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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 "Black's Law Dictionary" and of Treatises on "Tax Titles," "Constitutional Law," "Interpretation of Laws," "Bankruptcy," etc.

SECOND EDITION
IN TWO VOLUMES

VOLUME I

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PREFACE TO THE FIRST EDITION.

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

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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 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

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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.

PREFACE TO THE SECOND EDITION.

DURING the twelve years which have elapsed since the first publication of this treatise, the law of Judgments, as expounded by the courts and affected by statutory enactments, has undergone a great elaboration and development, though without much change in the cardinal principles upon which its most important rules are based. In the same period the case-law of the subject has enormously increased. It therefore seemed to the author that a new edition of this work would be acceptable to the profession, and would indeed be necessary to its continuance in that career of usefulness of which he has many gratifying testimonies. Accordingly, the book has been subjected to a careful and thorough revision, many parts of it have been wholly re-written, much new matter has been added, and the later decisions, to the number of about seven thousand, have been incorporated in the notes. It is hoped that the work, as thus enlarged and brought abreast of the current of judicial decisions, will be found a reliable guide to the rules and principles on which its subject rests, and a complete repertory of the precedents, both ancient and modern. H. C. B.

Washington, D. C., October 1, 1902.

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THE LAW OF JUDGMENTS.

CHAPTER I.

THE NATURE AND CLASSIFICATION OF JUDGMENTS AND DECREES.

PART I. THE NATURE OF JUDGMENTS.

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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, 3 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 instituted therein for the redress of an injury." Bouv. Law Dict. voc. "Judg-

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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 is, equally with a judgment, the deliverance of the law,

ment." "The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." 2 Tidd, 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. 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 Daniell, Ch. Prac. 986. "A decree in chancery is the judgment of the

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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 occurred 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,

chancellor upon the facts ascertained and should be signed by him and entered on the minutes of the court." Code Ga. § 4212.

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

[5] State v. McArthur, 5 Kan. 280; Hughes v. Shreve, 3 Metc. (Ky.) 547; Kramer v. Rebman, 9 Iowa, 114.

[6] Code Civ. Proc. Cal. § 577; Code Civ. Proc. N. Y. § 1200; Code Kan. § 395; Code Or. § 240. Miller's Code Iowa, § 2849, declares that "every final adjudication of the rights of the parties in an action is a judgment." See Walker v. Walker, 93 Iowa, 643, 61 N. W. 930. In Tennessee, the word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are declared to be interchangeable as used in the Code. Ward v. Kenner (Tenn.) 37 S. W. 707.

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

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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 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, "it is considered." 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

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

[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. But in Georgia, it is said that an order passed by a judge of the superior court, whether in term or at chambers, granting an application presented by a trustee for leave to sell the trust property, has all the sanctity of a formal judgment of a court of general jurisdiction, and will be supported by the same presumptions. Reinhart v. Blackshear, 105 Ga. 799, 31 S. E. 748.

[10] Baker v. State, 3 Ark. 491, Dickinson, J.

[11] Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526

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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 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.[14] The case of a proceeding against "unknown owners" is

[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. See, infra, § 532.

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

[14] The action of a county court incorporating a town, under the statute in Missouri, is not a judgment or order, within the meaning of the act allowing appeals. Hall v. De Armond, 46 Mo. App. 596. But a decree adjudging against certain persons certain amounts and ordering the same paid into court to the credit of an estate, and providing for the distribution of the fund to designated persons in fixed amounts, is such a final judgment as will

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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." [15] It 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.[16] 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.[17] 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

support a writ of error, though not in favor of any person acting individually or in a representative capacity. Haines v. Christie, 27 Colo. 288, 60 Pac. 567.

[15] Whitwell v. Emory, 3 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. (N. Y.) 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, 25 Fla. 654, 6 South. 261.

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

[17] Battell v. Lowery, 46 Iowa, 49; Dunns v. Batchelor, 20 N. C. 46; Early v. Moore, 4 Munf. (Va.) 262; Mudd v. Rogers, 10 La. Ann. 648; Nichols v. Stewart, 21 Ill. 106. See infra, § 118.

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case.[18] But where a court inadvertently determines two matters standing in such opposition as to be incapable of harmonious construction, as, for instance, that the same property belongs absolutely to each of two persons, the decision is of no effect.[19]

§ 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 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 a judgment may be entered for a sum payable in a particular kind of money.[20] 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

[18] 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.

[19] Gage v. Downey, 94 Cal. 241, 29 Pac. 635.

[20] See, infra, § 152.

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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.[21]

It has also been said that a judgment constitutes a vested right of property in the creditor, which cannot lawfully be diminished or destroyed by the legislature.[22] Within limits this is no doubt true. But it appears that the right to receive interest on the amount of a judgment, at the rate fixed by law at the time the judgment was rendered, is not such a vested right of property as to be beyond the control of the legislature; and consequently a statute reducing the rate of interest on judgments may validly apply to those in force at the date of its enactment, and interest on such existing judgments can be recovered only at the reduced rate from the time of the passage of the statute.[23] Again, although there was no law allowing an appeal from a particular judgment, at the time of its rendition, it cannot be said that the successful party has any vested right that his judgment shall not be made subject to review by subsequent legislation.[24]

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

[22] Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

[23] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; Wyoming Nat. Bank v. Brown, 9 Wyo. 153, 61 Pac. 465.

[24] Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041.

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§ 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 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." [25]

§ 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." [26]

§ 7. Judgments sometimes called Contracts.

The notion that a judgment is to be considered as a contract appears to have originated with Blackstone.[27] At any rate, the present writer has been unable to discover any authority for such a prop-

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

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

[27] 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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osition 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 forward as a recognized principle of law in numerous American cases.[28] 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." [29] 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." [30] 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

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

[29] Taylor v. Root, *43 N. Y. 335, Woodruff, J.

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

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of an express contract.[31] 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.[32]

§ 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.[33] 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

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

[32] 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. Prohib. § 197. And see Sprott v. Reid, 3 Iowa, 489, 56 Am. Dec. 549.

[33] Bidleson v. Whytel, 3 Burrows, 1548; Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; Wadsworth v. Henderson (C. C.) 16 Fed. 447; Todd v. Crumb, 5 McLean, 172, Fed. Cas. No. 14,073; Jordan v. Robinson, 15 Me. 168; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64; McDonald v. Dickson, 87 N. C. 404; Napier v. Gidiere, Speers, Eq. (S. C.) 215, 40 Am. Dec. 613; Keith v. Estill, 9 Port. (Ala.) 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. (Ill.) 269; Rae v. Hulbert, 17 Ill. 572; Sprott v. Reid, 3 Iowa, 489, 56 Am. Dec. 549; Larrabee v. Baldwin, 35 Cal. 156; Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 955.

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this principle. (3 Bl. Comm. 160.) But contracts of this description are not barred by this part of the statute [of limitations]." [34] 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 liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed." [35] 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.[36] "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

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

[35] McDonald v. Dickson, 87 N. C. 404.

[36] Garrison v. City of New York, 21 Wall. 196, 22 L. Ed. 612; McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 263; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; City of Sherman v. Langham, 92 Tex. 13, 42 S. W. 961.

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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." [37]

§ 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.[38] But, as we have seen, there is a preponderance of authority in favor of the proposition that judgments are not contracts.

[37] Field, J., in Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. See State v. New Orleans, 32 La. Ann. 709, holding that claims arising from a tort,—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.

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

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But in point of fact, the most distinctive mark of a contract is wanting, viz.: the assent of both parties.[39] 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 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.[40] 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

[39] "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.

[40] "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.

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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.[41] 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 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." [42]

§ 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,[43] 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.[44] If

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

[42] Wadsworth v. Henderson (C. C.) 16 Fed. 451, Barr, J.

[43] See Weaver v. Lapsley, 43 Ala. 224; Scarborough v. Dugan, 10 Cal. 305. But see Sprott v. Reid, 3 Iowa, 489, 56 Am. Dec. 549. Compare Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

[44] Black, Const. Prohib. §§ 152, 157, 163, 197, 199.

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the cause of action was in tort, the constitutional clause does not apply.[45] 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 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.[46] 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,

[45] Garrison v. City of New York, 21 Wall. 196, 22 L. Ed. 612; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193.

[46] Moore v. Nowell, 94 N. C. 265; Johnson v. Butler, 2 Iowa, 545.

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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.

§ 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." [47]

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.[48]

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.[49]

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.

[47] Hale v. Lawrence, 22 N. J. Law, 72; Silver v. Rhodes, 2 Har. (Del.) 369; Pettys v. Marsh, 24 Fla. 44, 3 South. 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.

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

[49] 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; Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969; White v. Levy, 93 Ala. 484, 9 South. 164.

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§ 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 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." [50]

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. This is called, in full,

[50] See Texas, S. F. & N. R. Co. v. Saxton, 3 N. M. 282 (Johns.) 6 Pac. 206. Where issue has been joined on a plea in abatement (the only plea in the case), and the issue submitted to a jury, resulting in a verdict for the plaintiff, the court should award a peremptory judgment quod recuperet, and not a default for want of a plea. Bishop v. Camp, 39 Fla. 517, 22 South. 735.

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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 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.[51]

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.[52] It cannot be entered, in a suit for unliquidated damages, over an answer stating matters in mitigation.[53]

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

[51] Garner v. Carrol, 7 Yerg. (Tenn.) 365; Jones v. Read, 1 Humph. (Tenn.) 335.

[52] Botto v. Vandament, 67 Cal. 332, 7 Pac. 753; Amador Co. v. Butterfield, 51 Cal. 526; Shattuc v. McArthur (C. C.) 25 Fed. 133; Felch v. Beaudry, 40 Cal. 439; Finley v. City of Tucson (Ariz.) 60 Pac. 872. 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. And where an issue is distinctly raised by the answer, and submitted to the jury without objection, and a verdict given for defendant, it is then too late for plaintiff to move for judgment on the pleadings. Lewis v. Foard, 112 N. C. 402, 17 S. E. 9.

[53] Shattuc v. McArthur (C. C.) 25 Fed. 133.

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verdict in his favor, an involuntary nonsuit is entered against him.[54]

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.

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.[55]

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.[56]

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.[57]

[54] Where plaintiff's evidence is excluded from the jury, the proper judgment is one of nonsuit. Wilson v. Breyfogle, 11 C. C. A. 248, 63 Fed. 379. Also where the court holds that plaintiff cannot recover on his pleadings. Murray v. Southerland, 125 N. C. 175, 34 S. E. 270. But a nonsuit does not warrant a judgment dismissing the complaint on the merits. Thiry v. Taylor Brewing & M. Co., 37 App. Div. 391, 56 N. Y. Supp. 85; McCune v. Eaton, 77 Minn. 404, 80 N. W. 355.

[55] A judgment of non pros. is in effect a judgment by default for laches. Walton v. Lefever (Pa.) 17 Lanc. Law Rev. 203; People v. Reuter, 88 Ill. App. 586. A plea being bad, so that demurrer thereto is improperly overruled, plaintiff is not in default for not replying, and therefore a judgment of non pros. for want of replication is error. Henderson v. Maryland Home Fire Ins. Co., 90 Md. 47, 44 Atl. 1020.

[56] Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; 3 Bl. Comm. 296; Cunningham v. Schley, 68 Ga. 105; infra, § 700.

[57] Tuppery v. Hertung, 46 Mo. 135. See Jones v. Webb, 8 S. C. 202; Summar v. Owen, 62 Tenn. 26.

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§ 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.[58] 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 the plaintiff's declaration, and shows that he was entitled to maintain his action."[59] 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.[60] 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.[61]

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.[62]

[58] 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. Scot, 1 Root (Conn.) 351; Bellows v. Shannon, 2 Hill (N. Y.) 86; Moye v. Petway, 76 N. C. 327; Ward v. Phillips, 89 N. C. 215; State v. Commercial Bank, 6 Smedes & M. (Miss.) 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. (Ind.) 384; Pomeroy v. Burnett, 8 Blackf. (Ind.) 142; Jones v. Fennimore, 1 G. Greene, 134; Oades v. Oades, 6 Neb. 304; Hauser v. Harding, 126 N. C. 295, 35 S. E. 586; O'Neal v. Rumley Co., (Ky.) 53 S. W. 521; Friendly v. Lee, 20 Or. 202, 25 Pac. 396. See Collier v. Jenks, 19 R. I. 493, 34 Atl. 998.

[59] Bouv. Law Dict., "Judgment."

[60] Dewey v. Humphrey, 5 Pick. (Mass.) 187.

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

[62] Felton v. Chicago, R. I. & P. R. Co., 69 Iowa, 577, 29 N. W. 618; Louis-

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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." [63] 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.[64]

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.[65] In Pennsylvania, when the court has reserved the question whether there is any evidence entitling the plaintiff to recover, and the evidence has been submitted to the jury, and a verdict has been returned for the plaintiff, the court

ville, N. A. & C. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; School District No. 46 v. Lund, 51 Kan. 731, 33 Pac. 595; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. (C. C.) 66 Fed. 471.

[63] Porter v. Waltz, 108 Ind. 40, 8 N. E. 705; Cox v. Ratcliffe, 105 Ind. 374, 5 N. E. 5; Pennsylvania Co. v. Smith, 98 Ind. 42; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; McNabb v. Clipp, 5 Ind. App. 204, 31 N. E. 858; Vance v. City of Franklin, 4 Ind. App. 515, 30 N. E. 149; Todd v. Badger, 134 Ind. 204, 33 N. E. 963; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146; Stein v. Chicago & G. T. Ry. Co., 41 Ill. App. 38.

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

[65] Wilde v. Trainor, 59 Pa. 442; Fayette City Borough v. Huggins, 112 Pa. 1, 4 Atl. 927; Buckley v. Duff, 111 Pa. 223, 3 Atl. 823; Keifer v. Eldred Township, 110 Pa. 1, 20 Atl. 592. Where, after reserving a point on certain facts, the court submits other evidence to the jury, a judgment non obstante cannot be entered if it is uncertain whether the jury found on the facts on which the reservation was made or on the other evidence. Keifer v. Eldred Township, supra. On a verdict in trespass awarding the plaintiff a specified amount of damages as compensation and a specified amount of punitive damages, the court, on appeal, may enter judgment for the amount of the compensatory damages and judgment non obstante for the defendant as to the punitive damages, although no point was reserved on the record. Gedusky v. Rubinsky, 8 Pa. Dist. R. 10.

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may then, on the reservation, enter judgment for the defendant non obstante veredicto.[66]

At the common law, a defendant is not entitled in any circumstances 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,[67] or, in case of conflict between the general verdict and the special findings, to move for judgment on such findings.[68] But in a number of the states, this rule has been relaxed, either by statute or by the decisions of the courts, so as to admit of the entry of judgment notwithstanding the verdict, in proper cases, in favor of the defendant.[69] Thus, in Nebraska, the code of procedure provides that "where, on the statements in pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party." This will entitle the defendant to a judgment notwithstanding a verdict for the plaintiff, if the plaintiff's own pleadings show that he ought

[66] Fisher v. Scharadin, 186 Pa. 565, 40 Atl. 1091. Compare Butts v. Armor's Estate, 164 Pa. 73, 30 Atl. 357, 26 L. R. A. 213; Yerkes v. Richards, 170 Pa. 346, 32 Atl. 1089; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52.

[67] German Ins. Co. v. Frederick, 7 C. C. A. 122, 58 Fed. 144; Smith v. Powers, 15 N. H. 546; Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 956; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345; Burnham v. New York, P. & B. R. Co., 17 R. I. 544, 23 Atl. 638; Smith v. Smith, 4 Wend. (N. Y.) 468; Schermerhorn v. Schermerhorn, 5 Wend. (N. Y.) 513; Bellows v. Shannon, 2 Hill (N. Y.) 86; Christian v. Yarborough, 124 N. C. 72, 32 S. E. 383; Bowdre v. Hampton, 6 Rich. Law (S. C.) 208; Barnes v. Rodgers, 54 S. C. 115, 31 S. E. 885; Buckingham v. McCracken, 2 Ohio St. 287; Bradshaw v. Hedge, 10 Iowa, 402; Lough v. Thornton, 17 Minn. 253 (Gil. 230); Sheehy v. Duffy, 89 Wis. 6, 61 N. W. 295; Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462; Floyd v. Colorado Fuel & Iron Co., 10 Colo. App. 54, 50 Pac. 864.

[68] Teehan v. Union Bridge Co., 84 Ill. App. 532.

[69] Martindale v. Price, 14 Ind. 115; Carl v. Granger Coal Co., 69 Iowa, 519, 29 N. W. 437; Holland v. Kindregan, 155 Pa. 156, 25 Atl. 1077. A judgment for defendant non obstante veredicto will not be granted where the defense is a general denial. Virgin Cotton Mills v. Abernathy, 115 N. C. 402, 20 S. E. 522. Nor where the pleadings and evidence raise questions of fact proper for the jury. Slivitzki v. Town of Wien, 93 Wis. 460, 67 N. W. 730. See Templeman v. Gibbs (Tex. Civ. App.) 25 S. W. 736.

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not to recover; but not merely on the ground that the verdict is contrary to the weight of the evidence.[70] In Minnesota, the law allows an entry of judgment for the defendant, notwithstanding a verdict for the plaintiff, in cases where the facts stated in the plaintiff's pleadings are not sufficient, in point of substance, to constitute a legal cause of action; but not on the ground of such a failure of evidence, in weight or detail, as would warrant the court in ordering a new trial.[71] A similar rule obtains in Oregon.[72] In Pennsylvania, where the plaintiff's evidence is so weak as to amount but to a scintilla, judgment may be rendered for the defendant non obstante veredicto.[73] In Kentucky, in an action for damages caused by defendant's negligence, where a plea of contributory negligence is not controverted, defendant is entitled to judgment notwithstanding a verdict for the plaintiff.[74]

A motion for judgment non obstante veredicto is founded on the record alone, and its determination cannot be influenced by affidavits or extrinsic evidence.[75] In some states, it is held that a party will not be entitled to have a judgment of this kind entered in his favor, unless he has moved to direct a verdict at the close of the testimony; and moreover, after judgment, he must specifically move for judgment non obstante veredicto, a mere motion for a new trial

[70] Code Civ. Proc. Neb. § 440; Manning v. City of Orleans, 42 Neb. 712, 60 N. W. 953; Gibbon v. American Bldg. & Loan Ass'n, 43 Neb. 132, 61 N. W. 126; Stewart v. American Exchange Nat. Bank, 54 Neb. 461, 74 N. W. 865.

[71] Cruikshank v. St. Paul Fire & Marine Ins. Co., 75 Minn. 266, 77 N. W. 958; Kreatz v. St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Bragg v. Chicago, M. & St. P. R. Co., 81 Minn. 130, 83 N. W. 511. Compare Baxter v. Covenant Mut. Life Ass'n, 81 Minn. 1, 83 N. W. 459.

[72] Benicia Agricultural Works v. Creighton, 21 Or. 495, 28 Pac. 775.

[73] Holland v. Kindregan, 155 Pa. 156, 25 Atl. 1077.

[74] Louisville & N. R. Co. v. Mayfield (Ky.) 35 S. W. 924.

[75] Snow v. Conant, 8 Vt. 309; Smith v. Smith, 2 Wend. (N. Y.) 624; Chicago & E. R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033; Lichtstein v. Northwestern Nat. Ins. Co., 23 Pa. Co. Ct. R. 471. In Ohio, the statute confines the court to a consideration of the statements in the pleadings, and the record, outside of such statements, should not be considered in disposing of the motion. McCoy v. Jones, 61 Ohio St. 119, 55 N. E. 219; Beetz v. Strobel, 6 Ohio Dec. 143.

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not being sufficient to authorize the judgment.[76] The 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.[77] And where one judge presided at the trial of an action, another judge has no authority, on motion for judgment notwithstanding the verdict, to make findings of fact on evidence not heard by him.[78]

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.[79]

§ 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."[80]

[76] Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099; Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366; Crane v. Knauf, 65 Minn. 447, 68 N. W. 79.

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

[78] Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

[79] 2 Tidd, Prac. 922.

[80] 5 Bac. Abr. 292, cited Freem. Judgm. § 8.

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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.

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.[81] It is otherwise defined as "one that is to be valid unless something else should be done within a given time to defeat it."[82] A rule or order nisi is one which is to be confirmed or

[81] Bouv. Law Dict. sub voce.

[82] United States v. Winstead (D. C.) 12 Fed. 50. See Strickland v. Cox, 102 N. C. 411, 9 S. E. 414.

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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.[83] 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.

[83] 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. Interlocutory and Intermediate Orders.
23. Must be final as to all Parties.
24. Must settle all the Issues.
25. Uncertainty of the Amount.
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27. Dismissal of Suit.
28. Judgment by Default.
29. Judgment on Demurrer.
30. Judgment on Plea in Abatement.
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32. Granting or Refusing Extraordinary Remedies.
33. On Motion for New Trial.
34. Vacating or Reversing former Judgment.
35. Orders as to Interpleader, Intervention, and Joinder of Parties.
36. Dissolving Attachments and Executions.
37. Order removing Cause.
38. Judgments and Orders of Probate Courts.
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 realty. So also, with certain minor exceptions, it is only a final judg-

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ment 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.[1] By the federal judiciary act [2] 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 puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.[3] 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.[4] 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.[5] In other words, it is not at all necessary that

[1] Tunno v. International R. & S. Co., 34 Fla. 300, 16 South. 180; Van Zandt v. Gormley, 66 Ill. App. 588; City of Bath v. Palmer, 90 Me. 467, 38 Atl. 365.

[2] Rev. St. U. S. § 709.

[3] 3Bl. Comm. 398.

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

[5] Belt v. Davis, 1 Cal. 134; Weston v. City of Charleston, 2 Pet. 449, 7 L. Ed. 481; Klink v. The Cusseta, 30 Ga. 504; Williams v. Wait, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768; State v. Superior Court of Jefferson County,

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the judgment should be upon the merits, if it definitely puts the case out of court.[6] 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.[7] On the other hand, a judgment is as final when pronounced by the court as when entered and recorded by the clerk.[8] 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.[9]

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.

3 Wash. St. 696, 29 Pac. 202. A judgment in a contest to determine whether a homestead is subject to sale on execution is a final judgment from which an appeal will lie. Wright v. Jones, 103 Ala. 539, 15 South. 852. To constitute a final judgment for purpose of appeal, it is not essential that it should be a bar to another suit. Colorado Eastern R. Co. v. Union Pac. R. Co., 36 C. C. A. 263, 94 Fed. 312.

[6] Where a verdict is returned in favor of plaintiff, and the court sustains a motion in arrest of judgment, and subsequently orders the cause stricken from the docket, the case has reached such an end that an appeal will lie. Daugherty v. Midland Steel Co., 23 Ind. App. 78, 53 N. E. 844. When a controversy between two parties is ended, so far as the court before which it is pending can end it, the judgment is then final, regardless of mere matter of form. Heegaard v. Dakota Loan & Trust Co., 3 S. D. 569, 54 N. W. 656.

[7] Macnevin v. Macnevin, 63 Cal. 186; Eastham v. Sallis, 60 Tex. 576; Durant v. Comegys, 2 Idaho, 809, 26 Pac. 755, 35 Am. St. Rep. 267.

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

[9] Brown v. Evans (C. C.) 18 Fed. 56; Danielson v. Northwestern Fuel Co. (C. C.) 55 Fed. 49; New York, C. & St. L. R. Co. v. Doane, 105 Ind. 92, 4 N. E. 419; Stoll v. Daily Min. Co., 19 Utah, 271, 57 Pac. 295. 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.

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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.[10]

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.[11] 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.[12]

§ 22. Interlocutory and Intermediate Orders.

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.[13] And the office of an interlocutory judgment at common law is, under the code practice, filled by various orders. But as,

[10] 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. 657. Conditional judgments may be final if they dispose of the case as to all parties before the court and as to the entire subject-matter of the litigation. Thus, a judgment for the sale of a certain tract of land to satisfy a sum adjudged to be a lien thereon, in the event that another tract ordered to be sold shall not be sufficient for that purpose, is a final order from which an appeal can be prosecuted. Tabor v. Payne (Ky.) 41 S. W. 557. Compare Standard Steam Laundry v. Dole, 20 Utah, 469, 58 Pac. 1109.

[11] Hobbs v. Beckwith, 6 Ohio St. 252; Maysville & L. R. Co. v. Punnett, 15 B. M. (Ky.) 47. An unconditional order for the payment of money within a certain time is a final order, from which an appeal lies. Nevitt v. Woodburn, 45 Ill. App. 417. In England, it is said that an order is final only where it is made upon an application or proceeding which must in any event, whether it succeeds or fails, finally determine the rights of the parties. Salaman v. Warner [1891] 1 Q. B. 734.

[12] Hazlehurst v. Morris, 28 Md. 67. An order refusing an application for judgment on the special findings of the jury, contrary to the general verdict, is not final or appealable. Persons v. Simons, 1 N. D. 243, 46 N. W. 969; Atchison, T. & S. F. R. Co. v. Brown, 57 Kan. 785, 48 Pac. 31.

[13] Sellers v. Union Lumbering Co., 36 Wis. 398. Under this definition, an order that a petition be treated as if it had not been filed is appealable. Har-

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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.[14] 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." [15]

An order setting aside a sale of property made in disregard of an injunction issued in the same suit is a final order and appealable.[16] So also is an order in an equity cause committing a witness, not a party to the suit, for contempt in refusing to testify;[17] and an order confirming a sale;[18] and an order vacating an arrest;[19] and an order directing a sheriff who has possession of warrants, by virtue of

rison v. Lebanon Waterworks, 91 Ky. 255, 15 S. W. 522, 34 Am. St. Rep. 180. In South Carolina, the statute gives the supreme court appellate jurisdiction of "any intermediate judgment, order, or decree involving the merits." Code Civ. Proc. S. C. § 11. See Du Pont v. Du Bos, 33 S. C. 389, 11 S. E. 1073. An order void as an act in excess of the court's jurisdiction is final in its legal significance, so as to be appealable. Therkelsen v. Therkelsen, 35 Or. 75, 54 Pac. 885. In Pennsylvania, the act allowing appeals from interlocutory orders was intended to reach only clear cases of error in law, and thus prevent the delay of a trial. Max Meadows Land & Imp. Co. v. Mendenhall, 4 Pa. Super. Ct. 398.

[14] For illustrations of orders affecting substantial rights, see Gilbert v. Thayer, 104 N. Y. 200, 10 N. E. 148; State Bank of Nebraska v. Green, 8 Neb. 297, 1 N. W. 210; Starbuck v. Dunklee, 10 Minn. 168 (Gil. 136), 88 Am. Dec. 68; Kingsley v. Gilman, 12 Minn. 515 (Gil. 425); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832.

[15] Code Civ. Proc. Cal. § 939.

[16] Grant v. Lowe, 32 C. C. A. 379, 89 Fed. 881.

[17] Butler v. Fayerweather, 33 C. C. A. 625, 91 Fed. 458.

[18] Edwards v. Maupin, 7 Mackey (D. C.) 39.

[19] Raisin Fertilizer Co. v. Grubbs, 114 N. C. 470, 19 S. E. 597.

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certain replevin proceedings, to deliver them to a certain person, made in another suit to which the sheriff is not a party.[20] An appeal will also lie from a judgment sustaining exceptions to a referee's report, and an order thereafter overruling a motion for a new trial;[21] and from an order directing the receiver of an insolvent corporation to sue the stockholders.[22] An order of the trial court, refusing to proceed with the trial of a case, is an interlocutory judgment.[23] And an order overruling a motion to correct the date of a judgment is a final order and appealable.[24]

But an order quashing the service of process in a case is not considered final in such sense as to be appealable.[25] Nor can an appeal be taken from an order granting or refusing leave to amend the pleadings;[26] nor from a judgment allowing a garnishee to file an answer after default;[27] nor from an order granting a change of venue;[28] nor from a refusal to grant a continuance.[29] An order denying a motion to set aside an order contained in the judgment, that execution issue as well against the defendant's person as against his property, is not final nor appealable.[30] And the same is true of

[20] Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095.

[21] Hart v. Hiatt, 2 Ind. T. 245, 48 S. W. 1038.

[22] Republic Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328.

[23] Kleiber v. McManus, 66 Tex. 48, 17 S. W. 249.

[24] Warrington v. Upham Manuf'g Co., 18 Ohio Cir. Ct. R. 311.

[25] Winn v. Carter Dry-Goods Co., 102 Ky. 370, 43 S. W. 436; Brown v. Rice, 30 Neb. 236, 46 N. W. 489; Persinger v. Tinkle, 34 Neb. 5, 51 N. W. 299; Standard Distilling Co. v. Freyhan, 34 Neb. 434, 51 N. W. 976. But in Kansas, such an order is final and appealable. Newberry v. Arkansas, K. & C. Ry. Co., 52 Kan. 613, 35 Pac. 210.

[26] Sinclair v. Western N. C. R. Co., 111 N. C. 507, 16 S. E. 336; State v. Caraleigh Phosphate & Fertilizer Works, 123 N. C. 162, 31 S. E. 373; Parker v. Harden, 122 N. C. 111, 28 S. E. 962; Gunn v. Donoghue, 135 Ill. 479, 25 N. E. 750; Lamon v. McKee, 7 Mackey (D. C.) 446; Troup v. Horbach, 57 Neb. 644, 78 N. W. 286; McElwain v. Huston, 1 Wash. St. 359, 25 Pac. 465. But in Iowa, an order striking out a cross bill is appealable. Mahaska County State Bank v. Christ, 82 Iowa, 56, 47 N. W. 886.

[27] Moore v. Hill, 87 Ga. 91, 13 S. E. 259.

[28] Edgerly v. Stewart, 86 Iowa, 87, 52 N. W. 1121; State v. Shaw, 21 Nev. 222, 29 Pac. 321. Compare Code Civ. Proc. Cal. § 939.

[29] Newman v. Wildenstein, 42 La. Ann. 925, 8 South. 607.

[30] Jennings v. Bartels, 2 Wash. T. 306, 24 Pac. 678.

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an order appointing an assignee in insolvency in place of the one named by the assignor in his deed.[31] Nor will an appeal lie from an interlocutory judgment reassigning a homestead and appointing commissioners to admeasure the same;[32] nor from an order in insolvency proceedings, provisionally passing upon the amount a creditor is entitled to pay on a purchase of the insolvent's assets.[33]

§ 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.[34] Thus when suit is instituted against two or more defendants, and judgment is entered 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.[35] For the same reason, a decree dismissing a bill in equity as to one of several de-

[31] State v. Parker, 6 Wash. 411, 34 Pac. 149.

[32] Macke v. Byrd, 109 Mo. 487, 19 S. W. 70.

[33] Brown v. Minnesota Thresher Manuf'g Co., 44 Minn. 322, 46 N. W. 560.

[34] Baker v. Old Nat. Bank, 33 C. C. A. 570, 91 Fed. 449; Deadwyler v. Bank of the University, 110 Ga. 511, 35 S. E. 779; Martin v. Crow, 28 Tex. 614; Whitaker v. Gee, 61 Tex. 217; Gulf City Street Ry. & Real-Estate Co. v. Becker (Tex. Civ. App.) 23 S. W. 1015; Reed v. Liston, 8 Tex. Civ. App. 118, 27 S. W. 913; Caldwell v. Bryan (Tex. Civ. App.) 37 S W. 335; Burrows v. Cox (Tex. Civ. App.) 38 S. W. 50; Delap v. Hunter, 1 Sneed (Tenn.) 101; Champ v. Kendrick, 130 Ind. 545, 30 N. E. 635; Keller v. Jordan, 147 Ind. 113, 46 N. E. 343; Sater v. Hunt, 1 Mo. App. Rep'r, 365, 61 Mo. App. 228; Harman v. Blackstone, 1 Mo. App. Rep'r, 391, 61 Mo. App. 254; Peck v. Vandenberg, 30 Cal. 11. But in Georgia, by statute, an order is final and appealable if it is "final as to some material party" to the action; and this allows an appeal by such a party when his rights are finally adjudged, though the action remains pending as to others. United Underwriters' Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565; Deadwyler v. Bank of the University, 110 Ga. 511, 35 S. E. 779. And see Connell v. Brumback, 18 Ohio Cir. Ct. R. 502.

[35] Whitaker v. Gee, 61 Tex. 217; Masterson v. Williams (Tex.) 11 S. W. 531; City of Texarkana v. Rodgers (Tex. Civ. App.) 26 S. W. 447; Maley v. Lake Erie & W. R. Co., 84 Ill. App. 55; Case v. Ingle, 2 Ind. T. 309, 51 S. W. 958; Schultz v. McLean, 76 Cal. 608, 18 Pac. 775. In Connecticut, the practice act, by authorizing one action against defendants with adverse interests, and authorizing the court in such cases to order separate trials, permits of the entry of a final and appealable judgment as to one defendant, although

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fendants sought to be jointly charged is not a final decree from which an appeal may be taken.[36] But these rules do not apply where there are parties who are merely formal parties to the record, or as to whom there are separable controversies. For example, an order dismissing an interpleader,[37] or discharging a garnishee,[38] may be final and appealable. So, the right of appeal is not affected by the fact that there is no decree against one of the respondents, who was not served with process, and who, though a proper, was not a necessary, party to the suit.[39] And a judgment in an action by an infant for personal injuries may be final, though it does not in express terms dispose of his next friend.[40] The same is true of a judgment against one of the members of a firm separately sued on the firm indorsement of a note.[41] And where several actions to enforce mechanics' liens against the same defendant are consolidated, a judgment against one of the plaintiffs is final as to him and may be appealed.[42]

§ 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,

the action remains pending as to the other parties. Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 33 Atl. 533.

[36] Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443; National Bank of Rondout v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; Dreyer v. Goldy, 171 Ill. 434, 49 N. E. 560; Lang v. Ingalls Zinc Co., 99 Tenn. 476, 42 S. W. 198. In Illinois, it appears that an appeal may be allowed in such a case if it is shown that "peculiar hardship" would result from refusing to allow it. See Pain v. Kinney, 73 Ill. App. 115, affirmed, 175 Ill. 264, 51 N. E. 621. And see Royall's Adm'rs v. Johnson, 1 Rand. (Va.) 421; Nichol v. Dunn, 25 Ark. 129.

[37] Standley v. Roberts, 8 C. C. A. 305, 59 Fed. 836.

[38] Steiner v. First Nat. Bank, 115 Ala. 379, 22 South. 30.

[39] Bradshaw v. Miners' Bank, 26 C. C. A. 673, 81 Fed. 902. See Harris v. Sanders (Tex. Civ. App.) 45 S. W. 29; Davis & Rankin Bldg. & Manuf'g Co. v. Hillsboro Creamery Co., 9 Ind. App. 553, 37 N. E. 294.

[40] Texas Cent. Ry. Co. v. Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

[41] Jameson v. Smith, 19 Tex. Civ. App. 90, 46 S. W. 864.

[42] Orman v. Crystal River Ry. Co., 5 Colo. App. 493, 39 Pac. 434.

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is not a final adjudication. For there cannot be two final judgments in the same action.[43] But this rule does not apply where several distinct causes of action are united in the same suit,[44] or where subordinate or ancillary matters arise in the course of the action, each capable of final determination by itself and independently of the main controversy.[45]

§ 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.[46] 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

[43] Brown v. Cranberry Iron & Coal Co., 25 U. S. App. 107, 13 C. C. A. 66, 65 Fed. 636; Frank v. Tatum (Tex. Civ. App.) 20 S. W. 869; Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; McKissack v. Voorhees, 119 Ala. 101, 24 South. 523; Potter v. Talkington (Idaho) 49 Pac. 14; Low v. Crown Point Min. Co., 2 Nev. 75. Compare Hake v. Coach, 105 Mich. 425, 63 N. W. 306. A judgment for plaintiff is not final unless it disposes of matters pleaded by way of cross-bill or counterclaim. Gulf, C. & S. F. R. Co. v. Stephenson (Tex. Civ. App.) 26 S. W. 236; Clopton v. Herring (Tex. Civ. App.) 26 S. W. 1104.

[44] Klever v. Seawall, 12 C. C. A. 653, 65 Fed. 373. In an action for the recovery of real estate, of personalty, and of moneys received, a judgment for the recovery of a certain sum is final and appealable, though no disposition of the real estate is made therein. Davies v. Thomson, 92 Tex. 391, 49 S. W. 215.

[45] A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final and appealable decree, although the residue of the fund may not have been finally disposed of. Tuttle v. Claflin, 31 C. C. A. 419, 88 Fed. 122. A judgment, in an action to establish plaintiff's right under a will, fixing an allowance for his support during the pendency of the suit, and ordering execution therefor, is final; and an appeal may be prosecuted during the pendency of the suit. McCreary v. Robinson, 92 Tex. 408, 49 S. W. 212.

[46] Millard v. Parsell, 57 Neb. 178, 77 N. W. 390; Riott v. Blackstone, 10 Pa. Super. Ct. 591.

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parties, but does not find the amount to be paid, leaving that for future determination, is not final.[47] 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.[48] 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.[49] 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.[50] 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.[51]

§ 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 prosecut-

[47] Follansbee v. Ballard Pav. Co., 154 U. S. 651, 14 Sup. Ct. 1189, 25 L. Ed. 802; Hunter v. Hunter, 100 Ill. 519.

[48] Belmont v. Ponvert, 3 Rob. (N. Y.) 693; Price v. Nesbit, 1 Hill, Eq. (S. C.) 445; Tuggle v. Gilbert, 1 Duv. (Ky.) 340; Deickhart v. Rutgers, 45 Mo. 132. But see Ayer v. Termatt, 8 Minn. 96 (Gil. 71).

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

[50] Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036.

[51] Fleming v. Bolling, 8 Grat. (Va.) 292.

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ing it." [52] For similar reasons a judgment of non pros. is appealable, being final as to the plaintiff.[53] But no appeal is ordinarily allowed from the plaintiff's voluntary entry of a nonsuit,[54] nor, unless the statute specially grants it, from an order setting aside a nonsuit.[55]

§ 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.[56] Thus a judgment dismissing a

[52] Belt v. Davis, 1 Cal. 134; Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835; Koons v. Bryson, 16 C. C. A. 227, 69 Fed. 297; Vicksburg, S. & P. R. Co. v. Scott, 47 La. Ann. 706, 17 South. 249; Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207; De Graf v. Seattle & T. Nav. Co., 10 Wash. 468, 38 Pac. 1006. But in Pennsylvania, under Act March 11, 1875, providing for a review by the supreme court where a nonsuit has been entered and a motion to set aside the judgment of nonsuit has been denied, error does not lie to the entry of a judgment of nonsuit, but only to a refusal to set such judgment aside. Scanlon v. Suter, 158 Pa. 275, 27 Atl. 963.

[53] Hartford Fire Ins. Co. v. Green, 52 Miss. 332; Henderson v. Maryland Home Fire Ins. Co., 90 Md. 47, 44 Atl. 1020; Purcell v. Payton, 58 Mo. App. 442.

[54] Mallory v. Taylor, 90 Va. 348, 18 S. E. 438; Rosenthal v. Roberson, 114 N. C. 594, 19 S. E. 667; Ropes v. Eldridge, 39 Fla. 47, 21 South. 570. An order refusing a party permission to dismiss his action is not final so as to be appealable. Troup v. Horbach, 57 Neb. 644, 78 N. W. 286.

[55] Ready v. Smith, 141 Mo. 305, 42 S. W. 727.

[56] 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 (Mass.) 553; Eddleman v. McGlathery, 74 Tex. 280, 11 S. W. 1100; Rogers v. Russell, 11 Neb. 361, 9 N. W. 547; Brush Electric Co. v. Electric Imp. Co., 7 U. S. App. 208, 2 C. C. A. 373, 51 Fed. 557; Hodges v. Kimball, 34 C. C. A. 103, 91 Fed. 845; Colorado Eastern R. Co. v. Union Pac. R. Co., 36 C. C. A. 263, 94 Fed. 312; Hunstock v. Hunstock, 43 La. Ann. 375, 8 South. 922; Howeth v. Clark (Tex.) 16 S. W. 175; Fuerman v. Ruhle (Tex.) 16 S. W. 536; Heegaard v. Dakota Loan & T. Co., 3 S. D. 569, 54 N. W. 656; Lawrence County v. Meade County, 6 S. D. 626, 62 N. W. 957; Byrne v. Hudson, 127 Cal. 254, 59 Pac. 597; Smith v. Mayor of Boston, 1 Gray (Mass.) 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

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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.[57] 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 garnishee for costs, at a subsequent term, is void.[58] But an appeal does not lie from an order directing the dismissal of the suit, but only from the judgment entered on such order.[59] Nor is a judgment appealable which dismisses the suit only as to some among the defendants,[60] nor one which dismisses it conditionally,[61] nor an order dismissing a cross-bill in equity.[62] Where a motion to dismiss is denied, this does not constitute such a final judgment as will be appealable.[63] Nor can plaintiff appeal from an order refusing to reinstate an action which he has himself dismissed.[64] It has also been held that the action of replevin is an extraordinary remedy, and that in such action a judgment dismissing the suit is not final, and error cannot be assigned upon such an order until after final judgment.[65]

§ 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 ascer-

judgment "that he go hence," that is no final judgment in favor of the defendant pleading. State Bank v. Roddy, 15 Ark. 401.

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

[58] Jackson v. St. Louis & S. F. R. Co., 89 Mo. 104, 1 S. W. 224.

[59] Metropolitan El. Ry. Co. v. Johnston, 84 Hun, 83, 32 N. Y. Supp. 49.

[60] Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co., 22 C. C. A. 11, 76 Fed. 10.

[61] Rich v. Manhattan R. Co., 138 N. Y. 668, 34 N. E. 402.

[62] Lamon v. McKee, 7 Mackey (D. C.) 446; Fleece v. Russell, 13 Ill. 31. See State v. Judge of Civil District Court, 35 La. Ann. 765.

[63] Plemmons v. Southern Imp. Co., 108 N. C. 614, 13 S. E. 188; Cameron v. Bennett, 110 N. C. 277, 14 S. E. 779; Bach v. Burke, 141 Pa. 649, 21 Atl. 779. Compare Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320.

[64] Smith v. May, 20 D. C. 97.

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

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tained 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.[66] "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." [67] Where suit is brought against two defendants who 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.[68]

"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 declaration. 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." [69]

[66] Sellers v. Burk, 47 Pa. 344; McClung v. Murphy, 2 Miles (Pa.) 177; Beitler v. Zeigler, 1 Pen. & W. (Pa.) 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; Daniel v. Cooper, 2 Houst. (Del.) 506; Phillips v. Hellings, 5 Watts & S. (Pa.) 44. In New York, no appeal can be taken from a judgment by default. Code Civ. Proc. N. Y. § 1294; Oliver v. French, 80 Hun, 175, 30 N. Y. Supp. 52; Hawkins v. Smith, 91 Hun, 299, 36 N. Y. Supp. 333. In Minnesota, no appeal lies from a judgment by default, until an application for relief has been made in the court below. Gederholm v. Davies, 59 Minn. 1, 60 N. W. 676. An order setting aside a default and allowing defendant to plead is not appealable. Territory v. Las Vegas Grant, 6 N. M. 87, 27 Pac. 414.

[67] Clements v. Berry, 11 How. 398, 13 L. Ed. 745, McLean, J.

[68] Commonwealth v. McCleary, 92 Pa. 188.

[69] Russell v. Lathrop, 122 Mass. 300.

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§ 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;[70] for the decision has the effect of disposing of that particular suit. But 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.[71] Hence no appeal will lie from an order sustaining a demurrer, where leave is granted to the party to amend his pleading, or to plead to the merits, as the case may be, unless he elects to stand upon his pleading as it is, or unless the time limited for amendment or new plea elapses without action on his part, and judgment is entered accordingly.[72] Nor can an appeal be taken from

[70] Peru Plow & Wheel Co. v. Sandwich Enterprise Co., 77 Ill. App. 653; Nicholas v. Maddox, 52 La. Ann. 496, 26 South. 994. A judgment for defendant on demurrer to part of the counts of a declaration is not reviewable on error before the case is determined as to the remaining counts. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366.

[71] Warner v. Tomlinson, 1 Root (Conn.) 201; Paddock v. Springfield Fire & Marine Ins. Co., 12 N. Y. 591; Elwell v. Johnson, 74 N. Y. 80; Johnson v. Polk Co., 24 Fla. 28, 3 South. 414; Rose v. Gibson, 71 Ala. 35; Shields v. Taylor, 13 Smedes & M. (Miss.) 127; State v. Falconer (Ark.) 5 S. W. 193; Slagle v. Bodmer, 58 Ind. 465; Hayes v. Caldwell, 5 Gilman (Ill.) 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. 44; Moraga v. Emeric, 4 Cal. 308; Miller v. Burlington & M. R. R. Co., 7 Neb. 227; Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514; Sheffield v. Murray, 80 Hun, 555, 30 N. Y. Supp. 799; Denslow v. Bush, 9 Misc. Rep. 337, 29 N. Y. Supp. 705; State v. Herod, 21 Ind. App. 177, 51 N. E. 952; Murphy v. Tilling, 2 App. D. C. 130; Gillespie v. Coleman, 98 Va. 276, 36 S. E. 377; State v. Trilling (Tex. Civ. App.) 57 S. W. 311; Olsen v. Newton, 3 Wash. St. 429, 30 Pac. 450; Potvin v. McCorvey, 1 Wash. St. 389, 25 Pac. 330; Smith v. Seattle & M. Ry. Co., 6 Wash. 295, 32 Pac. 1073. Compare Willis v. Marks, 29 Or. 493, 45 Pac. 293.

[72] Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514; Taylor v. MacLee, 19 Civ. Proc. R. 429, 11 N. Y. Supp. 640; Knickerbocker Co. v. Roskopf, 19 N. Y. Supp. 391; Mooney v. Byrne, 1 App. Div. 316, 37 N. Y. Supp. 388; Koch v. City of New York, 5 App. Div. 276, 39 N. Y. Supp. 164; Potts v. Potts,

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an order overruling a demurrer with leave to plead. There is no finality in such an order, though there would be in a judgment entered upon the demurrant's election to stand upon his demurrer or on his failure to plead, and finally disposing of the case.[73] It is 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.[74] So, in Mississippi, it is said that, under the statute, judgments on demurrers are not final

88 Md. 640, 42 Atl. 214; Throne-Franklin Shoe Co. v. Gunn, 123 Ala. 640, 26 South. 198; Texas Land & Loan Co. v. Winter (Tex. Sup.) 57 S. W. 39; Ferguson v. Mason (Ky.) 50 S. W. 15; Gurley v. Newport News & M. V. R. Co., 91 Tenn. 486, 19 S. W. 571; Thomas v. Chicago & E. Ry. Co., 139 Ind. 462, 39 N. E. 44; Maguire v. Woods, 33 Ill. App. 638; Peru Plow & Wheel Co. v. Sandwich Enterprise Co., 77 Ill. App. 653; Clark v. Village of North Muskegon, 86 Mich. 29, 48 N. W. 647; Perry v. Church, 107 Mich. 480, 65 N. W. 273; Mowbray v. Denver & R. G. R. Co., 2 Colo. App. 128, 29 Pac. 1016; Yager v. Lemp, 39 Neb. 93, 58 N. W. 285; Mason County v. Dunbar, 10 Wash. 163, 38 Pac. 1003; Case v. Ingle, 2 Ind. T. 309, 51 S. W. 958. See Johnson v. Union Switch & Signal Co., 125 N. Y. 720, 26 N. E. 455. It has been held that an order sustaining a demurrer to a petition for the removal of an assignee is appealable, as it affects a substantial right of both the petitioners and the assignee. Burtt v. Barnes, 87 Wis. 519, 58 N. W. 790.

[73] Meagher v. Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 Sup. Ct. 876, 36 L. Ed. 834; Werner v. City Council of Charleston, 151 U. S. 360, 14 Sup. Ct. 356, 38 L. Ed. 192; Robinson v. Belt, 5 C. C. A. 521, 56 Fed. 328; Edelin v. Lyon, 1 App. D. C. 87; Richardson v. Richardson, 193 Pa. 279, 44 Atl. 445; Nealon v. Frisbie, 9 Misc. Rep. 660, 30 N. Y. Supp. 551; Ackerly v. Osborn, 13 Misc. Rep. 323, 34 N. Y. Supp. 459; Cameron v. Bennett, 110 N. C. 277, 14 S. E. 779; Festorazzi v. St. Joseph's Catholic Church, 96 Ala. 178, 10 South. 521; Krause v. Stichtenoth, 15 Ohio Cir. Ct. R. 199; Foster v. Lindley, 20 Ind. App. 155, 50 N. E. 367; French v. Bellows Falls Sav. Inst., 67 Ill. App. 179; Chicago & N. W. Ry. Co. v. Andrews, 148 Ill. 27, 35 N. E. 617; Goldsmith v. Wilson, 82 Iowa, 720, 47 N. W. 1016; Quinn v. Capital Ins. Co., 82 Iowa, 550, 48 N. W. 935; Taylor v. Taylor, 87 Mich. 64, 49 N. W. 519; Fitzsimmons v. Milwaukee, L. S. & W. Ry. Co., 98 Mich. 257, 57 N. W. 127; Nelson v. Donovan, 14 Mont. 78, 35 Pac. 227; Gaines v. Cyrus, 23 Or. 403, 31 Pac. 833; Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030; Jones v. Quayle (Idaho) 32 Pac. 1134. See South & N. A. R. Co. v. Highland Ave. & B. R. Co., 104 Ala. 233, 16 South. 112.

[74] Reagh v. Spann, 3 Stew. (Ala.) 100.

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until the end of the term, until which time, on proper showing, they may be set aside.[75]

§ 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.[76] 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 domicile, and after hearing testimony the court decided that "his domicile 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.[77]

§ 31. Judgment for Costs.

A judgment which merely awards costs to the defendant, without more, is not a final judgment.[78] 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

[75] Shields v. Taylor, 13 Smedes & M. 127; Jacobs v. New York Life Ins. Co., 71 Miss. 656, 658, 15 South. 639.

[76] Jewett v. Davis, 6 N. H. 518; McCartee v. Chambers, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; Haight v. Holley, 3 Wend. (N. Y.) 258; Guild v. Bonnemort, 156 Mass. 522, 31 N. E. 645. Compare Lee v. Harper, 90 Ala. 548, 8 South. 685. For the rule in Missouri, see Mackey v. Hyatt, 42 Mo. App. 443; D. M. Osborne & Co. v. Farmers' Mach. Co., 114 Mo. 579, 21 S. W. 837. No appeal lies from an order overruling a plea in abatement. Bartels v. Sonnenschein, 54 Neb. 68, 74 N. W. 417.

[77] Benjamin v. Dubois, 118 U. S. 46, 6 Sup. Ct. 925, 30 L. Ed. 52; State v. Georgia Co., 109 N. C. 310, 13 S. E. 861.

[78] Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782; Green v. Banks, 24 Tex. 522; Whitney Iron Works Co. v. Reuss, 40 La. Ann. 112, 3 South. 500; Dusing v. Nelson, 7 Colo. 184, 2 Pac. 922; Higbee v. Bowers, 9 Mo. 354; Bick v. Seal, 39 Mo. App. 567; Kern v. Saul, 14 Ind. App. 72, 42 N. E. 496. Compare Sanborn v. Perry, 86 Wis. 361, 56 N. W. 337; Sprott v. Reid, 3 G. Greene (Iowa) 489, 56 Am. Dec. 549. An order denying a motion for costs, on the ground that the cause had been withdrawn before the return day, and before it had been entered on the docket of the court, is a final and appealable judgment. Wildman v. Munger, 70 Conn. 380, 39 Atl. 599.

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the subject-matter. "The form of the judgment," say the court in Texas, "is immaterial, but in substance it must show intrinsically and distinctly, 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."[79]

§ 31a. Allowance of Claims against Fund.

An application for the allowance of a claim against a fund which is before the court, or for a distributive share of such fund, is generally so far separable from the main controversy as to constitute a distinct, though subordinate, proceeding. Where this is the case, the decision of the court on such an application is to be regarded as final, quoad hoc, and therefore appealable. This rule applies to a decree or order allowing attorneys' fees out of a fund in course of administration by the court,[80] to an order granting or denying alimony or an allowance pending the suit,[81] to an order fixing the compensation of a receiver,[82] or directing him to pay certain claims out of the proceeds of a sale of the property,[83] or to pay a certain rate of wages to his employés.[84] Again, an order of a court of bankruptcy allowing a claim in bankruptcy is a final decision and appealable,[85] and the same is true of an order of the probate court fixing

[79] Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782.

[80] Jacksonville, T. & K. W. R. Co. v. American Const. Co., 6 C. C. A. 249, 57 Fed. 66; Tuttle v. Claflin, 31 C. C. A. 419, 88 Fed. 122; Oyster v. Bank, 107 Iowa, 39, 77 N. W. 523. Compare Fraser v. District of Columbia, 7 Mackey (D. C.) 150.

[81] Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; White v. White, 86 Cal. 212, 24 Pac. 1030; Campbell v. Campbell (Ky.) 50 S. W. 849.

[82] Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

[83] Rome & D. R. Co. v. Sibert, 97 Ala. 393, 12 South. 69.

[84] Guarantee Trust & Safe-Deposit Co. v. Philadelphia, R. & N. E. R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

[85] Duff v. Carrier, 5 C. C. A. 177, 55 Fed. 433.

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and determining the rights and estate of a surviving husband or wife in the homestead.[86] But it seems that the refusal of a court to distribute a fund before it,[87] or to strike off a mechanic's lien,[88] is, at least in some states, not an appealable order.

§ 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.[89] 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.[90] And so, generally, is a decree dissolving an injunction, or

[86] Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973.

[87] In re Hopper's Estate, 192 Pa. 287, 43 Atl. 1020.

[88] Carter v. Caldwell, 147 Pa. 370, 23 Atl. 575. And see In re Schaifer's Estate, 155 Pa. 250, 25 Atl. 607.

[89] Gibbons v. Ogden, 6 Wheat. 448, 5 L. Ed. 302; Barnard v. Gibson, 7 How. 650, 12 L. Ed. 857; Verden v. Coleman, 18 How. 86, 15 L. Ed. 272; Norton v. Hood (C. C.) 12 Fed. 763; Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Price v. Strange, 2 Hen. & M. (Va.) 615; Ewing v. Fuller, 7 D. C. 3; Dulaney v. Murphy (Ky.) 15 S. W. 7; Cottam v. Currie, 42 La. Ann. 875, 8 South. 600; Otto v. Halff (Tex. Civ. App.) 32 S. W. 1052; Green v. Banks, 24 Tex. 522; Ex parte Hawley, 24 Ark. 596; Moss v. Ashbrooks, 15 Ark. 169; Pentecost v. Magahee, 4 Scam. (Ill.) 326; Lucan v. Cadwallader, 114 Ill. 285, 7 N. E. 286; Jefferson v. Bohemian Ass'n, 5 Ill. App. 230; Greve v. Goodson, 142 Ill. 355, 31 N. E. 677; School Directors v. Wright, 43 Ill. App. 270; Keenan v. Williams, 45 Ill. App. 530; Clabby v. Sheldon, 47 Ill. App. 166; Harrison v. Rush, 15 Mo. 175; Tanner v. Irwin, 1 Mo. 65; Wing v. Warner, 2 Doug. (Mich.) 288; Chouteau v. Rice, 1 Minn. 24 (Gil. 8); School Dist. v. Brown, 10 Neb. 440, 6 N. W. 770; Smith v. Sahler, 1 Neb. 310; Scofield v. State Nat. Bank, 8 Neb. 16; Clark v. Fitch, 32 Neb. 511, 49 N. W. 374; Meng v. Coffee, 52 Neb. 44, 71 N. W. 975; Schuffert v. Grote, 83 Mich. 263, 47 N. W. 254; State v. First Judicial District Court, 52 Minn. 283, 53 N. W. 1157; North Point Irr. Co. v. Utah & S. L. Canal Co., 14 Utah, 155, 46 Pac. 824. But where the court not only refuses a preliminary injunction, but enters a decree settling the rights of the parties, an appeal lies. Helm v. Gilroy, 20 Or. 517, 26 Pac. 851.

[90] French v. Shoemaker, 12 Wall. 86, 20 L. Ed. 270; Merchants' Bank v. Kent, 43 Mich. 292, 5 N. W. 627; Rickards v. Coon, 13 Neb. 419, 14 N.

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refusing to dissolve it, where that is the sole or the main object of the bill.[91] It must be noted, however, that these rules may not apply in 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;[92] 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.[93] 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.[94]

W. 162; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615; Carondelet Canal Nav. Co. v. City of New Orleans, 44 La. Ann. 394, 10 South. 871; Davis v. Fasig, 128 Ind. 271, 27 N. E. 726; Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439; Sprague v. Locke, 1 Colo. App. 171, 28 Pac. 142. But see Brown v. Swann, 9 Pet. 1, 9 L. Ed. 29.

[91] Saloy v. Collins, 30 La. Ann. 63; Titus v. Mabee, 25 Ill. 257; Prout v. Lomer, 79 Ill. 331; Hedges v. Meyers, 5 Ill. App. 347; Oberkoetter v. Luebbering, 4 Mo. App. 481; McVickar v. Wolcott, 4 Johns. (N. Y.) 510; Cors v. Tompkins, 46 Ill. App. 322; Northwestern Brewing Co. v. Manion, 67 Ill. App. 316; Donahue v. Johnson, 9 Wash. 187, 37 Pac. 322. But see Hiriart v. Ballon, 9 Pet. 156, 9 L. Ed. 85.

[92] See Code Civ. Proc. Cal. § 939; Code Civ. Proc. Kan. § 542; Andrews v. Love, 46 Kan. 264, 26 Pac. 746. The act of congress establishing the circuit courts of appeals (Act March 3, 1891, § 7) authorizes an appeal to those courts from an "interlocutory order or decree granting or continuing an injunction." On the construction of this clause, see Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, 17 L. R. A. 615; Robinson v. City of Wilmington, 9 C. C. A. 84, 60 Fed. 469; Andrews v. National Foundry & Pipe Works, 10 C. C. A. 60, 61 Fed. 782.

[93] Holden v. Hasenrodt, 2 S. D. 220, 49 N. W. 97; Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784.

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

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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.[95] And an order removing a receiver is likewise interlocutory.[96] In a few states, nevertheless, it is held that orders appointing receivers are final and appealable.[97] 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 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.[98] An order confirming a sale of property made by a receiver is final and appealable,[99] and so is an order granting or denying an application for leave to sue the receiver,[100] an order authorizing receiver's certificates to issue for past and future expenses and making them a lien superior

[95] Fuller v. Adams, 12 Ind. 559; Produce Bank v. Morton, 40 N. Y. Super. Ct. 328; Eaton & H. R. Co. v. Varnum, 10 Ohio St. 622; Hottenstein v. Conrad, 5 Kan. 249; Maysville & L. R. Co. v. Punnett, 15 B. Mon. (Ky.) 47; Kansas Rolling Mill Co. v. Atchison, T. & S. F. R. Co., 31 Kan. 90, 1 Pac. 274; Lewis v. McCabe, 16 Mo. App. 398; Stebbins v. Savage, 5 Mont. 253, 5 Pac. 278; Bayor v. Ewart, 37 Ill. App. 318; Brachtendorf v. Kehm, 72 Ill. App. 228; Robrecht v. Robrecht, 46 W. Va. 738, 34 S. E. 801.

[96] Farson v. Gorham, 117 Ill. 137, 7 N. E. 104; Dufour v. Lang, 4 C. C. A. 663, 54 Fed. 913.

[97] 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. 395; Clark v. Raymond, 84 Iowa, 251, 50 N. W. 1068; City of Ogden v. Bear Lake & River Water-Works & Irrigation Co., 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305. Compare Brown v. Vandermeulen, 41 Mich. 418, 49 N. W. 920. In Maryland, the statute allows an appeal from an order appointing a receiver, but not from an order refusing to rescind the appointment. R. Frank Williams Co. v. United States Baking Co., 86 Md. 475, 38 Atl. 990.

[98] Cincinnati, S. & C. R. Co. v. Sloan, 31 Ohio St. 1; McCord v. Weil, 33 Neb. 868, 51 N. W. 300; Anderson v. Matthews, 8 Wyo. 307, 57 Pac. 156.

[99] City of New Orleans v. Peake, 2 U. S. App. 403, 2 C. C. A. 626, 52 Fed. 74.

[100] Meeker v. Sprague, 5 Wash. 242, 31 Pac. 628.

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to the claims of interveners,[101] and an order requiring payment of the receiver's compensation and other expenses out of funds in his hands.[102] An order settling the accounts of the receiver, which embraces all the transactions of the receivership during the entire period of his appointment, is in the nature of a final judgment;[103] but not an order merely directing the receiver to make a partial distribution of the funds in his hands.[104]

An order of a superior court granting a writ of certiorari is not appealable,[105] but if the court, on such writ, dismisses the case and orders execution and a writ of procedendo, this is a final and appealable judgment.[106] So, also, an appeal will lie from a judgment of a superior court dismissing an application for a writ of prohibition.[107] But an order denying an application for the writ of habeas corpus is not a final judgment from which an appeal may be taken.[108]

§ 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.[109] So also, an order overruling a motion to set aside the ver-

101 Standley v. Hendrie & Bolthoff Mfg. Co., 25 Colo. 376, 55 Pac. 723.

102 Ogden City v. Bear Lake & River Waterworks & Irrigation Co., 18 Utah, 279, 55 Pac. 385.

103 Patterson v. Ward, 6 N. D. 359, 71 N. W. 543.

104 Sykes v. Thornton, 152 Pa. 94, 25 Atl. 174.

105 Bank v. Burns, 107 N. C. 465, 12 S. E. 252.

106 Holman v. G. A. Stowers Furniture Co. (Tex. Civ. App.) 30 S. W. 1120.

107 Fayerweather v. Monson, 61 Conn. 431, 23 Atl. 878; Overland Gold Min. Co. v. McMaster, 19 Utah, 177, 56 Pac. 977.

108 Lambert v. Barrett, 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865. See Commonwealth v. Blatt, 165 Pa. 213, 30 Atl. 674.

109 Hume v. Bowie, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438; Morning Journal Ass'n v. Rutherford, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513, 16 L. R. A. 803; Baker v. Remington, 45 N. Y. 323; Lawson v. Moore, 44 Ala. 274; Fuller v. Boggs, 49 Ala. 127; Wheeler v. Maillot, 15 La. Ann. 659; Brown v. Carraway, 47 Miss. 668; Houston v. Starr, 12 Tex. 424; Stewart v. Jones, 9 Tex. 469; Wampler v. Walker, 28 Tex. 598; Schweitzer v. Irwin's Ex'x, 101 Ky. 401, 41 S. W. 265; Kennery's Adm'r v. Louisville & N. R. Co., 21 Ky. Law Rep. 532, 51 S. W. 804; State v. Perry, 4 Baxt. (Tenn.) 438; Louisville & N. R. Co. v. Conley, 10 Lea (Tenn.) 531; Hoyt

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dict 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.[110] The same remark is true of an order denying an application for a rehearing.[111] 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.[112] But in a few states, 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.[113] And in some other states, it is provided by statute that an appeal may be taken from an order granting or refusing a new trial.[114] But where an order refusing a new trial and dismissing the motion therefor is itself appeal-

Dry Goods Co. v. Thomas, 19 Ohio Cir. Ct. R. 638; House v. Wright, 22 Ind. 383; White v. Harvey, 23 Ind. 55; Byers v. Butterfield, 33 Mo. 376; McDonough v. Nicholson, 46 Mo. 35; Burden v. Hornsby, 50 Mo. 238; People v. Judge of Circuit Court, 41 Mich. 5, 2 N. W. 181; Johnson v. Parrotte, 46 Neb. 51, 64 N. W. 363; Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506, 50 Pac. 611.

