillespie v. Commercial Ins. Co., 12 Gray, 201, 71 Am. Dec. 743; Overstreet v. Shannon, 1 Mo. 529; Morris v. Bailey, 15 La. Ann. 2; Commonwealth v. Kirkbride, 2 Brewst. 419.

[181] Rogers v. Rogers, 15 B. Mon. 364, 378.

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against the property of such a defendant located in the state of his residence.[182] Even under the articles of confederation it was held that a judgment obtained in Massachusetts, in a foreign attachment where there was no personal notice to the defendant, could not be considered as conclusive evidence of the debt, when made the basis of a suit in Pennsylvania, and therefore the defendant ought still to be at liberty to controvert and deny it. "The articles of confederation must not be construed to work such evident mischief and injustice as are contained in the doctrine urged for the plaintiff." [183]

§ 895. Want of Jurisdiction Apparent on the Record.

It will sometimes happen, although not frequently, that the record of a judgment rendered in another state, when produced, will show on its face, that there was no jurisdiction in the court to pronounce the judgment. Whenever this is the case, the document is stripped of its character and dignity as a record, no presumptions will be indulged in its favor, and it will not be treated as possessing any force or validity whatever.[184] "The judgment of a court of general jurisdiction in any state in the Union," said the court in New York at an early day, "is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: First. If it appear by record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and second, if it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." [185] But in an action on a judgment of another state, a recital in the original writ that the defendant was an "absent and absconding debtor," where that is merely a form prescribed by law in that state, in case of trustee process, whether the defendant is in the state or not, does not show a want of jurisdiction of the person of the defendant.[186]

[182] Grover & Baker S. M. Co. v. Radcliffe, 66 Md. 511, 8 Atl. Rep. 265.

[183] Phelps v. Holker, 1 Dall. 261 (1788).

[184] Middlesex Bank v. Butman, 29 Me. 19; Tessier v. Lockwood, 18 Nebr. 167, 24 N. W. Rep. 734.

[185] Shumway v. Stillman, 6 Wend. 447.

[186] Bissell v. Wheelock, 11 Cush. 277.

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§ 896. Presumption in Favor of Jurisdiction.

When a court of record in one of the states has assumed to exercise jurisdiction over a subject-matter in controversy between parties resident in that state, and has pronounced judgment, and the record of such judgment, duly authenticated according to the act of congress, is made the basis of an action in another state, the legal presumption, in the absence of proof to the contrary, and although the record may be silent or ambiguous on the point, is in favor of the jurisdiction of the court rendering the judgment.[187] "It would seem to be clear," says the court in Kentucky, "that the judgments of the superior judicial tribunals of one of these states are *prima facie* entitled to the presumption in every other state that they were rendered by competent authority. They cannot therefore be impugned by a mere allegation of want of jurisdiction. But he who would defeat a judgment on this ground must show the want of jurisdiction by appropriate allegations of facts, unless it appear on the face of the judgment or record which is the basis of the action."[188] Hence, for example, where the plaintiff produces a certified copy of the record, which shows service on the defendant, and the defendant produces another certified copy which does not show service, but the two records are not contradictory, the court will take that produced by the plaintiff as a more full and extended record, and will support the action.[189] The same presumption extends to findings by the court which rendered the judgment on the subject of its own jurisdiction. Where the record shows that the court considered that there was a sufficient waiver of notice under their laws, it will be so held in the court where the judgment is put in suit.[190] Where the record shows the return "executed in full" on the summons, this will be considered *prima facie* evidence of service.[191] Where the transcript showed that the action

[187] Buffum v. Stimpson, 5 Allen, 591, 81 Am. Dec. 767; Stewart v. Stewart, 27 W. Va. 167; Veite v. McFadden, 3 Week. Not. Cas. 68; Lockhart v. Locke, 43 Ark. 17; Mills v. Stewart, 12 Ala. 90; Lincoln v. Tower, 2 McLean, 473; Dodge v. Coffin, 15 Kans. 277.

[188] Davis v. Connelly's Exr., 4 B. Mon. 136.

[189] Barringer v. King, 5 Gray, 9.

[190] Nunn v. Sturges, 23 Ark. 389.

[191] Blackburn v. Jackson, 26 Mo. 306.

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had been instituted in one common law court, and by agreement of the attorneys of the parties transferred to another, with a waiver of "all possible objections to the jurisdiction" of the latter court, but no order for the transfer appeared in the transcript, and after several trials and continuances final judgment was rendered without the jurisdiction of the court *ad quem* being called in question, it was held that the presumption was in favor of the jurisdiction, and if the court had no jurisdiction it must arise from some provision of law which ought to have been shown.[192]

This presumption of jurisdiction, however, does not exist in cases where it appears of record that the defendant was a non-resident of the state where the original judgment was rendered. According to the United States supreme court: "Whenever it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree was rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." [193] And even a recital in the record, that it appeared to the court that the defendant had notice of the pendency of the suit, is not presumptive evidence that the defendant, a non-resident, was served with notice within that state.[194]

§ 897. Jurisdiction may be Inquired into.

Except in a very few states, the doctrine is firmly settled that when the judgment of a *domestic* court of record comes collaterally in question, the presumption that the court had jurisdiction of the subject and parties is irrefragable and conclusive, unless want of jurisdiction distinctly appears on the face of the record.[195] On the other hand, any judgment coming from a foreign country may be impeached on this ground.[196] What, then, is the *status*, in this

[192] Harper v. Nichol, 13 Tex. 151.
[193] Galpin v. Page, 18 Wall. 350.
[194] Downer v. Shaw, 22 N. H. 277.
[195] *Supra*, vol. 1, §§ 271–275.
[196] *Supra*, § 885.

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respect, of judgments rendered in a sister state of the Union? Are they domestic or foreign? We have just seen that jurisdiction is presumed; but is this presumption final and incontrovertible or not? The answer must depend upon the further question, what is the effect, in this regard, of the provision of the constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state?" For it is by this provision alone that such judgments are differentiated from strictly foreign judgments. When this clause of the organic law first received an authoritative interpretation, in the case of *Mills* v. *Duryee*,[197] the very broad and general terms of that decision were understood, by the state courts generally, to exclude the idea that any pleas whatever would be allowable in an action on a sister state judgment, save only such as would be pleadable against the judgment in the state of its rendition. But the question of jurisdiction was not raised in that case, and the decision does not bear directly upon it. And the rule in *Mills* v. *Duryee* was afterwards qualified and explained, so that its true value as an exposition of the constitutional provision came to be better understood. And later decisions of the same court settled the doctrine that the language in question did not place such judgments in *all* respects on the footing of domestic judgments, but only in respect to their conclusiveness on the merits, and was not intended to preclude an inquiry into the jurisdiction of the court rendering the judgment.[198] To this view the supreme court has always steadfastly adhered. And the same has been accepted, on that authority, or

[197] 7 Cranch, 481.

[198] D'Arcy v. Ketchum, 11 How. 165, 176. In this case Catron, J., said: "On the other hand, the international law as it existed among the states in 1790 was, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle, congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one state to the laws of another. . . . . There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the state where made."

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independently worked out, by all the state courts. So that the rule is now settled beyond possibility of change or contradiction, that, in an action on a judgment of a court of a sister state, it is open to the defendant to deny the jurisdiction of the court rendering the judgment over his person or the subject-matter of the suit.[199] "The rule seems to be well settled," says the supreme court of Nebraska, "that the judgment of a state court, so authenticated, is conclusive upon the merits or subject-matter of the suit, but that it does not exclude such defenses as inquire into the jurisdiction of the court in which it was pronounced, or the right of the state itself to exercise authority over the person or the subject-matter of the suit, or to plead as a defense to an action on such judgment a release, payment, or limitation by common law prescription or statute, or fraud in obtaining the judgment." [200] Where suit is brought against two defendants, on a judgment rendered in a sister state, one of such defendants can plead a want of jurisdiction in the foreign court over his co-defendant.[201] The judgment of a state court may be collaterally questioned

[199] D'Arcy v. Ketchum, 11 How. 165; Bischoff v. Wethered, 9 Wall. 812; Board of Public Works v. Columbia College, 17 Wall. 521; Thompson v. Whitman, 18 Wall. 457; Galpin v. Page, 18 Wall. 350; Knowles v. Gaslight Co., 19 Wall. 58; Hill v. Mendenhall, 21 Wall. 453; Arnott v. Wood, 1 Dill. 362; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Mowry v. Chase, 100 Mass. 79; Carleton v. Bickford, 13 Gray, 591, 74 Am. Dec. 652; Wright v. Andrews, 130 Mass. 149; Bissell v. Wheelock, 11 Cush. 277; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; McDermott v. Clary, 107 Mass. 501; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Rathbone v. Terry, 1 R. I. 73; Black v. Black, 4 Bradf. Surr. 174; Kerr v. Kerr, 41 N. Y. 272; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Reel v. Elder, 62 Pa. St. 308; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Guthrie v. Lowry, 84 Pa. St. 533; Mitchell v. Ferris, 5 Houst. (Del.) 34; Wernwag v. Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Stewart v. Stewart, 27 W. Va. 167; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Brasswell v. Downs, 11 Fla. 62; Miller v. Ewing, 8 Sm. & Mar. 421; Norwood v. Cobb, 15 Tex. 500; Barrett v. Oppenheimer, 12 Heisk. 298; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Spier v. Corll, 33 Ohio St. 236; Westcott v. Brown, 13 Ind. 33; Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Zepp v. Hager, 70 Ill. 223; Barlow v. Steel, 65 Mo. 611; Marr v. Wetzel, 3 Colo. 2; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269.

[200] Eaton v. Hasty, 6 Nebr. 419, 428, 29 Am. Rep. 365. See also Wilcox v. Kassick, 2 Mich. 165.

[201] Mackay v. Gordon, 34 N. J. Law, 286.

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or attacked in a federal court sitting in the same state, for a want of jurisdiction over the subject-matter or of notice to the defendant, the same as if it were a judgment of a court of another state.[203] In Mississippi, it is held that a judgment rendered against a person after his death is void for want of jurisdiction; and since, in actions on judgments of other states, it is competent to deny the jurisdiction, it is admissible, for the purpose of defeating such action, to aver that the defendant was dead when the judgment was rendered.[203]

But there are sometimes cases in which the inquiry into the question of jurisdiction comes so close to an examination of the merits as to call for a nice discrimination. This is illustrated by the case of *Rocco* v. *Hackett*.[204] This was an action brought in New York upon a judgment rendered by a court in Massachusetts, in an action to which the defendant had appeared after being personally served with process. It appeared that the judgment sued on was itself rendered upon an earlier judgment against the same defendant in another court of Massachusetts. And the defendant offered to prove that he never had notice of the original action, was not a resident of Massachusetts, and was not served with process in that suit. But the court in New York refused to admit such evidence, for the reason that the merits of the judgment now in suit could not be inquired into again, and that although the courts of New York might have held the original judgment void, yet as the Massachusetts court had not done so, but had rendered a new judgment upon it, that new judgment must be considered as conclusive of the question.

§ 898. Requisites of Plea Denying Jurisdiction.

The defendant being at liberty, in an action on a judgment of another state, to impeach it for want of jurisdiction, as we have just shown, the rule is next to be stated that the plea denying the jurisdiction of the court must, by certain and positive averments, negative every fact from which the jurisdiction might arise.[205] Thus, it is

[202] Swift v. Meyers, 87 Fed. Rep. 87.

[203] Gerault v. Anderson, Walk. (Miss.) 30, 12 Am. Dec. 521.

[204] 2 Bosw. 579.

[205] Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Struble v. Malone, 3

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not sufficient for the defendant to answer that he was not a resident of the state where the judgment was rendered, that he had no agent there, and that he was not served with notice; for *non constat* that he did not voluntarily appear.[206] So, in a suit on a judgment obtained in another state against a domestic corporation, it was held to be not a good plea to allege that process was not served on any one authorized to act for it in the suit, for it may have had an office and transacted business in such foreign state and made the contract there, and the process may have been served on its president or other officer while in such state.[207] But where the defendant averred in his plea that he was not served with process, that he had no notice whatever of the existence of the suit, that he made no appearance to the action either in person or by attorney, and that when the suit was brought, as well as when the judgment was rendered, he was a non-resident of that state, the plea was held good and sufficient, the court saying, "we know of no other means by which the court could have acquired jurisdiction of his person."[208] So also the following plea was held good: "That the defendant was not served with process in the suit in which the said judgment was obtained; that he did not appear to said suit in person or by any duly authorized attorney; and that he was not resident or present within the jurisdiction of the court in which the said judgment was rendered at any time pending the said suit, or when judgment was rendered therein; that A. & B. appeared in said suit for the defendant, but that neither they nor any other person or persons were ever authorized by the defendant to do so."[209] But where the answer alleged that the foreign court had no jurisdiction to render such judgment, but that it was rendered on a complaint which on its face disclosed that no cause of action existed, it was held that the answer did not allege want of jurisdiction, but only error in its exercise, and therefore a demurrer was rightly sustained.[210]

Iowa, 586; Puckett v. Pope, 3 Ala. 552; Smith v. Rhoades, 1 Day, 168; Barkman v. Hopkins, 11 Ark. 157; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374.

[206] Struble v. Malone, 3 Iowa, 586; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374.

[207] Moulin v. Trenton Mut. Ins. Co., 24 N. J. Law. 222.

[208] Barkman v. Hopkins, 11 Ark. 157, 168.

[209] Price v. Ward, 25 N. J. Law, 225.

[210] Williams v. Renwick (Ark.), 12 S. W. Rep. 331.

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§ 899. Jurisdiction, if Impeached, may be Supported by Evidence.

The opinion has sometimes been expressed that, in an action on a judgment of a sister state, where the plea is *nul tiel record*, it is the proper practice for the court to determine the issue by inspection of the transcript of the record, and if the transcript fails to show that the court rendering the judgment had jurisdiction of the person of the defendant, it cannot be aided by other evidence.[211] But the more approved doctrine is that if the defendant traverses the fact of jurisdiction of his person, the plaintiff may produce extraneous evidence to show that jurisdiction in fact attached.[212] And if, in such an action, the record shows a certain kind of service (as by arrest of the defendant), expert testimony is admissible to show that by the usage and practice of the court rendering the judgment such service is sufficient to support the judgment, there being nothing in the statutes of that state inconsistent with such a service.[213]

§ 900. Cases Refusing to Allow Contradiction of Record.

So far we have considered the case where the record of a judgment rendered in another state was silent or ambiguous on the subject of jurisdiction or contained no direct averment or finding of jurisdiction. But let us suppose that such a record recites the facts necessary to confer jurisdiction upon the court. Are such recitals then conclusive, or may they be contradicted, on a plea denying jurisdiction, by extrinsic evidence? It is familiar doctrine that a *record* is evidence of the highest nature, in fact of "uncontrollable verity," that it imports absolute truth, and can in no wise be contradicted or impeached in respect to its positive recitals. And it seems to have been clearly the intention of the constitution and of congress to give to the judicial proceedings of each state all the weight and dignity

[211] Kimball v. Merrick, 20 Ark. 12; Noyes v. Butler, 6 Barb. 613. See also Zepp v. Hager, 70 Ill. 223.

[212] Knowles v. Gaslight Co., 19 Wall. 58; Sears v. Dacey, 122 Mass. 338; McDermott v. Clary, 107 Mass. 501; Stockwell v. McCracken, 109 Mass. 86.

[213] Mowry v. Chase, 100 Mass. 79.

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of a record in the other states. There was therefore much plausibility in the view (once very generally held, and still adhered to in a few modern cases) that in the case supposed the defendant must not be allowed to contradict the recitals of the record.[214] The applications of this doctrine to the various cases arising in practice were stated in one of the Illinois decisions in the following terms: First,

[214] Lincoln v. Tower, 2 McLean, 473; Dilworth v. Johnson, 6 Fed. Rep. 459; Bradstreet v. Insurance Co., 3 Sumn. 600; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Lapham v. Briggs, 27 Vt. 26; Farr v. Ladd, 37 Vt. 156; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Wetherill v. Stillman, 65 Pa. St. 105; Lance v. Dugan (Pa.), 13 Atl. Rep. 942; Miller v. Dungan, 35 N. J. Law, 389; Pritchett v. Clark, 4 Harr. (Del.) 280; Westcott v. Brown, 13 Ind. 83; Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Zepp v. Hager, 70 Ill. 223; Caughran v. Gilman, 72 Iowa, 570, 34 N. W. Rep. 423; Wilson v. Jackson, 10 Mo. 330; Wilcox v. Kassick, 2 Mich. 165. In the case of Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244, it was said: "Jurisdictional facts, such as the service of the writ and the like, are presumed, and conclusively presumed, in the case of a domestic court of general jurisdiction, unless the record itself shows the contrary; and we suppose the same would be true of a foreign judgment of the same character, were it not that a citizen here cannot by any process reach a foreign judgment, to get it reversed, without going to the foreign jurisdiction where the judgment was rendered, which is never required of our own citizens or inhabitants." And in Hall v. Williams, 6 Pick. 232, 239, 17 Am. Dec. 356, Chief Justice Parker observed: "In regard to the conclusiveness of such judgments to all intents and purposes, there is yet a question of considerable importance, which has been discussed and decided in almost every state of the Union in which there are printed reports of their judicial decisions; and the question is presented now by the issue taken on the second and third pleas to this action. The defendants, in answer to the declaration, say that neither of them was served with notice of the suit in which the judgment was rendered, nor appeared, nor authorized any one to appear for him in the action, and that F. was never an inhabitant of or resident in the state of Georgia. The plaintiffs reply that the defendants are estopped by the record to deny these facts, and the record being set forth on oyer, the defendants demur to the replication of estoppel. If it appeared by the record that the defendants had notice of the suit, or that they appeared in defense, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially, and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defense."

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if the record of the judgment shows that the defendant was *personally* served with process, or personally appeared to the action, the record is conclusive, and he is estopped by it from denying that the court had jurisdiction of his person. Second, if the record does not show any service of process, nor notice to the defendant, nor appearance by him, the judgment is a mere nullity, and the record affords no presumption whatever.[215] Third, if the record shows a service of process, or a notice to the defendant, or an appearance for him, but not amounting, in either case, to *personal* notice or appearance, the record affords a presumption that the court had jurisdiction, but this presumption the defendant is at liberty to rebut.[216]

§ 901. Record may be Contradicted.

Notwithstanding the force of the reasoning in the cases just cited, there was much to be said on the other side. It is fair to infer that the constitution means no more than that full faith and credit shall be given to the *valid and lawful* judgments of the courts of a sister state. But if, in point of fact, the court had no jurisdiction of the defendant, the sentence which it assumed to pronounce is no judgment at all; it is a nullity. It is true that a *record* must be held incontrovertible. But in the absence of jurisdiction, the account of the court's proceedings is not a record, for those proceedings would be *coram non judice*. For the very purpose, therefore, of according due faith and credit to the judgment, it must first be ascertained whether the document purporting to be a record is in reality entitled to that character. Nor should recitals of jurisdiction be conclusive on this point. For if, actually, there was no jurisdiction, no greater force or credit can be given to such recitals than to any other part of the instrument. Their own credibility depends upon the antecedent question. In other words, a recital that the paper *is* a record does not make it one. It is true that in most of the states collateral

[215] This position, however, is contrary to most of the authorities, which hold that in the silence of the record, jurisdiction will be presumed. *Supra*, § 896.

[216] Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430. In support of the third position taken in this case, see also Lincoln v. Tower, 2 McLean, 473.

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impeachment of domestic judgments for want of jurisdiction is not allowed. But this is because the party has a more appropriate remedy, which is also easy and efficacious, by direct proceedings to have the judgment vacated or reversed. But this reason does not operate in the case of judgments recovered in one state against citizens of another. Besides the hardship and inconvenience that would be caused by denying all other remedy, it is familiar doctrine that the courts of a state will never compel their own citizens to resort to a foreign tribunal for relief which they themselves can accord.

These and similar considerations had weight with many of the state courts. And a great number of rulings were made (both before and after the federal decisions to be presently noticed) to the effect that, in an action on a judgment from another state, the defendant may always deny the jurisdiction of the court which rendered it, notwithstanding recitals in the record to the contrary.[217] Still this body of authority grew up side by side with an almost equal volume of judicial opinion directly opposed to it in principle. And the consequent doubt and uncertainty in regard to this important question was not removed until the United States supreme court came to deal with the controversy, and put its authoritative construction upon the terms of the law governing it. In the first case in which the precise question fairly arose, that court decided that the inquiry into the jurisdiction could not be prevented by any recitals in the record. At the conclusion of a thoughtful and well reasoned opinion, in which the extant authorities were reviewed with much learning and judg-

[217] Carleton v. Bickford, 18 Gray, 591, 74 Am. Rep. 652; Bodurtha v. Goodrich, 8 Gray, 508; Wright v. Andrews, 180 Mass. 149; McDermott v. Clary, 107 Mass. 501; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Gleason v. Dodd, 4 Met. 333; Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56; Dennison v. Hyde, 6 Conn. 508; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Frothingham v. Barnes, 9 R. I. 474; Black v. Black, 4 Bradf. Surr. 174; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172; Kerr v. Kerr, 41 N. Y. 272; Shumway v. Stillman, 6 Wend. 447; Mitchell v. Ferris, 5 Houst. (Del.) 84; Kingsbury v. Yniestra, 59 Ala. 320; Norwood v. Cobb, 24 Tex. 551; Wood v. Wood, 78 Ky. 624; Chaney v. Bryan, 15 Lea, 589; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Pollard v. Baldwin, 22 Iowa, 328; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Napton v. Leaton, 71 Mo. 358; People v. Dawell, 25 Mich. 247; 12 Am. Rep. 260; Rape v. Heaton, 9 Wis. 328, 76 Am. Rep. 269; Kane v. Cook, 8 Cal. 449.

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ment, Mr. Justice Bradley expressed himself as follows: "If it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent an inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force. . . . . On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."[218] The doctrine thus announced was soon afterwards re-affirmed in the same court, it being held that, although the record might show a return of the sheriff to the effect that the defendant had been personally served with process, yet the latter might deny and disprove it.[219] And the rule has been recognized and extended in later decisions of the court,[220] so that it may be now regarded as a fixed and settled principle, and one which of course is binding on the state tribunals. Before leaving this point it is necessary to remark that there is good authority for the proposition that if it appears affirmatively from the

[218] Thompson v. Whitman, 18 Wall. 457.

[219] Knowles v. Gaslight Co., 19 Wall. 58.

[220] Hall v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 714. And see Graham v. Spencer, 14 Fed. Rep. 603.

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record of the judgment, and *as a matter of adjudication*, that the defendant had legal notice of the suit or duly authorized an appearance to be entered for him, then he is no longer at liberty to allege a want of jurisdiction.[221] The reason of this is obvious. In such a case, the question of jurisdiction would be one of the grounds of defense to the original action, there set up and adjudicated, and of course equally concluded with any other defense. And hence the principle which forbids a re-examination of the merits of the controversy would apply.

§ 902. Plea Contradicting Record must be Special.

In an action on a judgment of a sister state, if it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict it is not admissible under the plea of *nul tiel record*. Defects appearing on the record may be taken advantage of under this plea, but if it is desired to contradict it, it must be done by a formal and special plea.[222] "The defendant may indeed negative the presumption by pleading and proof; he may show that the court which assumed to bind him had no authority over his person, and he may do this not only when the record is silent, but in opposition to its explicit entries or allegations; but if, instead of adopting this course, he confine himself to a plea of *nul tiel record*, and thus shut the plaintiff out from sustaining the record by extrinsic evidence, the judgment itself should be sufficient proof of its own validity."[223]

§ 903. Denying Authority of Attorney to Appear.

In several of the earlier cases it was held that when the record of a judgment in a sister state shows an appearance by attorney, it is not permitted to the defendant, when sued upon it, to deny that the court had jurisdiction. This position was rested on the general theory of the "absolute verity" of the record, and the constitutional

[221] Gleason v. Dodd, 4 Met. 333.
[222] Hill v. Mendenhall, 21 Wall. 453; Bennett v. Morley, 10 Ohio, 100.
[223] Fritz v. Fisher, 5 Clarke (Pa.), 350.

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doctrine that no pleas should be admitted against such a judgment except such as would have been available against it in the state where it was rendered.[224] But this view was never universally accepted, and the best modern cases have entirely repudiated it. So that it may now be regarded as the settled rule that, in an action on such a judgment, if the record recites that the defendant appeared by attorney, this may well be conclusive proof that the attorney did appear for him, but it is only *prima facie* evidence that the attorney was *authorized* to appear for him, and the defendant is at full liberty to prove that such appearance was unauthorized or fraudulent, and consequently that there was no jurisdiction of his person.[225] A recent case in New York carries this rule to a point which seems to be its extreme limit. There the defendant offered to prove that although the record recited his appearance by attorney, yet such appearance was wholly unauthorized. But it appeared that he had already moved, in the court which rendered the judgment, to have it set aside on that identical ground, that the motion was made upon affidavits and a full hearing had, but that it was decided against him. Nevertheless it was held that he was not prevented from raising the ques-

[224] Field v. Gibbs, 1 Pet. C. C. 155; Roberts v. Caldwell, 5 Dana, 512; Edmonds v. Montgomery, 1 Iowa, 143. This was also the doctrine in Missouri (see Warren v. Lusk, 16 Mo. 102; Baker v. Stonebraker, 24 Mo. 172), until the decision in the case of Thompson v. Whitman, 18 Wall. 457, after which the courts felt obliged to conform to the principles therein established. See Eager v. Stover, 59 Mo. 87.

[225] Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Shumway v. Stillman, 6 Wend. 447; Price v. Ward, 25 N. J. Law, 225; Koonce v. Butler, 84 N. Carr. 221; Sherrard v. Nevius, 2 Cart. (Ind.) 241, 52 Am. Dec. 508; Boylan v. Whitney, 8 Ind. 140; Welch v. Sykes, 8 Gilm. 197, 44 Am. Dec. 689; Thompson v. Emmert, 15 Ill. 416; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Harshey v. Blackmarr, 20 Iowa, 172, 89 Am. Dec. 520; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Eager v. Stover, 59 Mo. 87. In the case of Bodurtha v. Goodrich, 3 Gray, 508, Chief Justice Shaw remarked: "There is another question here, and that is, whether the defendant is conclusively bound by the entry of the name of an attorney on the docket, purporting to be an appearance for him, although it is true and susceptible of proof, that such entry was made by the accident or mistake of the attorney, or that, through some false and fraudulent representation made to the attorney, or other cause, in fact the attorney was never authorized to enter such appearance. It would certainly be very strange if an inhabitant of another state could thus be bound by a judgment given and recorded by a court having no jurisdiction, without any act or default of such party. . . .

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tion of jurisdiction when sued in the courts of another state upon such judgment, nor from proving such facts as would support his contention.[226] If the defendant may thus show that the appearance was unauthorized, he may of course show that the authority was special or limited. Thus the recital of the record may be explained by proof that the attorney was not empowered to submit the defendant to the jurisdiction of the court, but only to plead to the jurisdiction.[227] So also, where the judgment was against the plaintiff for costs, and he is sued upon it in another state, he may defend by showing that he gave no authority to institute the suit and had no knowledge thereof before judgment was rendered.[228] But it cannot be shown, against such a judgment, that the attorney who had entered an appearance for the defendant in the original action had subsequently, without the consent of the latter, withdrawn such appearance after issue joined and several continuances of the cause, and that the counsel who afterwards appeared did so without any authority. For this would not invalidate the previous action of the counsel who was duly employed, and the latter's withdrawal of appearance would not put the party for whom he appeared out of court.[229]

We think that where it appears that, as in the present case, the defendant was an inhabitant of another state, that no property of his was attached by trustee process or otherwise, and that he was not served with process, and the only ground to sustain the judgment is that he appeared by attorney, it is competent for the plaintiff in error to aver and prove that such attorney was never authorized to appear for him and thereby give the court jurisdiction. And even had the record gone further, and stated that such attorney was duly authorized and did appear, still it would be open to the plaintiff in error to aver and prove facts tending to show that the court had no jurisdiction of the cause, and therefore that they could make no record binding upon him, being a stranger, and such record would not be conclusive. It would be reasoning in a circle, and inconclusive, to say that the court had jurisdiction because it was shown by their record that the defendant appeared by attorney, and that they had authority to make such record, binding upon him, because they had jurisdiction."

[226] Howard v. Smith, 85 N. Y. Superior Ct. 131.

[227] Graham v. Spencer, 14 Fed. Rep. 603.

[228] Watson v. New England Bank, 4 Met. 343.

[229] Wilson v. Hilliard (Pa.), 5 Atl. Rep. 258.

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§ 904. Jurisdiction by Attachment of Property.

Most of the cases in which the effect and validity of judgments from another state have been called in question have presented instances of an attempted exercise of jurisdiction over persons who were not citizens or residents of the state. And in most of the states, statutes exist which authorize the institution of proceedings against such persons upon the attachment and seizure of property belonging to them and found within the territory, together with some species of constructive or substituted service of process. We have therefore to consider the extent of the jurisdiction thus acquired, to what purposes it may be directed, and how the resultant judgment will be regarded in other states. Now in the first place, it is not denied (indeed it is familiar doctrine) that the existence of property, either real or personal, within the limits of a state, gives to that state the dominion and jurisdiction over it, to the extent of regulating its transfer, controlling its use and disposition, subjecting it to process and execution, and devoting it to the satisfaction of the just claims of its own citizens.[220] So far it is immaterial whether the owner of the property be a citizen or a foreigner, a resident or absentee. And since such proceedings, as far as concerns the particular property seized, are substantially *in rem*, they do not need the support of an actual and personal notice to the owner, but such notice may be merely constructive. On the other hand, as we shall see more fully in the succeeding sections, no state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance, so as to render a judgment or decree which shall be binding on him personally. For that purpose, constructive or substituted service is of no avail. As a result of these two doctrines, the rule must be that if jurisdiction in an action is obtained against a non-resident by attachment of his property only, the judgment rendered thereon will bind the property attached and justify its disposition under execution, but beyond that it will have no extra-territorial force or validity what-

[220] Story, Confl. of Laws, §§ 549–551.

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ever. And to this proposition the authorities unanimously agree.[281] It follows from this that a judgment founded upon attachment of property, affecting to bind not only the property attached but also the person of a defendant not a citizen of the state or within its precincts at the time, is to be treated as a nullity by a court in another state which is called on to enforce it by action, so far as concerns any personal liability of the defendant, although it would bind his person

[281] Green v. Van Buskirk, 7 Wall. 139; Cooper v. Reynolds, 10 Wall. 308; Galpin v. Page, 18 Wall. 350; Pennoyer v. Neff, 95 U. S. 725; Thompson v. Emmert, 4 McLean, 96; McVicker v. Beedy, 31 Me. 314, 50 Am. Dec. 666; Young v. Ross, 31 N. H. 201; Woodruff v. Taylor, 20 Vt. 65; Price v. Hickok, 39 Vt. 292; McDermott v. Clary, 107 Mass. 501; Kilburn v. Woodworth, 5 Johns. 37, 4 Am. Dec. 321; Fenton v. Garlick, 8 Johns. 194; Bates v. Delavan, 5 Paige, 299; Robinson v. Ward, 8 Johns. 86, 5 Am. Dec. 327; Pawling v. Bird, 13 Johns. 192; Bartlett v. Spicer, 75 N. Y. 528; Phelps v. Holker, 1 Dall. 261; Steel v. Smith, 7 Watts & S. 447; Miller v. Dungan, 36 N. J. Law, 21; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Arndt v. Arndt, 15 Ohio, 33; Melhop v. Doane, 31 Iowa, 397, 7 Am. Rep. 147; Chamberlain v. Faris, 1 Mo. 517, 14 Am. Dec. 304; Jones v. Spencer, 15 Wis. 583; Story, Confl. of Laws, § 549.

In the important case of Pennoyer v. Neff, *supra*, this subject was considered with much care and attention, and we quote the following language of Field, J., as a clear exposition of the most approved doctrine on the point in question. "Substituted service by publication," said the learned judge, "or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability. . . . . In all the cases

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in the courts and by the laws of the state in which it was rendered.[232] It follows also that if the property attached is not sufficient to satisfy the plaintiff's claim, the judgment will be no bar to another action in another state for the balance of the original demand.[233] Further, the recitals of a judgment *in rem*, obtained in a sister state without personal service and upon publication only, and where the defendant did not appear to the suit, are not evidence of debt in a separate action pending in another state between the same parties.[234] A personal judgment for costs may not be rendered against the defendant, on default, in an action of trespass to try title to real estate, if citation was served on him by publication, as a non-resident, and not personally, and if such judgment be entered, it cannot be enforced against other property of the defendant even within the jurisdiction of the court.[235] But a suit to enforce the lien of a mortgage by a sale of the property is in the nature of a proceeding *in rem*, and in case the mortgagor or his successor in interest is a non-resident, or not found, so that he cannot be personally served with process in the state, the court may decree a sale of the property on such substituted or constructive service of process on the defendant as the legislature may provide.[236] But in such a case, it is apprehended, a personal

brought in the state and federal courts, where attempts have been made, under the act of congress, to give effect in one state to personal judgments rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception so far as we are aware, that such judgments were without any binding force, except as to property or interests in property within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under the control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated,—that the tribunals of one state have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

[232] Steel v. Smith, 7 Watts & S. 447; Miller v. Dungan, 36 N. J. Law, 21, and other cases cited in preceding note.

[233] National Bank v. Peabody, 55 Vt. 492.

[234] Iles v. Elledge, 18 Kans. 296.

[235] Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. Rep. 165.

[236] Swift v. Meyers, 37 Fed. Rep. 87.

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judgment or decree for the deficiency would have no extra-territorial validity. Further, the jurisdiction of a state includes the power to appropriate debts, due by its citizens to non-residents, to the payment of debts due by such non-residents to other citizens of the state, and to prescribe the remedial means or judicial proceedings by which such appropriations may be made. And when the proceedings in an action for that purpose are in conformity with the laws of the state, they are final and conclusive upon the non-resident, so far as the fund itself is concerned, although he was not served with process and did not appear in the action.[227] Finally, the doctrine that the judgment in an attachment proceeding creates no personal liability against the defendant, outside the state where rendered, applies only where the proceeding is strictly *in rem*, and not where there was personal service of process on the defendant or an appearance entered by him.[228]

905. Extra-Territorial Service of Process.

It is well settled that extra-territorial service of process confers no jurisdiction for the rendition of a valid personal judgment. A citizen of one state cannot be compelled to go into another state, and there litigate an action pending against him, merely by the service of a writ upon him in his own state. For no state can send its process into another state. The moment it crosses the border it loses the character of judicial process. True, the personal service of it gives the defendant actual notice of the suit, and in this it differs from service by publication. But this difference is immaterial for jurisdictional purposes. In that respect both methods of citation stand on the same footing. Hence service of process in another state, though authorized by the laws of the forum, gives no authority to render a personal judgment which will have any force or vitality beyond the state where the action was brought.[229] But of course if the defendant, after being so served, files an answer in the suit and

[227] Campbell v. Home Ins. Co., 1 S. Car. 158.

[228] Payne v. O'Shea, 84 Mo. 129.

[229] Parrott v. Alabama Ins. Co., 4 Woods, 353; Ewer v. Coffin, 1 Cush. 23, 48 Am. Dec. 587; Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. Rep. 160; Reber v. Wright, 68 Pa. St. 471; Pennoyer v. Neff, 95 U. S. 714; Folger v. Columbian Ins. Co., 99 Mass. 267.

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sets up a defense on the merits, the judgment rendered will be valid and conclusive.[240]

§ 906. Constructive Service on Non-Residents.

A judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by an authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode (*e. g.*, publication of summons in a newspaper) recognized as sufficient and valid by the laws of that state; and such absence of jurisdiction will defeat an action on such judgment in any other state.[241] As remarked by a learned judge in Kentucky: "Although the federal constitution declares, in effect and according to the established interpretation of it here, that a judgment rendered in one of the states of the Union shall be as effectual as it may be where it was pronounced, yet it has been decided that, as no state has jurisdiction, legislative or judicial, over

[240] Jones v. Jones, 36 Hun, 414.

[241] D'Arcy v. Ketchum, 11 How. 165; Bischoff v. Wethered, 9 Wall. 812; Cooper v. Reynolds, 10 Wall. 308; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight Co., 19 Wall. 58; Pennoyer v. Neff, 95 U. S. 714; Empire v. Darlington, 101 U. S. 87; Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. Rep. 586; Thompson v. Emmert, 4 McLean, 96; McVicker v. Beedy, 31 Me. 314, 50 Am. Dec. 666; Whittier v. Wendell, 7 N. H. 257; Rangeley v. Webster, 11 N. H. 299; Rider v. Alexander, 1 D. Chip. 275; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Price v. Hickok, 39 Vt. 292; Woodward v. Tremere, 6 Pick. 354; Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56; Carleton v. Bickford, 13 Gray, 591, 74 Am. Dec. 652; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Rathbone v. Terry, 1 R. I. 73; Frothingham v. Barnes, 9 R. I. 474; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Reber v. Wright, 68 Pa. St. 471; Scott v. Noble, 72 Pa. St. 115, 13 Am. Rep. 663; Mitchell v. Ferris, 5 Houst. (Del.) 34; Davidson v. Sharpe, 6 Ired. 14; Miller v. Miller, 1 Bail. 242; Howell v. Gordon, 40 Ga. 302; Dearing v. Bank, 5 Ga. 497, 48 Am. Dec. 300; Ponce v. Underwood, 55 Ga. 601; Feltus v. Starke, 12 La. Ann. 798; Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Carlin v. Taylor, 7 Lea, 666; Barkman v. Hopkins, 11 Ark. 157; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Arndt v. Arndt, 15 Ohio, 33; Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Zepp v. Hager, 70 Ill. 223; Winston v. Taylor, 28 Mo. 82, 75 Am. Dec. 112; Outhwite v. Porter, 13 Mich. 533; Tyler v. Peatt, 30 Mich. 63; Jones v. Spencer, 15 Wis. 583; Kane v. Cook, 8 Cal. 449.

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any other persons than its own citizens and foreigners within its sovereign limits, a judgment or decree *in personam* against a citizen of another state, without actual service of process or voluntary appearance, is not made binding and conclusive in any other state by the federal constitution."[242] So also the supreme court of the United States declares that a judgment or decree which is merely *in personam* "can only be supported, against a person who is not a citizen or resident of the state in which it is rendered, by actual service upon him within its jurisdiction, and constructive service by publication in a newspaper is not sufficient. The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force, as against a citizen of another state, in a court of the United States, though held within the state in which the judgment was rendered."[243] A judgment so rendered, therefore, will be regarded in other states as void and a mere nullity; it may be impeached collaterally or otherwise; it forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.[244] Even in the state where the action is brought, according to the best authorities, a judgment rendered upon merely constructive service has not sufficient vitality to justify the courts in seizing and selling property of the non-resident debtor, found within the state, for its satisfaction. If the action was begun by an attachment of property, so as to be substantially *in rem*, the courts will be justified in ordering the disposition of *that* property. But to warrant the subjection of any *other* property, although it lies within the same territory, to the claims of creditors, there must first be established a valid personal liability of the defendant, and that can never result from a sentence based on nothing more than constructive citation.[245]

[242] Whiting v. Johnson, 5 Dana, 390.

[243] Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. Rep. 586.

[244] Eaton v. Badger, 33 N. H. 228; Carleton v. Washington Ins. Co., 35 N. H. 162.

[245] Pennoyer v. Neff, 95 U. S. 714.

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§ 907. Constructive Service on Residents.

"Each state has the right to prescribe by law how its citizens shall be brought into its courts. And whatever conflict there may be in some of the earlier cases on the subject, we think it is now well settled that if process be served upon the defendant according to the laws of the state of which he is a resident, and judgment be afterwards rendered against him, such a judgment is as binding between the parties, in this state, when relied on as a bar to the prosecution of a second suit, upon the same cause of action, as it is in the state where it was rendered."[246] Consequently, if the defendant was subject to the jurisdiction of the state where the action was brought, and process was served upon him in accordance with its laws,—as, by leaving a copy of the summons at his usual residence,—the judgment is presumably valid, although he was in fact temporarily absent from the state.[247] But it has also been held that the judgment is liable to be impeached, in another state, by proof that the defendant was not domiciled in the state where it was rendered, nor subject to its laws, or that the judgment is not valid according to those laws.[248] And some few cases, in opposition to the opinion of the majority, hold that, even in the case of its own citizens or residents, a state cannot rightfully substitute a merely constructive service for actual personal citation.[249]

908. Voluntary Appearance of Non-Resident.

Where suit is brought against a non-resident defendant, and the service of process is by publication, or in some other mode not amounting to personal citation, yet if he voluntarily appears and defends the action, the court acquires complete jurisdiction of his person, and the judgment is valid and binding alike in the state

[246] Harryman v. Roberts, 52 Md. 64, 75. And see also Henderson v. Staniford, 105 Mass. 504; Gillespie v. Commercial Ins. Co., 12 Gray, 201.

[247] Cassidy v. Leitch, 2 Abb. New Cas. 315; Huntley v. Baker, 33 Hun, 578; Biesenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629.

[248] Cassidy v. Leitch, 2 Abb. New Cas. 315.

[249] Bowler v. Huston, 33 Gratt. 266. And see Amsbaugh v. Exchange Bank, 33 Kans. 100, 5 Pac. Rep. 384.

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where rendered, in the domicile of the defendant, and in all other courts.[250] On the same principle, one who prosecutes an appeal from a judgment of a *nisi prius* court of a sister state to the supreme court of that state, and who submits himself to the jurisdiction of the appellate tribunal, cannot impeach its judgment, in an action brought thereon in another state, on the ground that the *nisi prius* court had never obtained jurisdiction of his person, as the judgment of the supreme court merges that of the lower court.[251] So a judgment rendered by a court in Massachusetts, upon a writ served upon the defendant personally in that jurisdiction, where he appeared and pleaded to the merits, is entitled to full faith and credit in the courts of Maine, although, at the time of the service of the writ, both the parties were citizens of the last named state.[252]

§ 909. Defendant Decoyed into Another State.

In a case where the defendant, residing in Iowa, was induced, by means of false pretenses or representations, to go into Illinois, the plaintiff thus designing to get service upon him, and in pursuance of such service a judgment was taken against him, which judgment was afterwards made the basis of an action in the courts of Iowa, it was there held that the jurisdiction so attaching was fraudulently obtained and would vitiate the judgment, and that the defendant might plead the fraud in bar of the subsequent action in Iowa. Said the court: "As we entertain no doubt that a court of Illinois would, if the facts alleged in this answer were proved, perpetually enjoin the collection of this judgment, we are clearly of the opinion that the defense here interposed should bar a recovery thereon in our own courts."[253] But some of the decisions rendered elsewhere on similar facts incline to

[250] Bellows v. Ingham, 2 Vt. 575; Harbin v. Chiles, 20 Mo. 314. See also Randolph v. Keiler, 21 Mo. 557.

[251] Roach v. Privett (Ala.), 7 South. Rep. 808.

[252] Cleaves v. Lord, 43 Me. 290.

[253] Dunlap v. Cody, 31 Iowa, 260, 7 Am. Rep. 129; Duringer v. Moschino, 93 Ind. 495. An affidavit of defense, in a suit on a foreign judgment, which alleges that the defendant was fraudulently enticed into the state where the judgment was rendered, for the purpose of getting service on him, but no defense on the merits, is insufficient. Luckenbach v. Anderson, 47 Pa. St. 123.

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the view that the defendant ought to apply to the court where the action is pending to have the proceedings set aside, on the ground of an abuse of its process, and that if he neglects to do this, and the action proceeds to judgment, he will be bound by the result in spite of the fraud practised upon him.[254] Other cases hold that his remedy is to bring suit against the persons conspiring to lure him into the foreign jurisdiction.[255] However this may be, it should be observed that there must be an actual fraud or trick put upon the defendant. A mere request to him to go to the other state and defend a suit in attachment actually pending there, is not a fraudulent device.[256]

§ 910. Non-Resident Corporations.

The principles stated in the preceding sections in relation to the acquisition of jurisdiction over non-resident defendants apply with the same force to foreign corporations as to natural persons.[257] A corporation is a resident of the state which creates it, and if sued in the courts of a different state, jurisdiction over it can only be acquired in some mode equivalent to personal service of process on an individual. But as an individual may submit himself to the jurisdiction of a foreign court, by accepting service of process within its territorial bounds, so may also a corporation, by having an officer or agent, authorized to accept service, in a foreign state where it does business. And indeed many of the states make the appointment of such a resident officer or agent a condition to the admission of certain classes of corporations to transact business within their borders. Hence when a corporation chartered in one state is sued in another, and service is there made upon a resident agent of the company who is authorized to receive service of process on its behalf, jurisdiction attaches, and the judgment in the action will be entitled to full faith and credit in the state where the corporation is chartered.[258] But it

[254] Steele v. Bates, 2 Ark. 338, 16 Am. Dec. 720; Townsend v. Smith, 47 Wis. 623, 3 N. W. Rep. 439, 32 Am. Rep. 793.

[255] Cook v. Brown, 125 Mass. 503, 28 Am. Rep. 259.

[256] Duringer v. Moschino, 93 Ind. 495.

[257] St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 354.

[258] Lafayette Ins. Co. v. French, 18 How. 404.

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is a well established rule of interstate or international law that the courts of another state will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that state. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an "agent" of the company.[259] A judgment rendered against a corporation in another state, after its dissolution according to law in the state which created it, is a nullity, and does not come within the constitutional provision requiring full faith and credit to be given to interstate judgments.[260]

§ 911. Irregularities in Service.

If the defendant was present within the territorial jurisdiction of the court when proceedings were begun against him, and process was there and then served upon him, no mere irregularity in such service, unless it was so radical as to deprive it of all citatory effect, can be set up against the judgment ensuing thereon in a suit upon such judgment in another state.[261]

§ 912. Continuation of Jurisdiction.

Where a court has acquired full jurisdiction of a cause, it retains it until the cause is finally determined. The exercise of the jurisdiction may be suspended, but the jurisdiction itself is never suspended. When, therefore, a court which still retains jurisdiction, but has suspended the exercise of it, assumes again to exercise its jurisdiction, its action is within its power and cannot be collaterally impeached. And where, in the case of a foreign judgment, it does not appear by the record that any notice was given to the party affected by the action of the court in thus resuming its jurisdiction, it will be presumed that, according to the practice of the court, no such notice

[259] Heming v. Planters' Ins. Co., 28 Fed. Rep. 440.

[260] *In re* Norwood, 82 Hun, 196.

[261] Jardine v. Reichert, 39 N. J. Law, 165; *Supra*, vol. 1, §§ 223, 224.

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was necessary, or that, if necessary, it was in fact given.[203] Where a judgment is rendered against a party who is fully within the jurisdiction of the court, and an appeal is taken after he has removed from the state, the appellate court has jurisdiction to proceed with the case, notwithstanding there can be no personal service of the process or notice of appeal.[203] So in cases where a *scire facias* is to be regarded as a continuation of the original action and not as a new suit, a judgment on the *scire facias* against a non-resident who was not served with notice of that proceeding and did not appear, will be held good in the courts of another state, provided the court had jurisdiction over him in the original suit.[204] So again, a judgment founded on a recognizance entered in the court of a state on the return of two successive writs of *scire facias nihil habet* will be regarded as valid and conclusive in another state. The proceeding is not *coram non judice*, inasmuch as the act of confessing the debt of record gives jurisdiction to the court over the person of the conusor.[205]

§ 913. Judgment against Joint Defendants.

If two or more persons are made joint defendants to an action, but only a part of them are within the jurisdiction of the court or per-

[203] Sanford v. Sanford, 28 Conn. 6.

[203] Nations v. Johnson, 24 How. 195; Cone v. Hooper, 18 Minn. 531, (Gil. 476.) Compare Meyer v. Hartman, 14 Mo. App. 180.

[204] Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266. See also Delano v. Jopling, 1 Litt. 117; Poorman v. Crane, Wright, 847. But compare Robinson v. Ward, 8 Johns. 86; Holt v. Alloway, 2 Blackf. 108.

[205] Elasser v. Haines (N. J.), 18 Atl. Rep. 1095. In this case, in the course of a long and well-considered opinion, Beasley, C. J., observed: "The inquiry therefore arises, and it involves the entire issue now before the court, how was it that judgment could go against a conusor who had not been served with the *scire facias*? The answer is that by the form of the procedure, of which the writs of *scire facias* formed a part, the conusor voluntarily made himself a party to the proceeding. He went into court and confessed a debt subject to a condition, with the knowledge that if he absented himself from the jurisdiction a judgment might be taken against him on the return of two unserved writs of *scire facias*. Such was the legal effect of the act done by him; and, in intendment of law, he was held to have assented to such effect. If, when he confessed the debt, he had expressly consented, in pursuance of a local statute, to the entry of a final judgment of this nature on the return of two unserved writs of *scire facias*,

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sonally served with process within the state, a judgment rendered against all cannot be enforced outside of the state in which it was recovered.[266] Thus, in those states where the common law prevails, when a commercial firm is sued, it is necessary that process should be served on each member of the firm, and if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction.[267] Whether a judgment so rendered will be ex-territorially valid against the defendant upon whom process was served, is a question of more difficulty. It seems to be conceded that if the judgment would be binding on such defendant at home, it must be accorded the same effect in all other states.[268] But most of the courts which have dealt with the question adhere to the doctrine that a joint judgment is an entirety and if void as to one defendant is void as to all.[269] And they presume, in the absence of evidence to the contrary, that the law of a sister state is in this respect identical with their own or with the common law. Consequently, the presumption will be that such a judgment is void even as against the defendant who was duly served, and this presumption

it is presumed it would not be contended that a judgment entered in accordance with such stipulation would not have been of unquestionable validity; and yet, as he is chargeable with the knowledge, when he entered into this recognizance, that such result would obtain, according to the laws then in force, the tacit assent to such procedure, that is necessarily to be implied, wants but little of the force that would have resided in such supposed positive agreement. Nor is there any hardship which can arise out of such an interpretation of this legal procedure. If the conusor has any defense which he desires to interpose to the movement to enter judgment against him, he has his day in court for that purpose; for he is aware that he has, to that end, until the return of the second writ of *scire facias*, and, by the exercise of ordinary diligence, he can keep himself informed with respect to the running of such writs. In such a course of law, nothing is perceived of which the defendant can justly complain. At all events, it is a proceeding to which he has voluntarily submitted himself, and has thereby impliedly assented to it from its inception to its obvious conclusion."

[266] Frothingham v. Barnes, 9 R. I. 474; Bowler v. Huston, 30 Gratt. 266; Rogers v. Burns, 27 Pa. St. 525.

[267] Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56; Board of Public Works v. Columbia College, 17 Wall. 521; Scott v. Bogart, 14 La. Ann. 261.

[268] Conley v. Chapman, 74 Ga. 709.

[269] On this doctrine, see *supra*, vol. 1, § 384.

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can only be removed by proof of the law of the other state authorizing the rendition of the judgment and making it valid and binding on that defendant. Thus, the court in Massachusetts said of a judgment recovered in Maine: "If that court had no jurisdiction of one defendant, its judgment, being entire and unqualified, is, in the absence of any evidence of the law of Maine upon the subject, void against both." [270] And the same tribunal had before ruled that a judgment by default, in another state, against several defendants, only part of whom were served with process, directing that execution issue against the sole property of the defendant served and the joint property of all the defendants, would not support an action in Massachusetts, even against the defendant who was served, without proof that by the laws of the other state, such a judgment might properly be rendered.[271]

§ 914. Joint Debtor Acts.

In several of the states statutes have been enacted which provide that when an action is brought against two or more joint defendants, and only a part of them are served with process, the suit may nevertheless proceed, and if the plaintiff recover, judgment may be rendered against all the defendants, but so that execution shall only issue against their joint property and the separate property of the defendant served. As to the ex-territorial validity of a judgment so rendered, it is held that it must be accorded exactly the same force and effect when made the basis of an action, in another state, against the defendant who was originally served, and he cannot allege that the judgment is invalid, or claim the right to open again the merits of the controversy.[272] As to the defendant who was not served, the case is different. As the judgment has only a qualified validity as to him, and is not enforceable, even in the state where rendered, against his individual property, it is clear that it will constitute no bar to an action against him in any other state on the original cause of action.[273]

[270] Wright v. Andrews, 130 Mass. 149. See also Scott v. Noble, 72 Pa. St. 115, 13 Am. Rep. 663.

[271] Knapp v. Abell, 10 Allen, 485.

[272] Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242; Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. Rep. 1194; Swift v. Stark, 2 Oreg. 97, 88 Am. Dec. 463.

[273] Stone v. Wainwright, 147 Mass. 201,

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But the joint debtor acts commonly provide that the judgment shall be conclusive on the defendant not served of the amount of the indebtedness but no further. Under this provision, it is held that when the plaintiff brings suit on the judgment in another state against both the defendants, he is not excused from the necessity of proving the original cause of action against the defendant who was not served. For the ground on which, consistently with established principles, such a judgment can be held conclusive as to the amount of the indebtedness against the defendant not served with notice, is, that by reason of the relation between them growing out of the joint character of their contract, the defendant served with notice may be regarded as authorized to act for the other defendant, so far as to bind him by his admission of the amount of the debt. When, therefore, there is a failure to prove, in the action founded on the judgment, a joint liability of the two defendants, the defendant not served with process cannot be regarded as affected to any extent by the judgment.[274] In New York it appears to be as yet an unsettled question whether a judgment obtained under the joint debtor act is evidence of the *extent* of the plaintiff's demand against the party not served, after his liability has been established by other evidence, or whether the effect of the judgment is merely to limit the amount of the claim so that no greater sum can be recovered.[275]

§ 915. Jurisdiction of Subject-Matter.

The opinion has been expressed that, in an action on a judgment of a sister state, the defendant cannot plead that the court rendering the judgment had no jurisdiction of the subject-matter of the suit; both the indebtedness and jurisdiction of the subject-matter are subjects of inquiry before the judgment is rendered and not after.[276] But this view is sustained neither by reason nor authority. That the jurisdiction of the subject may be inquired into is conclusively shown by the universally acknowledged rule that a judgment assuming to dis-

17 N. E. Rep. 801; Shirley v. Shattuck, 13 Met. 256.

[274] Duryee v. Hale, 31 Conn. 317.

[275] Oakley v. Aspinwall, 4 N. Y. 513.

[276] Hensley v. Force, 12 Ark. 756.

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pose of or affect the title to lands situate outside the state is of no ex-territorial validity.[277] Besides, total want of jurisdiction of the matter decided has the same effect, in rendering the judgment a mere nullity, as total want of jurisdiction of the parties.[278] Hence it is rightly held that a decree in one state which adjudicates a matter not presented by the pleadings nor within the issue, can have no higher effect in another state than a judgment rendered in the courts of the latter under like conditions; that is, it must be treated as absolutely void.[279] In determining the validity of a judgment in this respect, the courts must look to the laws of the state where the judgment was rendered and be governed by the construction its own courts have given thereto.[280]

Part V. Fraud as Ground of Impeachment.

§ 916. Cases Allowing Defense of Fraud.

It has been made a question whether or not fraud practised in obtaining it can be pleaded to an action on a judgment rendered in a sister state. There are numerous expressions of opinion to be found in the books to the effect that such a plea is admissible.[281] Some of the cases cited are direct and positive adjudications upon the question. But others are merely *dicta* upon this point, the topic being touched on in the course of general discussions of the validity and

[277] *Supra*, § 872.

[278] *Supra*, vol. 1, §§ 240, 242.

[279] Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. Rep. 385.

[280] Stark v. Ratcliff, 111 Ill. 75.

[281] Pearce v. Olney, 20 Conn. 544; Brainard v. Fowler, 119 Mass. 262; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Buford v. Buford, 4 Munf. 241, 6 Am. Dec. 511; Miller v. Leach, 95 N. Car. 229; Sharman v. Morton, 31 Ga. 34; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Fletcher v. Rapp, 1 Sm. & Mar. Ch. 374; White v. Trotter, 14 Sm. & Mar. 30, 53 Am. Dec. 112; Norwood v. Cobb, 20 Tex. 588; Coffee v. Neely, 2 Heisk. 304; Welch v. Sykes, 3 Gilm. 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Holt v. Alloway, 2 Blackf. 108; Rogers v. Gwin, 21 Iowa, 58; Marx v. Fore, 51 Mo. 77; Eaton v. Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

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effect of judgments from other states. The latter (to which many more might be added) are of course of no direct authority upon the question, but they show that many of the courts have always taken it for granted that the defense of fraud might be interposed in such an action. In an early case in Vermont it was said: "It is a point settled that when debt is brought upon a foreign judgment rendered by default, the court will go into the consideration of such judgment, and if it appears that such judgment was surreptitiously obtained, they will not render judgment upon it." The judgment here spoken of was rendered in Connecticut against a non-resident, upon attachment of certain property which he now denied to be his.[282] So in a case in Arkansas it was held that a judgment of a sister state may be impeached on the ground of fraud practised in obtaining it. But this was a case where the defendant in such judgment went into chancery with a bill to enjoin its collection. It was therefore a direct proceeding to annul it, and one which would have been permissible in the state where the judgment was rendered.[283] According to another authority, such a judgment, if it was procured by fraud, may be impeached in the state where suit is brought upon it for the same reasons that would justify a court of equity in enjoining a judgment at law in the latter state.[284]

§ 917. Plea of Fraud, when Admissible.

The doctrine stated in the preceding section was never universally accepted. In many of the states the courts have adhered to the rule that the plea of fraud is not admissible in an action on a judgment from a sister state, unless it could be set up in the courts of the state rendering the judgment.[285] And this must now be regarded as settled law, especially in view of certain recent rulings of the United States

[282] Waddams v. Burnham, 1 Tyler, 288.

[283] Conway v. Ellison, 14 Ark. 360.

[284] Turley v. Taylor, 6 Baxt. 376.

[285] Anderson v. Anderson, 8 Ohio, 108; Bicknell v. Field, 8 Paige, 440; McRae v. Mattoon, 18 Pick. 53; Sanford v. Sanford, 28 Conn. 6; Benton v. Burgot, 10 Serg. & R. 240; Granger v. Clark, 22 Me. 128; Barras v. Bidwill, 3 Woods, 5; McDonald v. Drew, 64 N. H. 547, 15 Atl. Rep. 148; Johnson v. Dobbins, 5 Week. Not. Cas. 537.

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supreme court in the same direction,[286] which, as involving the construction of the constitution, and of an act of congress, must be regarded as of binding authority upon the state courts, and which therefore have the effect to overrule the former decisions and *dicta* to the contrary. Indeed, the cases referred to, in the supreme court, seem at first sight even to exclude the qualification that the plea of fraud is admissible when it would be admissible at home. This, however, arises from the generality of the terms in which they express the rule, and it is not a necessary inference that the rule is to be applied so strictly as to exclude the case supposed. Thus, in one of the latest cases before that tribunal, Mr. Justice Gray took occasion to remark: "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."[287] The cases following this view have held that if the judgment was founded in fraud, or was entered without the authority of the court, the party injured must resort to that court and there procure the judgment to be vacated. Thus the supreme court of Pennsylvania says: "If the judgment was entered in West Virginia by fraud or collusion, the court in which it was entered is the proper one to redress the wrong. It is a matter with which we have nothing to do."[288] And there seems to be logically no escape from this position, except in cases where the court which rendered the judgment would itself allow the defense of fraud in an action upon it. Most of the cases on the subject recognize this important exception. But not all of them have been successful in discerning the true rule for ascertaining when the excepted cases occur. For example, in the case of *Peel* v. *January*[289] we find the following line of reasoning: In an action on a sister state judgment, only those defenses can be made which could be made against the judgment in the courts of the state

[286] Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 22 Wall. 77.

[287] Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. Rep. 242.

[288] Wyoming Manuf. Co. v. Mohler (Pa.), 17 Atl. Rep. 31. See also Bicknell v. Field, 8 Paige, 440.

[289] 35 Ark. 331, 37 Am. Rep. 27.

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where it was rendered. The available defenses must therefore be ascertained by the law prevailing in the state where the judgment was rendered. In the absence of evidence to the contrary, it is presumed that the common law obtains in a sister state. At the common law fraud could not be set up as a defense to an action on a judgment; it could be pleaded only by third persons. Therefore fraud cannot be pleaded by the defendant to an action on such a judgment. The fallacy here is in assuming that the common law is always to be presumed the rule of decision in another state. It is true the question must be governed by the laws of the state from which the judgment comes. But in cases of this sort, as we have already shown,[290] the courts of a sister state are bound to take judicial notice of those laws, or to examine and see for themselves whether the common law really survives in that jurisdiction or has been abrogated. And such an investigation would often lead to a different result from that arrived at in the case cited.

§ 918. Principles Governing the Question.

The topic is not without its difficulties, and the following observations are put forward in the hope that they may to some extent aid the reader in discovering the true principles which should govern it. In the first place, to allow the plea of fraud to be made in all cases, in an action on a judgment of a sister state, would be tantamount to allowing an inquiry into the merits, by an impeachment of the justice of the sentence, which, if the judgment could not be assailed on this ground at home, is beyond question inadmissible. This is the ground of the decision in the case of *Christmas* v. *Russell*.[291]

It would also, in the case supposed, amount to a collateral attack upon the judgment, which, also, is universally forbidden. And this is the basis of the decision in *Anderson* v. *Anderson*.[292]

The allegation of fraud must not be confounded with the right of the defendant to deny that the court had jurisdiction over him. As we have already seen, he may aver that the court never had such jurisdiction, or that the service of process was constructive merely,

[290] *Supra*, § 860. [291] 5 Wall. 290. [292] 8 Ohio, 108.

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and that therefore, in the one case, the judgment is void, and in the other case, is extra-territorially invalid. But the present rule forbids him to allege that although the jurisdiction was regularly obtained, and did in fact attach, yet it was fraudulently procured.

In some of the states, where the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now when the same judgment is made the basis of an action in another state, he ought to be allowed the same latitude of defense. For, if it were otherwise, the foreign court would be required to give *greater* faith and credit to the judgment than it is entitled to at home, which the constitution does not require.

It will be shown in the next section that the courts of one state, in proper cases, may enjoin the prosecution of an action on a judgment from another state. Now in several of the states, where equitable defenses are heard in legal actions, the defendant may directly impeach a *domestic* judgment by defending against it on grounds which would have moved a court of equity to enjoin its collection. And when the action is on a *foreign* judgment, or one from a sister state, it is difficult to see why he should not be allowed to pursue the same course. It is not reasonable to put him to the indirect method of bringing a new and independent suit merely because, in the other state, he would have to take the same circuitous course. The question seems to be wholly one of practice. It does not involve the degree of faith and credence to be given to the judgment, but only the remedy of a party fraudulently affected by it.