[110] Waterhouse v. Rock Island Alaska Min. Co., 38 C. C. A. 281, 97 Fed. 466; Neidlinger v. Yoost, 39 C. C. A. 494, 99 Fed. 240; Moore v. United States, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Wheeler v. United States, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; Sigafus v. Porter, 51 U. S. App. 693, 28 C. C. A. 443, 84 Fed. 430; Whittaker v. West Boylston, 97 Mass. 273; Holdsworth v. Tucker, 147 Mass. 572, 18 N. E. 430; Taylor v. Smith, 24 App. Div. 519, 49 N. Y. Supp. 41; Damron v. Ferguson, 32 W. Va. 33, 9 S. E. 39; Roberts v. State, 3 Tex. App. 47; Conord v. Runnels, 23 Ohio St. 601; J. W. Reedy Elevator Manuf'g Co. v. Pitvowsky, 35 Ill. App. 364; Little v. Leighton, 46 Minn. 201, 48 N. W. 778; Smith v. Johnson, 37 Neb. 675, 56 N. W. 323; Kearney v. Snodgrass, 12 Or. 311, 7 Pac. 309; White v. Pease, 15 Utah, 170, 49 Pac. 416; Bacon v. Thornton, 16 Utah, 138, 51 Pac. 153.

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

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

[113] Baldwin v. Foss, 71 Iowa, 389, 32 N. W. 389; Atkinson v. Williams, 151 Ind. 431, 51 N. E. 721. And see Kernan v. St. Paul City Ry. Co., 64 Minn. 312, 67 N. W. 71.

[114] Code Civ. Proc. Cal. § 939; Code Civ. Proc. Kan. § 542; List v. Jockheck, 45 Kan. 349, 748, 27 Pac. 184; Ormiston v. Trumbo, 77 Mo. App. 310.

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able, no appeal will lie from an order refusing to revoke a prior order to that effect.[115]

§ 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.[116] 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.[117] 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 noth-

[115] Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Griess v. State Inv. & Ins. Co., 93 Cal. 411, 28 Pac. 1041.

[116] McCall v. Hitchcock, 7 Bush (Ky.) 615; Belt v. Davis, 1 Cal. 134; State v. Allen, 92 Mo. 20, 4 S. W. 414. A judgment of a federal circuit court denying a petition of a receiver of a corporation against which judgment was entered, to have the judgment opened and for leave to answer, is reviewable on error. Rust v. United Waterworks Co., 17 C. C. A. 16, 70 Fed. 129. And so is a decree taking from one party the right of redemption given to him by a former decree in the same suit, and conferring such right on another party. Burgess v. Ruggles, 146 Ill. 506, 34 N. E. 1036.

[117] McCulloch v. Dodge, 8 Kan. 476; Higgins v. Brown, 5 Colo. 345; Brown v. Edgerton, 14 Neb. 453, 16 N. W. 474; Dorsey v. Thompson, 37 Md. 25; Roh v. Vitera, 38 Neb. 333, 56 N. W. 977; Hirsh v. Weisberger, 44 Mo. App. 506. In Pennsylvania, under the act of May 20, 1891, an appeal may be taken from an order of the court opening a judgment. Pfaff v. Thomas, 3 Pa. Super. Ct. 419; Kelber v. Pittsburg Nat. Plow Co., 146 Pa. 485, 23 Atl. 335. But not from an order refusing to vacate a former order. Lowenstein v. North Schuylkill Ins. Co., 132 Pa. 410, 20 Atl. 688. Nor from an order of the orphans' court opening a decree of confirmation of the sale of land and setting aside the sale, since that is a matter of judicial discretion. Appeal of Montgomery Nat. Bank, 140 Pa. 187, 21 Atl. 242.

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ing, and is not assignable for error.[118] "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."[119] A writ of error cannot be taken from the supreme court 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 orders a new trial, such judgment not being final.[120] But a judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion in the latter as to further proceedings, is final.[121]

§ 35. Orders as to Interpleader, Intervention, and Joinder of Parties.

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.[122] So an order directing the payment into court of a garnishee fund claimed by a third person, pending the determination of the right to it, is not a final judgment.[123] An order refusing leave to intervene in a pending suit, where such intervention is not essential to the preservation of the petitioner's rights, but such rights may be asserted in an inde-

[118] Evans' Adm'r v. Clover, 1 Grant, Cas. (Pa.) 164; Lowenstein v. North Schuylkill Ins. Co., 132 Pa. 410, 20 Atl. 688; Lockwood v. Bock, 46 Minn. 73, 48 N. W. 458; Smith v. Shawano Co., 77 Wis. 672, 47 N. W. 95; Travelers' Ins. Co. v. Weber, 2 N. D. 239, 50 N. W. 703; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Welsh v. Lambert, 18 Utah, 1, 54 Pac. 975. But compare McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Northern Pac. & P. S. S. R. Co. v. Black, 3 Wash. St. 327, 28 Pac. 538; Myers v. Landrum, 4 Wash. St. 762, 31 Pac. 33; In re Davis' Estate, 11 Mont. 196, 28 Pac. 645; Tucker v. Stone, 92 Mich. 298, 52 N. W. 302. In Vermont, where an application to set aside a judgment is denied as a matter of law, the proceedings may be reviewed on appeal. Johnson v. Shumway, 65 Vt. 389, 26 Atl. 590.

[119] Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175.

[120] Houston v. Moore, 3 Wheat. 433, 4 L. Ed. 428; Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403.

[121] Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117.

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

[123] Louisiana Nat. Bank v. Whitney, 121 U. S. 284, 7 Sup. Ct. 897, 30 L. Ed. 961.

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pendent suit, is not a final order from which an appeal lies.[124] Nor is an order permitting a party to intervene,[125] nor an order striking out a petition of intervention because not filed in time.[126] Nor can an appeal be taken from an interlocutory order joining parties defendant in a cause.[127]

§ 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.[128] 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 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.[129] There is something

[124] Credits Commutation Co. v. United States, 34 C. C. A. 12, 91 Fed. 570; Lewis v. Baltimore & L. R. Co., 10 C. C. A. 446, 62 Fed. 218; Jones & Laughlins v. Sands, 25 C. C. A. 233, 79 Fed. 913; Hamlin v. Toledo, St. L. & K. C. R. Co., 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826. Compare Henry v. Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

[125] Jones v. New York Life Ins. Co., 11 Utah, 401, 40 Pac. 702.

[126] Whitney v. Spearman, 50 Neb. 617, 70 N. W. 240.

[127] Sneeden v. Harris, 107 N. C. 311, 12 S. E. 205; Lamon v. McKee, 7 Mackey (D. C.) 446.

[128] Hamner v. Scott, 8 C. C. A. 655, 60 Fed. 343; Atlantic Lumber Co. v. Bucki & Son Lumber Co., 35 C. C. A. 59, 92 Fed. 864; Philadelphia & R. R. R. v. Snowdon, 161 Pa. 201, 28 Atl. 1067; Slingluff v. Sisler, 193 Pa. 264, 44 Atl. 423; Stanton v. Heard, 100 Ala. 515, 14 South. 359; Realty Inv. Co. v. Porter, 58 Kan. 817, 50 Pac. 879; Noyes v. Phipps, 9 Kan. App. 887, 58 Pac. 1007; Wirt v. Dinan, 41 Mo. App. 236; Root v. State Bank, 30 Neb. 772, 47 N. W. 82; Jacobi v. Schloss, 7 Cold. (Tenn.) 385; Cutter v. Gumberts, 8 Ark. 449; Butcher v. Taylor, 18 Kan. 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 (Md.) 241; Talbot v. Pierce, 14 B. Mon. (Ky.) 195; Hanson v. Bowyer, 4 Metc. (Ky.) 108; Wickman v. Nalty, 41 La. Ann. 284, 6 South. 123.

[129] Bruce v. Conyers, 54 Ga. 678. And see Chappell v. Comins, 44 Kan.

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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." [130] 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.[131] But this view also has been denied.[132]

§ 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.[133] "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." [134] 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. But the right of appeal in such cases was taken away by the act of congress of March 3, 1887, which provides that "whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately

743, 25 Pac. 216; Williams v. Hutchinson, 26 Fla. 513, 7 South. 852; Code Civ. Proc. Cal. § 939.

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

[131] McCargo v. Chapman, 20 How. 555, 15 L. Ed. 1021; Terry v. Hughes, 93 Ala. 432, 8 South. 686; Bond v. Charleen, 1 Dak. 224, 46 N. W. 585.

[132] Loomis v. Lane, 29 Pa. 242, 72 Am. Dec. 625; Packer v. Owens, 164 Pa. 185, 30 Atl. 314.

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

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

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carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." [135] Nor will any appeal lie when the circuit court denies the motion to remand, and decides to retain jurisdiction; for this, it is considered, is not a final judgment or decree, but merely an interlocutory decision.[136]

§ 38. Judgments and Orders of Probate Courts.

Orders made by a surrogate or probate court, in the course of the administration or settlement of an estate before it, such as an order appointing or removing an executor, administrator, guardian, or trustee, are interlocutory in their nature and not generally appealable.[137] But when the final stage of the case is reached, and a decree is made for the distribution of the funds or estate under the control of the court, and the discharge of the executor or trustee, this is a final judgment, from which an appeal is generally allowed.[138] An

[135] 24 Stat. 553; Black, Dill. Rem. Causes, § 223; Sherman v. Grinnell, 123 U. S. 679, 8 Sup. Ct. 260, 31 L. Ed. 278; Morey v. Lockhart, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68; Wilkinson v. Nebraska, 123 U. S. 286, 8 Sup. Ct. 120, 31 L. Ed. 152; Birdseye v. Schaeffer, 140 U. S. 117, 11 Sup. Ct. 885, 35 L. Ed. 402; Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; Illinois Cent. R. Co. v. Brown, 156 U. S. 386, 15 Sup. Ct. 656, 39 L. Ed. 461. A later statute (25 Stat. 693) allowed an appeal from a "final judgment or decree" of a circuit court, involving the question of its jurisdiction. But it is held that an order of the circuit court remanding a cause to the state court on the ground of want of jurisdiction is not a "final judgment or decree," and hence this statute does not help the party objecting to the remand to procure a review of the order. Texas Land & Cattle Co. v. Scott, 137 U. S. 436, 11 Sup. Ct. 140, 34 L. Ed. 730; Joy v. Adelbert College, 146 U. S. 355, 13 Sup. Ct. 186, 36 L. Ed. 1003. The act creating the circuit courts of appeals does not give those courts jurisdiction to review, on appeal from a circuit court, an order of the latter court remanding a cause to a state court. In re Coe, 5 U. S. App. 6, 1 C. C. A. 326, 49 Fed. 481.

[136] Bender v. Pennsylvania Co., 148 U. S. 502, 13 Sup. Ct. 640, 37 L. Ed. 537; Patten v. Cilley, 1 C. C. A. 522, 50 Fed. 337.

[137] Monger v. Jeffries, 62 Ohio St. 149, 56 N. E. 654; Grimes v. Barratt, 60 Kan. 259, 56 Pac. 472. Compare Tome v. Stump, 89 Md. 264, 42 Atl. 902. An order of the probate court amercing a sheriff is a final and appealable judgment. Fenton v. White, 4 Okl. 472, 47 Pac. 472.

[138] Whitaker v. Sparkman, 30 Fla. 347, 11 South. 542; In re McFarland's Estate, 10 Mont. 445, 26 Pac. 185.

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order of such a court merely requiring a personal representative, guardian, or trustee to file an account, is not in its nature final,[139] nor is an order settling and allowing an annual or partial account of an executor or administrator.[140] But the case is otherwise when settlement is made of the final accounts of such fiduciaries, especially when distribution is ordered and the discharge of the trustee allowed. This is such a final decree as will be the proper subject of an appeal.[141]

§ 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.[142] But the first decree in partition may be final, and it will have that character, if it settles all the rights of the parties

[139] In re Callahan's Estate, 139 N. Y. 51, 34 N. E. 756; Wilcox v. Wilcox, 63 Vt. 137, 21 Atl. 423; In re Palethorp's Estate, 160 Pa. 316, 28 Atl. 689.

[140] Baker v. Schoeneman, 41 Mo. 392; In re Barnes, 43 Mo. App. 295. But if a partial distribution is ordered, it seems the decree may be considered final quoad hoc. McDonald v. McDonald, 68 Miss. 689, 9 South. 896.

[141] Moore's Appeal, 10 Pa. 435; Weinerth v. Trendley, 39 Mo. App. 333; In re Hill's Heirs, 7 Wash. 421, 35 Pac. 131; In re Bigge, 52 Kan. 184, 34 Pac. 782.

[142] Green v. Fisk, 103 U. S. 518, 26 L. Ed. 485; Id., 154 U. S. 668, 14 Sup. Ct. 1193, 26 L. Ed. 486; Elder v. McClaskey, 17 C. C. A. 251, 70 Fed. 529; Beebe v. Griffing, 6 N. Y. 465; Gesell's Appeal, 84 Pa. 238; Templeman v. Steptoe, 1 Munf. (Va.) 339; Young v. Skipwith, 2 Wash. (Va.) 300; Putman v. Lewis, 1 Fla. 455; Medford v. Harrell, 10 N. C. 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. Darby, 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 Neb. 299; Murray v. Yates, 73 Mo. 13. Compare Capell v. Moses, 36 S. C. 559, 15 S. E. 711; Skinner v. Carter, 108 N. C. 106, 12 S. E. 908.

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and leaves nothing for the future consideration or judicial action of the court.[143] 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.[144] 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.[145] 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.[146]

§ 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.[147] And so, it seems, is a judgment for condemnation, where the right to condemn is contested, although the amount of compensation remains still to be determined.[148] But an order in condemnation proceedings merely appointing commis-

[143] Ansley v. Robinson, 16 Ala. 793; Banton v. Campbell's Heirs, 2 Dana (Ky.) 421; Damouth v. Klock, 28 Mich. 163; Ruthenberg v. Helberg, 43 La. Ann. 410, 9 South. 99.

[144] Williams v. Wells, 62 Iowa, 740, 16 N. W. 513. See Cannon v. Hemphill, 7 Tex. 184; Taylor v. Dawson, 65 Ill. App. 232.

[145] Beatty v. Beatty's Adm'r (Ky.) 5 S. W. 771; Ames v. Ames, 148 Ill. 321, 36 N. E. 110.

[146] Holloway v. Holloway, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339.

[147] Sacramento, P. & N. R. Co. v. Harlan, 24 Cal. 337; Hutchinson v. McLaughlin, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287. See City of Johnstown v. Wade, 157 N. Y. 50, 51 N. E. 397.

[148] Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

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sioners to assess the damages is not a final or appealable order.[149] On similar principles, a decree of confirmation of a report of viewers laying out a road is final until reversed on certiorari;[150] and so is a judgment setting aside the award of commissioners for the assessment of damages upon the opening of a highway.[151]

§ 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.[152] 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.[153] According to another authority, any decree is final which renders the equities incapable of change in the further progress of the cause.[154] Or where nothing remains to be done which may be the

[149] Southern R. Co. v. Postal Tel. Cable Co., 35 C. C. A. 366, 93 Fed. 393; Ludlow v. City of Norfolk, 87 Va. 319, 12 S. E. 612.

[150] In re Hunter's Private Road, 46 Pa. 250.

[151] Morris & E. R. Co. v. City of Orange, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363.

[152] Railroad Co. v. Southern Exp. Co., 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Grant v. Phœnix Mut. Life Ins. Co., 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237; Cook's Heirs v. Bay, 4 How. (Miss.) 485; Vanmeter's Ex'rs v. Vanmeter, 3 Grat. (Va.) 148.

[153] Jaques v. Methodist Episcopal Church, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447.

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

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subject of exception or appeal.[155] 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."[156] 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 there may remain a reference to be had, or the adjustment of some incidental or dependent matter.[157]

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.[158]

§ 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

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

[156] Evans v. Dunn, 26 Ohio St. 439. See Grant v. East & West R. Co., 1 C. C. A. 681, 50 Fed. 795. Where discovery by answer is the only relief prayed in the bill, a rule to answer is, in effect, a final decree, and is therefore appealable. Grimes v. Hilliary, 38 Ill. App. 246.

[157] Walker v. Crawford, 70 Ala. 567. See Travis v. Waters, 1 Johns. Ch. (N. Y.) 85; Champlin v. Memphis & O. R. Co., 9 Heisk. (Tenn.) 683.

[158] Kelley v. Stanbery, 13 Ohio, 408; Desvergers v. Parsons, 8 C. C. A. 526, 60 Fed. 143; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 780; Wood v. Harmison, 41 W. Va. 376, 23 S. E. 560; Wheelberger v. Knights, 71 Ill. App. 331. The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done by the decree. Potter v. Beal, 2 C. C. A. 60, 50 Fed. 860.

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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.[159] 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.[160] 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.[161] So also, a reservation of the question of costs, in a decree which in other respects disposes of the subject-matter of the suit, renders such decree interlocutory.[162] Again, a decree ordering an act to be done before the decree itself can be effectual is interlocutory.[163] 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.[164] So if it directs an act to be

[159] Miller's Adm'r v. Cook's Adm'rs, 77 Va. 806; Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 20.

[160] Hanover Fire Ins. Co. v. Tomlinson, 3 Hun (N. Y.) 630.

[161] White v. Conway, 66 Cal. 383, 5 Pac. 672.

[162] Dickenson v. Codwise, 11 Paige (N. Y.) 189; Johnson v. Hoover, 75 Md. 486, 23 Atl. 903. Compare McFarland v. Hall's Heirs, 17 Tex. 691. An order directing a receiver to turn over money collected by him, with leave to apply to the court for the payment of his charges, and to have the same taxed as costs against the complainant, is not a final determination of his rights, and is not appealable. French v. Genoa Junction Ice Co., 82 Ill. App. 318.

[163] Hays v. May's Heirs, 1 J. J. Marsh. (Ky.) 497.

[164] Bond v. Marx, 53 Ala. 177; Woman's College v. Horne (Tenn. Ch.) 53 S. W. 980; Marks v. Semple, 111 Ala. 637, 20 South. 791. Compare Wright v. Bruschke, 62 Ill. App. 358.

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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.[165] 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.[166]

§ 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.[167] 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 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.[168] Again, a decree which ascertains the sum in the

[165] Goodwin v. Miller, 2 Munf. (Va.) 42. And see Donaldson v. Farmers' & Exchange Bank, 4 S. C. 106.

[166] Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404.

[167] Turner v. Crebill, 1 Hammond (Ohio) 368. And see Harmon v. Bynum, 40 Tex. 324. But the general rule appears to be that a decree which makes the relief granted conditional upon the performance of certain acts by the successful party is not final unless it is shown that the conditions have been complied with. See Stratton v. Dewey, 24 C. C. A. 435, 79 Fed. 32; Ligon v. Ligon, 105 Ala. 460, 17 South. 89; McAnally v. Haynie, 17 Tex. Civ. App. 521, 42 S. W. 1049. Compare Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156.

[168] Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898.

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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.[169] It is also held that a decree for specific performance, requiring a conveyance, is final, although it directs the submission of the conveyance to the judges for their approval.[170]

§ 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.[171] Second, where a decree ascer-

[169] Ledyard v. Henderson, 46 Miss. 260; Bank of Lewisburg v. Sheffey, 140 U. S. 445, 11 Sup. Ct. 755, 35 L. Ed. 496; Lohman v. Cox, 9 N. M. 503, 56 Pac. 286.

[170] Long v. Maxwell, 8 C. C. A. 410, 59 Fed. 948.

[171] Chace v. Vasquez, 11 Wheat. 429, 6 L. Ed. 511; Perkins v. Fourniquet, 6 How. 206, 12 L. Ed. 406; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Humiston v. Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. Ed. 1122; Talley v. Curtain, 7 C. C. A. 1, 58 Fed. 4; Gunn v. Black, 8 C. C. A. 542, 60 Fed. 159; Security Trust Co. v. Sullivan, 23 C. C. A. 458, 77 Fed. 778; Pickrell v. Thompson, 12 App. D. C. 449; Kane

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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.[172]

v. Whittick, 8 Wend. (N. Y.) 219; Johnson v. Everett, 9 Paige (N. Y.) 636; Chittenden v. Missionary Society of Methodist Episcopal Church, 8 How. Prac. (N. Y.) 327; Cruger v. Douglass, 2 N. Y. 571; Tompkins v. Hyatt, 19 N. Y. 534; Moore v. Lincoln Park & Steamboat Consol. Co., 196 Pa. 519, 46 Atl. 857; Templeman v. Steptoe, 1 Munf. (Va.) 339; Ryan's Adm'r v. McLeod, 32 Grat. (Va.) 367; Mackey v. Bell, 2 Munf. (Va.) 523; Price v. Nesbit, 1 Hill, Eq. (S. C.) 445; McCrady v. Jones, 36 S. C. 136, 15 S. E. 430; Smith v. Thomason, 26 S. C. 607, 12 S. E. 96; Putman v. Lewis, 1 Fla. 455; Griffin v. Orman, 9 Fla. 22; Owens v. Love, 9 Fla. 325; Garrard v. Webb, 4 Port. (Ala.) 73; Garner v. Prewitt, 32 Ala. 13; Broughton v. Wimberly, 65 Ala. 549; Cook's Heirs v. Bay, 4 How. (Miss.) 485; Pryor v. Smith, 4 Bush (Ky.) 379; Berryhill v. McKee, 3 Yerg. (Tenn.) 157; Porter v. Burton, 10 Heisk. (Tenn.) 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.

[172] Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94; Mills v. Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Taylor v. Read, 4 Paige (N. Y.) 561; Dickenson v. Codwise, 11 Paige (N. Y.) 189; Coithe v. Crane, 1 Barb. Ch. (N. Y.) 21; Harvey v. Branson, 1 Leigh (Va.) 108; Rawlings' Ex'r v. Rawlings, 75 Va. 76; Fleming v. Bolling, 8 Grat. (Va.) 292; Weatherford v. James, 2 Ala. 170; Bank of Mobile v. Hall, 6 Ala. 141, 41 Am. Dec. 41; McKinley v. Irvine, 13 Ala. 681; Hastie v. Aiken, 67 Ala. 313; Bradford v. Bradley's Adm'rs, 37 Ala. 453; Cochran v. Miller, 74 Ala. 50; Ex parte Elyton Land Co., 104 Ala. 88, 15 South. 939; Garry v. Jenkins, 109 Ala. 471, 20 South. 8; Mattingly v. Elder (Ky.) 44 S. W. 215; McFarland v. Hall's Heirs, 17 Tex. 676; Merle v. Andrews, 4 Tex. 200; Meek v. Mathis, 1 Heisk. (Tenn.) 534; Ex parte Crittenden, 10 Ark. 333; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Guardian Savings Bank v. Reilly, 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 what-

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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 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.[173]

§ 45. Directing an Account.

According to the rules just stated, a decree directing an account to be taken is generally interlocutory;[174] that is, unless all the steps

ever 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 register'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 reserved 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 (N. Y.) 636.

[173] Beebe v. Russell, 19 How. 283, 15 L. Ed. 668.

[174] Latta v. Kilbourn, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169; Hollander v. Fechheimer, 162 U. S. 326, 16 Sup. Ct. 795, 40 L. Ed. 985; Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.,

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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.[175] 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.[176]

§ 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.[177] Thus an order that a party is not to pay a sum adjudged against him "until further ordered" is not final.[178] 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.[179]

173 U. S. 582, 19 Sup. Ct. 551, 43 L. Ed. 818; Pittsburg, C. & St. L. R. Co. v. Baltimore & O. R. Co., 10 C. C. A. 20, 61 Fed. 705; Merriman v. Chicago & E. I. R. Co., 12 C. C. A. 275, 64 Fed. 535; McKeown v. Officer, 127 N. Y. 687, 28 N. E. 401; C. & C. Electric Motor Co. v. Lewis, 47 Ill. App. 576; Kanawha Lodge No. 25 v. Swann, 37 W. Va. 176, 16 S. E. 462; Heffner v. Day, 54 Ark. 79, 14 S. W. 1090. Compare Sprague v. Bond, 113 N. C. 551, 18 S. E. 701.

175 Webber v. Randall, 89 Mich. 531, 50 N. W. 877; Hake v. Coach, 105 Mich. 425, 63 N. W. 306; Decatur Land Co. v. Cook (Ala.) 27 South. 359; Allison v. Drake, 145 Ill. 500, 32 N. E. 537.

176 Raynor v. Raynor, 94 N. Y. 248. And see Jackson County v. Gullatt, 84 Ala. 243, 3 South. 906; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668; Johnson v. Everett, 9 Paige (N. Y.) 636.

177 In re Turner's Estate, 183 Pa. 543, 38 Atl. 1040; O'Meara v. First Nat. Bank (Ky.) 37 S. W. 266. See St. Louis Nat. Bank v. Bloch, 44 La. Ann. 893, 11 South. 466.

178 Tinley v. Martin, 80 Ky. 463.

179 Rhodes v. Turner, 21 Ala. 210.

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§ 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.[180] 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.[181] 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.[182]

§ 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 interest 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.[183] 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

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

[181] Clark v. Dunnam, 46 Cal. 204; Evans v. Dunn, 26 Ohio St. 439; Arnold v. Sinclair, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

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

[183] Myers v. Manny, 63 Ill. 211; Morris v. Morange, 38 N. Y. 172; Baker v. Lehman, Wright (Ohio) 522; Ray v. Law, 3 Cranch, 179, 2 L. Ed. 404; Whiting v. Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Bronson v. La Crosse & M. R. R. Co., 2 Black, 524, 17 L. Ed. 347; Johnson v. Everett, 9 Paige (N. Y.) 636; May v. Ball (Ky.) 56 S. W. 7. Compare Allen v. Belches, 2 Hen. & M. (Va.) 595; Malone v. Marriott, 64 Ala. 486.

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further order and decree upon the coming in of a master's report, then, and in any such case, it is merely interlocutory.[184] It is to be observed that the judgment for the deficiency arising on a sale of the property, and directing that execution may issue therefor, is not final, so as to be appealable, until there has been a judicial determination of the amount of the deficiency after the sale.[185] But where a petition of intervention is filed, claiming priority over the mortgage or other rights in the property, a decree which settles the rights of the intervener, and directs provision to be made for their satisfaction in the sale or in the distribution of the proceeds, is final and appealable, although the main suit has not reached a final decree.[186]

§ 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.[187] And the same is true of a judgment rendered on a feigned issue directed out of chancery.[188] And on similar principles, an order of a probate court adjudging that parties have the right to have issues to determine the validity of a will transmitted to a law court for trial by jury, and framing and transmitting such issues, is not a final order.[189]

[184] Burlington, C. R. & N. R. Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. 58, 31 L. Ed. 73; Johnson v. Everett, 9 Paige (N. Y.) 636; Williams v. Walker, 107 N. C. 334, 12 S. E. 43; Illinois Trust & Savings Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132. An order denying an application for the appointment of a special master to sell mortgaged premises is not appealable before rendition of a final decree of foreclosure. American Inv. Co. v. Nye, 40 Neb. 720, 59 N. W. 355, 42 Am. St. Rep. 692. See Riddle v. Hudgins, 7 C. C. A. 335, 58 Fed. 490.

[185] Eggleston v. Morrison, 185 Ill. 577, 57 N. E. 775; Parmele v. Schroeder, 59 Neb. 553, 81 N. W. 506.

[186] Central Trust Co. v. Marietta & N. G. R. Co., 1 C. C. A. 116, 48 Fed. 850; Central Trust Co. v. Madden, 17 C. C. A. 236, 70 Fed. 451; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

[187] Dabbs v. Dabbs, 27 Ala. 646; Eames v. Eames, 16 Pick. (Mass.) 141.

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

[189] Dugan v. Northcutt, 7 App. D. C. 351.

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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 are well known to the common law and must be tested and

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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

[1] Schroeder v. Fromme, 31 Tex. 602. And see Crouse v. Derbyshire, 10 Mich. 479, 82 Am. Dec. 51; Goodwill v. Elkins, 51 La. Ann. 521, 25 South. 317.

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

[3] Bouv. Law Dict. voc. Judgment. As to judgments by consent, see Edwards v. Turner (Tenn.) 47 S. W. 144; Goodrich v. Alfred, 72 Conn. 257, 43 Atl. 1041.

[4] Gerald v. Burthee, 29 Tex. 202; Hart v. Sarvis, 3 Ohio N. P. 316.

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enter up such a judgment, will not sustain it, where there has been 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 con-

[5] Craig v. Glass, Smith (Ind.) 27. See O'Neal v. Clymer, 21 Tex. Civ. App. 386, 52 S. W. 619; Hudson v. McMahon (Ky.) 50 S. W. 259. Compare Shadrack's Adm'r v. Woolfolk, 32 Grat. (Va.) 707.

[6] Stewart v. Walters, 38 N. J. Law, 274. A judgment by agreement may be entered in open court by the judge on consent of the attorney, orally expressed, or may be entered on the record without express sanction of the court from the written agreement between counsel, duly filed, in which latter case the court's assent is presumed. Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577. Where a judgment is confessed in open court, it must be presumed that the authority to confess was judicially passed upon by the court. Chicago Tip & T. Co. v. Chicago Nat. Bank, 74 Ill. App. 439. As to presumption of authority on the part of defendant's attorney to confess judgment, see Harper v. Cunningham, 5 App. D. C. 203.

[7] Burton v. Lawrence, 4 Tex. 373. And see Hicks v. Ayer, 5 Ga. 298. The withdrawal of a plea in abatement on the day set for trial, and the filing of an answer admitting plaintiff's claim, and consenting to judgment, does not render the judgment entered one by confession. Adler v. Anderson, 42 Mo. App. 189.

[8] Smith v. Simms, 9 Ga. 418. But see New England Mortgage Security Co. v. Tarver, 9 C. C. A. 190, 60 Fed. 660; Little v. Dyer, 35 Ill. App. 85.

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fess 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.

§ 52. Authorised 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

[9] Bouv. Law Dict., voc. "Judgment."

[10] Edgar v. Greer, 7 Iowa, 136; Chapin v. Thompson, 20 Cal. 686; McCrairy v. Ware, 6 Kan. App. 155, 51 Pac. 293; Burr v. Mathers, 51 Mo. App. 470; Harper v. Cunningham, 5 App. D. C. 203. In Virginia, the statute providing for judgments by confession being merely declaratory of the common law, only substantial compliance therewith is required. Saunders v. Lipscomb, 90 Va. 647, 19 S. E. 450.

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

[12] Marbury v. Pace, 29 La. Ann. 557. A power of attorney given with a note, authorizing judgment thereon by confession without process, is valid. Whitton v. Whitton, 64 Ill. App. 53.

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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 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

[13] Bass v. Estill, 50 Miss. 300. Miller's Code Iowa, §§ 176, 177, providing that judgments by confession shall be signed by the judge, is merely directory, and a failure to sign does not vitiate the judgment. Dullard v. Phelan, 83 Iowa, 471, 50 N. W. 204.

[14] Beach v. Botsford, 1 Doug. (Mich.) 199, 40 Am. Dec. 145.

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

[16] Pickett v. Thruston, 7 Ark. 397; Kellogg v. Keith, 4 Ill. App. 386. Compare Pond v. Simons, 17 Ind. App. 84, 45 N. E. 48. A power of attorney authorizing confession of judgment "as of any term" does not authorize the entry of judgment in vacation. Graves v. Whitney, 49 Ill. App. 435; Whitney v. Bohlen, 157 Ill. 571, 42 N. E. 162.

[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.

[18] Brown v. Hume, 16 Grat. (Va.) 456.

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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 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]

[19] Lanning v. Carpenter, 23 Barb. (N. Y.) 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. In some states it is held that a judgment by confession can be entered only in a court having jurisdiction of the county or district where the defendant resides, and where alone a personal judgment might be recovered against him in a contested action. Ex parte Ware Furniture Co., 49 S. C. 20, 27 S. E. 9; McClure v. Bowles, 5 Ohio N. P. 327. But elsewhere the doctrine prevails that a confessed judgment is valid if entered in a court having jurisdiction of the subject-matter, and within the state where the note and warrant were made, without regard to the defendant's place of residence, and even though he may have removed from the state. Kitchen v. Bellefontaine Nat. Bank, 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282.

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

[21] Kelly v. Lyons, 40 La. Ann. 498, 4 South. 480.

[22] Hauer's Appeal, 5 Watts & S. (Pa.) 473.

[23] Manufacturers' & Mechanics' Bank v. Boyd, 3 Denio (N. Y.) 257. But a judgment upon the confession of the defendant which is valid in the state

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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 meantime, 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

where it is entered is equally valid in every other state. Coleman v. Waters, 13 W. Va. 278. And a warrant of attorney may be so drawn as to authorize a confession of judgment in a foreign state. Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304. Thus, it is held that if the authority is to confess judgment "in any court of record," it may be executed in any state in the Union. Pirie v. Stern, 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103; First Nat. Bank v. McKinney, 16 Ohio Cir. Ct. R. 80. See First Nat. Bank v. Garland, 109 Mich. 515, 67 N. W. 559, 33 L. R. A. 83, 63 Am. St. Rep. 597. Compare Davis v. Packer, 8 Ohio Cir. Ct. R. 107.

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

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

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contested. The only difficulty occurs in the case of persons who are 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 duly to 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.[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,

[26] Knox v. Flack, 22 Pa. 337. Compare Ziegler v. Evans, 8 Kulp (Pa.) 180.

[27] See infra, §§ 193, 196.

[28] A warrant of attorney in a note to confess judgment in favor of the payee is available to his administrator. Drake v. Simpson (Ohio) 30 Wkly. Law Bul. 236. If the warrant does not specify the person in whose favor judgment is to be entered, it may be in favor of the legal holder of the note at the time of entry. Shepherd v. Wood, 73 Ill. App. 486. As to confessions in favor of partners, see Mahaffey v. Rogers, 10 Ohio Cir. Ct. R. 24. A person may confess judgment for money due the state as well as to an individual. State v. Love, 23 N. C. 264.

[29] Smith v. Mayo, 83 Va. 910, 5 S. E. 276.

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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 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

[30] Thornton v. Lane, 11 Ga. 459.

[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. Cayuga County Sup'rs, 7 How. Prac. 257; Maneval v. Jackson Tp., 9 Pa. Co. Ct. R. 28. 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. 292.

[34] Mallory v. Clark, 20 How. Prac. 418. As to confessions by executors, see In re Claghorn's Estate, 181 Pa. 600, 37 Atl. 918, 59 Am. St. Rep. 680. By assignees for benefit of creditors, see Packer v. Roberts, 140 Ill. 9, 671, 29 N. E. 668.

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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, 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 stat-

[35] Dorrance v. Scott, 3 Whart. (Pa.) 309, 31 Am. Dec. 509; Graham v. Long, 65 Pa. 383; Caldwell v. Walters, 18 Pa. 79, 55 Am. Dec. 592; Keiper v. Helfricker, 42 Pa. 325; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Brunner's Appeal, 47 Pa. 67; Finley's Appeal, 67 Pa. 453; Swayne v. Lyon, 67 Pa. 436; Steinman v. Ewing, 43 Pa. 63; Glyde v. Keister, 32 Pa. 85; Shallcross v. Smith, 81 Pa. 132. But now in Pennsylvania by the Act of June 3, 1887, § 2 (P. L. 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 Real-Estate Inv. Co. v. Roop, 132 Pa. 496, 19 Atl. 278, 7 L. R. A. 211. And see Harris v. Reinhard, 165 Pa. 36, 30 Atl. 510.

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

[37] First Nat. Bank v. Garlinghouse, 53 Barb. (N. Y.) 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. Dec. 100, 33 How. Prac. 278.

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ute, 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 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 ab-

[38] Swing v. Woodruff, 41 N. J. Law, 469.

[39] Haywood v. Shreve, 44 N. J. Law, 94. See further Stevens v. Dubarry, Minor (Ala.) 379; Baines v. Burbridge, 15 La. Ann. 628; Dancy v. Martin, 23 La. Ann. 323; Henchman v. Roberts, 2 Har. (Del.) 74; Mendenhall's Ex'rs v. Springer, 3 Har. (Del.) 87; Patton v. Stewart, 19 Ind. 233; Harris v. Jenkins, 72 N. C. 183; Wallace v. Rippon, 2 Bay (S. C.) 112.

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

[41] Crenshaw v. Julian, 26 S. C. 283, 2 S. E. 133, 4 Am. St. Rep. 719.

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

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solutely 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 apply 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

[43] Shallcross v. Smith, 81 Pa. 132; Wallace v. Rippon, 2 Bay (S. C.) 112.

[44] See infra, § 211. And see, as to judgments by confession, specifically, Mendenhall's Ex'rs v. Springer, 3 Har. (Del.) 87.

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

[46] Baker v. Lukens, 35 Pa. 146; Eneu v. Clark, 2 Pa. 234, 44 Am. Dec. 191; Bering v. Burnet, 2 Clark (Pa.) 399.

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

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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 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

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

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

[50] Bitzer v. Shunk, 1 Watts & S. (Pa.) 340, 37 Am. Dec. 469; York Bank's Appeal, 36 Pa. 458; Myers v. Sprenkle, 13 York Leg. Rec. 181; Squier v. Squier, 1 Lack. Leg. N. 193; Williams v. Jones, 7 Kulp (Pa.) 386; Lehman Mach. Co. v. Rood, 8 Kulp (Pa.) 264; Crane v. French, 1 Wend. (N. Y.) 311; Stoutenburgh v. Vandenburgh, 7 How. Prac. (N. Y.) 229; Harper v. Cunningham, 8 App. D. C. 430; Mills v. Dickson, 6 Rich. Law (S. C.) 487; Elliott v. Holbrook, 33 Ala. 659; Hopper v. Lucas, 86 Ind. 43; Davenport Mills Co. v. Chambers, 146 Ind. 156, 44 N. E. 1109; Chicago Trust & Sav. Bank v. Kinnare, 67 Ill. App. 186; Christy v. Sherman, 10 Iowa, 535; Risser v. Martin, 86 Iowa, 392, 53 N. W. 270; Fairbanks v. Kraft, 43 Mo. App. 121; Burr v. Mathers, 51 Mo. App. 470; Soper v. Fry, 37 Mich. 236; Richardson v. Fuller, 2 Or. 179; Buchanan v. Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899. In some states, however, the late decisions show a tendency to relax this rule. Thus, in Pennsylvania, while a judgment confessed against a firm by one partner without explicit authority from his copartners will not bind the other members of the firm personally, yet an execution issued under it may be levied on property of the partnership. Adams v. James L. Leeds Co., 195 Pa. 70, 45 Atl. 666; McIlvain v. James L. Leeds Co., 189 Pa. 638, 42 Atl. 307; Budd v. Shock, 11 Pa. Co. Ct. R. 480. And the debt for which a judgment is confessed by one of the partners in the name of the firm will be presumed to be that of the firm. Evans v. Watts, 192 Pa. 112, 43 Atl. 464. In Illinois and Ohio, a judgment against a firm confessed by one partner without authority can be impeached or questioned only by the other partners, not by creditors of the firm, unless, perhaps, where the judgment is fraudulent. McCormick Harvesting Mach. Co. v. Coe, 53 Ill. App. 488; Browne v. Cassem, 74 Ill. App. 305; Berg v. Commercial Nat. Bank, 84 Ill. App. 614; George W. McAlpin Co. v. Finsterwald,

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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.[55] But whether it may stand as a

57 Ohio St. 524, 49 N. E. 784. When a warrant of attorney expressly authorizes any attorney of any court of record to appear for the maker of a note and confess judgment, the fact that one member of a firm signs the declaration, and the other the cognovit, does not render the judgment void. Blanck v. Medley, 63 Ill. App. 211.

[51] Appeal of Perth Amboy Terra-Cotta Co., 124 Pa. 367, 17 Atl. 4.

[52] Mair v. Beck (Pa.) 2 Atl. 218; McCleery v. Thompson, 130 Pa. 443, 18 Atl. 735.

[53] Wiggins v. Klienhans, 9 N. J. Law, 249; Ballinger v. Sherron, 14 N. J. Law, 144; Hutchinson v. Brown, 19 D. C. 136; Rees v. Richmond, 62 Law T. (N. S.) 427. Compare Virginia & T. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426.

[54] Taylor v. Beck, 3 Rand. (Va.) 316; Strause v. Braunreuter, 21 Pa. Co. Ct. R. 228. In New York, the Code of Civil Procedure (section 1278), provides that a judgment by confession against one joint debtor shall not bar an action against all the joint debtors upon the same demand. See Harbeck v. Pupin, 123 N. Y. 115, 25 N. E. 311.

[55] A joint judgment cannot be entered on a several warrant of attorney. Weintraute v. Solomon, 2 Marv. (Del.) 371, 43 Atl. 257; Liberty Grotto v.

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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 judgment can be entered against a less number, and it is void as to all.[56] 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.[57]

§ 59. By Officers of a Corporation.

A private corporation has a right to confess judgment, as an incident to its power to sue and be sued.[58] But the trend of the modern decisions is to the effect that no officer of such a corporation—whether it be the president, secretary, treasurer, or manager—has authority, merely by virtue of his office, to confess a judgment against the company or sign a warrant of attorney for that purpose. To do this, he must receive authority from the board of directors, or, according to some of the cases, from a majority of the stockholders at a regular meeting.[59] But, in special circumstances, such authority may be inferred from the knowledge and acquiescence of

Meade, 11 Pa. Co. Ct. R. 340. And under a joint warrant of attorney annexed to a joint note, a judgment cannot be entered against one of the makers alone. Kahn v. Lesser, 97 Wis. 217, 72 N. W. 739. See Frank v. Thomas, 35 Ill. App. 547.

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

[57] North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Knox v. Winsted Sav. Bank, 57 Ill. 330; York Bank's Appeal, 36 Pa. 458. The statute in Pennsylvania, requiring the prothonotary to enter a judgment by confession on a warrant of attorney "against the person or persons who executed the same," does not restrict him to the names appearing in full on the face of the warrant, but he may inquire who are the legal makers of the instrument liable thereon, though they did not put their own hands to it, and their names do not appear on its face. Miller v. Royal Flint Glass Works, 172 Pa. 70, 33 Atl. 350.

[58] Shute v. Keyser (Ariz.) 29 Pac. 386; Solomon v. C. M. Schneider & Co., 56 Neb. 680, 77 N. W. 65.

[59] Stokes v. New Jersey Pottery Co., 46 N. J. Law, 237; Raub v. Blairstown Creamery Ass'n, 56 N. J. Law, 262, 28 Atl. 384; McMurray v. St. Louis Oil Manuf'g Co., 33 Mo. 377; Jackson v. Cartwright Lumber Co., 2 Pa. Dist. R. 680; Nimocks v. Cape Fear Shingle Co., 110 N. C. 20, 14 S. E. 622; P. P. Mast Buggy Co. v. Litchfield Furniture, Hardware & Implement Co., 55 Ill. App. 98; Bailey v. Snyder, 61 Ill. App. 472; Howell v. Gilt-Edge Manuf'g

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the directors,[60] or the action of the officer signing the confession may be ratified by a subsequent vote of the directors or stockholders.[61] If a judgment note executed by an officer of a corporation is otherwise valid and binding on the company, it is not avoided by the fact that the corporate seal is not attached.[62] Upon a confession of judgment by a corporation, the court in which the action is pending must judge of the authority of the person appearing for the corporation in that behalf; and its decision on the point is final and conclusive.[63]

§ 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.[64] This 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;[65] 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.[66] 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

Co., 32 Neb. 627, 49 N. W. 704. Compare Miller v. Bank of British Columbia, 2 Or. 291.

[60] Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; Chicago Tip & T. Co. v. Chicago Nat. Bank, 74 Ill. App. 439.

[61] Smead Foundry Co. v. Chesbrough, 18 Ohio Cir. Ct. R. 783.

[62] Chicago Tip & T. Co. v. Chicago Nat. Bank, 74 Ill. App. 439.

[63] White v. Crow (C. C.) 17 Fed. 98.

[64] Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Farmers' & Mechanics' Bank v. Mather, 30 Iowa, 283; Ingersoll v. Dyott, 1 Miles (Pa.) 245; Chapin v. McLaren, 105 Ind. 563, 5 N. E. 688.

[65] See infra, vol. 2, § 698.

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

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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.[67] 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.[68] 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.[69] 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.[70]

§ 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.[71] It is usual, however, to confer the authority upon "any attorney" of

[67] Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66; Buchanan v. Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

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

[69] Flanagan v. Continental Ins. Co., 22 Neb. 235, 34 N. W. 367; McCalmont v. Peters, 13 Serg. & R. (Pa.) 196.

[70] Finney v. Ferguson, 3 Watts & S. (Pa.) 413. Compare Lewis v. Rapelyea, 1 Barb. (N. Y.) 29.

[71] Rabe v. Heslip, 4 Pa. 139. See Grubbs v. Blum, 62 Tex. 426. Authority to confess a judgment on a note, or waive the benefit of exemp-

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a particular court or "any attorney of any court of record" in the particular state.[72] 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.[73] The warrant should name or describe, with reasonable certainty, the person in whose favor judgment is to be entered,[74] and state the time of entry, though this is usually done by authorizing a confession "at any term" of court, or "at any time."[75] 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.[76] 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.[77] It also appears that a warrant of attorney to confess judgment need not be under seal.[78] Of course if the warrant is annexed to or incorporated in a note or bond, the debt on which it is based will be

tion or inquisition laws, cannot be implied from authority to execute the note. Payne v. Robinson, 11 Pa. Co. Ct. R. 544.

[72] See McClure v. Bowles, 5 Ohio N. P. 327.

[73] Patton v. Stewart, 19 Ind. 233; Kuehne v. Goit, 54 Ill. App. 596.

[74] See Packer v. Roberts, 140 Ill. 9, 671, 29 N. E. 668; McClure v. Bowles, 5 Ohio N. P. 327. Where a note and warrant of attorney are written together, over one signature, the warrant, though not stating in whose favor judgment may be confessed, is not void for uncertainty, but the instrument as a whole will be construed to authorize confession in favor of the payee. Drake v. Simpson, 30 Wkly. Law Bul. (Ohio) 236.

[75] Where a warrant of attorney authorizes a confession of judgment upon a note "at any time," judgment may be confessed at any time after the delivery of the note. Elkins v. Wolfe, 44 Ill. App. 376. This is true even though the note is postdated. Volkenand v. Drum, 143 Pa. 525, 22 Atl. 881.

[76] Mason v. Smith, 8 Ind. 72.

[77] Sweesey v. Kitchen, 80 Pa. 160. As to the effect of failure to fill out blanks in the warrant, see, further, First Nat. Bank v. Trout, 58 Ohio St. 347, 51 N. E. 27; Packer v. Roberts, 140 Ill. 9, 671, 29 N. E. 668. The caption of a cognovit upon which a judgment is confessed in vacation is not an essential part of the instrument, and, if defective, may be treated as surplusage. Browne v. Cassem, 74 Ill. App. 305.

[78] Kneedler's Appeal, 92 Pa. 428.

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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.[79] 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 the defect in the warrant might have been pleaded in avoidance or given in evidence under a plea of nul tiel record.[80] 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.[81] 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.[82]

§ 61a. Revocation or Expiration of Warrant.

A warrant of attorney to confess a judgment is not revocable at the pleasure of the principal; though he endeavors to revoke it, yet the court will grant leave to the plaintiff to enter up the judgment.[83] But no judgment can be entered on such a warrant after the death

[79] Gambia v. Howe, 8 Blackf. (Ind.) 133. Where several obligations or installments, all between the same parties and all due, are covered by separate warrants of attorney, or by one warrant authorizing confession of judgment "from time to time," a single judgment may be entered by confession for the gross amount then due. Odell v. Reynolds, 17 C. C. A. 317, 70 Fed. 656; Fortune v. Bartolomei, 164 Ill. 51, 45 N. E. 274.

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

[81] Chambers v. Denie, 2 Pa. 421. But compare Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765.

[82] Iglehart v. Chicago Marine & Fire Ins. Co., 35 Ill. 514; Anderson v. Field, 6 Ill. App. 307; Gambia v. Howe, 8 Blackf. (Ind.) 133.

[83] Odes v. Woodward, 2 Ld. Raym. 849; Wassell v. Reardon, 11 Ark. 705, 44 Am. Dec. 245. But in Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197, it is said that a simple power from a principal to his attorney to confess judgment in favor of a third person, which is not supported by a consideration and is not given as a security for a debt, or to render

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of the defendant. While the latter event may not operate exactly as a revocation of the power, yet there can be no valid judgment rendered against a dead man.[84] Entry of the judgment, however, is not prevented by the supervening insanity of the defendant; for this disability does not revoke any power of attorney which the principal could not have revoked had he remained sane.[85]

It was the settled practice under the common law, founded on a rule of the court of King's Bench (and still operative in this country except where changed by statute or a rule of court), that a judgment could not be confessed on a warrant of attorney executed more than a year and a day before, unless an affidavit was filed showing that the maker was alive, and that the debt or some portion of it was still due, and a rule of court, or order of a judge in vacation, must be obtained granting leave to enter judgment.[86] But entry of the judgment will not be prevented by the fact that the statute of limitations has run against the debt for which the confession was made, since the subject-matter of the power is not extinguished by the limitation.[87] But payment of the debt will cancel the power. A warrant

a security effectual, is not properly speaking a warrant of attorney, and is revocable at the pleasure of the maker, so long as it remains unexecuted.

[84] Lanning v. Pawson, 38 Pa. 480; Sauerfield v. McNierney's Estate, 30 Pittsb. Leg. J. (N. S.) 283. In New York, this rule is established by statute. Code Civ. Proc. N. Y. § 1275; Maddock v. Stevens, 15 Civ. Proc. R. 248, 3 N. Y. Supp. 528.

[85] Spencer v. Reynolds, 9 Pa. Co. Ct. R. 249.

[86] Hinds v. Hopkins, 28 Ill. 344; Alldritt v. First Nat. Bank, 22 Ill. App. 24; Manufacturers' & Mechanics' Bank v. St. John, 5 Hill (N. Y.) 497. In Pennsylvania, a rule of court provides that "if a warrant of attorney to confess judgment be above ten years [old] and under twenty, the court, or a judge thereof in vacation, must be moved for leave to enter judgment, which motion must be grounded on an affidavit that the warrant was duly executed and that the money is unpaid and the party living. When the warrant is above twenty years old, there must be a rule to show cause served on the defendant, if he can be found within the county." But the court may, in a proper case, after the entry of judgment, grant leave to file the required affidavit nunc pro tunc. Woods v. Woods, 126 Pa. 396, 17 Atl. 662.

[87] Wassell v. Reardon, 11 Ark. 705, 44 Am. Dec. 245; Cross v. Moffat, 11 Colo. 210, 17 Pac. 771. But a judgment on a judgment note not under seal, entered more than six years after the execution of the note, may be opened to allow a plea of the statute of limitations. Bennett v. Allen, 10 Pa. Co. Ct. R. 256. See, infra, § 69.

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of attorney contained in a note to confess judgment thereon, for example, remains in force only so long as the note remains unpaid; and where the payee, after receiving satisfaction thereof, fraudulently conceals the fact, and procures an attorney to appear and confess judgment without the maker's knowledge or consent, such appearance confers no jurisdiction on the court, and the judgment is void.[88] It is held, however, that judgment may be entered on a note under a warrant of attorney duly executed, but lost or stolen.[89] Strictly speaking the authority of the warrant is exhausted by the entry of one judgment; yet if another judgment is entered on the same obligation under the same warrant, in another county, it will not be absolutely void, but merely irregular, insomuch that a purchaser at a judicial sale under the second judgment may acquire a good title.[90]

§ 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.[91] Nor is it required that the affidavit go beyond the stat-

[88] First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Rea v. Forrest, 88 Ill. 276.

[89] Bauer v. Ribs, 4 Pa. Dist. R. 583.

[90] Martin v. Rex, 6 Serg. & R. (Pa.) 296; supra, § 53.

[91] Mulford v. Stratton, 41 N. J. Law, 466; Reading v. Reading, 24 N. J. Law, 358. The requirement of an affidavit that the debt is "justly and honestly due and owing" will prevent an accommodation indorser of notes,

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ute. Hence it is not necessary for the debtor to deny, in specific terms, that the debt has been paid, released, barred, or discharged.[92] 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.[93] Where the statute requires an affidavit to the justness of the debt only upon a confession of judgment without process, it does not apply where the defendant files an answer admitting the debt, and consents to the judgment.[94]

§ 63. Statement of the Indebtedness.

In many of the states, 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." This requirement is imperative.[95] The designation of the amount of the debt, in particular, 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.[96] The requirement that the facts be stated is

secured by bond and warrant of attorney, from entering up judgment before he has paid the notes, although he has assumed their payment, when the payee has not released the maker. Sterling v. Fleming, 53 N. J. Law, 652, 24 Atl. 1001.

[92] Lanning v. Carpenter, 20 N. Y. 447. See Oppenheimer v. Giershofer, 54 Ill. App. 38.

[93] Vanderveere v. Gaston, 24 N. J. Law, 818; Bible v. Voris, 141 Ind. 569, 40 N. E. 670. Compare Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

[94] Lanier v. Blount (Tex. Civ. App.) 45 S. W. 202.

[95] Winnebrenner v. Edgerton, 30 Barb. (N. Y.) 185; Lanning v. Carpenter, 20 N. Y. 447; Smith v. Smith, 117 N. C. 348, 23 S. E. 270. Compare Hughes v. Helms (Tenn.) 52 S. W. 460. A judgment confessed without such a statement is voidable at the instance of other creditors (Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803), and cannot be validated as to one not a party or privy by renewals of execution thereon, or by revival of the judgment. Woods v. Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688. A warrant of attorney reciting a bond which is on the same sheet of paper, may be detached from the bond, and entered up without any statement. United Security Life Ins. & Trust Co. v. Vaughn, 22 Pa. Co. Ct. R. 167.

[96] Clements v. Gerow, 30 Barb. (N. Y.) 325. A statement that no part of the note or interest has been paid, and that the full amount thereof, with

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intended to enable other creditors to test the bona fides of the transaction by which a particular debt is preferred; and it is said that the statement is sufficient if it sets forth a consideration such as the law recognizes as valuable; and is definite enough to prevent the parties from shifting it, and to furnish other creditors with a basis for inquiry if they desire to attack it.[97] 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 debtor, sufficiently states the facts out of which the indebtedness arose.[98] 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 instance of a junior judgment-creditor or bona fide purchaser.[99] 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.[100] 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

interest since the date of the note, is due and owing thereon, is sufficient to include interest. Rothchild v. Mannesovitch, 29 App. Div. 580, 51 N. Y. Supp. 253. See Tilles v. Albright, 63 Hun, 633, 18 N. Y. Supp. 493.

[97] Teasdale Commission Co. v. Van Hardenberg, 53 Mo. App. 326; Atwater v. Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741; McDowell v. Daniels, 38 Barb. (N. Y.) 143; Wight v. Mott, Kirby (Conn.) 152.

[98] Kern v. Chalfant, 7 Minn. 487 (Gil. 393); Kendig v. Marble, 58 Iowa, 529, 12 N. W. 584, citing Van Fleet v. Phillips, 11 Iowa, 558; Miller v. Clarke, 37 Iowa, 325.

[99] Terrett v. Brooklyn Imp. Co., 18 Hun, 6; Miller v. Kosch, 74 Hun, 50, 26 N. Y. Supp. 183. See Wood v. Mitchell, 117 N. Y. 439, 22 N. E. 1125.

[100] Frost v. Koon, 30 N. Y. 428; Johnston v. McAusland, 9 Abb. Prac. (N. Y.) 214. See Davis v. Morris, 21 Barb. (N. Y.) 152. A statement that plaintiff performed services for and loaned money to defendant, and that thereafter, at a certain time, there was an adjustment of accounts between them concerning said matters, and a certain sum was found due plaintiff, which defendant promised to pay, sufficiently shows an account stated, so as to sustain an entry of a judgment by confession. Critten v. Vredenburgh, 4 App. Div. 216, 38 N. Y. Supp. 542.

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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.[101] 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.[102] 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.[103] 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 described," is sufficient to satisfy the statute.[104] But a statement that the note was "given for goods sold and delivered and money had and received" is not sufficient.[105] 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

[101] Nichols v. Kribs, 10 Wis. 76, 78 Am. Dec. 294; Lawless v. Hackett, 16 Johns. (N. Y.) 149; Bryan v. Miller, 28 Mo. 32, 75 Am. Dec. 107. Compare Ex parte Graham, 54 S. C. 163, 32 S. E. 67.

[102] Read v. French, 28 N. Y. 285; Neusbaum v. Keim, 24 N. Y. 325; Delaware v. Ensign, 21 Barb. (N. Y.) 85; Weil v. Hill, 71 Hun, 133, 24 N. Y. Supp. 521.

[103] Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; Davidson v. Alexander, 84 N. C. 621; Pond v. Davenport, 44 Cal. 481; McHenry v. Shephard, 2 Mo. App. 378; Woods v. Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688. But a confession stating the amount of indebtedness, and authorizing entry of judgment therefor, with interest from a certain date, and further stating that it is for the amount due on a bond under seal executed by defendant on a given date, and that it is justly due for borrowed money, is sufficient. Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6.

[104] Stern v. Mayer, 19 Mo. App. 511.

[105] Cordier v. Schloss, 18 Cal. 576. But compare Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765. Where the statement sets out that the promissory note annexed was given "for value received in one Sweepstakes separator," the judgment is not invalid for want of a showing as to how the indebtedness arose. Brown v. Barngrover, 82 Iowa, 204, 47 N. W. 1082.

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note, is defective.[106] 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.[107] 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.[108] 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.[109]

§ 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.[110] In another case, where the defendant had signed the verification, but not the statement, which was written upon the same page, this

[106] Norris v. Denton, 30 Barb. (N. Y.) 117.

[107] Pond v. Davenport, 44 Cal. 481. But see Mather v. Mather, 38 App. Div. 32, 55 N. Y. Supp. 973; Claflin v. Dodson, 111 Mo. 195, 19 S. W. 711.

[108] Kirby v. Fitzgerald, 31 N. Y. 417.

[109] Dow v. Platner, 16 N. Y. 562; First Nat. Bank v. Carleton, 43 App. Div. 6, 59 N. Y. Supp. 635; Dullard v. Phelan, 83 Iowa, 471, 50 N. W. 204. A statement which sets out a certificate of deposit and then states that on the back of the certificate is the following, "We hereby guaranty payment of the within," is sufficient to support a judgment against the guarantors. Briggs v. Yetzer, 103 Iowa, 342, 72 N. W. 647.

[110] French v. Edwards, 5 Sawy. 266, Fed. Cas. No. 5,098.

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was considered sufficient, as being a substantial compliance with the law.[111]

§ 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.[112] 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.[113] The verification of the statement, if faulty but not wholly void, is susceptible of amendment.[114]

§ 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.[115] If the defect in the statement arose through mere inadvertence, an amendment may be permitted as against creditors who have not sought to vacate the judgment;[116] but not against a creditor who has taken steps to have it set aside.[117]

§ 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 absolute-

[111] Purdy v. Upton, 10 How. Prac. (N. Y.) 494.
[112] Ingram v. Robbins, 33 N. Y. 409, 88 Am. Dec. 393.
[113] Grattan v. Matteson, 54 Iowa, 229, 6 N. W. 298.
[114] Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202.
[115] Symson v. Selheimer, 105 N. Y. 660, 12 N. E. 31.
[116] Bradley v. Glass, 20 App. Div. 200, 46 N. Y. Supp. 790.
[117] Blackmer v. Greene, 4 N. Y. Ann. Cas. 395, 47 N. Y. Supp. 113.

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ly void as against creditors.[118] Thus, if it fails to set out all the facts 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.[119] 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.[120] 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.[121]

[118] Sheldon v. Stryker, 34 Barb. (N. Y.) 116. But in some other decisions it is held that a judgment by confession which does not conform to the requirements of the statute is absolutely void and a mere nullity. Edgar v. Greer, 10 Iowa, 279; Utah Nat. Bank v. Sears, 13 Utah, 172, 44 Pac. 832. And see Ainsworth v. Mobile Fruit & Trading Co., 102 Ga. 123, 29 S. E. 142.

[119] Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521; Crouse v. Johnson, 65 Hun, 337, 20 N. Y. Supp. 177. That a judgment by confession fails to state the facts out of which the indebtedness arose, or to show that the sum confessed is justly due, is a defect of which a subsequent judgment creditor may avail himself. Bradley v. Glass, 20 App. Div. 200, 46 N. Y. Supp. 790.

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

[121] Irregularities in a judgment by confession, which do not make it void, may be amended. Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765. In Illinois, it is said that, without proof of the execution of the power of attorney to enter judgment by confession, the clerk acquires no jurisdiction of the debtor, and therefore the judgment, being void, may be attacked collaterally. Oppenheimer v. Giershofer, 54 Ill. App. 38. In Bacon v. Raybould, 4 Utah, 357, 10 Pac. 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." Compare Utah Nat. Bank v. Sears, 13 Utah, 172, 44 Pac. 832.

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§ 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.[122] 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.[123] And such a judgment, upon proof of its honesty and good faith, authorizes the creditor to impeach a fraudulent transfer made by the debtor, for the purpose of making the lien of the judgment effectual.[124] 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.[125] 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.[126] 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.[127]

[122] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 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's Adm'r v. Woolfolk, 32 Grat. (Va.) 707.

[123] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Boyles v. Chytraus, 175 Ill. 370, 51 N. E. 563; Krickow v. Pennsylvania Tar Manuf'g Co., 87 Ill. App. 653.

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

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

[126] Cordier v. Schloss, 18 Cal. 576. See Bacon v. Raybould, 4 Utah, 357, 10 Pac. 481; Richards v. McMillan, 6 Cal. 419, 65 Am. Dec. 521.

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

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§ 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.[128] 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 the judgment, although the demand might not have been recoverable at law.[129] 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

[128] Nusbaum v. Louchheim (Pa.) 1 Atl. 391. A judgment confessed on a note given as security for indorsements is not fraudulent because confessed for more than the amount of the notes indorsed, the party not having at hand at the time the means of determining their amount, and nothing more than was due ever having been claimed or received on the judgment. Page v. Simpson, 188 Pa. 393, 41 Atl. 638. It is error to render judgment on judgment notes authorizing entry of judgment on default in payment of the interest notes, in the absence of proof of such default, or production by the payee of the interest notes, as, in their absence, there would be no presumption of their nonpayment. Crofut v. Aldrich, 54 Ill. App. 541. A judgment note may be legally given as security for a pre-existing debt, and, when so given, is not open to the objection of want of consideration. Lane v. Union Nat. Bank, 75 Ill. App. 299; Union Nat. Bank v. Lane, 177 Ill. 171, 52 N. E. 361, 69 Am. St. Rep. 216.

[129] Shufelt v. Shufelt, 9 Paige (N. Y.) 137, 37 Am. Dec. 381.