§ 919. Enjoining Action on Fraudulent Judgment.

The principles upon which the chancery courts of one state will be justified in interfering to restrain proceedings upon a judgment fraudulently recovered in another state were well and clearly laid down by the supreme court of Missouri in the following terms: "In this state, a proceeding in the nature of a bill in equity will lie to

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enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other states, when sued on in this state. The fraud, however, for which a judgment will be enjoined must be in the procurement of the judgment. And courts of equity will not vacate or enjoin a judgment merely based upon a cause of action which may be vitiated by fraud, for this is a valid and meritorious defense, which may be interposed, and unless its interposition is prevented by fraud of an adversary, it cannot be asserted against a judgment, either foreign or domestic."[293] Nor does the constitutional provision stand in the way of such a proceeding. For the court of equity does not thereby impugn the foreign judgment, but considers the equities subsisting between the parties and acts upon them personally, restraining the one from pursuing a judgment so obtained and protecting the other.[294]

§ 920. False Evidence and Conspiracy.

A bill in equity for an injunction against the use, in one state, of a judgment rendered in another state, cannot be maintained on the ground that the judgment was obtained by means of the false and fraudulent testimony of the prevailing party or of other witnesses.[295] Nor will an action lie by the judgment-defendant against the plaintiff and another for fraudulently conspiring together to obtain a judgment against such defendant in an action brought in a court of another state, which court had jurisdiction of the subject-matter and

[293] Payne v. O'Shea, 84 Mo. 129. See also Davis v. Headley, 22 N. J. Eq. 115; Pearce v. Olney, 20 Conn. 544; Black v. Smith, 18 W. Va. 794; Eaton v. Hasty, 6 Nebr. 419, 29 Am. Rep. 365; Ward v. Quinlivin, 57 Mo. 425.

[294] Pearce v. Olney, 20 Conn. 544.

[295] Metcalf v. Gilmore, 59 N. H. 417, 47 Am. Rep. 217; Riley v. Murray, 8 Ind. 354. Where in an action on a judgment of a sister state, it appears that the defendant was served in the original action and appeared by attorney, that his testimony was taken by commission, and that the cause was pending for a long time, the mere fact that the defendant expected that the testimony of an important witness would be in his favor, while on the trial he testified against the defendant's case, will not support a plea that the judgment was fraudulently obtained. Weir v. Vail, 65 Cal. 466.

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the parties, where the defendant appeared in the action and answered, and where the judgment remains in full force.[296]

§ 921. Fraud Anterior to the Judgment.

If in any case the plea of fraud is admissible in an action on a judgment of a sister state, it must be fraud practised in the very procurement of the judgment, not anterior to it. A defense founded on the fraudulent character of the *subject-matter of the suit*, which the defendant omits to set up in the court rendering the judgment, cannot be alleged against that judgment when it is made the basis of an action in another state.[297] Thus, in New York it is said: "It is a rule well settled that every judgment may be impeached for fraud, and this applies as well to judgments of our own state as to those of other states or foreign judgments. But what will constitute fraud sufficient to vitiate a judgment, and who can make the objection, and under what circumstances it can be interposed, are material questions. The rule is that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents." [298]

[296] Engstrom v. Sherburne, 137 Mass. 158. In the case of Brown v. Eaton, 98 Ind. 591, it was held that to a suit by an assignee on a judgment rendered in another state on default, an answer that the defendant had no notice or knowledge of the suit, and was not liable to the judgment-plaintiff on any cause of action, and that he and the present plaintiff and the officer who had made return of service of process had fraudulently conspired together, and made and procured a false return, when in fact there was no service, was good on demurrer. But it is to be noted that the real contention in this case was that the court rendering the judgment had no jurisdiction; because, although it appeared from the record that there had been service, yet that only transpired in consequence of the fraud alleged.

[297] Packer v. Thompson (Nebr.), 41 N. W. Rep. 650; Jeter v. Fellowes, 32 Pa. St. 465; Hockaday v. Skegga, 18 La. Ann. 681.

[298] Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

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Part VI. Sister State Judgments in Rem.

§ 922. Probate Adjudications.

The probate of a will in another state is to be regarded as a "judicial proceeding" to the record of which full faith and credit is to be given when authenticated conformably to the act of congress.[299] So when the question of the validity of a will has been finally determined by a court of competent jurisdiction in the state of the domicile of the testator, parties to that cause are estopped from raising the same questions in an action on the will in another state.[300] And the courts are bound to respect a decree of another state, enforcing provisions in a will, even though such provisions would be contrary to the policy of their own laws.[301] A judgment obtained by an administrator is a debt at law due him personally, on which he can sue as an individual in a foreign state.[302] So a money judgment rendered by a court of original jurisdiction in a sister state, against one who was at the time the executor of the debtor in that state and also in another state, may be made the basis of an action in the latter state.[303] But it is held that a judgment rendered in one state against an administrator of a decedent will not support an action against a personal representative of the decedent in another state, where it is not alleged that any assets which were formerly in the hands of the administrator in the former state have come into the possession of the representative in the latter state.[304]

[299] Halle v. Hill, 13 Mo. 612.

[300] Dalrymple v. Gamble, 68 Md. 523, 13 Atl. Rep. 156; Wells v. Neff, 14 Oreg. 66, 75, 12 Pac. Rep. 88; Thomas v. Morrisett, 76 Ga. 884. Compare Gillett v. Camp, 23 Mo. 375. In Rhode Island, however, it is held that the probate of a will in another state is only *prima facie* evidence of its validity on an application to a court of probate of Rhode Island to allow a copy of the same to be filed and recorded; that the constitutional provision does not extend the operation of such a decree to things which, at the death of the testator, were beyond the territorial jurisdiction of the state whose court has taken the probate. Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49; Olney v. Angell, 5 R. I. 198, 73 Am. Dec. 62.

[301] Carruthers v. Corbin, 38 Ga. 75.

[302] Lewis v. Adams, 70 Cal. 403, 11 Pac. Rep. 883, 59 Am. Rep. 423.

[303] Turley v. Dreyfus, 33 La. Ann. 885.

[304] Cherry v. Speight, 28 Tex. 503.

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§ 923. Garnishment Proceedings.

When a judgment has been rendered against a garnishee, in one state, upon regular proceedings had in a court invested with jurisdiction of the cause and parties, and without any collusion between the plaintiff and the garnishee, such judgment is binding and conclusive in every other state, and constitutes a complete defense to the garnishee when sued for the same debt by his original creditor.[305] "It has been very well settled in this commonwealth," says the supreme court of Massachusetts, "that a judgment against a garnishee in another state, where the court has jurisdiction of the person and of the subject-matter, will protect one here who has been obliged to pay or is compellable to pay, in pursuance of such judgment, although it be a debt due on a promissory note or other negotiable security, although no such judgment would have been rendered against a garnishee or trustee under our laws, and although such law appears to us a little unreasonable. He who pays under the judgment of a tribunal having legal jurisdiction to decide and adequate power over the person or property to compel obedience to its decisions, has an indisputable claim to protection. But upon general principles, one who has not yet been compelled to pay, and who may never be obliged to pay, to another, who has attached the debt in his hands, although he may have good right to insist that the proceedings ought not to be commenced or prosecuted against him, whilst his hands are tied and he is legally prohibited from paying his debt, and so may have good ground for an abatement or stay of proceedings, seems in no condition to deny the plaintiff's right to recover his debt, absolutely and forever."[306] It makes no difference that the claim garnisheed would be exempt from such process in the state where the second action against the garnishee is brought; if the first judgment was in accordance with the laws of the state where it was rendered, it is valid and binding everywhere else.[307] Where a garnishment in another state

[305] Morgan v. Neville, 74 Pa. St. 52; Moore v. Spackman, 12 Serg. & R. 287; Ocean Ins. Co. v. Portsmouth R. Co., 8 Met. 420; Hull v. Blake, 13 Mass. 153; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 462, 3 South. Rep. 852.

[306] Meriam v. Rundlett, 13 Pick. 511.

[307] Gray v. Delaware & Hudson Canal

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was pleaded as a defense to an action on an account, it was held competent for the plaintiff to show that the foreign judgment (against the principal defendant) on which the garnishment was based was void for want of jurisdiction, because of matters extrinsic to the record.[308]

§ 924. Decrees in Divorce.

That a judgment rendered by a competent court in another state, in a proceeding for divorce, should be entitled to the same presumptions in its favor, and should be accorded the same degree of faith and credit, as are extended to any other judgment, under the protection of the constitution, would seem to be a self-evident truth. Yet we find a decision of the supreme judicial court of Massachusetts to the effect that, although the court in a sister state rendering a decree of divorce be a court of record, yet "its jurisdiction over the subject of divorce is a special authority not recognized by the common law, and its proceedings in relation to it stand on the same footing as those of courts of limited and inferior jurisdiction, so that its powers in the case must be shown and appear to have been strictly pursued."[309] This decision, however, has not commended itself to the judicial reason of other courts. It is supported neither by logic nor authority, and no such doctrine is taught in the cases or textbooks, however much they may differ on other points. But the general subject of the interstate validity of decrees of divorce is one which for a long time has bristled with perplexing and contradictory opinions. Much of the difficulty is removed, however, by a right understanding of the nature of the proceeding and a correct use of

Co., 5 Abb. New Cas. 131; Robarge v. Central Vt. R. Co., 18 *Id.* 363. In the case of McCarty v. Steam Propeller New Bedford, 4 Fed. Rep. 818, it was held that the wages earned by a seaman in the coastwise trade of the United States are not subject to garnishment at the instance of a creditor of the seaman in an action at law brought in a state court. And the judgment of the state court in such case, directing the garnishee to pay such wages to the creditor, is void for want of jurisdiction. That is, the proceeding being *in rem*, and the court having no jurisdiction of the *res* (the wages), its judgment is not binding on the federal court.

[308] O'Rourke v. Chicago, etc., R. Co., 55 Iowa, 332, 7 N. W. Rep. 582.

[309] Commonwealth v. Blood, 97 Mass. 538.

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terms. Without these, it would be hopeless to search for the true principles and rules.

§ 925. Divorce Proceedings are in Rem.

In the first place, a proceeding in divorce is a proceeding *in rem*. It is not an action by the petitioner against the defendant, at least not primarily. It is a proceeding by the petitioner to obtain an adjudication upon his or her marital *status*, which is the *res;* and the person who has the nearest interest in that *status*, and whose acts are alleged to have given rise to a cause for its dissolution, is named and cited as defendant.[210] In the next place, it is an admitted principle of international law that every state has the sole and paramount right to legislate and adjudicate upon the *status* of its own domiciled citizens, and to regulate and determine their domestic relations. These two principles will furnish the key to the whole subject. For, accepting them as true, it at once becomes apparent that the jurisdiction in divorce must depend solely upon the domicile of the parties, —upon the power to adjudicate upon their *status*,—and not upon any question of service of process. "Every state or sovereignty," says the court in Missouri, "has the right to determine the domestic relations of all persons having their domicile within its territory; and therefore, where a husband or wife is domiciled within a particular state, the courts of that state can take jurisdiction over the *status*, and for proper causes act on this *rem* and dissolve the relation. The decree so pronounced is a judgment *in rem*, and when not affected by fraud it is valid everywhere, and under the constitution and laws of the United States, such decrees are entitled to full faith and credit in all the states and territories."[211] It thus becomes important to inquire more closely into the question of domicile. And here a variety of possible cases are to be distinguished.

§ 926. Both Parties Citizens of the State.

If both the married parties are *bona fide* domiciled citizens of a given state, there can be no question of the power of the courts of

[210] 2 Bishop, Mar. & Div. §§ 147, 156, 164.

[211] Gould v. Crow, 57 Mo. 200.

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that state to divorce them. It is immaterial that the marriage was celebrated in another state, and that the laws of such other state do not recognize the cause alleged as sufficient ground for granting a divorce. Wherever the parties go they carry their *status* with them, and it becomes subject to the jurisdiction of any state in which they acquire an actual domicile. And the causes for altering or dissolving that *status* must be determined by the laws of the state which has present jurisdiction over it, not by the laws of the state where it originated.[312] Further, in this case, it is immaterial where the offense was committed which is alleged as ground for divorce. If both parties were domiciled in one state, and the offense charged was perpetrated there, and both afterwards remove to another state and acquire a domicile there, the latter state has jurisdiction to dissolve the marriage on the ground of such offense. Here again it is the law of the state having control of the *status* which must govern, not the *lex loci delicti*.[313] Finally, if both parties are citizens of the state where the proceedings are taken, it is immaterial that the defendant is temporarily absent from that state and is only constructively notified of the suit. The New York court of appeals, in an important and well considered case, has declared that jurisdiction of the person of a defendant in an action for divorce may be acquired by a court of the state in which he or she is a domiciled citizen, by such proceedings in the nature of service of process as the law of the state has made equivalent to personal service within its jurisdiction. So long as the citizen retains that relation to the state, he owes it allegiance and is subject to its laws, and this subjection he cannot throw off by a temporary or prolonged absence from the state. A judgment

[312] Harding v. Alden, 9 Me. 148, 23 Am. Dec. 549; Fellows v. Fellows, 8 N. H. 160; Barber v. Root, 10 Mass. 265; Vischer v. Vischer, 12 Barb. 640; Pawling v. Bird, 13 Johns. 192; Tolen v. Tolen, 2 Blackf. 407, 21 Am. Dec. 742.

[313] Tolen v. Tolen, 2 Blackf. 407, 21 Am. Dec. 742; Fishli v. Fishli, 2 Litt. 337; Schnaufer v. Schnaufer, 4 La. Ann. 355; Hare v. Hare, 10 Tex. 355; Hubbell v. Hubbell, 3 Wis. 662. The decisions in New Hampshire and Pennsylvania to the contrary (Clark v. Clark, 8 N. H. 21; Frary v. Frary, 10 N. H. 61; Batchelder v. Batchelder, 14 N. H. 380; Payson v. Payson, 34 N. H. 518; Dorsey v. Dorsey, 7 Watts, 349; Hollister v. Hollister, 6 Pa. St. 449) have been strongly criticised by Mr. Bishop (2 Mar. & Div. §§ 178–177) and shown to be contrary both to sound reason and the weight of authority.

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of divorce, therefore, rendered by the courts of any state, against a domiciled citizen thereof, upon a substituted service of process such as the law has authorized in the case of an absent defendant, is valid to effect a dissolution of the marriage contract, and is conclusive upon the defendant in every other state, although he was not within the territorial jurisdiction during the progress of the suit and did not appear therein.[314]

§ 927. Neither Party a Domiciled Citizen.

The converse of the case supposed in the preceding section would be that where neither of the parties was actually domiciled in the state assuming to grant the divorce. And in this event, upon the principles already developed, it is evident that there can be no jurisdiction in the courts of such state. "The tribunals of a country," says Mr. Bishop, "have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither of the parties has within its territory an actual *bona fide* domicile. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction."[315] And all the American authorities agree in sustaining this doctrine.[316] In a recent case in Maine it was said: "The state has the absolute right to determine or alter the civil *status* of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such *status* may have been made or done. Other states or countries will, in this matter, accept without question the decrees of the courts of the home state. But the state has this power only over its own inhabitants. The mere presence within its territory of the inhabitants of other states gives it no authority to fix or change their *status*. The state of their

[314] Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709; Shaw v. Shaw, 98 Mass. 158; Guest v. Guest, 8 Ontario, 344.

[315] 2 Bishop, Mar. & Div. § 144.

[316] Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Blain v. Blain, 45 Vt. 538; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Gregory v. Gregory, 76 Me. 535; Sewall v. Sewall, 122 Mass. 156; Davis v. Commonwealth, 13 Bush, 318; Hood v. State, 56 Ind. 263; State v. Armington, 25 Minn. 29; Barber v. Root, 10 Mass. 260; Ditson v. Ditson, 4 R. I. 93; Jackson v. Jackson, 1 Johns. 424; Maguire v. Maguire, 7 Dana, 181; Pomeroy v. Wells, 8 Paige, 406.

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residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere."[317]

§ 928. Domicile of One Party Sufficient.

It now remains for us to consider the case in which the petitioner is a domiciled citizen of the state where the proceedings in divorce are taken, and the defendant is domiciled elsewhere. And on the admitted principle that each state has the right to determine the *status* and the domestic relations of its own citizens, the conclusion appears irresistible that the *bona fide* presence of the *res*—the *status* of a domiciled citizen—should give its courts jurisdiction. If this were not so, neither of the two states in which the parties are respectively resident, nor both together, could exercise this unquestioned right. But the question, though easily soluble on purely logical grounds, may also be treated as one settled by authority. And the decided weight of authority is in favor of the rule here contended for.[318] In this connection it must be observed that the usual rule, that the domicile of the wife follows that of the husband, does not apply in these cases. For the purpose of petitioning in divorce, she may have a separate domicile. The law will recognize her as having a separate existence, and separate rights and interests, in all cases where the very object of the proceeding is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests and especially a separate domicile and home.[319]

§ 929. Domicile must be Bona Fide.

While it is sufficient, as just stated, for jurisdictional purposes, that the domicile of the plaintiff should be in the state where the

[317] Gregory v. Gregory, 78 Me. 187, 3 Atl. Rep. 280, 57 Am. Rep. 792.

[318] 2 Bishop, Mar. & Div. §§ 155, 156; Pennoyer v. Neff, 95 U. S. 714; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. 407, 21 Am. Dec. 743; Burlen v. Shannon, 115 Mass. 438; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Dutcher v. Dutcher, 39 Wis. 657; Cook v. Cook, 56 Wis. 195, 14 N. W. Rep. 33, 443, 43 Am. Rep. 706.

[319] Harteau v. Harteau, 14 Pick. 181, 25 Am. Dec. 372; Colvin v. Reed, 55 Pa. St. 379; Jenness v. Jenness, 24 Ind. 355; Ditson v. Ditson, 4 R. I. 87.

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proceedings are had, yet it is necessary that this should be an actual and *bona fide* domicile and its origin and continuance both free from any fraud. To quote the language of an eminent writer: "We conceive the true rule to be that the actual *bona fide* residence of either husband or wife within a state will give to that state authority to determine the *status* of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense, and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party."[220] And this opinion is amply justified by the rulings of the courts.[221] Thus, in a recent case in Massachusetts, it was said that if a person goes into another state, in fraud and evasion of the laws of his domicile, without acquiring a domicile in such other state, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in his own state, but which was not a ground of divorce by its laws, a court of the state to which he so removes has no jurisdiction, and its decree granting a divorce is entitled to no faith or credit in other states, although it may recite jurisdictional facts.[222]

[220] Cooley, Const. Lim. *400.

[221] Lyon v. Lyon, 2 Gray, 367; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. Rep. 110; Neff v. Beauchamp, 74 Iowa, 92, 36 N. W. Rep. 905; Gettys v. Gettys, 3 Lea, 260, 31 Am. Rep. 637; Irby v. Wilson, 1 Dev. & B. Eq. 568; Magurn v. Magurn, 3 Ontario, 570; Hoffman v. Hoffman, 46 N. Y. 30; Shannon v. Shannon, 4 Allen, 134; Cox v. Cox, 19 Ohio St. 502; Leith v. Leith, 39 N. H. 20; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; People v. Baker, 76 N. Y. 78; Holmes v. Holmes, 4 Lans. 388.

[222] Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299.

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§ 930. Conclusiveness of Findings as to Residence.

Although the point is not entirely free from doubt, it appears to be the better opinion that the recitals in the record of a divorce case, that the parties were residents of the state where the suit was instituted, do not preclude a party from showing, in another state, where the divorce comes collaterally in question, that the parties never were in fact domiciled in the former state, and that the suit was fraudulent and collusive.[322] And this accords with the general rule, already stated and discussed, which allows the impeachment of a judgment of a sister state on the ground of want of jurisdiction, even in contradiction of the record.

§ 931. Constructive Service of Process.

If it be conceded that a divorce proceeding is a proceeding *in rem*, it will necessarily follow that actual and personal notice to the defendant is not indispensable. The vital requisite is the jurisdiction of the *res*. And power and authority over the *res*, as we have shown, depends upon the actual and *bona fide* domicile of the petitioner within the state. This being secured, it is immaterial that the other party is only constructively notified of the institution of the proceedings. The citation should be the best that the circumstances permit, and such as will tend to prevent fraud. But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. This rule is sustained by a great preponderance of authority, as will appear in the next section.

§ 932. Validity of Divorces Granted on Constructive Notice.

Although the foregoing arguments have generally been accounted complete and irrefragable, yet some of the courts, while conceding

[322] People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260. See Kinnier v. Kinnier, 45 N. Y. 535; Kerr v. Kerr, 41 N. Y. 272.

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one or more of the separate points, have refused to accept the conclusion to which the whole line of reasoning logically and inevitably leads. Thus the books exhibit a few decisions, and some *dicta*, to the effect that a decree of divorce against a non-resident, founded upon a merely constructive service of process, as by publication, is void and of no effect.[324] But some of these cases have been overruled, others have been tacitly repudiated, and the true and fundamental principles governing the question have become more and more clear to the courts and have gained weight with the increasing body of decisions. So that now the rule may be regarded as settled, by the great preponderance of authority, that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the state and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that state and in all other states.[325] As summing up the principles advocated and leading to this ultimate conclusion, we quote the following from the opinion of Mr. Justice Field in an important decision of the federal supreme court. After speaking of the inefficacy of substituted service of process as a foundation for a judgment personally binding on the defendant, the learned judge observed: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the *status*

[324] Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Barber v. Root, 10 Mass. 262; Irby v. Wilson, 1 Dev. & B. Eq. 568; Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767; Vischer v. Vischer, 12 Barb. 640; Lyon v. Lyon, 2 Gray. 367.

[325] Cheever v. Wilson, 9 Wall. 108; Pennoyer v. Neff, 95 U. S. 714; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 115 Mass. 438; Ditson v. Ditson, 4 R. I. 87; Baker v. People, 15 Hun, 256; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; State v. Schlachter, Phill. (N. Car.) 520; Hull v. Hull, 2 Strobh. Eq. 174; Harrison v. Harrison, 19 Ala. 499; Thompson v. State, 28 Ala. 12; Maguire v. Maguire, 7 Dana, 181; Mansfield v. McIntyre, 10 Ohio, 28; Tolen v. Tolen, 2 Blackf. 407, 21 Am. Dec. 743; Wilcox v. Wilcox, 10 Ind. 436; Beard v. Beard, 21 Ind. 321; Wakefield v. Ives, 35 Iowa, 238; Gould v. Crow, 57 Mo. 200; Wright v. Wright, 24 Mich. 180; Hubbell v. Hubbell, 8 Wis. 662, 62 Am. Dec. 702; Shafer v. Bushnell, 24 Wis. 372; Cook v. Cook, 56 Wis. 195, 14 N. W. Rep. 33, 443, 43 Am. Rep. 706; Cooley, Const. Lim. *401 and note; 2 Bishop, Mar. & Div. §§ 155–164; 2 Kent Comm. 110.

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of one of its citizens towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would therefore fail, if a divorce were sought in the state of the defendant, and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress." [888]

§ 933. Matters Incidental to Dissolution of Marriage.

A decree in divorce is *in rem*, and therefore justified by jurisdiction over the *res* alone, only in so far as it affects the marital *status*. If it goes further than this, and assumes to adjudicate matters collateral or incidental to the dissolution of the marriage, the proceeding becomes one *in personam*, and no personal liability can be imposed upon the defendant unless there is jurisdiction of his person acquired by a proper service of process. "All the cases which recognize the jurisdiction of a state to determine the marital *status* of its own citizens, although one of the parties lives in another state, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the *status* or marriage relation. To go one step further, and say the guilty party, who is a non-resident, and therefore beyond the process of the court, shall not marry again, is quite a different thing. Such a prohibition is not necessarily a part of the

[888] Pennoyer v. Neff, 95 U. S. 714, 734.

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decree dissolving the marriage, but in the nature of a decree *in personam* affecting the rights of parties beyond the jurisdiction of the court."[327] On the same principle, when the defendant in divorce is a non-resident and is not personally served with process within the state, or has not voluntarily submitted himself to the jurisdiction of the court, a decree awarding *alimony* has no extra-territorial validity, for to that extent it is a purely personal judgment.[328] Where a state statute provided that "whenever a marriage shall be declared void, or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree. . . . . And it shall be the duty of the court, in all such cases, to enter a decree in accordance with this provision," it was held that a decree of divorce obtained in another state did not come within the purview of this section, so as to affect the title to lands within the first named state.[329]

Part VII. Judgments of Inferior Courts of Another State.

§ 934. Doctrine that such Judgments are to be Treated as Foreign Judgments.

The question of the effect and credence to be given to judgments rendered by the inferior or non-record courts of other states has been the subject of considerable dispute. There are several decisions which hold that a judgment of a justice of the peace, for example, in another state, is to be considered as standing upon the same ground as a strictly foreign judgment, and as leaving the whole merits of the controversy open to investigation.[330] The basis of this doc-

[327] Garner v. Garner, 56 Md. 127.

[328] Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415; Gould v. Crow, 57 Mo. 200; Lytle v. Lytle, 48 Ind. 200; Beard v. Beard, 21 Ind. 321. In the case last cited it was held that it is competent for the legislature to authorize the courts of the state to render personal judgments for alimony, upon constructive notice against citizens of the state, though not against non-residents. See *supra*, § 907.

[329] Barrett v. Failing, 3 Fed. Rep. 471.

[330] Warren v. Flagg, 2 Pick. 448; Rob-

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trine is that a sister state judgment does not become entitled to "full faith and credit" until it has been authenticated in the manner prescribed by the act of congress, and that a judgment of a court not of record does not admit of being so authenticated. A recent writer, in speaking of such judgments, observes that "being rendered by courts of only local and very limited and prescribed jurisdiction, having no clerk nor seal, they are not governed by the act of congress which provides for the authentication of judicial records and proceedings. Their effect, therefore, in other states, would seem to be the same as that accorded to judgments rendered by foreign countries. They must be shown to have been rendered by courts having jurisdiction over the parties and subject-matter, to have been authorized by the laws of the state where rendered. The judgment itself must be proved as a fact, like a foreign judgment."[331] But we shall presently endeavor to show that the fundamental assumption on which this reasoning rests is entirely untenable, and that being established, the doctrine must fall with it.

§ 935. Conclusiveness of Justices' Judgments.

Aside from the question of authentication, many well-considered cases hold that a judgment of a justice of the peace of another state,

inson v. Prescott, 4 N. H. 450; Mahurin v. Bickford, 6 N. H. 567; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281; King v. Van Gilder, D. Chip. 59; Graham v. Grigg, 3 Harr. (Del.) 408; Clark v. Parsons, Rice, 16; Lawrence v. Gaultney, Cheves, 7; McElfatrick v. Taft, 10 Bush, 160; Wood v. Wood, 78 Ky. 624.

[331] Rorer, Interstate Law, p. 92. In the case of Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281, it was said by Bell, J.: "It was natural that the national legislature should be of the opinion that there might be tribunals in some of the states of such limited powers that it would be proper to leave their decisions to be dealt with at common law. And the fair construction of the act of congress seems to us to make precisely that exception. It prescribes a mode of proof which implies that there must be a clerk and a judge, chief justice, or presiding magistrate, while it must have been well known that justices of the peace and many other inferior tribunals have no officer that can, with any propriety, be denominated a judge or presiding magistrate. The omission to provide for cases of these classes, it seems, must have been intentional. And when the act provides that the records and judicial proceedings, authenticated as aforesaid, shall have faith, etc., it evidently designs to omit and leave unprovided for the proceedings of such courts as do not admit of such authentication."

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although the court be not one of record, is a "judicial proceeding" within the meaning of the federal constitution, and full faith and credit is to be given to it, that is, it must be considered conclusive on the merits.[332] Thus, the supreme court of Vermont declares that "the conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These reasons apply to the judgments of justices of the peace as well as to any others. The argument that, as justices have no clerks nor seals, and cannot authenticate records in the mode prescribed by the act of congress, therefore their judgments are not entitled to full faith and credit, seems to rest upon the manner in which the court is organized, and its inability to comply with a particular form of authenticating its records, rather than upon the broader and more solid ground of the authority and jurisdiction of the court, and the interest of the community that there should be an end to litigation."[333] But the argument for the conclusiveness of such judgments may be based on even broader grounds than these, as was done in the case of *Glass* v. *Blackwell*.[334] This was an action upon a justice's judgment from another state, and the court held that it was conclusive on the merits. It was contended by the appellee that as the judgment did not come within the act of congress, it must be treated as a foreign judgment was at common law, that is, not conclusive on the merits. The court rather inclined to the opinion that the clause in the constitution upon the subject of the interstate

[332] Silver Lake Bank v. Harding, 5 Ohio, 545; Stockwell v. Coleman, 10 Ohio St. 33; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Starkweather v. Loomis, 2 Vt. 573; Blodget v. Jordan, 6 Vt. 580; Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288; Kean v. Rice, 12 Serg. & R. 203; Danforth v. Thompson, 34 Iowa, 243; Bissell v. Edwards, 5 Day, 363, 5 Am. Dec. 166; Beal v. Smith, 14 Tex. 305; Glass v. Blackwell, 48 Ark. 50, 2 S. W. Rep. 257. When, by the statute of another state, the transcript of the record of a justice of the peace, filed in a court of common pleas of such state is directed to be treated as a judgment of said court, such judgment, when transferred to another state as the judgment of said court, is entitled to the same faith and credit as a judgment originally obtained in said court. Rowley v. Carron, 117 Pa. St. 52, 11 Atl. Rep. 435.

[333] Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288.

[334] 48 Ark. 50, 2 S. W. Rep. 257.

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recognition of judgments was self-executing and controlling, and was not limited and bounded by the following sentence, giving congress the power to prescribe the manner in which such proceedings should be proved and the effect thereof. Under that construction, sister state judgments would be conclusive by the mere force of the constitutional provision and without the aid of legislation. And in that case, justices' judgments would be included, although not susceptible of authentication in the manner prescribed by the act. But the court thought it unnecessary to decide this, inasmuch as the judgment ought to be regarded as conclusive at common law. For notwithstanding the *dicta*, in the earlier English cases, against the conclusiveness of foreign judgments, the rulings in that country are now all the other way, and it is held that a foreign judgment is not re-examinable on the merits, if the court had jurisdiction and there was no fraud. And in America also, the current of authority has shifted from the earlier standards and is now all in favor of holding a judgment, whether foreign or domestic, rendered by a competent court having jurisdiction and without fraud, binding and conclusive whenever it may be called in question. In either view, therefore, a justice's judgment from another state must be regarded as finally precluding any investigation of the merits.

§ 936. Jurisdictional Inquiries.

A judgment rendered by an inferior court of another state may be impeached by proof that the court had no jurisdiction of the subject-matter.[335] And in accordance with the general rule that no presumptions can be indulged in favor of the validity of the proceedings of inferior courts, it is held that the record of such a judgment must show on its face all the requisites to its validity.[336] Where a state statute provides that "in pleading a judgment or determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made," this provision applies

[335] Russell v. Perry, 14 N. H. 152.
[336] Perry v. Northern Ins. Co., 5 Phila. 188; Shufeldt v. Buckley, 45 Ill. 223.

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to the judgments of courts of special or limited jurisdiction in other states, as well as to the judgments of domestic courts of that character.[337] But in an action on such a judgment the plea of *nul tiel record* is not good, as it is no denial of the indebtedness, and cannot put in issue the existence of a record which, if exhibited, must be held to be no record at all.[338]

§ 937. Authentication of Such Judgments.

Some of the cases hold that the judgments of inferior courts in other states do not admit of being authenticated in the manner prescribed by the act of congress, but can only be proved in the same mode as foreign judgments.[339] This doctrine, however, is unsound. There is in reality no reason why the act should not apply to the records of such courts. In the first place, it is objected that the memorials of proceedings before such courts are not records in the technical sense. But the statute applies equally to "records and judicial proceedings," the latter term, from the very fact of its being added to the former, being obviously intended to cover just that class of proceedings which could not properly be denominated records, from the fact of their transpiring in inferior or non-record courts. In the next place, it is said that such tribunals have neither clerk nor seal. As to the latter, the statute requires the annexing of the seal of the court, *if there be a seal*. If there is none, that fact may be certified, and the omission, thus explained, does no harm. But since all courts of record have seals, the fact that congress added such a proviso shows that it was intended the act should apply to non-record courts as well. As to the clerk, it is very reasonably held that the justice may authenticate the record of his proceedings in the capacity of both judge and clerk of his court.[340] There is some plausibility in the contention that a justice of the peace cannot be described as a "judge or chief justice," but it will scarcely be denied

[337] Archer v. Romaine, 14 Wis. 875; Terre Haute & I. R. Co. v. Baker (Ind.), 24 N. E. Rep. 83.

[338] McElfatrick v. Taft, 10 Bush, 160.

[339] Mahurin v. Bickford, 6 N. H. 567; Graham v. Grigg, 8 Harr. (Del.) 408; McElfatrick v. Taft, 10 Bush, 160.

[340] Case v. Huey, 26 Kans. 553.

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that the following term, "presiding magistrate," very aptly describes him. On the whole, therefore, the conclusion seems inevitable, not only that the act of congress can be made to cover the judgments of inferior courts and magistrates, but that it was specifically so intended.

PART VIII. JUDGMENTS OF THE FEDERAL COURTS.

§ 938. Entitled to Full Faith and Credit.

The federal tribunals are not regarded as foreign to each other or to the state courts. Therefore the judgment of a United States court, when sued on in a state court or in another federal court, or the judgment of a state court, when made the basis of an action in a United States court, is entitled to full faith and credit under the constitution.[341] According to a recent authoritative decision, the judgments and decrees of the United States circuit courts, sitting in a particular state, are to be accorded in that state, whether as the foundation of an action or of a defense, either by plea or in proof, such effect, and such effect only, as would be accorded in similar circumstances to the judgments or decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of the federal supreme court, upon a writ of error to the highest appellate tribunal of the state.[342] From this principle it follows that *nil debet* is not a good plea to a judgment of a United States circuit court when sued on in a state court.[343] So it is held that a court of equity of a state will entertain a bill to annul a fraudulent conveyance of his property made by a debtor, where the

[341] United States v. Dewey, 6 Biss. 501; Amory v. Amory, 3 Biss. 266; Owens v. Gotzian, 4 Dill. 436; St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246; Dennison v. Hyde, 6 Conn. 508; Barney v. Patterson, 6 Har. & J. 182; Dudley v. Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522; Thompson v. Lee Co., 22 Iowa, 206; Harrison v. Phœnix Ins. Co., 88 Ind. 575; Ruegger v. Indianapolis & St. L. R. Co., 103 Ill. 449; Niblett v. Scott, 4 La. Ann. 246.

[342] Crescent City Live Stock Co. v. Butchers' Union Co., 120 U. S. 141, 7 Sup. Ct. Rep. 472.

[343] St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246.

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creditor's debt has been reduced to judgment in a federal court held in the same state.[344] But the judgments of the federal courts must be construed to be embraced in the act of congress upon the authentication of records, or else, as to proof, they must be esteemed as foreign judgments. In either case the judgment must be properly authenticated. Hence, in a suit in a state court, the certificate of a discharge in bankruptcy, by the clerk of a United States district court in another state, under the seal of the court, is not admissible in evidence without the authentication of the clerk's certificate by the judge.[345] This conclusiveness as evidence extends to the judgments of all the federal courts without distinction. By the act of March 27, 1804, § 2, the provisions of the act of 1790 were extended to the records and judicial proceedings of all the courts of the territories or countries subject to the jurisdiction of the United States, and this has been held to be a constitutional exercise of the legislative powers of congress. A judgment recovered in the supreme court of the District of Columbia is therefore clearly within the provisions of these acts.[346] And the judgments of the state courts must receive equal recognition from the federal courts. If a decree pronounced by a court of competent jurisdiction in one of the states would be enforced in that state, it will be enforced by a United States circuit court sitting in a different state.[347]

§ 939. Jurisdiction may be Questioned.

State courts have the right to examine collaterally into the alleged defects of judgments rendered by United States courts of original and limited jurisdiction, when such judgments are made the basis of actions or of litigants' titles. But the inquiry must be restricted to an examination to ascertain whether the court which rendered the judgment had jurisdiction, and whether it exercised that jurisdiction according to the forms of proceeding established by law. The inquiry into the facts must be restricted to test the verity of allegations as

[344] Bullitt v. Taylor, 84 Miss. 708, 69 Am. Dec. 412.

[345] Dorsey v. Maury, 10 Sm. & Mar. 298.

[346] Johnson v. Dobbins, 5 Week. Not. Cas. 537.

[347] Caldwell v. Carrington, 9 Pet. 86.

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to domicile or citizenship necessary to give jurisdiction. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing. But no inquiry can be made as to the correctness of the judgment upon the merits.[348] To render the sentence of a district court of the United States, sitting in admiralty and deciding the question of prize, conclusive on the same point arising incidentally in the state courts, such district court must have had jurisdiction of the subject-matter, and the state courts are competent to inquire and decide whether it had or not.[349]

[348] Pasteur v. Lewis, 39 La. Ann. 5, 1 South. Rep. 307. See also Gibson v. Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. Rep. 729.

[349] Slocum v. Wheeler, 1 Conn. 429.

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CHAPTER XXIII.

ASSIGNMENT OF JUDGMENTS.

§ 940. Effect of Assignment at Common Law.
941. Who may Assign Judgments.
942. What Judgments Assignable.
943. Agreement to Assign Future Judgment.
944. Assignment of Part of Judgment.
945. Mode of Assignment.
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955. Vacation or Reversal of Judgment in Assignee's Hands.
956. Latent Equities of Third Persons.
957. Priority between Assignments.

§ 940. Effect of Assignment at Common Law.

At the common law, a verdict or judgment was not considered as being in itself negotiable.[1] Hence, under that system, a judgment or decree was not assignable so as to vest the legal title in the assignee. The latter could take only an equitable interest, which was subject to every equity and charge which attached to the judgment in the hands of the assignor.[2] As a consequence of this doctrine it follows that, wherever the rule is not changed by statute, the assignee of a judgment is powerless to maintain an action thereon, or to sue out *scire facias* for its revival, in his own name and behalf. To every such proceeding the assignor, as holding the legal title, must be a party.[3] But the presence of the assignor on the record is

[1] Duncan v. Bloomstock, 2 McCord, 318, 13 Am. Dec. 728; Edmonds v. Montgomery, 1 Iowa, 142.

[2] United States v. Samperyac, Hempst. 118.

[3] Moore v. Ireland, 1 Cart. (Ind.) 531;

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merely formal. The assignee is the real party in interest. His equitable title is sufficient to entitle him to sue in the name of the assignor whenever he may choose, and to control the issue of final process and receive the money collected.[4] But these common law rules have been abrogated in most if not all of the states, either by statutes explicitly relating to the assignment of judgments, or by the general authorization of actions in the name of the "real party in interest," thus investing the assignee with the complete legal title. This will more fully appear in a succeeding section.

§ 941. Who may Assign Judgments.

In order to be able to make an assignment of a judgment, the person must have a real and substantial interest in it. Hence the assignee of a judgment takes nothing when the record of the judgment itself apprises him that the plaintiff therein had no beneficial interest, but was a mere trustee for others.[5] The general retainer of an attorney at law does not give him any power to assign the judgment or decree obtained by his client.[6] And a judgment in favor of the state, when paid by a surety, cannot be assigned to such surety by any officer or agent of the state.[7] There is no reason why an ordinary corporation should not be able, acting through a person duly empowered, to assign a judgment subsisting in its own favor. And it has been held that this may be done by a national bank.[8]

§ 942. What Judgments Assignable.

Although a claim for damages arising out of the commission of a tort is not generally assignable, yet where the tort has become

Reid v. Ross, 15 Ind. 265; Forbes v. Tiffany, 4 Ind. 204; Edmonds v. Montgomery, 1 Iowa, 143; Elliot v. Waring, 5 B. Mon. 239, 17 Am. Dec. 69; Mayor v. Trustees, 7 Ga. 204; McKinney v. Mehaffey, 7 Watts & S. 276.

[4] Weir v. Pennington, 6 Engl. (Ark.) 745.

[5] Brice v. Taylor (Ark.), 9 S. W. Rep. 854.

[6] Mayer v. Blease, 4 S. Car. 10; Rice v. Troup, 62 Miss. 186; Clark v. Kingsland, 1 Sm. & Mar. 256; Head v. Gervais, 1 Walk. (Miss.) 431, 12 Am. Dec. 577; Wilson v. Wadleigh, 36 Me. 496; Maxwell v. Owen, 7 Cold. 630.

[7] Peacock v. Pembroke, 8 Md. 848.

[8] Emory v. Joice, 70 Mo 537.

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merged in a judgment rendered upon it, such judgment may be transferred by assignment, and the assignee may sue on the judgment in his own name.[9] It seems reasonable to hold that decrees in equity for the payment of money should be assignable under the same restrictions and with the same effect as judgments at law; but the precise question does not appear to have been passed upon by the courts.

§ 943. Agreement to Assign Future Judgment.

In the case of actions *ex contractu*, a valid assignment may be made before the rendition or entry of judgment, which will become operative as soon as the judgment is perfected. That is, the assignment of a cause of action founded on breach of contract, or of a verdict recovered in the suit, carries the right to the judgment afterwards recovered or entered up, so that the defendant at once becomes the debtor of the assignee and not of the record plaintiff.[10] But it is otherwise in the case of actions for torts. A claim for damages from a tort (at least where it is such as would not survive to the personal representatives) is not capable of being assigned; nor does it make any difference that a verdict has been rendered in an action brought upon such claim, for that does not merge the claim nor transform its character.[11] Consequently a judgment in an action for such a tort is not assignable before it comes into being, that is, before it has been rendered or entered up, although a verdict has been returned on which judgment can be and is afterwards signed. The plaintiff acquires title not by the verdict, but by the judgment, and until its rendition he has no title to assign. Hence an assignment of the cause of action and verdict cannot have the effect to pass the subse-

[9] Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Mackey v. Mackey, 43 Barb. 58; Moore v. Howell, 94 N. Car. 265. See also Kessel v. Albertis, 56 Barb. 362; Risley v. Phœnix Bank, 11 Hun, 484; Bridge v. Johnson, 5 Wend. 342.

[10] Wright v. Parker, 10 Iowa, 342; Weire v. Davenport, 11 Iowa, 49; Robinson v. Weeks, 6 How. Pr. 161; Hudson v. Morris, 50 Tex. 595; Dugas v. Matthews, 9 Ga. 510, 54 Am. Dec. 361.

[11] Comegys v. Vasse, 1 Pet. 213; Crouch v. Gridley, 6 Hill, 250; Kellogg v. Schuyler, 2 Denio, 73.

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quent judgment to the assignee. He has no interest in it, and payment to the judgment-plaintiff will satisfy it.[12]

§ 944. Assignment of Part of Judgment.

An assignment of a *part* of a judgment, without the consent of the debtor, cannot affect him; for the law sets its face against partial assignments of choses in action, and if this were allowed in the case of a judgment, it might be split up into many demands, to the great annoyance of the defendant.[13] Thus, in a recent case in Pennsylvania, plaintiff was the assignee of a part of a judgment, and the other part, remaining unpaid, was assigned to a third person. Plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a *scire facias*, and to obtain an independent right to process for its collection. But it was held that the undivided judgment could not be so separated into distinct parts.[14] But in another case, where a debtor assigned to his creditor so much of a judgment against a third person as would pay his debt, and placed the judgment under the creditor's control, it was considered that the assignment was valid as against the debtor's personal representative.[15] Where one joint owner of a decree executes an instrument transferring to a third person a part of his interest therein, the legal title and right to control the decree is not thereby changed, nor does the assignee become a partner in the decree. Where such assignment is intended as a mode of payment for property purchased by the assignor, its legal effect is to create a security, and the assignor's liability is not thereby extinguished.[16] Where parts of the same judgment debt are successively assigned to different persons, and, upon a sale of property under the judgment, the proceeds are not suffi-

[12] Gamble v. Central R. & Banking Co., 80 Ga. 595, 7 S. E. Rep. 315; Rice v. Stone, 1 Allen, 566; Lawrence v. Martin, 22 Cal. 173. Compare Pratt v. Wertheimer, 39 Hun, 463.

[13] Love v. Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Loomis v. Robinson, 76 Mo. 488; Burnett v. Crandall, 63 Mo. 410.

[14] Hopkins v. Stockdale, 117 Pa. St. 365, 11 Atl. Rep. 368.

[15] Wood v. Wallace, 24 Ind. 226. And see Godbold v. Kirkpatrick (S. Car.), 1 S. E. Rep. 156.

[16] Hanks v. Harris, 29 Ark. 323.

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cient to pay them all, they will take *pro rata* shares in the fund, and not be paid in full in the order of the assignments.[17]

§ 945. Mode of Assignment.

An assignment of a judgment need not be under seal, nor is it necessary even that it should be in writing. It may be by parol, and will still be binding upon the parties if made in good faith and for a valuable consideration.[18] If the judgment-debtor, after notice of an equitable assignment by parol, receives a release of the debt from the judgment-creditor, he cannot successfully plead in bar to an action brought by the assignee to recover the amount of the judgment.[19] But in this case the intent to assign the judgment must be clearly shown.[20] Where the assignment is made on the record, a reasonable degree of certainty is required. But if the entry is so ambiguous as not to show whether an assignment or a satisfaction was intended, it may be explained by parol evidence.[21] And the assignment is not vitiated by mistakes in the description if it can be shown what judgment was meant.[22] Authority to assign a judgment can be conferred by power of attorney.[23] But whatever mode is adopted, the assignment must be definitive and absolute. Thus the transfer of a judgment upon condition that the transferee was to pay for it if he could make anything out of it does not invest him with such property in the judgment as will entitle him to maintain an action upon it.[24]

[17] Moore's Appeal, 92 Pa. St. 309.

[18] Briggs v. Dorr, 19 Johns. 95; Prescott v. Hull, 17 Johns. 284; Kessel v. Albertis, 56 Barb. 362; Ford v. Stuart, 19 Johns. 342; Clark v. Moss, 11 Ark. 786; Weir v. Pennington, 11 Ark. 745; Stoddard v. Benton, 6 Colo. 508; Brahan v. Ragland, 3 Stew. 247; Haden v. Walker, 5 Ala. 86; Becton v. Ferguson, 22 Ala. 599; Cravens v. Duncan, 55 Ind. 347; Wood v. Wallace, 24 Ind. 226; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Bartlett v. Yates, 7 Jones (N. Car.) 615; Steele v. Thompson, 62 Ala. 323. Compare Dugas v. Matthews, 9 Ga. 510, 54 Am. Dec. 361; Parker v. Bacon, 26 Miss. 425; Winberry v. Koonce, 83 N. Car. 351.

[19] Dunn v. Snell, 15 Mass. 481.

[20] Thomas v. Porter, 3 Bush, 177.

[21] Emory v. Joice, 70 Mo. 537.

[22] Griffin v. Camack, 86 Ala. 695; Aylesworth v. Brown, 10 Barb. 167; People v. Fleming, 2 N.Y. 484; Klemme v. McLay, 68 Iowa, 158, 26 N. W. Rep. 53.

[23] Caley v. Morgan, 114 Ind. 350, 16 N. E. Rep. 790.

[24] Pike v. Bright, 29 Ala. 333.

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§ 946. Statutory Mode of Assignment.

Where the statute provides a mode of assigning judgments, it is generally considered to be merely cumulative, and not to prevent a party from making an equitable assignment in any other lawful way.[25] Thus, where the statute enacts that judgments may be assigned "on or attached to the entry of such judgment, and the assignment, when attested by the clerk of the court, shall vest the title," etc., an assignment of a judgment, not attested as the statute requires, is not void; it is at least good in equity, and vests such title in the assignee as will enable him to use it as a set-off to a judgment held by the defendant against him.[26] Where a state statute, in reference to the assignment of judgments, is so worded as to embrace only judgments rendered in the courts of that state, an assignment of a judgment recovered in another state may be proved by a written instrument transferring to the assignee the equitable interest in the debt, and he may sue upon it in his own name and for his own benefit.[27]

§ 947. Equitable Assignment.

Where a judgment creditor sells his judgment and attempts to assign it upon the record to the purchaser, but by mistake the assignment is made upon the wrong record, it nevertheless operates as an equitable assignment.[28] So also the transfer of property will in some cases operate as an assignment of a judgment. Thus, where A. recovered judgment for possession in an action for the recovery of real property against B., and afterwards sold the property to C. without assigning the judgment on the record, it was held that C., by the purchase of the property, became the real party in interest, and could properly revive the judgment by *scire facias*.[29] Again, where a plaintiff in a judgment gives to a creditor an order on his attorney to pay to him the money collected by the attorney on the judgment,

[25] Burgess v. Cave, 52 Mo. 43. See Blackman v. Joiner, 81 Ala. 344, 1 South. Rep. 851.

[26] Adams v. Lee, 82 Ind. 587.

[27] Baker v. Stonebraker, 34 Mo. 172.

[28] Frybarger v. Andre, 106 Ind. 337, 7 N. E. Rep. 5.

[29] Wright v. Parks, 10 Iowa, 342.

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which order the creditor delivers to the attorney, it creates an equitable assignment of and lien on the proceeds of the judgment, and the attorney holds the same in trust for the creditor, and such assignment cannot be revoked by the judgment-plaintiff.[20] So when a person having a future interest in property on which there is a judgment-lien, for the purpose of protecting such interest, pays the debt of the judgment-debtor, he thereby becomes an equitable assignee of the judgment and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit.[21] In some of the states, a judgment, as property, may be taken in execution and sold.[22] But according to other authorities, the judgment-creditor's interest can be reached only by summoning the judgment-debtor as garnishee.[23]

§ 948. Title Passing to Assignee.

At common law, the assignment of a judgment does not vest the legal title in the assignee; that remains in the judgment-creditor, subject to the equitable rights of the assignee.[24] But the cases generally agree that the assignment carries with it the debt or claim on which the judgment was based,[25] and the right to stand in the creditor's place as regards the means of its collection and enforcement,[26] together with any incidental rights or advantages, existing at the time, such as the benefit of an appeal-bond.[27] And the assignee's rights are not affected by the fact that the consideration was less than

[20] Hussey v. Culver, 6 N. Y. Supp. 466. But compare Teetor v. Abden, 2 Cart. (Ind.) 183.

[21] Sutton v. Sutton, 26 S. Car. 33, 1 S. E. Rep. 19.

[22] Ochiltree v. Missouri, etc., R. Co., 49 Iowa, 150; Safford v. Maxwell, 23 La. Ann. 345; Adams v. Hackett, 7 Cal. 187.

[23] Osborn v. Cloud, 23 Iowa, 104, 92 Am. Dec. 413; McBride v. Fallon, 65 Cal. 301, 4 Pac. Rep. 17.

[24] Hossack v. Underwood, 55 Ill. 123; Hanks v. Harris, 29 Ark. 323; Hewett v. Outland, 2 Ired. Eq. 438.

[25] Bolen v. Crosby, 49 N. Y. 183; Ellsworth v. Caldwell, 18 Abb. Pr. 20; Pratt v. Wertheimer, 39 Hun, 463; Villa v. Weston, 33 Conn. 50. Even if the judgment was void, the assignment transfers the original debt. Brown v. Scott, 25 Cal. 189.

[26] Burns v. Bangert, 16 Mo. App. 23; Applegate v. Mason, 13 Ind. 75. See *infra*, § 951.

[27] Ullman v. Kline, 87 Ill. 268. But probably not a bond in attachment. Forrest v. O'Donnell, 42 Mich. 556, 4 N. W. Rep. 259.

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the face of the judgment;[38] nor even by fraud in the transfer, unless the judgment-debtor can show that he was injured by such fraud.[39]

§ 949. Rights as against Assignor.

The assignor of a judgment must be held to an implied warranty that there is such a judgment, that he is the owner of it, that it is a valid and subsisting obligation for the amount it purports to be, and that no part thereof has been paid.[40] This rests upon the presumed superior knowledge of the vendor as to the condition of the debt and as to any payments that may have been made upon it. He must in ordinary cases have better means of knowing the facts than the purchaser. There may undoubtedly be cases to which this presumption would not apply; as when a judgment is transferred to one who has had charge of its collection, under such circumstances as would raise a presumption that he was privy to the payments. But these cases are exceptions to the rule.[41] But a transfer by an assignee of the judgment, ignorant of any defect therein or defense thereto, of simply his "right, title, and interest therein, without recourse," will not render him liable upon a similar implied warranty.[42] And in an assignment of a judgment there is no *implied* warranty of the solvency of the judgment-debtor. Where the assignee has pursued the debtor to insolvency and failed to collect the amount, the assignor is under no liability to refund the consideration, unless by express agreement.[43] Of course the judgment-creditor, after the assignment, cannot receive payment of the judgment or enter satisfaction of it. "A party who, after having for a valuable consideration assigned a judgment, satisfies it, clearly incurs a liability to his assignee. If the satisfaction-piece is given on payment of the judgment, the money may be recovered by the assignee in an action for money had

[38] Harmon v. Hope, 87 N. Y. 10; Inglehart v. Thousand Island Hotel Co., 32 Hun, 377.

[39] Long v. Klein, 35 La. Ann. 884.

[40] Miller v. Dugan, 36 Iowa, 433; Lile v. Hopkins, 12 Sm. & Mar. 299, 51 Am. Dec. 115; Furniss v. Ferguson, 15 N. Y. 437; Johnson v. Boice, 40 La. Ann. 278, 4 South. Rep. 163.

[41] Furniss v. Ferguson, 15 N. Y. 437.

[42] Miller v. Dugan, 36 Iowa, 433.

[43] Robinson v. White, 4 Litt. 235; Reid v. Ross, 15 Ind. 265; Mohler's Appeal, 5 Pa. St. 418.

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and received, and if the satisfaction is given without payment, and the assignee is prejudiced thereby, he is entitled to recover of his assignor the damages sustained."[44] But an assignment of his judgment by a judgment-creditor to his attorney, for reasons of convenience, and for his own benefit, cannot prevail against a subsequent settlement by him with the judgment-debtor.[45]

§ 950. Notice of Assignment.

The judgment-debtor must have notice of the assignment. He will be protected, as against the assignee, in respect to any payments he may make to the plaintiff in the judgment before receiving such notice.[46] On the other hand it is well settled that *after* notice to the debtor of a *bona fide* transfer of the judgment, the rights of the assignee will be protected from any and all acts of the parties.[47] "It is not necessary that direct notice of the assignment be given by the assignee or his agent. It is sufficient if the information be given under circumstances and in terms calculated to arrest the attention of the debtor."[48] But where the assignment is merely entered on the record, it is held that this is not constructive notice to the debtor. "He is under no obligation to make inquiry. A subsequent incumbrancer or purchaser must know, for it is his duty to examine the

[44] Booth v. Farmers' and Mechanics' Nat. Bank, 50 N. Y. 396.

[45] Baker v. Secor, 7 N. Y. Supp. 803.

[46] Gaullagher v. Caldwell, 22 Pa. St. 300, 60 Am. Dec. 85; Lee v. Delehanty, 25 Hun, 197; Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; Frissell v. Haile, 18 Mo. 18; Dodd v. Brott, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; Page v. Benson, 22 Ill. 484; Styles v. McNeil, 6 Mart. N. S. 296, 17 Am. Dec. 183; Johnson v. Boice, 40 La. Ann. 273, 4 South. Rep. 163. But in some states it is held that where the judgment-debtor, being summoned as garnishee in an action against the judgment-creditor, has paid to the sheriff the amount due on the judgment, without notice of its previous assignment, he is not protected from the claims of the assignee of the judgment. Robinson v. Weeks, 6 How. Pr. 161; Richardson v. Ainsworth, 20 How. Pr. 530; Brown v. Ayres, 23 Cal. 525. But a different rule obtains in other states. Drumm v. Sherman, 20 La. Ann. 96.

[47] Stoddard v. Benton, 6 Colo. 508; Ullman v. Kline, 87 Ill. 268; Hughes v. Trahern, 64 Ill. 48.

[48] Guthrie v. Bashline, 25 Pa. St. 80. Where a judgment-debtor became surety for the prosecution of a bill to enjoin the judgment against him, and the bill contained an allegation of the assignment of the judgment, it was held that he was charged with notice of the assignment. Wilcox v. Morrison, 9 Lea, 699.

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records. Not so with the debtor himself. The judgment-docket is not for his benefit."[49]

§ 951. Right of Assignee to Sue.

Although, at common law, as we have already stated, the assignee of a judgment was not regarded as invested with the legal title, and therefore was not competent to sue thereon in his own name, this rule has been abrogated by statute in many states, and now the assignee is the only proper party to maintain an action on the judgment or to sue out *scire facias* for its revival.[50] The new rule, however, is not universal. Thus, in Alabama, it is held that a judgment is not a "contract express or implied, for the payment of money," within the meaning of the statute which requires an action on such contract to be brought in the name of the real party in interest, and therefore, in that state, an action on a judgment is still properly brought, notwithstanding its assignment, in the name of the original plaintiff.[51] The assignee of a judgment founded on a contract cannot maintain a suit thereon in a court of the United States, unless such a suit might be there prosecuted had the assignment not been made.[52]

§ 952. Rights as against Judgment-Debtor.

The assignment of a judgment carries with it to the assignee all the rights and advantages incident thereto, as against the judgment-debtor, including the right of proceeding with an attachment already issued.[53] The assignee has all the equitable remedies of the plaintiff

[49] Henry v. Brothers, 48 Pa. St. 70.

[50] Edmonds v. Montgomery, 1 Iowa, 143; Charles v. Haskins, 11 Iowa, 329; Steele v. Thompson, 62 Ala. 323; Moore v. Nowell, 94 N. Car. 265; Clark v. Digges, 5 Gill, 109; Murphy v. Cochran, 1 Hill (N. Y.) 339; Benne v. Schnecko (Mo.), 13 S. W. Rep. 82. See Timberlake v. Powell, 99 N. Car. 233, 5 S. E. Rep. 410.

[51] Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809. *Supra*, vol. 1, § 11.

[52] Walker v. Powers, 104 U. S. 245. See Act Congr. Mar. 3, 1887 (24 Stat. at L. 552); Dillon, Removal of Causes, § 100.

[53] Forwood v. Dehoney, 5 Bush, 174; Perry v. Roberts, 30 Ind. 244; Parmelee v. Dann, 23 Barb. 461; Bolen v. Crosby, 49 N. Y. 183; Ritch v. Eichelberger, 13 Fla. 169; Richmond Building Asso. v. Association, 100 Pa. St. 191; Van Houten v. Reilly, 6 Sm. & Mar. 440; Burson v. Blair, 12 Ind. 371.

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in the judgment.[54] But the assignment does not pass any interest in the money which the sheriff had previously collected on the judgment.[55] And where one of several joint wrong-doers pays the judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of another, who is merely a man of straw.[56]

§ 953. Assignee Takes Subject to Equities.

The assignee of a judgment takes it subject to all the equities subsisting between the original parties, whether he had notice of the same or not; he can occupy no better position, and acquire no firmer rights, than his assignor possessed.[57] For instance, the assignee takes the judgment subject to any right of set-off which existed in the judgment-debtor prior to the assignment, no matter whether he had notice of such right or not.[58] And in respect to a lien on property for the satisfaction of the judgment, he can occupy no better position than the assignor.[59] So where the assignee has notice of a certain agreement, relative to the enforcement of the judgment, between the parties thereto, he takes subject to that agreement, and cannot set it aside for fraud of the defendant in obtaining it, whatever rights his assignor may have had.[60] The assignee is a necessary

[54] Kimball v. Cummins, 3 Met. (Ky.) 327.

[55] Robinson v. Towns, 30 Ga. 818.

[56] Boyer v. Bolender (Pa.), 18 Atl. Rep. 127.

[57] Downer v. South Royalton Bank, 39 Vt. 25; Shelton v. Hurd, 7 R. I. 403; Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; McCotter v. McCotter, 16 Abb. Pr. 265; Filbert v. Hawk, 8 Watts, 443; Starr v. Haskins, 26 N. J. Eq. 414; Stout v. Van Kirk, 10 N. J. Eq. 78; Lattomus v. Gorman, 3 Del. Ch. 232; Rawson v. McJunkin, 27 Ga. 432; Scott v. Harkins, 32 Ga. 302; Mayor of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308; Burson v. Blair, 12 Ind. 371; Rea v. Forrest, 88 Ill. 275; Hughes v. Trahern, 64 Ill. 48; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Burtis v. Cook, 16 Iowa, 194; Isett v. Lucas, 17 Iowa, 503, 85 Am. Dec. 572; Independent School Distr. v. Schreiner, 46 Iowa, 172; Blakesley v. Johnson, 13 Wis. 530; Brisbin v. Newhall, 5 Minn. 273, (Gil. 217); Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76. See Cook v. McCahill, 41 N. J. Eq. 69, 3 Atl. Rep. 82.

[58] Graves v. Woodbury, 4 Hill (N. Y.), 559, 40 Am. Dec. 296; Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Hobbs v. Duff, 23 Cal. 596; Neal v. Sullivan, 10 Rich. Eq. 276.

[59] Rider v. Kelso, 53 Iowa, 367, 5 N. W. Rep. 509.

[60] Borst v. Baldwin, 30 Barb. 180.

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party to a suit for a perpetual stay of the proceedings on the judgment upon the ground of equities existing between the complainant and the assignor previous to the assignment.[61] Where a judgment once paid, but not satisfied of record, is assigned by the judgment-creditor, the assignee takes it subject to all defenses and equities which the judgment-debtor had against the assignor.[62]

§ 954. Set-Off of Judgment against Judgment.

As a deduction from the rule that the assignee of a judgment takes it subject to all the equities subsisting between the original parties, many of the cases sustain the doctrine that one judgment may be set off against another, although one of the judgments has been assigned to a third person for a valuable consideration and without notice of the existence of the other judgment, provided the right of set-off existed at the time of the assignment.[63] Other decisions, without going to this length, hold that such judgments may be set off where one of them was *fraudulently* assigned for the very purpose of preventing such offset.[64] And others go no further than to declare that if the assignee has *notice* of the other judgment, he will take subject to the equitable right to set it off.[65] Still another view is that the equity in question cannot prevail over the assignment unless the assignor was *insolvent* at the time of the assignment.[66] But a considerable proportion of the authorities take the broad ground that the right to set off judgments is permitted only where it will infringe on no other right of equal grade, and further, that an assignment of one

[61] Mumford v. Sprague, 11 Paige, 438.

[62] Traphagen v. Lyons, 38 N. J. Eq. 613; Stout v. Van Kirk, 10 N. J. Eq. 78; Sutton v. Sutton, 26 S. Car. 33, 1 S. E. Rep. 19. Compare Doub v. Mason, 2 Md. 380.