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debt be an honest one.[130] 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.[131] 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.[132] 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.[133] 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.[134]

§ 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 due or to become due," this may well include a claim founded upon an obligation now existing but not yet demandable. Thus the

130 Keen v. Kleckner, 42 Pa. 529; Wassell v. Reardon, 11 Ark. 705, 44 Am. Dec. 245; Cross v. Moffat, 11 Colo. 210, 17 Pac. 771. Compare Kahn v. Lesser, 97 Wis. 217, 72 N. W. 739; Matzenbaugh v. Doyle, 156 Ill. 331, 40 N. E. 935. In Pennsylvania, the court may, in its discretion, open a judgment entered by confession on a note not under seal, where it appears on the face of the note that the statute of limitations had run against the debt at the time the judgment was entered. Bates v. Cullum, 163 Pa. 234, 29 Atl. 870; Bennett v. Allen, 10 Pa. Co. Ct. R. 256. See, supra, § 61a.

131 Dewey v. Moyer, 72 N. Y. 70.

132 Nichols v. Hewit, 4 Johns. (N. Y.) 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. Indiana, 2 G. Greene (Iowa) 492. See Little v. Dyer, 138 Ill. 272, 27 N. E. 905, 32 Am. St. Rep. 140; Scott v. Mantonya, 164 Ill. 473, 45 N. E. 977.

133 Genestelle v. Waugh, 11 Mo. 367. See Odell v. Reynolds, 17 C. C. A. 317, 70 Fed. 656; Fortune v. Bartolomei, 164 Ill. 51, 45 N. E. 274.

134 Burkham v. Van Saun, 14 Abb. Prac. N. S. (N. Y.) 163; Boutel v. Owens, 2 Sandf. (N. Y.) 655.

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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.[135] "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."[136] 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.[137] 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.[138] 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.[139] 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.[140]

[135] Black v. Pattison, 61 Miss. 599; Mechanics' Bank v. Mayer, 93 Mo. 417, 6 S. W. 237; McClish v. Manning, 3 G. Greene (Iowa) 223; Shepherd v. Wood, 73 Ill. App. 486; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. 185, 31 L. R. A. 265, 47 Am. St. Rep. 245.

[136] Calloway v. Byram, 95 Ind. 423; Farmers' & Mechanics' Bank v. Spear, 49 Ill. App. 509. See Forrester v. Strauss, 21 Civ. Proc. R. 166, 18 N. Y. Supp. 41.

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

[138] Title Ins., Trust & Safe Deposit Co. v. Rau, 153 Pa. 488, 26 Atl. 220; German-American Title & Trust Co. v. Campbell, 184 Pa. 541, 39 Atl. 291; Farwell v. Huston, 151 Ill. 239, 37 N. E. 864, 42 Am. St. Rep. 237; Cohen v. Burgess, 44 Ill. App. 206; Blanck v. Medley, 63 Ill. App. 211.

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

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

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§ 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;[141] or to secure both existing and future indorsements for his accommodation.[142] "A judgment or other security may be taken and held for future responsibilities and advances, to the extent of the 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."[143] And it seems that advances made or responsibilities incurred, after a subsequent judgment has intervened, will not be covered by the confessed judgment.[144]

§ 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.[145] 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.[146] In those states, however, where a judgment can only be confessed for a debt

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

[142] Lansing v. Woodworth, 1 Sandf. Ch. (N. Y.) 43.

[143] Averill v. Loucks, 6 Barb. (N. Y.) 19; Truscott v. King, 6 Barb. (N. Y.) 346. See Frye v. Jones, 78 Ill. 627.

[144] Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320.

[145] Ford v. Elkin, 2 Speers (S. C.) 146. And see Ely v. Parkhurst, 25 N. J. Law, 188. Where two persons have exchanged accommodation notes, which have not been paid, there is a valid consideration for one of them to confess judgment to the other, though they are not due, and the liability is contingent. Curtis v. Fox, 191 Pa. 644, 43 Atl. 1093.

[146] Allen v. Norton, 6 Or. 344. A confession is valid though the judgment

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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." [147]

§ 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.[148] 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.[149] 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.[150] Where the confession of judgment does not determine the extent of the recovery, and it is not ascertainable

is not to be entered up except upon the happening of a contingency. Keep v. Leckie, 8 Rich. Law (S. C.) 164.

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

[148] Davenport v. Wright, 51 Pa. 292. Compare Tucker v. Gill, 61 Ill. 236. Where the power of attorney in a bond limits the sum for which judgment may be entered, the attorney has no authority to enter judgment for a sum exceeding such limit. Mutual Guarantee Bldg. & Loan Ass'n v. Fallen, 21 Pa. Co. Ct. R. 617. But judgment on a note is not vitiated because confessed for a greater rate of interest than the note bears (Merchants' Nat. Bank v. Newton Cotton Mills, 115 N. C. 507, 20 S. E. 765), nor because the prothonotary made an entry for interest from the date of the note, no claim for interest having been made by the plaintiff, and none ever received by him on the judgment. Page v. Simpson, 188 Pa. 393, 41 Atl. 638. As to inclusion of interest, see, further, Cordray v. City of Galveston (Tex. Civ. App.) 26 S. W. 245.

[149] See Latrobe Bldg. & Loan Ass'n v. Fritz, 152 Pa. 224, 25 Atl. 558.

[150] Lewis v. Smith, 2 Serg. & R. (Pa.) 142.

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by mere calculation, it must be liquidated by the court and not by the clerk.[151]

§ 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.[152] 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 held that the prothonotary had no power to enter a judgment.[153] 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.[154]

§ 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.[155] And it is altogether usual to incorporate a stipulation for

[151] Bonta v. Clay, 1 Litt. (Ky.) 27. Where a power of attorney authorizes a confession of judgment for any rent due by the terms of a lease which fixes the amount of rent, a judgment in accordance with such power may properly be entered, though the lease also binds the lessee to pay damages for waste of water and other items, thereby rendering the amount due, aside from rent, uncertain. Scott v. Mantonya, 60 Ill. App. 481.

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

[153] Connay v. Halstead, 73 Pa. 354. The maker of a note authorizing judgment by confession and the payment of attorneys' fees cannot question the attorneys' fees on the ground that he was insolvent when he made the note. Blanck v. Medley, 63 Ill. App. 211.

[154] Cook v. Cooper, 4 Har. (Del.) 189.

[155] Ball v. Miller, 38 Ill. 110.

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such fees in the warrant. Such a provision rests upon a valid consideration and is not fraudulent as to other creditors;[156] 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.[157] 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.[158] 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 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.[159]

§ 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.[160] The power of attorney confessing the judgment should be filed as a part of the record.[161] In Illinois, where judgment is confessed be-

156 Weigley v. Matson, 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 335.

157 Hulse v. Mershon, 125 Ill. 52, 17 N. E. 50. See Sweeney v. Stroud, 55 N. J. Law, 97, 25 Atl. 273.

158 Moore v. Kilgore, 110 Pa. 433, 1 Atl. 593.

159 Campbell v. Goddard, 123 Ill. 220, 14 N. E. 261.

160 King v. Higgins, 3 Or. 406.

161 Durham v. Brown, 24 Ill. 93.

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fore the clerk in vacation, the formal writing up of the judgment in the court records is held to be essential; and an execution issued before it is so written up is invalid.[162] But in some other states, it appears that the statutory requirements as to the recording of such judgments are merely directory, the statement, affidavit, and other papers accompanying the confession constituting the judgment roll and serving as the basis for an execution.[163]

§ 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.[164] 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.[165] In regard to the jurisdiction of the court below, it seems to be conceded that it has power to give equitable relief in cases calling for its interposition.[166] "The power of the courts to open judgments entered by con-

[162] Knights v. Martin, 155 Ill. 486, 40 N. E. 358.

[163] Saunders v. Lipscomb, 90 Va. 647, 19 S. E. 450; Ex parte Graham, 54 S. C. 163, 32 S. E. 67.

[164] Garner v. Burleson, 26 Tex. 348; Mandeville v. Holey, 1 Pet. 136, 7 L. Ed. 85; Wilson v. Collins, 9 Ala. 127. See De Riemer v. Cantillon, 4 Johns. Ch. (N. Y.) 85.

[165] 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.

[166] McAllister's Appeal, 59 Pa. 204; Walker v. Ensign, 1 Ill. App. 113; Wilson v. Cox, 170 Pa. 331, 33 Atl. 79; Seaver v. Siegel, 54 Ill. App. 632; Jordan v. Huntington, 58 Ill. App. 646; Second Ward Sav. Bank v. Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569. Where, in a suit against a city

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fession, 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." [167] 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.[168] 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.[169] 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

to quiet title to land claimed as a street, a decree is entered by confession, the court may, in its discretion, in view of the public interests involved, open the case and allow an answer to be filed. Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370.

[167] Earnest v. Hoskins, 100 Pa. 551.

[168] McCabe v. Sumner, 40 Wis. 386. Thus, a judgment by confession may be opened where it is alleged to be usurious (McGuire v. Campbell, 58 Ill. App. 188), or to let in a plea of the statute of limitations. Bates v. Cullum, 163 Pa. 234, 29 Atl. 870; Bennett v. Allen, 10 Pa. Co. Ct. R. 256. But there is no abuse of discretion in refusing to open the judgment where the only defense is a counterclaim, which is denied by the plaintiff. Walter v. Fees, 155 Pa. 55, 25 Atl. 829. And see Evans v. Barclay, 38 Ill. App. 496. Where it appears that a judgment purporting to have been entered by agreement was entered without authority, it may be set aside. Foley's Ex'r v. Gatliff (Ky.) 43 S. W. 190. But a judgment admitted to be just will not be set aside in equity for the mere reason that the attorney confessing it under a warrant was not formally admitted to practice in the court where the judgment was taken, nor for defective verification of the complaint. Purcell v. Kleaver, 98 Wis. 102, 73 N. W. 322. In Illinois, it is held that where the defendant in a confessed judgment asks for and obtains leave to plead, he thereby waives all technicalities and objections to the judgment. Roby v. Updyke, 61 Ill. App. 328.

[169] Roenigk's Appeals (Pa.) 3 Atl. 99; Howie v. Lewis, 196 Pa. 558, 46 Atl. 850.

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or mistake.[170] 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.[171] 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 parties, or for a substantial failure to comply with the statutory requirements.[172] Where an application to open a confessed judgment is based on grounds going to the merits, and is contested, the issues raised should ordinarily be tried by a jury; but in Pennsylvania, it is held that the court to which such an application is made, though there is a conflict of testimony, may pass on the weight of evidence and the credibility of the witnesses, without sending the case to a jury.[173] Terms may be imposed upon the defendant, on granting his application to open the judgment; but it is not proper to require that the money supposed to be due should be brought into court, though the judgment may be allowed to stand as security to abide the result.[174]

170 English's Appeal, 119 Pa. 533, 13 Atl. 479, 4 Am. St. Rep. 656. A court ought not to open a confessed judgment on the ground of fraud if, upon all the testimony, the evidence of fraud is not distinct. Sigle v. Seigley, 9 Kulp (Pa.) 471. Affidavits filed in support of a motion to open a judgment by confession are to be construed most strongly against the party making the motion. Chicago Fire-Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534.

171 See Reynolds v. Silvers, 17 N. J. Law, 275; York Bank's Appeal, 36 Pa. 458; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Chapin v. Thompson, 20 Cal. 681; supra, §§ 58, 64. As to opening the judgment for the benefit of one of two joint defendants, who alleges that his signature was forged, see Darragh v. Bigger, 172 Pa. 89, 33 Atl. 273.

172 Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Filson v. Greenspan, 194 Pa. 546, 45 Atl. 330. See Thompson v. Hintgen, 11 Wis. 112; Pirie v. Hughes, 43 Wis. 531. In the absence of fraud, judgments by confession will not be set aside simply because they were given by defendant after obtaining from plaintiff an extension of time to answer in an action then pending. Wood v. Mitchell, 63 Hun, 629, 17 N. Y. Supp. 782.

173 Blauvelt v. Kemon, 196 Pa. 128, 46 Atl. 416. Compare Hughes v. Moody, 10 Pa. Co. Ct. R. 305.

174 McGuire v. Campbell, 58 Ill. App. 188.

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§ 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." [175] 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.[176]

[175] Braddee v. Brownfield, 4 Watts (Pa.) 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, 34 N. C. 83.

[176] Braddee v. Brownfield, 4 Watts (Pa.) 474; Sheldon v. Stryker, 34 Barb. (N. Y.) 116; Neusbaum v. Keim, 24 N. Y. 325; Dean v. Thatcher, 32 N. J. Law, 470; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Twogood v. Pence, 22 Iowa, 543; Sherman v. Christy, 17 Iowa, 322; Secrist v. Zimmerman, 55 Pa. 446; Kirby v. Fitzgerald, 31 N. Y. 417; Weikel v. Long, 55 Pa. 238; Goff v. Dabbs, 4 Baxt. (Tenn.) 300. See Hoppock v. Cray (N. J.) 21 Atl. 624. The confession of a judgment by the maker of a note, in favor of the holder, does not discharge sureties or indorsers who are not parties thereto. First Nat. Bank v. Eureka Lumber Co., 123 N. C. 24, 31 S. E. 348.

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CHAPTER IV.

JUDGMENTS BY DEFAULT.

79. Judgment of Nil Dicit.
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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

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

[2] Taylor v. McLaughlin, 2 Colo. 375. In an action on two notes, each set out as a distinct cause of action, where defendant answers only as to one of the notes, judgment should be given, on motion, on the other note. Curran v. Kerchner, 117 N. C. 264, 23 S. E. 177.

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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 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.

§ 79a. Judgment for Want of Affidavit of Defense.

According to the practice at common law in some of the states, where an action is brought upon an obligation for the payment of a sum certain in money, if the defendant means to contest it, he is required to file, within a limited time after notice of the plaintiff's statement, an affidavit setting forth the facts on which he means to rely as a defense; if he fails to do this, judgment may be taken against him "for want of an affidavit of defense."[5] If such an affidavit is filed, but the plaintiff deems it inadequate in law to constitute a defense to the action, he may have a rule on the defendant "to show cause why judgment should not be entered against him for want of a sufficient affidavit of defense."[6] A motion for judgment on this ground, being in the nature of a demurrer, admits the facts averred in the affidavit, and denies their sufficiency as an answer to

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

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

[5] Tobyhanna & L. Lumber Co. v. Home Ins. Co., 167 Pa. 231, 31 Atl. 564; 2 Bright. Purd. Dig. (Pa.) 1356, 1357; Laws Pa. 1887, p. 271, § 5; Act Pa. May 31, 1893 (P. L. 185). Plaintiff's right to a default judgment for want of an affidavit of defense within the required time is not affected by an appearance of defendant by attorney within such time. North v. Yorke, 174 Pa. 349, 34 Atl. 620.

[6] Such a judgment, it is said, is not a judgment by default or confession. Abeles v. Powell, 6 Pa. Super. Ct. 123. It is error to give judgment on account of the insufficiency of an affidavit of defense filed, when the case is not one in which such an affidavit can legally be required. Bartoe v. Guckert, 158 Pa. 124, 27 Atl. 845.

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the claim.[7] And if the court decides that the allegations of the affidavit are not adequate to constitute a defense to the action, judgment will be given for the plaintiff, unless, for special reasons, leave should be granted to file a new or supplemental affidavit of defense.[8] If the defense alleged is good as to part of the claim, but insufficient as to the balance, the court may direct judgment for the part insufficiently denied, and allow the plaintiff to try the case as to the remainder.[9] And a statute in Pennsylvania provides that, where an affidavit of defense is filed to a part of the claim sued for, the plaintiff may take judgment for the amount admitted to be due, and proceed to trial for the balance.[10] This applies to any action in which a part of the claim is admitted to be due, irrespective of how the amount is ascertained or the balance computed,[11] but not to a case where the affidavit applies to the whole of the plaintiff's claim, though it may be insufficient in law as to a part of it.[12] In Connecticut, a statute provides that, in causes where an attorney appears for the defendant, the plaintiff may require him to state to the court whether he believes a bona fide defense exists to the action, whether such defense will be made, and whether there will be a trial, and that if such attorney refuses to disclose as required, or shall not satisfy the court that such defense will be made or such trial had, the court may order judgment for the plaintiff. Where this rule is complied with, the court has no authority to pass on the legal sufficiency of the de-

[7] Hicks v. National Bank, 168 Pa. 638, 32 Atl. 63. On such a motion, the correctness of an averment in the affidavit as to the law of another state cannot be tested by reference to the statutes of that state. Wood Co. v. Berry Co., 4 Pa. Dist. R. 141.

[8] Sykes v. Anderson, 14 Pa. Co. Ct. R. 329; Laird v. Campbell, 92 Pa. 475; Callan v. Lukens, 89 Pa. 134. Where leave has been given to file a supplemental affidavit, it must be filed within a reasonable time, or else the court may enter judgment without a new rule or further notice to the defendant. Close v. Hancock, 3 Pa. Super. Ct. 207.

[9] Drake v. Irvine, 10 Pa. Co. Ct. R. 486.

[10] Act Pa. May 31, 1893 (P. L. 185).

[11] Roberts v. Sharp, 14 Pa. Co. Ct. R. 186, affirmed 161 Pa. 185, 28 Atl. 1023.

[12] Reilly v. Daly, 159 Pa. 605, 28 Atl. 493; Myers v. Cochran, 3 Pa. Dist. R. 135, 33 Wkly. Notes Cas. 250.

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fense, and render judgment because it deems such defense insufficient.[13]

§ 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.[14] 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.[15] 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 abridgment of the constitutional right of trial by jury.[16] The right is one which (at least in a civil action) may be

[13] Jennings v. Parsons, 71 Conn. 413, 42 Atl. 76.

[14] A judgment is by default where there has been no appearance by the defendant, even though he was not legally summoned. Brown v. Chapman, 90 Va. 174, 17 S. E. 855. But 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.

[15] Where judgment by default is entered against defendant, a final judgment cannot afterwards be rendered in his favor without first setting aside the default. Bateman v. Pool, 84 Tex. 405, 19 S. W. 552.

[16] Cureton v. Stokes, 22 S. C. 583; Lawrance v. Borm, 86 Pa. 226; Randall v. Weld, 86 Pa. 357; Hunt v. Lucas, 99 Mass. 409; Dortic 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 v. Ladd, 35 Ill. 178; Seeley v. City of Bridgeport, 53 Conn. 1, 22 Atl. 1017; Raymond v. Danbury & N. R. Co., 43 Conn. 596, Fed. Cas. No. 11,593; Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

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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.[17] 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.[18] 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.[19] 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.[20] Under statutes allowing such a course of procedure, a defendant may proceed with the case upon the failure of the plaintiff to appear, and judgment may be rendered on the merits.[21] But one who is origi-

[17] Hibernia Savings & Loan Soc. v. Superior Court, 56 Cal. 265.

[18] Scamahorn v. Scott, 42 Iowa, 529; Abell v. Simon, 49 Md. 318; Gracy v. Coates, 2 McCord, 224; Jones v. Tracy, 75 Pa. 417; Laughlin v. January, 59 Mo. 383; Debs v. Dalton, 7 Ind. App. 84, 34 N. E. 236.

[19] See, infra, §§ 227–232, §§ 190, 196. Particularly as to the validity of default judgments against infants, lunatics, and married women, see Jackson v. Brunor, 17 Misc. Rep. 339, 39 N. Y. Supp. 1080; Appel v. Brooks, 4 Misc. Rep. 626, 24 N. Y. Supp. 100; Kent v. West, 22 Misc. Rep. 403, 50 N. Y. Supp. 339; Marion v. Regenstein, 98 Ala. 475, 13 South. 384.

[20] Cloud v. Inhabitants of Town of Pierce City, 86 Mo. 357.

[21] Clune v. Quitzow, 125 Cal. 213, 57 Pac. 886.

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nally a defendant, but afterwards, by leave of court, becomes a plaintiff and files a cross bill, is not entitled to a default judgment against his co-defendants, if they had no notice of his cross bill or that he had changed his status in the case.[22]

§ 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 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.[23] 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

[22] Cole v. Grigsby (Tex. Civ. App.) 35 S. W. 680.

[23] Russell v. Hogan, 1 Scam. (Ill.) 552; Catlin v. Latson, 4 Abb. Prac. (N. Y.) 248; Taylor v. Beck, 3 Rand. (Va.) 316; Woodward v. Newhall, 1 Pick. (Mass.) 500; Hutchings v. Real Estate 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. Board of Sup'rs of Jasper County, 27 Ill. 303. Where one of several defendants answers, he is not in default for failure to answer an amended petition which does not change the effect of the original as to him. Bremen Bank v. Umrath, 55 Mo. App. 43. In an action against several defendants on a joint demand, where one defendant, not served, appears and files and serves his plea, he is entitled to notice of trial; and until such notice is given the court cannot legally enter judgment by default against the remaining defendants. Penfold v. Slyfield, 110 Mich. 343, 68 N. W. 226.

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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.[24] It is also held that where process is served on only one of two defendants, judgment cannot be rendered against both by default.[25] But it seems to be otherwise under the "joint debtor acts," existing in several of the states, in actions upon a joint contract.[26]

§ 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.[27] 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.[28]

[24] See, infra, §§ 208, 209. Where a number of defendants are jointly sued on a joint liability, and a joint judgment is asked, it is error for the court to render a several judgment on default against one defendant, without first trying and determining the liability of all the defendants. Osbun v. Bartram, 15 Ohio Cir. Ct. R. 224. Compare German-American Bank v. Stickle, 59 Neb. 321, 80 N. W. 910. A grantor of realty by warranty deeds, sued with his grantees in an action to set aside the title which he assumed to convey, may defend in his own name for the defendants served but not answering. Bausman v. Eads, 46 Minn. 148, 48 N. W. 769, 24 Am. St. Rep. 201.

[25] Rider v. Alleyne, 2 Scam. (Ill.) 474; Winslow v. Lambard, 57 Me. 356. In an action against three defendants, service on one only does not authorize judgment by default against the others, where no facts are alleged making service on one valid as to all. Tilman v. Johnson (Tex.) 16 S. W. 788. See Kellogg v. Window, 100 Iowa, 552, 69 N. W. 875.

[26] See, infra, §§ 235, 236.

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

[28] Warren Manuf'g Co. v. Ætna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17,206; Graham v. Graham, 4 Munf. (Va.) 205; Staunton Perpetual Bldg. & Loan Co. v. Haden, 92 Va. 201, 23 S. E. 285; Rorer v. People's Bldg. L. & S. Ass'n, 47 W. Va. 1, 34 S. E. 758; Stallings v. Gully, 48 N. C. 344; Winslow v. Anderson, 20 N. C. 1, 32 Am. Dec. 651; Duncan v. Gerdine, 59 Miss. 550; Prentiss v. Mellen, 1 Smedes & M. (Miss.) 521; State v. Billings, 23

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And due and proper service must appear upon the record before the court is authorized to render a judgment by default;[29] 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.[30] 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.[31] 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 liable to be corrected or set aside on motion, or reversed above, but not absolutely void, and hence not open to collateral attack.[32] In the next place, the process, sufficient in

La. Ann. 798; Townsand v. Townsand, 21 Ill. 540; Moore v. Watkins, 1 Ark. 268; Shepherd v. Marvel, 16 Ind. App. 417, 45 N. E. 526; Ditch v. People, 31 Ill. App. 368; Holtt v. Skinner, 99 Iowa, 360, 68 N. W. 788; York Draper Mercantile Co. v. Hutchinson, 2 Kan. App. 47, 43 Pac. 315; Johnson v. Delbridge, 35 Mich. 436; Bascom v. Young, 7 Mo. 1; Zimmerman v. Gerdes, 106 Wis. 608, 82 N. W. 532; D. M. Osborne & Co. v. Columbia County Farmers' Alliance Corp., 9 Wash. 666, 38 Pac. 160.

[29] Wilkinson v. Bayley, 71 Wis. 131, 36 N. W. 836; Zimmerman v. Gerdes, 106 Wis. 608, 82 N. W. 532; People's Mut. Ben. Soc. v. Frazer, 97 Mich. 627, 56 N. W. 944; Campbell v. Donovan, 111 Mich. 247, 69 N. W. 514. A mere recital in a default judgment that process was served is not sufficient evidence of that fact. Herman's Ex'x v. Martin (Ky.) 55 S. W. 429.

[30] Smith v. Ellendale Mill Co., 4 Or. 70.

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

[32] Bishop v. Donnell, 171 Mass. 563, 51 N. E. 170; Dunn v. Hughes (Tex. Civ. App.) 36 S. W. 1084; Harbolt v. State, 37 Tex. Cr. R. 639, 40 S. W. 998; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; De Tar v. Boone Co.,

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itself, must be duly served upon the party or upon some person authorized to receive service in his stead.[33] 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." [34] 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.[35] But a default obtained without proper service and on an unauthorized appearance, is an absolute nullity.[36] The defendant may also acknowledge service of the writ, and thereby fore-

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, Fed. Cas. No. 7,097. A judgment by default against defendant is valid, notwithstanding a mistake in the summons in the Christian name of the plaintiff. Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386. But a citation not authenticated by the seal of the court will not, on appeal, support a judgment by default. Line v. Cranfill (Tex. Civ. App.) 37 S. W. 184. And where the copy of the notice delivered to the defendant fails to show that the original notice was signed by the plaintiff or his attorney, as required by statute, the service is not sufficient to give the court jurisdiction to enter a default judgment. Hoitt v. Skinner, 99 Iowa, 360, 68 N. W. 788. In New York, plaintiff cannot take a judgment by default if a copy of the complaint is not served with the summons. See Crouse v. Reichert, 61 Hun, 46, 15 N. Y. Supp. 369.

[33] A judgment by default on service of a summons on the attorney of defendant, when the latter in no manner voluntarily submits himself to the jurisdiction of the court, is void. Goldberg v. Fowler, 29 Misc. Rep. 328, 60 N. Y. Supp. 475. As to service of papers by mail, see Seifert v. Caverly, 63 Hun, 604, 18 N. Y. Supp. 327.

[34] Isaacs v. Price, 2 Dill. 351, Fed. Cas. No. 7,097. Compare Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52.

[35] The entry of an order that the cause "is hereby continued by consent" does not show such an appearance and waiver of service as will support a judgment by default. Flowers v. Jackson, 66 Ark. 458, 51 S. W. 462.

[36] Fleming v. Boulevard Highlands Imp. Co., 12 Colo. App. 187, 54 Pac. 859; Great West Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; Dillon v. Rand, 15 Colo. 372, 25 Pac. 185; Howell v. Campbell, 53 Kan. 742, 37 Pac. 120. An affidavit for continuance filed by defendant is not such an appearance as will warrant judgment by default. Hoyt v. Macon, 2 Colo. 113. Nor is service of notice of a motion

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go 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.[37] 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.[38] 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 the ordinary case of a defendant who has been served and has appeared.[39] 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.[40]

to dissolve an attachment on account of irregularity, made by defendant's attorney. Glidden v. Packard, 28 Cal. 649. So where, in foreign attachment, defendant appears merely to move for a rule on plaintiff to show his cause of action, for the purpose of securing a release of the property, it is a special appearance, and not sufficient to authorize a judgment by default. Warren Sav. Bank v. Silverstein, 15 Pa. Co. Ct. R. 584. On the withdrawal of his appearance for defendant by the attorney entering the same, though without leave of court, a valid judgment by default may be entered against the defendant. Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103. But if the defendant was personally served, it is immaterial, as affecting a judgment by default against him, whether or not an attorney who appeared for him was authorized to do so, since in either event the judgment is proper. Hunter v. Bryant, 98 Cal. 252, 33 Pac. 55.

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

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

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

[40] Watson v. Miller Bros., 69 Tex. 175, 5 S. W. 680. But a judgment

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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.[41]

§ 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.[42] Hence if the plaintiff's pleading sets out

by default is not void where it appears that summons upon the petition as amended was duly served on the defendant. Little v. Ferguson (Ky.) 55 S. W. 554.

[41] See Gary v. Northwestern Masonic Aid Ass'n (Iowa) 50 N. W. 27; Taylor v. Rossiter, 6 Houst. (Del.) 485. And see, infra, §§ 227–232. A judgment by default on constructive service by publication, there being no personal service and no appearance by defendant, is void, where, at the commencement of such action, and at the time of the making of such publication, the defendant was a resident within the jurisdiction, and, by due diligence, service could have been made upon him personally. Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054.

[42] Amason v. Nash, 19 Ala. 104; Wellborn v. Sheppard, 5 Ala. 674; Merritt v. White, 37 Miss. 438; Glenn v. Shelburne, 29 Tex. 125; Stahl v. Chicago, St. P., M. & O. R. Co., 94 Wis. 315, 68 N. W. 954. Compare Hibernia Sav. & Loan Soc. v. Matthai, 116 Cal. 424, 48 Pac. 370. Plaintiff cannot take a default where there is no declaration or complaint on file. Woodruff v. Matheney, 55 Ill. App. 350; Press v. Ridgway Refrigerator Manuf'g Co., 37 Ill. App. 269; Haygood v. Tait, 126 Ala. 264, 27 South. 842. But a judgment by default is not invalidated by reason of the fact that the defendant's attorney had taken the papers from the files before judgment was rendered, and then had them in his possession. Schultz v. Meiselbar, 144 Ill. 26, 32 N. E. 550.

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no cause of action, a judgment by default thereon cannot stand.[43] "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 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.[44] 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." [45] A view opposite to that here stated has been taken in some of the New York cases,[46] 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

[43] Thigpen v. Mundine, 24 Tex. 282; Abbe v. Marr, 14 Cal. 210; Barron v. Frink, 30 Cal. 486; Hallock v. Jaudin, 34 Cal. 167; Andrews v. Union Cent. Life Ins. Co., 92 Tex. 584, 50 S. W. 572; Ide v. Booth, 8 Pa. Co. Ct. R. 499.

[44] But some of the cases hold that, in order to support a judgment by default, the declaration or complaint must be sufficient to withstand a general demurrer. Globe Acc. Ins. Co. v. Reid, 19 Ind. App. 203, 47 N. E. 947; Ishmel v. Potts (Tex. Civ. App.) 44 S. W. 615.

[45] Bosch v. Kassing, 64 Iowa, 312, 20 N. W. 454. See Walker v. Massey, 10 Ala. 30. In an action to protect a water right, if the complaint states a good title, it will support a decree taken by default. Bailey v. Malheur & H. L. Irr. Co., 36 Or. 54, 57 Pac. 910.

[46] Adams v. Oaks, 20 Johns. 282; Dorr v. Birge, 8 Barb. 351; Pope v. Dinsmore, 8 Abb. Prac. 429; Reeder v. Lockwood, 30 Misc. Rep. 531, 62 N. Y. Supp. 713. See, also, Frankfurth v. Anderson, 61 Wis. 107, 20 N. W. 662; Askren v. Squire, 29 Or. 228, 45 Pac. 779; Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476.

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any judgment, whether the defendant answers or not.[47] 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.[48] 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.[49] 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 general damages, upon a declaration containing a count bad in substance) the judgment will be erroneous.[50]

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§ 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 and voidable at his instance.[51] He has the whole of the last day in which to plead, and cannot be said to be in default until

[47] The failure of defendant to appear or answer is an admission only as to the facts which are properly pleaded by the plaintiff. Doud Sons & Co. v. Duluth Milling Co., 55 Minn. 53, 56 N. W. 463.

[48] Thompson v. Stetson, 15 Neb. 112, 17 N. W. 368. So, a default judgment for fraudulent representations cannot stand, unless the intent to defraud was alleged in the complaint. Shields v. Clement, 12 Misc. Rep. 506, 33 N. Y. Supp. 676. But it is said that a default judgment is not void merely because the complaint fails to show whether the plaintiff (described as a "company") is a corporation or a partnership. Moore v. Martin & Hoyt Co., 124 Ala. 291, 27 South. 252.

[49] Hunt v. City of San Francisco, 11 Cal. 250.

[50] Hemmenway v. Hickes, 4 Pick. (Mass.) 497; Dryden v. Dryden, 9 Pick. (Mass.) 546.

[51] Parker v. Linden, 59 Hun, 623, 13 N. Y. Supp. 787; Lash v. Warren (Tex.) 14 S. W. 694; Hole v. Page, 20 Wash. 208, 54 Pac. 1123; Forbes v. Muxlow, 18 Civ. Proc. R. 239, 13 N. Y. Supp. 797; Gillette-Herzog Manuf'g Co. v. Ashton, 55 Minn. 75, 56 N. W. 576. As to judgment by default in a justice's court, rendered, in the absence of defendant and his counsel, prior to the hour set in the citation, see Yentzer v. Thayer, 10 Colo. 63, 14 Pac.

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that day has fully expired;[52] and if the last day falls upon a Sunday or a holiday, he is entitled to the whole of the next succeeding day.[53] But a judgment thus prematurely entered is not absolutely void; if the defendant takes no steps to correct the error, he is presumed to have waived it.[54] The time limited 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.[55] 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.[56] 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.[57] In case of a default, judg-

53, 3 Am. St. Rep. 563. And see Dow v. March, 80 Me. 408, 15 Atl. 26. Where a municipal court orders an answer to be filed, and adjourns to a subsequent day, it cannot in the interim render a legal judgment by default on failure to file an answer. Whitman & Barnes Manuf'g Co. v. Hamilton, 27 Misc. Rep. 198, 57 N. Y. Supp. 760.

[52] Porter v. Hower, 9 Pa. Co. Ct. R. 283; Lohman v. Cox, 9 N. M. 503, 56 Pac. 286.

[53] Rothchild v. Link, 29 App. Div. 580, 51 N. Y. Supp. 253. But where the time to plead is limited to a certain number of days, Sundays and holidays are to be counted, except where the last day is dies non. Bailey v. Edmundson, 168 Mass. 297, 46 N. E. 1064.

[54] White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; Burt v. Scrantom, 1 Cal. 416; Mitchell v. Aten, 37 Kan. 33, 14 Pac. 497, 1 Am. St. Rep. 231; West v. Williamson, 1 Swan (Tenn.) 277; Glover v. Holman, 3 Heisk. (Tenn.) 519.

[55] Hoguet v. Wallace, 28 N. J. Law, 523; Beebe v. George H. Beebe Co., 64 N. J. Law, 497, 46 Atl. 168; Wiggins v. Mayer, 91 Ga. 778, 18 S. E. 430; McDonald v. Tutty, 99 Ga. 184, 27 S. E. 157. But an acceptance of service and waiver of citation will not authorize judgment by default before the expiration of the time allowed for pleading. Anheuser-Busch Brewing Ass'n v. McGowan, 49 La. Ann. 630, 21 South. 766.

[56] Harper v. Biles, 115 Pa. 594, 8 Atl. 446.

[57] Emery v. Downing, 13 N. J. Eq. 59.

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ment may be entered before the case is reached in its regular order on the docket.[58]

§ 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 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.[59] The authorities do not go to the extent

[58] Brenner v. Gundershiemer, 14 Iowa, 82. Where an answer is due after the commencement of a term of court, and no pleading is filed nor appearance made by the defendant, the case may be docketed, and judgment by default rendered at any time thereafter during such term. Leonard v. Hargis, 58 Kan. 40, 48 Pac. 586. See Kessler v. Vera, 25 Misc. Rep. 763, 54 N. Y. Supp. 142.

[59] Phonoharp Co. v. Stobbe, 20 Misc. Rep. 698, 46 N. Y. Supp. 678; Com. v. Krause, 23 Pa. Co. Ct. R. 511; Carolina Inv. Co. v. Kelly, 123 N. C. 388, 31 S. E. 671; Green v. Jones, 102 Ala. 303, 14 South. 630; Taylor v. McNairy, 42 Miss. 276; Beard v. Orr & Lindsey Shoe Co. (Miss.) 8 South. 512; Hambrick v. Dent, 70 Miss. 59, 11 South. 608; Biloxi Lumber & Export Co. v. New Orleans Railway & Mill Supply Co. (Miss.) 28 South. 21; Bedwell v. Thompson, 25 Tex. Supp. 245; Sevier v. Turner (Tex. Civ. App.) 33 S. W. 294; Hepburn v. Danville Nat. Bank (Tex. Civ. App.) 34 S. W. 988; Hicks v. Vann, 4 Ark. 526; Boyer v. Robinson, 6 Ark. 552; Alexander v. Stewart, 23 Ark. 18; White v. Reagan, 25 Ark. 622; Harris v. Muskingum Manuf'g Co., 4 Blackf. 267, 29 Am. Dec. 372; Young v. State Bank, 4 Ind. 304; Terrell v. State, 68 Ind. 155; Wall v. Galvin, 80 Ind. 447; Lyon v. Barney, 1 Scam. (Ill.) 387; Faurot v. Park Nat. Bank, 37 Ill. App. 322; City of Pana v. Humphreys, 39 Ill. App. 641; Wells v. Mathews, 70 Ill. App. 504; Keck v. McEldowney, 73 Ill. App. 159; Miller v. Hardacre, 1 G. 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 Neb. 147, 26 N. W. 915; Strong v. Comer, 48 Minn. 66, 50 N. W. 936; Porter v. Bichard, 1 Ariz. 87, 25 Pac. 530. Under a statute providing that either party to a civil action may propound interrogatories to the other, which must be answered fully, and that if the answers are not full and clear, the court may, on motion, compel them to be made so, or default or nonsuit the answering party, the court cannot, without further proceedings, default the answering party because the answers are deemed insufficient or evasive. Feis v. Raymond, 139 Mass. 98, 28 N. E. 691. In some states, the mere filing of an answer will not prevent a judgment by default, but there must also be a subsequent appearance by defendant to protect his rights. Lytle v. Custead, 4 Tex. Civ. App. 490, 23 S. W. 451. And see Schwarz v. Oppenheimer, 90 Ala. 462, 8 South. 36.

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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.[60] 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.[61] 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.[62] And especially after replying to a plea filed in proper time the plaintiff cannot take judgment by nil dicit; if the plea is bad, he should withdraw his replication and demur.[63]

[60] 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.

[61] Wooldridge v. Brown, 1 Tex. 478. See, per contra, Lyon v. Barney, 1 Scam. (Ill.) 387.

[62] Briggs v. Sholes, 14 N. H. 262. Where the admissions in an answer negative its general denials, the latter may be disregarded, and if the complaint be verified, judgment may be asked on the former. Fremont v. Seals, 18 Cal. 433. In Texas, to defeat a judgment by default for want of an answer, defendant must file an answer consisting of a written pleading; it is not sufficient for him to request orally, on the appearance day, that the action be dismissed because of its being brought in the wrong county. State v. Patterson (Tex. Civ. App.) 40 S. W. 224.

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

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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.[64] And a judgment by default, entered while exceptions are pending and undetermined, is erroneous and irregular.[65] 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.[66] When a demurrer to the answer is sustained, in the absence of defendant and his counsel, an opportunity must be accorded to the defendant to elect whether he will plead over or stand on the demurrer.[67] 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.[68]

For the same reasons, a default cannot be entered while a motion is pending.[69] 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.[70] So of a motion to dismiss, for want of security for costs by a non-resident plaintiff, made in due time.[71] A motion to quash the return or the summons is no waiver of the right to plead, and in such

[64] Steelman v. Watson, 5 Gilman (Ill.) 249; McKinney v. Moy, 1 Scam. (Ill.) 534; Key v. Hayden, 13 Iowa, 602; Willamette Falls Transportation & Milling Co. v. Smith, 1 Or. 181; Hirsh v. Clawson, 106 Ind. 329, 6 N. E. 919; Fish v. Wheeler, 31 Ill. App. 596; Race v. Irving Park Hall Ass'n, 50 Ill. App. 131.

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

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

[67] Thwing v. Doye, 2 Okl. 608, 44 Pac. 381.

[68] Jordan v. John Ryan Co., 35 Fla. 259, 17 South. 73.

[69] Atchison, T. & S. F. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512; Ridgway v. Horner, 55 N. J. Law, 84, 25 Atl. 386; Hosmer v. Holtt, 161 Mass. 173, 36 N. E. 835.

[70] Mattoon v. Hinkley, 33 Ill. 208. As to the effect of the pendency of an application for a change of venue, as preventing a default, see Anderson v. Perkins, 52 Mo. App. 527; Pennie v. Visher, 94 Cal. 323, 29 Pac. 711.

[71] The Osprey v. Jenkins, 9 Mo. 643.

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case a refusal to allow the defendant to plead, and an entry of judgment as upon default, is error.[72] 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, 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.[73] 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.[74] 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.[75] 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.[76] 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

[72] Story v. Ware, 35 Miss. 399, 72 Am. Dec. 125; Farris v. Walter, 2 Colo. App. 450, 31 Pac. 231. Compare Higley v. Pollock, 21 Nev. 198, 27 Pac. 895.

[73] Dart v. Hercules, 34 Ill. 395; Grigg v. Gilmer, 54 Ala. 425. When defendant has withdrawn his appearance, he is not entitled to notice of an application for judgment by default. Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037.

[74] Such is the case where defendant's answer is stricken out as sham and frivolous, and he unwarrantably neglects to file an amended pleading. McMurran v. Meek, 47 Minn. 245, 49 N. W. 983.

[75] McPherson v. First Nat. Bank, 12 Neb. 202, 10 N. W. 707. And see McKellar v. Lamkin, 22 Tex. 244; London Assur. Corp. v. Lee, 66 Tex. 247, 18 S. W. 508.

[76] Robinson v. Keys, 9 Humph. (Tenn.) 144; La Barre v. City of Waterbury, 69 Conn. 554, 37 Atl. 1068. Compare Mullins v. Johnson (Ky.) 52 S. W. 843. In California, the rule is that an amendment of the complaint in matter of substance opens a default. Witter v. Bachman, 117 Cal. 318, 49 Pac. 202. As to the effect of the death of the plaintiff and the substitution of his executor, extending the time to answer, when the defendant is already in default, see Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

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cause of action shown by the amended complaint.[77] 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."[78] When a default has actually been entered against the defendant, he cannot escape its consequences by filing a plea or answer, unless by consent of the plaintiff or leave of court.[79] But a default may be waived; and it will be considered that this is done, if the plaintiff subsequently permits the defendant, without objection, to participate in the proceedings, as, by filing an answer or a demurrer.[80]

§ 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 subsequent action between the parties or their privies.[81] But while a de-

[77] First Nat. Bank v. Prescott, 27 Wis. 616. Where, in an action of assumpsit, the general issue has been pleaded, and an amendment to the declaration is allowed, it is error to enter judgment by default against the defendant for failure to answer the amended declaration. Ridgely Nat. Bank v. Fairbank, 54 Ill. App. 296.

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

[79] Irvine v. Davy, 88 Cal. 495, 26 Pac. 506; Camp v. Phillips, 88 Ga. 415, 14 S. E. 580. As to the discretion of the trial court in granting defendant leave to answer after the time, see Lichtenberger v. Worm, 41 Neb. 856, 60 N. W. 93. And see Crane v. Crane, 121 Cal. 99, 53 Pac. 433.

[80] Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654; Sawtelle v. Muncy, 116 Cal. 435, 48 Pac. 387.

[81] Leonard v. Simpson, 2 Bing. N. C. 176; Oregon Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.) 28 Fed. 505; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817; Thatcher v. Gammon, 12 Mass. 268; Briggs v. Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Gaskill v. Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Newton v. Hook, 48 N. Y. 676; Brown v. Mayor, etc., of City of New York, 66 N. Y. 385; McCalley v. Wilburn, 77 Ala. 549; Ellis v. Mills, 28 Tex. 584; Dunn v. Pipes, 20 La. Ann.

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fault 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.[82] "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."[83] 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 remain to be ascertained by the assessment of damages.[84] A judgment by default will also operate as a merger of the cause of action

276; Ligon v. Triplett, 12 B. Mon. (Ky.) 283; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Fletcher v. Holmes, 25 Ind. 458; Van Valkenburgh v. City of Milwaukee, 43 Wis. 574; Doyle v. Hallam, 21 Minn. 515; Kittridge v. Stevens, 16 Cal. 381. Infra, § 697.

[82] Unfried v. Heberer, 63 Ind. 67. Such a judgment, in an action to enforce stockholders' liability, is conclusive that a defendant, duly summoned and failing to answer, was a stockholder. Ueland v. Johnson, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698. But it is said that a judgment by default against defendants in an action wherein they were alleged to be partners, does not establish the existence of the partnership. Baker v. Baer, 59 Ark. 503, 28 S. W. 28. Where a default is taken in a suit on a contract entered into with a foreign corporation, its capacity to make the contract is admitted. Starr Cash & Package Car Co. v. Starr, 69 Conn. 440, 37 Atl. 1057. Judgment by default in an action for assessments upon property for public improvements is conclusive that such property was subject to assessment, and after the lapse of 20 years will be binding even where the defendant was a municipal corporation. City of New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96. So also, the allegation that money sought to be recovered was received by defendant in a fiduciary capacity is admitted by a default and need not be proved. Steamship Richmond Hill Co. v. Seager, 31 App. Div. 288, 52 N. Y. Supp. 985. In fact, as stated in an Illinois decision, the entire cause of action, except the amount of damages as stated in the declaration, is admitted by a default. Phœnix Ins. Co. v. Hedrick, 73 Ill. App. 601.

[83] Barton v. Anderson, 104 Ind. 578, 4 N. E. 420.

[84] 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; Missis-

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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.[85] 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.[86]

§ 88. Entry by the Clerk.

Where the defendant makes default, and the nature of the action and of the plaintiff's demand is such that there is no necessity for judicial action in determining the relief to be granted or the amount of the recovery, the statutes generally provide that a judgment may be entered by the clerk of the court, without application to the judge.[87] But in so entering judgment by default the clerk 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

sippi & T. R. Co. v. Green, 9 Heisk. (Tenn.) 588; Parker v. House, 66 N. C. 374.

[85] Hanscom v. Hewes, 12 Gray (Mass.) 334.

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

[87] See Bullard v. Sherwood, 85 N. Y. 253; Skillman v. Greenwood, 15 Minn. 102 (Gil. 77); Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Wall v. Heald, 95 Cal. 364, 30 Pac. 551; Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55. On failure of a defendant properly served to appear within the time allowed, the court may enter judgment against him without a prior formal entry of default by the clerk. Hibernia Sav. & Loan Soc. v. Matthai, 116 Cal. 424, 48 Pac. 370. Where the statute provides that, if there is an allegation of fraud, the plaintiff cannot recover unless he proves the fraud at the trial, judgment by default cannot be entered by the clerk without the intervention of the court when the action is predicated on certain acts of defendant which are alleged to have been done with a fraudulent intent. Fayerweather v. Tucker, 25 Abb. N. C. 395, 11 N. Y. Supp. 39.

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not binding.[88] 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.[89] 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 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.[90]

§ 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."[91] 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

[88] Kelly v. Van Austin, 17 Cal. 564; Providence Tool Co. v. Prader, 32 Cal. 634, 91 Am. Dec. 598; Curry v. Roundtree, 51 Cal. 184; Files v. Robinson, 30 Ark. 487; Taylor v. Smith (Tenn. Ch.) 36 S. W. 970. Where the statute empowers the clerk to enter judgment in actions on contracts to recover money or damages, if defendant fails to answer, this does not authorize him to enter judgment by default in an action for trespass. Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237.

[89] McConkey v. McCraney, 71 Wis. 576, 37 N. W. 822; Elder v. Grunsky, 127 Cal. 67, 59 Pac. 300.

[90] Lenoir v. Broadhead's Adm'r, 50 Ala. 58; Bond v. Pacheco, 30 Cal. 530.

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

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mere matter of calculation, then a final judgment may be at once entered for such amount; but if the action sounds in tort,[92] or claims specific relief, or if the damages must be computed or liquidated otherwise than by simple calculation,[93] 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. 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 a plea, as the law required, the appellate court said: "In this we think there is manifest error." [94] 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.[95] Nor can a final judgment by default be rendered in an action of detinue.[96] Nor is such judgment proper upon a note payable in Confederate money. "A jury should have assessed the value of the contract [note], upon

[92] Stewart v. Bryan, 121 N. C. 46, 28 S. E. 18; Studdert v. Hassell, 6 Humph. (Tenn.) 137; Wilson v. Dawson, 96 Va. 687, 32 S. E. 461.

[93] Holmes v. Lewis, 2 Wis. 83; Kenum v. Henderson, 6 Ala. 132; Cooley v. Tybee Beach Co., 99 Ga. 290, 25 S. E. 691; Faucette v. Ludden, 117 N. C. 170, 23 S. E. 173; In re Scharmann, 49 App. Div. 278, 63 N. Y. Supp. 267; City of Guthrie v. T. W. Harvey Lumber Co., 5 Okl. 774, 50 Pac. 84.

[94] 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. 212. In Illinois, where no plea is filed in an action of assumpsit, and the defendant is absent, it is error to impanel a jury and assess damages without default first taken and entered. Lehr v. Vandeveer, 48 Ill. App. 511.

[95] Wolf v. Hamberg, 8 S. C. 82; Rogers v. Moore, 86 N. C. 85; Jenkins v. Wilkerson, 76 Miss. 368, 24 South. 700. Where the cause of action is for services rendered as an attorney, but no fixed sum is alleged to have been agreed on, an inquiry of damages must be had upon defendant's default. Skinner v. Terry, 107 N. C. 103, 12 S. E. 118.

[96] Studdert v. Hassell, 6 Humph. (Tenn.) 137.

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a writ of inquiry, before the judgment was made final." [97] On the other hand, a demand founded upon a simple promissory note for a sum certain, not expressed to be payable otherwise than in lawful money, will warrant a final judgment upon defendant's default.[98] And the same is true of a claim for sums alleged to have been expended by a mortgagee to protect his security, as, for taxes,[99] and of a claim by a municipal corporation against a tax collector and his sureties upon the official bond.[100]

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.[101] 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.[102]

§ 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, consisted of the execution of a writ of in-

[97] Williams v. Rockwell, 64 N. C. 325.

[98] Georgia Railroad & Banking Co. v. Pendleton, 87 Ga. 751, 13 S. E. 822. Compare Kaiser v. Brown, 98 Ga. 19, 25 S. E. 925; Thomas v. American Freehold Land & M. Co. (C. C.) 47 Fed. 550, 12 L. R. A. 681. A note containing a stipulation for attorney's fees will support a judgment by default which includes such fees, without a writ of inquiry. Ledbetter & Co. Land & Loan Ass'n v. Vinton, 108 Ala. 644, 18 South. 692.

[99] Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476.

[100] Combs v. Breathitt County (Ky.) 38 S. W. 138.

[101] Lombard v. Clark, 33 Mo. 308.

[102] Haldeman v. Starrett, 23 Ill. 393.

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quiry, whereby the sheriff was directed to summon a jury of twelve men, over which he should himself preside, and proceed to assess the amount of damages sustained by the plaintiff. The verdict being given, the sheriff returned the inquisition, which was entered on the roll in the manner of a postea, and thereupon judgment was rendered that the plaintiff should recover the exact sum of damages so assessed.[103] 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; 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.[104] The important question is as to the constitutional right of trial by jury. Under the clause found in many of the state constitutions, 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.[105] 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.[106]

[103] See Hickman v. Baltimore & O. R. Co., 30 W. Va. 296, 4 S. E. 654.

[104] For the practice in the several states, and particularly as to the assessment being made by the court or by a jury, see Rowen v. New York, N. H. & H. R. Co., 59 Conn. 364, 21 Atl. 1073; Falken v. Housatonic R. Co., 63 Conn. 258, 27 Atl. 1117; Thompson v. Fox, 21 Misc. Rep. 298, 47 N. Y. Supp. 176; Commercial Union Assur. Co. v. Everhart's Adm'r, 88 Va. 952, 14 S. E. 836; McLeod v. Nimocks, 122 N. C. 437, 29 S. E. 577; Allen v. Lathrop-Hatton Lumber Co., 90 Ala. 490, 8 South. 129; Decatur & N. Imp. Co. v. Crass, 97 Ala. 524, 12 South. 41; Ross v. Noble, 6 Kan. App. 361, 51 Pac. 792; Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Haley v. Eureka County Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815. Where defendant is dissatisfied with the assessment of damages on a default, his remedy is by motion to correct the assessment. Riely v. Barton, 32 Ill. App. 524.

[105] Hickman v. Baltimore & O. R. Co., 30 W. Va. 296, 4 S. E. 654.

[106] Hopkins v. Ladd, 35 Ill. 178; Seeley v. City of Bridgeport, 53 Conn. 1, 22 Atl. 1017; Raymond v. Danbury & N. R. Co., 43 Conn. 596, Fed. Cas. No. 11,593.

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§ 91. Evidence on Assessment of Damages.

A default admits the cause of action and the material and traversable avèrments 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.[107] 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.[108] 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.[109]

[107] Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Russ v. Gilbert, 19 Fla. 54; Maund v. Loeb, 87 Ala. 374, 6 South. 376; Union Cent. Life Ins. Co. v. Lipscomb (Tex. Civ. App.) 27 S. W. 307; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Martin v. New York & N. E. R. Co., 62 Conn. 331, 25 Atl. 239. But in Florida, it is said that it is error to render final judgment after a default entered in a suit on a bond without production of the bond or proper evidence of it. West v. Fleming, 36 Fla. 298, 18 South. 587.

[108] Patrick v. Ridgaway, 4 Har. & J. (Md.) 312; Durden v. Carhart, 41 Ga. 76.

[109] The defendant has the right to cross-examine the plaintiff's witnesses and interpose objections to evidence. St. Louis S. W. R. Co. v. Denson (Tex. Civ. App.) 26 S. W. 265; Davis v. Wimberly, 86 Ga. 46, 12 S. E. 208. He may also offer any evidence which goes in mitigation or reduction of damages, but cannot have the benefit of a set-off or counterclaim, or other ground for the reduction of damages, unless it necessarily arises from the facts pleaded by the plaintiff. Regan v. New York & N. E. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306. And he cannot introduce evidence controverting the plaintiff's entire cause of action, or tending to avoid it, or to show that no right of action existed. Phillips v. Bachelder, 47 Mo. App. 52; Garrard v. Dollar, 49 N. C. 175, 67 Am. Dec. 271; Foster v. Smith, 10 Wend. (N. Y.) 377; Lambert v. Sanford, 55 Conn. 437, 12 Atl. 519; Lee v. Knapp, 90 N. C. 171. Thus, he cannot defend on the ground that the contract was within the statute of frauds. Williams v. Crosby Lumber Co., 118 N. C. 928, 24 S. E. 800. But in Connecticut, a statute permits the defendant to notify the plaintiff of any

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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.[110] 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.[111] 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.[112] 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.[113] In an action against joint defendants, where one suffers default, but the other proceeds to trial and secures a general verdict against the plaintiff, this is equivalent to a finding that nothing is due from the defaulted defendant, and no judgment can be entered against him.[114]

special defense to be set up on a hearing in damages on default; and this enables him to avail himself of the defense of res judicata. Brennan v. Berlin Iron-Bridge Co., 71 Conn. 479, 42 Atl. 625. See, also, Ockershausen v. New York, N. H. & H. R. Co., 71 Conn. 617, 42 Atl. 650; Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42.

110 Gage v. Rogers, 20 Cal. 91; White v. Snow, 71 N. C. 232; Johnson v. Mantz, 69 Iowa, 710, 27 N. W. 467; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9; Reidy v. Bleistift, 31 Misc. Rep. 181, 63 N. Y. Supp. 974; Bast v. Hysom, 6 Wash. 170, 32 Pac. 997. Where the complaint demands judgment for the principal of a debt and the costs, a judgment which includes interest, as well as the debt and costs, is erroneous. Pickett v. Handy, 9 Colo. App. 357, 48 Pac. 820. But the clerk has authority to add to the amount due on a note the sum therein stipulated to be paid for attorneys' fees, if within the amount demanded in the summons. Alexander v. McDow, 108 Cal. 25, 41 Pac. 24.

111 Burling v. Goodman, 1 Nev. 314; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9; Parszyk v. Mach, 10 S. D. 555, 74 N. W. 1027. Where the complaint only seeks subrogation of plaintiff to the right of another defendant in a judgment, plaintiff is not entitled, on default of the defendant, to a personal judgment against him. Heins v. Wicke, 102 Iowa, 396, 71 N. W. 345. But it has been held that, where the action is on a note and mortgage, the court may, on default, give judgment for foreclosure of the mortgage, though plaintiff has only asked for a personal judgment for the amount due. Weaver v. Gardner, 14 Kan. 347.

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

113 Rees v. Conococheague Bank, 5 Rand. (Va.) 326, 16 Am. Dec. 755.

114 Hayden Saddlery Hardware Co. v. Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

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§ 93. Judgment by Default not aided by Presumptions.

In several states it is held that 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.[115] "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." [116]

§ 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.[117]

[115] Hudson v. Breeding, 7 Ark. 445; Elligood v. Cannon, 4 Har. (Del.) 176; Connoly v. Alabama & T. R. R. Co., 29 Ala. 373; Schloss v. White, 16 Cal. 65. But in Proulx v Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067, it is said that the ordinary presumption of regularity in the proceedings of a court of general jurisdiction applies in the case of a judgment by default. And in Florida, it appears that, where a final judgment entered by the clerk on a default is not void on its face, but voidable only, because of matters dehors the judgment, it becomes an absolute verity after the lapse of 60 days from the entry of the default, unless set aside or reversed by an appellate court. Einstein v. Davidson, 35 Fla. 342, 17 South. 563.

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

[117] See infra, §§ 297–355.

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§ 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." [118] We have already seen that such a judgment will be reversed when founded upon a pleading which does not state a cause of action.[119] 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.

[118] Stevens v. Ross, 1 Cal. 94; Gerhart v. Fout, 72 Mo. App. 138. But in New York, the statute restricts the right of appeal to parties not in default; and consequently the remedy of one aggrieved by an invalid judgment by default is by motion to have it corrected. Park v. Park, 24 Misc. Rep. 372, 53 N. Y. Supp. 677.

[119] 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 in civil cases, are not especially favored. The liberality of the statutes and the indulgence

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

[2] 3 Bl. Comm. 393. Also, the objection that the judgment is not in conformity with the verdict may be made by motion in arrest. Lee v. Wilkins, 79 Mo. App. 159.

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of the courts, 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.[3] 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.[4] 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.[5] A joint motion by several defendants in arrest of judgment cannot be sustained as to a part only.[6] A motion in arrest of judgment need not be in writing, nor point out the grounds therefor, nor need it be brought into the record by bill of exceptions.[7]

§ 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 vacate or set aside the judgment.[8] But where the law provides

[3] See Virginia & T. Coal & Iron Co. v. Fields, 94 Va. 102, 26 S. E. 426.

[4] Inhabitants of Stetson v. Inhabitants of Corrina, 44 Me. 29; Rev. St. Me. c. 82, § 31. In Illinois, a statute provides that judgments shall not be arrested because of any mispleading, discontinuance, or misjoining of the issue, or any default or negligence by which neither party has been prejudiced. Rev. St. Ill. c. 7, § 6. See Mayer v. Brensinger, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196.

[5] Supra, § 16.

[6] Van Gundy v. Carrigan, 4 Ind. App. 333, 30 N. E. 933.

[7] Chicago & S. E. Ry. Co. v. Wheeler, 14 Ind. App. 62, 42 N. E. 489.

[8] State v. Kibling, 63 Vt. 636, 22 Atl. 613; Keller v. Stevens, 66 Md. 132.

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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.[9] 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.[10] It is held to be the correct rule of practice not to entertain a motion in arrest of judgment after the overruling of a demurrer to the declaration, at least where the motion is based on any exceptions which might have been considered on the demurrer;[11] and clearly, matter which was objected to by demurrer and decided upon cannot afterwards be urged in arrest of judgment.[12] But a motion of this character may be received after a decision on a motion for a new trial.[13]

§ 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.[14] And for the purpose of such

6 Atl. 533; Colchen v. Ninde, 120 Ind. 88, 22 N. E. 94; Potter v. McCormack, 127 Ind. 439, 26 N. E. 883; Bayless v. Jones, 10 Ind. App. 102, 37 N. E. 421; Smith v. State, 140 Ind. 343, 39 N. E. 1060; Barnhart v. Edwards (Cal.) 57 Pac. 1004.

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

[10] State v. Leathers, 61 Mo. 381.

[11] Rouse v. Peoria County, 2 Gilman (Ill.) 99; Independent Order of Mutual Aid v. Paine, 122 Ill. 625, 14 N. E. 42; Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Indiana & I. S. R. Co. v. Sampson, 31 Ill. App. 513; Crown Coal & Tow Co. v. Yoch Coal Min. Co., 57 Ill. App. 666; Mayer v. Lawrence, 58 Ill. App. 194; Story & Clark Organ Co. v. Rendleman, 63 Ill. App. 123; Miller v. McCormick Harvesting Mach. Co., 84 Ill. App. 571.

[12] Freeman v. Camden, 7 Mo. 298; Chicago & A. R. Co. v. Clausen, 173 Ill. 100, 50 N. E. 680; Cleveland, C., C. & St. L. Ry. Co. v. Jenkins, 70 Ill. App. 415; Chicago & A. R. Co. v. Pearson, 82 Ill. App. 605.

[13] Wilkinson v. Daniel, Wright (Ohio) 368.

[14] Burrows v. Niblack, 28 C. C. A. 130, 84 Fed. 111; Noyes v. Parker, 64 Vt. 379, 24 Atl. 12; Ward v. Lakeside Ry. Co., 20 Pa. Co. Ct. R. 494; Burnett v. Ballund, 2 Nott & McC. (S. C.) 435; Watt's Case, 4 Leigh (Va.) 672; Gerling

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a motion, the evidence does not constitute a part of the record.[15] "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."[16] 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 notice of the court by proof aliunde."[17] Much less, of course, can such a motion be supported by matter which becomes part of the record after the motion has been overruled.[18] 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

v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691; State v. George, 30 N. C. 324, 49 Am. Dec. 392; State v. Douglass, 63 N. C. 500; Brown v. Lee, 21 Ga. 159; Garner v. State, 42 Ga. 203; Frank v. State, 39 Miss. 705; State v. Addison, 15 La. Ann. 185; State v. Green, 43 La. Ann. 402, 9 South. 42; Case v. State, 5 Ind. 1; McGill v. Rothgeb, 45 Ill. App. 511; McCarty v. O'Bryan, 107 Mo. 584, 38 S. W. 456; Elsenrath v. Kallmeyer, 61 Mo. App. 430; Floyd v. Colorado Fuel & Iron Co., 10 Colo. App. 54, 50 Pac. 864.

[15] Burrows v. Niblack, 28 C. C. A. 130, 84 Fed. 111; Clary v. Hardeeville Brick Co. (C. C.) 100 Fed. 915; Ward v. Lakeside Ry. Co., 20 Pa. Co. Ct. R. 494; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652. After verdict, on a motion in arrest of judgment, the court will presume that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial. Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 361.

[16] Balliett v. Humphreys, 78 Ind. 388. See Sanner v. Sayne, 78 Ga. 467, 3 S. E. 651; Court of Probate v. Sprague, 3 R. I. 205.

[17] White v. Caldwell, 17 Mo. App. 691. In passing upon a motion in arrest, it is not allowable for the judge to invoke his recollection as to what occurred at the trial. City of Washington v. Calhoun, 103 Ga. 675, 30 S. E. 434. Nor can a motion in arrest be aided by statements of the adverse party's counsel. Taylor v. Corley, 113 Ala. 580, 21 South. 404. In an action to rescind a deed for fraudulent representations as to incumbrances, the fact that the incumbrance has been paid off before trial cannot be considered on motion in arrest of judgment. Moore v. Cross, 87 Tex. 557, 29 S. W. 1051.