[63] Graves v. Woodbury, 4 Hill (N. Y.), 559, 40 Am. Dec. 296; Pierce v. Bent, 69 Me. 381; Hovey v. Morrill, 61 N. H. 9, 60 Am. Rep. 315; Chase v. Woodward, 61 N. H. 79; Langston v. Roby, 68 Ga. 406; Brown v. Hendrickson, 39 N. J. Law, 289; Hobbs v. Duff, 23 Cal. 596; Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Merrill v. Souther, 6 Dana, 305; McBride v. Fallon, 65 Cal. 301, 4 Pac. Rep. 17; Yorton v. Railroad, 62 Wis. 367, 23 N. W. Rep. 401; Wells, Fargo & Co. v. Clarkson, 5 Mont. 336, 5 Pac. Rep. 894; Orr v. Spooner, 19 U. C. Q. B. 601.

[64] Hurst v. Sheets, 14 Iowa, 322.

[65] Irvine v. Myers, 6 Minn. 562, (Gil. 398).

[66] Henderson v. McVay, 32 Ala. 471; Davis v. Milburn, 3 Iowa, 168.

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of the judgments destroys that mutuality which is an essential condition to the right of set-off, and consequently, that this equity will not be permitted to affect an assignee for value and in good faith.[67] Most of the cases seem to agree in the rule that where a judgment recovered by the plaintiff has been assigned to his attorney in good faith, in payment for his services in the action, the court should refuse to set off against such judgment a judgment recovered by defendant against plaintiff prior to the assignment, but of which the attorney had then no notice.[68]

§ 955. Vacation or Reversal of Judgment in Assignee's Hands.

The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons that would justify such action if it remained in the hands of the plaintiff.[69] And when proceedings are instituted for any of these purposes, the assignor is not a proper or necessary party, as he has no longer an interest in the judgment.[70] Upon the reversal of the judgment, the assignee, if he has purchased property under his own execution, will lose his title thereto.[71] So if he has acquired rights under the judgment, and it is subsequently reversed, he must make restitution, the same as if he were an original party.[72]

§ 956. Latent Equities of Third Persons.

In several of the authorities we find the statement that the rule of *caveat emptor* applies to the purchaser of a judgment as well as to

[67] Ramsey's Appeal, 2 Watts, 228, 27 Am. Dec. 301; Goodwin v. Richardson, 44 N. H. 125; Primm v. Ransom, 10 Mo. 444; Ledyard v. Phillipps, 58 Mich. 204, 24 N. W. Rep. 551; Gallaher v. Pendleton, 55 Iowa, 142, 7 N. W. Rep. 512; Bill v. Perry, 43 Iowa, 368.

[68] Simmons v. Reid (S. Car.), 9 S. E. Rep. 1058; Terney v. Wilson, 45 N. J. Law, 282; Ely v. Cooke, 28 N. Y. 365. Compare Yerton v. Railroad, 62 Wis. 367, 23 N. W. Rep. 401.

[69] Weber v. Tschetter (Dak.), 46 N. W. Rep. 201; Northam v. Gordon, 28 Cal. 255.

[70] Ritch v. Eichelberger, 13 Fla. 169.

[71] Reynolds v. Harris, 14 Cal. 667.

[72] McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449.

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purchasers of other classes of personal property.[73] But the generally recognized doctrine is that the assignee of a judgment is not affected by the latent equities of third persons, not parties to the judgment, of which he had no notice at the time of the assignment.[74] "The party proposing to take an assignment of a judgment can go to the judgment-debtor and ascertain the true state of the case. If the debtor have any equitable ground for refusing to pay, he can so state; if not, and he so state to the party proposing to take an assignment, and the purchase is made on the faith of such disclaimer, he will be thereafter estopped to set up any such matter. But a party proposing to purchase a judgment has no means of ascertaining what claims third persons may have, or pretend to have, on the judgment, unless such claims appear on or attached to the entry of judgment where the same is to be assigned. Hence it would seem that an assignee without notice should take the judgment freed from the claims of such third persons." [75] In accordance with this principle, it is held that while an unrecorded deed to lands takes precedence of a judgment as against the judgment-creditor, if before the recovery of his judgment he has actual notice of the conveyance by the debtor, yet the assignee of such judgment, who buys without notice that his assignor had notice before the rendition of the judgment of the conveyance, is not affected by the notice to his assignor.[76] So the equity of a purchaser for value of a judgment, which is a lien upon certain real estate, is at least equal to the equitable claim of the owner of such real estate to be subrogated to the rights of a mortgagee in a mortgage thereon which has been paid off and satisfied, and of which the purchaser of the judgment had no actual knowledge, and where the equities are equal the law must prevail.[77] Again, the *bona fide* assignee of a judgment is not affected in his right to enforce the same by an agreement

[73] Cox v. Palmer, 60 Miss. 793; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151.

[74] Wright v. Levy, 12 Cal. 257; McCotter v. McCotter, 16 Abb. Pr. 265; Hale v. First Nat. Bank, 50 Iowa, 642; Starr v. Haskins, 26 N. J. Eq. 414; Murray v. Lilburn, 2 Johns. Ch. 442; Hendrickson's Appeal, 24 Pa. St. 363; Greene v. Daily, 5 Mason, 214; Garland v. Harrison, 17 Mo. 282; Ives v. Addison, 39 Kans. 172, 17 Pac. Rep. 797. See Thompson v. Noble, 8 N. Y. Supp. 873.

[75] Robeson v. Roberts, 20 Ind. 155, 161.

[76] Duke v. Clark, 58 Miss. 465, 474.

[77] Ritter v. Cost, 99 Ind. 80.

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between the judgment-debtor and another creditor, that he will pay off the judgment if the creditor will accept a conveyance of his property, and credit him therefor with a certain amount upon his indebtedness, the assignee having no notice of such agreement.[78] So again, an agreement between the seller and purchaser of a judgment, that its lien shall be superior to that of a prior judgment against the same parties held by the seller, cannot be set up against a subsequent purchaser for value of the prior judgment, no notice, actual or constructive, of the agreement being given to such purchaser.[79] The *bona fide* assignee for valuable consideration of a judgment confessed to indemnify the plaintiff as surety on certain notes given by the defendant to a third person, takes free and discharged of the equity of that person to have the fruits of the judgment applied on account of the payment of the notes; nor is there any obligation on the part of such assignee to make inquiry as to the existence of such an equity.[80]

The foregoing rule, however, is subject to certain important qualifications. In the first place, the purchaser of a judgment is ordinarily charged with an inspection of the record of that judgment, and is therefore affected with notice of any rights which it plainly discloses.[81] Again, some of the cases hold that he is not entitled to the protection of a *bona fide* purchaser unless he has actually paid the purchase-money before the adverse equity is asserted.[82] Where, after the assignment and after notice to the debtor, the assignor wrongfully enters satisfaction of the judgment, the assignee may have the entry set aside, but he will not be permitted to take proceedings to injure rights acquired by third persons upon the faith of the entry of satisfaction.[83] So again, under proper circumstances, an attorney's lien upon a judgment will be held superior to the claim of an assignee.[84] In a case where a debtor, while in failing circumstances, confessed a judgment to his brother, which was then assigned to a

[78] Starr v. Haskins, 26 N. J. Eq. 414.

[79] Winton's Appeal (Pa.), 5 Atl. Rep. 433.

[80] Mifflin County Bank's Appeal, 96 Pa. St. 150.

[81] Griffiths v. Sears, 112 Pa. St. 523, 4 Atl. Rep. 492.

[82] Christie v. Bishop, 1 Barb. Ch. 105.

[83] Beebe v. Bank, 1 Johns. 528; Wardell v. Eden, 2 Johns. Cas. 258.

[84] Gill v. Truelsen, 39 Minn. 373, 40 N. W. Rep. 254.

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creditor of the debtor, who, in consideration of his original claim and the judgment so acquired, took a bill of sale of the assets of the debtor, it was held, in a suit by other creditors to set aside the judgment and sale as fraudulent, that the judgment should be treated as overdue paper, and the creditor took it subject to all equities.[85] And cases are not wanting which even hold that the assignee of a judgment takes it subject to *all* equities, in favor of third persons as well as between the original parties, and whether he takes with or without notice.[86]

§ 957. Priority between Assignments.

The doctrine favored by a majority of the decisions is that an assignee of a judgment takes no title if his assignor had previously assigned the same judgment to another party, whether or not he had notice of such previous assignment.[87] But it has also been held that a second purchase of a judgment, evidenced by a transfer on the record, would pass title against a prior purchase not recorded and of which the second purchaser was ignorant.[88] If a judgment is assigned by its owner, and afterwards levied on and sold as his property, the right of the assignee is prior to that of the purchaser at the sheriff's sale.[89] The rightful assignee of a judgment may enjoin the collection of the same by one who claims the same judgment by a simulated assignment.[90]

[85] Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. Rep. 491.

[86] Downer v. South Royalton Bank, 39 Vt. 25; De La Vergne v. Evertson, 1 Paige, 181, 19 Am. Dec. 411.

[87] Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Clarke v. Hogeman, 18 W. Va. 718; Dismore v. Boyd, 6 Lea, 689.

[88] Campbell's Appeal, 29 Pa. St. 401.

[89] Fore v. Manlove, 18 Cal. 436. Compare Cole v. Brewer, 4 Lea, 318.

[90] Klein v. Dennis, 36 La. Ann. 284.

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CHAPTER XXIV.

ACTIONS UPON JUDGMENTS.

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§ 958. Judgment as a Cause of Action.

At the common law, an action of debt will lie on a judgment as soon as it is recovered, and without any regard to the plaintiff's right to take out execution; for the remedy by execution is cumulative merely, and the statutes giving this remedy do not impair the common law right of action on the judgment as a debt of record. Accordingly, in a majority of the states, the owner of a judgment may bring

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suit thereon in the same or any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment might still have been enforced by execution, and even although an execution is then outstanding.[1] Thus an action may be maintained upon a judgment, although an *alias* execution was issued thereon after the commencement of such action.[2] And an action to recover the amount of a judgment with interest, in which a summons is issued and served as on a money demand, is an action on the judgment, and not an action to revive it.[3] It cannot be said, however, that this rule is universally accepted at the present day. Some states, having a regard to the oppressive and vexatious character of a succession of unnecessary suits upon the same obligation, refuse to allow the maintenance of such actions without the showing of some special and adequate cause. Thus in Oregon, in holding that a judgment-creditor cannot sue upon the judgment as often as he may choose, without showing any necessity therefor, the court declared that "neither the common law, nor the practice in the various states, nor anything inherent in the subject, gives the judgment-creditor an absolute right of action on a domestic judgment,

[1] Hickman v. Macon Co., 42 Fed. Rep. 759; Clark v. Goodwin, 14 Mass. 287; O'Neal v. Kittredge, 8 Allen, 470; Linton v. Hurley, 114 Mass. 76; Wilson v. Hatfield, 121 Mass. 551; White River Bank v. Downer, 29 Vt. 332; Whittemore v. Carkin, 58 N. H. 576. Denison v. Williams, 4 Conn. 402; Ives v. Finch, 28 Conn, 112; Hale v. Angel, 20 Johns. 342; Goodrich v. Colvin, 6 Cow. 397; Church v. Cole, 1 Hill (N. Y.), 645; Smith v. Mumford, 9 Cow. 26; Stewart v. Peterson, 63 Pa. St. 230; Kingsland v. Forrest, 18 Ala. 519, 52 Am. Dec. 232; Elliott v. Holbrook, 33 Ala. 659; Gardner v. Henry, 5 Cold. 458; Burns v. Simpson, 9 Kans. 658; Hummer v. Lamphear, 32 Kans. 439, 4 Pac. Rep. 865; Headley v. Roby, 6 Ohio, 521; Davidson v. Nebraker, 21 Ind. 334, 88 Am. Dec. 350; Gould v. Hayden, 63 Ind. 443; Becknell v. Becknell, 110 Ind. 42, 10 N. E. Rep. 414; Greathouse v. Smith, 3 Scam. 541; Albin v. People, 46 Ill. 372; Haven v. Baldwin, 5 Iowa, 503; Thompson v. Lee Co., 22 Iowa, 206; Simpson v. Cochran, 23 Iowa, 81, 92 Am. Dec. 410; Ames v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538. In Michigan, an action of debt will lie on a justice's judgment immediately upon its rendition, although execution has been stayed. McDonald v. Butler, 3 Mich. 558. So where excessive costs have been awarded by a justice in giving judgment, and the judgment-debtor does not appeal, the party recovering judgment is entitled to rectify the error by remitting the costs and suing again upon the judgment for damages. Whelpley v. Nash, 46 Mich. 25, 8 N. W. Rep. 570.

[2] Moor v. Towle, 38 Me. 133.

[3] Mawhinney v. Doane (Kans.), 20 Pac. Rep. 488.

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unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment."[4] In South Carolina, an action will not lie on a justice's judgment until after the expiration of the time during which execution may issue on such judgment, that is, a year and a day.[5] In Louisiana, it is said that the necessity of bringing a separate action to enforce a judgment exists in two cases; first, where the judgment is a foreign judgment, and second, in the case of a domestic judgment, where the debtor is dead and his estate is under administration.[6] In several of the states it is provided that an action on a domestic judgment cannot be prosecuted without leave of the court first obtained.[7] And in some jurisdictions, in order to prevent actions on domestic judgments being brought vexatiously, the statutes enact that costs shall not be allowed in such actions, unless the action was brought with previous leave of the court for cause shown.[8] It seems to be conceded that an action will not lie on a judgment which appears of record to have been satisfied by levy of execution on real estate, regular upon the face of it. The record must be held conclusive, until, by some proceeding brought to operate directly upon the record itself, the levy is avoided.[9] But in Maine, the action may be maintained, notwithstanding a return made by the officer of a full satisfaction of the execution, when in fact no such satisfaction was received.[10] Causes of action on several judgments cannot be united in one suit, unless all the debtors in the judgments are the same and are made defendants to the action.[11]

[4] Pitzer v. Russel, 4 Oreg. 124. And see also Smith v. Belmont Iron Co., 11 Bush, 390.

[5] Lee v. Giles, 1 Bailey L. 449, 21 Am. Dec. 446; Ligon v. McNeil, 6 Rich. 377; Vandiver v. Hammet, 4 Rich. 509.

[6] Succession of Beckham, 16 La. Ann. 352. So where the debtor has left the jurisdiction. Wood v. Newberry, 48 Mo. 322.

[7] McDonald v. Dickson, 85 N. Car. 248; Kendall v. Briley, 86 N. Car. 56; Warren v. Warren, 84 N. Car. 614; Watts v. Everett, 47 Iowa, 269; Matthews v. Davis, 61 Iowa, 225, 16 N. W. Rep. 102; Farish v. Austin, 25 Hun, 480; Carpenter v. Butler, 29 Hun, 251.

[8] Merchant's Nat. Bank v. Gaslin (Minn.), 43 N. W. Rep. 483.

[9] Pratt v. Jones, 23 Vt. 341, 54 Am. Dec. 80; Grosvenor v. Chesley, 48 Me. 369. The rule does not apply if there is a defect of title apparent on the face of the return. In such case, the creditor may waive the levy. Lawrence v. Pond, 17 Mass. 433.

[10] Hutchinson v. Greenbush, 30 Me. 450.

[11] Barnes v. Smith, 1 Rob. (N. Y.) 699.

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§ 959. Judgment must be Final and in Force.

In order that a judgment should be available as a cause of action, it is plainly necessary that it should be complete and definitive in its nature and a valid and subsisting legal obligation. Hence no action can be maintained upon a merely interlocutory judgment or order.[12] Nor upon a judgment which is void on its face.[13] Nor where it appears from the record of the judgment that its collection has been enjoined, and no disposition of the injunction is shown.[14] But in Kansas an action can be maintained on a dormant domestic judgment, if commenced within one year after the judgment becomes dormant.[15]

§ 960. Effect of Pending Appeal.

According to most of the authorities, the pendency of an appeal, writ of error, or petition for review does not deprive the plaintiff of the right to bring a new action upon his judgment, unless a stay of proceedings has been obtained upon the filing of a sufficient bond.[16] But in Connecticut it is held that an appeal from a judgment of a justice of the peace to the county court, allowed, but not duly entered in that court, not merely suspends the judgment but vacates it, so that an action of debt upon it cannot be sustained.[17] The English cases hold that if the plaintiff sues on his judgment pending a writ of error, and recovers, he cannot take out execution on the new judgment until the revisory proceedings are determined.[18]

§ 961. Judgments of Inferior Courts.

Although a judgment rendered by an inferior court, not of record, cannot be called a debt of record, in the strictest sense, yet it is unde-

[12] Fry v. Malcolm, 4 Taunt. 705; Biddle v. Dowse, 9 Dow. & Ry. 404; Ledyard v. Brown, 39 Tex. 402.

[13] Ellis v. Conn. Mut. Life Ins. Co., 8 Fed. Rep. 81; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429.

[14] Blair v. Caldwell, 3 Mo. 353.

[15] Baker v. Hummer, 31 Kans. 335, 2 Pac. Rep. 808.

[16] Dawson v. Daniel, 2 Flip. 301; Gifford v. Whalon, 8 Cush. 428; Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Taylor v. Shew, 39 Cal. 536; Suydam v. Hoyt, 25 N. J. Law, 230; Woodward v. Carson, 86 Pa. St. 176.

[17] Curtiss v. Beardsley, 15 Conn. 518.

[18] Benwell v. Black, 3 T. R. 643.

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niably a legal obligation, upon which an action may be maintained in any court of competent jurisdiction.[19] In New York it is held that an action will lie upon a surrogate's decree for the payment of money.[20] But the courts of Pennsylvania refuse to take cognizance of a suit on a decree of the Orphans' Court directing the payment of a legacy, on the ground that such court has exclusive jurisdiction.[21]

§ 962. Suits on Decrees in Chancery.

The English law has always sanctioned the maintenance of actions at law upon decrees in chancery rendered in foreign countries or in the colonies, when such decrees were merely for the payment of a specific sum.[22] But in regard to the decrees of their own court of chancery, the rule in that country is fixed to the contrary. The law courts refuse to take cognizance of actions on such decrees, for the reason that the court which made the decree can, within its own jurisdiction, enforce it, and therefore the action would be unnecessary.[23] In the United States, some of the earlier cases manifested a disposition to follow the English rule in this respect.[24] But these decisions have been overruled. And it is now well settled that an action of debt will lie in a court of law upon the decree of a domestic court of chancery, in all cases where such decree directs the payment of a fixed, liquidated, and absolute debt in money.[25] Thus, it is said by the supreme court of Pennsylvania: "It is a general principle that where a man is under an obligation to pay a certain sum of money, whether that obligation be founded on a contract or the judgment of a court, an action of debt lies; and on that principle we support

[19] Williams v. Jones, 13 Mees. & W. 628. See Deidrich v. Nachtsheim, 33 Wis. 225.

[20] Dubois v. Dubois, 6 Cow. 494.

[21] Black's Exr. v. Black, 34 Pa. St. 354.

[22] Sadler v. Robins, 1 Camp. 253; Henly v. Soper, 8 Barn. & C. 16; Henderson v. Henderson, 6 Ad. & El. N. S. 295.

[23] Carpenter v. Thornton, 3 B. & Ald. 52.

[24] Hugh v. Higgs, 8 Wheat. 697; Van Buskirk v. Mulock, 18 N. J. Law, 184.

[25] Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Thrall v. Waller, 13 Vt. 231, 37 Am. Dec. 592; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. 179; Pennington v. Gibson, 16 How. 65; Nations v. Johnson, 24 How. 203; Ames v. Hoy, 12 Cal. 11; Post v. Neafie, 3 Caines, 22; People v. Sturtevant, 9 N. Y. 263; Tilford v. Oakley, Hempst. 197; McKim v. Odom, 12 Me. 94; Mutual Life Ins. Co. v. Newton (N. J.), 14 Atl. Rep. 756; Warren v. McCarthy, 25 Ill. 95.

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actions of debt on foreign judgments, and I confess I see no reason why a decree in chancery is not as strong as a foreign judgment. If it be objected that proceedings in chancery are not according to the course of the common law, the same objection lies against judgments of courts on the continent of Europe, where the proceedings are according to the civil law. To be sure, in the case of a foreign judgment, the defendant is permitted to deny the original cause of action; but so likewise would the defendant in the present case have been permitted to enter into the merits of the original controversy, were it not for the constitution and laws of the United States which forbid it. The objection, therefore, of being precluded from contesting the merits of the original decree does not lie against the action of debt, which, in its nature, did not preclude it, but against the constitution."[26] But an action will not lie on a decree for the performance of any other acts than the payment of money.[27] A decree, in a suit for foreclosure of a mortgage, that the amount found due be paid, or, in default, the premises be sold and the proceeds paid into court, is in the alternative, and in an action on such decree for the whole amount, *nul tiel record* is a good plea.[28]

§ 963. Parties to Action on Judgment.

According to the practice now prevailing in a majority of the states, the assignee of a judgment is regarded as the "real party in interest," so that he may maintain an action thereon in his own name.[29] But the mere possession of a transcript of a judgment raises no presumption that the possessor has any interest therein sufficient to enable him to sue on it.[30] In debt by an administrator upon a judgment recovered by him, he need not declare as administrator; and the rule is the same where he was appointed administrator by a foreign jurisdiction and recovered the judgment there. For the judgment is a

[26] Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

[27] Warren v. McCarthy, 25 Ill. 95.

[28] Burgess v. Souther, 15 R. I. 202, 2 Atl. Rep. 441.

[29] *Supra*, §§ 940, 951. See Love v. Fairfield, 5 Gilm. 203; Smith v. Belmont Iron Co., 11 Bush, 390; Triplett v. Scott, 12 Ill. 137.

[30] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

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debt due to *him*, and the principle which forbids a foreign administrator to sue for a debt due the estate does not apply.[31] If the judgment-debtor is dead, the rule of the common law forbids the bringing of an action on the judgment against his personal representative.[32] And a judgment against an administrator in one state will not support an action against a different administrator in another state.[33] Where a judgment is rendered against two or more defendants jointly, they should all be made parties to an action on the judgment, if living and within the jurisdiction of the court.[34] But when suit is brought against two defendants who are jointly indebted to the plaintiff, and one only is served with process, and judgment is taken against him under the provisions of the joint debtor act, and afterwards an action is brought upon the judgment so obtained, the person who was not originally served with process is not a proper party defendant to the latter action.[35]

§ 964. Requisites of Declaration.

A judgment need not be set out *in hæc verba* in an action brought upon it; it is sufficient to set it forth according to its legal effect.[36] A complaint in such an action is sufficient if it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment.[37] It is not necessary to allege that the judgment has not been appealed from. It is sufficient to aver that it remains unpaid and in full force.[38] A declaration setting forth the recovery by the plaintiff against the defendant of a judgment for a certain sum as damages and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action

[31] Talmadge v. Chapel, 16 Mass. 71.

[32] United States v. Cushman, 2 Sumn. 310.

[33] Creswell v. Slack, 68 Iowa, 110, 26 N. W. Rep. 42. But it is otherwise when the successive defendants are executors. Turley v. Dreyfus, 33 La. Ann. 885; Latine v. Clements, 3 Ga. 426.

[34] Blake v. Burley, 9 Iowa, 592.

[35] Tay v. Hawley, 39 Cal. 93; Lindh v. Crowley, 26 Kans. 47.

[36] Central Bank v. Veasy, 14 Ark. 671.

[37] Ewing v. Jennings, 15 Nevad. 379.

[38] Chaquette v. Ortet, 60 Cal. 594.

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has accrued to the plaintiff to have and recover of the defendant the balance due thereon and interest, is sufficient on demurrer.[38]

§ 965. Declaring on Judgment of Inferior Court.

Where suit is brought on the judgment of an inferior court, or court of limited or statutory jurisdiction, it is no longer considered necessary (as formerly it was) to allege all the proceedings in full. But after setting out the jurisdictional facts, a general averment of *superinde taliter processum fuit* is admissible as a summary of all other steps up to the recovery.[39]

§ 966. Averments of Jurisdiction.

In regard to allegations of jurisdictional facts, in a declaration upon a domestic judgment, an important distinction is to be noted between the judgments of courts of record and those of the inferior tribunals. In suing on a judgment rendered by a superior court of general jurisdiction, it is not necessary to set out the facts conferring jurisdiction; for in such cases the presumption is in favor of jurisdiction and all things requisite to the validity of the judgment.[41] But in suing on the judgment of an inferior or limited court, it is necessary, as a general rule, unless the requirement is specially abrogated by statute, to set out in detail all the facts conferring jurisdiction both of the subject-matter and the person of the defendant.[42] And, independently of statutes, a general allegation that the court had jurisdiction is not sufficient, but the facts must be detailed.[43] But as

[38] O'Neal v. Kittredge, 3 Allen, 470.

[39] Makareth v. Pollard, 1 Ld. Raym. 80; Rowland v. Veale, 1 Cowp. 18; Higginson v. Martin, 2 Mod. 195; Cornell v. Barnes, 7 Hill (N. Y.), 37*n*; Barnes v. Harris, 4 N. Y. 375.

[41] Wilbur v. Abbot, 58 N. H. 272; Hansford v. Van Auken, 79 Ind. 302; Spaulding v. Baldwin, 81 Ind. 376; Bruckman v. Taussig, 7 Colo. 561, 5 Pac. Rep. 152; Holmes v. Campbell, 12 Minn. 221 (Gil. 141); Springsteene v. Gillett, 30 Hun, 260; Rogers v. Odell, 39 N. H. 452; Judge v. Fillmore, 1 D. Chip. 423; Pennington v. Gibson, 16 How. 65; Lathrop v. Stuart, 5 McLean, 167.

[42] Willey v. Strickland, 8 Ind. 453; Dakin v. Hudson, 6 Cow. 221; Cleveland v. Rogers, 6 Wend. 438; Cornell v. Barnes, 7 Hill (N. Y.), 35; Barnes v. Harris, 3 Barb. 603; Turner v. Roby, 3 N. Y. 193; Bridge v. Ford, 4 Mass. 641.

[43] Cleveland v. Rogers, 6 Wend. 438;

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regards jurisdiction of the subject-matter, the trial court will take judicial notice of statutes conferring jurisdiction on these tribunals, and if the facts pleaded as to the amount and nature of the claim show that it was within the provisions of such statutes, jurisdiction of the subject-matter is sufficiently averred.[44]

§ 967. Statutes Regulating Jurisdictional Averments.

In most of the states statutes have been enacted prescribing that in suing on a judgment of a court of limited or inferior jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but merely that the judgment or determination was duly given or made; but that, if that allegation is controverted, the party pleading the judgment must, on trial, establish the facts conferring jurisdiction.[45] Under these statutes, the allegation that the judgment was "duly given" or made is equivalent to, and a substitute for, the averments of jurisdictional facts required at common law.[46] Thus an allegation that a judgment was "duly made by and entered in" a certain court is sufficient.[47] But either the words of the statute or words of exactly similar import must be employed. Hence an allegation that the judgment was "entered in said action," without averring that it was *duly* entered, is not considered sufficient.[48] In some jurisdictions, it is held that the provisions of these statutes apply to judgments rendered by the inferior courts of a sister state.[49] But it is apparently

Sheldon v. Hopkins, 7 Wend. 435; Barnes v. Harris, 8 Barb. 603.

[44] Masterson v. Matthews, 60 Ala. 260; Stiles v. Stewart, 12 Wend. 273, 27 Am. Dec. 142.

[45] Code Civil Proced. N. Y. § 532; Dig. Stats. Ark. (1884) c. 119, § 5067; Comp. Laws Ariz. (1877) § 2495; Code Civil Proced. Cal. § 456; Code Civil Proced. Dak. § 130; 2 Miller's Rev. Code Iowa, § 2714; Code Civil Proced. Colo. § 66; Rev. Stats. of Idaho (1887), § 4211; 2 Davis Rev. Stat. Ind. p. 76, § 83; Code Civil Proced. Kans. § 121; Carroll's Ky. Civil Code, § 122; 2 Howell's Mich. Stats. § 6878; Genl. Stat. Minn. (1878) p. 722, § 108; 2 Wagner's Mo. Stat. (1870) p. 1020, § 42; Comp. Stat. Mont. (1887) p. 86, § 108; Genl. Stats. Nebr. (1885) p. 645, § 127; 1 Comp. Laws of Nevada, p. 296, c. 52, § 59; Tourgee's N. Car. Code, p. 109, § 121; 1 Rev. Stat. Ohio (1890) § 5090; 1 Hill's Laws of Oreg. p. 230, § 86; Rev. Stat. S. Car. (1872) p. 609, § 184; 2 Comp. Laws Utah (1888), p. 250, § 3242.

[46] Keys v. Grannis, 3 Nevad. 438; Willey v. Strickland, 8 Ind. 453; Crake v. Crake, 18 Ind. 156; Hanscom v. Tower, 17 Cal. 518; Wheeler v. Dakin, 12 How. Pr. 537; State v. Bowen, 45 Miss. 347.

[47] Lee v. Terbell, 33 Fed. Rep. 850.

[48] Hunt v. Dutcher, 13 How. Pr. 538.

[49] Crake v. Crake, 18 Ind. 156; Toledo, etc., R. Co. v. McNulty, 34 Ind. 531.

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agreed that they do not include judgments of such courts in foreign countries.[50]

§ 968. Evidence.

In an action on a judgment of a court of a sister state, the judgment itself is to be proved by a copy of the record duly authenticated under the act of congress in that behalf.[51] If the judgment was rendered by a co-ordinate court of the same state, it should be evidenced by an exemplification attested in accordance with the local law. If it was rendered by the same court in which the action is brought, the original record or judgment-roll should be produced.[52] The minute book of the court is not evidence of a judgment.[53] And where, in such an action, the judgment is sought to be proved by a transcript, the transcript must correspond to the declaration, or it cannot be read in evidence.[54] Thus, under the plea of *nul tiel record*, a variance as to the amount, between the judgment laid and the judgment produced, is fatal.[55] But where a declaration on a judgment rendered in the United States circuit court for the district of Mississippi described it as rendered in a suit brought in that court, and it appeared that the suit originated in the district court for the same district, it was held that the variance was not fatal.[56]

§ 969. Action on Lost or Destroyed Record.

Some few of the authorities hold that no action can be maintained upon a record which has been lost or destroyed; that the existence and tenor of a judgment can be proved in no other way than by an inspection of the record itself; and that therefore, if a party desires to sue upon a judgment the record of which, for such reasons, cannot be produced, he must first resort to the court which made the record

But see Karns v. Kunkle, 2 Minn. 313 (Gil. 268).

[50] McLaughlin v. Nichols, 13 Abb. Pr. 244; Hollister v. Hollister, 10 How. Pr. 539.

[51] *Supra*, §§ 876–879, 937.

[52] Wentworth v. Keazer, 30 Me. 336; Smith v. Frost, 5 Hill (N. Y.) 431.

[53] Lehr v. Hall, 5 How. (Miss.) 54.

[54] Lawrence v. Willoughby, 1 Minn. 87, (Gil. 65.)

[55] Eichelberger v. Smyser, 8 Watts, 181; Butler v. Owen, 7 Ark. 369.

[56] Dudley v. Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522.

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and procure its restoration by proper proceedings for that purpose.[57] But the great preponderance of authority is in favor of the rule that, in such a case, secondary evidence is admissible to establish the fact of the existence of such a judgment and its contents.[58]

§ 970. Defenses to Action on Judgment.