[18] Heward v. State, 21 Miss. 261; Bull v. Mathews, 20 R. I. 100, 37 Atl. 536.

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or plea.[19] 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." [20]

§ 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.[21] So a misjoinder of parties as plaintiffs is no ground for arresting the judgment.[22] Neither is an objection that some of the defendants are non-residents.[23] 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

[19] Washington & B. Turnpike Road v. State, 19 Md. 239; State v. James, 2 Bay (S. C.) 215; Sedgwick v. Dawkins, 18 Fla. 335.

[20] 3 Bl. Comm. 394.

[21] Reugger v. Lindenberger, 53 Mo. 364; Yonley v. Thompson, 30 Ark. 399; Thompson v. Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 328; Crouch v. Hance, 62 Mo. App. 25; Chandler & Taylor Co. v. Norwood, 14 App. D. C. 357.

[22] 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.

[23] Washington & N. O. Tel. Co. v. Hobson, 15 Grat. (Va.) 122.

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considered that this furnished no ground for a motion in arrest of judgment, the death itself not being shown by the record.[24] Nor will judgment be arrested because of an ordinary mis-spelling of a party's name.[25] 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.[26]

§ 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.[27] 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.[28] An admirable illustration of this rule is

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

[25] Toledo, W. & W. Ry. Co. v. Ingraham, 77 Ill. 309.

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

[27] Parker's Adm'r v. Abrams, 50 Ala. 35; Lester v. Piedmont & Arlington Life Ins. Co., 55 Ga. 475; Spahr v. Nicklaus, 51 Ind. 221; Merritt v. Dearth, 48 Vt. 65; Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927.

[28] Bedell v. Stevens, 28 N. H. 118; Gould v. Kelley, 16 N. H. 551; Jaccard v. Anderson, 32 Mo. 188; Smith v. Curry, 16 Ill. 147; Philson v. Bampfield's Adm'r, 1 Brev. (S. C.) 202; Seelye v. People, 40 Ill. App. 449; Illinois Live-Stock Ins. Co. v. Kirkpatrick, 61 Ill. App. 74; Pierson v. Independent School Dist., 106 Iowa, 695, 77 N. W. 494; Johnson v. Miller, 82 Iowa, 693, 48 N. W. 1081, 31 Am. St. Rep. 514; Consolidated Canal Co. v. Peters (Ariz.) 46 Pac. 74. In Town of Walpole v. Marlow, 2 N. H. 385, the rule is thus

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furnished by a recent 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.[29] 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.[30] Thus judgment will not be arrested,

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.

[29] Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. 208. So also, in an action against a railroad company for killing a horse, the jurisdictional defect of failing to allege that it was killed in the county where the action is brought may be reached by motion in arrest of judgment. Louisville, N. A. & C. Ry. Co. v. Johnson, 11 Ind. App. 328, 36 N. E. 766; Chicago & S. E. Ry. Co. v. Wheeler, 14 Ind. App. 62, 42 N. E. 489.

[30] Saulsbury v. Alexander, 50 Mo. 142; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Hugnes v. Frum, 41 W. Va. 445, 23 S. E. 604. A motion in arrest of judgment will not extend to such defects in the complaint as are cured by verdict or the finding of the court. Powell v. Bennett, 131 Ind. 465, 30 N. E. 518; Bayless v. Jones, 10 Ind. App. 102, 37 N. E. 421. An omission of the formal concluding words of a pleading cannot be taken advantage of by a motion in arrest of judgment. Stearns v. Stearns' Adm'r, 32 Vt. 678; District of Columbia v. Eaton, 13 App. D. C. 182.

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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.[31] 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 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.[32] 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.[33] 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.[34] 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.[35] Nor that the complaint only warrants a recovery of nominal damages.[36] 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.[37]

[31] Higgins v. Bogan, 4 Har. (Del.) 330; Woods v. State, 10 Mo. 698; Machon v. Randle, 66 Tex. 282, 17 S. W. 477.

[32] Rea v. Harrington, 58 Vt. 181, 2 Atl. 457, 56 Am. Rep. 561 (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.

[33] Auld v. Butcher, 2 Kan. 135.

[34] Pickering v. Mississippi Val. Nat. Tel. Co., 47 Mo. 457. And see Baden v. Clarke, 1 Gill (Md.) 165. So the fact that the præcipe is in trespass and the declaration in case is no ground for arrest of judgment. Homan v. Fleming, 51 Ill. App. 572.

[35] Allen v. Word, 6 Humph. (Tenn.) 284.

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

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

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Nor can the question of the propriety of allowing an amendment to be made in the pleadings be reached on motion in arrest.[38]

§ 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 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.[39] 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.[40] 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.[41] 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.[42] Thus in New Hampshire, judg-

[38] Le Strange v. State, 58 Md. 26. And see Hatfield v. Cummings, 152 Ind. 537, 53 N. E. 761.

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

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

[41] Supra, § 84.

[42] Hoag v. Hatch, 23 Conn. 585; Sims v. Dame, 113 Ind. 127, 15 N. E. 217; Gilmore v. Ward, 22 Ind. App. 106, 52 N. E. 810; Burrows v. Niblack, 28 C. C. A. 130, 84 Fed. 111; Swift & Co. v. Fue, 167 Ill. 443, 47 N. E. 761; Baltimore & O. S. W. Ry. Co. v. Alsop, 176 Ill. 471, 52 N. E. 253; Hayes v. Solomon, 90 Ala. 520, 7 South. 921.

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ment 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.[43]

§ 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.[44] 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.[45] And in Missouri, where several 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.[46]

§ 103. Objections to the Jury.

An objection to the mode of drawing and impaneling the grand jury cannot be made the ground of a motion in arrest of judgment.[47] 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.[48] 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.[49] It is generally held—in accordance with the rule that judg-

[43] Conway v. Town of Jefferson, 46 N. H. 521.

[44] Haskell v. Bowen, 44 Vt. 579. Objection to the joinder of a count in tort with one on contract may be taken in arrest of judgment. Joy v. Hill, 36 Vt. 333; Bull v. Mathews, 20 R. I. 100, 37 Atl. 536.

[45] Meyers v. Field, 37 Mo. 434.

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

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

[48] Chapman v. Welles, Kirby (Conn.) 133.

[49] Cox v. Moss, 53 Mo. 432; Brown v. Hannibal & St. J. R. Co., 37 Mo. 298; Brown v. St. Louis & S. F. Ry. Co., 69 Mo. App. 418.

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ment 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.[50] 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.[51]

§ 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.[52] 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.[53]

§ 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

[50] 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. Clark v. Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

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

[52] Young v. Wickliffe, 7 Dana (Ky.) 447; 3 Bl. Comm. 393. But in some states, a motion in arrest of judgment will not reach a defective verdict. Potter v. McCormack, 127 Ind. 439, 26 N. E. 883; Westfield Gas & Milling Co. v. Abernathey, 8 Ind. App. 73, 35 N. E. 399. Inconsistency between a special finding and the general verdict cannot be taken advantage of by motion in arrest. Moffitt v. Albert, 97 Iowa, 213, 66 N. W. 162.

[53] Keirle v. Shriver, 11 Gill & J. (Md.) 405.

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make out the plaintiff's case, will not be sustained;[54] nor, in general, a motion based on any matters which took place on the trial.[55] 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.[56] 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.[57]

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

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

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

[57] 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.
110. Entry by the Clerk.
111. Entry in wrong Book.
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113. Remedy against Clerk for improper Entry.
114. Contents of the Judgment.
115. Form of the Judgment.
116. Designation of the Parties.
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119. Conditions in Judgment.
120. Joint Defendants.
121. Time of entering Judgment.
122. Date of the Judgment.
123. Construction of Ambiguous Judgments.
124. The Judgment-Roll, or Record.
125. Supplying Lost Records.
125a. Entry of Judgments in Federal Courts.

§ 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 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

[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 exceed-

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of its action.[2] 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."[3] 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.

ingly 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." Ware, Dist. J., in Goddard v. Coffin, 2 Ware (Dav. 381) 382, Fed. Cas. No. 5,490. And see Matthews v. Houghton, 11 Me. 377.

[2] Miller v. Albright, 12 Ohio Cir. Ct. R. 533.

[3] Los Angeles County Bank v. Raynor, 61 Cal. 145. A judgment ordered by the judge to be entered for a certain amount, though not yet entered or signed, is a debt to the judgment creditor capable of being attached. Holtby v. Hodgson, 24 Q. B. Div. 103. Where counsel on both sides have treated the verdict as serving the office of a judgment as well as of a verdict, objections on account of the failure to enter judgment are waived. Webster v. Dundee Mortg. & Trust Co., 93 Ga. 278, 20 S. E. 310.

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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 all) the priority among different liens is determined by their respective dates of docketing.[4] 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.[5] 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.[6] The performance of this duty by the court may be enforced by the writ of mandamus. But to make this remedy available it must appear that the court had jurisdiction in the premises, that regular and sufficient proceedings were had, that the case is ripe for judgment, and that the complainant has an absolute right to the judgment sought, no constraint upon the judicial discretion of the court being permissible.[7]

[4] See infra, § 443.

[5] The claim of res judicata cannot be made on the showing of a minute on the clerk's docket, this not being a judgment. Young v. People, 171 Ill. 299, 49 N. E. 503.

[6] Isler v. Brown, 67 N. C. 175. There is no judgment in fact upon a verdict until the motion for a new trial is decided. City of Louisville v. Muldoon (Ky.) 43 S. W. 867.

[7] People v. Murray, 2 Misc. Rep. 152, 23 N. Y. Supp. 160; Fairbanks v. Amoskeag Nat. Bank (C. C.) 32 Fed. 572; Smith v. Moore, 38 Conn. 105; State v. Klein, 140 Mo. 502, 41 S. W. 895; Broder v. Superior Court, 103 Cal. 121, 37 Pac. 143; Elder v. Grunsky, 127 Cal. 67, 59 Pac. 300; State v. Dickinson, 59 Neb. 753, 82 N. W. 16; People v. Graham, 16 Colo. 347, 26 Pac. 936; People v. Downer, 18 Colo. 500, 33 Pac. 162; Corthell v. Mead, 19 Colo. 386, 35 Pac. 741; State v. Hunter, 4 Wash. St. 651, 30 Pac. 642.

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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.[8] 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.[9] 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.[10] Where issues are sent from one court to another to be tried, it 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.[11]

[8] Mace v. Gaddis, 3 Wash. T. 125, 13 Pac. 545.

[9] State v. Jacksonville, P. & M. R. Co., 16 Fla. 708; Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172. See, also, Shepherd v. Harvey's Adm'x (Ky.) 43 S. W. 456; Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

[10] Western Land Co. v. English, 75 Iowa, 507, 39 N. W. 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 (N. Y.) 529, 43 Am. Dec. 768. It is no ground for the reversal of a judgment that the decree is prepared by the attorneys of the successful party, where the decision as prepared is adopted by the trial judge. Stepp v. National Life & Maturity Ass'n, 37 S. C. 417, 16 S. E. 134.

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

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§ 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.[12] But an application for judgment is in some instances required by statute, and is probably always necessary in case of default. In California, a statute provides that an action may be dismissed, or judgment of nonsuit entered, "when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."[13] But this does not cause the party to lose his judgment when the lapse of the time mentioned was caused by the delay of the court or the negligence of the clerk.[14] 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.[15] 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.[16]

[12] A formal motion for judgment on a special verdict is not necessary. Carthage Turnpike Co. v. Overman, 19 Ind. App. 309, 48 N. E. 874. See Voris v. Star City Bldg. & Loan Ass'n, 20 Ind. App. 630, 50 N. E. 779.

[13] Code Civ. Proc. Cal. § 581.

[14] Jones v. Chalfant (Cal.) 31 Pac. 257; San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 322, 58 Pac. 824.

[15] Pormann v. Frede, 72 Wis. 226, 39 N. W. 385. See, as to defective notice of a motion for a judgment, White v. Sydenstricker, 6 W. Va. 46. Application for an order directing the entry of a judgment may be made ex parte; and no notice is necessary unless a stay exists, or the court, for some special reason, directs that notice be given. Gould v. Duluth & D. Elevator Co., 3 N. D. 96, 54 N. W. 316.

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

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§ 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 slight aid in determining the same question in modern law.[17] 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.[18] 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.[19] And some of the authorities show a tendency to construe 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.[20] So the signature of the judge affixed by consent

[17] French v. Pease, 10 Kan. 51.

[18] Succession of Asbridge, 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 Metc. (Ky.) 65, 71 Am. Dec. 458; 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. In Louisiana, a statute requires judgments to be read in open court. It is held that this requirement is jurisdictional, and that a judgment not so read, or which is signed in chambers, is invalid. Woodlief v. Logan, 50 La. Ann. 438, 23 South. 716; State v. Judges of Fourth Circuit Court of Appeals, 48 La. Ann. 905, 19 South. 932; Richardson v. Turner, 52 La. Ann. 1613, 28 South. 158.

[19] Wickmam v. Nalty, 41 La. Ann. 284, 6 South. 123; State v. Judge of Fifth District, 12 La. Ann. 455.

[20] Tharpe v. Crumpler, 63 Ga. 273; Huckaby v. Sasser, 69 Ga. 603. A

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in vacation is a sufficient authentication of a decree in an ordinary action to authorize an execution.[21] 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.[22] In harmony with these decisions it is also held that an irregularity in the signature of the judge—as, in his placing it in the body of the decree instead of at the foot,[23] or his signing it while he is in another county,[24]—is immaterial. And where the court is composed of several judges, its orders are sufficiently authenticated by the signature of either.[25]

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.[26] And a valid judgment will support an exe-

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.

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

[22] Rollins v. Henry, 78 N. C. 342; Keener v. Goodson, 89 N. C. 273; Bartlett v. Lang's Adm'rs, 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. Ex parte Slocomb, 9 Ark. 375.

[23] Hurley v. Hewett, 89 Me. 100, 35 Atl. 1026.

[24] National Bank of Greensboro v. Gilmer, 118 N. C. 668, 24 S. E. 423.

[25] In re Millcreek Road, 9 Pa. Co. Ct. R. 592.

[26] California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 Pac. 123; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Cathcart v. Peck, 11 Minn. 45 (Gil. 24); Fontaine v. Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515; Platte County v. Marshall, 10 Mo. 345; Fulton v. State, 103 Wis. 238, 79 N. W. 234; Lockhart v. State, 32 Tex. Cr. R. 149, 22 S. W. 413; Scott v. Rohman, 43 Neb. 618, 62 N. W. 46; Gordon v. Bodwell, 55 Kan. 131, 39 Pac. 1044. Judgments are not invalidated by the failure of the judge to sign the minutes of the term. Jordan v. State, 37 Tex. Cr. R. 222, 38 S. W. 780. Nor is it necessary to the validity of orders entered at a special term of court that the minutes of said term be signed by the judge. Wright v. State, 37 Tex. Cr. R. 3, 38 S. W. 811.

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cution issued in conformity therewith, although the formal record evidence of its rendition may not have been in existence at the time execution issued.[27] 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.[28] The judgment itself is to be entered in the judgment-book, and is in theory entered by the clerk."[29] 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.[30] 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,[31] 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.[32] In some

[27] Fontaine v. Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515. And see Los Angeles County Bank v. Raynor, 61 Cal. 145.

[28] Where a "decision in writing" is required, an entry by the clerk at the end of the trial of the amount for which plaintiff is entitled to recover does not constitute a judgment. Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491. If the court does not file the written decision, and a judgment is rendered and entered without it, the remedy is by motion in the court below to set the judgment aside. Garr, Scott & Co. v. Spalding, 2 N. D. 414, 51 N. W. 867.

[29] De Laney v. Blizzard, 7 Hun, 66.

[30] French v. Pease, 10 Kan. 51.

[31] In New York, when an action is referred to a referee to hear and determine, and his report directs a judgment to be entered, it stands as a decision of the court, and the clerk must enter judgment upon it when its form has been settled by the referee. Paget v. Melcher, 26 App. Div. 12, 49 N. Y. Supp. 922. And see Bentley v. Gardner, 27 Misc. Rep. 674, 58 N. Y. Supp. 824.

[32] The clerk must enter the judgment in accordance with the verdict, or finding of the court, and the order for judgment; he has no authority to in-

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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.[33] 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.[34] "The fact that the clerk did not perform his entire duty 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

sert any additional clauses, as, that the case was dismissed on the merits, when the court did not so state. Card v. Meineke, 70 Hun, 382, 24 N. Y. Supp. 375; Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694. A judgment entered by a clerk of court who has no authority to enter the same is void. Lacoste v. Eastland, 117 Cal. 673, 49 Pac. 1046.

[33] But in California, a judgment does not become effective until filed with the clerk, and is of no effect if filed after the expiration of the judge's term, no matter when prepared and signed. Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. And see Danielson v. Northwestern Fuel Co. (C. C.) 55 Fed. 49.

[34] Craig v. Alcorn, 46 Iowa, 560; Bridges v. Thomas, 50 Ga. 378; Bird v. McClelland, Stumpf & Pelzer Brick Manuf'g Co. (C. C.) 45 Fed. 458; Risk v. Uffelman, 7 Misc. Rep. 133, 27 N. Y. Supp. 392; New York City Baptist Mission Soc. v. Tabernacle Baptist Church, 10 App. Div. 288, 41 N. Y. Supp. 976. See Helvete v. Rapp, 7 Serg. & R. (Pa.) 306. Omission properly to record the verdict is a mere irregularity which does not destroy the validity of the judgment, at least until it be set aside. Gunn v. Plant, 94 U. S. 664, 24 L. Ed. 304.

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been done in the case, copied by the clerk into a bo - 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."[35] 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.[36] 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.[37] 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 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.[38] 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

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

[36] Booth v. Farmers' & Mechanic's Nat. 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.

[37] Townshend v. Wesson, 4 Duer, 342. But compare Ward v. White, 66 Ill. App. 155.

[38] Whitney v. Townsend, 67 N. Y. 40. And see Hardin v. Melton, 28 S. C. 38, 4 S. E. 805.

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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.[39]

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.[40] 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.[41]

§ 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.[42] As concerns third persons the case

[39] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872; Maurin v. Carnes, 71 Minn. 309, 74 N. W. 139. See Locke v. Hubbard, 9 S. D. 364, 69 N. W. 588.

[40] 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, Fed. Cas. No. 7,793; Johns v. Fritchey, 39 Md. 258.

[41] Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 553; Hotchkiss v. Cutting, 14 Minn. 542 (Gil. 408); Jorgensen v. Griffin, 14 Minn. 466 (Gil. 346); Lythgoe v. Lythgoe, 75 Hun, 147, 26 N. Y. Supp. 1063.

[42] Wolf v. Great Falls Water-Power Co., 15 Mont. 49, 38 Pac. 115; West v. Keeton, 17 Tex. Civ. App. 139, 42 S. W. 1034. In Minnesota, notwithstanding the adoption of a code of procedure merging 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-

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might 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.[43] 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.[44]

§ 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.[45] 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.[46] We shall return to this subject in a later chapter.[47]

§ 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

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. City of New York, 3 Sandf. 721.

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

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

[45] Metz v. State Bank, 7 Neb. 165; Sterling Manuf'g Co. v. Early, 69 Iowa, 94, 28 N. W. 458. See Hahn v. Mosely, 119 N. C. 73, 25 S. E. 713; New England Loan & Trust Co. v. Avery (Tex. Civ. App.) 41 S. W. 673.

[46] Old Dominion Granite Co. v. Clarke, 28 Grat. 617.

[47] See infra, § 405.

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to make a proper entry of it, provided he shows an absolute loss of his judgment in consequence of such neglect.[48] 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.[49]

§ 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.[50] 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.[51] 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.[52] But it is

[48] Blossom v. Barry, 1 Lans. 190. If the entry is incorrect, the party affected should first avail himself of his remedy by application to the court to correct it. State v. Currie, 72 Minn. 403, 75 N. W. 742.

[49] Saylor v. Com. (Pa.) 5 Atl. 227; Coyne v. Souther, 61 Pa. 455.

[50] Barrett v. Garragan, 16 Iowa, 47; Church v. Crossman, 41 Iowa, 373; Ordinary v. McClure, 1 Bailey (S. C.) 7, 19 Am. Dec. 648. For judgment entries held sufficient, though irregular in form, see Simmons v. Craig, 137 N. Y. 550, 33 N. E. 76; Cameron v. Great Northern Ry. Co., 8 N. D. 124, 77 N. W. 1016; Whiteside v. Noyac Cottage Ass'n, 68 Hun, 565, 23 N. Y. Supp. 63. For entries held not sufficient to constitute a judgment, see Emig v. Medley, 69 Ill. App. 199; Carter v. Elmore, 119 N. C. 296, 26 S. E. 35.

[51] Hamilton v. Ward, 4 Tex. 356. But in New York, the code requires that the decision shall state concisely the grounds on which the issues have been decided; and a decision merely directing judgment, without any statement of the grounds, will not support a judgment. Newman v. Mayer, 7 N. Y. Ann. Cas. 497, 65 N. Y. Supp. 294.

[52] 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.

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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.[53]

§ 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 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." [54] 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.[55] 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.[56] It may therefore be stated as the modern rule that the

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

[54] 3 Bl. Comm. 396.

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

[56] Johnson v. Gillett, 52 Ill. 360; Minkhart v. Hankler, 19 Ill. 47; Johnson v. Miller, 50 Ill. App. 60; Coats v. Barrett, 49 Ill. App. 275; Deadrick v. Harrington, Hempst. 50, Fed. Cas. No. 3,694b; Taylor v. Runyan, 3 Clarke (Iowa) 474; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Thornton v. Perry, 101 Ga. 608, 29 S. E. 24; Marsh v. Synder, 14 Neb. 8, 14 N. W. 804. In Pennsylvania, the entry "judgment on verdict" may, in a scire facias upon it, be considered as the judgment which the plaintiff was entitled to have. Shirtz v. Shirtz, 5 Watts, 255. To constitute a sufficient judgment on a demurrer, there should be a formal entry of the submission on demurrer to a specified pleading, a recital of consideration thereof by the court, and a

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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.[57] In other words, the sufficiency of the writing claimed to be a judgment should always be tested by its substance rather than its form.[58] 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.[59] In a case where the 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.[60] In the next place, a true judgment must be

formal adjudication, such as, "It is therefore considered and adjudged by the court that the demurrer be, and it is hereby, overruled" or sustained, as the case may be. Jasper Mercantile Co. v. O'Rear, 112 Ala. 247, 20 South. 583; Alabama Nat. Bank v. Hunt, 125 Ala. 512, 28 South. 488. A record in the following language, "It is therefore ordered by the court that judgment enter herein on the verdict of the jury, formerly entered in this cause," is not a judgment. Fitzsimmons v. Munch, 74 Ill. App. 259.

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

[58] Humboldt Mill & Min. Co. v. Terry, 11 Nev. 237.

[59] Robinson v. Govers, 67 Hun, 317, 22 N. Y. Supp. 249; Whitwell v. Emory, 3 Mich. 84, 59 Am. Dec. 220; Putnam v. Crombie, 34 Barb. (N. Y.) 232. A finding of facts, together with conclusions of law filed by a trial judge with the clerk, is not a judgment until actually spread on the court records. Christie v. Iowa Life Ins. Co., 111 Iowa, 177, 82 N. W. 499. So, a memorandum on the minute book of the judge, to the effect that an award of arbitrators in a certain sum is approved and accepted, does not constitute a judgment. Gage v. Judson (D. C.) 92 Fed. 545. An orally expressed opinion or finding of a judge in a case not tried to a jury does not, according to the practice of the federal courts, constitute a judgment. Judson v. Gage, 39 C. C. A. 156, 98 Fed. 540. So also, in Ohio, under Rev. St. § 5310, the decision of the court must be in writing and entered on the minutes, to constitute a judgment. Wiley v. Lewis, 6 Ohio Dec. 242.

[60] Miller v. Burlington & M. R. Co., 7 Neb. 227. An entry thus:—"Judg-

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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.[61] 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.[62] 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.[63]

ment accordingly taxing all costs against def't," is not a judgment. Roberts v. State, 3 Tex. App. 47. And see Birdsell Manuf'g Co. v. Independent Fire-Sprinkler Co., 87 Ill. App. 443. An entry of judgment as follows: "Whereupon the court enters judgment upon the finding," is insufficient. Faulk v. Kellums, 54 Ill. 188.

[61] Morgan v. Flexner, 105 Ala. 356, 16 South. 716. An order for judgment entered in the judgment book does not constitute a judgment unless the wording is such that it expresses the final sentence of the court on the matters contained in the record, and at once ends the case, and contemplates no further judicial action. McTavish v. Great Northern R. Co., 8 N. D. 333, 79 N. W. 443. 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.

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

[63] Breading v. Boggs, 20 Pa. 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.[64] 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.[65] And in a suit against two defendants, a judgment against "the defendant," instead of "the defendants," is not so defective as to be void for uncertainty, where the record clearly shows that it is in fact a judgment against both of the parties defendant.[66] 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

[64] Captain of The Mollie Hamilton v. Paschal, 9 Heisk. (Tenn.) 203. A judgment that "it is considered by this court have and recover of said defendant" a sum stated is void for uncertainty as to the plaintiff. Fuller Watchman's Electrical Detector Co. v. Louis, 50 Ill. App. 428.

[65] 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. (Tenn.) 189; Bolling v. Speller, 96 Ala. 269, 11 South. 300; Hendry v. Crandall, 131 Ind. 42, 30 N. E. 789. But a judgment ordered for "plaintiff," after overruling a motion for a new trial, without specifying which of the two plaintiffs, where the verdict was rendered for "plaintiffs," is fatally defective. C. Aultman & Co. v. Wirth, 45 Ill. App. 614.

[66] Roach v. Blakey, 89 Va. 767, 17 S. E. 228; McMahon v. Perkins, 22 R. I. 116, 46 Atl. 405; New Mexico & S. P. R. Co. v. Madden, 7 N. M. 215, 34 Pac. 50; Turner v. City of Houston (Tex. Civ. App.) 43 S. W. 69. See Missouri Pac. Ry. Co. v. Smith (Tex.) 16 S. W. 803.

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"defendants" in the judgment will be treated as a merely clerical error, and the judgment be held as one against the original defendant only.[67] 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.[68] 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 uncertainty. A judgment against A. or B. is no valid judgment against either A. or B., and is simply void." [69] 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.[70] 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.[71] 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

[67] Taylor v. Taylor, 64 Ind. 356. And see Holcomb v. Tift, 54 Mich. 647, 20 N. W. 627; Finnagan v. Manchester, 12 Iowa, 521; Haynes v. Backman (Cal.) 31 Pac. 746.

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

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

[70] Low v. Graff, 80 Ill. 360. And see Dietrich v. Dietrich, 154 Pa. 92, 25 Atl. 1080.

[71] Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Root v. Fellowes, 6 Cush. (Mass.) 29. See Preston v. Wright, 60 Iowa, 351, 14 N. W. 352. Where a defendant is in the habit of signing checks, and doing business at banks and other places, by the initials of his Christian name, these initials will be treated as his business name, and a judgment recovered against him by that name is not subject to collateral attack. Oakley v. Pegler, 30 Neb. 628, 46 N. W. 920. And where a debtor is equally well known by two names, a judgment against him in either name is good as to him and as to his receiver. Isaacs v. Mintz, 11 N. Y. Supp. 423.

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plaintiffs against the defendants is sufficient, as the pleadings show who they are.[72] 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.[73] The title of a case is matter of form only, and a clerical error therein will not vitiate.[74]

§ 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.[75] Thus a decree for the distribution of an estate should set out specifically the property to be distributed.[76] 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.[77] 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.[78] 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

[72] Collins v. Hyslop, 11 Ala. 508. But if the judgment entry does not set forth the individual names of the members of a firm, those names must be disclosed by other parts of the record. If the action was brought by several persons as partners, but without setting forth their individual names anywhere in the cause, a judgment rendered in the firm name is fatally defective. Hitch v. Gray, 1 Marv. (Del.) 400, 41 Atl. 91; Simmons v. Titche, 102 Ala. 317, 14 South. 786.

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

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

[75] Whether the description of land in a judgment is sufficiently definite to identify the land is a question for the jury. Birdseye v. Rogers (Tex. Civ. App.) 26 S. W. 841.

[76] Jones v. Minogue, 29 Ark. 637.

[77] Hearne v. Erhard, 33 Tex. 60.

[78] Gear v. Hart, 31 Tex. 135.

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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, or other pleadings or documents, for such description, in apt and sufficient words.[79] 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.[80]

§ 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.[81] 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.[82] Hence a judgment which is uncertain as to the amount which it awards is invalid.[83] For example, a judgment against a garnishee "for the amount of his answer or so much there-

[79] Foster v. Bowman, 55 Iowa, 237, 7 N. W. 513; Jones v. Belt, 2 Gill (Md.) 106; Martin v. Teal (Tex. Civ. App.) 29 S. W. 691; Sanger v. Roberts, 92 Tex. 312, 48 S. W. 1. A decree describing the property to be sold as "a lot with a livery stable thereon" situated on a certain street, and naming the person who conveyed it to defendant, is sufficient. McCue v. Sharp (Ky.) 45 S. W. 770. It will be presumed that the land described in the judgment is the same as that in the petition, there being no contradiction in the description, though that in the judgment is fuller. Leavell v. Seale (Tex. Civ. App.) 45 S. W. 171. But in Kentucky, it is said that a judgment should be certain as to the description of real property ordered to be sold; and it is not sufficient that the property may be identified by a reference to the pleadings. Neff v. Covington Stone Co. (Ky.) 56 S. W. 723; Harrison's Ex'x v. Taylor (Ky.) 43 S. W. 723.

[80] Coleman v. Reel, 75 Iowa, 304, 39 N. W. 510, 9 Am. St. Rep. 484.

[81] People v. Pirfenbrink, 96 Ill. 68; Etheridge v. Middleton, 1 Marv. (Del.) 139, 40 Atl. 714.

[82] Boyken v. State, 3 Yerg. (Tenn.) 426.

[83] Jones v. Acre, Minor (Ala.) 5. A judgment for the recovery of money, not stating the amount for which it was rendered, is void, where nothing ap-

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of as will satisfy the plaintiff's debt and costs" has been held void for uncertainty.[84] 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.[85]

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.[86] 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.[87] But it is error to render

pears in the record to supply the defect. Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Board of Com'rs of Custer County v. Moon, 8 Okl. 205, 57 Pac. 161.

[84] Berry v. Anderson, 2 How. (Miss.) 649.

[85] 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. Dunns v. Batchelor, 20 N. C. 46.

[86] Dinsmore v. Austill, Minor (Ala.) 89.

[87] 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, notwithstand-

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judgment on a verdict for the plaintiff which fails to state how much 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.[88]

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.[89] 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.[90] 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.[91] 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;[92] or if the clerk himself fills up the blanks, after the lapse of more than a year from the judgment, his

ing 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. 492. On 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. C. 536.

88 Bartle v. Plane, 68 Iowa, 227, 26 N. W. 88.

89 Noyes v. Newmarch, 1 Allen (Mass.) 51.

90 Lea v. Yates, 40 Ga. 56. So, a judgment for "—— dollars," based upon a verdict expressed in the same way, is a nullity, and will not bar a subsequent suit upon the same cause of action. School Directors v. Newman, 47 Ill. App. 364. 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. 128.

91 See Ulshafer v. Stewart, 71 Pa. 170; Gray's Heirs v. Coulter, 4 Pa. 188.

92 Hagler v. Mercer, 6 Fla. 721.

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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.[93] 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, 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.[94] 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.[95]

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.[96] 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.[97] Other authorities seem reluctant to admit that this alone would absolutely avoid the judgment so as to render it open

[93] Lind v. Adams, 10 Iowa, 398, 77 Am. Dec. 123.

[94] Calhoun v. Terry Porter Co., 21 Conn. 526. See, also, Big Goose & Beaver Ditch Co. v. Morrow, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955; Young v. Connelly, 112 N. C. 646, 17 S. E. 424. 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.

[95] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

[96] Erlanger v. Avegno, 24 La. Ann. 77.

[97] Smith v. Miller, 8 N. J. Law, 175, 14 Am. Dec. 418; Linder v. Monroe's Ex'rs, 33 Ill. 390.

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to collateral attack.[98] 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.[99] 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. 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.[100] 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.[101] 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.[102]

[98] Fullerton v. Kelliher, 48 Mo. 542; Kopperl v. Nagy, 37 Ill. App. 23; Davis v. McCary, 100 Ala. 545, 13 South. 665.

[99] Cave v. City of Houston, 65 Tex. 619.

[100] 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."

[101] Hopkins v. Orr, 124 U. S. 510, 8 Sup. Ct. 590, 31 L. Ed. 523.

[102] Woods v. Freeman, 1 Wall. 398, 17 L. Ed. 543; Lawrence v. Fast, 20 Ill. 338, 71 Am. Dec. 274; Lane v. Bommelmann, 21 Ill. 143; Gibson v. City of Chicago, 22 Ill. 572; Eppinger v. Kirby, 23 Ill. 521, 76 Am. Dec. 709; Dukes v. Rowley, 24 Ill. 210; Baily v. Doolittle, 24 Ill. 577; Potwin v. Oades, 45 Ill. 367; People v. San Francisco Savings Union, 31 Cal. 135; Randolph v. Metcalf, 6 Cold. (Tenn.) 400; Tidd v. Rines, 26 Minn. 201, 2 N. W. 497; Black, Tax Titles (2d Ed.) § 180.

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This rule governs also in case of a judgment for a special assessment.[103] 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.[104]

An entry of judgment for the right sum, but inaccurately named "damages" instead of "debt,"—or so much debt and so much damages,—is not reversible error.[105] 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.[106]

§ 119. Conditions in Judgment.

In an ordinary action at law, the court cannot render a conditional judgment.[107] But "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

[103] Pittsburgh, F. W. & C. R. Co. v. City of Chicago, 53 Ill. 80.

[104] In the case of Gutzwiller v. Crowe, 32 Minn. 70, 19 N. W. 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. 497; because one of the grounds on which that case was ruled was that the figures were not separated by any line or decimal mark. And see New England Loan & Trust Co. v. Avery (Tex. Civ. App.) 41 S. W. 673; Dyke v. Bank of Orange, 90 Cal. 397, 27 Pac. 304; Therme v. Bethenold, 106 Iowa, 697, 77 N. W. 497. A clerical mistake made in writing a judgment with an additional cipher is rendered immaterial by a remittitur. Lowdon v. Fisk (Tex. Civ. App.) 27 S. W. 180.

[105] 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 (Ky.) 123.

[106] Gilbert v. Earl, 47 Vt. 9. Where judgment is recovered for compensatory and punitive damages, the court is not required to specify how much is for the one and how much for the other. Hambly v. Hayden, 20 R. I. 558, 40 Atl. 417.

[107] Johnson v. Carver, 175 Pa. 200, 34 Atl. 627; Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1; Coh v. Bright, 2 Mo. App. Rep'r, 1191, 65 Mo. App. 417.

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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.[108] 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.[109] 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.[110] 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.

§ 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,[111] 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 with-

108 Hageman v. Salisberry, 74 Pa. 280. And see Little v. White, 3 Ind. 544.

109 Greeno v. Barnard, 18 Kan. 518.

110 Mills v. Kansas Lumber Co., 26 Kan. 574.

111 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. (Mass.) 391.

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out 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.[112] 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."[113] 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."[114]

§ 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 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.[115] 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

[112] Johnson v. Vaughan, 9 B. Mon. (Ky.) 217. See Creigh v. Hedrick, 5 W. Va. 140.

[113] Code N. Y. § 274; Code Wis. § 184; Code Civ. Prac. Ky. § 370; Code Civ. Proc. Cal. § 578.

[114] Patton v. Shanklin, 14 B. Mon. (Ky.) 15.

[115] Droz v. Lakey, 2 Sandf. (N. Y.) 681.

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which, in computing time, excludes the first and includes the last day, has no application, the provision being clear and explicit.[116] In Pennsylvania, a law requires[117] 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.[118] 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."[119] But the failure of the clerk to enter judgment within the prescribed time does not, according to the authorities, affect the validity of the judgment afterwards entered; for the injunction of the statute is merely directory and not mandatory.[120] 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.[121] In other states it appears to be required

[116] Marvin v. Marvin, 75 N. Y. 240, construing Code Civ. Proc. N. Y. § 1228. And see Hutchinson v. Brown, 8 App. D. C. 157. 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.

[117] Act Pa. May 14, 1874.

[118] Pittsburgh & C. R. Co. v. Shaw (Pa.) 14 Atl. 323.

[119] Code Civil Proc. Cal. § 664. A similar statute is in force in Ohio (Rev. St. § 5326); and it is held that the clerk may enter judgment immediately on rendition of the verdict, and before the expiration of the time for moving for a new trial. Young v. Shallenberger, 53 Ohio St. 291, 41 N. E. 518.

[120] First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Heinlen v. Phillips, 88 Cal. 557, 26 Pac. 366; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

[121] Waters v. Dumas, 75 Cal. 563, 17 Pac. 685.

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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.[122]

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 so to move will not be prejudiced by a premature entry of judgment,[123] 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 so to move.[124] And even where it appeared that judgment was entered up while a motion for a new trial was actually on file, which

[122] Shephard v. Brenton, 20 Iowa, 41. And see Murdock v. Ganahl, 47 Mo. 135; Prudential Ins. Co. v. Taylor, 59 N. J. Law, 352, 35 Atl. 798; Voorhies v. Hennessy, 7 Wash. 243, 34 Pac. 931. A judgment not entered within the time provided by law is not for that reason void. Brown v. Porter, 7 Wash. 327, 34 Pac. 1105. But in New York, it is held that a judgment rendered by a justice of the district court will be reversed where it was rendered after the time limited by law. Orvis v. Curtiss, 8 Misc. Rep. 681, 28 N. Y. Supp. 728. And in Iowa, under a statutory provision that, where a verdict is rendered by a jury in a justice's court, the justice shall enter judgment thereon "forthwith," it is held that a judgment entered more than 90 days after the return of the verdict is void for want of jurisdiction. Tomlinson v. Litze, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458.

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

[124] Harvey v. McAdams, 32 Mich. 472.

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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.[125]

§ 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.[126] 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.[127] 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.[128] But in a majority of the states, a judgment takes effect from the day it is actually rendered or entered.[129] "The term of the court is not with us regarded

[125] Hasted v. Dodge (Iowa) 35 N. W. 462.

[126] 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. For a similar case, see Peetsch v. Quinn, 6 Misc. Rep. 50, 26 N. Y. Supp. 728.

[127] Norwood v. Thorp, 64 N. C. 682. See Coe v. Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764. But if a case was not ready for trial, so that no judgment could be given on the first day of the term, the judgment does not relate back to that date. Dunn's Ex'rs v. Renick, 40 W. Va. 349, 22 S. E. 66.

[128] Bradish v. State, 35 Vt. 452; Herring v. Polley, 8 Mass. 113; Chase v. Gilman, 15 Me. 64; Goodall v. Harris, 20 N. H. 363. 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. (Vt.) 274.

[129] A judgment is not void merely because it is not dated. Reed v. Lane, 96 Iowa, 454, 65 N. W. 380.

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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."[130] And the date of a judgment may be fixed by reference to the record of the proceedings in the case.[131] We shall have occasion to discuss this topic more fully in connection with the subject of priority among judgment-liens.[132]

§ 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."[133] 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.[134] And for this purpose, recourse may be had to duly attested stipulations between the parties.[135] But where a judgment refers to the findings for certain data, and the findings do not

[130] Ex parte Dillard, 68 Ala. 594; Alabama C. & N. Co. v. State, 54 Ala. 36; Quinn v. Wiswall, 7 Ala. 645; Powe v. McLeod, 76 Ala. 418; Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; Dyson v. Simmons, 48 Md. 207; Stannis v. Nicholson, 2 Or. 332.

[131] Cooper v. Cooper, 14 La. Ann. 665.

[132] See infra, §§ 441–444.

[133] Clay v. Hildebrand, 34 Kan. 694, 9 Pac. 466, Valentine, J. See, to the same effect. Fleenor v. Driskill, 97 Ind. 27; Hofferbert v. Klinkhardt, 58 Ill. 450; Succession of Durnford, 1 La. Ann. 92; Fowler v. Doyle, 16 Iowa, 534; Four-Mile Land Co. v. Slusher (Ky.) 55 S. W. 555.

[134] Walker's Ex'r v. Page, 21 Grat. (Va.) 636.

[135] Thayer v. McGee, 20 Mich. 195.

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contain the data, but refer again to the pleadings, which are also uncertain, the judgment will be reversed for uncertainty.[136] 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 recital to have been a clerical mistake and that it was the plaintiff who demurred.[137] 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 counterclaim 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.[138] 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.[139]

§ 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.[140] In our modern practice, the proceedings

[136] Kelley v. McKibben, 53 Cal. 13.

[137] Evans v. McMahan, 1 Ala. 45.

[138] Baughn v. Baughn, 114 Ind. 73, 17 N. E. 181. See Jarboe v. Brown, 39 Ind. 549.

[139] Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159.

[140] 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

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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 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." [141] 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.[142] A record, it will be remembered, imports absolute verity, must be tried by itself, and cannot be contradicted.[143]

or an examined copy thereof, is the only evidence of them that will be admitted." And see Steph. Pl. 24.

[141] Vail v. Iglehart, 69 Ill. 332; Stevison v. Earnest, 80 Ill. 513. And see Burge v. Gandy, 41 Neb. 149, 59 N. W. 359; Boe v. Irish, 69 Minn. 493, 72 N. W. 842.

[142] 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,

[143] See note 143 on following page.

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§ 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 the inherent authority of the courts.[144] 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.[145] 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.[146] 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

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.

143 Adams v. Betz, 1 Watts (Pa.) 425, 26 Am. Dec. 79; Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056. Where a judgment roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the other disregarded. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 878.

144 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.

145 Doswell v. Stewart, 11 Ala. 629.

146 George v. Middough, 62 Mo. 549. And see Gibson v. Vaughan, 61 Mo. 418.

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the proposed substitute, it will order the substitute to stand enrolled as and for the original.[147] 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.[148] "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 chancery, 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." [149]

§ 125a. Entry of Judgments in Federal Courts.

An act of congress provides that "the practice, pleadings, and forms and modes of proceeding in civil cases, other than equity and admiralty causes, in the circuit and district courts [of the United States], shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." [150] This law, it is held, extends to the mode of entering and recording judgments, and requires the judgments of the federal

[147] Adkinson v. Keel, 25 Ala. 551.

[148] Fisher v. Sievres, 65 Ill. 99.

[149] 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, 87 Ala. 299, 6 South. 3.

[150] Rev. St. U. S. § 914.

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circuit and district courts, in actions at law, to be entered and recorded in the same manner as those of the courts of the state wherein such United States courts sit.[151] Thus, if the state practice authorizes the entry of a judgment upon the report of a referee, without any application to the court, no application will be considered necessary in an action in a federal court in such state.[152] But a state law requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding on the federal courts.[153]

[151] Morrison v. Bernards Township (C. C.) 35 Fed. 400; Sawin v. Kenny, 93 U. S. 289, 23 L. Ed. 926.

[152] Fourth Nat. Bank v. Neyhardt, 13 Blatchf. 393, Fed. Cas. No. 4,991.

[153] Martindale v. Waas (C. C.) 11 Fed. 551.

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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.
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§ 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;

[1] Lord Mohun's Case, 6 Mod. 59; Hodges v. Templer, 6 Mod. 191; Mayor of Norwick v. Berry, 4 Burrows, 2277; Evans v. Rees, 12 Adol. & E. 167, 175; Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; Wood v. Keyes, 6 Paige (N. Y.) 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. 414; Shep-

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it 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,

hard v. Brenton, 20 Iowa, 41. Statutory provisions requiring a proceeding to vacate or modify a judgment to be brought within a certain time after the judgment is pronounced do not apply to a motion for an entry of judgment nunc pro tunc. Hyde v. Michelsen, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533. And see Risser v. Martin, 86 Iowa, 392, 53 N. W. 270.

[2] Chissom v. Barbour, 100 Ind. 1.

[3] Mayor of Norwick v. Berry, 4 Burrows, 2277; Toulmin v. Anderson, 1 Taunt. 385; Bridges v. Smyth, 8 Bing. 29; Blewett v. Tregonning, 4 Adol. & E. 1002; Green v. Cobden, 4 Scott's Cas. 486; Key v. Goodwin, 1 Moore & S. 620; Harrison v. Heathorn, 1 Dowl. & L. 529; Evans v. Rees, 12 Adol. & E. 167; Moor v. Roberts, 3 C. B. (N. S.) 844; Seymour v. Greenwood, 30 Law J. Exch. 189; Abington v. Lipscomb, 11 Law J. Q. B. 15; Davies v. Davies, 9 Ves. 461; Neil v. McMillan, 27 U. C. Q. B. 257; Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369; City of New Orleans v. Warner, 176 U. S. 92, 20 Sup. Ct. 280, 44 L. Ed. 385; Griswold v. Hill, 1 Paine, 483, Fed. Cas. No. 5,834; 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; Ryght-

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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 so to enter judgment does not extend to suits in tort.[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 happening while the case is in the hands of the court, and which would otherwise

myer v. Durham, 12 Wend. (N. Y.) 245; Spalding v. Congdon, 18 Wend. (N. Y.) 543; Holmes v. Honie, 8 How. Prac. (N. Y.) 383; De Agreda v. Mantel, 1 Abb. Prac. (N. Y.) 130; Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334, 8 Am. Dec. 570; Wood v. Keyes, 6 Paige (N. Y.) 478; Kissam v. Hamilton, 20 How. Prac. (N. Y.) 369; Fulton v. Fulton, 8 Abb. N. C. (N. Y.) 210; Long v. Stafford, 103 N. Y. 275, 8 N. E. 522; Arthur v. Schriever, 60 N. Y. Super. Ct. 59, 16 N. Y. Supp. 610; Hess v. Cole, 23 N. J. Law, 116; Wilson v. Myers, 11 N. C. 73, 15 Am. Dec. 510; Isler v. Brown, 66 N. C. 556; Beard v. Hall, 79 N. C. 506; Allston v. Sing, Riley (S. C.) 199; Powe v. McLeod, 76 Ala. 418; McLean v. State, 8 Helsk. (Tenn.) 22; Pool v. Loomis, 5 Ark. 110; Dial v. Holter, 6 Ohio St. 228; In re Jarrett's Estate, 42 Ohio St. 199; In re Page's Estate, 50 Cal. 40. The same rule applies where the defendant is a corporation, and is dissolved after the action has been tried and the case taken under advisement by the court. Shakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

[4] Citizens' Bank v. Brooks (C. C.) 23 Fed. 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. 36.

[8] Ireland v. Champneys, 4 Taunt. 884. But see Brown v. Wheeler, 18 Conn. 199.

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rob the successful suitor of his judgment.[9] Thus, in a case in Massachusetts, where the action was upon a statute which was afterwards repealed, but before the repealing 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.[10]

§ 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.[11] 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.[12] So also if the plaintiff dies during the pendency of a motion, and the motion is subsequently decided

[9] The general principle is that, whenever delay in entering a judgment is caused by the action of the court, judgment nunc pro tunc will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it. McNamara v. New York, L. E. & W. R. Co., 56 N. J. Law, 56, 28 Atl. 313; Ferrell v. Hales, 119 N. C. 199, 25 S. E. 821; Todd v. Todd, 7 S. D. 174, 63 N. W. 777. Compare McClain v. Davis, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634; Littlejohn v. Arbogast, 86 Ill. App. 506.

[10] Inhabitants of Springfield v. Inhabitants of Worcester, 2 Cush. (Mass.) 52.

[11] Den v. Tomlin, 18 N. J. Law, 14, 35 Am. Dec. 525; McNamara v. New York, L. E. & W. R. Co., 56 N. J. Law, 56, 28 Atl. 313; Terry v. Briggs, 12 Cush. (Mass.) 319; Dial v. Holter, 6 Ohio St. 228; Fitzgerald v. Stewart, 53 Pa. 343; Brown v. Wheeler, 18 Conn. 199; Collins v. Prentice, 15 Conn. 423.

[12] Griffith v. Ogle, 1 Bin. (Pa.) 172; Brown v. Wheeler, 18 Conn. 199.

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in favor of the defendant, the latter may enter up his judgment as of a term before the decease of the plaintiff.[13] 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.[14] 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 afterwards the exceptions were overruled, it was held that the plaintiff should have judgment as of the term when the verdict was rendered.[15] 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.[16] 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.[17]

§ 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.[18] 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.

[13] Spalding v. Congdon, 18 Wend. (N. Y.) 543.

[14] Snow v. Carpenter, 54 Vt. 17.

[15] 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.

[16] Kane v. Hills, R. M. Charlt. (Ga.) 103; Hardee v. Stovall, 1 Ga. 92; Van Gunden v. Kane, 88 Va. 591, 14 S. E. 334.

[17] Richardson v. Green, 130 U. S. 104, 9 Sup. Ct. 443, 32 L. Ed. 872.

[18] Fishmongers' Co. v. Robertson, 3 C. B. 970; Wilkes v. Perks, 5 Man. & G. 376.

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§ 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 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.[19] 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.[20] The rule applies equally to cases of judgment by confession,[21] and to judgments by default.[22] It may be invoked in proceedings in a

[19] Chichester v. Cande, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238; Hagler v. Mercer, 6 Fla. 721; Wilkerson v. Goldthwaite, 1 Stew. & P (Ala.) 159; Whorley v. Memphis & C. R. Co., 72 Ala. 20; Cotten v. McGehee, 54 Miss. 621; Forbes v. Navra, 63 Miss. 1; Hammer v. McConnel, 2 Ohio, 31; Howell v. Morlan, 78 Ill. 162; Ives v. Hulce, 17 Ill. App. 30; Shephard v. Brenton, 20 Iowa, 41; Gibson v. Chouteau's Heirs, 45 Mo. 171, 100 Am. Dec. 366; Groner v. Smith, 49 Mo. 318; Belkin v. Rhodes, 76 Mo. 643; Swain v. Naglee, 19 Cal. 127; Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; St. Louis, I. M. & S. Ry. Co. v. Winfrey (Ark.) 16 S. W. 572; Fitzsimmons v. Munch, 79 Ill. App. 538; Day v. Goodwin, 104 Iowa, 374, 73 N. W. 864, 65 Am. St. Rep. 465; Van Etten v. Test, 49 Neb. 725, 68 N. W. 1023; Hamer v. McKinley-Lanning L. & T. Co., 51 Neb. 496, 71 N. W. 51; Hyde v. Michelson, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533; Gund v. Horrigan, 53 Neb. 794, 74 N. W. 257; Marshall v. Taylor, 97 Cal. 422, 32 Pac. 515; Parrott v. McDevitt, 14 Mont. 203, 36 Pac. 193.

[20] Murray v. Cooper, 6 Serg. & R. (Pa.) 126.

[21] Davis v. Barker, 1 Ga. 559; Doughty v. Meek, 105 Iowa, 16, 74 N. W. 744, 67 Am. St. Rep. 282. See, also, Mountain v. Rowland, 30 Ga. 929.

[22] Monarch v. Brey (Ky.) 51 S. W. 191.

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probate court,[23] and in actions for divorce,[24] as well as in other cases. And its application is not confined to final judgments, but extends also to orders of the court. Entry of an order sustaining a demurrer to the petition may be thus supplied;[25] and, generally speaking, if it shall be made to appear to the satisfaction of the court that any given 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 record as of the term when it was made.[26]

§ 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 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."[27] 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.[28] 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.[29] 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 sup-

[23] Brooks v. Brooks, 52 Kan. 562, 35 Pac. 215.

[24] Rush v. Rush, 97 Tenn. 279, 37 S. W. 13.

[25] Texas Land & Loan Co. v. Winter, 93 Tex. 560, 57 S. W. 39.

[26] Burnett v. State, 14 Tex. 455, 65 Am. Dec. 131; Ferguson v. Millaudon, 12 La. Ann. 348; Huber Manuf'g Co. v. Sweny, 57 Ohio St. 169, 48 N. E. 879.

[27] Allen v. Sales, 56 Mo. 28.

[28] Pollard v. King, 62 Ga. 103. As to the necessity of signing a judgment, see § 109 supra.

[29] Seymour v. Thomas Harrow Co., 81 Ala. 250, 1 South. 45.

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plying 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.[30]

§ 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.[31] The object and effect of an amendment nunc pro tunc 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.[32] Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render;[33] nor supply an order which it might or ought to have

[30] Allen v. Sales, 56 Mo. 28.

[31] Brignardello v. Gray, 1 Wall. 627, 17 L. Ed. 692; In re Inhabitants of Limerick, 18 Me. 183; Smith v. Hood, 25 Pa. 218, 64 Am. Dec. 692; Perkins v. Dunlavy, 61 Tex. 241; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau's Heirs, 45 Mo. 171, 100 Am. Dec. 366; Evans v. Fisher, 26 Mo. App. 541; Whitwell v. Emory, 3 Mich. 84, 59 Am. Dec. 220.

[32] Adams v. Higgins, 23 Fla. 13, 1 South. 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 Neb. 274, 281.

[33] Ross v. Ross, 83 Mo. 100; Cleveland Leader Printing Co. v. Green, 52 Ohio St. 487, 40 N. E. 201, 49 Am. St. Rep. 725; Page v. Chapin, 80 Mo. App. 159.

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made, but wholly omitted to make.[34] 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.[35] 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.[36]

§ 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 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." [37] 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

[34] Hyde v. Curling, 10 Mo. 359.

[35] Moore v. State, 63 Ga. 165.

[36] 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. 366.

[37] Hazard v. Durant, 14 R. I. 25. And see Birdsell Manuf'g Co. v. Independent Fire-Sprinkler Co., 87 Ill. App. 443.

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the record does not show that a verdict was rendered, it cannot be supplied at a subsequent term of the court.[38]

§ 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.[39] 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.[40] 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.[41] In general, we may say that the necessity 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

[38] Gray v. Thomas, 12 Smedes & M. (Miss.) 111; Jennings v. Ashley, 5 Ark. 128. And see North v. Pepper, 20 Wend. (N. Y.) 677; Kissam v. Hamilton, 20 How. Prac. (N. Y.) 375.

[39] Mays v. Hassell, 4 Stew. & P. 222, 24 Am. Dec. 750; Bentley v. Wright, 3 Ala. 607; Allen v. Bradford, 3 Ala. 281, 37 Am. Dec. 689; Glass v. Glass, 24 Ala. 468; Nabers' Adm'r v. Meredith, 67 Ala. 333. Compare Womack v. Sanford, 37 Ala. 445.

[40] Long v. Stafford, 103 N. Y. 274, 8 N. E. 522.

[41] Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; Weed v. Weed, 25 Conn. 337; King v. Burnham, 129 Mass. 598. See infra, § 164.

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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.[42] "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."[43] 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 place at the trial or upon outside evidence.[44] 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

[42] Adams v. Re Qua, 22 Fla. 250, 1 Am. St. Rep. 191; Draughan v. Tombeckbee Bank, 1 Stew. (Ala.) 66, 18 Am. Dec. 38; Andrews' Adm'r 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. 188; 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 Metc. (Ky.) 65, 71 Am. Dec. 458; Ludlow's Heirs v. Johnston, 3 Ohio, 553, 17 Am. Dec. 609; Coughran v. Gutcheus, 18 Ill. 390; Cairo & St. L. R. Co. v. Holbrook, 72 Ill. 419; Hyde v. Curling, 10 Mo. 359; Gibson v. Chouteau's Heirs, 45 Mo. 171, 100 Am. Dec. 366; Fletcher v. Coombs, 58 Mo. 430; Atkinson v. Atchison, T. & S. F. R. Co., 81 Mo. 50; Blize v. Castlio, 8 Mo. App. 290; Swain v. Naglee, 19 Cal. 127; Hegeler v. Henckell, 27 Cal. 491; Ware v. Kent, 123 Ala. 427, 26 South. 208, 82 Am. St. Rep. 132; Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626; Boyd v. Schott (Ind.) 50 N. E. 379; Tynan v. Weinhard, 153 Ill. 598, 38 N. E. 1014. An oral announcement of the court's decision is not a sufficient basis for an entry of judgment nunc pro tunc. Boyd v. Schott, 152 Ind. 161, 52 N. E. 752.

[43] Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200.

[44] Belkin v. Rhodes, 76 Mo. 643; Graham v. Lynn, 4 B. Mon. (Ky.) 17, 39 Am. Dec. 493; Short v. Kellogg, 10 Ga. 180; Chicago, B. & Q. R. Co. v. Wingler, 165 Ill. 634, 46 N. E. 712. The presumption of the verity of the record will control where the evidence afforded by the papers and files in the case is in conflict with that furnished by the minute book and the judge's docket. Missouri, K. & E. Ry. Co. v. Holschlag, 144 Mo. 253, 45 S. W. 1101, 66 Am. St. Rep. 417. But in Kansas, it is said that the minutes on the court's docket

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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.[45] 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.[46] So a memorandum written by the presiding judge across a motion entered on the motion-docket will authorize a nunc pro tunc order.[47]

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.[48] 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.[49] But when the fact that a judgment

and the testimony of the presiding judge are ordinarily controlling. Shockey v. Akey, 6 Kan. App. 920, 49 Pac. 694. An entry in the clerk's minutes, giving the style of the case and the case number, followed by the abbreviation "Judgt.," is a sufficient basis for the entry of a judgment nunc pro tunc. Monarch v. Brey (Ky.) 51 S. W. 191.

[45] Farmer v. Wilson, 34 Ala. 75.

[46] Mead v. Brown, 65 Mo. 552. And see Wade v. Bryant (Ky.) 7 S. W. 397.

[47] 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.

[48] Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; Rugg v. Parker, 7 Gray (Mass.) 172; Weed v. Weed, 25 Conn. 337; Jacobs v. Burgwyn, 63 N. C. 193; Aydelotte v. Brittain, 29 Kan. 98; Bobo v. State, 40 Ark. 224; Brownlee v. Board of Com'rs of Grant Co., 101 Ind. 401.

[49] 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.[50] 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.[51]

§ 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.[52] Hence the entry, by its relation back, will cure any variance between the judgment as originally (defectively) entered and the execution issued thereon.[53] "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

N. W. 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. 803.

[50] Camoron v. Thurmond, 56 Tex. 22; Burnett v. State, 14 Tex. 455, 65 Am. Dec. 131; Johnson v. Wright, 27 Ga. 555; Weed v. Weed, 25 Conn. 337; Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; Rugg v. Parker, 7 Gray (Mass.) 172; Clark v. Lamb, 8 Pick. (Mass.) 415, 19 Am. Dec. 332; Davis v. Shaver, 61 N. C. 18, 91 Am. Dec. 92.

[51] Robertson v. Pharr, 56 Ga. 245.

[52] Bush v. Bush, 46 Ind. 70.

[53] Jordan v. Petty, 5 Fla. 326.

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purchaser." [54] But it is held that for the purpose of a statute of limitations, 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.[55]

§ 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.[56] 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.[57] 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.[58] 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

[54] Ludlow's Heirs v. Johnston, 3 Ohio, 553, 575, 17 Am. Dec. 609. Entering a decree nunc pro tunc, and thereby restricting the time for appeal, is not prejudicial error, where the defeated party succeeds in perfecting his appeal. Monson v. Kill, 144 Ill. 248, 33 N. E. 43.

[55] Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532.

[56] Bank of Newburgh v. Seymour, 14 Johns. (N. Y.) 219; Vroom v. Ditmas, 5 Paige (N. Y.) 528; Smith v. Hood, 25 Pa. 218, 64 Am. Dec. 692; Galpin v. Fishburne, 3 McCord (S. C.) 22, 15 Am. Dec. 614; Acklen v. Acklen, 45 Ala. 609; Graham v. Lynn, 4 B. Mon. (Ky.) 18, 39 Am. Dec. 493; Small v. Douthitt, 1 Kan. 335; Shirley v. Phillips, 17 Ill. 471; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Koch v. Atlantic & P. R. Co., 77 Mo. 354; Hays v. Miller, 1 Wash. T. 143. But on motion to enter nunc pro tunc a judgment already rendered, a stranger cannot intervene and question the judgment. Hillens v. Brinsfield, 113 Ala. 304, 21 South. 208.

[57] Miller v. Wolf, 63 Iowa, 233, 18 N. W. 889. But a party to an action cannot prevent the court from entering nunc pro tunc the judgment pronounced by it, by showing that some third person, not a party to the suit, has acquired an interest in the property involved since the rendition of the original judgment. Hyde v. Michelsen, 52 Neb. 680, 72 N. W. 1035, 66 Am. St. Rep. 533.

[58] Acklen v. Acklen, 45 Ala. 609.

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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.[59]

[59] Koch v. Atlantic & P. 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. Monllaws, 8 Hun, 65; Dennison v. Leech, 9 Pa. 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 of the Republic, 48 Tex. 599; Price v. Grand Rapids & I. R. Co., 18 Ind. 137;

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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

Oakes v. Ward, 19 Ill. 46; Taylor v. Richman, 87 Ill. App. 419; Stiles v. Brown, 3 G. Greene (Iowa) 589; Hayton v. Hope, 3 Mo. 53; Beckwith v. Boyce, 12 Mo. 440; Cauthorn v. Berry, 69 Mo. App. 404; Wheeler v. Mayher, (Colo. App.) 61 Pac. 623; Lamping v. Hyatt, 27 Cal. 99; Bond v. Pacheco, 30 Cal. 530; Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51; Morrison v. L'Hommedieu, 15 App. Div. 623, 44 N. Y. Supp. 79; Denison v. Lewis, 5 App. D. C. 328; Southern Bell Telephone & Telegraph Co. v. D'Alemberte, 39 Fla. 25, 21 South. 570; Wilkins v. Burns (Tex. Civ. App.) 25 S. W. 431; Warren v. Prewett (Tex. Civ. App.) 25 S. W. 647; Chaney v. Ramey (Ky.) 43 S. W. 235. It is immaterial that the evidence may prove a greater debt, or a greater amount of damage, than was alleged by the plaintiff in his declaration. Denison v. Lewis, 5 App. D. C. 328; Cauthorn v. Berry, 69 Mo. App. 404; Lister v. Vowell, 122 Ala. 264, 25 South. 564. And where the declaration specially alleges the items of damage, in precise and definite sums, there can be no greater recovery than their aggregate, notwithstanding that the ad damnum clause claims a greater amount in a lump sum. Kerry v. Pacific Marine Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65. But in Indiana, it appears that, where the complaint demands a money judgment in a specified sum, and defendant has answered, judgment may be rendered for a greater sum than that demanded, should the case justify it. Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397. And see Code Civ. Proc. Cal. § 580.

[2] Helms v. Kearns, 40 Ind. 124.

[3] Andrews v. Monllaws, 8 Hun, 65; Bond v. Pacheco, 30 Cal. 530. See Thompson v. Turner, 22 Ill. 389.

[4] Lester v. Cloud, 67 Ga. 770.

[5] Janson v. Bank of the Republic, 48 Tex. 599.