The general rule is, that in an action upon a judgment, no defense is admissible which accrued prior to the rendition of the judgment. For all such defenses either were in fact litigated in the original action, or might have been then interposed by the exercise of proper diligence, and therefore in either case they are *res judicatæ*.[59] Thus, the defendant cannot plead that he was an infant at the time the judgment was rendered; for if he did plead that defense in the original action, it is *res judicata*, and if he did not, it is a defense which he ought to have made, and which he cannot be allowed to set up in an action on the judgment.[60] On no pretext can the merits of the judgment be re-examined. And consequently the plea of *nil debet* cannot be permitted.[61] Thus, the validity of the judgment cannot be impeached by showing that the note on which it was founded was given for a loan of "Confederate" treasury notes.[62] And for the same reason, evidence that before the judgment was rendered the claim on which it was founded was in part satisfied, is incompetent, while the judgment remains unreversed.[63] But a judgment does not conclude a defense

[57] Foulk v. Colburn, 48 Mo. 280; Walton v. McKesson, 64 N. Car. 77.

[58] Mandeville v. Reynolds, 68 N. Y. 528; Jackson v. Crawford, 12 Wend. 533; Jackson v. Cullum, 2 Blackf. 228, 18 Am. Dec. 158; Stockbridge v. West Stockbridge, 12 Mass. 400; Newcomb v. Drummond, 4 Leigh, 57; Mason v. Bull, 26 Ark. 164; Ames v. Hoy, 12 Cal. 11; Parry v. Walser, 57 Mo. 169.

[59] Biddle v. Wilkins, 1 Pet. 692; Whittemore v. Malcolmson, 28 Fed. Rep. 605; Noble v. Merrill, 48 Me. 140; Bird v. Smith, 34 Me. 63; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; McAllister v. Singer Manuf. Co., 64 Ga. 622; Bullock v. Ballew, 9 Tex. 498; Taylor v. Harris, 21 Tex. 438; Snow v. Mitchell, 37 Kans. 636, 16 Pac. Rep. 737; Morris v. Curry, 41 Ark. 75; Ellis v. Clarke, 19 Ark. 420, 70 Am. Dec. 603; Brown v. Trulock, 4 Blackf. 429; Burton v. Stewart, 11 Ind. 238; Indianapolis, etc., R. Co. v. Risley, 50 Ind. 60; Guinard v. Heysinger, 15 Ill. 288; Jackson v. Fletcher, 1 Morris (Iowa), 230; Poorman v. Mitchell, 48 Mo. 45; Morris v. Boomer, 16 Wis. 547.

[60] Ludwick v. Fair, 7 Ired. 422, 47 Am. Dec. 333.

[61] Tappan v. Heath, 16 N. H. 34.

[62] Allgood v. Whitley, 49 Ala. 215.

[63] Stephens v. Howe, 127 Mass. 164; Bird v. Smith, 34 Me. 63.

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which did not exist at the time of its rendition, and such defense, becoming available in the interval, may be set up against an action on the judgment.[64]

§ 971. Plea of Nul Tiel Record.

The proper form of the general issue in an action upon a domestic judgment is *nul tiel record*.[65] This plea puts in issue simply the existence of the record declared upon, and is determined by the court upon an inspection of the record. If the judgment upon its face is valid, the plea is not sustained except when questions of variance arise. The record should go to the jury only when matter of fact, as well as of law, is properly put in issue.[66] Under this plea the validity of the declaration is not involved; the only inquiry is whether or not the judgment sued on was correctly set forth and described by the plaintiff.[67] Where the plaintiff in his declaration makes profert of the judgment declared on, it does not thereby become a part of the record, so as to enable the defendant to demur for defects in the judgment.[68]

§ 972. Want of Jurisdiction as a Defense.

According to the doctrine prevailing in some of the states, in an action on a domestic judgment which is sought to be made the basis of a new recovery, it is permissible to show that the court rendering the judgment had no jurisdiction, either of the person or the subject-matter, and this even in contradiction of the direct and positive recitals of the record; the rule being based on the theory that such a proceeding is a direct attack upon the judgment, and not a collateral impeachment of it.[69] But in other states it is not permitted to defend against the judgment on this ground, the doctrine which

[64] Burwell v. Jackson, 9 N. Y. 535.
[65] Reynolds v. Robertson (Cal.), 4 Pac. Rep. 1192.
[66] Stevens v. Fisher, 30 Vt. 200.
[67] Dudley v. Lindsey, 9 B. Mon. 486, 50 Am. Dec. 522.
[68] Deem v. Crume, 46 Ill. 69.
[69] Clark v. Little, 41 Iowa, 497; Salliday v. Bainhill, 29 Iowa, 555; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589.

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ascribes "absolute verity" to the record being considered as of controlling authority.[70] The reader will find a detailed discussion of the subject of impeaching judgments for want of jurisdiction in an earlier chapter of this work.[71] It need scarcely be added that if the judgment sued on be a *foreign* judgment, or one rendered in a sister state, the question of jurisdiction is always open to inquiry.[72]

§ 973. Fraud as a Defense.

As a general rule, in an action at law upon a judgment of a court of general jurisdiction, the defendant is not permitted to show, as a matter of defense at law, that the judgment was fraudulently obtained.[73] But in those states where the code system of pleading and practice has abolished all distinction between actions at law and suits in equity, any kind of equitable defense may be set up to an action at law. Now equity can afford relief against a judgment obtained at law by fraud. Therefore, in those states, fraud can be pleaded to an action at law on the judgment.[74] But that a judgment was obtained by the false testimony of the plaintiff, or other witnesses, on the trial of the cause in which it was rendered, the defendant being in court, cannot be set up as a defense to an action thereon.[75]

§ 974. Error or Irregularity no Defense.

Although a judgment may be so erroneous or irregular that it would be vacated on motion or reversed on appeal, yet it is not open to collateral impeachment on this ground. Until it is corrected or annulled in a regular and proper manner, it is a valid and binding

[70] Miller v. Dungan, 35 N. J. Law, 391; Kittredge v. Martin, 141 Mass. 410, 6 N. E. Rep. 95; Holt v. Thacher, 52 Vt. 592.

[71] *Supra*, vol. 1, §§ 270–289.

[72] *Supra*, §§ 818, 835, 894–915.

[73] Christmas v. Russell, 5 Wall. 290; Carpentier v. Oakland, 30 Cal. 439.

[74] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; State of Michigan v Phoenix Bank, 33 N. Y. 9, 27; Hackley v. Draper, 60 N. Y. 88; Greene v. Hallenbeck, 24 Hun, 116; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27; Duringer v. Moschino, 93 Ind. 495; Hopkins v. Woodward, 75 Ill. 62.

[75] Cottle v. Cole, 20 Iowa, 481; Demeritt v. Lyford, 37 N. H. 541.

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obligation. The defendant must seek his remedy by appeal or error, or by a motion to set the judgment aside. If an action is brought upon the judgment, he cannot plead the error or irregularity in defense.[76] This was the principle of the decision in an English case where, to an action against husband and wife, on a judgment against the wife, the defendants pleaded that she was covert when the action in which the judgment was recovered was commenced and thence until the judgment, and that the husband was not a party to the judgment or a defendant in the action; but it was held that the plea was bad.[77]

§ 975. Plea of Payment.

"To an action on a record, a plea of payment was not good at common law. But if a judgment of record had been paid, the defendant had a right to demand a warrant to some attorney of the court, authorizing him to enter up satisfaction on the roll. But by the statute of 4 Anne, c. 16, § 12, payment may be pleaded to an action on a judgment, if the whole judgment be satisfied."[78] And there can be no question that such plea would now be good in all the courts of this country. It is said, however, that in debt on a judgment, under the plea of payment, the defendant cannot properly be allowed the benefit of a *partial* payment, because the plea is properly one in bar and goes to the entire amount of the judgment, and the proper mode of obtaining the benefit of such partial payment is by rule to show cause why it should not be applied on the judgment. Still, if evidence of a partial payment is given without objection, under such plea, and the jury allows it, the appellate court will not set aside the verdict and order a new trial for that reason.[79] But it is clearly not admissible for the defendant to prove that a part of the claim on which the judgment is founded was paid *before* the rendition of the judgment.[80] It is no defense to an action on a judgment that an execution upon

[76] Hawes v. Hathaway, 14 Mass. 233; Townsend v. Cox, 45 Mo. 401; *supra*, vol. 1, §§ 261-269.

[77] Dick v. Tolhausen, 4 Hurl. & N. 695.

[78] Briley v. Sugg, 1 Dev. & B. Eq. 366, 30 Am. Dec. 172, citing 1 Archb. Pr. 325; 2 Saund. Pr. Cas. 713; 1 Chit. Pl. 426.

[79] Colclough v. Rhodus, 2 Rich. 76.

[80] Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635.

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it is in full life and in the officer's hands, if there is no plea or proof of payment.[81] The payment or satisfaction of the judgment must be specially pleaded; it cannot be proved under the plea of *nul tiel record.*[82] And according to the strict theory, the defendant may plead either *nul tiel record* or payment of the judgment but *not both.*[83]

§ 976. Accord and Satisfaction as a Defense.

It is generally held that the plea of accord and satisfaction is a good defense to an action on a judgment.[84] But there is also authority for the rule that debt on a judgment cannot be barred at common law, by an accord and satisfaction by parol.[85]

§ 977. Discharge in Bankruptcy.

In New York it is held that where a judgment is actually rendered before the discharge of the defendant under the bankrupt act, for the payment of a debt which was contracted before the proceedings in bankruptcy were instituted, such debt may be proved under the decree in bankruptcy; and the discharge of the defendant is a bar to any suit or other proceeding upon the judgment to charge the defendant personally with the debt, unless the discharge can be successfully impeached for some of the causes specified in the bankrupt law.[86] But elsewhere the opinion prevails that if the judgment was obtained after the defendant was adjudicated a bankrupt and before his dis-

[81] White River Bank v. Downer, 29 Vt. 332; Tarbell v. Downer, 29 Vt. 339; Reynolds v. Lyon, 20 Ga. 225; Linton v. Hurley, 114 Mass. 76; Wilson v. Hatfield, 121 Mass. 551. *Per contra*, Ligon v. McNeil, 6 Rich. 377. And see Gassner v. Sandford, 2 Sandf. 440.

[82] Tunstall v. Robinson, 1 Hempst. 229.

[83] Riley v. Riley, 20 N. J. Law, 114.

[84] Farmers' Bank v. Groves, 12 How. 51; Savage v. Everman, 70 Pa. St. 315, 10 Am. Rep. 676; Witherby v. Mann, 11 Johns. 518; Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247; LePage v. McCrea, 1 Wend. 164, 19 Am. Dec. 469; Brown v. Feeter, 7 Wend. 301; Evans v. Wells, 22 Wend. 324; La Farge v. Herter, 11 Barb. 159; Harden v. Campbell, 4 Gill, 29; McCullough v. Franklin Coal Co., 21 Md. 256; Reid v. Hibbard, 6 Wis. 175; Jones v. Ransom, 3 Ind. 327.

[85] Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260.

[86] Johnson v. Fitzhugh, 3 Barb. Ch. 360; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290.

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charge, upon a debt provable under the bankrupt law, the debt is merged in the judgment, and the subsequent certificate of discharge is no defense to an action on the judgment.[87]

§ 978. Arrest and Imprisonment of Debtor.

To an action of debt on a judgment it is a good plea in bar that execution issued on the judgment declared on, and by virtue thereof defendant was arrested and committed to prison, without averring that the defendant remained in prison until the commencement of the present action. Any facts which show that the debtor has been discharged from imprisonment without satisfaction of the judgment should be replied by the plaintiff.[88] But such action is not barred by the fact that the bail of the defendant in the former suit had surrendered him, and that he was in prison by virtue of such surrender, and liable to be taken upon execution, when the plaintiff commenced the second action and arrested the defendant's body.[89]

§ 979. Equitable Defenses.

In several of the states, statutes have been enacted which provide that, in actions at law, the defendant shall be entitled to allege as a defense any facts which would entitle him in equity to be absolutely relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such action. And in others, by the abolition of the distinction between law and equity, precisely the same result has been brought about, the courts hearing any defenses available to the defendant, whether legal or equitable in their character. In construing a statute of the former class, the supreme court of Massachusetts recently expressed itself as follows: "The purpose of the statute was not to create any new equitable defenses in addition to those already existing, but to permit a defendant in an action at law to avail himself of those which were recognized by

[87] Bown v. Morange, 108 Pa. St. 69; Woodbury v. Perkins, 5 Cush. 86, 51 Am. Dec. 51.

[88] Kinsman v. Page, 23 Vt. 628; Coburn v. Palmer, 10 Cush. 278.

[89] Clark v. Goodwin, 14 Mass. 237.

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courts of equity, and thus relieve him from the necessity of initiating a new procedure in order to obtain the benefit of them. That a defense should be established under it, such defense must be one within the rules and principles of equity jurisprudence. A court of equity will interfere undoubtedly to restrain a party from executing a judgment, when facts appear showing that it would be against conscience that he should do so, of which facts the injured party could not have availed himself in a court of law, or of which he might have availed himself, but which he had been prevented from doing by fraud or accident unmixed with any fraud or negligence in himself or his agents." And it was accordingly held that the statute did not permit the defendant to set up a defense against an action on the judgment which he might have presented in the original action, upon the mere allegation that he was ignorant of it at the time, where no excuse was offered for not ascertaining and setting up such defense at the proper time, and no deception or fraud on the part of the plaintiff was alleged.[90] In the federal courts, equitable defenses cannot be set up in actions at law.[91] Hence, in an action on a domestic judgment in a federal court, a paragraph of the answer seeking to impeach the judgment sued on for fraud, should be stricken out.[92]

§ 980. Amount of Recovery.

In an action upon a judgment rendered in another state, for the penalty of a bond, to stand as a security for future as well as past breaches, the plaintiff can recover only the amount of damages for past breaches for which execution has been there awarded, and not the amount of the penalty.[93] "Judgments by default are interlocutory or final, and although in actions of debt the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of inquiry, after a judgment by default, to recover interest by way of damages for the detention of the debt."[94]

[90] Barton v. Radcliffe (Mass.), 21 N. E. Rep. 374.

[91] Bennett v. Butterworth, 11 How. 669; Montejo v. Owen, 14 Blatchf. 324; Parsons v. Denis, 7 Fed. Rep. 317.

[92] Buller v. Sidell, 48 Fed. Rep. 116.

[93] Battey v. Holbrook, 11 Gray, 212.

[94] Smith v. Vanderhorst, 1 McCord, 328, 10 Am. Dec. 678.

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§ 981. Interest on Judgments.

At common law, judgments did not bear interest, and in an action on a judgment interest was recoverable (if at all) only by way of damages.[95] In Louisiana, under the statute, interest cannot be collected on a money judgment which, by its terms, is silent as to interest.[96] But in a majority of the states, by the present statutes, interest is allowed on judgments and may be recovered in actions upon them. Thus in Pennsylvania it is held (and indeed it has been the law of that state from a very early day) that whether debt or *scire facias* is brought on a judgment, interest is recoverable.[97] In regard to the various classes of judgments which carry interest, and to any exceptions or qualifications of the general rule, information must be sought in the local statute law. The subject of allowing interest on judgments recovered in other states, and the rate at which it is to be computed, has already been discussed.[98] There are, however, a few general rules, which bear upon this part of our subject, which may be here noticed. Thus, it has been held that a recovery of damages for simple negligence of a party to whom no benefit could accrue by reason of the injury inflicted, should not carry interest.[99] In Texas, and probably some other states, an account against an estate, after being allowed by the administrator and approved by the probate court, bears interest.[100] And where a judgment has been recovered for the full penalty of a bond, such judgment will carry interest.[101] But it is otherwise in the case of a judgment rendered for a fine.[102] In

[95] Collais v. McLeod, 8 Ired. 221, 19 Am. Dec. 876; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Hamer v. Kirkwood, 25 Miss. 95; Trenholm v. Bumpfield, 3 Rich. 876; Crawford v. Simonton, 7 Port. 110; Thomas v. Wilson, 3 McCord, 166; Norwood v. Manning, 3 N. & McC. 395; Harrington v. Glenn, 1 Hill (S. Car.), 79.

[96] Succession of Anderson, 33 La. Ann. 581. Where a judgment on a debt arising *ex contractu* decrees interest, but is indefinite as to the time when it commences to run, the interest decreed must be considered as commencing on the day that the suit was instituted. Keenan v. Whitehead, 15 La. Ann. 333.

[97] Berryhill v. Wells, 5 Binn. 56; Schell v. Stetson, 12 Phila. 187.

[98] *Supra*, § 880.

[99] Kenney v. Hannibal, etc., R. Co., 63 Mo. 98; Western & A. R. Co. v. Young (Ga.), 7 S. E. Rep. 912.

[100] Finley v. Carothers, 9 Tex. 517.

[101] Winslow v. Ancrum, 1 McC. Ch. 100.

[102] State v. Steen, 14 Tex. 396.

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an action of debt on a judgment, where partial payments have been made, interest is to be computed upon the judgment in the same manner as upon a note of hand under similar circumstances.[103] As to the date at which the interest to be computed on a judgment begins to run, it is the general rule that the interest commences from the time the judgment is perfected.[104] And a judgment cannot be rendered to draw interest from a day prior to its rendition.[105] If there is interest due on the demand on which the action is brought, it should be included in the original judgment when entered.[106] But a recent case in Wisconsin holds that when judgment is taken by default, interest will be allowed on the amount of the judgment from the time of the commencement of the action, although the complaint is for unliquidated damages and interest is not specifically prayed for.[107]

§ 982. Rate of Interest how Determined.

In the absence of a statute changing the rule, a judgment carries only such rate of interest as was established by law at the date of its rendition, notwithstanding the contract or cause of action on which it was founded may bear a higher rate; because the contract is merged in the judgment, and thereafter the law fixes the interest and not the parties.[108] But in several of the states, the statutes are so framed, or the courts have so construed them, that a judgment draws interest at the same rate as the instrument or cause of action on which it is founded, provided such rate of interest does not exceed the highest rate of legal interest.[109] Thus, if a contract specifies a

[103] Hodgdon v. Hodgdon, 2 N. H. 169.

[104] Johnson v. Tuttle, 17 Abb. Pr. 315. But when an action is brought upon an interest-bearing claim, and there is a verdict for the plaintiff, and the defendant delays the giving of judgment by a motion for a new trial or otherwise, the plaintiff is entitled to legal interest on the verdict. Dowell v. Griswold, 5 Sawyer, 39; Gibson v. Cincinnati Inquirer, 2 Flip. 88.

[105] Simmons v. Garrett, 1 McCahon, 82.

[106] Bibend v. Ins. Co., 30 Cal. 78.

[107] Whereatt v. Ellis, 68 Wis. 61, 30 N. W. Rep. 520.

[108] Verree v. Hughes, 11 N. J. Law, 91; Hawkins v. Ridenhour, 13 Mo. 125; White v. Haffaker, 27 Ill. 349; Wayman v. Cochrane, 35 Ill. 152; Guernsey Bank v. Kelley, 14 Ohio St. 367; McCutchen v. Dougherty, 44 Miss. 419.

[109] Wilson v. King, 1 Morris (Iowa), 106; Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 121; Gautier v. English, 29 Cal. 165; Hagood v. Aikin, 57 Tex. 511;

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rate of interest, not beyond the percentage which the parties may legally contract for, and a judgment is rendered thereon, it bears interest at the contract rate, and not at the rate which all contracts carry if no rate be stipulated therein.[110]

§ 983. Interest on Decrees in Equity.

Where a judgment does not at law bear interest, equity, following the law, will not give interest.[111] But upon the equity of a statute allowing interest to be collected upon executions issued upon judgments rendered on contracts or on prior judgments, complainants in chancery are entitled to interest upon decrees in similar cases, and the decree should be so drawn as to direct the payment of interest, upon the amount decreed, until such amount is paid according to the directions of the decree, so that the interest may be levied upon the execution.[112] In respect to interest, a decree has the same force as a judgment when it contests with other liens or claims for money. But this refers only to a decree *in personam* binding all the property of the debtor, and rendered against the defendant without reference to the sale of particular property and the distribution of the fund arising therefrom.[113] In New Jersey, "decrees in equity as well as judgments at law universally bear the legal rate of interest, without regard to the terms of the contract, or to the place where it was executed, whether within the state or abroad."[114]

§ 984. Compounding Interest.

It is held in some of the cases that where a former judgment is sued on, interest accrued on it is properly added to the principal,

City of Burrton v. Harvey County Savings Bank, 28 Kans. 390; State v. Vogel, 14 Mo. App. 187. As to construction of such a statute, with reference to contracts for compound interest, see Raun v. Reynolds, 11 Cal. 14.

[110] Daniel v. Gibson, 72 Ga. 867, 53 Am. Rep. 845.

[111] McMillan v. Scott, 1 T. B. Mon. 150. And see McAlexander v. Lee, 8 A. K. Mar. 483; Moore v. Pendergrast, 6 J. J. Mar. 534; Crocker v. Clements, 23 Ala. 296; Lair v. Jelf, 3 Dana, 181; Hunt v. Smith, 8 Rich. Eq. 465.

[112] Ryckman v. Parkins, 5 Paige, 543.

[113] Nat. Bank of Augusta v. Heard, 65 Ga. 189.

[114] Wilson v. Marsh, 13 N. J. Eq. 289.

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and judgment rendered on the whole amount to bear interest from the date of the last judgment.[115] But there are also authorities which oppose this rule.[116] In California, where the plaintiff in a suit on a judgment recovered against an intestate in his lifetime, has judgment, interest is not to be compounded, but must be allowed upon the sums in the judgment sued on, according to the legal rates respectively applicable thereto.[117]

§ 985. Limitation of Actions on Judgments.

In most, if not all, of the states the statutes of limitation either expressly prescribe a period within which suits on judgments must be brought, or are so framed as to include such actions by necessary implication.[118] Where the law enacts that such a suit shall be commenced within a certain number of years "next after the judgment was entered," in computing the time within which the action may be brought, the day on which the judgment was entered is to be excluded.[119] In New York, and probably in some other states, it is held that after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment as that an action of debt may be maintained upon it with the same effect as before the statute had attached.[120]

[115] Heidenheimer v. Johnston (Tex.), 18 S. W. Rep. 46. See also Corcoran v. Doll, 32 Cal. 82.

[116] Pinckney v. Singleton, 2 Hill (S. Car.), 343. And in *Re* Fuller, 1 Sawyer, 243, it was held that a stipulation in a judgment that the interest on it shall bear interest, if not paid annually, is void, but the judgment itself is not usurious.

[117] Quivey v. Hall, 19 Cal. 97.

[118] See Mason v. Cronise, 20 Cal. 211; Kennard v. Alston, 62 Miss. 763; Succession of Rice, 15 La. Ann. 649.

[119] Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70. See, *per contra*, Cook v. Moore, 95 N. Car. 1.

[120] Carshore v. Huyck, 6 Barb. 583. And see Pease v. Howard, 14 Johns. 479.

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CHAPTER XXV.

PAYMENT AND SATISFACTION OF JUDGMENTS.

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Part I. Payment by Judgment-Debtor.

§ 986. To Whom Payment may be Made.

Payment of a judgment must be made to the real owner of the judgment, or to some one authorized in law or fact to receive the money for him. The party who has the exclusive right to merge a claim into a judgment, and after judgment to make the money on an execution, must be regarded in law as the owner of the judgment.[1] In case there are several plaintiffs in the judgment, payment may be made to either, with the effect of discharging the whole obligation.[2] Where a judgment is taken in the name of one who is merely a nominal party thereto, a payment by a garnishee of the debtor to the real party in interest will operate to discharge the judgment.[3] We have already seen that in case of an assignment of the judgment, the debtor must be notified. Any payment made by him, before such notice, to the original creditor is valid.[4] The payment of a judgment or decree to the attorney of record who obtained it, before his authority is revoked or before due notice of such revocation is given to the defendant, is valid and binding on the plaintiff, so far at least as the defendant is concerned.[5] Payment may also, as a matter of course, be made to an agent of the plaintiff duly authorized to collect the judgment,[6] or to the *prochein ami* of an infant plaintiff who has no

[1] Lacey v. Waples, 28 La. Ann. 158.

[2] Erwin v. Rutherford, 1 Yerg. 169.

[3] Matter v. Phillips, 52 Iowa, 282, 3 N. W. Rep. 49.

[4] *Supra*, § 950. See also The "Lulie D.," 4 Biss. 249. In New York it is held that the judgment will not be discharged, as against the assignee, by payment to a third person, even though the latter was in equity entitled to require the judgment creditor to account to him as his agent for whatever was realized on the judgment. Seymour v. Smith, 17 Abb. New Cas. 387.

[5] Yoakum v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738; Harper v. Harvey, 4 W. Va. 539; Baltimore, etc., R. Co. v. Fitzpatrick, 32 Md. 619; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Wilkinson v. Holloway, 7 Leigh, 277.

[6] The parol assignment of a judgment constitutes the assignee an agent for the plaintiff, and a payment to such agent discharges the judgment. Bartlett v. Yates, 7 Jones (N. Car.) 615. A party against whom a bank had obtained a judgment subsequently deposited sums of money with a branch of the bank, which were lost by the insolvency of the bank. The judgment passed by assignment to the plaintiff. *Held*, that the deposits did not extin-

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regular guardian.[7] The debtor may also pay the money to the clerk of the court before an execution issues, or after the execution has been returned, but the clerk has no authority to receive payment while the execution is in the hands of the sheriff.[8] Nor has the clerk the power to receive payment of the debt before it has been reduced to judgment. But if he receives the money and retains it until after judgment, and by some plain and unequivocal act shows an intention to hold the money in his official capacity and apply it to the payment of the judgment, the judgment will be discharged.[9] If the debtor pays the amount of the judgment to the sheriff, who holds an execution for its collection, he is entitled to have the judgment entered satisfied, although the creditor never receives the money.[10] But payment to a sheriff when he has no writ in his hands authorizing a levy, will not discharge the debt.[11] Payment to a deputy sheriff, who holds the judgment and assumes the right to receive payment, does not release the debtor from liability, unless the deputy is authorized by a judicial mandate to proceed to collect and acquit the debtor, or the collection is made by the deputy as agent of the plaintiff, irrespective of office.[12] Where a judgment-debtor has had no notice of the transfer and subrogation of record of the judgment to a third party, payment by him of the amount of the judgment, under process of garnishment, to a creditor of the judgment-plaintiff, will discharge the debt.[13] And so also where the assignment was entirely void.[14]

§ 987. Medium of Payment.

The owner of a judgment may receive property, securities, or any other thing of value in satisfaction of the same, if he so chooses, and

guish the judgment, nor could they be allowed as a set-off against the judgment in the hands of the assignee. Spilman v. Payne, 84 Va. 435, 4 S. E. Rep. 749.

[7] Morgan v. Thorne, 7 Mees. & W. 400; Collins v. Brook, 4 H. & N. 270.

[8] Bynum v. Barefoot, 75 N. Car. 576; Hawkeye Ins. Co. v. Luckow, 76 Iowa, 21, 39 N. W. Rep. 923.

[9] Governor v. Read, 38 Ala. 252.

[10] Beard v. Millikan, 68 Ind. 231.

[11] Lofland v. Jefferson, 4 Harr. (Del.) 303; Irwin v. McKee, 25 Ga. 646; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497.

[12] Bailey v. Hester (N. Car.), 8 S. E. Rep. 164.

[13] Drumm v. Sherman, 20 La. Ann. 96. The rule is otherwise in New York. Robinson v. Weeks, 6 How. Pr. 161; Richardson v. Ainsworth, 20 How. Pr. 530.

[14] Lawrence v. Martin, 22 Cal. 173.

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when he has once accepted any substitute for money, his acceptance becomes irrevocable.[15] Thus a judgment may be satisfied, the creditor assenting, by the giving of a note secured by a deed of trust on land,[16] or a check of a third party,[17] or a bond and mortgage on real estate,[18] or drafts for various amounts due at stated different times.[19] But the consent of the creditor to a substituted medium of payment must be unequivocally manifested. His mere acceptance of a note for the full amount of the judgment does not operate to satisfy or discharge the judgment, unless it is expressly so agreed.[20] Hence a note given by the judgment-debtor to the creditor for the amount of the debt, but designed only to fix the time for payment, and after maturity returned to the maker, is no satisfaction of the judgment.[21] But it seems that if the plaintiff, on receiving collateral security for his judgment, covenants and agrees never to enforce it, this will operate as a discharge of the judgment.[22] While the plaintiff himself possesses this right of accepting payment otherwise than in money, at his option, no one else can exercise that option for him. His attorney cannot be supposed to possess the power. On the contrary, the debtor must affirmatively prove that the attorney was directly authorized to accept payment in that which was substituted for money.[23] And it is well settled that a sheriff or other collecting officer has no power to receive anything in satisfaction of a claim placed in his hands for collection but money, or bank notes circulating as such, without authority from the plaintiff. A payment in any other way is no satisfaction of the judgment, and the plaintiff may proceed against the debtor.[24]

[15] Lyon v. Northrup, 17 Iowa, 314; Ives v. Phelps, 16 Minn. 451 (Gil. 407); Weston v. Clark, 37 Mo. 572.

See Planters' Bank v. Calvit, 3 Sm. & Mar. 143, 41 Am. Dec. 616.

[16] Bushong v. Taylor, 82 Mo. 660.

[17] Lyon v. Northrup, 17 Iowa, 314.

[18] La Farge v. Herter, 11 Barb. 159.

[19] Woolfolk v. Degelos, 24 La. Ann. 199.

[20] Riggs v. Goodrich, 74 Mo. 108; McCoy v. Haylett, 14 Kans. 430; Schneider v. Meyer, 56 Mo. 475.

[21] Schneider v. Meyer, 56 Mo. 475.

[22] Chambers v. McDowell, 4 Ga. 185.

[23] Portis v. Ennis, 27 Tex. 574.

[24] Draper v. State, 1 Head, 262; Crutchfield v. Robins, 5 Humph. 15, 42 Am. Dec. 417; Heald v. Bennett, 1 Dougl. (Mich.) 513; Mitchell v. Hackett, 25 Cal. 539; Alcardi v. Robbins, 41 Ala. 541; Ellis v. Smith, 42 Ala. 349; Codwise v. Field, 9 Johns. 263. Compare Trigg v. Harris, 49 Mo. 176.

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§ 988. Tender.

It is held that a tender by a judgment-debtor to the judgment-creditor of the full amount of the debt, in a currency which the creditor is required by law to receive, is not of itself a satisfaction of the judgment or a discharge of its lien. The remedy of the debtor, if the tender is refused, is to apply to the court to restrain the sale under execution and enter satisfaction of the judgment.[25]

§ 989. Payment of Less than Whole Amount.

It is held in some of the cases, following the rule of the common law, that a part payment of a judgment, under a parol agreement that such payment shall be accepted as full satisfaction, does not discharge the judgment;[26] although the case is otherwise if the agreement is evidenced by a sealed instrument acknowledging satisfaction.[27] But there are numerous other authorities which hold that compromise and part payment of a judgment, on a verbal agreement that the same shall discharge it in full, will operate, especially under equitable circumstances, as a discharge of the judgment.[28] Thus, in one of the cases cited it was said: "Whether the ancient rule, that a payment of a part is not a satisfaction of an entire demand, be in force or not, it seems to us that where the right of appeal from a judgment has not lapsed, and the debtor is in a condition and about to take such appeal, but at the instance of the creditor, and with money borrowed from third parties with the knowledge and at the request of the creditor, pays him a portion of the amount of the judgment under an agreement that it shall be in full, the entire judgment is satisfied."[29] And it is certain that payment of part of a judgment,

[25] Lincoln Savings Bank v. Ewing, 12 Lea, 598.