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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. For if a judgment is entered for too great an amount, it may be reformed by remitting the excess.[7] Again, if the plaintiff amends his petition, and issue is joined thereon, his recovery will not be limited to the amount claimed in the original petition.[8] Or, in proper cases, the complaint will be deemed to have been amended so as to demand judgment for the amount actually recovered.[9] 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.[10] It should also be remarked that the rule prohibiting a judgment for a greater sum than that demanded by the plaintiff does not apply to the addition of costs to the amount of the recovery, though the total may exceed the ad damnum,[11] but it does prevent the addition of attorneys' fees in excess of the sum claimed in the complaint.[12]

§ 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 defi-

[6] Chaffee v. Hooper, 54 Vt. 513; Bond v. Pacheco, 30 Cal. 530; Gum-Elastic Roofing Co. v. Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

[7] Anthony v. Estes, 101 N. C. 541, 8 S. E. 347; Lister v. Vowell, 122 Ala. 264, 25 South. 564. In case of remittitur, the judgment previously entered should first be set aside, and a remittitur entered, and this should then be followed by judgment for the amount remaining. Bartling v. Thielman, 183 Ill. 88, 55 N. E. 677.

[8] Kohn v. Johnson (Iowa) 80 N. W. 543.

[9] Carpenter v. Sheldon, 22 Ind. 259.

[10] Day v. Berkshire Woolen Co., 1 Gray (Mass.) 420.

[11] French v. Goodnow, 175 Mass. 451, 56 N. E. 719. And the same is true of interest. Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366.

[12] Skym v. Weske Consolidated Co. (Cal.) 47 Pac. 116.

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nitely 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.[13] 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.[14] 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.[15]

§ 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 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.[16]

§ 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,

[13] Supra, § 89.

[14] Beam v. Hayden, 5 Bush (Ky.) 426; Evans v. Parks, 10 Ark. 306; Warren v. Kennedy, 1 Heisk. (Tenn.) 437.

[15] Snell v. Irvine, 17 Fla. 234.

[16] Cleveland Co-op. Stove Co. v. Grimes, 9 Neb. 123, 2 N. W. 345; Basset v. Mitchell (Kan.) 19 Pac. 671. But a recovery for an amount greater than the sum indorsed on the summons is lawful where the excess is for interest accrued since the commencement of the suit. Elliott v. Knight, 64 Ill. App. 87. And the fact that the judgment exceeds the sum indorsed on the summons is unimportant where the defendant appears and answers to the merits. Erck v. Omaha Nat. Bank, 43 Neb. 613, 62 N. W. 67.

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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.[17] 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.[18] 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.[19] 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.[20] But the fact that more extensive relief, of the same general nature, is prayed in the bill than is warranted by the

[17] Dodge v. Wright, 48 Ill. 382; Smith v. So Rill (Tex. Civ. App.) 54 S. W. 38.

[18] Laverty v. Sexton, 41 Iowa, 435; Galloway v. Galloway, 61 Tenn. 328; Colton v. Ross, 2 Paige (N. Y.) 396, 22 Am. Dec. 648; Wilkin v. Wilkin, 1 Johns. Ch. (N. Y.) 111; Kelly v. Payne, 18 Ala. 371; Stone v. Anderson, 26 N. H. 506; Allen v. Coffman, 1 Bibb (Ky.) 469; Barr v. Haseldon, 10 Rich. Eq. (S. C.) 53.

[19] Rogers v. Brooks, 30 Ark. 612.

[20] Rome Exchange Bank v. Eames, 4 Abb. Dec. (N. Y.) 83; Rogers v. Brooks, 30 Ark. 612; Carpentier v. Brenham, 50 Cal. 549; Miller v. Allen, 104 Ky. 114, 46 S. W. 523. For example, where plaintiff seeks to recover for a conversion, a judgment for foreclosure of an alleged lien on the same property cannot be granted under his prayer for general relief. Behrens Drug Co. v. Hamilton (Tex. Civ. App.) 45 S. W. 622. So, where plaintiff's pleadings asked for a lien only on personal property of defendant, a judgment giving him in addition a lien on defendant's realty, is erroneous. Conlin v. Lamont Iron Co., 116 Mich. 626, 74 N. W. 1004. In an action to enforce a contract for the sale of land, where both parties allege a sale, but differ as to the consideration, a decree cancelling the contract as inequitable is erroneous. Hoover v. Binkley, 66 Ark. 645, 51 S. W. 73.

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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.[21]

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.[22] 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.[23] 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 cannot 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 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." [24] But under this clause, where a complaint contains no prayer for damages, a judgment on default awarding damages is erro-

[21] Vicksburg & M. R. Co. v. Ragsdale, 54 Miss. 200.

[22] Code N. Y. § 275; Code Civ. Proc. Cal. § 580.

[23] Mudge v. Steinhart, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17.

[24] Hale v. Omaha Nat. Bank, 49 N. Y. 626; Hagar v. Townsend (C. C.) 67 Fed. 433. Compare Gall v. Gall, 17 App. Div. 312, 45 N. Y. Supp. 248.

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neous, although the complaint states facts sufficient to sustain such a judgment.[25] 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.[26] 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.[27] 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.[28] 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

[25] Pittsburgh Coal Min. Co. v. Greenwood, 39 Cal. 71. See Miner v. Pearson, 16 Kan. 27; Olcott v. Kohlsaat, 55 Hun, 607, 8 N. Y. Supp. 117.

[26] Marder v. Wright, 70 Iowa, 42, 29 N. W. 799; Humphrey v. Thorn, 63 Ind. 296; Bank of Russellville v. Coke (Ky.) 45 S. W. 867; Poledori v. Newman, 116 Cal. 375, 48 Pac. 325; Ellis v. Rademacher, 125 Cal. 556, 58 Pac. 178. The filing of a demurrer is not the making of a defense within the meaning of these statutes. Board of Sinking Fund Com'rs v. Mason & Foard Co. (Ky.) 41 S. W. 548. In Missouri, it is said that, where a petition contains a plain statement of the cause of action, it is immaterial what the prayer is; and the trial court may direct such judgment as the averments and facts of the case will warrant. Gunnell v. Emerson, 80 Mo. App. 322. And in North Carolina, there is a ruling that, where a judgment is justified by the pleadings and proof, it is immaterial that it is not in conformity with the prayer of the complaint. Reade v. Street, 122 N. C. 301, 30 S. E. 124.

[27] Evans v. Schafer, 119 Ind. 49, 21 N. E. 448. And see Eldridge v. Adams, 54 Barb. 417.

[28] Chase v. Christianson, 41 Cal. 253. See Conlin v. Lamont Iron Co., 116 Mich. 626, 74 N. W. 1004. Compare Childress v. Smith (Tex. Civ. App.) 37 S. W. 1076.

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the case made by the proof.[29] Nevertheless this equitable power in the courts will not justify them in awarding to the plaintiff, upon a replication, an entirely different judgment from that prayed for in his petition.[30]

§ 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.[31] 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.[32] 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.[33] 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.[34] According to the practice of the United States courts, the clerk has no

[29] Johnson v. Hathorn, 2 Abb. Dec. 465.

[30] Marder v. Wright, 70 Iowa, 42, 29 N. W. 799; Eastlick v. Wright, 121 Cal. 309, 53 Pac. 654; Hibernia Savings & Loan Soc. v. Thornton, 123 Cal. 62, 55 Pac. 702; Lazarus v. Barrett, 5 Tex. Civ. App. 5, 23 S. W. 822. But in Iowa, under Miller's Code, § 2514, which provides for a change into the proper proceedings in case a wrong proceeding is adopted, a proper judgment at law for the amount of the claim will be given, though the proceeding was erroneously commenced in equity to establish a mechanic's lien. Swift v. Cainan, 102 Iowa, 206, 71 N. W. 233, 37 L. R. A. 462, 63 Am. St. Rep. 443.

[31] Buck v. Little, 24 Miss. 463; Reid v. Dunklin, 5 Ala. 205; Mitchell v. Geisendorff, 44 Ind. 358; John A. Tolman Co. v. Savage, 5 S. D. 496, 59 N. W. 882; Clark v. Gallaher, 3 Tex. Civ. App. 541, 22 S. W. 1047. But the judgment may include interest accrued since the verdict. Hallberg v. Brosseau, 64 Ill. App. 520. And it is said that a trifling excess in the judgment (such as ten cents) will not invalidate it, especially where the decree orders a sale in the exact amount of the verdict. Brown v. Montgomery (Tex. Civ. App.) 31 S. W. 1079. The fact that the court, in entering final judgment in ejectment, did not award to the plaintiff all the premises to which he was entitled under the verdict, affords no ground of complaint to defendant. Colorado Central Consolidated Min. Co. v. Turck, 2 C. C. A. 67, 50 Fed. 888.

[32] Stevens' Ex'rs v. Lee, 70 Tex. 279, 8 S. W. 40.

[33] Baltzell v. Hickman, 4 Litt. (Ky.) 265.

[34] Walker v. Fuller, 29 Ark. 448.

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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.[35]

§ 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.[36] 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 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.[37] It is also held that payments made pending the suit are to be deducted in making up the judgment.[38] But where the plaintiff is entitled to the entire amount sued for or nothing at all, a judgment in his favor for part of such amount cannot stand.[39]

§ 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

[35] Robostelli v. New York, N. H. & H. R. Co. (C. C.) 34 Fed. 507.

[36] Gray v. Hines, 4 Munf. (Va.) 437. Attorney's commissions stipulated for by a judgment note will be computed on the balance due on the note, for which judgment is entered, unless it is shown that previous payments credited on the note were secured by the services of the attorney. George P. Steel Iron Co. v. Jacobs, 9 Pa. Super. Ct. 122.

[37] Hathaway v. Hemingway, 20 Conn. 191. The court, in this case, was inclined to think the remedy was by application to a court of chancery. But a mistake of this kind could probably be cured by amendment in the court rendering the judgment; and it has been held that failure to credit such a partial payment in the entry of the judgment will be cured by crediting it on the execution. Wolford v. Bowen, 57 Minn. 267, 59 N. W. 195.

[38] Joy v. Hull, 4 Vt. 455, 24 Am. Dec. 625.

[39] Pionier v. Alexander, 7 Misc. Rep. 709, 28 N. Y. Supp. 157; Owens v. Flynn, 7 Misc. Rep. 171, 27 N. Y. Supp. 336.

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and order the residue to be refunded, inasmuch as the tender admits the whole to be due.[40] 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.[41] 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.[42] 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.[43] 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.[44]

§ 145. Joint Parties.

Embarrassing questions sometimes arise in regard to the amount and character of the judgment in cases where there are numerous

[40] Sweetland v. Tuthill, 54 Ill. 215. It is equally error to render judgment for the plaintiff upon the pleadings, without evidence, for a larger sum than the answer admits to be due to him. Van Etten v. Kosters, 48 Neb. 152, 66 N. W. 1106. If defendant becomes entitled to costs, because of plaintiff's failure to recover a more favorable judgment than defendant has offered, a single judgment should be entered for the plaintiff for the amount recovered, less defendant's costs. Coatsworth v. Ray, 52 N. Y. Supp. 498.

[41] Coffman v. Brown, 7 Colo. 147, 2 Pac. 905.

[42] But defendant is not entitled to recoupment for an amount larger than that claimed in his plea. Paragon Refining Co. v. Lee, 98 Tenn. 643, 41 S. W. 362. A judgment for plaintiff in an action in which a set-off is pleaded need not specifically show what disposition was made of the set-off. Coats v. Barrett, 49 Ill. App. 275. Where a counterclaim is well pleaded and the plaintiff interposes no reply, he cannot recover more than the sum claimed in his petition, less the amount of the counterclaim; and a verdict in his favor for more than this should be set aside. Ashland Land & Live-Stock Co. v. Woodford, 50 Neb. 118, 69 N. W. 769.

[43] Moore v. Woodside, 26 Ohio St. 537. And see Clarkson v. Manson, 60 How. Prac. 48.

[44] Brush v. S. A. & D. R. Co., 43 Iowa, 554. An agreement between the parties as to the amount of the recovery will support a judgment for such amount, although the pleadings were not amended to correspond with the agreement. Wilson v. Panne, 1 Kan. App. 721, 41 Pac. 984.

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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.[45] 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.[46] 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.[47] 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.[48] 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

[45] Grant v. Schmidt, 22 Minn. 1. See Helmuth v. Bell, 150 Ill. 263, 37 N. E. 230.

[46] Williams v. Williams, 74 N. C. 1.

[47] Davis v. Davis, 2 Cush. (Mass.) 111.

[48] Supra, §§ 82, 120; Moffett v. Bickle, 21 Grat. 280.

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multiplicity of suits.[49] But at law one defendant to a suit cannot 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.[50] In New Hampshire, damages may be apportioned among several defendants by separate judgments, if justice will be promoted by such procedure.[51]

§ 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." [52] 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.[53] 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.[54]

§ 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

[49] Chamley v. Dunsany, 2 Schoales & L. 690, 718. See Jones v. Sander, 2 Wash. St. 329, 26 Pac. 224.

[50] Cavin v. Williams, 8 Bush (Ky.) 343.

[51] City Sav. Bank v. Whittle, 63 N. H. 587, 3 Atl. 645.

[52] Code Civil Proc. Cal. § 666. See Gaff v. Hutchinson, 38 Ind. 341; James v. Daniels (Tex. Civ. App.) 43 S. W. 26; National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125; Nichols & Shepard Co. v. Wiedmann, 72 Minn. 344, 75 N. W. 208. As to the propriety of adjudging affirmatively for defendant, where he has not asked for affirmative relief, see Gilreath v. Gilliland, 95 Tenn. 383, 32 S. W. 250.

[53] Kraker v. Shields, 20 Grat. (Va.) 377.

[54] Walker v. Abt, 83 Ill. 226.

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judgment for the gross sum of principal and interest made up to a certain day, with interest on such gross sum, is erroneous.[55] 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 the debt, interest, and damages, without distinguishing the amount of either.[56] 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.[57] 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.[58] In some states, the statutes provide that, when judgment is rendered upon a verdict, interest shall be computed from the date of the verdict to the time of rendering the judgment on the same, and made a part of the judgment. But a judgment is not void for uncertainty because the interest is not so computed.[59] It also appears that where the verdict, in an action on an implied contract, does not mention interest, the court cannot allow interest in entering the judgment.[60]

[55] Boarman v. Patterson, 1 Gill (Md.) 372.

[56] Wilmans v. Bank of Illinois, 1 Gilman (Ill.) 667.

[57] Spence v. Rutledge, 11 Ala. 590. But it is held by the United States supreme court 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. 739, 33 L. Ed. 184.

[58] Dean v. Blount, 71 Tex. 270, 9 S. W. 168; Washington Park Club v. Baldwin, 59 Ill. App. 61.

[59] Blumke v. Dailey, 67 Ill. App. 381. It is error to compute interest on the amount of a verdict for a period prior to the date of its rendition, and render judgment therefor, when the verdict neither includes such interest nor affords data for its computation. Southern Kansas Ry. Co. v. Showalter, 57 Kan. 681, 47 Pac. 831.

[60] Carter v. Christie, 1 Kan. App. 604, 42 Pac. 256. See Goggan v. Evans, 12 Tex. Civ. App. 256, 33 S. W. 891.

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§ 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.[61] 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.[62] 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 plaintiff 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.[63]

§ 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.[64]

[61] Libby v. Rosekrans, 55 Barb. (N. Y.) 202. Upon proof of a claim against an estate for money payable in installments, some of which are not yet due, judgment may be rendered for its payment at different times as the installments fall due. Wolfe v. Wilsey, 2 Ind. App. 549, 28 N. E. 1004.

[62] Thatcher v. Taylor, 3 Munf. (Va.) 249.

[63] Farnham v. Mallory, 2 Abb. Dec. (N. Y.) 100.

[64] Powell v. Redfield, 4 Blatchf. 47, Fed. Cas. No. 11,359; United States v.

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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.[65] 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.[66]

§ 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 rendered 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.[67]

§ 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

Montell, Taney, 47, Fed. Cas. No. 15,798; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780.

[65] Palmer v. York Bank, 18 Me. 166, 36 Am. Dec. 710; Royse v. May, 93 Pa. 454; Shrewsbury v. Bawtlitz, 57 Mo. 414; Osborn v. Lovell, 36 Mich. 246; Chipman v. Emerick, 5 Cal. 239; Sedg. Dam. 588.

[66] Osborn v. Lovell, 36 Mich. 246.

[67] Supra, § 118.

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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.[68] 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.[69]

§ 152. Judgment for Coined Money.

When the "legal tender act" (Act Cong. Feb. 25, 1862) first came before the supreme federal tribunal for interpretation, it was held to be unconstitutional.[70] But this decision was afterwards overruled, and the act was held to be constitutional and valid, both as applied to contracts made before its passage and as to those entered into since; and it was further decided that the treasury notes were equally a legal tender when reissued by authority as upon their original issue.[71] At the same time, the court held that the legal tender act applied only to debts which were payable in money generally, not to obligations solvable in commodities, nor to debts or contracts as to which the parties had agreed that they should be payable only in a specified kind of money. Hence, where a contract for the payment of money is by its terms made payable "in specie," "in coin," "in coined money," or "in gold coin," it cannot be satisfied by a tender in treasury notes; and when a contract so worded is put in suit, the judgment rendered upon it should specify "coined dollars" or "gold coin," or otherwise as the case may be, as the medium of its satisfaction.[72] Notwithstanding these decisions, some of the cases, refusing to accept this construction of the act, or preferring to abide by the 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

[68] Swain v. Smith, 65 N. C. 211; Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

[69] Coffin v. Hill, 1 Heisk. (Tenn.) 385.

[70] Hepburn v. Griswold, 8 Wall. 603, 19 L. Ed. 513.

[71] Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

[72] Trebilcock v. Wilson, 12 Wall. 687, 20 L. Ed. 460; Bronson v. Rodes, 7 Wall. 229, 19 L. Ed. 141; Butler v. Horwitz, 7 Wall. 258, 19 L. Ed. 149.

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entirely erroneous to enter judgment for a particular kind of money.[73] But in a majority of the states the courts have 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.[74] It is 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.[75] Also it is considered that interest on the debt can only be paid in coined money.[76] But the costs of the action may be paid in legal tender notes.[77] However, it is only in respect to contracts expressly stipulating for payment in coin that judgments for coin can be entered. In suits for unliquidated damages, such judgments are not permissible.[78] Nor can they be rendered in actions of tort.[79] So

[73] Davis v. Field, 43 Vt. 221; 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. Shultz, 13 Mich. 420; Wood v. Bullens, 6 Allen (Mass.) 518; Killough v. Alford, 32 Tex. 457, 5 Am. Rep. 249; Reed v. Eldredge, 27 Cal. 346.

[74] Independent Ins. Co. v. Thomas, 104 Mass. 192; Paddock v. Commercial Ins. Co., 104 Mass. 521; Chrysler v. Renois, 43 N. Y. 209; Kellogg v. Sweeney, 46 N. Y. 291, 7 Am. Rep. 333; Ransford v. Marvin, 8 Abb. Prac. (N. S.) 432; McCalla v. Ely, 64 Pa. 254; Chesapeake Bank v. Swain, 29 Md. 483; Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; Foster v. Atlantic & P. R. Co., 1 Mo. App. 390; Harding v. Cowing, 28 Cal. 212; Reese v. Stearns, 29 Cal. 273; Winans v. Hassey, 48 Cal. 634; McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122; Hittson v. Davenport, 4 Colo. 169; Smith v. Wood, 37 Tex. 620.

[75] Dewing v. Sears, 11 Wall. 379, 20 L. Ed. 189; Davis v. Mason, 3 Or. 154; Foster v. Atlantic & P. R. Co., 1 Mo. App. 390; Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66. 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.

[76] Chesapeake Bank v. Swain, 29 Md. 483; Chrysler v. Renois, 43 N. Y. 209.

[77] Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; Chrysler v. Renois, 43 N. Y. 209.

[78] Calhoun v. Pace, 37 Tex. 454.

[79] Livingston v. Morgan, 53 Cal. 23; Chamberlin v. Vance, 51 Cal. 75. Where there is no allegation in the complaint that there was an agreement to

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a person who deposited gold with a banker is only entitled to recover the amount in dollars and cents in the circulating medium of the country.[80] 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.[81] 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.[82]

In California, and perhaps some other states, the statutes provide that judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein; and under such a law, a judgment expressed to be payable in "U. S. gold coin" is not erroneous where the note on which it is rendered is worded in the same manner.[83]

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. San Francisco & H. B. R. Co., 50 Cal. 523.

[80] Gumbel v. Abrams, 20 La. Ann. 568, 96 Am. Dec. 426.

[81] Wells, Fargo & Co. v. Van Sickle, 6 Nev. 45.

[82] Churchman v. Martin, 54 Ind. 380.

[83] Sheehy v. Chalmers (Cal.) 36 Pac. 514; Code Civ. Proc. Cal. § 667.

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CHAPTER IX.

THE AMENDMENT OF JUDGMENTS.

§ 153. Amendment during the Term.
154. Amendment after the Term.
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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 in which any judicial act was done the proceedings were considered to continue in fieri, and even after a judgment was rendered, the

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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 correctly to describe the firm against which the judgment is given.[4] Nor is it

[1] Co. Litt. 260a; 3 Bl. Comm. 407.

[2] Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. Ed. 511; Alabama Gold Life Ins. Co. v. Nichols, 109 U. S. 232, 3 Sup. Ct. 120, 27 L. Ed. 915; Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244; Tilton v. Barrell (C. C.) 17 Fed. 59; Burch v. Scott, 1 Bland (Md.) 112; Lemacks v. Glover, 1 Rich. Eq. (S. C.) 141; Worthington v. Campbell (Ky.) 1 S. W. 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, 24 Neb. 803, 40 N. W. 317; De Castro v. Richardson, 25 Cal. 49; Cooper v. Cooper, 51 App. Div. 595, 64 N. Y. Supp. 901; Conklin v. New York El. R. Co., 18 Civ. Proc. R. 366, 13 N. Y. Supp. 782; Culbreth v. Smith, 124 N. C. 289, 32 S. E. 714; Barton v. American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210; Texas Savings Loan Ass'n v. Smith (Tex. Civ. App.) 32 S. W. 380; McGurry v. Wall, 122 Mo. 614, 27 S. W. 327; Stitt v. Kurtenbach, 85 Ill. App. 38. But while the court has control of its judgments during the entire term at which they are rendered, this rule will not be applied so as to enable a party to take advantage of his own negligence or misconduct, to the injury of other parties. Cornell University v. Parkinson, 59 Kan. 365, 53 Pac. 138.

[3] Dawson v. Wisner, 11 Iowa, 6.

[4] Sugg v. Thornton, 73 Tex. 666, 9 S. W. 145.

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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 the case.[5] Thus, where an action was tried by the court without a jury, the judge has power, during the same term, to reduce the amount of the judgment if satisfied that it is too great.[6] 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.[7] 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.[8] 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.[9]

§ 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

[5] Wolmerstadt v. Jacobs, 61 Iowa, 372, 16 N. W. 217; Carothers v. Lange (Tex. Civ. App.) 55 S. W. 580.

[6] Flickinger v. Omaha Bridge & Terminal Ry. Co., 98 Iowa, 358, 67 N. W. 372.

[7] Bishop v. Aborn, 16 R. I. 568, 18 Atl. 203.

[8] Ryon v. Thomas, 104 Ind. 59, 3 N. E. 653.

[9] State v. Daugherty, 70 Iowa, 439, 30 N. W. 685.

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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.[10] It is said by the 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." [11] In the following sections we shall endeavor to show that, beside the correction of clerical errors, the courts have power, after the

[10] Harrison v. State, 10 Mo. 686; Botkin v. Pickaway County Com'rs, 1 Ohio, 375, 13 Am. Dec. 630; Bramblet's Heirs v. Pickett's Heirs, 2 A. K. Marsh. (Ky.) 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 (Tenn.) 77; Cook v. Wood, 24 Ill. 295; Ballo v. Wilson, 12 Mart. O. S. (La.) 358, 13 Am. Dec. 376; McLean v. Stewart, 14 Hun, 472; Daviess County Court v. Howard, 13 Bush (Ky.) 101; Ocoee Bank v. Hughes, 2 Cold. (Tenn.) 52; Killpatrick v. Rose, 9 Johns. (N. Y.) 78; Coughran v. Gutcheus, 18 Ill. 390; Gould's Estate v. Watson, 80 Ill. App. 242; Schmelzer v. Chicago Ave. Sash & Door Manuf'g Co., 85 Ill. App. 596; Schmidt v. Rehwinkel, 86 Ill. App. 267; Hook v. Mercantile Trust Co., 32 C. C. A. 238, 89 Fed. 410; Foley v. Foley, 15 App. Div. 276, 44 N. Y. Supp. 588; Stewart v. Stewart, 40 W. Va. 65, 20 S. E. 862; Ivey v. Gilder, 119 Ala. 495, 24 South. 715; McLain v. Duncan, 57 Ark. 49, 20 S. W. 597; Nixon v. Nichols, 10 Ind. App. 1, 37 N. E. 421; State v. Harper, 56 Mo. App. 611; Anderson v. McCloud-Love Live-Stock Commission Co., 58 Neb. 670, 79 N. W. 613. An amendment of a decree from one on the merits, final in its character, to one dismissing the bill for want of jurisdiction, and leaving the merits for determination in an action at law, is substantial and material, and cannot be made after the term at which it was rendered. Horner v. Horner, 37 Ill. App. 199.

[11] Coughran v. Gutcheus, 18 Ill. 390.

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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 proposition may be cited that, after the term, the power of the court to amend its own record is limited to such corrections or changes as are in affirmance of the judgment originally rendered; it has no authority to strike out the judgment, to enlarge or diminish it, to change its whole nature, or to render another and different judgment upon the same record.[12] 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.[13] A decision in Virginia holds that a decree for alimony, affirmed on appeal as to 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.[14] 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.[15] It follows also that a judgment cannot be expunged at

[12] Gould's Estate v. Watson, 80 Ill. App. 242; Bethel v. Bethel, 6 Bush (Ky.) 65, 99 Am. Dec. 655. After the term, the court cannot enlarge its judgment so as to include a recovery against bondsmen not originally included therein. Barber v. City of Biloxi, 76 Miss. 578, 25 South. 298. Again, after the term at which a final judgment in replevin was rendered, the court cannot amend that judgment by entering a further judgment for damages and a retorno habendo. Peterson v. Metropolitan Nat. Bank, 88 Ill. App. 190. Mistake of counsel in entering a decree which does not conform to the opinion of the court cannot be corrected after the term expires. Doe v. Waterloo Min. Co. (C. C.) 60 Fed. 643.

[13] Buckles v. Northern Bank of Kentucky, 63 Ill. 268.

[14] Cralle v. Cralle, 84 Va. 198, 6 S. E. 12.

[15] De Castro v. Richardson, 25 Cal. 49.

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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.[16] 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.[17] And it appears that the rule which prevents the court from interfering with its judgments after the term does not apply to such action as may be taken in that behalf with the consent of the parties concerned, or at their request.[18] And further, a judgment may be carried over the term by motion; that is to say, if a motion to amend or correct it, or a petition for a rehearing, is filed during the term at which the judgment was rendered, its operation will be so far suspended that the matter may be heard and determined at the ensuing term.[19]

§ 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.[20] Hence a mis-

[16] Jones v. Hart, 60 Mo. 351.

[17] Hastings v. Cunningham, 35 Cal. 549; Aull v. Day, 133 Mo. 337, 34 S. W. 578. A court has jurisdiction to set aside a judgment rendered at a previous term, requiring a party to pay the costs of the term. Tanton v. Keller, 78 Ill. App. 31.

[18] Sheridan v. City of Chicago, 175 Ill. 421, 51 N. E. 898; Hewetson v. City of Chicago, 172 Ill. 112, 49 N. E. 992.

[19] O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525; Watson v. Le Grand Roller Skating Rink Co., 177 Ill. 203, 52 N. E. 317. Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the later term, and remains subject to the control of the court until the close of such term. Judson v. Gage, 39 C. C. A. 156, 98 Fed. 540.

[20] Balch v. Shaw, 7 Cush. (Mass.) 282; Fay v. Wenzell, 8 Cush. (Mass.) 315; Wilson v. Myers, 11 N. C. 73, 15 Am. Dec. 510; Speed's Ex'rs v. Hann, 1 T. B. Mon. (Ky.) 16, 15 Am. Dec. 78; Smith v. Mullins, 3 Metc. (Ky.) 182; Brady v. Beason, 28 N. C. 425; Portis v. Talbot, 33 Ark. 218; Russell v. Erwin's Adm'r, 41 Ala. 292; Johnson v. Bank of Kentucky, 2 Duv. 521; Hammer v. McConnel, 2 Ohio, 31; Ohio v. Beam, 3 Ohio St. 508; Silner v. But-

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take 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.[21] A court may, upon motion of one party and 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.[22] So a misnomer of the term of the court in the entry of a judgment is a clerical error and amendable.[23] And the same is true of a misnomer of one of the parties,[24] or a misdescription of the property involved.[25] So also, a judgment entered against a party in a representative capacity, when it should have been against him individually, or vice versa, or a personal judgment against an executor which should have been against the goods of the estate, may be amended by other parts of the record, on motion, when the mistake is plainly that of the clerk.[26] Again, where a judgment in attachment gives the right of execution to the defendant, instead of to the plaintiff, this is manifestly a clerical error and may be corrected at a subsequent term.[27] And so also where there have been two trials

terfield, 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. 732; Granite State Provident Ass'n v. McHugh, 88 Hun, 617, 34 N. Y. Supp. 341; Knox v. Moore, 41 S. C. 355, 19 S. E. 683; Birmingham v. Leonhardt, 2 Kan. App. 513, 43 Pac. 996; Brittenham v. Robinson, 22 Ind. App. 536, 54 N. E. 133; Cauthorn v. Berry, 69 Mo. App. 404; Farley v. Cammann, 43 Mo. App. 168; People v. County Court of Arapahoe County, 9 Colo. App. 41, 47 Pac. 469.

[21] Eau Claire Lumber Co. v. Anderson, 13 Mo. App. 429.

[22] Grimes v. Grosjean, 24 Neb. 700, 40 N. W. 137; Carlton v. Patterson, 29 N. H. 580; Clark v. Clark, 138 N. Y. 653, 34 N. E. 513; Day v. Argus Printing Co., 47 N. J. Eq. 594, 22 Atl. 1056.

[23] Burnham v. Chicago, 24 Ill. 496.

[24] Southern Kansas Ry. Co. v. Brown, 44 Kan. 681, 24 Pac. 1100; Brown v. Barnes, 93 Ala. 58, 9 South. 455; First Nat. Bank v. Kowalsky (Cal.) 31 Pac. 1133.

[25] Wilcox v. Wells (Idaho) 51 Pac. 985.

[26] Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561; Atkins v. Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; Yarborough's Ex'r v. Scott's Ex'r, 5 Ala. 221; Speed's Ex'rs v. Hann, 1 T. B. Mon. (Ky.) 16, 15 Am. Dec. 78; Wyman v. Buckstaff, 24 Wis. 477. But compare Sass v. Hirschfeld, 23 Tex. Civ. App. 1, 56 S. W. 602; Leonis v. Leffingwell, 126 Cal. 369, 58 Pac. 940.

[27] Hogue v. Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

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of a case, and the record shows that judgment was rendered on the second verdict, but the clerk entered it for the amount of the first verdict.[28] So again, where it is shown, on motion to correct the entry of a judgment of dismissal of an action as to a party thereto, that the order was not intended or understood by either party to include a dismissal of the cause of action against such party, the error may be corrected.[29] In some states, the courts have authority, by statute 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.[30] And in others, the judge in vacation may correct any miscalculation or misrecital of any sum of money in a judgment.[31]

§ 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 the omission may be supplied by an amendment after the term.[32] If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intend-

[28] Gaynor v. Clements, 10 Colo. 209, 26 Pac. 324.

[29] Stuart v. City of Logansport, 87 Ind. 584.

[30] Lee v. Houston, 20 Ala. 301; Code Ala. 1886, § 2836.

[31] Morris v. Coleman County (Tex. Civ. App.) 35 S. W. 29; Sayles' Civ. St. Tex. art. 1355.

[32] Lewis v. Ross, 37 Me. 230, 59 Am. Dec. 49; State v. Moran, 24 Neb. 103, 38 N. W. 29; Galloway v. McKeithen, 27 N. C. 12, 42 Am. Dec. 153; Gaines v. Wedgeworth, 19 Ga. 31; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Thorp v. Platt, 34 Iowa, 314; Trammell v. Trammell, 25 Tex. Supp. 261; Rogers v. Rogers, 1 Paige (N. Y.) 188; Newburgh Bank v. Seymour, 14 Johns. (N. Y.) 219; Gardner v. Dering, 2 Edw. Ch. (N. Y.) 131; Ray v. Connor, 3 Edw. Ch. (N. Y.) 478; Nye v. Stillwell, Bierce, Smith & Valle Co., 12 Ohio Cir. Ct. R. 40; Kendall v. O'Neal, 16 Mont. 303, 40 Pac. 599.

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ed 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.[33] 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.[34] The omission of the clerk's signature to a judgment filed and docketed, where that is required, may be supplied in like manner.[35] Where a decree orally announced as dismissing a bill without prejudice, is drawn and enrolled, omitting the phrase "without prejudice," these words may be afterwards supplied by amendment.[36] And in like manner, where a decree in foreclosure proceedings, by inadvertence or mistake, omits a fractional part of the land described in the mortgage and the findings, the court may amend the decree by including such land.[37] 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.[38] 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.[39] Again, where a guardian ad litem was appointed at the proper term, but no

[33] Whorley v. Memphis & C. R. Co., 72 Ala. 20.

[34] Crane v. Crane, 51 Ark. 287, 11 S. W. 1.

[35] Seaman v. Drake, 1 Caines (N. Y.) 9.

[36] Township of Hiawatha v. Schoolcraft County Circuit Judge, 90 Mich. 270, 51 N. W. 282.

[37] Dickey v. Gibson, 113 Cal. 26, 45 Pac. 15, 54 Am. St. Rep. 321. But compare Ruff v. Elkin, 40 S. C. 69, 18 S. E. 220. See, also, Young's Guardian v. Sadler (Ky.) 24 S. W. 877.

[38] Allison v. Thomas, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89; Fawcett v. Vary, 59 N. Y. 597; Hibernia Savings & Loan Soc. v. Matthai, 116 Cal. 424, 48 Pac. 370; Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

[39] De Caters v. Le Ray De Chaumont, 3 Paige (N. Y.) 178.

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entry made on the docket, the entry may be subsequently supplied.[40] 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 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." [41] 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.[42] On the same principle, plaintiff is not entitled to an amendment of a judgment in his favor, so as to include the sureties on an appeal bond, where the judgment, as entered, followed the minutes of the court and was properly rendered against defendant alone, and where any judgment against the sureties would necessarily have been for a different amount.[43]

§ 157. Reforming and Perfecting the Judgment.

A judgment entry may be amended at any time to make it correspond with the judgment actually rendered.[44] And for this pur-

[40] Johnson v. Wright, 27 Ga. 555.

[41] Close v. Gillespey, 3 Johns. (N. Y.) 526.

[42] Forquer v. Forquer, 19 Ill. 68.

[43] Robertson v. King, 120 Ala. 459, 24 South. 929.

[44] Gilmer v. City of Grand Rapids (C. C.) 16 Fed. 708; Tucker v. New Brunswick Trading Co., 44 Ch. Div. 249; Capen v. Inhabitants of Stoughton, 16

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pose 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.[45] So an amendment may be made where a judgment of dismissal failed to include a judgment for costs properly chargeable to the plaintiff,[46] or where a judgment is confessed in open court, and the clerk improperly enters it as a judgment by default,[47] or where, on a nonsuit for failure of proof, at the close of plaintiff's case, the judgment is erroneously made to recite a dismissal on the merits,[48] or where, by the terms of a judgment confessed, it purports to be for the benefit of the "several creditors" of the debtor, but there is un-

Gray, 364; Robertson v. Hay, 12 Misc. Rep. 7, 33 N. Y. Supp. 31; Sexton v. Bennett, 63 Hun, 624, 17 N. Y. Supp. 437; Gough v. McFall, 52 N. Y. Supp. 221; Portis v. Talbot, 33 Ark. 218; Sharpe v. Fowler (Ky.) Litt. Sel. Cas. 446; Beam v. Bridgers, 111 N. C. 269, 16 S. E. 391; Converse v. Langshaw, 81 Tex. 275, 16 S. W. 1031; State v. White, 75 Mo. App. 257; Hoagland v. Way, 35 Neb. 387, 53 N. W. 207; Hall v. Merrill, 47 Minn. 260, 49 N. W. 980; Nell v. Dayton, 47 Minn. 257, 49 N. W. 981; Bostwick v. Van Vleck, 106 Wis. 387, 82 N. W. 302; San Joaquin Land & Water Co. v. West, 99 Cal. 345, 33 Pac. 928. Where a party moves for and obtains an amendment of a judgment against him, he thereby waives all erroneous rulings of the court preceding the judgment. Pittsburg, C., C. & St. L. R. Co. v. Beck (Ind.) 52 N. E. 399. And after an order entered, as dictated by the judge, has been construed and affirmed by the supreme court, an amendment cannot be allowed on the ground that the construction placed on it was not what the judge intended. Harrison v. Harrison, 114 N. C. 219, 19 S. E. 232. Under the statute law of Louisiana, a strict rule prevails; and the judge, after having by mistake signed a judgment in favor of defendant, cannot of his own accord substitute therefor a judgment for the plaintiff, although the latter was the judgment orally given by him. State v. Judge of Civil District Court, 43 La. Ann. 1169, 10 South. 294.

[45] Williams v. Hayes, 68 Wis. 248, 32 N. W. 44. Further as to striking out words improperly inserted by the clerk, see Brusie v. Peck Bros. & Co., 62 Hun, 248, 16 N. Y. Supp. 645.

[46] Marine Bank Co. v. Mallers, 58 Ill. App. 232.

[47] Grand Rapids Sav. Bank v. Widdecomb, 114 Mich. 639, 72 N. W. 615.

[48] Mannion v. Broadway & S. A. R. Co., 18 Civ. Proc. R. 40, 13 N. Y. Supp. 759.

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disputed evidence that it was intended only for his unsecured "business creditors," [49] or where a cognovit was filed by an attorney at law as such, but the judgment erroneously recites that it was filed by defendant's "attorney in fact." [50] And where a judgment is erroneous on its face by reason of not conforming to the verdict, no other objection being made, it may be corrected on motion.[51] This power of amendment may also be used to clear up ambiguities. Thus it is 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." [52] 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.[53] 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

[49] Jenkins v. Davis, 141 Pa. 266, 21 Atl. 592.

[50] Odell v. Reynolds, 17 C. C. A. 317, 70 Fed. 656.

[51] Seattle & M. Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567. But where the court has lost jurisdiction by entering a final decree in divorce, the subsequent appearance of defendant to contest a motion for alimony does not give the court jurisdiction to amend the decree by adding an order reserving the question of alimony for further consideration. O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225.

[52] Welch v. Keene, 8 Mont. 305, 21 Pac. 25.

[53] Sweeny v. Delany, 1 Pa. 320, 44 Am. Dec. 136.

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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." [54] 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.[55]

§ 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.[56] "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

[54] Wilson v. Myers, 11 N. C. 73, 15 Am. Dec. 510.

[55] McEachern v. Kerchner, 90 N. C. 177. And see Knox v. Moser, 72 Iowa, 154, 33 N. W. 617. A judgment entered by consent of defendant, but which was broader than the consent authorized, will not be vacated where plaintiff agrees to its modification to conform to the real intention of the parties. McManus v. Ennis, 1 App. Div. 30, 36 N. Y. Supp. 1049.

[56] Elder v. Richmond Gold & Silver Min. Co., 7 C. C. A. 354, 58 Fed. 536; Duffey v. Houtz, 105 Pa. 96; Gannon v. Riel, 3 Lack. Leg. N. 68; Heert v. Cruger, 14 Misc. Rep. 508, 35 N. Y. Supp. 1063; Shipman v. Fletcher, 91 Va. 473, 22 S. E. 458; Milam Co. v. Robertson, 47 Tex. 222; Missouri Pac. Ry. Co. v. Haynes, 82 Tex. 448, 18 S. W. 605; Horner v. Horner, 37 Ill. App. 199; Webb v. Elliott, 75 Mo. App. 557; Turner v. Christy, 50 Mo. 145; Durning v. Burkhardt, 34 Wis. 585; Pinger v. Vanclick, 36 Wis. 141; Dillon v. Chicago, K. & N. R. Co., 58 Neb. 472, 78 N. W. 927.

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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 error 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." [57]

A judgment, therefore, cannot be amended so as to vary the rights of the parties as fixed by the original decision of the court and the judgment entered thereon.[58] Thus, it is error to amend a judgment by reducing its amount, where the reason for the alteration is that the court has changed its mind; such action may be taken as the means of correcting a miscalculation or other clerical error, but not to set right a judicial mistake.[59] Again, the power of amendment cannot be used as a means of enlarging the judgment originally given, by decreeing additional relief to the successful party,[60] or by adding judgments against parties not originally included in the judgment, or giving a personal judgment in addition to the decree of fore-

[57] Browder v. Faulkner, 82 Ala. 257, 3 South. 30, citing Whorley v. Memphis & C. R. Co., 72 Ala. 20; Emerson v. Head, 81 Ala. 443, 1 South. 197.

[58] Smith v. Smith, 40 App. Div. 251, 57 N. Y. Supp. 1122; Stilwell v. Stilwell, 81 Hun, 392, 30 N. Y. Supp. 961.

[59] Griffith v. Maxwell, 19 Wash. 614, 54 Pac. 35; Heath v. New York Building Loan Banking Co., 84 Hun, 302, 32 N. Y. Supp. 454.

[60] First Nat. Bank v. Dusy, 110 Cal. 69, 42 Pac. 476. In foreclosure on default in payment of the first of several instalments of interest contracted to be paid, a decree directing a sale to satisfy said instalment alone, which was duly signed and entered, cannot be amended so as to provide for further sales on subsequent defaults. Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775. So, where the question of alimony is raised by the pleadings in a divorce case, the failure to find on that issue is a judicial error, and not a clerical mistake; and hence the judgment cannot be amended by adding an order reserving the question of alimony for further consideration. O'Brien v. O'Brien, 124 Cal. 422, 57 Pac. 225. And see Thompson v. Thompson, 73 Wis. 84, 40 N. W. 671.

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closure originally pronounced,[61] or releasing from the operation of the judgment parties or property originally affected by it.[62] Nor has the court power or jurisdiction to correct a valid and final judgment, after the term, by readjudging the question of costs and taxing them in a different amount, or distributing them in a different manner, from that originally fixed.[63] So also, a judgment dismissing the complaint, entered after trial, cannot be amended by appointing a referee to pass on plaintiff's claim, unless the dismissal is vacated.[64]

§ 159. Amendment as to Amount of Judgment.

If there has been obvious clerical error on the part of the clerk or the court in the entry of the amount recovered by a judgment, the entry may be amended to conform to the truth.[65] Thus if, through an error of the clerk, a judgment by default has been entered for a

[61] Kenyon v. Baker, 82 Iowa, 724, 47 N. W. 977; Barnes v. Hale, 44 Neb. 355, 62 N. W. 1063; Smith v. Fox (Tex.) 15 S. W. 196.

[62] Johnson v. Foreman, 24 Ind. App. 93, 56 N. E. 254. But where, in an action to set aside a sale on foreclosure, the court, by mere inadvertence, goes further than the relief asked and also adjudges the mortgage to be void, this mistake can be corrected by an amendment striking out the provision as to the mortgage. Chase v. Whitten, 62 Minn. 498, 65 N. W. 84.

[63] Hedgecoxe v. Conner (Tex. Civ. App.) 43 S. W. 322; People v. Common Council of Buffalo, 9 Misc. Rep. 403, 29 N. Y. Supp. 1071; Manning v. Nelson, 107 Iowa, 34, 77 N. W. 503; Genet v. Delaware & H. Canal Co., 136 N. Y. 217, 32 N. E. 851.

[64] Duryea v. Fuechsel, 76 Hun, 404, 27 N. Y. Supp. 1037.

[65] Smith v. Hood, 25 Pa. 218, 64 Am. Dec. 692; Wall v. Covington, 83 N. C. 144; Sherry v. Priest, 57 Ala. 410; Modawell v. Hudson, Id. 75; Arrington v. Conrey, 17 Ark. 100; Emison v. Walker (Ky.) 31 S. W. 461; De Hymel v. Scottish-American Mortgage Co., 80 Tex. 493, 16 S. W. 311; Miller v. Royce, 60 Ind. 189; Daniels v. McGinnis, 97 Ind. 549; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533. But an amendment cannot be used to correct a judicial mistake, as distinguished from a mere clerical error. Missouri Pac. Ry. Co. v. Haynes, 82 Tex. 448, 18 S. W. 605; Pursley v. Wickle, 4 Ind. App. 382, 30 N. E. 1115. And see section 158, supra. And so, when the error complained of in a consent decree is the insertion of a particular amount as the result of a calculation by one of the parties upon a basis which the other parties do not regard as in accordance with the agreement, it is not a clerical error, but a mistake of parties, and it can be corrected only by original bill. Morris' Adm'r v. Peyton's Adm'r, 29 W. Va. 201, 11 S. E. 954.

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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.[66] So also, a clerical error in the calculation of interest, or in fixing the date from which interest shall run, may be corrected by an amendment.[67] Again, if the clerk, by mistake or inadvertence, enters up a judgment for a sum in excess of that found by the verdict or ordered by the court, the entry may be corrected so as to correspond with the verdict or findings.[68] On the same principle, a court rendering a judgment in excess of the amount which its jurisdiction allows may reduce it to such limit.[69] And where a judgment by default is too large, and the plaintiff remits the excess, the court may correct the judgment to conform to the remittitur.[70] But the fact that the evidence fails to support the full amount of the judgment is properly ground for a new trial, rather than a motion to modify the judgment.[71] If a judgment is erroneously rendered for a sum greater than the amount of the plaintiff's claim, it may be corrected on

[66] Sherman v. Nixon, 37 Ind. 153; Mechanics' Bank v. Minthorne, 19 Johns. (N. Y.) 244. But where judgment by default has been properly entered, the court cannot, on mere motion, vacate the judgment at a subsequent term, allow an amendment increasing the ad damnum, and enter a new judgment for a larger sum. Radclyffe v. Barton, 154 Mass. 157, 28 N. E. 148.

[67] Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co. (C. C.) 84 Fed. 744; West Chester & W. Plank-Road Co. v. Chester County, 21 Pa. Co. Ct. R. 86; Hastings v. Alabama State Land Co., 124 Ala. 608, 26 South. 881; Triplett v. Lake, 43 W. Va. 428, 27 S. E. 363.

[68] Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708; Kindel v. Beck & Pauli Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Ellis H. Roberts & Co. v. Buckley, 145 N. Y. 215, 39 N. E. 966; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741. Where a petition claimed "part" of certain lands, and the finding gave plaintiff the lands "sued for and described in the petition," but the clerk inadvertently entered judgment for the whole of the lands mentioned, it was held an amendable mistake. Elliott v. Buffington, 149 Mo. 663, 51 S. W. 408. An error of the clerk in inserting in a decree the amount of the costs claimed by the plaintiff, before they had been ascertained or taxed, did not render it void, and was cured by the subsequent taxing by the court, and collection by the sheriff, of only the actual costs in the case. Janes v. Bullard, 107 Cal. 130, 40 Pac. 108.

[69] Stinerville & B. Stone Co. v. White, 25 Misc. Rep. 314, 54 N. Y. Supp. 577.

[70] Pennsylvania Fire Ins. Co. v. Wagley (Tex. Civ. App.) 36 S. W. 997.

[71] Boos v. State, 11 Ind. App. 257, 39 N. E. 197.

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motion.[72] 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.[73] 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.[74] 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.[75]

§ 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.[76] 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.[77] Also, if the

[72] Dunn v. Tillotson, 9 Port. (Ala.) 272; Smith v. Robinson, 11 Ala. 270; Nelson v. Cottingham, 152 Ind. 135, 52 N. E. 702; McLellan Dry-Dock Co. v. Farmers' Alliance Steam-Boat Line, 43 La. Ann. 258, 9 South. 630.

[73] Brown v. Lawler, 21 Minn. 327.

[74] O'Conner v. Mullen, 11 Ill. 57.

[75] Hardy v. Cathcart, 1 Marsh. C. P. 180.

[76] Wright v. McBride, 42 Ga. 234; Smith v. Redus, 9 Ala. 99, 44 Am. Dec. 429; Shelly v. Dobbins, 31 La. Ann. 530; Davenport v. Kirkland, 156 Ill. 169, 40 N. E. 304. But a judgment against a party sued by a wrong name, and not appearing in the action, is a nullity and incapable of amendment. Schoellkopf v. Ohmeis, 11 Misc. Rep. 253, 32 N. Y. Supp. 736.

[77] Leviston v. Swan, 33 Cal. 480. But a judgment rendered against several defendants cannot be amended so as to stand as a personal judgment against

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judgment is irregular, as embracing more parties than the record justifies, it is proper practice to correct the judgment in the trial court.[78] 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.[79] 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.[80] 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.[81] 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.[82] But if a suit is brought in the name of A. "and others,"

one as principal, and against the others as sureties, if no such issue was raised on the trial. Levi v. Drudge, 139 Ind. 458, 39 N. E. 45.

[78] Mulliken v. Hull, 5 Cal. 245; Robinson v. Moore, 1 Tex. Civ. App. 93, 20 S. W. 904.

[79] Hammer v. McConnel, 2 Ohio, 32; Lemen v. Young, 14 Ind. 3; People's Nat. Bank v. McArthur, 82 N. C. 107; Heintz v. Pratt, 54 Ill. App. 616; City of California v. Harlan, 75 Mo. App. 506. A judgment is not such an entirety as not to be amendable in respect to one of the parties alone, unless the substantial rights of the others would be injuriously affected thereby. Neenan v. City of St. Joseph, 126 Mo. 89, 28 S. W. 963.

[80] Henderson v. Banks, 70 Tex. 398, 7 S. W. 815; Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193.

[81] Hood v. Branch Bank of State, 9 Ala. 335; State v. Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664. The rule is the same where there are several plaintiffs, one of whom dies. Billingslea v. Smith, 77 Md. 504, 26 Atl. 1077; Mingay v. Lackey, 142 N. Y. 449, 37 N. E. 471.

[82] Whittaker v. Gee, 63 Tex. 435; Russell v. Erwin's Adm'r, 41 Ala. 292; Doty v. Caldwell (Tex. Civ. App.) 38 S. W. 1025. But it seems the court

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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.[83] 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.[84] But in another case, where, by mistake, 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.[85]

§ 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.[86] 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

cannot allow an amendment of a judgment confessed severally on a joint bond, by adding the name of the co-obligor. Brown v. Smyth, 4 Har. (Del.) 204. And see Sprague v. Jones, 9 Paige, 395.

[83] Carskadden v. McGhee, 7 Watts & S. 140.

[84] Boland v. Benson, 54 Wis. 387, 11 N. W. 911. But where a judgment is entered in the name of the next friend of an infant, without showing the capacity in which he sues, it may be amended by inserting the infant's name. Kees v. Maxim, 99 Mich. 493, 58 N. W. 473.

[85] Gay v. Cheney, 58 Ga. 304.

[86] Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70; McCoy v. Porter, 17 Serg. & R. 59; Hopkins v. Flynn, 7 Cow. (N. Y.) 526.

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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.[87] A court of probate jurisdiction may amend its proceedings in a proper case;[88] 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.[89] 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.[90] And an arbitrator, it is held, after the delivery of his award, may correct a mere clerical error not affecting the merits.[91] But there are decisions to the effect that a motion to amend or correct a judgment cannot be made before a judge other than the one whose judgment is sought to be modified.[92] And the clerk of the court has no ex officio right, without an express order of the court to that effect, to complete, alter, or amend the record kept by a predecessor in that office whose term has expired.[93]

§ 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.[94] At the same time, the inherent power of a court to correct or amend its own records in the interests of justice is not lost by the mere lapse of time,[95] unless, as is the case in some states, the

[87] Smith v. Kennedy, 63 Ala. 334.

[88] Aull v. St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; In re Robertson, 51 App. Div. 117, 64 N. Y. Supp. 385.

[89] Kennedy v. Wachsmuth, 12 Serg. & R. 171, 14 Am. Dec. 676.

[90] Gates v. Bennett, 33 Ark. 475.

[91] Goodell v. Raymond, 1 Williams (Vt.) 241.

[92] New York Security & Trust Co. v. Lipman, 83 Hun, 569, 32 N. Y. Supp. 65; Wells v. Vanderwerker, 45 App. Div. 155, 60 N. Y. Supp. 1089; Hughes v. Edisto Cypress Shingle Co., 51 S. C. 1, 28 S. E. 2.

[93] Rockland Water Co. v. Pillsbury, 60 Me. 425.

[94] Rogers v. Rogers, 1 Paige, 188; Bonar v. Gosney (Ky.) 30 S. W. 602.

[95] Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193. A judgment which,

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time within which such action may be taken is limited by statute.[96] 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;[97] 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.[98]

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."[99] And in California it is held that the amendment may be made even after the judgment has been

though dormant, still survives as a debt of record, enforceable by suit, may be so amended as to cure a mere irregularity therein. Williams v. Merritt, 109 Ga. 217, 34 S. E. 1012. Plaintiff's delay for two years to apply to correct a clerical omission in a judgment is not ground for denying the application, where it was made upon the discovery of the omission. Brittenham v. Robinson, 22 Ind. App. 536, 54 N. E. 133.

[96] See Code Civ. Proc. Cal. § 473; Dyerville Manuf'g Co. v. Heller, 102 Cal. 615, 36 Pac. 928; Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Code Civ. Proc. Colo. § 75; Pleyte v. Pleyte, 15 Colo. 44, 24 Pac. 579; Child v. Whitman, 7 Colo. App. 117, 42 Pac. 601; Miller's Code Iowa, §§ 2837, 3154; Reed v. Lane, 96 Iowa, 454, 65 N. W. 380. In Rhode Island, a decree cannot be amended after a year has lapsed since the entry thereof on simple motion to amend, or petition, or even petition for a rehearing. Fitch v. Richard, 18 R. I. 617, 29 Atl. 689.

[97] Hassler's Appeal, 5 Watts, 176.

[98] Mechanics' Bank v. Minthorne, 19 Johns. 244. See Harrison v. Union Trust Co., 80 Hun, 463, 30 N. Y. Supp. 443.

[99] Sparrow v. Strong, 2 Nev. 362; Richardson v. Mellish, 3 Bing. 346; Freel v. State, 21 Ark. 226; Exchange Nat. Bank v. Allen, 68 Mo. 474; Dow v. Whitman, 36 Ala. 604. But compare Haydel v. Roussel, 1 La. Ann. 35.

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affirmed on appeal.[100] But in Alabama, on the other hand, it 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.[101] 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.[102] 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.[103] 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.[104] 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.[105] 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.[106] If a judgment is

[100] Dreyfuss v. Tompkins, 67 Cal. 339, 7 Pac. 732; Rousset v. Boyle, 45 Cal. 64.

[101] Werborn v. Pinney, 76 Ala. 291.

[102] Nuckolls v. Irwin, 2 Neb. 60.

[103] Weed v. Weed, 25 Conn. 337.

[104] In re Inhabitants of Limerick, 18 Me. 183; Rugg v. Parker, 7 Gray (Mass.) 172; Weed v. Weed, 25 Conn. 337; State v. King, 27 N. C. 203; Forquer v. Forquer, 19 Ill. 68; Stockdale v. Johnson, 14 Iowa, 178; Arrington v. Conrey, 17 Ark. 100; Morrow v. Geeting, 23 Ind. App. 494, 55 N. E. 787. The proper remedy to correct a judgment which contains an unauthorized provision is a motion to strike out. Sabater v. Sabater, 7 App. Div. 70, 39 N. Y. Supp. 958.

[105] Latta v. Griffith, 57 Ind. 329; Goodwine v. Hedrick, 29 Ind. 383.

[106] Clark v. Digges, 5 Gill (Md.) 109.

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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.[107]

If the judgment is objectionable in form, the remedy is by motion to correct it in the court below, and an appeal may be taken from a denial of the motion; but an appeal without making such motion is not proper.[108] A defendant in a foreclosure proceeding, who desires the correction of a mistake in the record entry of the decree, does not waive his right to apply therefor by taking a stay of the order of sale.[109] If the motion for correction or amendment is denied, the remedy is by appeal, and not by renewing the motion,[110] nor by applying for a new trial or rehearing of the motion.[111] When the application is granted, the costs of the motion are properly taxed against the party who resisted the application.[112] Mandamus will not lie to control the judicial action of an inferior court to correct a decree which it had full authority and jurisdiction to render, where the petitioner has a full and adequate remedy to correct it on appeal on the final determination of the cause.[113]

§ 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.[114] Nevertheless if the amendment is to be based upon matter

[107] Martin v. Mattield, 49 Cal. 43.

[108] Simmons v. Craig, 137 N. Y. 550, 33 N. E. 76.

[109] Hoagland v. Way, 35 Neb. 387, 53 N. W. 207.

[110] Bonar v. Gosney (Ky.) 30 S. W. 602.

[111] Morrow v. Geeting, 23 Ind. App. 494, 55 N. E. 787.

[112] Morris v. Coleman County (Tex. Civ. App.) 35 S. W. 29.

[113] Ex parte Woodruff, 123 Ala. 99, 26 South. 509.

[114] Wallis v. Thomas, 7 Ves. 292; Rockland Water Co. v. Pillsbury, 60 Me. 427; Weed v. Weed, 25 Conn. 337; Wooster v. Glover, 37 Conn. 315; Poole v. McLeod, 1 Smedes & M. (Miss.) 391; McNairy v. Castleberry, 6 Tex. 286; Wheeler v. Goffe, 24 Tex. 660; Martin v. Bank of State, 20 Ark.

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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.[115] And indeed it has been held that if the amendment relates only to a matter of form, the notice may be dispensed with.[116] 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.[117] 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 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.

636; Alexander v. Stewart, 23 Ark. 18; Cook v. Wood, 24 Ill. 295; Means v. Means, 42 Ill. 50; Michael v. City of Mattoon, 172 Ill. 394, 50 N. E. 155; Hinton v. Life Ins. Co. of Virginia, 116 N. C. 22, 21 S. E. 201; Case v. Mannis, 57 Hun, 594, 11 N. Y. Supp. 243; Berthold v. Fox, 21 Minn. 51; Hill v. Hoover, 5 Wis. 386, 68 Am. Dec. 70. 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.

[115] Supra, § 134. And see Ware v. Kent, 123 Ala. 427, 26 South. 208, 82 Am. St. Rep. 132.

[116] Balch v. Shaw, 7 Cush. (Mass.) 282.

[117] Emery v. Whitwell, 6 Mich. 491.

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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.[118] 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."[119] 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.[120] Nor can the amendment be made from the judge's memory or knowledge of the fact omitted.[121] Nor by his affidavit in regard to the error to be corrected.[122] And certainly amendments cannot be made from the recollections of witnesses testifying ex parte.[123] It is also the rule, in the states mentioned, that

[118] 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. 188; Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200; West v. Galloway's Adm'r, 33 Ala. 306; Harris v. Martin, 39 Ala. 556; Summersett v. Summersett's Adm'r, 40 Ala. 596, 91 Am. Dec. 494; Pettus v. McClannahan, 52 Ala. 55; Lilly v. Larkin, 66 Ala. 122; Guise v. Middleton, Smedes & M. Ch. (Miss.) 89; Moody v. Grant, 41 Miss. 565; Russell v. McDougall, 3 Smedes & M. (Miss.) 234; Shackelford v. Levy, 63 Miss. 125; Hendrix's Heirs v. Clay, 2 A. K. Marsh. (Ky.) 462; Norton v. Sanders, 7 J. J. Marsh. (Ky.) 12; Stephens v. Wilson, 14 B. Mon. (Ky.) 88; Finnell v. Jones' Ex'x, 7 Bush (Ky.) 359; Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Hansen v. Schlesinger, 125 Ill. 230, 17 N. E. 718; State v. Clark, 18 Mo. 432; Saxton v. Smith, 50 Mo. 490; Bohn v. Stivers, 75 Mo. App. 291; Leinkauff v. Tuscaloosa Sale & Advancing Co., 105 Ala. 328, 16 South. 891; De Castro v. Richardson, 25 Cal. 49; Morrison v. Dapman, 3 Cal. 255; Swain v. Naglee, 19 Cal. 127; Solomon v. Fuller, 14 Nev. 63.

[119] Hudson v. Hudson, 20 Ala. 364, 56 Am. Dec. 200.

[120] Dickson v. Hoff's Adm'r, 3 How. (Miss.) 165; Boon v. Boon, 8 Smedes & M. (Miss.) 318; Shackelford v. Levy, 63 Miss. 125.

[121] State v. Smith, 1 Nott & McC. 16; Stony Island Hotel Co. v. Johnson, 57 Ill. App. 608.

[122] Smith v. Brannan, 13 Cal. 107.

[123] Coughran v. Gutcheus, 18 Ill. 390.

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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.[124] 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.[125]

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.[126] 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."[127] 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

[124] Kemp v. Lyon, 76 Ala. 212.

[125] Bramblet's Heirs v. Pickett's Heirs, 2 A. K. Marsh. (Ky.) 10, 12 Am. Dec. 350; Solomon v. Fuller, 14 Nev. 63; State v. Primm, 61 Mo. 166; Portis v. Talbot, 33 Ark. 218.

[126] Matheson's Adm'rs v. Grant's Adm'r, 2 How. 263, 11 L. Ed. 261; Frink v. Frink, 43 N. H. 508, 80 Am. Dec. 189, 82 Am. Dec. 172; Clark v. Lamb, 8 Pick. (Mass.) 415, 19 Am. Dec. 332; Rugg v. Parker, 7 Gray (Mass.) 172; Weed v. Weed, 25 Conn. 337; Arrington v. Conrey, 17 Ark. 100; Hollister v. Judges of Lucas County District Court, 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; Breene v. Booth, 6 Colo. App. 140, 40 Pac. 193; People v. Arapahoe County Court, 9 Colo. App. 41, 47 Pac. 469. See, also, In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865.

[127] Frink v. Frink, 43 N. H. 508.

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omitted, in which case it might well be that parol evidence would not be admissible, but only the record itself.[128] 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.[129] 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.[130] 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.[131]

In Illinois, the present rule appears to be that the court, upon notice to the parties in interest, may amend its record at a subsequent term, if evidence to support the amendment can be drawn from the record, or from some minute or memorial paper, or notes taken by a stenographer, or other document in the nature of a record, made in connection with the case or upon the trial or hearing; but that an amendment cannot be based on oral evidence alone.[132]

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 in-

[128] Mitchell v. Lincoln, 78 Ind. 531.

[129] See Makepeace v. Lukens, 27 Ind. 435, 92 Am. Dec. 263; Boyd v. Blaisdell, 15 Ind. 73.

[130] Gillett v. Booth, 95 Ill. 183; Nicklin v. Robertson, 28 Or. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

[131] Sullivan's Sav. Inst. v. Clark, 12 Neb. 578, 12 N. W. 103.

[132] Stitt v. Kurtenbach, 85 Ill. App. 38; Gillett v. Booth, 95 Ill. 183.

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quiry 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.

§ 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." [133] 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 simply to 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.[134] 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 later 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 in-

[133] McDowell v. McDowell, 92 N. C. 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, 30 N. C. 70, 47 Am. Dec. 338.

[134] King v. State Bank, 9 Ark. 185, 47 Am. Dec. 739. See Mansel v. Castles, 93 Tex. 414, 55 S. W. 559. Interlineal corrections of clerical omissions in a record, although irregular and reprehensible, do not necessarily invalidate the judgment. Allen v. Sales, 56 Mo. 28.

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tended to modify a former one just so far as it differs from it, either in length or breadth.[135]

§ 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.[136] Hence an appellate court will not issue its writ of mandamus 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.[137] It is also true that the regularity of an amendment made by a court of competent jurisdiction cannot be inquired into collaterally.[138]

§ 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.[139] On the other hand, in Iowa [140] and Missouri,[141] it is held that if judgment is by mistake entered for a sum less than the amount actually recovered, so that the creditor,

[135] Barrell v. Tilton, 119 U. S. 637, 7 Sup. Ct. 332, 30 L. Ed. 511; Eddie v. Eddie, 138 Mo. 599, 39 S. W. 451.

[136] Brown v. McCune, 5 Sandf. (N. Y.) 224; Austin v. Jordan, 5 Tex. 130.

[137] Commonwealth v. Hultz, 6 Pa. 469; Ex parte Morgan, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. Ed. 135.

[138] Hamilton v. Seltz, 25 Pa. 226, 64 Am. Dec. 694.

[139] Bank of Tennessee v. Patterson, 8 Humph. (Tenn.) 362, 47 Am. Dec. 618; Smith v. Bowes, 38 Md. 463.

[140] Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643.

[141] Wilson v. Boughton, 50 Mo. 17. And see Pelzer Manuf'g Co. v. Hamburg-Bremen Fire Ins. Co. (C. C.) 71 Fed. 826; Gill v. Pelkey, 54 Ohio St. 348, 43 N. E. 991; Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660.

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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-creditors, purchasers, or mortgagees—who have acquired interests for value and without notice.[142] It is proper to insert, in the order allowing an amendment, a saving of the intervening rights of third persons, but the law will make the reservation whether it is expressed or not.[143] During the term, however, at which the judgment was rendered, or decree made, the court has power to amend or correct it, and a person who acquires an interest in property involved, on the faith of the judgment or decree, but with notice of the proceedings, takes it subject to the possibility that the judgment or decree may be corrected or vacated.[144]

[142] Crutcher v. Commonwealth, 6 Whart. (Pa.) 340; Remick v. Butterfield, 31 N. H. 70, 64 Am. Dec. 316; Colman v. Watson, 54 Ind. 65; Ligon's Adm'rs v. Rogers, 12 Ga. 281; Perdue v. Bradshaw, 18 Ga. 287; Calef v. Parsons, 48 Ill. App. 253; Homan v. Hellman, 35 Neb. 414, 53 N. W. 369; Nell v. Dayton, 47 Minn. 257, 49 N. W. 981.

[143] McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

[144] Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; Studebaker Bros. Manuf'g Co. v. Hunt (Tex. Civ. App.) 38 S. W. 1134.

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CHAPTER X.

THE VALIDITY OF JUDGMENTS.

§ 170. Voidable and Void Judgments.
171. Jurisdiction.
172. Character and Status of Parties.
173. Constitution of the Court.
174. Disqualified Judge.
175. Acts of Judge de Facto.
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177. Time and Place of holding Court.
178. Place of Trial.
179. Judgment rendered in Vacation.
180. After Expiration of Term.
181. Premature Entry of Judgment.
182. Sundays and Holidays.
183. Judgment must be supported by the Pleadings.
184. Judgment in Action not at Issue.
185. Findings necessary to support the Judgment.
186. Judgment must follow Verdict.

§ 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 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

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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." An irregular judgment is one which is rendered contrary to the

[1] See infra, § 218. The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein. Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

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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 Grat. (Va.) 358; Boggess v. Howard, 40 Tex. 153; Ex parte Lange, 18 Wall. 175, 21 L. Ed. 872; Wolfe v. Davis, 74 N. C. 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 Barn. & Adol. 245.

[4] State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Burt v. Winona & St. P. R. Co., 31 Minn. 472, 18 N. W. 285; State v. Anone, 2 Nott & McC. (S. C.) 27; Gilliam v. Reddick, 26 N. C. 368; State v. Porter, 1 Ala. 688; Mayo v.

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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

Stoneum, 2 Ala. 390; Masterson v. Matthews, 60 Ala. 260; State v. Alling, 12 Ohio, 16.

[5] Keene v. McDonough, 8 Pet. 308, 8 L. Ed. 955.

[6] Penn v. Tollison, 26 Ark. 545; Thompson v. Mankin, 26 Ark. 586, 7 Am. Rep. 628; Ray v. Thompson, 43 Ala. 454, 94 Am. Dec. 696.

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being carried into effect.[7] The position was anomalous in the 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 meantime 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

[7] Pepin v. Lachenmeyer, 45 N. Y. 27; Martin v. Hewitt, 44 Ala. 418; Mosely 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. 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. C. 555, 6 Am. Rep. 749.

[10] Hickman v. Jones, 9 Wall. 197, 19 L. Ed. 551.

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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 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

[11] White v. Cannon, 6 Wall. 443, 18 L. Ed. 923.

[12] Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657. 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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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 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,

[13] Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340. See, also, Botts v. Crenshaw, Chase, 227, Fed. Cas. No. 1,690; Livingston v. Jordan, Chase, 454, Fed. Cas. No. 8,415; Brooke v. Filer, 35 Ind. 402; French v. Tumlin, Fed. Cas. No. 5,104.

[14] See infra, vol. 2, § 525.

[15] 12 Co. 113.

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the judgment so rendered would be entirely null and void.[16] So a judgment pronounced by a judge who was disqualified 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 de-

[16] In re Cottle, 5 Pick. (Mass.) 483; Coffin v. Cottle, 9 Pick. (Mass.) 287; Sigourney v. Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; Gay v. Minot, 3 Cush. (Mass.) 352; Washington Ins. Co. v. Price, 1 Hopk. Ch. (N. Y.) 1; Place v. Butternuts Woolen & Cotton Manuf'g Co., 28 Barb. (N. Y.) 503; State v. Castleberry, 23 Ala. 85. But in Texas, it is said that an alleged disqualification of the trial judge can be reviewed by appeal, and is no ground for enjoining proceedings on the judgment. Dunson v. Spradley (Tex. Civ. App.) 40 S. W. 327.

[17] Newcome v. Light, 58 Tex. 141, 44 Am. Rep. 604; Jouett v. Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194. Compare Louisville & N. R. Co. v. Taylor, 93 Va. 226, 24 S. E. 1013.

[18] Dimes v. Grand Junction Canal Co., 17 Jur. 73; Gorrill v. Whittier, 3 N. H. 268.

[19] Chambers v. Clearwater, 40 N. Y. 310; Oakley v. Aspinwall, 3 N. Y. 547; Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513. See Reams v. Kearns, 5 Cold. (Tenn.) 217; Horton v. Howard, 79 Mich. 642, 44 N. W. 1112, 19 Am. St. Rep. 198; In re Depuy's Estate, 56 Hun, 639, 9 N. Y. Supp. 121.

[20] Fowler v. Brooks, 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425 (citing Phillips v. Eyre, L. R. 6 Q. B. 1, 22); Trawick's Heirs v. Trawick's Adm'rs, 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; Matthews v. Noble, 25 Misc. Rep. 674, 55 N. Y. Supp. 190.

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cisions 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 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,

[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.

[22] Herbster v. State, 80 Ind. 484. The fact that one judge presided when the cause was heard, and another when judgment was rendered, does not invalidate the judgment. Reed v. Lane, 96 Iowa, 454, 65 N. W. 380.

[23] Campbell v. Commonwealth, 96 Pa. 344; Burt v. Winona & St. P. R. Co., 31 Minn. 472, 18 N. W. 285; In re Ah Lee (D. C.) 6 Sawy. 410, 5 Fed.

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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 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

899; Carland v. Custer County, 5 Mont. 579, 6 Pac. 24; Taylor v. Skrine, 3 Brev. (S. C.) 516; Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Clark v. Commonwealth, 29 Pa. 129; People v. Bangs, 24 Ill. 184. And see Griffin's Case, Chase, 364, Fed. Cas. No. 5,815.

[24] Ostrander v. People, 29 Hun (N. Y.) 513; Blackburn v. State, 3 Head (Tenn.) 690; Gregg v. Jamison, 55 Pa. 468.

[25] McCraw v. Williams, 33 Grat. (Va.) 510.

[26] Pepin v. Lachenmeyer, 45 N. Y. 27.

[27] Read v. City of Buffalo, 4 Abb. Dec. (N. Y.) 22; Carli v. Rhener, 27 Minn. 292, 7 N. W. 139; State v. Williams, 5 Wis. 308, 68 Am. Dec. 65; Cary v. State, 76 Ala. 78; Threadgill v. Carolina Cent. Ry. Co., 73 N. C. 178; Woodside v. Wagg, 71 Me. 207; Deutermann v. Pollock, 30 App. Div. 378, 51 N. Y. Supp. 928. Where the term of office of the judge who tried the case has expired, judgment may be rendered by his successor. Rauh v. Scholl, 19 Wash. 30, 52 Pac. 332. But where the docket of a justice of the peace shows that a judgment was entered on a day on which he was not within the state, such judgment is void for want of jurisdiction. Toliver v. Brownell, 94 Mich. 577, 54 N. W. 302.

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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 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

[28] Cromer v. Bolnest, 27 S. C. 436, 3 S. E. 849. But compare Mace v. O'Reilley, 70 Cal. 231, 11 Pac. 721.

[29] Woodside v. Wagg, 71 Me. 207.

[30] Babcock v. Wolf, 70 Iowa, 676, 28 N. W. 490; Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96; McDowell v. McDowell, 92 N. C. 227.

[31] State v. Roberts, 8 Nev. 239; Dalton v. Libby, 9 Nev. 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. 707.

[33] Smithson v. Dillon, 16 Ind. 169. See Coffinberry v. Horrill, 5 Cal. 493; Bowden v. Hatcher, 83 Ga. 77, 9 S. E. 724.

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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 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

[34] Venable v. Curd, 2 Head, 582.

[35] Clare v. Clare, 4 Greene (Iowa) 411.

[36] Thomas v. Fogarty, 19 Cal. 644.

[37] Le Grange's Lessee v. Ward, 11 Ohio, 257; Smith v. State, 9 Humph. (Tenn.) 10.

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county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered.[38]

§ 178. Place of Trial.

That a judgment was rendered in a county other than that in which the venue was laid is a mere irregularity, and does not avoid the judgment.[39] And the same is true of the fact that the judge made and signed a decree in a county other than that where the trial was had.[40] So also, the jurisdiction of the court is not affected by the fact that the action was tried in a county which was not the one declared by statute to be the proper county for its trial.[41] Thus, 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." [42] This decision illustrates the difference between void judgments and such as are merely erroneous. In gen-

[38] Herndon v. Hawkins, 65 Mo. 265.

[39] Spichler v. Asiel, 83 Hun, 223, 31 N. Y. Supp. 584.

[40] Walter v. Merced Academy Ass'n, 126 Cal. 582, 59 Pac. 136.

[41] Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

[42] Gage v. Downey, 79 Cal. 140, 21 Pac. 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.[43] "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."[44] 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."[45] 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

[43] Kinports v. Rawson, 29 W. Va. 487, 2 S. E. 85; State v. Judge of Fifth District Court, 26 La. Ann. 119; Culver v. Leovy, 21 La. Ann. 306; Dodge v. Coffin, 15 Kan. 277; Bruce v. Doolittle, 81 Ill. 103; Sheppard v. Wilson, 1 Morris (Iowa) 448; Peabody v. Phelps, 7 Cal. 53; Filley v. Cody, 4 Colo. 109; Champion v. Sessions, 1 Nev. 478; Backer v. Eble, 144 Ind. 287, 43 N. E. 233; Gamble v. Buffalo County, 57 Neb. 163, 77 N. W. 341. But a judgment entered in vacation as of the last day of the previous term has the same effect, when signed by the judge at the next term, as if entered in term-time. Louisville & N. R. Co. v. Trustees of Elizabethtown Dist. Public Schools (Ky.) 49 S. W. 34.

[44] Earls v. Earls, 27 Kan. 538.

[45] Laughlin v. Peckham, 66 Iowa, 121, 23 N. W. 294.

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then to be entered as of the preceding term,[46] or the ensuing term,[47] and will be perfectly valid as between the parties,[48] and even against third persons in the absence of fraud or collusion.[49] Nor is the main rule of quite universal application. In some states, either in accordance with the established practice of the courts,[50] or by express statutory authority,[51] 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.[52] 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.[53]

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

[46] King v. Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46.

[47] Hervey v. Edmunds, 68 N. C. 243.

[48] City of New Orleans v. Gauthreaux, 32 La. Ann. 1126; Green v. Reagan, 32 La. Ann. 974; Hervey v. Edmunds, 68 N. C. 243; King v. Green, 2 Stew. (Ala.) 133, 19 Am. Dec. 46; Hattenback v. Hoskins, 12 Iowa, 109; O'Hagen v. O'Hagen, 14 Iowa, 264.

[49] City of New Orleans v. Gauthreaux, 32 La. Ann. 1126.

[50] Beyerle v. Hain, 61 Pa. 226.

[51] Ex parte Bennett, 44 Cal. 85. And see Harris v. Jones, 96 Va. 658, 32 S. E. 455; Russell v. Hank, 9 Utah, 309, 34 Pac. 245.

[52] Wilson v. Rodewald, 61 Miss. 228. And see Abraham v. Levy, 18 C. C. A. 469, 72 Fed. 124.

[53] Hook v. Richeson, 115 Ill. 431, 5 N. E. 98.

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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.[54] 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 during 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," [55] but it may cover a recess caused by the adjournment over of the court for a number of days.[56]

§ 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.[57] 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.[58] 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.[59] On principles analogous to those obtaining in the case of courts of record, it is held that if a justice of

[54] Sieber v. Frink, 7 Colo. 148, 2 Pac. 901; Earls v. Earls, 27 Kan. 538. Supervisors of Manitowoc Co. v. Sullivan, 51 Wis. 115, 8 N. W. 12. But in Indiana it is held that a judgment duly pronounced in term, but entered in vacation, and the entry never seen 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. 289.

[55] Jacobs, Law Dict.; Bouv. Law Dict.

[56] Conkling v. Ridgely, 112 Ill. 36, 1 N. E. 261, 54 Am. Rep. 204.

[57] Smith v. Chichester, 1 Cal. 409; Passwater v. Edwards, 44 Ind. 343; Ferrell v. Hales, 119 N. C. 199, 25 S. E. 821.

[58] State v. Knight, 19 Iowa, 94.

[59] Iliff v. Arnott, 31 Kan. 672, 3 Pac. 525.

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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.[60] But in several of the states it is held 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.[61] 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.[62] 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.[63]

§ 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.[64] 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

[60] 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 Neb. 392, 27 N. W. 397.

[61] Shackelford v. Miller, 91 N. C. 181; Hardin v. Ray, 89 N. C. 364; Morrison v. Citizens' Bank, 27 La. Ann. 401. Where motions and demurrers are submitted for decision during the term or in vacation, the court, by failure to determine the questions until the next term, does not lose jurisdiction so as to require a resubmission. Reed v. Lane, 96 Iowa, 454, 65 N. W. 380.

[62] Molyneux v. Huey, 81 N. C. 106.

[63] Thorpe v. Corwin, 20 N. J. Law, 311.

[64] Teat v. Cocke, 42 Ala. 336. But while such a premature entry constitutes an irregularity, the later cases hold that it does not go to the jurisdiction of the court, and does not render the judgment entirely void. Marshall & Ilsley Bank v. Hyman, 84 Wis. 23, 53 N. W. 1126; Tobar v. Losano, 6 Tex. Civ. App. 698, 25 S. W. 973; Main v. Johnson, 7 Wash. 321, 35 Pac. 67.

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after the default, is an irregularity, although, in this instance, it appears that the error may be corrected on motion at a subsequent term.[65] 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.[66] 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,[67] or while an order staying all proceedings in the case remains still in force.[68]

§ 182. Sundays and Holidays.

It is a maxim of the common law that "dies dominicus non est juridicus." 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." [69] But in some of the states, by the operation of statutes authorizing or requiring the rendition of a judgment im-

[65] Nave v. Todd, 83 Mo. 601. A judgment rendered by a justice of the peace before the return day of the warrant is erroneous but not void. Glover v. Holman, 3 Heisk. (Tenn.) 519.

[66] Smith v. Coe, 7 Rob. (N. Y.) 477.

[67] Bosman v. Akeley, 39 Mich. 710, 33 Am. Rep. 447; Aymar v. Chace, 12 Barb. (N. Y.) 301; Barret v. Thompson, 5 Ind. 457; Miller v. Hoc, 1 Fla. 189; Clark v. People, 15 Ill. 213; Benson v. Arnold, 75 Ill. App. 610; Hammond v. Freeman, 9 Ark. 62; Davison v. Brown, 93 Wis. 85, 67 N. W. 42.

[68] Uhe v. Chicago, M. & St. P. Ry. Co., 3 S. D. 563, 54 N. W. 601; Id., 4 S. D. 505, 57 N. W. 484.

[69] Baxter v. People, 3 Gilman (Ill.) 368, 384; Mackalley's Case, 5 Coke, 66; Swann v. Broome, 3 Burrows, 1595; Pearce v. Atwood, 13 Mass. 347; Chapman v. State, 5 Blackf. (Ind.) 111; Nabors v. State, 6 Ala. 200; Frost v. Hull, 4 N. H. 158; Arthur v. Mosby, 2 Bibb (Ky.) 589; Story v. Elliot, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; Davis v. Fish, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387; Elood v. Bates, 31 Vt. 147; City of Parsons v. Lindsay, 41 Kan. 336, 21 Pac. 227, 3 L. R. A. 658, 13 Am. St. Rep. 290; Allen v. Godfrey, 44 N. Y. 433; Coleman v. Henderson, Litt. Sel. Cas. (Ky.) 171, 12 Am. Dec. 290; Hoghtaling v. Osborn, 15 Johns. (N. Y.) 119; Ex parte White, 15 Nev. 146, 37 Am. Rep. 466; Hemmens v. Bentley, 32 Mich. 89; Ex parte Juneman, 28 Tex. App. 486, 13 S. W. 783; Shearman v. State, 1 Tex. App. 215, 28 Am. Rep. 402; Styles v. Harrison, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824.

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mediately upon the reception of a verdict, it is held that if a verdict is returned on Sunday, a judgment entered upon it the same day will be valid.[70] 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.[71] 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.[72]

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.[73] 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.[74] So it is held that a judgment rendered by a justice of the peace on Thanksgiving Day is not void.[75] 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

[70] Thompson v. Church, 13 Neb. 287, 13 N. W. 626; Hurford v. City of Omaha, 4 Neb. 336; Taylor v. Ervin, 119 N. C. 274, 25 S. E. 875. See, also, Perkins v. Jones, 28 Wis. 243; Wearne v. Smith, 32 Wis. 412.

[71] Where a confession of judgment and order for execution were handed by the plaintiff to the prothonotary on Sunday, and the next day the latter entered judgment and issued execution, it was held that the judgment was valid. The prothonotary was not bound to receive the papers on Sunday; his acceptance of them was not an official act, but he received them merely as agent of the plaintiff. Kauffman's Appeal, 70 Pa. 261.

[72] Ecker v. First Nat. Bank, 64 Md. 292, 1 Atl. 849; In re Worthington, 7 Biss. 455, Fed. Cas. No. 18,051. To avoid a judgment, regular on its face, on the ground that it was rendered after midnight on Saturday, the evidence should establish, beyond the doubt naturally arising from the difficulty of determining the precise time of a particular transaction, that it was thus rendered. Bishop v. Carter, 29 Iowa, 165.

[73] See Spiedel Grocery Co. v. Armstrong, 8 Ohio Cir. Ct. R. 489.

[74] Hamer v. Sears, 81 Ga. 288, 6 S. E. 810.

[75] Bear v. Youngman, 19 Mo. App. 41.

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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.[76]

§ 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.[77] 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.[78] Again, under the common count for goods sold and delivered, no recovery can be had for money advanced, or personal services rendered for defendant.[79] In an action for money obtained from plaintiff by fraud, it is error, on finding no fraud shown, to give judgment as for money loaned.[80] Where the complaint alleges that the fall of plaintiff's wall, for which he claims damages, was caused by defendant's negligent excavation of land "adjacent" to plaintiff's land, but the evidence shows that the excavation was "beneath" the plaintiff's building, the latter cannot recover.[81] So also, where the petition alleges that two defendants are jointly indebted to plaintiff as a banking firm, he is not entitled to recover a judgment against

[76] In re Worthington, 7 Biss. 455, Fed. Cas. No. 18,051. In Illinois, a judgment by confession entered on the 25th of December is not void. Bradley v. Claudon, 45 Ill. App. 326.

[77] Bachman v. Sepulveda, 39 Cal. 688; Marshman v. Conklin, 21 N. J. Eq. 546; Parsley v. Nicholson, 65 N. C. 207; Frevert v. Henry, 14 Nev. 191; Lee v. British & American Mortg. Co., 16 Tex. Civ. App. 671, 40 S. W. 1041; Clark v. Clark, 21 Tex. Civ. App. 371, 51 S. W. 337; Wheeler v. Foster, 82 Ill. App. 153; Clemons v. Heelan, 52 Neb. 287, 72 N. W. 270; Selberling v. Mortinson, 10 S. D. 644, 75 N. W. 202.

[78] Degraw v. Elmore, 50 N. Y. 1.

[79] Rand, McNally & Co. v. Hornbarger, 82 Ill. App. 341. But defendant cannot complain of a judgment based on a contract as it is alleged in his answer, though it differs from that alleged by plaintiff. Ach v. Carter, 21 Wash. 140, 57 Pac. 344.

[80] Kress v. Woehrle, 23 Misc. Rep. 472, 52 N. Y. Supp. 628.

[81] Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749.

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one of them as a city treasurer.[82] Where an action is brought to foreclose a mechanic's lien, and the lien is shown to have been discharged by the giving of a bond, the court has no power to render a personal judgment against the defendant.[83] On the same principle, where the theory of the complaint and of the trial, as well as of the entire evidence, was that a deed was not intended as a mortgage, but as a conveyance, a judgment based on the theory that the deed was a mortgage cannot be upheld.[84] And although, under modern systems, courts of law may enforce equitable rights, the proof must agree with the pleadings, and the relief granted must be within the prayer for relief and the grounds relied on.[85] 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.[86] 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 plaintiff.[87] 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.[88] 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

[82] City of Syracuse v. Reed, 5 Kan. App. 806, 49 Pac. 259.

[83] Mertz v. Mapes-Reeve Const. Co., 30 Misc. Rep. 343, 63 N. Y. Supp. 455.

[84] Bullenkamp v. Bullenkamp, 43 App. Div. 510, 60 N. Y. Supp. 84.

[85] Eddy & Bissell Live-Stock Co. v. Blackburn, 17 C. C. A. 532, 70 Fed. 949.

[86] Harris v. Harris, 10 Wis. 467.

[87] Knudson v. Curley, 30 Minn. 433, 15 N. W. 873. A judgment is not void or erroneous because the name of plaintiff's attorney attached to the complaint is printed instead of being written. Hancock v. Bowman, 49 Cal. 413.

[88] Gordon v. Downey, 1 Gill (Md.) 41. In California, it is said that if any material issue is raised by the pleadings, a verdict in favor of a party supports a judgment in his favor. Orton v. Brown, 117 Cal. 501, 49 Pac. 583. But in Wisconsin, the court declares that a judgment which is based on only one of two issues raised by the pleadings, and which leaves the other undisposed of, is erroneous. Gage v. Allen, 84 Wis. 323, 54 N. W. 627. And if there is no count in the declaration on the cause of action shown by the evidence, there can be no recovery. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 306.

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does not warrant.[89] 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.[90] So a judgment rendered without any complaint having been filed, is valid if entered by agreement or if ratified by subsequent consent.[91] A judgment or decree based upon incompetent evidence is never, for that reason alone, void.[92] 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.[93] 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.[94] 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 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

[89] Ellison v. New Bedford Five Cent. Sav. Bank, 130 Mass. 48; Leonard v. Robbins, 13 Allen (Mass.) 217.

[90] Peoples v. Norwood, 94 N. C. 167. And see Mengis v. Fifth Ave. Ry. Co., 81 Hun, 480, 30 N. Y. Supp. 999.

[91] Gay v. Grant, 101 N. C. 206, 8 S. E. 99. But without such consent, a judgment recovered in a court of record will be set aside where no complaint or written statement of the cause of action was filed therein. Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399.

[92] Mann v. Martin, 14 Bush (Ky.) 763.

[93] Steele v. Palmer, 41 Miss. 88; Armstrong v. Barton, 42 Miss. 506; Porterfield v. Butler, 47 Miss. 170, 12 Am. Rep. 329.

[94] Braunsdorff v. Fay, 18 La. Ann. 187; Du Bay v. Uline, 6 Wis. 588; Baltimore & O. R. Co. v. Faulkner, 4 W. Va. 180.

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the exercise of that jurisdiction can make the proceedings or judgment of the court void." [95] 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 reversal by a suitable proceeding in a tribunal having authority to review it.[96] So where a court of record, having jurisdiction, ren-

[95] Freem. Judgm. § 135a. And in Doyle v. Smith, 1 Cold. (Tenn.) 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.

[96] Connolly v. Edgerton, 22 Neb. 82, 34 N. W. 76; Lubker v. Grand Detour Plow Co., 53 Neb. 111, 73 N. W. 457; Springfield F. & M. Ins. Co. v. Hamby, 65 Ark. 14, 45 S. W. 472; McCreary v. Robinson (Tex. Civ. App.) 57 S. W. 682. 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. And see Texas Brewing Co. v. Meyer (Tex. Civ. App.)

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ders 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.[97] 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.[98] 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.[99] If the findings are required to be specific, a general finding for the plaintiff will not support a judgment in his favor.[100]

§ 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.[101] Again, if the verdict is clearly wrong, this may furnish ground for arresting the judgment or granting a new trial.[102] 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.[103] And it may also be stated as a general principle that the judgment must conform to the verdict, not only as to the amount, but also as to the measure

38 S. W. 263; Maynard v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 14 Utah, 458, 47 Pac. 1030; Williams v. Williams, 104 Cal. 85, 37 Pac. 784; National Horse-Importing Co. v. Novak, 95 Iowa, 596, 64 N. W. 616.

[97] Garner v. State, 28 Kan. 790.

[98] Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. 455.

[99] People v. Judge of Circuit Court, 34 Mich. 62.

[100] Ladd v. Tully, 51 Cal. 277.

[101] Supra, § 16.

[102] Supra, § 104.

[103] Supra, § 142.

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of relief and as to the parties against whom the finding is made.[104] Moreover the judgment cannot go beyond the verdict in settling the rights of the parties, or admeasuring the recovery, or declaring or foreclosing liens.[105] In cases where the statutes provide for the returning of special verdicts, and enact that "if a general and a special verdict are inconsistent, judgment shall be rendered pursuant to the latter," it is held that a judgment should be rendered pursuant to the general verdict in all cases where the facts constituting the special finding are not inconsistent with the general verdict.[106] Where the court has permitted the jury to amend its verdict, it is error to enter judgment on the original verdict, rejecting the amendment.[107] It is also error to render a judgment upon a verdict which finds upon a part only of the issues.[108] Finally, where the verdict is for the plaintiff, subject to a question of law reserved, a subsequent judgment for him should be entered, not on the point reserved, but on the verdict.[109]

[104] Morsch v. Besack, 52 Neb. 502, 72 N. W. 953; Bell v. Otts, 101 Ala. 186, 13 South. 43, 46 Am. St. Rep. 117; Hellman v. Schwartz, 44 Ill. App. 84. In an action against two defendants, who seek no affirmative relief, a verdict for "the defendant" will support a judgment that plaintiff take nothing, and that defendants (by name) recover their costs. Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040. So where, in an action against principal and surety, the latter alone defends, and the verdict is against the principal only, the legal effect is a finding in favor of the surety, and a judgment accordingly is not erroneous. Howard v. Johnson, 91 Ga. 319, 18 S. E. 132.

[105] Freiberg v. Brunswick-Balke-Collender Co. (Tex.) 16 S. W. 784; Boyd v. Ernst, 36 Ill. App. 583. But where the evidence authorizes the court to direct a verdict, the court may, in rendering judgment, go further than the verdict in adjusting the equities of the parties. Smith v. Smith, 23 Tex. Civ. App. 304, 55 S. W. 541.

[106] Quaid v. Cornwall, 13 Bush (Ky.) 601.

[107] George v. Belk, 101 Tenn. 625, 49 S. W. 748.

[108] Hackett v. Jones, 34 Ill. App. 562. When the jury fail to pass upon an issue, the court has no right to render a judgment thereon, however clear and undisputed the evidence may be. First Nat. Bank v. Vander Stucken (Tex. Civ. App.) 37 S. W. 170.

[109] Ringle v. Pennsylvania R. R., 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628.

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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 Parties 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 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

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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, 3 McLean, 235, Fed. Cas. No. 8,891. And see International Bank v. Sherman, 101 U. S. 406, 25 L. Ed. 866.

[2] Rice County Com'rs v. Lawrence, 29 Kan. 158; Neale v. Utz, 75 Va. 480. But see Coffee v. Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

[3] Wood v. Ward, 2 Flip. 336, Fed. Cas. No. 17,966.

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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, 3 Gray (Mass.) 411; Higgins v. Peltzer, 49 Mo. 152; Weil v. Simmons, 66 Mo. 617; Griffith v. Clarke, 18 Md. 457; Rubel v. Bushnell, 91 Ky. 251, 15 S. W. 520. See Smith v. Borden, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585, 33 Am. St. Rep. 867.

[5] Griffith v. Clarke, 18 Md. 457; Hoffman v. Shupp, 80 Md. 611, 31 Atl. 505.

[6] White v. Foote Lumber & Manuf'g Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650.

[7] See O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840.

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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]

[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. (N. Y.) 581; Phillips v. Stewart, 27 Ga. 402; Evans v. Lipscomb, 28 Ga. 71; Sackett v. Wilson, 2 Blackf. (Ind.) 85; Parker v. Steed, 1 Lea (Tenn.) 206.

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

[10] Rev. St. Me. 1883, c. 61, § 4; Acts N. Y. 1853, c. 576, § 1; Acts Md. 1880, p. 253; Acts Va. 1875, c. 359, § 3; Rev. St. W. Va. 1878, c. 122, § 10; Code N. C. § 1823; Gen. St. Colo. § 2275; Comp. Laws Wyo. c. 82, § 7; 2 Rev. St. Ind. § 5127, construed in Smith v. Beard, 73 Ind. 159.

[11] Pub. St. R. I. c. 166, § 16; 2 Rev. St. Ind. § 5127; Acts Md. 1880, p. 253; Acts Va. 1875, c. 359, § 3; Rev. St. W. Va. 1878, c. 122, § 10; Gen. St. Colo. § 2275; Comp. Laws Wyo. c. 82, § 7.

[12] Joyes v. Hamilton, 10 Bush (Ky.) 544.

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§ 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 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,

[13] Morse v. Toppan, 3 Gray (Mass.) 411; Norton v. Meader, 4 Sawy. 603, Fed. Cas. No. 10,351; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Graham v. Long, 65 Pa. 383; Swayne v. Lyon, 67 Pa. 439; Vandyke v. Wells, 103 Pa. 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. 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 Barn. & C. 421; Frazier v. Felton, 8 N. C. 231; Green v. Branton, 16 N. C. 504; Vick v. Pope, 81 N. C. 22; Glover v. Moore, 60 Ga. 189; Mashburn v. Gouge, 61 Ga. 512; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Phelps v. Brackett, 24 Tex. 236; Spalding v. Wathen, 7 Bush (Ky.) 659; Chatterton v. Young, 2 Tenn. Ch. 768; Howell v. Hale, 5 Lea (Tenn.) 405; Sheppard v. Kendle, 3 Humph. (Tenn.) 81; Keith v. Keith, 26 Kan. 26; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Burk v. Hill, 55 Ind. 419; Wilson v. Coolidge, 42 Mich. 112, 3

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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 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

N. W. 285; Vantilburg v. Black, 3 Mont. 459; Gambette v. Brock, 41 Cal. 78; Guthrie v. Howard, 32 Iowa, 54; Farris v. Hayes, 9 Or. 81.

[15] Gambette v. Brock, 41 Cal. 78.

[16] 43 Ohio St. 78, 1 N. E. 93.

[17] Winter v. City Council of Montgomery, 79 Ala. 481.

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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 proceeding 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

[18] Parsons v. Spencer, 83 Ky. 305.

[19] Shryock v. Buckman, 121 Pa. 248, 15 Atl. 480, 1 L. R. A. 533.

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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]

§ 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

[20] Parsons v. Spencer, 83 Ky. 305. On another appeal in the same case (Spencer v. Parsons, 89 Ky. 577, 13 S. W. 72, 25 Am. St. Rep. 555), the court sustained its ruling by the following 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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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 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

[21] Lewis v. Perkins, 36 N. J. Law, 133; Swayne v. Lyon, 67 Pa. 436; Hecker v. Haak, 88 Pa. 238; Magruder v. Buck, 56 Miss. 314; Cary v. Dixon, 51 Miss. 593; Albree v. Johnson, 1 Flip. 341, Fed. Cas. No. 146; 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; March v. McCardle, 1 Pa. Dist. R. 677; Green v. Ballard, 116 N. C. 144, 21 S. E. 192. Compare Weldy v. Young, 21 Pa. Co. Ct. R. 15.

[22] Gould v. McFall, 111 Pa. 66, 2 Atl. 403; Brown v. McKinney, 130 Pa. 365, 18 Atl. 642; Rauch v. Young, 9 Pa. Co. Ct. R. 416.

[23] Crockett v. Deriot, 85 Va. 240, 3 S. E. 128; Foertsch v. Germuiller, 9 App. D. C. 351; Holtby v. Hodgson, 24 Q. B. Div. 103. In an action on an English judgment against a married woman, containing a provision limiting its execution to her separate estate, it is erroneous to enter a general personal judgment against the defendant, without adding thereto the limitation imposed by the English judgment. Sanguinnetti v. Roche, 60 Hun, 584, 15 N. Y. Supp. 185.

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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 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 section 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

[24] Lee v. Ryall, 68 Ala. 354.

[25] Sweeney v. Smith, 15 B. Mon. (Ky.) 325, 61 Am. Dec. 188.

[26] Steed v. Knowles, 84 Ala. 205, 3 South. 897.

[27] Winston v. McAlpine, 65 Ala. 377.

[28] Johnson County v. Rugg, 18 Iowa, 137; Wolff v. Van Metre, 19 Iowa, 134; Reed v. King, 23 Iowa, 500; Patton v. Stewart, 19 Ind. 233; Kirby v. Childs, 10 Kan. 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. 132; Washington v. Hackett, 19 La. Ann. 146.

[30] Pub. St. Mass. c. 147, § 7; Gen. Laws N. H. c. 183, § 12; Acts Vt. 1884, No. 140, § 1; Code Civ. Proc. N. Y. § 450; Rev. St. N. J. "Married Women," 10, 11; Act Pa. June 3, 1887, § 2 (P. L. 333); Rev. St. Ohio, § 4996; Rev. St. Ill. c. 68, § 1; Rev. Code Iowa, § 2562; Gen. St. Minn. c. 66, § 29; Comp.

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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 creditors 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

Laws Kan. c. 62, § 3; Comp. St. Neb. pt. 1, c. 52, § 3; Acts Md. 1882, c. 265; Laws Or. 1878, p. 93, § 7; Gen. St. Colo. § 2279; Code Wash. § 2396; Code Civ. Proc. Dak. § 77; Comp. Laws Wyo. 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 (Ky.) 542; McCue v. Sharp (Ky.) 45 S. W. 770; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; Jones v. Taylor, 7 Tex. 240, 56 Am. Dec. 48; Patrick v. Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Van Metre v. Wolf, 27 Iowa, 341; Jones v. Glass, 48 Iowa, 345; Davis v. First Nat. Bank of Cheyenne, 5 Neb. 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.

[32] Lewis v. Gunn, 63 Ga. 542.

[33] Rammelsberg v. Mitchell, 29 Ohio St. 22.

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proper proceeding for that purpose.[84] The theory is, that the appointment of a guardian is not a prerequisite to the jurisdiction of the 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.[85] 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.[86] And if it is set aside, the interest of a bona fide purchaser under the judgment without notice will not be affected.[87]

[84] O'Hara v. McConnell, 93 U. S. 150, 23 L. Ed. 840; Tucker v. Bean, 65 Me. 352; Barber v. Graves, 18 Vt. 292; Crockett v. Drew, 5 Gray (Mass.) 399; Austin v. Charleston Fem. Sem., 8 Metc. (Mass.) 196, 41 Am. Dec. 497; Swan v. Horton, 14 Gray (Mass.) 179; Hill v. Keyes, 10 Allen (Mass.) 258; Sims v. New York College of Dentistry, 35 Hun (N. Y.) 344; Moore v. McEwen, 5 Serg. & R. (Pa.) 373; Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Roberts v. Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463; Larkins v. Bullard, 88 N. C. 35; Stancill v. Gay, 92 N. C. 462; England v. Garner, 90 N. C. 197; Finley v. Robertson, 17 S. C. 435; Cook v. Rogers, 64 Ala. 406; Taylor v. Rowland, 26 Tex. 293; Montgomery v. Carlton, 56 Tex. 361; Martin v. Weyman, 26 Tex. 460; Wallis v. Stuart, 92 Tex. 568, 50 S. W. 567; Booker v. Kennerly, 96 Ky. 415, 29 S. W. 323; Simmons v. McKay, 5 Bush (Ky.) 25; Allison v. Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68; Walkenhorst v. Lewis, 24 Kan. 420; Trapnall's Adm'x v. State Bank, 18 Ark. 53; Boyd v. Roane, 49 Ark. 397, 5 S. W. 704; St. Clair v. Smith, 3 Ohio, 355; Blake v. Douglass, 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. 468; Webster v. Page, 54 Iowa, 461, 6 N. W. 716; Drake v. Hanshaw, 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 Neb. 680, 33 N. W. 424.

[85] England v. Garner, 90 N. C. 197; Bernecker v. Miller, 44 Mo. 102; Simmons v. McKay, 5 Bush (Ky.) 25; Frierson v. Travis, 39 Ala. 150.

[86] Millard v. Marmon, 116 Ill. 649, 7 N. E. 468; Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105.

[87] England v. Garner, 90 N. C. 197.

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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 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.

[38] Hill v. Keyes, 10 Allen (Mass.) 258.

[39] Syme v. Trice, 96 N. C. 243, 1 S. E. 480; McCrosky v. Parks, 13 S. C. 90; Phillips v. Dusenberry, 8 Hun (N. Y.) 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, 79 Am. Dec. 681; Krickow v. Pennsylvania Tar Manuf'g Co., 87 Ill. App. 653.

[40] In re Mousseau's Will, 30 Minn. 202, 14 N. W. 887.

[41] Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Abdil v. Abdil, 26 Ind. 287; Winston v. McLendon, 43 Miss. 254.

[42] Lenox v. Notrebe, 1 Hemp. 251, Fed. Cas. No. 8,246c; Genobles v. West, 23 S. C. 154; Young v. Young, 91 N. C. 359; Winston v. McLendon, 43 Miss. 254; Taylor v. Walker, 1 Heisk. (Tenn.) 734; Armstrong v. Wyandotte Bridge Co., 1 McCahon, 166; Abdil v. Abdil, 26 Ind. 287; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457; Good v. Norley, 28 Iowa, 188; Kansas City, St. J. & C. B. 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

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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, 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

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. C. 435.

[43] Simmons v. McKay, 5 Bush (Ky.) 25.

[44] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; Walkenhorst v. Lewis, 24 Kan. 420.

[45] Heroman v. Louisiana Institute of Deaf and Dumb, 34 La. Ann. 805; Robb v. Irwin's Lessee, 15 Ohio, 689; Preston v. Dunn, 25 Ala. 507; Nelson v. Moon, 3 McLean, 319, Fed. Cas. No. 10,111; Larkins v. Bullard, 88 N. C. 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. 676.

[46] Roy v. Rowe, 90 Ind. 54; New York Life Ins. Co. v. Bangs, 103 U. S. 435, 26 L. Ed. 580; Whitney v. Porter, 23 Ill. 445. See Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Sprague v. Haines, 68 Tex. 215, 4 S. W. 371; McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943; Ingersoll v. Mangam, 84 N. Y. 622.

[47] Whitney v. Porter, 23 Ill. 445.

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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 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

[48] Wornock v. Loar (Ky.) 11 S. W. 438; Civ. Code Ky. § 52.

[49] Larkins v. Bullard, 88 N. C. 35; Stancill v. Gay, 92 N. C. 462. The Code, § 387, 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. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326.

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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 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

[50] Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153; Beeler's Heirs v. Bullitt's Heirs, 3 A. K. Marsh (Ky.) 280, 13 Am. Dec. 161; Porter's Heirs v. Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; Bourne v. Simpson, 9 B. Mon. (Ky.) 454; Austin v. Charleston Fem. Sem., 8 Metc. (Mass.) 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; Fulbright v. Cannefox, 30 Mo. 425; Marshall v. Fisher, 46 N. C. 111; Whitney v. Porter, 23 Ill. 445. Infants are not estopped, as against their submission of their rights to the protection of the court, by the consent of a solicitor to the entry of a decree, when it does not appear by formal entry, or by proofs, that such solicitor was in fact employed to represent them. White v. Miller, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. Ed. 921.

[51] Smith v. McDonald, 42 Cal. 484.

[52] Wells 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's Adm'r, 81 Va. 588.

[53] Roach v. Hix, 57 Ala. 576; Stammers v. McNaughten, 57 Ala. 277; Fitch v. Cornell, 1 Sawy. 157, Fed. Cas. No. 4,834.

[54] Blake v. Douglass, 27 Ind. 416. One against whom, when of full age, a default judgment was rendered on debts incurred while an infant, cannot, in a proceeding on such judgment, set up his infancy. Cauthorn v. Berry, 69 Mo. App. 404.

[55] Rhoads v. Rhoads, 43 Ill. 239; Peak v. Pricer, 21 Ill. 164; Lieserowitz v. West Chicago St. R. Co., 80 Ill. App. 248; Chalfant v. Monroe, 3 Dana (Ky.) 35; Massie's Heirs 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

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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 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

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, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493; Beckley v. Newcomb, 24 N. H. 359; Childs v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121; Jackson v. Brunor, 16 Misc. Rep. 294, 38 N. Y. Supp. 110; In re Becker, 28 Hun (N. Y.) 207.

[57] Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249.

[58] Porter's Heirs v. Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153; Beeler's Heirs v. Bullitt's Heirs, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161.

[59] Hanna v. Spotts' Heirs, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132.

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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, 8 L. Ed. 890; Walton v. Coulson, 1 McLean, 120, Fed. Cas. No. 17,132; Tucker v. Bean, 65 Me. 352; Dow v. Jewell, 21 N. H. 470; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; Wright v. Miller, 8 N. Y. 9, 59 Am. Dec. 438; Thompson v. McDermott, 19 Fla. 852; Jones v. Jones, 56 Ala. 612; Daily's Adm'r v. Reid, 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. City of New Orleans, 12 La. Ann. 426; Massie's Heirs v. Donaldson, 8 Ohio, 377; Chaffin v. Kimball's Heirs, 23 Ill. 36; Reddick v. State 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' Heirs, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; Cowan v. Anderson, 7 Cold. (Tenn.) 284; Heath's Adm'r v. Ashley's Adm'r, 15 Mo. 393; English v. Savage, 5 Or. 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. (N. Y.) 103, 59 Am. Dec. 447; Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; Cox v. Story, 80 Ky. 64; Kuchenbeiser v. Beckert, 41 Ill. 172; Seward v. Clark, 67 Ind. 289; Simpson v. Alexander, 6 Cold. (Tenn.) 619; Coffin v. Heath, 6 Metc. (Mass.) 76; Dow v. Jewell, 21 N. H. 470; Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262.

[63] Lockwood v. Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97; Anderson's Adm'r v. Irvine, 11 B. Mon. (Ky.) 341; Creath v. Smith, 20 Mo. 113; Hanna

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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]

v. Spotts' Heirs, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172; Field v. Williamson, 4 Sandf. Ch. (N. Y.) 613.

[64] Beeler v. Bullitt, 4 Bibb (Ky.) 11; Wright v. Miller, 4 Barb. (N. Y.) 600; Harris v. Youman, 1 Hoff. Ch. (N. Y.) 178; Townsend v. Cox, 45 Mo. 401; Coffin v. Heath, 6 Metc. (Mass.) 76; Loyd v. Malone, 23 Ill. 43, 76 Am. Dec. 179.

[65] Ralston v. Lahee, 8 Iowa, 17, 74 Am. Dec. 291; English v. Savage, 5 Or. 518; In re Hogton, L. R. 18 Eq. 573; In re Livingston, 34 N. Y. 555; Rivers v. Durr, 46 Ala. 418; McLemore v. Chicago, St. L. & N. O. R. Co., 58 Miss. 514; Marshall v. Fisher, 46 N. C. 111; Smith v. McDonald, 42 Cal. 484; Wills v. Spraggins, 3 Grat. (Va.) 567; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; 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. 897; Ashton v. Ashton, 35 Md. 496.

[66] Gray v. Winder, 77 Cal. 525, 20 Pac. 47. An infant who sues by his next friend is as much bound by the judgment (the court having jurisdiction) as if of full age. Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429.

[67] Becton v. Becton, 56 N. C. 419.

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§ 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] 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

[68] New Orleans & C. R. Co. v. Bosworth, 8 La. Ann. 80; Norton v. Jamison, 23 La. Ann. 102; Edwards v. Whited, 29 La. Ann. 647; Lee v. Gardiner, 26 Miss. 521; Parker v. Horne, 38 Miss. 215; Tarleton v. Cox, 45 Miss. 430; Colson's Ex'rs v. Wade's Ex'rs, 5 N. C. 43; Burke v. Stokely, 65 N. C. 569; Carter v. Carriger's Adm'rs, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; Morrison v. Deaderick, 10 Humph. (Tenn.) 342; Collins v. Knight, 3 Tenn. Ch. 187; McCreery v. Everding, 44 Cal. 284; Lynch's Ex'x v. Tunnell, 4 Har. (Del.) 284; Meyer v. Hearst, 75 Ala. 390; Guyer's Adm'r v. Guyer, 6 Houst. (Del.) 430; Greenstreet v. Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; Weis v. Aaron, 75 Miss. 138, 21 South. 763, 65 Am. St. Rep. 594; Watson v. Adams, 103 Ga. 733, 30 S. E. 577; Kager v. Vickery, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153, 78 Am. St. Rep. 318.

[69] Life Association v. Fassett, 102 Ill. 315, 325.

[70] Succession of Hoggatt, 36 La. Ann. 337. See Green v. Taney, 16 Colo. 398, 27 Pac. 249.

[71] Bragg v. Thompson, 19 S. C. 572.

[72] Tobias v. Dorsey, 2 Wkly. Notes Cas. 15.

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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 adjudication 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 de-

[73] Lanning v. Pawson, 38 Pa. 480.

[74] City of New Orleans v. Whitney, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102; Loring v. Folger, 7 Gray (Mass.) 505; Reid v. Holmes, 127 Mass. 326; West v. Jordan, 62 Me. 484; Holt v. Thacher, 52 Vt. 592; Yaple v. Titus, 41 Pa. 195, 80 Am. Dec. 604; Carr v. Townsend's Ex'rs, 63 Pa. 202; Livingston v. Rendall, 59 Barb. (N. Y.) 493; Hooe v. Barber, 4 Hen. & M. (Va.) 439; Neale v. Utz, 75 Va. 480; Collins v. Mitchell, 5 Fla. 364; Powell v. Washington, 15 Ala. 803; Wood v. Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541; Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Ledbetter v. Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801; 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 (Ky.) 659; Case v. Ribelin, 1 J. J. Marsh. (Ky.) 30; Swasey v. Antram, 24 Ohio St. 87; Stoetzell v. Fullerton, 44 Ill. 108; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263; Davies v. Coryell, 37 Ill. App. 505; Coleman v. McAnulty, 16 Mo. 173, 57 Am. Dec. 229; Webber v. Stanton, 1 Mich. N. P. 97; Jennings v. Simpson, 12 Neb. 558, 11 N. W. 880; Hayes v. Shaw, 20 Minn. 405 (Gil. 355); Berkey v. Judd.

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clares 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 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

27 Minn. 475, 8 N. W. 383; Elliott v. Bastian, 11 Utah, 452, 40 Pac. 713; Mosley v. Southern Manuf'g Co., 4 Okl. 492, 46 Pac. 508.

[75] Mitchell v. Schoonover, 16 Or. 211, 17 Pac. 867, 8 Am. St. Rep. 282.

[76] Stocking v. Hanson, 22 Minn. 542; Hayes v. Shaw, 20 Minn. 405 (Gil. 355).

[77] Beard v. Roth (C. C.) 35 Fed. 397.

[78] McClelland v. Moore, 48 Tex. 355.

[79] Webb v. Wiltbank, 1 Clark (Pa.) 324.

[80] Merrill v. Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649.

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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 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

81 Bridges v. Smyth, 8 Bing. 29.

82 Lynn v. Lowe, 88 N. C. 478.

83 Jennings v. Simpson, 12 Neb. 558, 11 N. W. 580; McCormick v. Paddock, 20 Neb. 486, 30 N. W. 602.

84 Wright v. Mills, 4 Hurl. & N. 488.

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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]

§ 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

[85] Hildreth v. Thompson, 16 Mass. 191.

[86] Stackhouse v. Zuntz, 41 La. Ann. 415, 6 South. 666.

[87] King v. Burdett, 28 W. Va. 601, 57 Am. Rep. 687; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Burke v. Stokely, 65 N. C. 569; Holman v. G. A. Stowers Furniture Co. (Tex. Civ. App.) 30 S. W. 1120. 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.

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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.

§ 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

[89] Collins v. Knight, 3 Tenn. Ch. 183. And see Aldrich v. Housh, 71 Ill. App. 607.

[90] Lewis v. Ash, 2 Miles (Pa.) 110. Compare Hartman v. Hesserich, 8 Wkly. Notes Cas. 483.

[91] Infra, § 211.

[92] Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397. 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.

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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]

§ 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

[93] Hall v. Harvey, 3 N. H. 61.

[94] Supra, §§ 126–130.

[95] Reid v. Holmes, 127 Mass. 326; M. T. Jones Lumber Co. v. Rhoades, 17 Tex. Civ. App. 665, 41 S. W. 102; Loring v. Folger, 7 Gray (Mass.) 505; Griswold v. Stewart, 4 Cow. (N. Y.) 457; Crosley v. Hutton, 98 Mo. 196, 11 S. W. 613; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

[96] Hayes v. Shaw, 20 Minn. 405 (Gil. 355); Walter v. Erdman, 4 Pa. Super. Ct. 348; Best v. Nix, 6 Tex. Civ. App. 349, 25 S. W. 130; Kennedy v. Pickering, Minor (Ala.) 137; 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's Adm'x, 1 Metc. (Ky.) 529.

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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 (section 200), the great preponderance 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

[98] Baragwanath v. Wilson, 4 Ill. App. 80; Powell v. Washington, 15 Ala. 803. In West Virginia, it is held that a judgment so rendered will be erroneous, but not void. Watt v. Brookover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. St. Rep. 811; McMillan v. Hickman, 35 W. Va. 705, 14 S. E. 227.

[99] Wentz v. Bealor, 14 Pa. Co. Ct. R. 337. In Broas v. Mersereau, 18 Wend. (N. Y.) 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."

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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, 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]

[100] Webber v. Stanton, 1 Mich. N. P. 97; Wood v. Boyle, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747. See Gilman v. Donovan, 53 Iowa, 362, 5 N. W. 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 meantime 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. (Mass.) 169.

[101] Horner v. Nicholson, 56 Mo. 226, citing Wag. St. p. 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 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.

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§ 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 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

[105] Johnson v. Pomeroy, 31 Ohio St. 247.

[106] Beverley's Case, 4 Coke, 123; Mansfield's Case, 12 Coke, 124; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614; Lamprey v. Nudd, 29 N. H. 299; Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; Wood v. Bayard, 63 Pa. 320; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; Brittain v. Mull, 99 N. C. 483, 6 S. E. 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. 145; Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; Heard v. Sack, 81 Mo. 610; Sacramento Sav. Bank v. Spencer, 53 Cal. 737; Withrow v. Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762; Spurlock v. Noe (Ky.) 43 S. W. 231, 39 L. R. A. 775; Noel v. Modern Woodmen of America, 61 Ill. App. 597; Pollock v. Horn, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66; White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. But compare Ex parte Kibler, 53 S. C. 461, 31 S. E. 274; In re Wing, 83 Hun, 284, 31 N. Y. Supp. 941; Heff v. Cox, 5 Ohio N. P. 413.

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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 creditable 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 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

[107] Allison v. Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68. An insane defendant should not be defaulted for want of appearance and answer. Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612.

[108] Lamprey v. Nudd, 29 N. H. 299.

[109] Dickerson v. Davis, 111 Ind. 433, 12 N. E. 145.

[110] Clarke v. Dunham, 4 Denio (N. Y.) 262; Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; Robertson v. Lain, 19 Wend. (N. Y.) 650. Though a judgment confessed by a lunatic may be set aside, the rights of a third person, buying at execution sale thereunder, without notice, before proceedings to set it aside, cannot be disturbed. Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617.

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think that it would be within the province of an appellate court to reverse the judgment on error.

§ 206. Joint Parties 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 defense does not falsify the averment of an original joint promise, but,

[111] Metropolitan Washing Mach. Co. v. Morris, 39 Vt. 393; Platner v. Johnson, 3 Hill (N. Y.) 476; Barker v. Ayers, 5 Md. 202; Rohr v. Davis, 9 Leigh (Va.) 30; Park v. Edge, 42 Ala. 631; Helm v. Van Vleet, 1 Blackf. (Ind.) 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; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; Stitt v. Kurtenbach, 85 Ill. App. 38; Schmelzer v. Chicago Ave. Sash & Door Manuf'g Co., Id. 596; Bedwell v. Ashton, 87 Ill. App. 272; Finance Co. v. Hanlon, 75 Ill. App. 188; Brady v. Madden, 67 Ill. App. 637; Anderson v. Chilson, 8 S. D. 64, 65 N. W. 435; Rupe v. New Mexico Lumber Ass'n, 3 N. M. (Johns.) 261, 5 Pac. 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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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] But where the plaintiff insists that he is entitled to judgment against all the defendants or none, and it proves that he is not entitled to judgment against some of them, he waives his right to the determination of the question as to whether he is entitled to judgment against any.[118] A judgment otherwise joint in form is not rendered several by a finding as to which of the defendants is the principal debtor, and which are the sureties.[119] And though one of two defendants sued as individuals on a note to which their names were signed as such did not in fact sign the note, judgment should go against both on proof of their liability as partners.[120] Under the main rule here considered it is plainly erroneous to render a final

[113] Hathaway v. Crocker, 7 Metc. 262.

[114] Barker v. Ayers, 5 Md. 202.

[115] Gray's Adm'rs v. White, 5 Ala. 490.

[116] Mitchell v. Brewster, 28 Ill. 163; Bell v. State, 7 Blackf. (Ind.) 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] Valentine v. Duff (Ind. App.) 33 N. E. 529.

[119] Farney v. Hamilton County, 54 Neb. 797, 75 N. W. 44. Where the surety on an appeal bond is dead, judgment in an action on the bond is not void because it is entered against the principal alone. Lewis v. Maulden, 93 Ga. 758, 21 S. E. 147.

[120] Johnson v. Bonfield (Ky.) 40 S. W. 697.

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judgment against a part of several defendants while the cause remains undisposed of as to the others.[121] 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.[122] And in a case in Texas, where the court declined to enter judgment against one defendant, and continued the case as to him, this was held to make the judgment entered against the other defendant void.[123]

At common law, there is also a rule (converse to that above stated) that, in a joint action by several plaintiffs, there can be no recovery by any of them unless all are entitled to a judgment.[124] But this is applicable only where the cause of action is joint, and does not apply to an action in which a number of creditors unite to set aside a fraudulent conveyance or attachment of their debtor's property.[125] And this rule also has been changed or modified by statute in some of the states. Thus, in Indiana, under a law authorizing the court to determine the ultimate rights of the parties on each side, or between themselves, where justice requires it, the court may order judgment in favor of the one plaintiff who shows himself entitled to recover, though the cause of action is joint and breaks down as to the other plaintiffs.[126]

121 Davidson v. Bond, 12 Ill. 84; Barbour v. White, 37 Ill. 164; Prewett v. Caruthers, 7 How. (Miss.) 304; Godding v. Decker, 3 Colo. App. 198, 32 Pac. 832.

122 Taylor v. Beck, 3 Rand. (Va.) 316; Rohr v. Davis, 9 Leigh (Va.) 30; Woodward v. Newhall, 1 Pick. (Mass.) 500; supra, § 82.

123 Wootters v. Kauffman, 67 Tex. 488, 3 S. W. 465.

124 Walker v. Pope, 101 Ga. 665, 29 S. E. 8; McLaran v. Wilhelm, 50 Mo. App. 658; Dempster Mill Manuf'g Co. v. Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

125 Henderson v. J. B. Brown Co., 125 Ala. 566, 28 South. 79.

126 Mississinewa Min. Co. v. Andrews, 22 Ind. App. 523, 54 N. E. 146.

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§ 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.[127] 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.[128] 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.[129] If the jury find a verdict against one of the joint defendants, without mentioning the other, this will justify the entry of a judgment against the former and in favor of the latter.[130] In Tennessee, it is said that joint tort feasors sued jointly are not entitled to have the damages assessed against them severally.[131] But in other states, it appears to be no ground of complaint that judgments are rendered separately against the defendants for separate and different amounts.[132] And if one of the defendants obtains a new trial, a judgment for a less amount may

[127] Albright v. McTighe (C. C.) 49 Fed. 817; Winslow v. Newlan, 45 Ill. 145; Harris v. Preston, 10 Ark. 201; Jansen v. Varnum, 89 Ill. 100; Howard v. Dayton Coal & Iron Co., 94 Ga. 416, 20 S. E. 336; Emerson, Talcott & Co. v. Skidmore, 7 Tex. Civ. App. 641, 25 S. W. 671; Williams v. Goff (Tex. Civ. App.) 54 S. W. 428; Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943.

[128] Hambleton v. McGee, 19 Md. 43.

[129] Hayden v. Woods, 16 Neb. 306, 20 N. W. 345. And see Cauthorn v. King, 8 Or. 138.

[130] Kinkler v. Junica, 84 Tex. 116, 19 S. W. 359. A judgment against a portion of the defendants in an action of tort amounts to a dismissal of the cause as against the other defendants. Davis v. Taylor, 41 Ill. 405.

[131] Nashville, C. & St. L. Ry. v. Jones, 100 Tenn. 512, 45 S. W. 681.

[132] Rowan v. Daniel, 20 Tex. Civ. App. 321, 49 S. W. 686.

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be rendered against him, while the original judgment remains in force against the other.[133]

§ 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 defendants," 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." [134] 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.[135] 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

[133] Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

[134] Rev. St. Me. c. 82, § 84; Gen. St. Conn. § 1108; Code Civ. Proc. N. Y. § 1204; Code Md. art. 50, § 12; Code Va. 1887, § 3395; Code S. C. § 296; Code Ark. §§ 4701, 4704; Code Civ. Proc. Ohio, § 371; Burns' Rev. St. Ind. 1894, § 579; Code Iowa, § 1815; Wag. St. Mo. p. 1019, § 32; Code Wis. § 184; Code Civ. Proc. Cal. §§ 578, 579; Hill's Code Or. §§ 244, 245; Comp. Laws S. D. § 4901. By virtue of Rev. St. U. S. § 914, where the law of the state contains a provision of this sort, the same practice will be adopted by the federal courts sitting within that state. Witters v. Sowles (C. C.) 34 Fed. 119.

[135] Gleason v. Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370; Owen v. Conner, 11 N. Y. Supp. 352; Stimson v. Van Pelt, 66 Barb. (N. Y.) 151; Westheimer v. Craig, 76 Md. 399, 25 Atl. 419; Longstreet v. Rea, 52 Ala. 195; Kuykendall v. Coulter, 7 Tex. Civ. App. 399, 26 S. W. 748; Lampkin v. Chisom, 10 Ohio St. 450; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Murray v. Ebright, 50 Ind. 362; Stafford v. Nutt, 51 Ind. 535; Richardson v. Jones, 58 Ind. 240; Eyre v. Cook, 9 Iowa, 185; Roggenkamp v. Hargreaves, 39 Neb. 540, 58 N. W. 162; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Hamm v. Basche, 22 Or. 513, 30 Pac. 501; Ah Lep v. Gong Choy, 13 Or. 205, 9 Pac. 483; Ross v. Wait, 4 S. D. 584, 57 N. W. 497.

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other.[136] 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.[137] 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.[138] 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.[139] 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.[140] And it is held that a statute of the character above described is a provision as applicable to suits by attachment as to 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.[141] 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.[142] But if the verdict, or the finding of the court, is against all the defendants jointly, it would be

[136] Claflin v. Butterly, 5 Duer (N. Y.) 327.

[137] Stoddart v. Van Dyke, 12 Cal. 437; Willis v. Morrison, 44 Tex. 27; Fielden v. Lahens, 2 Abb. Dec. (N. Y.) 111.

[138] Crews v. Lackland, 67 Mo. 619; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Morgan v. Righetti (Cal.) 45 Pac. 260; Shafer v. Hewitt, 6 Colo. App. 374, 41 Pac. 509.

[139] Barker v. Cocks, 50 N. Y. 689. But a statute allowing judgment to be had against one or more defendants in an action on contract, according to the rights of the case, has no application where the defendants file a joint plea of non-assumpsit, and there is nothing to indicate that the defense is merely personal as to one defendant. Gibson v. Beveridge, 90 Va. 696, 19 S. E. 785.

[140] Moss v. Jerome, 10 Bosw. (N. Y.) 220.

[141] Allen v. Clayton (C. C.) 11 Fed. 73.

[142] Lamar v. Williams, 39 Miss. 342.

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error to render a judgment thereon against a part only, dismissing the action as to the others.[143] 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.[144] As these statutes are framed in some of the states they permit a plaintiff, suing upon a joint cause of action against two defendants, to recover a separate judgment against each for one-half of the claim.[145] And where the statute also permits the court to grant affirmative relief to defendant, it may give judgment for one of the defendants as against another, if that can be done without injury to the plaintiff.[146] But a judgment against a garnishee, when there has been no judgment against the defendant in the suit to which the garnishment is ancillary, is void.[147] And the fact that persons have been improperly joined as parties defendant does not warrant the entry of a judgment in their favor, but the action should be dismissed as to them.[148]

§ 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.[149] So if one defendant interposes an objection by

[143] Kellogg, Johnson & Co. v. Gilman, 3 N. D. 538, 58 N. W. 339; Boys v. Shawhan, 88 Cal. 111, 25 Pac. 1063. The verdict having been rendered jointly against both plaintiffs, and the judgment against one of them alone, he is entitled to a reversal. Frisbie v. McFarlane, 196 Pa. 110, 46 Atl. 359.