[26] Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Garvey v. Jarvis, 54 Barb. 179; McArthur v. Dane, 61 Ala. 589.

[27] Beers v. Hendrickson, 45 N. Y. 665.

[28] Clay v. Hoysradt, 8 Kans. 74; Walrath v. Walrath, 27 Kans. 395; Harper v. Graham, 20 Ohio, 105; Case v. Hawkins, 53 Miss. 702; Reed v. Hibbard, 6 Wis. 175; Jackson v. Olmstead, 87 Ind. 92; Hendrick v. Thomas, 106 Pa. St. 327.

[29] Clay v. Hoysradt, 8 Kans. 74.

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together with an additional consideration, either in the shape of an article of value,[30] or of the doing or procuring some act which is a burden or inconvenience to the defendant and a possible benefit to the plaintiff,[31] is sufficient to support the latter's agreement to release the entire judgment. A defendant in a litigated case who has consented to a judgment for a certain sum agreed upon as fixing the real amount of the plaintiff's debt or damages, cannot satisfy the judgment by the payment of a smaller sum, on the ground that there was a prior or contemporaneous parol agreement that such smaller sum should be received in full satisfaction of the judgment.[32] An attorney has no authority, by virtue of his general retainer, to accept anything less than the full amount of the judgment, nor to bind his client by an agreement to compromise for any less sum.[33]

§ 990. Evidence of Payment.

The payment of a judgment may be proved by parol evidence, by a separate written receipt, or by a receipt upon the records of the court.[34] And the return and receipts on the execution are also competent evidence of payment.[35] A party who claims to have paid a judgment, and offers in evidence a discharge by a person describing himself as assignee of the judgment, must prove the authority of such assignee.[33]

§ 991. Keeping Judgment Alive after Payment.

It is a general rule that a judgment once fully paid, and thereby satisfied and extinguished, cannot be kept alive by the agreement of the parties, to stand as a security for other liabilities or for future

[30] Neal v. Handley, 116 Ill. 418, 6 N. E. Rep. 45.

[31] Booth v. Campbell, 15 Md. 569.

[32] Knight v. Cherry, 64 Mo. 513.

[33] Jones v. Ransom, 3 Ind. 327; Trumbull v. Nicholson, 27 Ill. 149; Garthwaite v. Wentz, 19 La. Ann. 196; Jewett v. Wardleigh, 32 Me. 110; Beers v. Hendrickson, 45 N. Y. 665; Vail v. Conant, 15 Vt. 314; Smock v. Dade, 5 Rand. 639, 16 Am. Dec. 780; Abbe v. Rood, 6 McLean, 107.

[34] Hollenbeck v. Stanberry, 38 Iowa, 325.

[35] Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

[36] Platt v. St. Clair, Wright, 526.

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advances.[37] But in Pennsylvania it is said that "actual payment discharges a judgment at law, but not in equity, if justice require the parties in interest to be restrained from alleging it, or insisting on their legal rights."[38] And in that state, and some others, it is held that the parties to a judgment (no rights of third persons being involved) may agree to change the purposes for which the judgment is to be held as security, *e. g.*, that when the judgment-debt is paid in full, it shall not be satisfied, but shall remain as security for another loan. No one but a lien-creditor whose rights would be affected can complain of such an agreement.[39] If a debtor pays his judgment-creditor a sum equal to the amount of the judgment, and thereupon causes the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee.[40] An entry upon the record of payment of the debt and interest, does not satisfy the judgment so far as to prevent further proceedings for the collection of costs.[41]

Part II. Presumption of Payment from Lapse of Time.

§ 992. Common Law Presumption.

At common law, a judgment, after the lapse of twenty years, without any payment or process upon it, or any acknowledgment of it in the mean time as a subsisting debt, or any explanation of its so remaining, will be presumed in law to be paid.[42] But this presump-

[37] Averill v. Loucks, 6 Barb. 19; Truscott v. King, 6 N. Y. 147; Troup v. Wood, 4 Johns. Ch. 228; Craft v. Merrill, 14 N. Y. 456; Winslow v. Clark, 2 Lans. 380; Fowler v. Smith (S. Car.), 10 S. E. Rep. 93.

[38] Fleming v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629; Milligan's Appeal, 104 Pa. St. 503.

[39] Peirce v. Black, 105 Pa. St. 342; Wood v. Currey, 49 Cal. 359.

[40] Horok v. Kimball, 2 Blackf. 309.

[41] Altman v. Klingensmith, 6 Watts, 445.

[42] Robinson v. Milby, 2 Houst. (Del.) 387; Bright v. Sexton, 18 Ind. 186; Hendricks v. Wallis, 7 Iowa, 224; Smith v. Miller, 14 Wend. 188; Beekman v. Hamlin (Oreg.), 24 Pac. Rep. 195; Bank v. Leonard, 4 Harr. (Del.) 536; Burt v. Casey, 10 Ga. 178; Miller v. Smith, 16 Wend. 425; Sargent v. Ramsay, Riley, 293; Pratt v. McLure, 10 Rich. Eq. 301; Thayer v. Mowry, 36 Me. 287; Morrow v.

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tion is not an absolute bar, like the statute of limitations, nor is it conclusive, but it may be rebutted by various circumstances showing non-payment.[43] If, however there are no circumstances in the case to rebut the presumption, it is not the duty of the court to submit the question, as an open one, to the jury. Satisfaction of the judgment is a presumption of law upon the facts.[44] The same presumption is also established as a rule of law by statute in several of the states. But such statutes do not make the lapse of twenty years a bar to proceedings on the judgment, but merely create a rebuttable presumption of payment.[45] In estimating the time sufficient to raise a presumption that a judgment has been paid, the period during which the party was under disability from infancy must be deducted.[46] Regard must also be had to the character of the judgment. For the presumption is not, in the nature of things, applicable to all judgments alike. Thus, no presumption of satisfaction of a judgment for the possession of land, rendered in an action to recover it for the non-payment of rent reserved on a manorial lease in perpetuity, arises from the lapse of twenty years without its enforcement.[47]

§ 993. Evidence to Rebut Presumption.

In regard to the kind and degree of evidence necessary to rebut the presumption of payment from lapse of time, it is impossible to lay down precise rules. Almost any evidence, adapted to the circumstances of the case and tending directly or by implication to negative the fact of payment, will answer the purpose, if sufficiently strong to satisfy the court and jury. In one of the cases it is said: "Although the full period of twenty years had elapsed, the law would not conclude that the debt had been paid, if the presumption was

Robinson, 4 Del. Ch. 521; Tennessee v. Virgin, 36 Ga. 390; Willingham v. Long, 47 Ga. 545; Biddle v. Girard Nat. Bank, 109 Pa. St. 349; Tobin v. Meyers, 18 S. Car. 324.

[43] Clark v. Clement, 33 N. H. 563. See also the cases cited above and those in the next section.

[44] Cope v. Humphreys, 14 Serg. & R. 15.

[45] Brewer v. Thomes, 28 Me. 81.

[46] McQueen v. Fletcher, 4 Rich. Eq. 152.

[47] Van Rensselaer v. Wright (N. Y. Ct. of App.), 25 N. E. Rep. 8.

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rebutted by evidence, such as proof of the defendant's recent acknowledgment of the debt, or of payment of interest within twenty years, or of demand made within that time, or of suit brought and the writ returned *non est inventus*, or that, during part of the time, the plaintiff was an alien enemy and disabled to sue, or that the courts of justice were closed and the country in the tumult and confusion of war and revolution."[48] The presumption will be rebutted by proof that, within the twenty years, payments have been made on the judgment,[49] even where the payment is made by a surety without the knowledge of the principal.[50] But not by evidence that the plaintiff indorsed on the record, as a credit on the judgment, a sum which he owed to the defendant, unless it further appears that the parties had a settlement of their dealings, after the recovery of the judgment, and agreed that said sum should be credited on the judgment.[51] The presumption is also negatived by a written admission of the debt, or evidence of a clear and well-identified promise, intelligently made, within the twenty years.[52] But a mere acknowledgment that the debt has not been paid will not suffice, unless there is also a distinct promise to pay it.[53] If the collection of the judgment has been prevented by an injunction, this fact also will avail to repel the presumption of payment.[54] The *poverty* of the defendant, alone, is not sufficient to overcome the presumption, but proof of his positive inability to pay during the whole period will do so.[55] Evidence of his failure in business is admissible, but this is not sufficient without something to show the *continued* insolvency of the debtor.[56] The fact that a judgment was allowed to stand open for twenty-four years, when the creditor had under execution, and within his reach, property ample to pay the judgment, is not conclusive that it has been satisfied; for the indulgence may be explained.[57] Other cases dealing with the

[48] Woodruff v. Sanders, 15 Ark. 143.
[49] Bissell v. Jaudon, 16 Ohio St. 498.
[50] Denny v. Eddy, 22 Pick. 533.
[51] Vaughan v. Marshall, 1 Houst. (Del.) 604.
[52] Beekman v. Hamlin (Oreg.), 24 Pac. Rep. 195.
[53] Stover v. Duren, 8 Strobh. 448, 51 Am. Dec. 634. Compare McNair v. Ingraham, 21 S. Car. 70.
[54] Hutsonpiller v. Stover, 12 Gratt. 579.
[55] Taylor v. Megargee, 2 Pa. St. 225; Knight v. Macomber, 55 Me. 132; Robinson v. Milby, 2 Houst. (Del.) 387; Waddell v. Elmendorf, 10 N. Y. 170.
[56] Jackson v. Nason, 38 Me. 85.
[57] Johnson v. Tuttle, 9 N. J. Eq. 365.

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weight and sufficiency of evidence available for this purpose are collected in the note.[58]

§ 994. Lapse of Less than Twenty Years.

"Before the expiration of twenty years the law did not make the presumption [of payment of a judgment]; nevertheless the jury, upon an issue of payment, might infer the fact of payment from a lapse of time, short of twenty years, *in combination with other circumstances* in evidence, such as the settlement of an account in the intermediate time, or the obligor being poor and the obligee being independent, or the parties residing in the neighborhood of each other, without any demand being made, and other like circumstances,—the evidence to be more or less strong, in aid of the presumption from lapse of time, as the time is more or less short of twenty years."[59] In the state of Tennessee, it has been settled law from early times that if a judgment or decree is permitted to lie dormant for *sixteen* years, with no demand or payment of interest, and no attempt to enforce the collection, a presumption of its payment will arise.[60]

Part III. Payment by Joint Party or Third Person.

§ 995. Parties Jointly Liable.

It appears to be the general rule that payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment, and the defendant paying cannot take an assignment of it, or be subrogated to the rights of the creditor as

[58] See Walker v. Robinson, 136 Mass. 280; Van Loon v. Smith, 103 Pa. St. 238; Boardman v. De Forrest, 5 Conn. 8; Mower v. Kip, 2 Edw. Ch. 165; Burt v. Casey, 10 Ga. 179; Yarnell v. Moore, 3 Cold. 173; Willaume v. Gorges, 1 Camp. 217.

[59] Woodruff v. Sanders, 15 Ark. 143. See also Wherry v. McCammon, 12 Rich. Eq. 337, 91 Am. Dec. 240; Baker v. Stonebraker, 36 Mo. 338; Kinsler v. Holmes, 2 S. Car. 483; Rector v. Morehouse, 17 Ark. 131; Murphy v. Philadelphia Trust Co., 103 Pa. St. 379; Van Loon v. Smith, 103 Pa. St. 238.

[60] Blackburn v. Squib, Peck, 64; McDaniel v. Goodall, 2 Cold. 391; Yarnell v. Moore, 3 Cold. 173; Husky v. Maples, 2 Cold. 25. Leiper v. Erden, 5 Yerg. 97; Anderson v. Settle, 5 Sneed, 202.

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against his co-defendant, or keep the judgment alive in any manner or for any purpose.[61] But still, in some of the states, it is held that the defendant so paying is entitled to be subrogated to the rights of the plaintiff in the judgment, to the extent to which such payment was for the benefit, or on behalf of his co-defendant.[62] In one of the early cases on the subject we find the following language: "A payment by any one of two or more jointly or jointly and severally bound for the same debt, is payment by all, and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties. It is true that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that one upon which all the parties are jointly liable. This is upon the score of intention, and because a plea of payment by a stranger is bad on demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention, because an assignment to one of his own debt is an absurdity. Where the securities are separate, as several bonds, or a several judgment upon a joint and several note, which is the case here, probably an assignment may be made to the surety himself, since he is no party to the judgment. But if that can be, clearly nothing but a plain intention, evinced by an assignment, to keep up the judgment, can have that effect."[63] Where a decree is rendered against several defendants, and a compromise made by the complainant with some, as to their portion of the debt, the other defendants are not released.[64]

[61] Montgomery v. Vickery, 110 Ind. 211, 11 N. E. Rep. 88; Morley v. Stevens, 47 How. Pr. 228; Booth v. Bank, 74 N. Y. 228; Tompkins v. Fifth Nat. Bank, 58 Ill. 57; Porter v. Gile, 44 Vt. 520; Towe v. Felton, 7 Jones (N. Car.), 216; Weston v. Clark, 37 Mo. 568; Bones v. Aiken, 35 Iowa, 534; Preslar v. Stallwarth, 37 Ala. 402; Hammatt v. Wyman, 9 Mass. 138; Hinton v. Odenheimer, 4 Jones Eq. 406; Sager v. May, 15 R. I. 528.

[62] Coffee v. Tevis, 17 Cal. 239. See also Brown v. White, 29 N. J. Law, 516; Durand v. Trusdell, 44 N. J. Law, 597; Huckaby v. Sasser, 69 Ga. 603; Wheeler's Estate, 1 Md. Ch. 80.

[63] Sherwood v. Collier, 8 Dever. 380, 24 Am. Dec. 264.

[64] Molyneaux v. Marsh, 1 Woods, 452. See also Penn v. Edwards, 50 Ala. 68.

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Where a judgment is obtained by the holder of negotiable paper against the maker and the first and second indorsers, and the first indorser purchases and takes an assignment of the judgment from the holder, such purchase and assignment do not operate as an extinguishment of the judgment as against the maker, and the indorser, so purchasing the judgment, can wield it against the property of the maker.[65]

Where several judgments have been rendered against parties jointly and severally liable on the same obligation, and one of the judgments has been paid, such payment is a satisfaction of all the judgments, except as to costs; and when suits are still being prosecuted against some of the parties liable, the payment of such judgment may be pleaded in bar of the further maintenance of the pending actions.[66] But it is held that where separate actions have been commenced against two joint wrong-doers, one of which has been prosecuted to judgment, a dismissal of the pending action upon payment of a sum intended to be in settlement of costs, and an acknowledgment of satisfaction, does not operate to satisfy the judgment, either wholly or *pro tanto*.[67]

§ 996. Payment by Surety.

Where a surety pays a judgment recovered against himself and his principal, he thereby satisfies it, and reduces himself to the situation of a simple contract creditor of the principal; but if he takes an assignment of the judgment to a stranger, and does not intend to satisfy it, the judgment will not be extinguished by the payment.[68] Where a judgment is joint, against two defendants, both are regarded as principals, unless by proof *aliunde* one is shown to be a surety, and where one of them pays the whole amount of the judgment, he is

[65] Corey v. White, 8 Barb. 12; Eno v. Crooke, 10 N. Y. 66. Compare Bank v. Abbott, 8 Denio, 181; Topp v. Bank, 2 Swan, 184.

[66] First Nat. Bank v. Indianapolis, etc., Co., 45 Ind. 5; Bank v. Mosely, 1 Strobh. 414; Sherman v. Brett, 7 Wis. 139; Craft v. Merrill, 14 N. Y. 456.

[67] Bell v. Perry, 43 Iowa, 368.

[68] Briley v. Sugg, 1 Dev. & Bat. Eq. 366, 30 Am. Dec. 172; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; Barringer v. Boyden, 7 Jones (N. Car.), 187; Hayes v. Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554; Dempsey v. Bush, 18 Ohio St. 376; Peters v. McWilliams, 36 Ohio St. 155; Cottrell's Appeal, 20 Pa. St. 294; McClung v. Beirne, 10 Leigh, 394; Flem-

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not therefore entitled to an execution, for use against his co-defendant, unless he himself has been judicially determined to be only a surety.[69] Where individual judgments are entered against the principals of two promissory notes in which each appears as surety for the other, and no appeal is taken from such judgments, and afterwards one of the debtors pays the judgment against himself, it will be presumed that the judgments are for separate debts, and the payment on the one judgment cannot be applied in satisfaction of the other.[70] Where, in an action against principal and surety on a title-bond, upon which they are severally as well as jointly liable, separate judgments against each are obtained, but in different amounts, the judgment-creditor may insist upon satisfaction of either; but if he accepts the amount of the smaller judgment against the surety and enters it satisfied in full, the debt itself is thereby extinguished, and all recourse on the larger judgment against the principal debtor is gone, although, in the entry of satisfaction, the creditor expressly reserves "all rights" against the principal debtor on the judgment against him. The attempted reservation under such circumstances is inoperative and void.[71]

§ 997. Release of Garnishee by Payment of Principal Judgment.

A judgment against a garnishee is ancillary to and dependent upon the judgment against the principal debtor. When the latter is paid off and satisfied, the former is *functus officio*; the purpose for which it was entered up has been accomplished in another way, and it ceases to be a valid process or obligation for any purpose whatever, except perhaps for costs.[72]

ing v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629. Where the administrator of a surety became the assignee of a judgment against his intestate and his principal, though he had assets in his hands sufficient to pay the judgment, it was held that the judgment was not satisfied by the assignment, but that he could enforce it against the principal. King v. Aughtry, 8 Strobh. Eq. 149.

[69] Laval v. Rowley, 17 Ind. 86.

[70] Caldwell v. Martin (S. Car.), 6 S. E. Rep. 857.

[71] Cox v. Smith, 10 Oreg. 418.

[72] Hammett v. Morris, 55 Ga. 644.

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§ 998. Payment by Sheriff.

According to the rule prevailing in New York, and in some other states, if a sheriff who has made himself liable for negligence in failing to collect money under a judgment, pays the amount of the judgment, either voluntarily or under legal compulsion, the judgment is thereby extinguished. He cannot, by taking an assignment of the judgment, succeed to the rights of the creditor, or keep it alive for the purpose of re-imbursing himself by recourse to the judgment-debtor.[73] But there are also numerous authorities in support of the proposition that the sheriff, on paying off the debt in his own exoneration, may take an assignment of the judgment in his own name, or to a third person in trust for himself, and then proceed to issue an *alias* execution thereon.[74] But most of the cases make a distinction founded on the circumstances under which the officer makes the payment. It is held that if he voluntarily pays the full amount of the judgment to the plaintiff, such payment will extinguish both the execution and judgment, and the officer cannot take out an *alias* execution for his own benefit.[75] But if the payment in such case is compelled by the judgment of a court of competent jurisdiction against the officer, this operates as an implied transfer of the judgment and execution to him.[76]

[73] Bigelow v. Prevost, 5 Hill, 566; Jones v. Wilson, 8 Johns. 434; Menderback v. Hopkins, 8 Johns. 436; Beach v. Vandenburgh, 10 Johns. 361; Carpenter v. Stilwell, 11 N. Y. 61; Sherman v. Boyce, 15 Johns. 443; Reed v. Pruyn, 7 Johns. 426, 5 Am. Dec. 287; Whittier v. Heminway, 22 Me. 288, 38 Am. Dec. 309; Simpson v. Mercer, 144 Mass. 418, 11 N. E. Rep. 720; Boren v. McGehee, 6 Port. 432, 31 Am. Dec. 695.

[74] Heilig v. Lemly, 74 N. Car. 250, 21 Am. Rep. 489; Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46; Dunn v. Snell, 15 Mass. 481; Cheever v. Mirrick, 2 N. H. 376; Rhea v. Preston, 75 Va. 757; Lintz v. Thompson, 1 Head, 456, 73 Am. Dec. 182.

[75] Lintz v. Thompson, 1 Head, 456, 73 Am. Dec. 182; Arnett v. Cloud, 2 Ga. 53; Garth v. Campbell, 10 Mo. 154; Hall v. Taylor, 18 W. Va. 544.

[76] Lintz v. Thompson, 1 Head, 456, 73 Am. Dec. 182; Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46; Chester v. Plaistow, 43 N. H. 545; Smith v. Alexander, 4 Sneed, 482.

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§ 999. Payment by Stranger.

When the amount due upon a judgment is paid wholly or in part by one who is not a party to it nor bound by it, the judgment is extinguished or not according to the intention of the party paying. If such is the design and agreement the judgment may be kept alive for his benefit, and he will succeed to the rights of the judgment creditor, and be entitled to enforce it against the debtor.[77] Thus, the purchase by a partnership of a judgment against one of its members and other parties, the assignment being taken in the name of a member not a judgment-defendant, is not a satisfaction of the judgment.[78] But where a judgment-debtor furnishes money to a third person to buy up the judgment at a discount, and he does so, the creditor not knowing the facts, it amounts only to a part payment.[79] Some of the authorities rule that there must be an *agreement* to keep the judgment alive, or else the payment by a volunteer will extinguish it; that unless he pays in the character of a surety, or to protect his own interests, he will not be subrogated to the rights of the creditor as a matter of course, but only in pursuance of a specific agreement or understanding.[80] But we conceive that the true criterion must be sought in the *intention* with which the payment is made. However this may be, whether an agreement must be shown or merely an intention to put himself in the place of the creditor, it is not necessary that either should be evidenced by a formal and valid assignment of the judgment. It is true an assignment would be conclusive proof, but its importance rests in its character as evidence, rather than in its power to effect a legal transfer of rights. Thus the court in New York declares that the taking of an assignment, *whether valid or void*, affords, under all circumstances, unequivocal evidence of an intention not to satisfy the judgment.[81] And the supreme court of Pennsyl-

[77] Harbeck v. Vanderbilt, 20 N. Y. 395; Rollins v. Thompson, 21 Miss. 523; Null v. Moore, 10 Ired. 324; Marshall v. Moore, 36 Ill. 321; Sydam v. Cannon, 1 Houst. (Del.) 431. Compare Riffle's Appeal, 8 Brewst. 94.

[78] Owensby v. Platt, 3 Ind. 459.

[79] Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578.

[80] Sandford v. McLean, 3 Paige Ch. 117, 23 Am. Dec. 773; Head v. Gervais, Walker, 577, 12 Am. Dec. 577.

[81] Harbeck v. Vanderbilt, 20 N. Y. 395.

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vania holds that where a third party pays the amount of a judgment, with the intention of holding it for his own use, although no transfer is taken, it is not a payment and satisfaction of the judgment.[83] But on the other hand, where a third party advances to the sheriff the amount due on a judgment, taking at the same time a mortgage from the defendant as security for such advance, it must be presumed that such party intended to extinguish the judgment and rely exclusively on the mortgage.[84] In a recent case in Michigan, it appeared that the attorney for the defendant paid a certain judgment, agreeing with the plaintiff's attorney that if the defendant refused to reimburse him, the payment was to be refunded, and the satisfaction of the judgment returned. The plaintiff supposed that his judgment had been satisfied and knew nothing as to where the money to pay it had come from. The defendant's attorney took no assignment of the judgment to protect himself. Under these circumstances, it was held that the judgment must be considered satisfied.[84] If the debtor joins with a stranger in paying off the judgment, taking an assignment to his attorney, the assignment will be valid as to the stranger, though void as to the debtor.[85]

Part IV. Set-Off of Judgment against Judgment.

§ 1000. Power to Order Set-Off of Judgments.

The courts, both of law and equity, have power to order one judgment to be set off against another, on proper application made, when the two judgments are between the same parties, and when equity and justice will be promoted by such action, thereby extinguishing both judgments if they are equal in amount, or, if they are unequal, satisfying the smaller judgment in full and the larger *pro tanto*.[86] This power was one which pertained originally only to the

[83] Campbell's Appeal, 29 Pa. St. 401.

[84] Phillips v. Behn, 19 Ga. 298.

[84] Rogers v. Welte, 61 Mich. 258, 28 N. W. Rep. 86.

[85] Harbeck v. Vanderbilt, 20 N. Y. 395.

[86] United States v. Griswold, 80 Fed. Rep. 604; Sowles v. Witters, 40 Fed. Rep. 413; Skrine v. Simmons, 86 Ga. 402, 91 Am. Dec. 771; Leavenson v. Lafontane, 8 Kans. 528; Pierce v. Bent, 69 Me. 381; Brown v. Warren, 43 N. H.

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courts of equity. But it is now everywhere considered entirely competent for the law courts, in the exercise of their legitimate and incidental powers, to order the set-off of mutual judgments under proper circumstances.[87] "This practice does not rest upon any statute, but upon the general jurisdiction of courts over the suitors in them. It is an equitable jurisdiction frequently exercised."[88] But cases sometimes arise where the rights of the parties and the questions involved are too complicated to admit of being adjusted except in equity, and in such cases a court of law will not order the set-off.[89] And in general, an application to set off one judgment against another is addressed entirely to the discretion of the court, and hence, where the set-off might legally be made, but it is apparent that injustice would result, the motion will be refused.[90] "When a set-off is not authorized by statute, and when it would deprive a party of any of his legal rights, there can be no doubt that he would be entitled to have them protected by a bill of exceptions."[91] No exception lies to the refusal of the court, in the exercise of its discretion, to allow a set-off of one judgment against another, in cases where a set-off is

430; Brown v. Hendrickson, 39 N. J. Law, 239; Quick v. Durham, 115 Ind. 302, 16 N. E. Rep. 601; Ames v. Bates, 119 Mass. 397; Simpson v. Hart, 14 Johns. 63.

[87] Scott v. Rivers, 1 Stew. & P. 24, 21 Am. Dec. 646; Davidson v. Geoghagan, 3 Bibb, 233; Palmateer v. Meredith, 4 J. J. Mar. 74.

[88] Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; Temple v. Scott, 3 Minn. 419, (Gil. 306). The learned editor of the American Decisions (vol. 13, p. 730) remarks that "it is probably the most consistent account of the matter, that when the legislature by the statutes of set-off conferred upon courts of law powers which had previously belonged exclusively to equity tribunals, the courts themselves, in order to preserve the symmetry of the doctrine, transplanted also the equitable practice of setting off judgments."

[89] Story v. Patten, 3 Wend. 331.

[90] Simpson v. Hart, 14 Johns. 63; Brown v. Hendrickson, 39 N. J. Law, 239; Tolbert v. Harrison, 1 Bailey, 599; Williams v. Evans, 2 McCord, 203; Conable v. Bucklin, 2 Aik. 221; Baker v. Hoag, 6 How. Pr. 201; Davidson v. Geoghagan, 3 Bibb, 233; Smith v. Lowden, 1 Sandf. 696; Makepeace v. Coates, 8 Mass. 451; Colquitt v. Bonner, 2 Ga. 155; Meador v. Rhyne, 11 Rich. 631; Low v. Duncan, 3 Strobh. 195; Temple v. Scott, 3 Minn. 419, (Gil. 306). In Allnut v. Winn, 3 J. J. Mar. 304, it was held that the chancellor cannot set off one judgment against another, unless there be a connection between the transactions on which the judgments were rendered, or unless the judgment prayed to be set off cannot be enforced by legal means. But no such limitation is generally recognized.

[91] Bartlett v. Pearson, 29 Me. 9.

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not a matter of right under the statute law.[92] To authorize the set-off, it is necessary that the subject-matter should be clear and indisputable and conclusive upon the party, and that it should have passed the ordeal of a judicial examination in a case where the court had jurisdiction.[93] Where a plaintiff seeks to have a judgment obtained by him set off against a judgment in favor of the defendant, he is seeking to recover on his judgment, within the meaning of a statute of limitations.[94]

§ 1001. Judgments of Different Courts may be Set Off.

It was at one time held that if two judgments existed in different courts, neither of those courts had power to order the judgments to be set off, but recourse must be had to equity. In such a case it was once observed: "It is true both these judgments are legal demands. Had they been recovered in the same court, they might have been set off at law under the equitable power of the court over its own judgments. But being recovered in different courts, there is no remedy but in equity, and yet there is an equitable right for which relief ought to be given."[95] But the accepted doctrine now is that if the party seeking the set-off moves for it in the court where the judgment against himself subsists, that court has power to order the judgment of any other court to be set off against its own judgment.[96] Thus, a judgment of a federal court may be set off against a judgment of a court of the state in which it sits.[97] A justice's judgment may be set off against the judgment of a court of record, if the time for appeal has expired.[98] And a judgment recovered before one justice can be ascer-

[92] Chipman v. Fowle, 130 Mass. 352; Burns v. Thornburgh, 3 Watts, 78.

[93] Harris v. Palmer, 5 Barb. 105.

[94] Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. Rep. 560. See Clark v. Story, 29 Barb. 295.

[95] Webster v. McDaniel, 2 Del. Chanc. 297. See also Buckmaster v. Grundy, 3 Gilm. 626.

[96] Duncan v. Bloomstock, 2 McCord, 318, 13 Am. Dec. 728; People v. New York Common Pleas, 13 Wend. 649, 28 Am. Dec. 495; Simpson v. Hart, 1 Johns. Ch. 91; Ewen v. Terry, 8 Cow. 126; Rix v. Nevius, 26 Vt. 384; Wright v. Mooney, 6 Ired. 22; Brown v. Hendrickson, 39 N. J. Law, 239; Best v. Lawson, 1 Miles, 11; Coxe v. Bank, 8 N. J. Law, 172, 14 Am. Dec. 417.

[97] Schautz v. Kearney, 47 N. J. Law, 56.

[98] Coxe v. Bank, 8 N. J. Law, 172, 14 Am. Dec. 417. But in an action before a justice of the peace, the defendant

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tained and applied by another in satisfaction of a counterclaim recovered before him by the other party.[98] And in Tennessee it is also held that the supreme court may set off two of its own judgments in a proper case.[99]

§ 1002. Where the Motion should be Made.

When judgments obtained in different courts are to be set off, the party making the application must move in the court in which the judgment *against* him was recovered, because that is the court which has control over that judgment, and so far as concerns the judgment in his favor, he always has the power to credit or satisfy it.[101]

§ 1003. Moving Party must be Real Owner of Judgment.

To enable a person to procure the setting off of one judgment against another on motion, he must be the absolute owner of the judgment in his own right.[102] And a party will not be allowed to set off a judgment of which another is the equitable owner, where the fact is known to him when making the motion.[103] But it is also held that the use-plaintiff—one to whose use a judgment has been obtained in the name of another—has an equitable right to use the judgment by way of set-off.[104] And so also has one who acquired the judgment by assignment before the bringing of the action in which the judgment against himself was rendered.[105] But a judgment purchased by a party with a view to set it off, and upon condition that if he

cannot set off a judgment recovered by him against the plaintiff, before another justice, which had been removed into the supreme court by *certiorari*. For, it was said, "he was not entitled to execution on the judgment, without giving satisfactory security to restore the debt or damages in case the judgment should be reversed," and he should not be permitted to have the fruits of his judgment indirectly, by setting it off. Willard v. Fox, 18 Johns. 497.

[98] McEwen v. Bigelow, 40 Mich. 215.

[99] Sneed v. Sneed, 14 Lea, 18.

[101] Russell v. Conway, 11 Cal. 98; Cooke v. Smith, 7 Hill (N. Y.), 186; Hicks v. Ross, 11 Barb. 481; Wright v. Cobleigh, 28 N. H. 32; Taylor v. Williams, 14 Wis. 155.