[144] Van Ness v. Corkins, 12 Wis. 186; Parke v. Meyer, 28 Ark. 281.

[145] Hassler v. Hefele, 151 Ind. 391, 50 N. E. 361.

[146] Beattie v. Latimer, 42 S. C. 313, 20 S. E. 53.

[147] Shoemaker v. Pace (Tex. Civ. App.) 41 S. W. 498.

[148] Gillum v. St. Louis, A. & T. Ry. Co., 4 Tex. Civ. App. 622, 23 S. W. 716.

[149] Bowman v. Noyes, 12 N. H. 302; Adderton v. Collier, 32 Mo. 507; State

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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.[150] But this rule also is modified by the joint debtor acts. Thus, under a provision that judgment may be given for or against one or more of several defendants, it is held that, where three persons are sued as partners, and two of them suffer default, but the other answers, denying that he was a member of the firm, judgment may be entered against those in default, though it is rendered in favor of the answering defendant.[151] So an action on a joint and several obligation against two defendants, only one of whom appeared and answered, can be tried, and verdict and judgment rendered for or against the party answering, without regard to the proceedings against his co-defendant.[152]

On the other hand, if one of the defendants makes default 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.[153] Nor is there any necessity, in such a case, of having previously taken an interlocutory judgment by default against the party failing to answer.[154] Where, in a joint

v. Gibson, 21 Ark. 140; Rich v. Husson, 4 Sandf. (N. Y.) 115; Miller v. Longacre, 26 Ohio St. 291; Champlin v. Tilley, 3 Day (Conn.) 303, Fed. Cas. No. 2,586; Campbell v. McHarg, 9 Iowa, 354. Compare Town of Storm Lake v. Iowa Falls & S. C. Ry. Co., 62 Iowa, 218, 17 N. W. 489.

[150] State v. Williams, 17 Ark. 371.

[151] Bailey Loan Co. v. Hall, 110 Cal. 490, 42 Pac. 962. And see Kingsland & Douglass Manuf'g Co. v. Mitchell (Tex. Civ. App.) 36 S. W. 757.

[152] Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071. In Illinois, it is said that where, in an action against two defendants, of whom only one has been served, judgment is entered by default against the defendant served, and the action continued as to the other, such judgment, though erroneous, is not void. Anderson v. Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696.

[153] Town of Fletcher v. Blair, 20 Vt. 124.

[154] Peters v. Crittenden, 8 Tex. 131. But in an action on a joint debt, plaintiff, after joining all the debtors as defendants, so as to avoid a plea of nonjoinder, cannot, by neglecting to take judgment against some of them who are in default, throw the burden of the common debt on one of them, against whom alone he enters judgment. Robinson v. Floyd, 153 Pa. 98, 25 Atl. 1040; Murtland v. Floyd, 153 Pa. 99, 25 Atl. 1038.

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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.[155]

§ 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.[156] 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.[157] 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.[158] 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.[159] So where, of two defendants, one is liable individually, and the other in his representative character, the judg-

[155] Downer v. Dana, 22 Vt. 22.

[156] Holmes' Heirs v. Gay's Heirs, 6 Bush (Ky.) 47; Rochester v. Anderson, 1 Bibb (Ky.) 439; Starry v. Johnson, 32 Ind. 438; Howell v. Barrett, 3 Gilman (Ill.) 433. A joint judgment in favor of defendants for costs is proper where they are sued jointly, though they answered separately. Leadbetter v. Lake, 118 Cal. 515, 50 Pac. 686.

[157] Judd Linseed Sperm Oil Co. v. Hubbell, 76 N. Y. 543. See, also, Murphy v. Gage (Tex. Civ. App.) 21 S. W. 396.

[158] Chambers v. Upton (C. C.) 34 Fed. 473. Judgment may be entered for different sums against several defendants, where plaintiff is entitled to recover more costs as against some of them than against the others. Fox v. Muller, 31 Misc. Rep. 470, 64 N. Y. Supp. 388.

[159] Sears v. McGrew, 10 Or. 48. See, also, Cronsdell v. Tallant, 83 Pa. 193; First Nat. Bank v. Burkhardt, 71 Minn. 185, 73 N. W. 858.

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ment against them should be several.[160] 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.[161] 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.[162]

§ 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.[163] 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

[160] Gray's Adm'r v. McDowell, 5 T. B. Mon. (Ky.) 501.

[161] Ransdell v. Threlkeld's Adm'r, 4 Bush (Ky.) 347.

[162] Read v. Jeffries, 16 Kan. 534. And see Stout v. Baker, 32 Kan. 113, 4 Pac. 141.

[163] Shuford v. Cain, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Richards v. Walton, 12 Johns. (N. Y.) 434; Holbrook v. Murray, 5 Wend. (N. Y.) 161; Rangely v. Webster, 11 N. H. 299; Knapp v. Abell, 10 Allen (Mass.) 485; Buffum v. Ramsdell, 55 Me. 252, 92 Am. Dec. 589; Dickerson v. Chrisman, 28 Mo. 134; Hulme v. James, 6 Tex. 242, 55 Am. Dec. 774; Long v. Garnett, 45 Tex. 400; Thomas v. Lowry, 60 Ill. 512; Brockman v. McDonald, 16 Ill. 112; Williams v. Chalfant, 82 Ill. 218; Roberts v. Pawley, 50 S. C. 491, 27 S. E. 913; Grace v. Casey-Grimshaw Marble Co., 62 Ill. App. 149; West Chicago St. Ry. Co. v. Annis, Id. 180; Meyer v. Kuhn, 13 C. C. A. 298, 65 Fed. 705; Van Renselaer v. Whiting, 12 Mich. 449; Hughes v. Lindsey, 10 Ark. 555; Smith's Adm'r v. Rollins, 25 Mo. 408; Winslow v. Lambard, 57 Me. 356; Burt v. Stevens, 22 N. H. 229; Donnelly v. Graham, 77 Pa. 274; City of St. Louis v. Gleason, 15 Mo. App. 25.

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defendant served, judgment should be rendered against 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.[164] 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.[165] 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

[164] Hanley v. Donoghue, 59 Md. 239, 43 Am. Rep. 554; Holbrook v. Murray, 5 Wend. (N. Y.) 161.

[165] Newburg v. Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Douglass' Lessee v. Massie, 16 Ohio, 271, 47 Am. Dec. 375; Ash v. McCabe, 21 Ohio St. 181; Jamieson v. Pomeroy, 9 Pa. 230; Shallcross v. Smith, 81 Pa. 132; Kitchens v. Hutchins, 44 Ga. 620; Green v. Beals, 2 Caines (N. Y.) 254; Crane v. French, 1 Wend. (N. Y.) 311; Brittin v. Wilder, 6 Hill (N. Y.) 242; St. John v. Holmes, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; York Bank's Appeal, 36 Pa. 460; North v. Mudge, 13 Iowa, 498, 81 Am. Dec. 441; Winchester v. Beardin, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; Collins v. Knight, 3 Tenn. Ch. 183; Mercer v. James, 6 Neb. 406; Council Bluffs Sav. Bank v. Griswold, 50 Neb. 753, 70 N. W. 376; Keith Bros. & Co. v. Stiles, 92 Wis. 15, 65 N. W. 860; Wise v. Hyatt, 68 Miss. 714, 10 South. 37; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Remington v. Cummings, 5 Wis. 138; Bailey v. McGinniss, 57 Mo. 362; Cheek v. Pugh, 19 Ark. 574; Murphy v. Orr, 32 Ill. 489; Valentine v. Cooley, Meigs (Tenn.) 618, 33 Am. Dec. 166; Crank v. Flowers, 4 Heisk. (Tenn.) 629; Smith v. Tupper, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

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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 against the person affected, these cases hold it to be equally voidable as against the co-defendants.[166] 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.[167] 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.[168] 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." [169] The acceptance

[166] Stenhouse v. Bonum, 12 Rich. Law (S. C.) 620; Tedlie v. Dill, 3 Ga. 104; Randalls v. Wilson, 24 Mo. 76.

[167] Holton v. Towner, 81 Mo. 360; Shallcross v. Smith, 81 Pa. 132.

[168] Sargeant v. French, 10 N. H. 444; Sheldon v. Quinlen, 5 Hill (N. Y.) 441; Hickman v. Branson, 1 Houst. (Del.) 429; Murphy v. O'Reiley, 78 Ky. 263; Draper v. State, 1 Head (Tenn.) 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's Heirs, 5 Iowa, 157; Fuller v. Robb, 26 Ill. 246; Kimball v. Tanner, 63 Ill. 519; Covenant Mut. Life Ins. Co. v. Clover, 36 Mo. 392; Powers v. Irish, 23 Mich. 429.

[169] McDonald v. Wilkie, 13 Ill. 22, 54 Am. Dec. 423, citing Harman v. Brotherson, 1 Denio (N. Y.) 537; Cruikshank v. Gardner, 2 Hill (N. Y.) 333; Sheldon v. Quinlen, 5 Hill (N. Y.) 441; Gaylord v. Payne, 4 Conn. 190; Bac. Abr., tit. "Error," M.

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of this rule, however, is not quite universal. It is said to have no application under the statutes and system of practice in Nevada.[170] 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.[171] In Virginia it is 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.[172] 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.[173] 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.[174]

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,

[170] Wood v. Olney, 7 Nev. 109.

[171] Ricketson v. Richardson, 26 Cal. 149. And see Saffold v. Navarro, 15 Tex. 76.

[172] Gray v. Stuart, 33 Grat. 351.

[173] Powers v. Irish, 23 Mich. 429, 438; Buffum v. Ramsdell, 55 Me. 252, 92 Am. Dec. 589.

[174] Voorhis v. Gamble, 6 Mo. App. 1; Dickerson v. Chrisman, 28 Mo. 134.

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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 application 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 follow 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.[175] 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.[176] 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.[177]

[175] Tripp v. Saunders, 59 How. Prac. (N. Y.) 379.

[176] North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Mercer v. James, 6 Neb. 406; York Bank's Appeal, 36 Pa. 458; Knox v. Winsted Sav. Bank, 57 Ill. 330.

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

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§ 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.[178] "The point of the objection to the judgment of the 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."[179] Exactly the same rule applies in the case of a corporation; though sued by a wrong name, it is bound, if duly served.[180] But in California, and probably in other states having similar statutory provisions, a judgment against a defendant served by a fictitious name, who appears and answers in his real name, cannot be supported unless the complaint is amended by inserting the true

[178] Oakley v. Giles, 3 East, 168; Lafayette Ins. Co. v. French, 18 How. 409, 15 L. Ed. 451; Smith v. Bowker, 1 Mass. 76; Fitzgerald v. Salentine, 10 Metc. (Mass.) 436; First Nat. Bank v. Jaggers, 31 Md. 38, 100 Am. Dec. 53; Althouse v. Hunsberger, 6 Pa. Super. Ct. 160; Waldrop v. Leonard, 22 S. C. 118; Bloomfield R. Co. v. Burress, 82 Ind. 83; Kingen v. Stroh, 136 Ind. 610, 36 N. E. 519; Griffith v. Milwaukee Harvester Co., 92 Iowa, 634, 61 N. W. 243, 54 Am. St. Rep. 573; Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51; Welsh v. Kirkpatrick, 30 Cal. 202, 89 Am. Dec. 85; Sutter v. Cox, 6 Cal. 415; Guinard v. Heysinger, 15 Ill. 288.

[179] Parry v. Woodson, 33 Mo. 347, 84 Am. Dec. 51.

[180] Hoffield v. Board of Education, 33 Kan. 644, 7 Pac. 216.

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name, as required by the code.[181] Moreover, 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.[182] 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.[183]

Similar principles apply to the case of a misnomer in the judgment itself, where the defendant was correctly named in the writ or the pleadings. The judgment will not be avoided by such misnomer, if the record contains data by which the judgment can be amended, or if the record and the judgment together point out the persons to be bound by the judgment, with unmistakable certainty.[184] Further, a misnomer in a judgment may 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.[185] So where a judgment is rendered and execution 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."[186] It may also happen that the process will contain a misnomer of the plaintiff. And some of the cases, having a regard

[181] McKinlay v. Tuttle, 42 Cal. 571; City and County of San Francisco v. Burr (Cal.) 36 Pac. 771; Alameda County v. Crocker, 125 Cal. 101, 57 Pac. 766.

[182] Fitzgerald v. Salentine, 10 Metc. (Mass.) 436.

[183] Ford v. Doyle, 37 Cal. 346.

[184] Chicago Clock Co. v. Tobin, 123 Cal. 377, 55 Pac. 1007; Ex parte Howard-Harrison Iron Co., 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928. A misrecital in a decree, to the effect that an intervener, who resisted plaintiff's claim, was a defendant, is not fatal. Newman v. Bullock, 23 Colo. 217, 47 Pac. 379.

[185] Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781. Where a judgment on a forfeited bond signed with the Christian name "Noberto" was entered against "Norberto," it was held not to be a fatal variance. Salinas v. State, 39 Tex. Cr. R. 319, 45 S. W. 900.

[186] Kuhn v. Kilmer, 16 Neb. 699, 21 N. W. 443.

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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."[187] 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.[188] 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.[189] A judgment for or against a partnership is not rendered invalid by the fact that it incorrectly names the partnership, if it also gives correctly the names of the individuals composing the firm.[190] 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

[187] Ex parte Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

[188] Kronski v. Missouri Pac. Ry. Co., 77 Mo. 362; McGaughey v. Woods, 106 Ind. 380, 7 N. E. 7; Terry v. French, 5 Tex. Civ. App. 120, 23 S. W. 911. A judgment in favor of "The United States National Bank" is sufficient to support an action thereon by "The United States National Bank of New York, N. Y." United States Nat. Bank v. Venner, 172 Mass. 449, 52 N. E. 543. But where an amended petition states the plaintiff's name differently from the original petition, a judgment in favor of the plaintiff by the name given in the original petition is not a final judgment to which a writ of error will lie. Green v. Brown (Tex.) 15 S. W. 37.

[189] Hart's Lessee v. Johnson, 6 Ohio, 87.

[190] Bailey v. Crittenden (Tex. Civ. App.) 44 S. W. 404. See, also, Ellis v. Jones, 51 Mo. 180. Where a person does business individually under a firm name, and as such firm becomes a joint lessee, a judgment against him individually for rent is proper. Ding v. Kennedy, 7 Colo. App. 72, 41 Pac. 1112.

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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 the courts, in this state." [191] 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.[192]

§ 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.[193] So a judgment against "D., treasurer," is a personal judgment, the word "treasurer" being merely descriptio personæ.[194]

[191] Clute v. Emmerich, 26 Hun (N. Y.) 10.

[192] Crawford v. Wilcox, 68 Tex. 109, 3 S. W. 695; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771.

[193] Tinsley v. Lee, 51 Ga. 482; Hall v. Craige, 68 N. C. 305. In determining whether a judgment against one as executor was obtained against him in his representative capacity, or individually, the pleadings in the action in which it was rendered may be considered. Croom v. Winston, 18 Tex. Civ. App. 1, 43 S. W. 1072. In an action against one as agent for an estate, on a bill accepted by him as such agent, a judgment against him as agent is proper, as execution thereon will not go against his individual property, but be levied on assets in his hands as agent. Rudd v. Deposit Bank (Ky.) 49 S. W. 207.

[194] Dougherty v. McManus, 36 Iowa, 657; Rockwell v. Tupper, 7 Pa. Super. Ct. 174; Sass v. Hirschfeld, 23 Tex. Civ. App. 396, 56 S. W. 941. Where a defendant, sued for a tort as an individual, defended in a representative capacity as assignee of an insolvent, the effect of a judgment against him in terms both as an individual and as assignee is simply to hold him liable individually. O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130. So, a personal judgment against a tax collector is not vitiated by the addition of the words "tax collector" to defendant's name. Stewart v. Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119. See, also, Rutan v. Wolters, 116 Cal. 403, 48 Pac. 385.

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CHAPTER XII.

THE VALIDITY OF JUDGMENTS AS DEPENDENT UPON JURISDICTION.

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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, or what are the respective rights of parties, as determined by the application of law to the facts before the tribunal. Technically, it may be defined as the power and authority constitutionally conferred upon

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(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.[1] 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 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.[2] But jurisdiction cannot be predicated of any voluntary or self-consti-

[1] See Windsor v. McVeigh, 93 U. S. 277, 23 L. Ed. 914; United States v. Arredondo, 6 Pet. 709, 8 L. Ed. 547; Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. Ed. 1233; Sheldon's Lessee v. Newton, 3 Ohio St. 494; Ex parte Bennett, 44 Cal. 84.

[2] Supra, § 173.

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tuted tribunal, lacking the color of governmental authority. Its proceedings must at least appear to be had under the authority and sanction of the sovereign.[3] 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." [4] 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 statute abolishing the court, or either enlarging or abridging its jurisdiction.[5] And conversely if the constitution organizes a court and

[3] Rogers v. Wood, 2 Barn. & Adol. 245.

[4] Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 931; Fithian v. Monks, 43 Mo. 515.

[5] Commonwealth v. Allegheny County Com'rs, 37 Pa. 237; Gibson v. Templeton, 62 Tex. 555; State v. Bank of East Tennessee, 5 Sneed (Tenn.) 573; Ward v. Thomas, 2 Cold. (Tenn.) 565; Gibson v. Emerson, 7 Ark. 172; State v. Jones, 22 Ark. 331; Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323; Deck's Estate v. Gherke, 6 Cal. 666; Zander v. Coe, 5 Cal. 230. See 2 Story, Const. §§ 1773, 1774; Durousseau v. United States, 6 Cranch, 307, 3 L. Ed. 232; United States v. More, 3 Cranch. 159, 2 L. Ed. 397; Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264; United States v. Peters, 5 Cranch, 115, 3 L. Ed. 53; 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. (Tenn.) 565; State v. Bank of East Tennessee, 5 Sneed (Tenn.) 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 & H. R. Co. v. Hunt, 20 Ind. 457.

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confers powers upon it, it does not require the aid of legislation to enable it to exercise those powers.[6] 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.[7] 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.[8]

§ 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.[9] 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 judgment 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.[10] But

[6] State v. Gleason, 12 Fla. 190.

[7] Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Reed v. Wright, 2 G. Greene (Iowa) 15. Compare Arnold v. Shields, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

[8] Champlin v. Bakewell, 21 La. Ann. 353.

[9] Home Ins. Co. v. Morse, 20 Wall. 451, 22 L. Ed. 365; 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. Town of Dane, 29 Wis. 419; Peabody v. Thatcher, 3 Colo. 275.

[10] Georgia R. & B. Co. v. Harris, 5 Ga. 527. But under the act of congress of March 3, 1887, § 1 (25 Stat. 433), providing that "no civil suit shall be brought before either of said courts [United States circuit or district courts] against any person * * * in any other district than that whereof he is an inhabitant," it is held that the right to be sued only in the district of his residence is a personal privilege, which the defendant may waive; and he does waive it by pleading to the merits. St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; Texas & P. R. Co. v. Cox, 145

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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.[11] 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.[12] 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.[13] 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.[14]

§ 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

U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98.

[11] Hobart v. Frost, 5 Duer (N. Y.) 672.

[12] A decree purporting to be rendered by consent of parties is not void on its face because it declares the title to the premises in controversy to be in a person other than one of the parties to the record, when it appears that such person was a purchaser pendente lite from one of the parties. Beardsley v. Hilson, 94 Ga. 50, 20 S. E. 272.

[13] Supra, §§ 190, 196.

[14] Hall v. Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180.

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or relied on as a valid judgment.[15] 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."[16] 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.[17] 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.[18] 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

[15] Fisher v. Harnden, 1 Paine, 55, Fed. Cas. No. 4,819; 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 & Mining Co., 111 Ill. 32; Swiggart v. Harber, 4 Scam. (Ill.) 364, 39 Am. Dec. 418; Miller v. Snyder, 6 Ind. 1; Seely v. Reid, 3 G. Greene (Iowa) 374; Bruschke v. Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417; Dowell v. Applegate, 24 Or. 440, 33 Pac. 937; Ex parte Gardner, 22 Nev. 280, 39 Pac. 570. Some of the cases discriminate in favor of judgments for the defendant, where there was jurisdiction of the subject-matter, though not of defendant's person. See City of Fostoria v. Fox, 60 Ohio St. 340, 54 N. E. 370.

[16] Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164, Trimble, J. See, also, Latham v. Edgerton, 9 Cow. (N. Y.) 227. A person against whom judgment has been rendered without service of process is not precluded by any lapse of time from contesting its validity; he can wait until it is sought to be enforced against him. Harper v. Cunningham, 8 App. D. C. 430.

[17] Bowers v. Chaney, 21 Tex. 363; Holland v. Johnson, 80 Mo. 34.

[18] Linn v. Carson's Adm'r, 32 Grat. (Va.) 170.

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of the cases seems to be that it is only when the judgment 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." [19] But other authorities maintain that proceedings void for want of jurisdiction cannot be cured by ratification or waiver.[20] And it is clear that a void judgment cannot be validated by citing the party against whom it was entered to show cause why it should not be declared valid,[21] nor by the court's approval of a sale on execution under it,[22] nor by the subsequent taking and dismissing of an appeal from such judgment.[23] And 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.[24] So when property has been attempted to

[19] Ramsey v. Linn, 2 Rawle (Pa.) 229.

[20] Laughton v. Nadeau (C. C.) 75 Fed. 789.

[21] Jewett v. Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

[22] Willamette Real-Estate Co. v. Hendrix, 28 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

[23] Jones v. Pharis, 59 Mo. App. 254.

[24] Richards v. Rote, 68 Pa. 248; Lane v. Nelson, 79 Pa. 407; Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Griffin's Ex'r v. Cunningham, 20 Grat. (Va.) 109; McDaniel v. Correll, 19 Ill. 226, 68 Am. Dec. 587; Denny v. Mattoon,

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be taken by a judicial proceeding which is void for want of jurisdiction, the legislature, for similar reasons, cannot validate it.[25] 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.[26]

§ 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.[27] So a judgment against a defendant named in the writ, but not made a party, is merely void.[28] 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.[29] 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;

2 Allen (Mass.) 361, 79 Am. Dec. 784; Israel v. Arthur, 7 Colo. 5, 1 Pac. 438; In re Christensen's Estate, 17 Utah, 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794; Board of Com'rs of Wells Co. v. Fahlor, 132 Ind. 426, 31 N. E. 1112.

[25] Richards v. Rote, 68 Pa. 248.

[26] Lane v. Nelson, 79 Pa. 407; State v. Town of Union, 33 N. J. Law, 350; Black, Const. Law (2d Ed.) 632.

[27] Ford v. Doyle, 37 Cal. 346; Overstreet v. Davis, 24 Miss. 393; Moseley v. Cocke, 7 Leigh (Va.) 225; Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; McKinney v. Frankfort & State Line R. Co., 140 Ind. 95, 38 N. E. 170; Missouri, K. & T. Ry. Co. v. Fulmore (Tex. Civ. App.) 26 S. W. 238; Johnson v. Block (Tex. Civ. App.) 46 S. W. 85; Houser v. Smith, 19 Utah, 150, 56 Pac. 683. A decree rendered by default against the unknown heirs of a person supposed to be dead is void where such person is in fact alive and is not a party to the suit. Burton v. Perry, 146 Ill. 71, 34 N. E. 60.

[28] Armstrong v. Harshaw, 12 N. C. 187.

[29] Bracey v. Calderwood, 36 La. Ann. 796.

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and it was held that the judgment was a mere nullity as to the sureties, although it was not void as to the defendant.[30]

§ 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 directed against the thing itself, and there is no attempt to fasten a personal liability upon the parties concerned.[31] 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 judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void.[32] "We think it may be regarded as settled, that a judgment of

[30] Cheek v. Pugh, 19 Ark. 574.

[31] 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's Adm'r v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106. 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. See Dernburg v. Tefft, 63 Ill. App. 33.

[32] Hollingsworth v. Barbour, 4 Pet. 466, 7 L. Ed. 922; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Windsor v. McVeigh, 93 U. S. 277, 23 L. Ed. 914; Pennoyer v. Neff, 95 U. S. 727, 24 L. Ed. 565; St. Clair v. Cox, 106 U. S. 353, 1 Sup. Ct. 354, 27 L. Ed. 222; Freeman v. Alderson, 119 U. S. 188, 7 Sup. Ct. 165, 30 L. Ed. 372; Ward v. Boyce, 80 Hun, 499, 30 N. Y. Supp. 491; Berkowitz v. Brown, 3 Misc. Rep. 1, 23 N. Y. Supp. 792; McGavock v. Clark, 93 Va. 810, 22 S. E. 864; Coger v. Coger, 48 W. Va. 135, 35 S. E. 823; Gunn v. Miller (Tex. Civ. App.) 26 S. W. 278; Luse v. Rankin, 57 Neb. 632, 78 N. W. 258; Eliot v. McCormick, 144 Mass. 11, 10 N. E. 705; Steen v. Steen, 25 Miss. 513; Smith v. State, 13 Smedes & M. (Miss.) 140; Enos v. Smith, 7 Smedes & M. (Miss.) 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. 347; Roberts v. Stowers, 7 Bush (Ky.) 295; North v. Moore, 8 Kan. 143; Ex parte Woods, 3 Ark. 532; Anderson v. Miller, 4 Blackf. (Ind.) 417; Smith v. Myers, 5 Blackf. (Ind.) 223; Wort v. Finley, 8 Blackf. (Ind.) 335; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Anderson v. Brown, 9 Mo. 646; Tyler v. Peatt, 30 Mich. 63. But it is not essential to the validity of a decree

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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." [33] 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.[34] 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.[35]

§ 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. 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 ren-

or judgment that it should be served upon any party to the cause after it is filed. Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061.

[33] Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355, citing Bliss v. Wilson, 4 Blackf. (Ind.) 109; Smith v. Myers, 5 Blackf. (Ind.) 223; Wort v. Finley, 8 Blackf. (Ind.) 335; Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; Buchanan v. Rucker, 9 East, 192; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Shriver v. Lynn, 2 How. 43, 11 L. Ed. 172; Westerwelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Hollingsworth v. Barbour, 4 Pet. 466, 7 L. Ed. 922; Campbell v. Brown, 6 How. (Miss.) 106; Shelton v. Tiffin, 6 How. 163, 12 L. Ed. 387.

[34] Outhwite v. Porter, 13 Mich. 533.

[35] King v. Poole, 36 Barb. (N. Y.) 242.

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dered 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." [36] 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." [37] 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.

§ 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 pur-

[36] Flint River Steamboat Co. v. Foster, 5 Ga. 202, 48 Am. Dec. 248.

[37] Cooley, Const. Lim. 356. And see Stuart v. Palmer, 74 N. Y. 190, 30 Am. Rep. 289; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Hagar v. Reclamation Dist. No. 108, 111 U. S. 707, 4 Sup. Ct. 663, 28 L. Ed. 569.

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suance of such notice." [38] 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.[39] 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.[40]

§ 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 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.[41] 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.[42] But where it appears that there was notice, though defective, and service, though imperfect, a decision of the court to which the process

[38] Thouvenin v. Rodrigues, 24 Tex. 468.

[39] Hurlbut v. Thomas, 55 Conn. 181, 10 Atl. 556, 3 Am. St. Rep. 43.

[40] Zecharie v. Bowers, 1 Smedes & M. (Miss.) 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.

[41] Peabody v. Phelps, 9 Cal. 213.

[42] 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.

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was returnable that such notice and service were sufficient, will not be held void in a collateral proceeding.[43] 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.[44] So where the officer's return upon mesne process is not signed.[45] And a judgment is not invalidated by the fact of an unnecessary indorsement of the amount upon the summons.[46] 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.[47] 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.[48]

§ 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 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.[49] But a judgment recovered by

[43] Shawhan v. Loffer, 24 Iowa, 217.

[44] Heighway v. Pendleton, 15 Ohio, 735.

[45] McElrath v. Butler, 29 N. C. 398.

[46] Larimer v. Clemmer, 31 Ohio St. 499.

[47] Ballinger v. Tarbell, 16 Iowa, 491, 85 Am. Dec. 527. See Glover v. Holman, 3 Heisk. (Tenn.) 519; West v. Williamson, 1 Swan (Tenn.) 277. Compare Johnson v. Baker, 38 Ill. 98, 87 Am. Dec. 293.

[48] Clapp v. Graves, 26 N. Y. 418.

[49] Campbell v. Hays, 41 Miss. 561; Christian v. O'Neal, 46 Miss. 669; Stewart v. Bodley, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105; W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043; Ford v. Delta & Pine Land Co. (C. C.) 43 Fed. 181. Where the writ is directed to an officer of another county than that where the action is brought, in violation of a

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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.[50] 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.[51] 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.[52] 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.[53] 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.[54]

§ 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.[55]

statute, the judgment, though erroneous, is not void. Brown v. Chapman, 90 Va. 174, 17 S. E. 855. "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, Fed. Cas. No. 7,097. See Cole v. Butler, 43 Me. 401; Hendrick v. Whittemore, 105 Mass. 23.

[50] Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342.

[51] 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 (Ohio) 586.

[52] South Bend Chilled Plow Co. v. Manahan, 62 Mich. 143, 28 N. W. 768.

[53] Rowley v. Howard, 23 Cal. 401.

[54] Knott v. Jarboe, 1 Metc. (Ky.) 504.

[55] Shields v. Thomas, 18 How. 253, 15 L. Ed. 368; Toland v. Sprague, 12

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"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." [56] 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.[57] 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.[58] And a general entry that the parties appeared means only that those who were served appeared.[59] 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 or service, cannot be construed as a waiver of those objections.[60] 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

Pet. 300, 9 L. Ed. 1093; Segee v. Thomas, 3 Blatchf. 11, Fed. Cas. No. 12,633; Payne v. Farmers' & Citizens' Bank, 29 Conn. 415; Christal v. Kelly, 88 N. Y. 285; Fox v. Reed, 3 Grant, Cas. (Pa.) 81; Reynolds v. Lyon, 20 Ga. 225; Tipton v. Wright, 7 Bush (Ky.) 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; Jenners v. Spraker, 2 Ind. App. 100, 27 N. E. 117; Adams Exp. Co. v. Hill, 43 Ind. 157; Louisville, N. A. & C. Ry. Co. v. Nicholson, 60 Ind. 158; Fulbright v. Cannefox, 30 Mo. 425; Suydam v. Pitcher, 4 Cal. 280; Harris v. Gwin, 18 Miss. 563; Choteau v. Rice, 1 Minn. 192 (Gil. 166); Anderson v. Morris, 12 Wis. 689; Lane v. Leech, 44 Mich. 163, 6 N. W. 228.

[56] Wilson v. Zeigler, 44 Tex. 657.

[57] Mahaney v. Penman, 4 Duer (N. Y.) 603.

[58] Kimball v. Merrick, 20 Ark. 12.

[59] Chester v. Miller, 13 Cal. 558. See Barker v. Shepard, 42 Miss. 277.

[60] Ames v. Winsor, 19 Pick. (Tenn.) 207; Allen v. Lee, 6 Wis. 478; Campbell v. Swasey, 12 Ind. 70; Nye v. Liscombe, 21 Pick. (Tenn.) 263; Standley v. Arnow, 13 Fla. 361; Michels v. Stork, 44 Mich. 2, 5 N. W. 1034.

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upon others, and it is error to render a final judgment pending such a motion.[61] 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.[62] 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.[63] And the record showing that complainants appeared by attorneys, it will be presumed that the attorneys had authority to appear for all the complainants.[64] 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.[65] We shall consider this point in a later section, in connection with the rule against the collateral impeachment of judgments.[66] 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.[67] It is scarcely necessary to add that if the court has not jurisdiction of the subject-matter, that ob-

[61] Klemm v. Dewes, 28 Ill. 317.

[62] Lente v. Clarke, 22 Fla. 515, 1 South. 149. And where a defendant, after the entry of a decree against him in a contested action, files a bill of review, alleging want of jurisdiction over him personally, he thereby submits to the court the question of the binding force of the decree, and its decision thereon is conclusive. Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130.

[63] Martin v. Judd, 60 Ill. 78; Leslie v. Fischer, 62 Ill. 118.

[64] Potter v. Parsons, 14 Iowa, 286.

[65] Brown v. Nichols, 42 N. Y. 26; England v. Garner, 90 N. C. 197.

[66] Infra, § 272.

[67] Infra, vol. 2, § 903.

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jection 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.[68] 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."[69] 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. In many of our states, however, there are statutes authorizing the

[68] Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914; Hovey v. Elliott, 169 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215.

[69] Stuart v. Palmer, 74 N. Y. 190, 30 Am. Rep. 289.

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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.[70] 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.[71] For example, while tax assessments may be enforced

[70] Beard v. Beard, 21 Ind. 321; Douglas v. Forrest, 4 Bing. 686; Becquet v. McCarthy, 2 Barn. & Adol. 951; McRae v. Mattoon, 13 Pick. (Mass.) 53; Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551; Orcutt v. Ranney, 10 Cush. (Mass.) 183; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; 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. Townes, 1 Hill (S. C.) 439; Hunt v. Lyle, 8 Yerg. (Tenn.) 142; Gilman v. Lewis, 24 N. J. Law, 246, note.

[71] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Buchanan v. Rucker, 9 East, 192; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Bischoff v. Weathered, 9 Wall. 812, 19 L. Ed. 829; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Zepp v. Hager, 70 Ill. 223; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Reber v. Wright, 68 Pa. 471; Pagett v. Curtis, 15 La. Ann. 451;

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against the property liable, without regard to the residence of the owner, yet a statute attempting to make a nonresident property owner personally liable for assessments for local improvements is an attempt to take property without due process of law, and a personal judgment against such owner would be void.[72] Again, in a suit to foreclose a mortgage or vendor's lien, where the defendant is a nonresident and is cited by publication only and does not enter an appearance, the court has no jurisdiction to render a personal judgment against him.[73] And where, in an action for the specific performance of a contract for the conveyance of lands, defendant is served only by publication, the plaintiff cannot recover damages for breach of the contract.[74] Nor can a personal judgment for costs be rendered in an action for partition, as against non-residents who were not served with process, except constructively, and who did not voluntarily appear.[75]

But if a non-resident defendant, being within the state, is there personally served with process,[76] or if he appears in the action by a duly authorized attorney,[77] 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 publica-

Park v. Park, 24 Misc. Rep. 372, 53 N. Y. Supp. 677; Belcher v. Sheehan, 171 Mass. 513, 51 N. E. 19; Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; Bradley v. Burnett (Tex. Civ. App.) 40 S. W. 170; Fowler v. Brown, 51 Neb. 414, 71 N. W. 54.

[72] Dewey v. City of Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665.

[73] Ward v. Green (Tex. Civ. App.) 28 S. W. 574; Spence v. Morris (Tex. Civ. App.) 28 S. W. 405.

[74] Tempel v. Dodge, 11 Tex. Civ. App. 42, 31 S. W. 686. See Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

[75] Freeman v. Preston (Tex. Civ. App.) 29 S. W. 495.

[76] Mowry v. Chase, 100 Mass. 79; Downer v. Shaw, 22 N. H. 277; Murphy v. Winter, 18 Ga. 690.

[77] Holt v. Alloway, 2 Blackf. (Ind.) 108; Walker v. Lathrop, 6 Iowa, 516; Davis v. Davis, 96 Ga. 136, 21 S. E. 1002. 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.

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tion, is not available on behalf of a co-defendant who appeared.[78] 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.[79] But the better view appears to be that the defendant may waive this objection.[80]

§ 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." [81] 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 state, and process published within it, are equally unavailing in proceedings to establish his personal liability." [82] 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.[83] In some of the states,

[78] Pattison v. Smith, 93 Ind. 447.

[79] Richardson v. Hunter, 23 La. Ann. 255; Georgia Railroad & Banking Co. v. Harris, 5 Ga. 527.

[80] Leach v. Kohn, 36 Iowa, 144.

[81] Story, Confl. Laws, § 539.

[82] Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. Ed. 565.

[83] Wilson v. Graham, 4 Wash. C. C. 53, Fed. Cas. No. 17,804; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Folger v. Columbian Ins. Co., 99

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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.[84]

§ 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. 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 realty over the property, not the person. The existence of property within a state gives its courts power and authority to adjudicate upon that

Mass. 267, 96 Am. Dec. 747; Price v. Hickok, 39 Vt. 292; Steel v. Smith, 7 Watts & S. (Pa.) 447; Holmes v. Holmes, 4 Lans. (N. Y.) 388; Dunn v. Dunn, 4 Paige (N. Y.) 425; Lutz v. Kelly, 47 Iowa, 307; Irby v. Wilson, 18 N. C. 568; Weil v. Lowenthal, 10 Iowa, 575; Ætna Life Ins. Co. v. Lyon County (C. C.) 95 Fed. 325; In re James' Estate, 78 Hun, 121, 28 N. Y. Supp. 992; Hinton v. Penn Mut. Life Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; Perry v. Bassett, 16 Tex. Civ. App. 288, 41 S. W. 523; Higgins v. Beckwith, 102 Mo. 456, 14 S. W. 931. 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, 38 Mich. 765, 31 Am. Rep. 332. But jurisdiction over one outside the territorial jurisdiction of the court is conferred by his acceptance of "due personal service" of the writ. Jones v. Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.

[84] McBride v. Harn, 52 Iowa, 79, 2 N. W. 962.

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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." [85] 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.[86] 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.[87] 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 judgment for no other purpose than to

[85] Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662; Du Pont v. Abel (C. C.) 81 Fed. 534; McAllister v. Guggenheimer, 91 Va. 317, 21 S. E. 475; Exchange Nat. Bank v. Clement, 109 Ala. 270, 19 South. 814.

[86] Johnson v. Dodge, 19 Iowa, 106; Payne v. Witherspoon, 14 B. Mon. (Ky.) 270; Mickey v. Stratton, 5 Sawy. 475, Fed. Cas. No. 9,530; Packard v. Matthews, 9 Gray (Mass.) 311. See Brown v. Tucker, 7 Colo. 30, 1 Pac. 221. The fact that the court rendered a personal, and therefore void, judgment against a non-resident defendant, not served, will not vitiate so much of the judgment as finds the amount due to the plaintiff and orders the sale of attached property. Barelli v. Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17.

[87] Phelps v. Holker, 1 Dall. (Pa.) 261, 1 L. Ed. 128; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Pennoyer v. Neff, 95 U. S. 725, 24 L. Ed. 565; Pawling v. Willson, 13 Johns. (N. Y.) 192; McDermott v. Clary, 107 Mass. 501; Arndt v. Arndt, 15 Ohio, 33; Woodruff v. Taylor, 20 Vt. 65; McVicker v. Beedy, 31 Me. 314, 1 Am. Rep. 666; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Story, Confl. Laws, § 549. See infra, vol. 2, § 904.

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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." [88] 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.[89] 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.[90] 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.[91] In a case,

[88] Stone v. Myers, 9 Minn. 303 (Gil. 287), 86 Am. Dec. 104.

[89] Easterly v. Goodwin, 35 Conn. 273. Where a judgment is rendered in rem, and the property attached is exhausted, service of a summons to renew the execution, and an order of court granting a renewal, do not make the judgment one in personam. Stanley v. Stanley, 35 S. C. 94, 14 S. E. 675.

[90] Bartlett v. McNeil, 60 N. Y. 53.

[91] Schwinger v. Hickok, 53 N. Y. 280; Heady v. Bexar Bldg. & Loan Ass'n (Tex. Civ. App.) 26 S. W. 468; Ward v. Green (Tex. Civ. App.) 28 S. W. 574. 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

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where, after attachment of property and publication of a citation, the plaintiff filed an amended petition, setting 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.[92] 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.[93] So where the non-resident defendant acknowledges service of the writ and waives the benefit of the statutes respecting absent defendants.[94]

§ 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.[95] That these views are entirely untenable will be at once apparent if we consider the real nature of such a proceeding. It

another action, as plaintiff, against the former plaintiff, as defendant, 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 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

[92] Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295.

[93] Kerr v. Swallow, 33 Ill. 379; Darrah v. Watson, 36 Iowa, 116.

[94] Richardson v. Smith, 11 Allen (Mass.) 134.

[95] Fiske v. Anderson, 33 Barb. (N. Y.) 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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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 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.[96]

§ 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;[97] 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.[98] But this position was successfully controverted in the important and leading case of Pennoyer v. Neff,[99] and the rule established that such a judgment (except in an action for divorce, which is governed by special rules, to be considered hereafter [100]) 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,

[96] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Graham v. Spencer (C. C.) 14 Fed. 603; Eastman v. Wadleigh, 65 Me. 251, 20 Am. Rep. 695; Coleman's Appeal, 75 Pa. 441; Tabler v. Mitchell, 62 Miss. 437; Johnson v. Holley, 27 Mo. 594.

[97] Quarl v. Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

[98] Jarvis v. Barrett, 14 Wis. 591.

[99] 95 U. S. 714, 24 L. Ed. 565.

[100] Infra, vol. 2, §§ 924–933. In an action for maintenance without divorce, against a non-resident husband, who is served by publication and does not appear, a provision of the judgment requiring him to give bond to comply with a condition of the judgment as to alimony is invalid. Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97.

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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 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." [101]

[101] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. And see Mitchell's Adm'r v. Gray, 18 Ind. 123; Smith v. McCutchen, 38 Mo. 415; Remer v. McKay (C. C.) 54 Fed. 432; Southern Bldg. & Loan Ass'n v. Brackett (Tex. Civ. App.) 39 S. W. 619; Evans v. Breneman (Tex. Civ. App.) 46 S. W. 80; McMahon v. Turney, 45 Mo. App. 103; Plummer v. Hatton, 51 Minn. 181, 53 N. W. 460; Willamette Real-Estate Co. v. Hendrix, 28 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

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§ 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.[102] Hence the statutory provisions for acquiring jurisdiction of a defendant by publication of the summons, in the stead of a personal service, must be strictly and exactly pursued.[103] 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." [104] Thus, defendants cannot be summoned by publication unless shown to be non-resi-

[102] Hebel v. Amazon Ins. Co., 33 Mich. 400.

[103] People v. Huber, 20 Cal. 81; Pinkney v. Pinkney, 4 G. Greene (Iowa) 324; Hodges v. Brett, Id. 345; Edrington v. Allsbrooks, 21 Tex. 186; Israel v. Arthur, 7 Colo. 5, 1 Pac. 438; Myer v. Kuhn, 25 U. S. App. 174, 13 C. C. A. 298, 65 Fed. 705; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116. Thus, it is essential that the published notice shall correctly state the parties to the suit and their names. Myer v. Kuhn, supra; City of Detroit v. Detroit City R. Co. (C. C.) 54 Fed. 1; Colton v. Rupert, 60 Mich. 318, 27 N. W. 520; Entrekin v. Chambers, 11 Kan. 368; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44. As to trifling misnomers and minor mistakes which do not necessarily vitiate, see Hirsh v. Weisberger, 44 Mo. App. 506; White v. McClellan, 62 Md. 347; Fanning v. Krapfl, 61 Iowa, 417, 14 N. W. 727; Lane v. Innes, 43 Minn. 137, 45 N. W. 4.

[104] Boswell v. Otis, 9 How. 336, 350, 13 L. Ed. 164.

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dents.[105] 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.[106] So a judgment following a service of summons purporting to be by publication, but which was made without affidavit and order, is void.[107] And so if the affidavit upon which the order for publication issued was substantially defective, there is no jurisdiction of the defendant.[108] 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.[109] 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.[110] 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.[111]

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 juris-

[105] Johnson v. Patterson, 12 Ind. 471.

[106] Chickering v. Failes, 26 Ill. 507.

[107] People v. Mullan, 65 Cal. 396, 4 Pac. 348.

[108] Braly v. Seaman, 30 Cal. 610.

[109] Hodson v. Tibbetts, 16 Iowa, 97.

[110] Tunis v. Withrow, 10 Iowa, 305, 77 Am. Dec. 117; Byram v. McDowell, 15 Lea (Tenn.) 581. Parol evidence tending to show defendant's knowledge of the suit will not validate a judgment which must rest on proof of a strict compliance with the statute in regard to service by publication. Roberts v. Roberts, 3 Colo. App. 6, 31 Pac. 941.

[111] Pomeroy v. Betts, 31 Mo. 419.

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diction, 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." [112]

§ 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.[113] 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.[114] 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.[115] So where there are several defendants, and part are served in time

[112] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

[113] Edwards v. Carter, 1 Strange, 473.

[114] Wilbur v. Abbot, 60 N. H. 40; Odom v. Denny, 16 Gray (Mass.) 114; McDoel v. Cook, 2 N. Y. 110; Jones v. Reed, 1 Johns. Cas. (N. Y.) 20; Boaz v. Heister, 6 Serg. & R. (Pa.) 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, Id. 140; Johnson v. Vaughan, 9 B. Mon. (Ky.) 217; Hickey v. Smith, 6 Ark. 456; Dunn v. Hall, 8 Blackf. (Ind.) 32; 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. 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' Lessee v. Massie, 16 Ohio, 271, 47 Am. Dec. 375. And see Forbes v. Bringe, 32 Neb. 757, 49 N. W. 720; Ward v. Stanley, 41 Ill. App. 417; Blyth & Fargo Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027; Boyd v. Ellis, 107 Mo. 394, 18 S. W. 29.

[115] Rogers v. Harrison, 44 Tex. 169.

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and others are not, judgment cannot be entered against any at the return term, but the case must be continued.[116]

§ 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 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.[117] 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.[118] But this statute must be strictly followed; the

[116] Evans v. Gill, 25 Ill. 116.

[117] Supra, § 211.

[118] Code N. Y. § 136; Code Civ. Proc. Cal. § 413; Code S. C. § 157; Laws Ill. 1895 (Act June 4th) § 5; Rev. St. Wis. § 2884. On the construction and application of these statutes, see Roberts v. Pawley, 50 S. C. 491, 27 S. E. 913;

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judgment must be in form against both; and a judgment against the one served alone is erroneous in substance.[119] 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.[120] 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.[121] Further, 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.[122]

§ 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.[123] In Vermont, in a case where pro-

Neal v. Pennington, 65 Ill. App. 68; Brawley v. Mitchell, 92 Wis. 671, 66 N. W. 799. A statute of Minnesota (Gen. St. 1894, § 5436) provides that, when a judgment is rendered against one of several persons jointly indebted, those who are not originally summoned to answer the complaint may be summoned to show why they should not be bound by the judgment; but the clerk cannot enter judgment against parties so sought to be held on default, or without express authority from the court. Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579.

[119] Nelson v. Bostwick, 5 Hill (N. Y.) 37, 40 Am. Dec. 310; Stehr v. Ollbermann, 49 N. J. Law, 633, 10 Atl. 547.

[120] Kelly v. Van Austin, 17 Cal. 564.

[121] Fleming v. Freese, 26 N. J. Law, 263.

[122] Harker v. Brink, 24 N. J. Law, 333.

[123] Ingraham v. Gildemeester, 2 Cal. 88; Hirschfield v. Franklin, 6 Cal. 607; Kelly v. Bandini, 50 Cal. 530; Simpson v. Prather, 5 Or. 86; Loney v. Bailey,

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cess was sued against two persons, who were declared against as joint promisors, 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.[124]

§ 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 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.[125] 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.[126] 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

43 Md. 10; Hunt v. Anderson, 33 Miss. 559; Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660; Moore v. Estes, 79 Ky. 282; Caldwell v. Harp, 2 McCord (S. C.) 275; Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 373; Norfolk & W. R. Co. v. Shippers' Compress Co., 83 Va. 272, 2 S. E. 139; Fender v. Styles, 31 Ill. 460; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Bennett v. Townsend, 1 Neb. 460; Cunningham v. Dixon, 1 Marv. (Del.) 163, 41 Atl. 519; Waidner v. Pauly, 141 Ill. 442, 30 N. E. 1025; Green v. Shaw, 66 Ill. App. 74; Bacon v. Green, 36 Fla. 325, 18 South. 870; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Dillard v. Turner's Adm'r, 87 Va. 669, 14 S. E. 123.

[124] Hodges v. Eastman, 12 Vt. 358.

[125] Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Ingraham v. Gildemeester, 2 Cal. 88; Schloss v. White, 16 Cal. 68; Inos v. Winspear, 18 Cal. 397; St. John v. Holmes, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; Mitchell v. Greenwald, 43 Miss. 167; Dresser v. Wood, 15 Kan. 344; Harford v. Street, 46 Iowa, 594; Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673; Faver v. Briggs, 18 Ala. 478; Anderson v. Arnette, 27 La. Ann. 237; Gaiennie v. Akin's Ex'r, 17 La. 42, 36 Am. Dec. 604; Dessauer v. Koppin, 3 Colo. App. 115, 32 Pac. 182.

[126] Smith v. Tupper, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483.

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enforced against the partnership property and the individual property of the partners served.[127] But such a judgment will have no extra-territorial validity against any partner who was not served and did not appear,[128] 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.[129]

§ 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.[130] 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.[131]

[127] 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.

[128] Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Scott v. Bogart, 14 La. Ann. 261.

[129] Davidson v. Knox, 67 Cal. 143, 7 Pac. 413.

[130] Mosher v. Small, 5 Pa. 221; Heaton v. Collins, 7 Blackf. (Ind.) 414; Hall v. Law, 2 Watts & S. (Pa.) 121. But a judgment entered against one who has not been served, on an appearance by an unauthorized attorney, which has not been ratified or confirmed, is absolutely void as against such defendant. First Nat. Bank v. Wm. B. Grimes Dry Goods Co., 45 Kan. 510, 26 Pac. 56.

[131] Kimmel v. Kimmel, 5 Serg. & R. (Pa.) 294.

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§ 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.[182] 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.[183]

§ 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 matter not within its jurisdiction is null and void, incapable of ratification, and subject to collateral impeachment.[184] 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, juris-

[182] Morgan v. Morgan, 2 Bibb (Ky.) 388; Clark v. Finnell, 16 B. Mon. (Ky.) 329; Boyd v. Baynham, 5 Humph. (Tenn.) 386, 42 Am. Dec. 438; Winchester v. Beardin, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; Neal v. Singleton, 26 Ark. 491. Per contra, Langley v. Grill, 1 Colo. 71.

[183] Savage v. Walshe, 26 Ala. 619; Bergen v. Bolton, 10 Mo. 658.

[184] Smith v. Knowlton, 11 N. H. 191; Morse v. Presby, 25 N. H. 299; Eaton v. Badger, 33 N. H. 228; Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414; Lyles v. Bolles, 8 S. C. 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. Where a complaint alleges two causes of action, the fact that the court had jurisdiction of one of them will not support a judgment upon both, where it had no jurisdiction of the other. Chicago & S. E. Ry. Co. v. Spencer, 23 Ind. App. 605, 55 N. E. 882. Compare Stovall v. Hibbs (Ky.) 32 S. W. 1087.

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diction 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."[135] 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."[136] 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, 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

[135] Bumstead v. Read, 31 Barb. (N. Y.) 669.

[136] Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931.

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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.[137] 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.[138]

§ 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 favor, it is an undoubted case of jurisdiction." [139] 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

[137] Where the plaintiff's demand exceeds the jurisdiction of the inferior court in which his suit is brought, it should dismiss the cause and transfer it to a court of competent jurisdiction; no other judgment or order can validly be made. Dazey v. Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312. But the fact that a justice of the peace erroneously allows interest, which makes the total amount exceed his jurisdiction, does not deprive him of original jurisdiction, so as to render the judgment void. McCormick Harvesting Mach. Co. v. Marchant, 11 Utah, 68, 39 Pac. 483. In Jones v. Jones, 14 N. C. 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. (Pa.) 213. But it is difficult to see how a nullity can be made the basis of an action.

[138] Supra, § 216.

[139] United States v. Arredondo, 6 Pet. 709, 8 L. Ed. 547.

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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.[140]

§ 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. 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

[140] Dunlap v. Southerlin, 63 Tex. 38. And see Humphries v. Bartee, 18 Miss. 282.

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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." [141]

On this principle, where a widow brought suit for the sole purpose of having dower assigned her in her deceased husband's lands, the 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,

[141] Munday v. Vail, 34 N. J. Law, 418. To the same effect see Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305; Husted v. Van Ness, 158 N. Y. 104, 52 N. E. 645; Burns & Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; Wright v. Durrett (Tenn. Ch. App.) 52 S. W. 710; Maddox v. Summerlin, 92 Tex. 483, 50 S. W. 567; Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747; Carter v. Gibson, 47 Neb. 655, 66 N. W. 631; Barnes v. Chicago, M. & St. P. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128.

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it was held that, the court having exceeded its jurisdiction, the decree of sale was void and open to collateral impeachment.[142] Again, where the issues in a suit in chancery are so framed as to present a controversy between the complainant on the one side and the defendants on the other, the court should not go beyond the pleadings and decree relief as between the co-defendants; and though the language of the decree may be broad enough to embrace the decision of questions disputed by the defendants inter sese, yet it will be construed in the light of the pleadings, and restricted to the issues raised thereby.[143] So again, in an action to foreclose a mortgage on premises described in the complaint, a decree directing the sale of lands not mentioned in the pleadings is void, though the owner of such other lands was made a party.[144] And in an action between a mortgagor and certain mortgagees of chattels, the court has no power to declare void a mortgage not attacked by the pleadings, and of which the holder was not a party to the action.[145] A judgment foreclosing a trust deed on church property cannot be entered in a suit between different factions of the church for the possession of the property, where neither party sought a foreclosure or sale of the property.[146] Again, upon a motion to discharge an attachment, the court has no power, besides allowing such discharge, to order the undertaking to be cancelled, that question not being submitted.[147] And where a ground of liability not suggested by the pleadings is submitted to the jury, and they render a general verdict for the plaintiff, the judgment thereon cannot be sustained unless the other ground of liability is so clearly established that a verdict might have been directed.[148]

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

142 Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262.
143 Graham v. La Crosse & M. R. Co., 3 Wall. 704, 18 L. Ed. 247.
144 Clapp v. McCabe, 84 Hun, 379, 32 N. Y. Supp. 425.
145 Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236.
146 First Baptist Church v. Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617.
147 Wyman v. Hallock, 4 S. D. 469, 57 N. W. 197.
148 Springer v. Westcott, 87 Hun, 190, 33 N. Y. Supp. 805.

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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.[149]

§ 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.[150] 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 judgment if one is rendered, is erroneous, if not absolutely void.[151] 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.[152]

[149] Wood v. Stanberry, 21 Ohio St. 142; Fithian v. Monks, 43 Mo. 502; Boswell v. Dickerson, 4 McLean, 262, Fed. Cas. No. 1,683.

[150] Boynton v. Foster, 7 Metc. (Mass.) 415. See Lininger v. Glenn, 33 Neb. 204, 49 N. W. 1128.

[151] Black, Dill. Rem. Causes, § 192; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. 478.

[152] See supra, §§ 179, 180. In Wisconsin, the failure of a justice to enter

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§ 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.[153]

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. 609.

[153] Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; Ex parte Kellogg, 6 Vt. 509; Moore v. Robison, 6 Ohio St. 302; Buckmaster v. Carlin, 3 Scam. (Ill.) 104; Georgia R. & Banking Co. v. Pendleton, 87 Ga. 751, 13 S. E. 822.

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CHAPTER XIII.

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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 doctrine of this court, and of all the courts of this

[1] Elliott v. Piersol, 1 Pet. 340, 7 L. Ed. 164; Gray v. Brignardello, 1 Wall. 627, 17 L. Ed. 692; Secrist v. Green, 3 Wall. 744, 18 L. Ed. 153; Gunn v. Plant, 94 U. S. 664, 24 L. Ed. 304; Bank of United States v. Voorhees, 1 McLean, 221, Fed. Cas. No. 939; Dunham v. Jones, 159 U. S. 584, 16 Sup. Ct. 108, 40 L. Ed. 267; Woodman v. Smith, 37 Me. 21; Gorrill v. Whittier, 3 N. H. 265; Porter v. Gile, 47 Vt. 620; Corey v. Morrill, 71 Vt. 51, 42 Atl. 976; Hendrick v. Whittemore, 105 Mass. 23; Smith v. Shaw, 12 Johns. (N. Y.) 256; People v. Downing, 4 Sandf. (N. Y.) 189; Kean v. McKinsey, 2 Pa. 30; Billings v. Russell, 23 Pa. 189, 62 Am. Dec. 330; Yaple v. Titus, 41 Pa. 195, 80 Am. Dec. 604; Wood v. Bayard, 63 Pa. 320; Fridge v. State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; McNeel's Ex'rs v. Auldridge, 34 W. Va. 748, 12 S. E. 851; Lancaster v. Wilson, 27 Grat. (Va.) 624; Howison v.

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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 useless and nugatory; purchasers on the faith of judicial process would find no protection; every right

Weeden, 77 Va. 704; Fox v. Cottage Building Ass'n, 81 Va. 677; Skinner v. Moore, 19 N. C. 138, 30 Am. Dec. 155; Morris v. Gentry, 89 N. C. 248; Reese v. Meetze, 51 S. C. 333, 29 S. E. 73; Bridges v. Nicholson, 20 Ga. 90; Vickery v. Scott, 20 Ga. 798; Archer v. Guill, 67 Ga. 195; Moore v. Ware, 51 Miss. 206; Factors' & Traders' Ins. Co. v. De Blanc, 31 La. Ann. 100; Kent v. Brown, 38 La. Ann. 802; Lee v. Patten, 34 Fla. 149, 15 South. 775; Brown v. Hearon, 66 Tex. 63, 17 S. W. 395; Brooks v. Powell (Tex. Civ. App.) 29 S. W. 809; 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. (Tenn.) 313, 42 Am. Dec. 431; Hall v. Heffley, 6 Humph. (Tenn.) 444; Lewis v. Simonton, 8 Humph. (Tenn.) 185; Bigelow v. Bigelow, 4 Ohio, 138, 19 Am. Dec. 591; Cochran v. Loring, 17 Ohio, 409; Newnam v. City of Cincinnati, 18 Ohio, 323; Sauer v. Twining, 81 Ind. 366; Keesling v. Doyle, 8 Ind. App. 43, 35 N. E. 126; First Nat. Bank v. Hanna, 12 Ind. App. 240, 39 N. E. 1054; Cody v. Hough, 20 Ill. 43; Kern v. Strausberger, 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; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497.

[2] McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545, Miller, J.

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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 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. This 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 of divorce rendered by courts of competent jurisdiction; [8] to an order of naturalization; [9] to decrees rendered by a court of equity, when sought to be assailed in the same or another court; [10] to a judgment in attachment; [11] to orders and

[3] Lancaster v. Wilson, 27 Grat. (Va.) 624, 629.

[4] Hendrick v. Whittemore, 105 Mass. 23.

[5] See supra, § 170; infra, § 278.

[6] Otis v. The Rio Grande, 1 Woods, 279, Fed. Cas. No. 10,613; Shearer v. City Nat. Bank, 115 Ala. 352, 22 South. 151.

[7] Bragg v. Lorio, 1 Woods, 209, Fed. Cas. No. 1,800.

[8] In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

[9] State v. Brandhorst, 156 Mo. 457, 56 S. W. 1094, 79 Am. St. Rep. 538.

[10] Bryan v. Kennett, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; Estep

[11] Harrison v. Pender, 44 N. C. 78, 57 Am. Dec. 573; Needham v. Wilson (C. C.) 47 Fed. 97.

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judgments in eminent domain proceedings;[12] to judgments of foreclosure;[13] to orders of courts calling special elections, under statutory authority for that purpose;[14] to a decree confirming an auditor's report on the distribution of the estate of an assignor for the benefit of creditors;[15] to a judgment forfeiting a recognizance, that being within the competence of the court;[16] to an order allowing a certain sum to the clerk for costs in insolvent criminal cases;[17] to an order of court approving the act of an administrator in allowing a claim against the estate;[18] to an order granting an allowance for the support of the widow and children;[19] to a decree authorizing the receiver of an insolvent corporation to levy an assessment on the stockholders to pay the debts;[20] to an order setting aside a judgment by default;[21] and to a decree vacating a former decree upon a petition to be let in to a defense.[22] Moreover, the rule against collateral impeachment applies not only to judgments in contested actions, but also to judgments by default, provided the court had jurisdiction,[23] and to judgments dismissing the action,[24] as also to judgments by confession,[25] and compromise and consent

v. Watkins, 1 Bland (Md.) 486; Covington v. Ingram, 64 N. C. 123; Lemmon v. Herbert, 92 Va. 653, 24 S. E. 249; Gomez v. Gomez, 81 Hun, 566, 31 N. Y. Supp. 206; Sauer v. Cincinnati St. Ry. Co., 5 Ohio N. P. 108.

[12] Farrington v. City of New York, 83 Hun, 124, 31 N. Y. Supp. 371; Lovitt v. Russell, 138 Mo. 474, 40 S. W. 123; Hopkins v. Cravey, 85 Tex. 189, 19 S. W. 1067.

[13] Toothaker v. Greer, 92 Me. 546, 43 Atl. 498; Kopp v. Blessing, 121 Mo. 391, 25 S. W. 757; Martina v. Muhlke, 88 Ill. App. 12.

[14] Jones v. Cullen, 142 Ind. 335, 40 N. E. 124; State v. Mackin, 51 Mo. App. 289.

[15] Com. v. Steacy, 100 Pa. 613.

[16] Rubush v. State, 112 Ind. 107, 13 N. E. 877.

[17] Duer v. Thweatt, 39 Ga. 578. See State v. Board of Com'rs of Lander County, 22 Nev. 71, 35 Pac. 300.

[18] Pitner v. Flanagan, 17 Tex. 7.

[19] Leaverton v. Leaverton, 40 Tex. 218.

[20] Eichman v. Hersker, 170 Pa. 402, 33 Atl. 229.

[21] Bender v. Askew, 14 N. C. 150, 22 Am. Dec. 714.

[22] Southern Bank v. Humphreys, 47 Ill. 227.

[23] Pendexter v. Cole, 66 N. H. 270, 20 Atl. 331.

[24] Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Haug v. Great Northern Ry. Co., 42 C. C. A. 167, 102 Fed. 74.

[25] F. Mayer Boot & Shoe Co. v. Falk, 89 Wis. 216, 61 N. W. 562; United

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judgments.[26] Also it is said that if an execution sale is merely voidable, none but parties to the proceeding can question it, and then only in the same action or by appeal or writ of error.[27]

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 a part of the court's record, cannot be impeached collaterally.[28] 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.[29]

§ 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." [30] And it is no reason for departing

States Electric Lighting Co. v. Leiter, 19 D. C. 575; Atwater v. American Exch. Nat. Bank, 152 Ill. 605, 38 N. E. 1017; Perisho v. Perisho, 71 Ill. App. 222; Chase v. Tuckwood, 86 Ill. App. 70; City of Helena v. United States, 43 C. C. A. 429, 104 Fed. 113; Wright v. Wright (C. C.) 103 Fed. 580.

[26] Biddle v. Pierce, 13 Ind. App. 239, 41 N. E. 475.

[27] Magnusson v. Cronholm, 51 Ill. App. 473.

[28] Ferguson v. Kumler, 25 Minn. 183.

[29] Walker v. Armour, 22 Ill. 658.