[102] Mason v. Knowlson, 1 Hill (N. Y.), 218; Turner v. Satterlee, 7 Cow. 480; Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 681.

[103] Meador v. Rhyne, 11 Rich. 631.

[104] Norwood v. Norwood, 4 Har. & J. 112.

[105] Sexton v. Gee, 1 Hill (S. Car.), 378.

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failed to obtain the set-off on motion, the assignment should be void and the assignor should pay the costs of the motion, cannot be set off.[106]

§ 1004. Mutuality of Parties Required.

In order that one judgment may properly be set off against another, it is necessary that there should be mutuality of parties. For otherwise the transaction is sure to involve injury to the rights of some person concerned. For instance, where, in an action brought by A. against B. and C., to recover a debt due from them to A., the defendants pleaded the set-off of a judgment recovered by B. and his wife against A. and D., it was held that the plea was insufficient.[107] But still there may be cases in which a set-off would be equitable, although the parties to the two judgments are not identical, and in such cases it will not be refused.[108] Thus, a judgment against two persons jointly, where each is liable for the whole amount, may be set off against a judgment held by one of them singly as plaintiff.[109] And so where two judgments are recovered, one in favor of A. against B. and his sureties, and the other in favor of B. individually against A., the court, on motion of B., will set off the one against the other.[110] A judgment recovered by a woman while sole against A. may be set off against a judgment recovered by A. against her and her husband personally, for a *devastavit* committed by her as administratrix.[111] In an early Pennsylvania case, it appeared that D. procured a policy of insurance to be made on a vessel for himself and others concerned in the same, and on a loss his executors recovered judgment against the underwriter, B., who had before obtained judgment against D. It was held that B. was entitled to set off this judgment, although it should appear that O. owned half of the vessel.[112] But unless the joint plaintiffs or joint defendants in the one judgment stand in some

[106] Miller v. Gilman, 7 Cow. 469.

[107] Atkins v. Churchill, 19 Conn. 394. See also Holmes v. Robinson, 4 Ohio, 90.

[108] Colquitt v. Bonner, 2 Ga. 155; Hobbs v. Duff, 23 Cal. 596.

[109] Hutchins v. Riddle, 12 N. H. 464; Simpson v. Hart, 14 Johns. 63; Allen v. Hall, 5 Met. 263.

[110] Prince v. Fuller, 34 Me. 122.

[111] Rutherford v. Crabb, 5 Yerg. 112.

[112] Darrah's Exrs. v. Bayard, 3 Yeates, 152.

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such relation as those just mentioned, it cannot be set off against a debt due to one of them, except on proof that the other is insolvent.[113] A judgment in favor of A. against B. individually, and a judgment in favor of a co-partnership consisting of B. and C., against A., are not mutual debts, and one cannot be set off against the other.[114]

It is well settled that the right to a set-off cannot be defeated by an assignment of one of the judgments made fraudulently for the very purpose of avoiding it.[115] But when the assignment was made in good faith and for value, and without any such purpose, it is doubtful whether the right of set-off is not lost. Some of the authorities hold that the mutuality which is necessary to the exercise of this power is destroyed by such an assignment. Others contend that the equity to a set-off is prior to the rights of the assignee, who takes the judgment subject to all equities between the original parties, and must be preferred. The subject has been discussed in an earlier chapter.[116]

§ 1005. Requisites of Judgments to be Set Off.

In order that a judgment should be available as a set-off, it is necessary that it should be a valid and subsisting obligation and final in its nature. Hence a judgment upon which an appeal is pending cannot be set off against another judgment,[117] nor can one which appears by the record to be satisfied, although it has not in fact been paid.[118] But the assignee of a dormant judgment against one who is insolvent may bring a suit to have it revived and set off against a judgment which has since been recovered against him by the other party, and which the latter is about to enforce.[119] A judgment for costs for a defendant may be set off against the judgment recovered

[113] Phelps v. Reeder, 89 Ill. 192.

[114] Francis v. Rand, 7 Conn. 221. But compare Jeffries v. Evans, 6 B. Mon. 119, 43 Am. Dec. 158.

[115] Morris v. Hollis, 2 Harr. (Del.) 4; Hurst v. Sheets, 14 Iowa, 322; Russell v. Conway, 11 Cal. 93.

[116] *Supra*, § 954. And see Wright v. Cobleigh, 28 N. H. 32; Graves v. Woodbury, 4 Hill (N. Y.), 559; Makepeace v. Coates, 8 Mass. 451.

[117] De Figaniere v. Young, 2 Rob. (N. Y.) 670.

[118] Smith v. Briggs, 9 Barb. 252.

[119] Simpson v. Huston, 14 Tex. 476.

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by the plaintiff;[120] but not so as to divest the lien of the attorney for costs in the first-mentioned judgment.[121] A judgment may be set off before a jury against a demand not yet ascertained by judgment.[122] And where there are two actions in the same court between the same parties, it is within the discretion of the court to withhold judgment in one action until the defendant, as plaintiff in the other suit, using due diligence, shall obtain his judgment for damages, after which one judgment may be set off against the other.[123] A proceeding by the debtor of a decedent to set off a judgment obtained by him against the decedent, against one obtained by the administrator on the debt due the estate, is not affected by the insolvency of the estate, such judgment not really constituting assets in the hands of the administrator.[124]

Part V. Satisfaction by Proceedings on Final Process.

§ 1006. Levy on Real Estate.

The mere levy of an execution upon real estate of the judgment-debtor does not amount even *prima facie* to a satisfaction of the judgment, for it does not interfere with the title or possession of the debtor.[125] "A levy upon real estate constitutes no satisfaction of an

[120] Hurd v. Fogg, 22 N. H. 98. Compare Gihon v. Fryatt, 2 Sandf. 638.

[121] Nicoll v. Nicoll, 2 Edw. Ch. 574; Dunkin v. Vandenbergh, 1 Paige, 622; Ainslie v. Boynton, 2 Barb. 258. In the case of a set-off of judgments or executions the lien of the attorney in the first suit for his fees and disbursements therein does not extend to counsel fees, but only to the taxable costs. Ocean Ins. Co. v. Rider, 22 Pick. 210.

[122] Metzgar v. Metzgar, 1 Rawle, 227. Compare Irvin v. Wright, 1 Scam. 185.

[123] New Haven Copper Co. v. Brown, 46 Me. 418.

[124] Quick v. Durham, 115 Ind. 302, 16 N. E. Rep. 601.

[125] Shepard v. Rowe, 14 Wend. 260; Taylor v. Ranney, 4 Hill (N. Y.), 621; Patterson v. Swan, 9 Serg. & R. 16; Deloach v. Myrick, 6 Ga. 410; Foster v. Rutherford, 20 Ga. 676; Overby v. Hart, 68 Ga. 493; Fry v. Bank, 16 Ala. 282; Beazley v. Prentiss, 13 Sm. & Mar. 97; Peale v. Bolton, 24 Miss. 630; White v. Graves, 15 Tex. 188; Boyd v. Mann, 9 Baxt. 349; Hogshead v. Carruth, 5 Yerg. 227; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 333; Reynolds v. Rogers, 5 Ohio, 169; Gregory v. Stark, 8 Scam. 612; Gold v. Johnson, 59 Ill. 62; Spafford v. Beach, 2 Dougl. (Mich.) 150; Davidson v. Gaston, 16 Minn. 230, (Gil. 202). Compare Anthony v. Humphries, 9 Ark. 176.

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execution until consummated by sale. Before that period there is no change either of property or possession, and no reason to hold the levy to be a satisfaction."[126] But a return of "land delivered" on an *elegit* is a legal satisfaction of the judgment.[127] And so where a judgment-creditor makes a valid levy of his execution on land in which the debtor has an estate for his own life, and the debtor's interest in such land and its income are set off to such creditor at a yearly value, to continue for a term of years "should the debtor so long live," in full satisfaction of the execution, the judgment-debt is satisfied by such levy, although the debtor dies before the expiration of the term of years for which the land was set off.[128] And a judgment is satisfied when, under proceedings ordered by the proper court, the lands of the defendant are seized, sold, and conveyed by the sheriff to the plaintiff, he bidding for them the amount of the judgment with the interest and costs.[129]

§ 1007. Levy on Personalty.

It was the doctrine of the common law, and has been quite generally held in this country, that a levy of execution upon sufficient personal property of the judgment-debtor to pay the judgment operates *per se* as a satisfaction and extinguishment of the judgment.[130] This doctrine proceeds upon the principle that after the debtor's property is removed from his possession by seizure on execution, he should not be held to any further liability under the judgment, and the plaintiff's remedy, for failure of actual satisfaction, is against the sheriff

[126] Beazley v. Prentiss, 18 Sm. & Mar. 97.

[127] Hinesly v. Hunn, 5 Harr. (Del.) 286.

[128] Thomas v. Platts, 43 N. H. 629.

[129] Walker v. Powers, 104 U. S. 245.

[130] Clark v. Withers, 1 Salk. 323; Slie v. Finch, 2 Rolle, 57; Speake v. Richards, Hobart, 206; Campbell v. Pope, Hempst. 271; Jackson v. Bowen, 7 Cow. 13; Shepard v. Rowe, 14 Wend. 260; Hunt v. Breading, 2 Serg. & R. 37, 14 Am. Dec. 595; Cathcart's Appeal, 18 Pa. St. 421; Marshall v. Morris, 18 Ga. 185; Campbell v. Spence, 4 Ala. 548, 39 Am. Dec. 301; Young v. Read, 3 Yerg. 296; Case v. Adams, 3 Ohio, 223; Frank v. Braskett, 44 Ind. 92; Burr v. Mendenhall, 80 Ind. 49; Smith v. Hughes, 24 Ill. 270; Martin v. Charter, 27 Ill. 294; Trigg v. Harris, 49 Mo. 176; Blair v. Caldwell, 3 Mo. 353; People v. Chisholm, 8 Cal. 29; Barber v. Reynolds, 44 Cal. 519.

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or his deputy.[121] At any rate, a levy under an execution upon sufficient personalty to satisfy the same is a satisfaction of the judgment at least so far as to discharge third persons who are liable collaterally or as sureties therefor, and the release of the property from the levy thus made, without the consent of the parties so liable, cannot revive their liability.[122]

§ 1008. Satisfaction by Levy is not Absolute.

The better doctrine, and the one now generally accepted, is that a levy of execution upon sufficient personal property of the debtor to discharge the judgment is to be considered as no more than a *prima facie* satisfaction, or satisfaction *sub modo*, and that the presumption arising therefrom is liable to be rebutted, on the part of the plaintiff, by evidence of any one of a number of combinations of circumstances which, without his own fault or the sheriff's, prevented the levy from furnishing actual satisfaction of the judgment.[123] As stated by the court in New York: "There are some old cases in which *dicta* are found that a levy upon sufficient property to satisfy an execution is a satisfaction, but that doctrine has long since been exploded. Where a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed, or otherwise disposed of, so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution, and the plaintiff must

[121] Hunt v. Breading, 12 Serg. & R. 87, 14 Am. Dec. 695.

[122] Mulford v. Estudillo, 23 Cal. 94.

[123] United States v. Dashiel, 3 Wall. 688; Folsom v. Chesley, 2 N. H. 432; McBride v. Bank, 28 Barb. 476; Denvrey v. Fox, 22 Barb. 522; People v. Hopson, 1 Denio, 574; Voorhees v. Gros, 3 How. Pr. 262; Green v. Burke, 23 Wend. 490; Peck v. Tiffany, 2 N. Y. 451; Lyon v. Hampton, 20 Pa. St. 46; Carr v. Weld, 19 N. J. Eq. 319; Banta v. McClennan, 14 N. J. Eq. 120; *In re* King, 2 Dev. 341, 21 Am. Dec. 335; Peay v. Fleming, 2 Hill Ch. 97; Ordinary v. Spann, 1 Rich. 429; McElwee v. Jeffreys, 7 S. Car. 228; Foster v. Rutherford, 20 Ga. 676; Chisolm v. Chittenden, 45 Ga. 218; Overby v. Hart, 68 Ga. 493; Walker v. McDowell, 4 Sm. & Mar. 118, 43 Am. Dec. 476; McNutt v. Wilcox, 1 Freem. Ch. 116; Wade v. Watt, 41 Miss. 248; Doe d. Shelton v. Hamilton, 28 Miss. 496, 57 Am. Dec. 149; McGinniss v. Lillard, 4 Bibb, 490; Curtis v. Root, 28 Ill. 367; French v. Snyder, 30 Ill. 343, 83 Am. Dec. 193; Trenary v. Cheever, 48 Ill. 28; Lucas v. Cassaday, 2 Greene (Iowa), 208; First Nat. Bank v. Rogers, 13 Minn. 407, (Gil. 376); 97 Am. Dec. 239; Bennett v. McGrade, 15 Minn. 132, (Gil. 99).

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in such case seek his remedy against the sheriff. But where the debtor has neither paid the debt nor been deprived of his property, the simple act of levying upon it is not a satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct, or by his request, or the voluntary act of the officer, because neither works any wrong to him."[134] This rule, as will be seen, is sustained by the greater weight of authority, and in some states it has been established by overruling the cases sustaining the earlier doctrine. But the conflict of authority is more apparent than real, for the cases holding the strict rule generally concur in admitting certain exceptions, the effect of which is practically to reduce it to the form above enunciated. Important consequences may be deduced from the rule as it stands at present. For example, it is no defense to an action on a judgment that an execution has been issued and levied on the defendant's property to a sufficient amount to discharge the judgment.[135] The presumption of satisfaction arising from such a levy may be rebutted by proof that actual satisfaction was not received through the insufficiency of the proceeds of the levy.[136] It may also be rebutted by proof that satisfaction could not have resulted from the levy on account of senior executions or other prior liens.[137] So again, it may be rebutted by proof that the property was removed from the plaintiff's possession by process of law.[138] Again, where the chattels levied on are abandoned and left in the debtor's possession, or restored to him at his request or for his benefit, no satisfaction of the judgment can be presumed to ensue.[139] Thus where the debtor, on a levy, gives a note with collaterals, and there-

[134] Peck v. Tiffany, 2 N. Y. 451, 456.

[135] Waddell v. Elmendorf, 5 Denio, 447.

[136] Newsom v. McLendon, 6 Ga. 392; Candle v. Dare, 7 Ark. 46; Moody v. Harper, 28 Miss. 615; Bibb v. Jones, 7 How. (Miss.) 897; McNutt v. Wilcox, 1 Freem. Ch. 116; Chandler v. Higgins, 109 Ill. 602.

[137] People v. Hopson, 1 Denio, 574; Hanness v. Bonnell, 23 N. J. Law, 159; Newsom v. McLendon, 6 Ga. 392; Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 631; Peay v. Fleming, 2 Hill Ch. 97; Cornelius v. Burford, 28 Tex. 202.

[138] Bean v. Seyfert, 12 Phila. 224; Banks v. Evans, 10 Sm. & Mar. 35, 48 Am. Dec. 734; Alexander v. Polk, 39 Miss. 737.

[139] United States v. Dashiel, 3 Wall. 688; Churchill v. Warren, 2 N. H. 298, 9 Am. Dec. 73; Ostrander v. Walters, 2 Hill (N. Y.), 329; Peck v. Tiffany, 2 N. Y. 451; Cummin's Appeal, 9 Watts & S. 73; Sasscer v. Walker, 5 Gill & J. 102, 25 Am. Dec. 272; Binford v. Al-

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upon goods seized, and which would have been sufficient, are restored, and he promises to pay the note out of a particular fund, but makes default, the judgment is not to be considered as satisfied.[140] But it must be remembered that such a levy is at least so far a satisfaction of the judgment as to throw upon the plaintiff the burden of proving either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff or the levying officer.[141]

§ 1009. Release of Property on Forthcoming Bond.

In several of the states it is provided by statute that where property levied on is surrendered on a forthcoming bond, and the bond is forfeited, a new judgment, on the bond, thereupon springs into existence, without any further formalities and by mere force of the statute; and accordingly it is held that the original judgment is merged in the statutory judgment and thereby satisfied and extinguished.[142] But in some other states, where the mere forfeiture of the forthcoming bond gives an inchoate right to *take* judgment, but does not amount to an actual judgment of itself, it is held that such forfeiture will not operate as a merger and satisfaction of the original judgment.[143] In Pennsylvania, when an execution is levied on personal property, but the sale is prevented by an interpleader issue at

ston, 4 Dev. 351; Stone v. Tucker, 2 Bail. 495; Morton v. Walker, 7 How. (Miss.) 554; Cornelius v. Burford, 28 Tex. 202; Allen v. Johnson, 4 J. J. Mar. 285; Williams v. Bowdon, 1 Swan, 282; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Biscoe v. Sandefur, 14 Ark. 568; Williams v. Boyce, 11 Mo. 537; Thomas v. Cleveland, 33 Mo. 126; First Nat. Bank v. Rogers, 15 Minn. 381, (Gil. 305); Wright v. Young, 6 Oreg. 87.

[140] Holbrook v. Champlin, 1 Hoff. Ch. 148. And see First Nat. Bank v. Rogers, 15 Minn. 381, (Gil. 305.)

[141] Newsom v. McLendon, 6 Ga. 392. See also First Nat. Bank v. Rogers, 13 Minn. 407, (Gil. 376); 97 Am. Dec. 239.

[142] Witherspoon v. Spring, 8 How. (Miss.) 60, 32 Am. Dec. 310; Bank of U. S. v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; Davis v. Hoopes, 33 Miss. 173 (compare Benton v. Crowder, 7 Sm. & Mar. 185); Kelly v. Garvin, 12 Ark. 613; Frazier v. McQueen, 20 Ark. 68; Douglas v. Twombly, 25 Ark. 124; Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607; Harrison v. Wilson, 2 A. K. Mar. 547; Young v. Read, 3 Yerg. 296. See also Hoyt v. Hudson, 12 Johns. 207; Taylor v. Hulme, 4 Watts & S. 407; Cox v. Reed, 27 Ill. 434.

[143] Cole v. Robertson, 6 Tex. 356, 55 Am. Dec. 784; Patton v. Hamner, 33 Ala. 307; Crawford v. Bank, 5 Ala. 55.

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the instance of a claimant who gives bonds and to whom the property is thereupon surrendered by the sheriff, the levy cannot be regarded as a satisfaction of the judgment.[144]

§ 1010. Sale on Execution.

Where property of the debtor is sold on execution, and the sale is not annulled or set aside, the judgment is satisfied to the extent of the net proceeds of the sale.[145] And where the property is purchased by the judgment-plaintiff himself, for the amount due him, the judgment is wholly extinguished.[146] So where money is realized on an execution sufficient to satisfy the judgment and returned into court, but by agreement of parties is withdrawn and deposited in a bank, which becomes insolvent, the judgment is satisfied.[147] But the possession of money by the sheriff, arising from the sale of lands, sufficient to satisfy a judgment earlier than that under which the sale was made, is not *per se* a satisfaction of such earlier judgment. The prior judgment-creditor may waive his priority in favor of a subsequent one, without working an extinguishment of his judgment, which may be satisfied out of any other land originally bound by it.[148] And conversely, the redemption by a junior judgment-creditor of lands sold on execution, is not a satisfaction of his judgment either in law or equity, although the premises to which he acquires title by such redemption are worth more than the amount paid by him to redeem the same from the original purchaser at the sheriff's sale.[149] If the sale was invalid, the question is different. The invalidity may have been caused by defects or irregularities in the process or in the advertisement, uncertainty in the description of the property, or other similar causes. It is generally held, in such a case, that where the plaintiff is compelled to return the property or account for its proceeds, the court will entertain his motion to set aside the satisfaction and issue a new execution.[150] But if the invalidity of the sale is attributable to

[144] Rice v. Groff, 58 Pa. St. 116.
[145] Halcombe v. Loudermilk, 8 Jones (N. Car.), 491.
[146] Kleinhenz v. Phelps, 6 Hun, 568.
[147] Cake v. Bird (Pa.), 15 Atl. Rep. 774.
[148] Bank of Penna v. Winger, 1 Rawle, 295, 18 Am. Dec. 633.
[149] Van Horne v. McLaren, 8 Page, 285.
[150] Townsend v. Smith, 20 Tex. 465;

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the fact that the debtor had no title or interest whatever in the property sold, the more approved doctrine appears to be that, where the creditor himself purchases the property, the judgment is finally and irrevocably satisfied and the law courts have no power to set it aside or grant him relief.[151] But this doctrine, it must be admitted, is opposed by a very respectable body of authorities.[152] And however it may be at law, the courts of equity will relieve a creditor from the consequences of his purchase at such an invalid sale.[153]

§ 1011. Taking Defendant on Ca. Sa.

The arrest and imprisonment of the defendant on a writ of *capias ad satisfaciendum* is a satisfaction of the judgment against him in such a sense that, while such imprisonment lasts, no proceedings can be taken against his property.[154] But in case of a judgment against several joint debtors, the arrest of one does not preclude the subsequent taking of the others.[155]

§ 1012. Discharge of Defendant from Custody.

At common law, the discharge of the defendant from custody under a *ca. sa.*, by the voluntary act of the plaintiff, operated in law as an absolute satisfaction of the judgment.[156] So where a plaintiff recovered separate judgments against two joint trespassers, and sued

70 Am. Dec. 400; Smith v. Reed, 53 Cal. 345; Gooch v. Atkins, 14 Mass. 379; Farmer v. Sassen, 63 Iowa, 110, 18 N. W. Rep. 714; Arnold v. Fuller, 1 Ohio, 458.

[151] Thomas v. Glazener (Ala.), 8 South. Rep. 153; Salmond v. Price, 13 Ohio, 368, 383; Hollister v. Dillon, 4 Ohio St. 197; Halcombe v. Loudermilk, 3 Jones (N. Car.), 491; Freeman v. Caldwell, 10 Watts, 10; Lansing v. Quackenbush, 5 Cow. 38.

[152] Cross v. Zane, 47 Cal. 602; Scherr v. Himmelman, 53 Cal. 312; Adams v. Smith, 5 Cow. 280; Ritter v. Henshaw, 7 Iowa, 98; Tudor v. Taylor, 26 Vt. 444.

[153] Warner v. Helm, 1 Gilm. 220; Henry v. Keys, 5 Sneed, 489; Muir v. Craig, 8 Blackf. 293; Price v. Boyd, 1 Dana, 486.

[154] Bank of Beloit v. Beale, 7 Bosw. 611; Fassett v. Tallmadge, 15 Abb. Pr. 205.

[155] Penn v. Remsen, 24 How. Pr. 503; Raymon v. Butterworth, 139 Mass. 471, 1 N. E. Rep. 126. See also Kasson v. People, 44 Barb. 347; Chapman v. Hart, 11 Wend. 41.

[156] Cattlin v. Kernot, 3 C. B. N. S. 796; Bonesteel v. Garlinghouse, 60 Barb. 388; King v. Goodwin, 16 Mass. 63.

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out execution on one of the judgments, under which the defendant was committed to prison, and afterwards the assignee of both judgments gave a written direction to the sheriff to discharge the defendant in custody, it was held that the judgment against the other defendant was thereby also discharged, and the remedy upon both judgments was gone.[157] But the rigor of this rule has been relaxed in various states by statutes or judicial decisions. And it is now held that further proceedings upon the judgment are not precluded if the defendant regains his liberty by an escape,[158] or by the act of the law,[159] or by a discharge under the insolvent laws,[160] or by reason of the plaintiff's refusing to pay the prison fees.[161] And in at least one state, by statute, no discharge of a debtor from imprisonment on an execution, by the creditor's consent or otherwise, operates to discharge the debt or the judgment on which the execution issued.[162]

§ 1013. Cumulative Judgments.

It is held that a judgment is not satisfied by the recovery of another judgment in another court in an action brought upon the first judgment; to extinguish the first judgment, the second judgment must in fact be satisfied.[163] But if judgments founded upon the same cause of action are recovered against the same defendant in several different states, a payment of one of them is a satisfaction of all.[164] The payment by a sheriff of a judgment recovered against himself, for his failure to make the money on an execution, is not a satisfaction of the original judgment, unless the defendant adopts the payment and insists upon it as a satisfaction of the judgment against himself.[165] Where a judgment is obtained against a defendant in an attachment, and afterwards a judgment for the whole amount is rendered in the

[157] Kasson v. People, 44 Barb. 349.
[158] Coburn v. Palmer, 10 Cush. 278.
[159] Bonesteel v. Garlinghouse, 60 Barb. 338.
[160] Owen v. Glover, 2 Cranch C. C. 578; Strode v. Broadwell, 36 Ill. 419.
[161] Prentiss v. Hinton, 6 Blackf. 85; Hidden v. Saunders, 2 R. I. 391; Nardin v. Battie, 3 East. 87.
[162] Abbott v. Osgood, 38 N. H. 280.
[163] Mumford v. Stocker, 1 Cow. 178; Griswold v. Hill, 2 Paine, 492.
[164] Tarver v. Rankin, 3 Ga. 210.
[165] Poe v. Darrah, 20 Ala. 288, 56 Am. Dec. 196.

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same suit against the garnishee, the latter judgment does not extinguish the former.[166]

Part VI. Entry of Satisfaction on the Record.

§ 1014. Entry of Satisfaction when Ordered.

When a judgment is fully paid, and the plaintiff, upon application of the defendant, refuses to acknowledge satisfaction, the court will compel him to enter satisfaction at his own expense and to pay the costs of the motion for that purpose.[167] But satisfaction of a judgment cannot be ordered to be entered because of any matter accruing before its rendition.[168] And if the judgment is regular on its face, and the facts concerning payment are controverted, the court should not order an entry of satisfaction without awarding an issue.[169] Nor will the court order such entry unless all the parties interested are brought before it and have an opportunity to be heard.[170] Neither should the court entertain jurisdiction of such a motion as to any of the parties, unless it is to be a satisfaction entirely and to all.[171] In some of the states, by statute, penalties are provided against a judgment-creditor who neglects or refuses to satisfy a judgment of record when the same has been paid, within a certain period after being requested to do so. But it is held that it must be shown that he was personally requested to enter satisfaction; a request made to the attorney who conducted the suit for the plaintiff is insufficient.[172]

[166] Price v. Higgins, 1 Litt. 278.

[167] Briggs v. Thompson, 20 Johns. 294. In the case of Medford v. Dorsey, 2 Wash. C. C. 467, there was judgment on an award that the defendant pay so much on receiving from the plaintiff an indemnity against certain claims; the plaintiff afterwards refused to give the indemnity; and on the defendant paying more claims (against which he was to be indemnified) than the amount of the judgment, the court ordered satisfaction to be entered on the judgment.

[168] Jarman v. Saunders, 64 N. Car. 367.

[169] McCutcheon v. Allen, 96 Pa. St. 319.

[170] Matter of Beers, 5 Rob. (N. Y.) 643.

[171] Long v. Shackelford, 25 Miss. 559.

[172] Marston v. Tryon, 108 Pa. St. 270.

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§ 1015. Nature and Effect of Entry.

The satisfaction of a judgment is *prima facie* evidence of payment or a gift; its legal effect is the extinguishment of the debt.[173] But it is said that an entry of satisfaction, indorsed on the judgment, is in the nature of a receipt for the amount thereof, and may be explained, qualified, controlled, or even contradicted by parol evidence.[174] An entry on the docket of the filing of a receipt of part of the sum due on a judgment against two, in full of the whole judgment against one, is not a legal entry of satisfaction, nor is it a release of the judgment.[175] In a case in Pennsylvania, it appeared that execution was issued on a judgment, and the defendant tendered the debt, interest, and costs to the plaintiff, and then obtained a rule why he should not be allowed to pay the same to the sheriff in full satisfaction of the judgment. The rule was made absolute and the sheriff returned the execution "stayed by order of court." It was held that this amounted to no more than an *inferential* satisfaction of the judgment, as it would not be clear and sufficient notice to one searching the title that the lien of the judgment was discharged.[176]

§ 1016. Striking Off Mistaken or Fraudulent Entry.

If an entry of satisfaction of a judgment be made upon the record by mistake, by fraud, or by falsely personating the plaintiff, the court where the record is has an undoubted right, upon proof of the facts and notice to the parties, to strike off such improper entry.[177] So a plaintiff whose judgment is entered satisfied by an attorney who had no authority to make the entry may maintain an action or application to have the entry cancelled.[178] Where an entry of satis-

[173] Kerr's Appeal, 104 Pa. St. 283; Packard v. Hill, 7 Cow. 434.

[174] Stewart v. Armel, 62 Ind. 593.

[175] Campbell v. Booth, 8 Md. 107.

[176] Allen v. Conrad, 51 Pa. St. 487.

[177] Murphy v. Flood, 2 Grant, 411; Russell v. Nelson, 99 N. Y. 119, 1 N. E. Rep. 314; Ackerman v. Ackerman, 44 N. J. Law, 173; Armstrong v. Harper, 65 Ala. 523; State v Young, 32 Kans. 292, 4 Pac. Rep. 309; Bogle v. Bloom, 36 Kans. 512, 13 Pac. Rep. 793; Wilson v. Stillwell, 14 Ohio St. 464; Cohen v. Camp, 46 Mo. 179. Compare Romain v. Garth, 5 Thomp. & C. 361.

[178] Freeman v. Paul, 105 Ind. 451, 5 N.

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faction of a judgment is made under an agreement, and the defendant fails to perform the conditions of the agreement, the plaintiff is entitled to an order vacating the entry and placing the judgment *in statu quo*.[179] And where the judgment-creditor wrongfully applies funds realized from collateral security to the payment of his judgment, the entry of satisfaction will be stricken off and the defendant admitted to a defense.[180] While summary proceedings upon motion are generally available for the purpose of procuring the cancellation of a fraudulent or mistaken entry of satisfaction, yet it is held that if there is conflicting evidence upon the material questions of fact, the court should not make its determination upon mere *ex parte* affidavits, but should put the party to a regular action.[181] Where a judgment-debtor gives a new obligation for the claim to the plaintiff, who thereupon marks the judgment satisfied, at the request of the debtor, the latter cannot have the satisfaction stricken off, and the judgment opened, on the ground that the original transaction was usurious.[182]

§ 1017. Release and Discharge of Judgment.

A parol release of a judgment is sufficient in equity, but a consideration is necessary to support it; it is not enough that it is in writing, if without a consideration.[183] An attorney at law has no power, except by special authority from his client, to release the client's judgment, where the judgment has not been paid or satisfied.[184] Where a judgment-debtor obtains possession of a discharge of the judgment, without a compliance with the conditions on which it was to be delivered, and the discharge is not filed with the clerk, nor satisfaction entered on the record, the judgment remains in full force.[185]

E. Rep. 754; Voell v. Kelly, 64 Wis. 504, 25 N. W. Rep. 536; Turnan v. Temke, 84 Ill. 286.

[179] Stuart v. Peay, 21 Ark. 117.

[180] Guthrie v. Reid, 107 Pa. St. 251. See also Geissinger's Appeal (Pa.), 4 Atl. Rep. 344.

[181] Chapman v. Blakeman, 31 Kans. 684, 3 Pac. Rep. 277. See also Dwight v. St. John, 25 N. Y. 203; Yeates v. Mead, 65 Miss. 89, 3 South. Rep. 651.

[182] Read's Appeal (Pa.), 17 Atl. Rep. 621.

[183] Whitehill v. Wilson, 3 Penr. & W. 405, 24 Am. Dec. 326. See Davis v. Bowker, 1 Nevad. 487.

[184] Rounsaville v. Hazen, 33 Kans. 71, 5 Pac. Rep. 422.

[185] Crosby v. Wood, 6 N. Y. 369.

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