[30] Driggers v. Cassady, 71 Ala. 529; United States Trust Co. v. Mercantile Trust Co., 31 C. C. A. 427, 88 Fed. 140; Newman v. City of Chicago, 153 Ill. 469, 38 N. E. 1053; People v. Weber, 164 Ill. 412, 45 N. E. 723; Young v. Lorain, 11 Ill. 637, 52 Am. Dec. 463; Job v. Tebbetts, 5 Gilman (Ill.) 376; Chesnut v. Marsh, 12 Ill. 173; Reinhardt v. Neallis, 101 Tenn. 169, 46 S. W. 446; McCarter v. Neil, 50 Ark. 188, 6 S. W. 731; Burcham v. Terry, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; Scott v. Pleasants, 21

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from this rule that the property owner was a non-resident, if the court had jurisdiction of the subject-matter and the usual constructive notice to the owner was given.[31] Nor can the judgment 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.[32] 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 land had been in fact paid before the suit,[33] or that no assessment was made for the year in question,[34] although delinquency is the very fact upon which the jurisdiction of the court must be based. And it is not even permitted to show, in any collateral proceeding, that the assessment on which the taxes were based was illegal and void, or that the statute or ordinance authorizing the assessment was unconstitutional or invalid.[35] In Illinois, it was at one time the settled rule that a judgment by default, in a proceeding under the statutes of that state for the condemnation and sale of land for taxes, was not conclusive upon the tax payer, and might be collaterally impeached.[36] But this rule has been very much narrowed by an amendment to the revenue law providing that the tax judgment shall estop all parties from raising objections which existed at or before the rendition of the judgment and could have been presented in defense thereto, and

Ark. 364; Duncan v. Lankford, 145 Ind. 145, 44 N. E. 12; Gibbs v. Southern, 116 Mo. 204, 22 S. W. 713; Wellshear v. Kelley, 69 Mo. 343; Hennessy v. City of St. Paul, 54 Minn. 219, 55 N. W. 1123; Eitel v. Foote, 39 Cal. 439; Branson v. Caruthers, 49 Cal. 375; Mayo v. Foley, 40 Cal. 281; Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Cadmus v. Jackson, 52 Pa. 295; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407; Black, Tax Titles (2d Ed.) § 177.

31 Neely v. Buchanan (Tenn. Ch.) 54 S. W. 995; Charley v. Kelley, 120 Mo. 134, 25 S. W. 571; Clark v. Kern, 146 Ill. 348, 35 N. E. 60.

32 Chesnut v. Marsh, 12 Ill. 173.

33 Chauncey v. Wass, 35 Minn. 1, 30 N. W. 826; Cadmus v. Jackson, 52 Pa. 295; Black, Tax Titles (2d Ed.) § 169.

34 Gibbs v. Southern, 116 Mo. 204, 22 S. W. 713.

35 Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; Mayo v. Foley, 40 Cal. 281; People v. Lingle, 165 Ill. 65, 46 N. E. 10. And see Higgins v. Bordages (Tex. Civ. App.) 28 S. W. 350.

36 Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449.

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making the judgment conclusive evidence of its own regularity and validity in all collateral proceedings, except where the tax had been paid or the land was not liable for it.[37]

§ 248. Adjudications in Bankruptcy.

An adjudication of bankruptcy, made by a court having jurisdiction of the subject-matter and of the person of the defendant, is conclusive of the fact decreed, and cannot be attacked collaterally, for any error or irregularity, in controversies between the trustee in bankruptcy and persons claiming an adverse interest in the property of the bankrupt, or otherwise.[38] On the same principle, a discharge in bankruptcy remains valid and binding until set aside or annulled in a suit brought for that purpose in the court where it was granted; it cannot be impeached collaterally for fraud, irregularity, or want of notice in the proceedings in which it was obtained.[39] A state court, for example, can neither annul nor disregard a dis-

[37] Drake v. Ogden, 128 Ill. 603, 21 N. E. 511; Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Black, Tax Titles (2d Ed.) § 177.

[38] Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832; Graham v. Boston, H. & E. R. Co. (C. C.) 14 Fed. 753; In re Columbia Real Estate Co. (D. C.) 101 Fed. 965; Hobson v. Markson, 1 Dill. 421, Fed. Cas. No. 6,555; In re Getchell, 8 Ben. 256, Fed. Cas. No. 5,371; In re Ives, 5 Dill. 146, Fed. Cas. No. 7,115; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726. As to questioning the jurisdiction of the court, the foregoing cases show that this cannot be done, if the objection to the jurisdiction concerns the character or number of creditors joining in the petition, the sufficient allegation of an act of bankruptcy, or the amount of debts owed by the bankrupt. But there are authorities to the effect that a total want of jurisdiction over the person of the bankrupt may be shown, even collaterally. In re Goodfellow, 1 Low. 510, Fed. Cas. No. 5,536; Fellows v. Hall, 3 McLean, 487, Fed. Cas. No. 4723; Stuart v. Aumiller, 37 Iowa, 102, 8 N. B. R. 541.

[39] United States v. Griswold (C. C.) 7 Sawy. 311, 8 Fed. 556. The prescribed notice to creditors is so far essential to the jurisdiction of the court to grant a discharge in bankruptcy that the want of it will be ground for setting the discharge aside in a direct proceeding for that purpose; though, in any collateral proceeding, the certificate of discharge is itself conclusive evidence of jurisdiction to grant it. Allen v. Thompson (D. C.) 10 Fed. 116.

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charge duly granted by a court of bankruptcy having jurisdiction, nor allow it to be impeached in any collateral proceeding for any cause which would authorize the bankruptcy court to revoke or set it aside; it can be impeached only in a direct proceeding for that purpose in the bankruptcy court itself.[40]

§ 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.[41] 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." [42]

[40] Corey v. Ripley, 57 Me. 69, 2 Am. Rep. 19; Stetson v. City of Bangor, 56 Me. 286; Parker v. Atwood, 52 N. H. 181; Fuller v. Pease, 144 Mass. 390, 11 N. E. 694; Way v. Howe, 108 Mass. 502, 11 Am. Rep. 386; Sheets v. Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Talbott v. Suit, 68 Md. 443, 13 Atl. 356; Brady v. Brady, 71 Ga. 71; Oates v. Parish, 47 Ala. 157; Milhous v. Alcardi, 51 Ala. 594; Stevens v. Brown, 49 Miss. 597; Alston v. Robinett, 37 Tex. 56; Brown v. Causey, 56 Tex. 340; Ewell v. Pitman (Ky.) 27 S. W. 870; Morris v. Creed, 11 Heisk. (Tenn.) 155; Hennessee v. Mills, 1 Baxt. (Tenn.) 38; Thurmond v. Andrews, 10 Bush (Ky.) 400; Smith v. Ramsey, 27 Ohio St. 339; Howland v. Carson, 28 Ohio St. 625; Wiley v. Pavey, 61 Ind. 457, 28 Am. Rep. 677; Brown v. Covenant Mut. Life Ins. Co., 86 Mo. 51; Thornton v. Hogan, 63 Mo. 143; Seymour v. Street, 5 Neb. 85; Thomas v. Jones, 39 Wis. 124.

[41] Morse v. Bishop, 55 Vt. 231.

[42] Jocelyn v. Donnel, Peck (Tenn.) 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.[43] 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.[44] 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.[45] In fact, the orders and judgments of probate courts concerning matters over which they have

[43] Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34; Grusenmeyer v. City of Logansport, 76 Ind. 549; Bell v. Raymond, 18 Conn. 100; Long v. Burnett, 13 Iowa, 28, 81 Am. Dec. 40; Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208; Bernal v. Lynch, 36 Cal. 135; Thompson v. Multnomah Co., 2 Or. 34; Shoemaker v. Brown, 10 Kan. 383.

[44] Tarbox v. Hays, 6 Watts (Pa.) 398, 31 Am. Dec. 478; Billings v. Russell, 23 Pa. 189, 62 Am. Dec. 330; McDonald v. Simcox, 98 Pa. 619; Cumberland Co. v. Boyd, 113 Pa. 52, 4 Atl. 346; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Wesson v. Chamberlain, 3 N. Y. 331; Lightsey v. Harris, 20 Ala. 409; Reid v. Spoon, 66 N. C. 415; Allen v. Mills, 26 Mich. 123; Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 103 Fed. 391; Livingston v. Allen, 83 Mo. App. 294. Compare Jones v. Pharis, 59 Mo. App. 254.

[45] Welty v. Ruffner, 9 Pa. 224; Gilmore v. Rodgers, 41 Pa. 120; Leedom v. Lombaert, 80 Pa. 381; City of 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, 51 Ark. 338, 11 S. W. 477; Barney v. Chittenden, 2 G. 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. (N. Y.) 259.

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jurisdiction are no more open to collateral attack than are the orders and judgment of other courts of general jurisdiction; they must have accorded to them the same intendments and favorable presumptions which attend the judgments of courts of general common-law jurisdiction.[46] This rule applies to an order admitting a will to probate;[47] to orders appointing or removing executors, administrators, or guardians;[48] to orders allowing claims against the estate of a decedent;[49] to orders authorizing the sale of land to pay debts of the estate, or confirming sales made by the executor;[50] and to decrees of partition made by a probate court having jurisdiction.[51]

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 and not impeachable collaterally, although irregularities or errors are alleged to have occurred in its

[46] Bensen v. Manhattan Ry. Co., 164 N. Y. 559, 58 N. E. 1085; Murzynowski v. Delaware, L. & W. R. Co., 15 N. Y. Supp. 841; Macey v. Stark, 116 Mo. 481, 21 S. W. 1088; Sherwood v. Baker, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 360; Gallup v. Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353.

[47] In re Warfield's Will, 22 Cal. 51, 83 Am. Dec. 49; Bolton v. Schriever, 135 N. Y. 65, 31 N. E. 1001, 18 L. R. A. 242; Varner v. Johnston, 112 N. C. 570, 17 S. E. 483; Belton v. Summer, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; Calloway v. Cooley, 50 Kan. 743, 32 Pac. 372; Halbert v. De Bode (Tex. Civ. App.) 28 S. W. 58.

[48] Steen v. Bennett, 24 Vt. 303; Loyd v. Waller, 20 C. C. A. 548, 74 Fed. 601; Winter v. London, 99 Ala. 263, 12 South. 438; Gillespie v. Hauenstein, 72 Miss. 838, 17 South. 602.

[49] Yeatman v. Yeatman, 35 Neb. 422, 53 N. W. 385; Shelton v. Hadlock, 62 Conn. 143, 25 Atl. 483; Munday v. Leeper, 120 Mo. 417, 25 S. W. 381; Murphy v. De France, 105 Mo. 53, 16 S. W. 861.

[50] Williams v. Sharp, 2 Ind. 101; Sturdy v. Jacoway, 19 Ark. 499; Tyson v. Belcher, 102 N. C. 112, 9 S. E. 634; Brown v. Lanman, 1 Conn. 467; Lebroke v. Damon, 89 Me. 113, 35 Atl. 1028; Watkins v. Lewis, 153 Ind. 648, 55 N. E. 83; Cobb v. Garner, 105 Ala. 467, 17 South. 47, 53 Am. St. Rep. 136; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325.

[51] Snevily v. Wagner, 8 Pa. 396; Fowler v. Succession of Gordon, 24 La. Ann. 270.

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proceedings.[52] So, where a board of land commissioners has once acquired jurisdiction of a matter, its subsequent proceedings therein cannot be collaterally questioned.[53] The same rule applies to the proceedings of a board of county officers exercising their statutory authority in proceedings for the laying out of a public highway or the location of a private way.[54] Again, as a state board of equalization acts judicially in determining what property is to be assessed for taxation, and in fixing the amount of the assessment, its judgment therein cannot be collaterally impeached.[55]

§ 251. Co-Ordinate Courts.

A judgment at law cannot be impeached collaterally in equity.[56] And conversely, the validity of a decree rendered by a court of equity cannot be impeached in a collateral action at law.[57] 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 federal court.[58] The courts of the United States cannot law-

[52] Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213; Keyes v. United States, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954; Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Swaim v. United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; United States v. Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

[53] Bernal v. Lynch, 36 Cal. 135.

[54] San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78; Helms v. Bell, 155 Ind. 502, 58 N. E. 707; Thomas v. Churchill, 84 Me. 446, 24 Atl. 899.

[55] McLeod v. Receveur, 18 C. C. A. 188, 71 Fed. 455.

[56] Redwine v. Brown, 10 Ga. 311.

[57] Watson v. Williams, 43 N. C. 232; Alexander v. Nelson, 42 Ala. 462.

[58] Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 Sup. Ct. 614, 27 L. Ed. 636; Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. 575, 32 L. Ed. 985; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; Lytle v. Town of Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78. Federal courts can determine whether or not a state court had jurisdiction of the parties to or subject-matter of a cause in which it has rendered judgment, and for this purpose they may look beyond the record and hear other evidence; but it cannot be shown by parol or extrinsic evidence that the subject-matter in the record was not that which was adjudicated. Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429. A decree of a state court can be collaterally attacked in a federal court only when it is entirely void, either for want of legal organization of the court, or want of jurisdiction over the par-

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fully 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.[59] 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.[60]

§ 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.[61] If an appeal is taken from a judgment, or a writ of error,[62] or if a motion is made to va-

ties or the subject-matter. But the fact that such decree is void on its face, because uncertain and incomplete, does not render it subject to collateral attack; the remedy must be sought in the court which rendered it, by proceedings for its vacation, or by appeal. Wood v. City of Mobile (C. C.) 99 Fed. 615.

[59] Kittredge v. Emerson, 15 N. H. 227.

[60] Kent v. Lake Superior Ship Canal Ry. & Iron Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; Anderson v. Elliott, 41 C. C. A. 521, 101 Fed. 609; Town of Ontario v. First Nat. Bank, 59 Hun, 29, 12 N. Y. Supp. 434; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Mead v. Weaver, 42 Neb. 149, 60 N. W. 385.

[61] Nichols v. Wimmer (Tex. Sup.) 19 Reporter, 475.

[62] An appeal or writ of error by infants after attaining their majority, to reverse a judgment irregularly rendered against them, is a direct attack on the judgment, not collateral. Moore v. Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113; Warren v. Union Bank of Rochester, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777. So of an appeal from a judgment by a third person, legally entitled to appeal because aggrieved by the judgment. Succession of Fortier, 51 La. Ann. 1562, 26 South. 554.

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cate or set it aside on account of some alleged irregularity,[63] 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.[64] So in the distribution of a fund, the court cannot inquire into the validity of a judgment regular on its face, or into the consideration on which it was founded.[65] Again, in an action of trespass to try title, any attack upon a judgment which forms the basis of the title of one of the parties, or enters into his title, will be considered a collateral impeachment of such judgment.[66] And in a suit on an appeal bond,

[63] An action or motion to vacate a judgment for want of service of process on the defendant is not a collateral attack, but direct. Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52. The same is true of a bill to set a judgment aside on the ground that it was procured by fraud. Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 43 Am. St. Rep. 334. Or because it was rendered against a minor plaintiff who was not represented by a guardian. Stephens v. Hewett, 22 Tex. Civ. App. 304, 54 S. W. 301.

[64] Rogers v. Rogers, 15 B. Mon. (Ky.) 364; Pearse v. Hill, 163 Mass. 493, 40 N. E. 765. Nor in an action on a promissory note given in satisfaction of the judgment. Mitchell v. State Bank, 1 Scam. (Ill.) 526. A proceeding to revive a judgment is collateral, and cannot be made the means of impeaching the original judgment for error. Foster v. Crawford (C. C.) 80 Fed. 991. And the same is true of a suit in equity to enforce the lien of a judgment against real estate of the debtor. First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; Baldwin v. Baer, 10 Wash. 414, 39 Pac. 117. Unless a judgment is void on its face, it cannot be collaterally attacked in proceedings after execution on exemplification filed in another county. Toomey v. Rosansky, 11 Pa. Super. Ct. 506. Nor can the correctness of a decree giving a party a lien on property be inquired into on a motion to vacate a sale made in conformity with such decree. Dryden v. Parrotte, 61 Neb. 339, 85 N. W. 287.

[65] Second Nat. Bank's Appeal, 85 Pa. 528; Safe-Deposit & Trust Co. v. Wright, 44 C. C. A. 421, 105 Fed. 155.

[66] Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325; Bouldin v. Miller (Tex. Civ. App.) 26 S. W. 133. Compare Fayssoux v. Kendall County (Tex. Civ. App.) 55 S. W. 583; Graham v. East Texas Land & Imp. Co. (Tex. Civ. App.) 50 S. W. 579; Scanlan v.

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the validity of the judgment appealed from and affirmed cannot be drawn in question.[67] 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.[68] Nor can a judgment be attacked in a proceeding to punish defendant for contempt in disobeying it,[69] nor when it is offered in evidence collaterally in another suit,[70] nor when an action is brought to recover land sold under an execution on the judgment.[71] Similarly, where a receiver of an insolvent sues to recover assets of his estate, defendant cannot assail the validity of the judgment under which the receiver was appointed.[72] And in an action by a guardian on the bond of a former guardian who had been removed, an objection by defendants that the court had no jurisdiction to remove such former guardian, and appoint the plaintiff, cannot be sustained, being a collateral attack on the judgment.[73] So where a sheriff is sued for failure to return an execution, he cannot impeach the judgment on which the writ issued.[74]

On the other hand, a complaint alleging that a judgment is absolutely void on its face, and yet is apparently a lien on plaintiff's land, and asking a decree annulling and avoiding such judgment, is not a collateral attack upon it.[75] And it has been held that no improper 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,

Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501. A cross bill attacking the validity of a decree of a probate court in ordering sale of land of an insolvent decedent to pay debts, in a suit to quiet title to the land, is a collateral attack. Friedman v. Shamblin, 117 Ala. 454, 23 South. 821.

[67] Sturgis v. Rogers, 26 Ind. 1; Bostic v. Love, 16 Cal. 69; Trogdon v. Cleveland Stone Co., 53 Ill. App. 206.

[68] Elmer v. Richards, 25 Ill. 289. See Tarbox v. Hays, 6 Watts (Pa.) 398, 31 Am. Dec. 478.

[69] Ketchum v. Edwards, 6 App. Div. 160, 39 N. Y. Supp. 1012.

[70] Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791.

[71] Brooks v. Powell (Tex. Civ. App.) 29 S. W. 809.

[72] Jones v. Blun, 145 N. Y. 333, 39 N. E. 954.

[73] Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

[74] Vicksburg Grocery Co. v. Brennan (Miss.) 20 South. 845.

[75] Penrose v. McKenzie, 116 Ind. 35, 18 N. E. 384. See McCampbell v. Durst, 73 Tex. 410, 11 S. W. 380.

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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.[76] And an action by heirs to quiet the title of property of the decedent, fraudulently sold to pay his debts, is not a collateral attack on the decree confirming the sale.[77] In Texas, under a statute allowing persons interested in the estate of a decedent to have the proceedings in the county court corrected on certiorari from the district court, where the cause shall be tried de novo, the proceeding is direct, and not collateral.[78]

§ 253. Proceedings to prevent Execution of the Judgment.

A bill in equity seeking to enjoin the enforcement of a judgment at law, by execution or otherwise, constitutes a collateral attack upon the judgment, and cannot be maintained on account of any mere errors or irregularities, but only upon a showing that the judgment is void.[79] There are cases, however, holding that a suit to enjoin the enforcement of a judgment on the ground of a total want of jurisdiction over the person of the defendant,—as, where no process was ever served on him,—is a direct attack on the judgment, and not collateral.[80] And the same is said to be true where the ground set up for enjoining the judgment is that it has been satisfied and released.[81] The validity of a judgment cannot be impeached

[76] Bedell v. Hayes, 21 La. Ann. 643. See Slidell v. Germania Nat. Bank, 27 La. Ann. 354.

[77] Bergin v. Haight, 99 Cal. 52, 33 Pac. 760. Compare Lynch v. Rooney, 112 Cal. 279, 44 Pac. 565.

[78] Wipff v. Heder, 6 Tex. Civ. App. 685, 26 S. W. 118; Kalteyer v. Wipff (Tex. Civ. App.) 49 S. W. 1055.

[79] Davis v. D. M. Osborn & Co., 156 Ind. 86, 59 N. E. 279; Krug v. Davis, 85 Ind. 309; A. B. Smith Co. v. Bank of Holmes County (Miss.) 18 South. 847; Kirk v. Duren, 45 S. C. 597, 23 S. E. 954; Hudson v. Yost, 88 Va. 347, 13 S. E. 436.

[80] Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824; Waite v. Ellis, 5 Ohio N. P. 415. But a suit to enjoin a judgment on the ground merely that the summons which was served was insufficient is a collateral attack. Missouri, K. & T. Ry. Co. v. Warden, 73 Mo. App. 117.

[81] Smith v. Morrill, 11 Colo. App. 284, 52 Pac. 1110; Brakke v. Hoskins, 98 Iowa, 233, 67 N. W. 235.

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on a motion to quash an execution issued on it. Such a motion cannot be based on the ground of mere error or irregularity in the judgment. The jurisdiction not being questioned, and the judgment not having been reversed, vacated, or set aside, such a motion would constitute a collateral attack upon it.[82]

§ 253a. Proceeding to Enforce Judgment by Mandamus.

When a judgment has been recovered against a municipal corporation, and application is made for a writ of mandamus to compel the proper municipal officers to provide funds for its payment by the levy and collection of a tax, it is not permissible for the respondents, in opposition to the motion for mandamus, or in answer to the alternative writ, to set up any matters impeaching the correctness of the judgment; as against any such collateral attack, the judgment is impregnable, and it is conclusive of all defenses which were, or might have been, urged in the original action.[83] For example, if the suit was upon bonds of the municipality, it is no defense to the proceeding for mandamus that such bonds were illegally issued, or were invalid for any other reason.[84] Nor can the municipality contend that the indebtedness on which the judgment

[82] Jones v. George, 80 Md. 294, 30 Atl. 635; Merrick v. Merrick, 5 Mo. App. 123, citing Swinney v. Watkins, 22 Ga. 570; Shorter v. Mims, 18 Ala. 658; Skidmore v. Bradford, 4 Pa. 296.

[83] Supervisors v. United States, 4 Wall. 435, 18 L. Ed. 419; Mayor v. Lord, 9 Wall. 409, 19 L. Ed. 704; United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225; Harshman v. Knox County Court, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; Mayor of New Orleans v. United States, 2 U. S. App. 125, 1 C. C. A. 148, 49 Fed. 40; Fleming v. Trowsdale, 29 C. C. A. 106, 85 Fed. 189; Clews v. Lee County, 2 Woods, 474, Fed. Cas. No. 2,892; Hill v. Scotland County Court (C. C.) 32 Fed. 716; Loague v. Taxing District of Brownsville (C. C.) 36 Fed. 149; People v. Common Council of Buffalo, 21 N. Y. Supp. 598; Bear v. Board of Com'rs of Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Harkness v. Hutcherson, 90 Tex. 383, 38 S. W. 1120; City of Sherman v. Langham, 92 Tex. 13, 42 S. W. 961; Stevens v. Miller, 3 Kan. App. 192, 43 Pac. 439; Stenberg v. State, 48 Neb. 299, 67 N. W. 190; People v. Board of Com'rs of Rio Grande County, 7 Colo. App. 229, 42 Pac. 1032; Id., 11 Colo. App. 124, 52 Pac. 748; State v. Moss, 13 Wash. 42, 42 Pac. 622.

[84] Mayor v. Lord, 9 Wall. 409, 19 L. Ed. 704; Fleming v. Trowsdale, 29 C. C. A. 106, 85 Fed. 189; Board of Com'rs of Rio Grande County v. Burpee, 24 Colo. 57, 48 Pac. 539; Stenberg v. State, 48 Neb. 299, 67 N. W. 190.

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was based was in excess of the amount fixed by the constitution as the limit of the debt which it might lawfully incur.[85] Neither can it be alleged in the proceedings for mandamus that the judgment was entered by consent of the officers of the city, notwithstanding there was a valid defense to the action, the judgment not being void on its face.[86] 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, by mandamus,—and requiring, in order to be sustained, reference to the alleged cause of action on 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.[87] And it is competent for the respondents to the writ of mandamus to show that the original judgment was entirely void for want of jurisdiction.[88] The same principles apply in an action to enjoin the collection of a tax levied to pay a judgment against a municipal corporation. The validity of the claim on which the judgment rests cannot be questioned; the judgment being conclusive against collateral attack by the municipality or by any individual taxpayer.[89]

§ 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 sen-

[85] Harshman v. Knox County Court, 122 U. S. 306, 7 Sup. Ct. 1171, 25 L. Ed. 225; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Holt County v. National Life Ins. Co., 25 C. C. A. 469, 80 Fed. 686; Geer v. Board of Com'rs of Ouray County, 38 C. C. A. 250, 97 Fed. 435; City of Helena v. United States, 43 C. C. A. 429, 104 Fed. 113; Edmundson v. Independent School District, 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224; Howard v. City of Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

[86] City of Helena v. United States, 43 C. C. A. 429, 104 Fed. 113. And see United States Trust Co. v. Territory (N. M.) 62 Pac. 987.

[87] Brownsville Taxing Dist. v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780.

[88] Moore v. Town Council of Edgefield (C. C.) 32 Fed. 498. Compare Boasen v. State, 47 Neb. 245, 66 N. W. 303.

[89] Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. Rep. 926.

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tence 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.[90] Accordingly the authorities declare that the writ will not be issued when it appears on the face of the petition that the petitioner is detained by virtue of the final judgment of a court of competent jurisdiction;[91] and that such a judgment, valid on its face, is an unanswerable return to a writ of habeas corpus.[92] 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.[93] The rea-

[90] People v. District Court, 22 Colo. 422, 45 Pac. 402.

[91] In re Brittain, 93 N. C. 587.

[92] Smith v. Hess, 91 Ind. 424.

[93] Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ableman v. Booth, 21 How. 506, 16 L. Ed. 196; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Yar-

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son is 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.[94] 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,

brough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Ex parte Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; Stevens v. Fuller, 136 U. S. 468, 10 Sup. Ct. 911, 34 L. Ed. 461; Ex parte Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; In re Eckart, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; In re Boyd, 4 U. S. App. 73, 1 C. C. A. 156, 49 Fed. 48; In re King (C. C.) 51 Fed. 434; Ex parte Shaffenburg, 4 Dill. 271, Fed. Cas. No. 12,696; Ex parte Parks, 1 Hughes, 604, Fed. Cas. No. 10,764; Ex parte Williams, 1 Wash. T. 240; In re Phinney, 32 Me. 440; O'Malia v. Wentworth, 65 Me. 129; In re Dougherty, 27 Vt. 325; Walbridge v. Hall, 3 Vt. 114; Olmsted v. Hoyt, 4 Day (Conn.) 436; Herrick v. Smith, 1 Gray (Mass.) 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. Prac. (N. Y.) 418; Commonwealth v. Keeper of Jail, 26 Pa. 279; Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374; Ex parte Rollins, 80 Va. 314; In re Schenck, 74 N. C. 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; Keene v. McDonough, 8 La. 185; State v. Fenderson, 28 La. Ann. 82; 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. Pressey, 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 Kan. 758, 1 Pac. 523; In re Petty, 22 Kan. 477; In re Eaton, 27 Mich. 1; In re Semler, 41 Wis. 517; In re Blair, 4 Wis. 522; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte Hartman, 44 Cal. 32; Ex parte Granice, 51 Cal. 375; Ex parte McCullough, 35 Cal. 98; Ex parte Lehmkuhl, 72 Cal. 53, 13 Pac. 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.

[94] "We reiterate what has so often been said before, that the writ of habeas corpus cannot be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the circuit court which had no jurisdiction of the person or of

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weight, or sufficiency of the evidence on which the judgment was rendered, or the reasons on which it was based.[95] 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;[96] nor of any errors made by the court in granting, modifying, or setting aside orders in criminal cases;[97] 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.[98] 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;[99] nor whether the indictment upon which the judgment was given, being regular on its face, was ever in fact found by a grand jury.[100] Neither can advantage be taken of the fact that the judgment does not specifically describe the offense of which the petitioner was convicted;[101] nor of the fact that only one officer was present at the returning of the verdict, instead of two as required by law;[102] nor of the fact that the court pronounced judgment upon a verdict on a charge of felony during the enforced absence of the petitioner in jail;[103] nor of the fact that the record

the subject-matter, or authority to render the judgment complained of, then relief may be accorded." In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; In re Chapman, 156 U. S. 211, 15 Sup. Ct. 331, 39 L. Ed. 401; Andrews v. Swartz, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

[95] Macke v. Ryan, 31 Kan. 54, 1 Pac. 785; In re Gilson, 34 Kan. 641, 9 Pac. 763; In re Watson, 30 Kan. 753, 1 Pac. 775; Ex parte Jackson, 45 Ark. 158; Starr v. Barton, 34 Ga. 99; State v. Bloom, 17 Wis. 521; Griffin v. State, 5 Tex. App. 457; In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596; Ex parte Phillips, 57 Miss. 357.

[96] Dover v. State, 75 Ala. 40.

[97] Ex parte Hartman, 44 Cal. 34.

[98] Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Shaffenburg, 4 Dill. 271, Fed. Cas. No. 12,696.

[99] State v. Fenderson, 28 La. Ann. 82.

[100] Ex parte Twohig, 13 Nev. 302.

[101] Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte Smith, 2 Nev. 338.

[102] Rex v. Carlile, 4 Car. & P. 415.

[103] Ex parte Farnham, 3 Colo. 545.

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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.[104]

§ 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.[105] 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.[106] It must also be remarked in this connection that there is

[104] Ex parte Smith, 2 Nev. 338.

[105] Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Buskirk, 18 C. C. A. 410, 72 Fed. 14; United States v. Patterson (C. C.) 29 Fed. 775; Ex parte Perkins, Id. 900; Ex parte Farley (C. C.) 40 Fed. 66; Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862; Johnson v. United States, 3 McLean, 89, Fed. Cas. No. 7,418; Miller v. Snyder, 6 Ind. 1; Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Cropper's Case, 2 Rob. (Va.) 842. On habeas corpus, a court has the power to review its own former judgment, so far as to determine whether it exceeded its power in passing a judgment claimed to be illegal. Ex parte Joyce, 25 Pittsb. Leg. J. 17, Fed. Cas. No. 7,556. 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. In re Tarble, 25 Wis 390, 3 Am. Rep. 85.

[106] 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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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 meantime, we call the reader's notice to the fact that the collateral investigation 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." [107] Finally, the writ of habeas corpus

[107] Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Dynes v. Hoover, 20 How. 78, 15 L. Ed. 838; Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; In re Davison (C. C.) 21 Fed. 620; Barrett v. Hopkins (C. C.) 7 Fed. 312; In re White (C. C.) 17 Fed. 723, 9 Sawy. 49; In re Grimley (C. C.) 38 Fed. 84; In re Bird, 2 Sawy. 33, Fed. Cas. No. 1,428; In re Corbett, 9 Ben. 274, Fed. Cas. No. 3,219; In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596; Ex parte Henderson, Fed. Cas. No. 6,349; People v. Warden of County Jail, 100 N. Y. 20, 2 N. E. 870.

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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." [108]

§ 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.[109] 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, sup-

[108] 9 Am. & Eng. Enc. Law, p. 236 (a source from which I have derived much assistance in preparing these sections); Griffin's Case, 1 Chase, 364, Fed. Cas. No. 5,815; State v. Bloom, 17 Wis. 521; People v. Stevens, 5 Hill (N. Y.) 630; Hoglan v. Carpenter, 4 Bush (Ky.) 89.

[109] Ex parte Boenninghausen, 91 Mo. 301, 1 S. W. 761; Ex parte Bowler, 16 Mo. App. 14; In re Harris, 47 Mo. 164; Platt v. Harrison, 6 Iowa, 79, 71 Am. Dec. 389; In re Underwood, 30 Mich. 502; Ex parte Fisher, 6 Neb. 369; Ex parte Winston, 9 Nev. 71; In re Callicot, 8 Blatchf. 89, Fed. Cas. No. 2,323; Ex parte Booth, 3 Wis. 145.

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posing 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.[110] The federal courts uniformly hold that the imprisonment 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.[111] 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.[112] 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

[110] Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868; In re Brosnahan (C. C.) 4 McCrary, 1, 18 Fed. 62; In re Lee Tong (D. C.) 9 Sawy. 335, 18 Fed. 253; Stockton Laundry Case (C. C.) 26 Fed. 611; In re Ziebold (C. C.) 23 Fed. 791; Ex parte McCready, 1 Hughes, 598, Fed. Cas. No. 8,732; In re Wong Yung Quy (C. C.) 6 Sawy. 237, 2 Fed. 624; Ex parte Davis (C. C.) 21 Fed. 396; Ex parte Yung Jon (D. C.) 28 Fed. 308; In re Barber (C. C.) 39 Fed. 641; In re Beine (C. C.) 42 Fed. 545; In re Wong Yung Quy (C. C.) 47 Fed. 717; In re Nichols (C. C.) 48 Fed. 164; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502; Ex parte Rosenblatt, 19 Nev. 439, 14 Pac. 298, 3 Am. St. Rep. 901; Brown v. Duffus, 66 Iowa, 193, 23 N. W. 396; Ex parte Burnett, 30 Ala. 461; In re Payson, 23 Kan. 757; Ex parte Delaney, 43 Cal. 478; Ex parte Rollins, 80 Va. 314; Ex parte Mato, 19 Tex. App. 112.

[111] In re Lee Tong (D. C.) 9 Sawy. 335, 18 Fed. 253; Stockton Laundry Case (C. C.) 26 Fed. 611; In re Ah Jow (C. C.) 29 Fed. 181; Laundry License Case (C. C.) 22 Fed. 705; Ex parte Yung Jon (D. C.) 28 Fed. 308.

[112] In re Wo Lee (C. C.) 26 Fed. 471.

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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.[113]

§ 258. Jurisdiction to render the Particular Sentence.

In the case of Ex parte Shaw,[114] 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 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.[115] 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 sus-

[113] In re Brosnahan (C. C.) 4 McCrary, 1, 18 Fed. 62; Duncan v. McCall, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219; Andrews v. Swartz, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. Ed. 422.

[114] 7 Ohio St. 81, 70 Am. Dec. 55.

[115] Ex parte Van Hagan, 25 Ohio St. 432; People v. Cavanagh, 2 Abb. Prac. (N. Y.) 89; Ex parte Bond, 9 S. C. 80, 30 Am. Rep. 20; Ex parte Crandall, 34 Wis. 177.

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tains 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.[116]

§ 259. Sufficiency of Process or Pleadings.

A person tried and convicted on a criminal charge, and sentenced to imprisonment, without any indictment or presentment by a grand jury, is entitled to be discharged on habeas corpus.[117] But 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

[116] Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Ex parte Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; In re Johnson (C. C.) 46 Fed. 477; Ex parte Bernert, 7 Pac. Coast Law J. 460; Ex parte Page, 49 Mo. 291; People v. Walters, 15 Abb. N. C. (N. Y.) 461; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Ex parte Kearny, 55 Cal. 212; In re Petty, 22 Kan. 477; Ex parte Bulger, 60 Cal. 438; 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." But a sentence for an offense punishable by imprisonment cannot be held void on habeas corpus because it imposes hard labor during the imprisonment. United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631.

[117] Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Ex parte McCluskey (C. C.) 40 Fed. 71.

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crime known to the law, yet that is no reason for discharging the petitioner, and he must be remanded.[118] 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.[119]

§ 260. To what Parties the Rule applies.

The rule prohibiting the collateral impeachment of a judgment applies only to the parties to the action, and those in privity with them, and who are entitled to take proceedings to have the judgment opened, vacated, or reversed;[120] it does not extend to stran-

[118] Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Parks, 93 U. S. 20, 23 L. Ed. 787; In re Lancaster, 137 U. S. 393, 11 Sup. Ct. 117, 34 L. Ed. 713; Ex parte Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. Ed. 845; Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; Ex parte Peters (C. C.) 12 Fed. 461; In re Johnson (C. C.) 46 Fed. 477; In re Hacker (D. C.) 73 Fed. 464; In re Krug (C. C.) 79 Fed. 308; Petition of Semler, 41 Wis. 517; Davis' 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.

[119] Matter of Coryell, 22 Cal. 178; Ex parte Kearney, 55 Cal. 212.

[120] Vose v. Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; Griswold v. Stewart, 4 Cow. (N. Y.) 457; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199; Coffin v. Freeman, 84 Me. 535, 24 Atl. 986; Ashton v. City of Rochester, 133 N. Y. 187, 30 N. E. 965, 28 Am. St. Rep. 619; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849.

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gers.[121] For instance, a stockholder in a corporation against which a judgment has been recovered, who may be made liable for its payment, is so far a privy in law that he may bring error to reverse the judgment; but for that very reason he cannot attack the judgment collaterally.[122] So, persons claiming land under an assignee for creditors cannot collaterally assail a judgment rendered against the assignee subjecting the land to the payment of a creditor's claim.[123] A judgment against an executor is prima facie evidence of the debt, as against the heirs of the decedent, and cannot be attacked by them collaterally save on the ground of fraud.[124] Even in the case of strangers to the litigation, it is not every one who may impeach the 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 against collateral attacks upon judgments 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.[125] In regard to garnishees, the rule approved by the best authorities is that a garnishee may impeach the validity of the judgment against the principal debtor on the ground of a want of jurisdiction over such

[121] Atkinson v. Allen, 12 Vt. 619, 36 Am. Dec. 361; Eureka Iron Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834; Caswell v. Caswell, 28 Me. 232, Succession of Quinn, 30 La. Ann. 947; Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 43 Am. St. Rep. 334; Shamlin v. Hall, 123 Ala. 541, 26 South. 285.

[122] Came v. Brigham, 39 Me. 35.

[123] Gonzales v. Batts, 20 Tex. Civ. App. 421, 50 S. W. 403.

[124] In re Schmidt's Estate, 4 Pa. Dist. R. 161.

[125] Eureka Iron Works v. Bresnahan, 66 Mich. 489, 33 N. W. 834; Staunton Perpetual Building & L. Co. v. Haden, 92 Va. 201, 23 S. E. 285; Russell v. Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; Wolf v. Youbert, 45 La. Ann. 1100, 13 South. 806, 21 L. R. A. 772. 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. 266. But a judgment under which land has been sold, if void for want of due service of process, may be collaterally attacked by one who has purchased under a junior judgment. Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402; Coffin v. Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

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debtor, but will not be permitted to assail it on the ground of any mere errors or irregularities.[126] Again, admitting that the particular individual has the right 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.[127] 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.[128] 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.[129]

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.[130] Thus defective findings, or the absence of any findings

[126] Pierce v. Carleton, 12 Ill. 358, 54 Am. St. Rep. 405; Whitehead v. Henderson, 4 Smedes & M. (Miss.) 704; Matheney v. Galloway, 12 Smedes & M. (Miss.) 475; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Schoppenhast v. Bollman, 21 Ind. 285; Nevatt v. Springfield Normal School, 79 Mo. App. 198; Debbs v. Dalton (Ind. Sup.) 32 N. E. 570.

[127] Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527. See Lyles v. Bolles, 8 S. C. 258; Boisse v. Dickson, 31 La. Ann. 741.

[128] Drexel's Appeal, 6 Pa. 272. And see Lowber and Wilmer's Appeal, 8 Watts & S. 387, 42 Am. Dec. 302; In re Hanika's Estate, 138 Pa. 330, 22 Atl. 90, 21 Am. St. Rep. 907.

[129] Rollins v. Henry, 78 N. C. 342.

[130] Huff v. Hutchinson, 14 How. 586, 14 L. Ed. 553; Parker v. Kane, 22 How. 1, 16 L. Ed. 286; Thompson v. Tolmie, 2 Pet. 157, 7 L. Ed. 381;

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of fact in a trial by consent by the court, do not render the judgment a nullity, and it cannot be attacked collaterally therefor.[131] So obvious clerical errors in the judgment-roll which could not deceive a person accustomed to such documents are no ground for impeaching the judgment collaterally.[132] And generally, a judgment cannot be attacked collaterally for any defect which, in a direct proceeding, might be cured by amendment.[133] Nor will a judgment be open to this kind of impeachment merely because it was prematurely rendered,—as, before the expiration of the defendant's time

Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Pullman's Palace Car Co. v. Washburn (C. C.) 66 Fed. 790; Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; Dauberman v. Hain, 196 Pa. 435, 46 Atl. 442; Trowbridge v. Hays, 21 Misc. Rep. 234, 45 N. Y. Supp. 635; Brooks v. City of New York, 57 Hun, 104, 10 N. Y. Supp. 773; Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Thorp v. Gordon (Tex. Civ. App.) 43 S. W. 323; Bradford v. Larkin, 57 Kan. 90, 45 Pac. 69; Selders v. Boyle, 5 Kan. App. 451, 49 Pac. 320; Hawkins v. McDougal, 126 Ind. 539, 25 N. E. 820; State v. Tow, 5 Ind. App. 261, 31 N. E. 1120; Chrisman v. Divinia, 141 Mo. 122, 41 S. W. 920; State v. Wear, 145 Mo. 162, 46 S. W. 1099; Vaule v. Miller, 64 Minn. 485, 67 N. W. 540; Bannister v. Higginson, 15 Me. 73, 32 Am. Dec. 134; Davidson v. Thornton, 7 Pa. 128; Miltimore v. Miltimore, 40 Pa. 151; Clark v. Bryan, 16 Md. 171; Howison v. Weeden, 77 Va. 704; Fox v. Cottage Building Ass'n, 81 Va. 677; State v. Conoly, 28 N. C. 243; Den dem. White v. Albertson, 14 N. C. 241, 22 Am. Dec. 719; Upson v. Horn, 3 Strobh. 108, 49 Am. Dec. 633; James v. Smith, 2 S. C. 183; Mobley v. Mobley, 9 Ga. 247; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; Doe ex dem. 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. (Ky.) 42, 27 Am. Dec. 35; Dorsey v. Kendall, 8 Bush (Ky.) 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. (Ill.) 364, 39 Am. Dec. 418; Wales v. Bogue, 31 Ill. 464; McBane v. People, 50 Ill. 503; Cameron v. Boyle, 2 G. Greene (Iowa) 154; Burton v. District of Warren Tp., 11 Iowa, 166; Perryman v. State, 8 Mo. 208; State v. St. Gemme, 31 Mo. 230; Lucas v. Todd, 28 Cal. 182.

[131] Breeze v. Doyle, 19 Cal. 101; Maryott v. Gardner, 50 Neb. 320, 69 N. W. 837; Fruits v. Elmore, 8 Ind. App. 278, 34 N. E. 829; Root v. Davis, 51 Ohio St. 29, 36 N. E. 669, 23 L. R. A. 445.

[132] Morrison v. Austin, 14 Wis. 601.

[133] Holland v. Laconia Building & Loan Ass'n, 68 N. H. 480, 41 Atl. 178.

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to plead, or pending a stay of proceedings, or before the hearing on a demurrer,—such an irregularity not making the judgment absolutely void.[134] It may also be stated that the judgment of a court having jurisdiction is not rendered void, or open to a collateral attack, because it is wrong in law, being based upon an erroneous application of legal principles or upon insufficient evidence,[135] nor because the form of action or remedy selected was one not properly admitting of the specific relief which the judgment grants,[136] nor because of the failure to file a bond in an injunction suit,[137] or an affidavit in a proceeding by attachment,[138] nor because the relief granted by the judgment was not wholly within the authority of the court, if the judgment may stand as valid for so much as was within the competence of the court,[139] nor because it gives costs in a replevin suit where costs are not granted by the statute.[140] A sale under order of the orphans' court is not subject to collateral attack because made on application of the administrator on behalf of creditors, instead of being made on the application of the creditors themselves,[141] nor because not made at the time required by law, if it is afterwards confirmed by the court.[142] Again, it is no ground for collateral impeachment of a judgment that the claim in suit was directly passed

[134] Alderson v. Bell, 9 Cal. 315; Belles v Miller, 10 Wash. 259, 38 Pac. 1050; Reed v. Nicholson, 158 Mo. 624, 59 S. W. 977; Davis v. Wade, 58 Mo. App. 641; Wells v. Atkins, 68 Vt. 191, 34 Atl. 694, 54 Am. St. Rep. 880; Anheuser-Busch Brewing Ass'n v. McGowan, 49 La. Ann. 630, 21 South. 766; Altman v. School District, 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468.

[135] Stevenson v. Bonesteel, 30 Iowa, 286; Bordages v. Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446; State v. Rogers, 131 Ind. 458, 31 N. E. 199; Vail v. Arkell, 146 Ill. 363, 34 N. E. 937; Rogers v. Johnson, 125 Mo. 202, 28 S. W. 635; Brandhoefer v. Bain, 45 Neb. 781, 64 N. W. 213.

[136] Insley v. United States, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163; Brundred v. Egbert, 164 Pa. 615, 30 Atl. 503; Johnson v. Miller, 55 Ill. App. 168.

[137] Lewis v. Rowland, 131 Ind. 103, 29 N. E. 922.

[138] Barelli v. Wagner, 5 Tex. Civ. App. 445, 27 S. W. 17; Slade v. Le Page, 8 Tex. Civ. App. 403; 27 S. W. 952. Compare Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

[139] Johnson v. Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363.

[140] Lutes v. Alpaugh, 23 N. J. Law, 165.

[141] Simpson v. Bailey, 80 Md. 421, 30 Atl. 622.

[142] Brown v. Christie, 27 Tex. 73, 84 Am. Dec. 607.

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on by the court, instead of being referred to a master in chancery, or that a receiver appointed by a court in another state was allowed to intervene.[143] Nor can a person affected by a judgment dispute its validity collaterally on the ground of a want of authority in the attorney on the other side to prosecute the action,[144] or of his own attorney to consent to the entry of a judgment.[145] Again, in a case admitting of doubt as to whether there should be a verdict, or whether judgment should be entered without a verdict, a judgment rendered upon a verdict is not, after the expiration of the term, open to collateral attack.[146] So, an order requiring a garnishee to pay money into court cannot be attacked by the judgment-debtor in a collateral proceeding, although the property in controversy may be exempt.[147] And where a decree in chancery erroneously authorizes execution to issue on the foot of the decree, the error may be corrected by an appeal or other direct proceeding, but the decree cannot be impeached collaterally.[148]

§ 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.[149] 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.[150] 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

[143] Youngstown Bridge Co. v. North Galveston, H. & K. C. R. Co. (Tex. Civ. App.) 31 S. W. 420.

[144] Guliano v. Whitenack, 30 N. Y. Supp. 415, 24 Civ. Proc. R. 55.

[145] Young v. Watson, 155 Mass. 77, 28 N. E. 1135.

[146] Griffin v. Smyly, 105 Ga. 475, 30 S. E. 416.

[147] Day v. First Nat. Bank, 6 Kan. App. 821, 49 Pac. 691.

[148] Northwestern Bank v. Hays, 37 W. Va. 475, 16 S. E. 561.

[149] Cooley v. Smith, 17 Iowa, 99; Huyck v. Graham, 82 Mich. 353, 46 N. W. 781; Anderson v. Carr, 65 Hun, 179, 19 N. Y. Supp. 992.

[150] Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266.

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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 by showing that that part of the lands was included in the decree by inadvertence and mistake.[151] Nor is a judgment subject to collateral attack because, though it purports to be by default, the defendant had in fact duly answered and tendered material issues.[152] Nor can a vendee collaterally assail a decree foreclosing the vendor's lien as containing an irregular description.[153]

§ 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.[154] 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.[155] The rule as stated by the court in Nebraska is that where there is an attempt at service reaching the defendant, a defect in the manner of the service or form of the return is a mere irregularity, and is not ground for collateral attack on the judgment; but where the attempted service does not reach the defendant at all, a judgment

[151] Jones v. Coffey, 97 N. C. 347, 2 S. E. 165. And see First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1000. The fact that a decree for the sale of several pieces of property, to satisfy liens against them, permits a lien which only attached to one piece to share pro rata in the proceeds of all, does not render the decree void, but only reversible for error. Ryan v. Staples, 23 C. C. A. 541, 76 Fed. 721.

[152] Dreyfuss v. Charles Seale & Co., 41 N. Y. Supp. 875, 18 Misc. Rep. 551.

[153] Sanger v. Roberts, 92 Tex. 312, 48 S. W. 1.

[154] Supra, §§ 223, 224.

[155] McCormick v. Webster, 89 Ind. 105; Murray v. Weigle, 118 Pa. 159, 11 Atl. 781; Allison v. Rankin, 7 Serg. & R. (Pa.) 269; Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; Treacy v. Ellis, 45 App. Div. 492, 61 N. Y. Supp. 600; Kelly v. Harrison, 69 Miss. 856, 12 South. 261; Moore v. Perry, 13 Tex. Civ. App. 204, 35 S. W. 838; Howard v. Lock (Ky.) 22 S. W. 332; Gandy v. Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460; Griffin v. McGavin, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

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founded thereon is absolutely void.[156] 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,[157] nor because the service of the writ did not conform to the requirements of the statute,[158] nor because service of the summons was made upon the return day,[159] nor because service was made by reading the summons to the defendant, instead of serving him with a copy,[160] nor because the writ was not served the requisite number of days before the hearing or judgment,[161] nor because service was made on the defendant as an adult while he was an infant, if the records do not show the latter fact,[162] nor because the summons was issued to and served by the coroner, when the statutes authorize him to act in certain cases in the place of the sheriff,[163] nor because the citation lacked a seal.[164] 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.[165] 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.[166] 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 judg-

[156] Campbell Printing Press & Manufacturing Co. v. Marder, Luse & Co., 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

[157] Campbell v. Hays, 41 Miss. 561.

[158] Cole v. Butler, 43 Me. 401.

[159] Dutton v. Hobson, 7 Kan. 196.

[160] Gandy v. Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460.

[161] Leonard v. Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Righter v. Thornton, 30 Wkly. Law Bul. (Ohio) 32.

[162] Kennedy v. Baker, 159 Pa. 146, 28 Atl. 252.

[163] Russell v. Durham (Ky.) 29 S. W. 16.

[164] Moore v. Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

[165] Fahs v. Taylor, 10 Ohio, 104.

[166] Dunham v. Wilfong, 69 Mo. 355.

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ment might be impeached collaterally.[167] Where the court has 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.[168]

§ 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.[169] 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." [170] 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.[171] 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.[172] Nor is it any ground for the collateral impeachment of a judgment that the plaintiff was not the real party in interest,[173]

[167] Hyde v. Redding, 74 Cal. 493, 16 Pac. 380.

[168] White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113.

[169] Levan v. Millholland, 114 Pa. 49, 7 Atl. 194; Gates v. Newman, 18 Ind. App. 392, 46 N. E. 654.

[170] Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747, 8 Sup. Ct. 337, 31 L. Ed. 309.

[171] Sponsler's Appeal, 127 Pa. 410, 17 Atl. 1097.

[172] Somers v. Losey, 48 Mich. 294, 12 N. W. 188.

[173] Cates v. Riley (Tex. Civ. App.) 55 S. W. 979.

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or was a foreign administrator who had not filed copies of his letters in the clerk's office before bringing suit,[174] or that the plaintiff, being a corporation, had failed to allege the fact of its incorporation.[175] So again, it is no ground for collateral attack upon a judgment rendered in an action against a partnership that the judgment was entered against one partner only,[176] or was rendered on the confession of only one of the partners.[177]

§ 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.[178] 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.[179] 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

[174] Marshall v. Charland, 109 Ga. 306, 34 S. E. 671.

[175] McFall v. Buckeye Grangers' Warehouse Ass'n, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47.

[176] Hough v. Stover, 46 Neb. 588, 65 N. W. 189.

[177] Belcher v. Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376.

[178] Supra, §§ 188–192.

[179] 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. 7. And see Benson v. Cahill (Tex. Civ. App.) 37 S. W. 1088; Carson v. Taylor, 19 Tex. Civ. App. 177, 47 S. W. 395; Truesdail v. McCormick, 126 Mo. 39, 28 S. W. 885; Equitable Securities Co. v. Block, 51 La. Ann. 478, 25 South. 271.

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is merely voidable.[180] 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.[181] 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.[182] 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 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.[183]

§ 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;[184] but that if the objection goes

[180] For the difference between voidable and void judgments, see § 170.

[181] Supra, §§ 193–198. As to collateral attacks upon judgments because one of the parties was an infant, see Colt v. Colt, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. Ed. 520; Id. (C. C.) 48 Fed. 385; Cohee v. Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; Smith v. Gray, 116 N. C. 311, 21 S. E. 200. Compare Hatch v. Ferguson, 15 C. C. A. 201, 68 Fed. 43, 33 L. R. A. 759.

[182] Supra, § 205. And see Weaver v. Brenner, 145 Pa. 299, 21 Atl. 1010; Thomas v. Hunsucker, 108 N. C. 720, 13 S. E. 221. Loss of jurisdiction to render a particular judgment because of the death of a party does not make it subject to collateral attack as being wholly void, unless the fact appears of record. Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

[183] Supra, § 211. See Bailey v. McGinniss, 57 Mo. 362.

[184] Supra, § 174.

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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.[185] 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.[186]

§ 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 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.[187]

§ 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.[188] This

[185] Supra, § 174. And see Wilson v. Smith (Ky.) 38 S. W. 870; State v. Ross, 118 Mo. 23, 23 S. W. 196; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 South. 112; Broder v. Conklin, 98 Cal. 360, 33 Pac. 211. Compare Pierce v. Bowers, 8 Baxt. (Tenn.) 353.

[186] 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, 119 Ind. 230, 21 N. E. 886.

[187] Smith v. Keen, 26 Me. 411; Chaffee v. Hooper, 54 Vt. 513; Bond v. Pacheco, 30 Cal. 530; Savage v. Hussey, 48 N. C. 149; Kansas City v. Winner, 58 Mo. App. 299; Mott v. State, 145 Ind. 353, 44 N. E. 548; Dornan v. Benham Furniture Co., 102 Tenn. 303, 52 S. W. 38; Botkin v. Kleinschmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641; supra, § 138.

[188] Odle v. Frost, 59 Tex. 684; Martin v. Porter, 4 Heisk. (Tenn.) 407;

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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.[189] Thus, where a judgment-creditor seeks to enforce his judgment against equities, the judgment-debtor cannot show that the contract upon which the judgment was rendered was infected with usury or other illegality.[190] Nor will a judgment be considered open to collateral impeachment because the petition or complaint, in the action in which it was rendered, did not state a cause of action,[191] nor because the remedy was at law, while the suit was in equity, or vice versa,[192] nor because the action, when commenced, appears to have been barred by some statute of limitations,[193] nor because the claim in suit had been satisfied

Pollock v. Buie, 43 Miss. 140; Bartlett v. Russell, 41 Ga. 196; Parker v. Albee, 86 Iowa, 46, 52 N. W. 533; Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291; MacLachlan v. Pease, 66 Ill. App. 634; Benjamin v. Early, 123 Mich. 93, 81 N. W. 973; Austin v. Austin, 43 Ill. App. 488; State v. Thompson, 28 Or. 296, 42 Pac. 1002.

189 State v. Supervisors of Town of Beloit, 20 Wis. 79; Lewis v. Armstrong, 45 Ga. 131; Bushee v. Surles, 77 N. C. 62; Figge v. Rowlen, 84 Ill. App. 238.

190 Bank of Wooster v. Stevens, 1 Ohio St. 233, 59 Am. Dec. 619.

191 Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399; Altman v. School District, 35 Or. 85, 56 Pac. 291, 76 Am. St. Rep. 468; North Pacific Cycle Co. v. Thomas, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

192 Lemmon v. Herbert, 92 Va. 653, 24 S. E. 249; Weaver v. Toney (Ky.) 54 S. W. 732, 50 L. R. A. 105.

193 Head v. Daniels, 38 Kan. 1, 15 Pac. 911; Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264.

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prior to the rendition of the judgment,[194] nor because the note on which the judgment was recovered was without consideration,[195] nor because the claim on which the judgment was rendered was based on a wager or a gambling transaction.[196] A judgment rendered in a suit founded on an obligation before its maturity, is not subject to collateral attack.[197] 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.[198] 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.[199]

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 solemniter esse acta."[200]

[194] Hyder v. Smith (Tenn. Ch.) 52 S. W. 884.

[195] Suber v. Chandler, 36 S. C. 344, 15 S. E. 426.

[196] Chicago Driving Park v. West, 35 Ill. App. 496; McCanless v. Smith, 51 N. J. Eq. 505, 25 Atl. 211. But in Mississippi, under a statute which renders void a judgment on a wager, it is a good plea to an action on a judgment that it was rendered on a note made in settlement of a wager. Campbell v. New Orleans Nat. Bank, 74 Miss. 526, 21 South. 400. And in Kentucky, under a statute providing that neither party to a champertous contract shall have any right of action thereon, it is held that a judgment may be attacked, because of champerty, in a collateral proceeding. Roberts v. Yancey, 94 Ky. 243, 21 S. W. 1047, 42 Am. St. Rep. 357.

[197] Mikeska v. Blum, 63 Tex. 44; Robertson v. Huffman, 92 Ind. 247.

[198] Harrison v. Pender, 44 N. C. 79, 57 Am. Dec. 573; Brantingham v. Brantingham, 12 N. J. Eq. 160.

[199] Butterfield's Appeal, 77 Pa. 197; Michaelis v. Brawley, 109 Pa. 7; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Woolery v. Grayson, 110 Ind. 149, 10 N. E. 935.

[200] Co. Litt. 232; Broom, Leg. Max. 942.

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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.[201] 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 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." [202] Hence, jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.[203]

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.

[201] Reed v. Jackson, 1 East. 355; Lyttleton v. Cross, 3 Barn. & C. 327.

[202] Voorhees v. Jackson, 10 Pet. 449, 472, 9 L. Ed. 490, Baldwin, J.: Hughes v. Cummings, 7 Colo. 138, 2 Pac. 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 Neb. 490, 39 N. W. 419.

[203] Blake v. Lyon & Fellows Manuf'g Co., 77 N. Y. 626; Jordan v. John Ryan Co., 35 Fla. 259, 17 South. 73. The test of jurisdiction is whether the court had power to enter upon the inquiry; not whether its conclusion was right or wrong. Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567.

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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.[204] 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 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.[205] Hence, when a court of general jurisdiction

[204] Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439.

[205] Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490; Kennedy v. Georgia State Bank, 8 How. 586, 12 L. Ed. 1209; McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Bump v. Butler County (C. C.) 93 Fed. 290; 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 (Mass.) 242; Hendrick v. Whittemore, 105 Mass. 23; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Ray v. Rowley, 4 Thomp. & C. 43; O'Connor v. Felix, 87 Hun, 179, 33 N. Y. Supp. 1074; Hering v. Chambers, 103 Pa. 175; National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71; Clark v. Bryan, 16 Md. 171; Woodhouse v. Fillbates, 77 Va. 317; Hill v. Woodward, 78 Va. 765; Bernhardt v. Brown, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402; Martin v. Bowie, 37 S. C. 102, 15 S. E. 736; Wilson's Heirs v. Wilson's Adm'r, 18 Ala. 176; Pender v. Felts, 2 Smedes & M. (Miss.) 535; Hardy v. Gholson, 26 Miss. 70; Briggs v. Clark, 7 How. (Miss.) 457; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Hambel v. Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; Woolley v. Sullivan, 92 Tex. 28, 46 S. W. 629; McCleskey v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Higgins v. Bordages (Tex. Civ. App.) 28 S. W. 350; Venable v. McDonald, 4 Dana (Ky.) 336; Sorrell v. Samuels (Ky.) 49 S. W. 762; Newcomb's Ex'r v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222;

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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.[206] And whatever is upon the records of such a court is presumed to be rightfully there.[207] 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.

§ 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

Adams' Lessee v. Jeffries, 12 Ohio, 253, 40 Am. Dec. 477; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Wiley v. Pratt, 23 Ind. 628; First Nat. Bank v. Hanna, 12 Ind. App. 240, 39 N. E. 1054; Pardon v. Dwire, 23 Ill. 572; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Law v. Grommes, 55 Ill. App. 312; Calhoun v. Ross, 60 Ill. App. 309; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Spurgin v. Bowers, 82 Iowa, 187, 47 N. W. 1029; 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. 548; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Illinois Trust & Savings Bank v. Pacific Ry. Co., 115 Cal. 285, 47 Pac. 60; Stoddard Manuf'g Co. v. Mattice, 10 S. D. 253, 72 N. W. 891; Gillilan v. Murphy, 49 Neb. 779, 69 N. W. 98.

[206] Jackson v. Dyer, 104 Ind. 516, 3 N. E. 863. For example, a state court of general jurisdiction, in the absence of a showing in the record to the contrary, will be presumed to have had jurisdiction of an action involving conflicting claims to letters patent, when its judgment is collaterally attacked; since, where a cause of action in relation to letters patent depends primarily on some contract of the parties, jurisdiction exists in the state courts, though the validity of the patent may incidentally arise. Shoemaker v. South Bend Spark-Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

[207] Drake v. Duvenick, 45 Cal. 455.

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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.[208] 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.[209] 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.[210] Where the record does not show that a default was not properly entered, the presumption arises that the required notice was given.[211] And in general, a judgment is not open to collateral impeachment merely because the record fails to show the service of the process by which the court acquired jurisdiction of the defendant; if the record is silent on this point, it will be presumed that lawful and sufficient process was duly served.[212] Similarly, when the judgment is against a non-resident, and jurisdiction was acquired by publication of notice, the judgment is not impeachable collaterally be-

[208] Travelers' Protective Ass'n v. Gilbert, 41 C. C. A. 180, 101 Fed. 46; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; Parr v. Lindler, 40 S. C. 193, 18 S. E. 636; Hams v. Root, 22 Tex. Civ. App. 413, 55 S. W. 411; Scaman v. Galligan, 8 S. D. 277, 66 N. W. 458; Axman v. Dueker, 45 Kan. 179, 25 Pac. 582; Horner v. State Bank, 1 Ind. 130, 48 Am. Dec. 355; Colt v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Lawler's Heirs 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. (Tenn.) 464; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Sharp v. Brunnings, 35 Cal. 528.

[209] Kramer v. Breedlove (Tex.) 3 S. W. 561; Stearns v. Wright, 13 S. D. 544, 83 N. W. 587.

[210] Jackson v. Tift, 15 Ga. 557.

[211] Evans v. Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583.

[212] Sommermeyer v. Sommermeyer, 89 Wis. 66, 61 N. W. 311; Elder v. Richmond Gold & Silver Min. Co., 7 C. C. A. 354, 58 Fed. 536; Galloway v. State Nat. Bank (Tex. Civ. App.) 56 S. W. 236; Hamer v. Cook, 118 Mo. 476, 24 S. W. 180; Eichhoff v. Eichhoff, 101 Cal. 600, 36 Pac. 11; Bank of Colfax v. Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

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cause the record does not show compliance with all the requirements of the statute authorizing that manner of citation, or directing the mode of its execution; a full compliance will be presumed.[213] Therefore 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 his pleading should set forth 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 jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach.[214] 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.[215] 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.[216] 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.[217] 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.[218] 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

[213] Figge v. Rowlen, 185 Ill. 234, 57 N. E. 195; Martin v. Burns, 80 Tex. 676, 16 S. W. 1072; Meade v. Bartlett, 1 Tex. Civ. App. 342, 23 S. W. 186; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20; Amy v. Amy, 12 Utah, 278, 42 Pac. 1121.

[214] Exchange Bank v. Ault, 102 Ind. 322, 1 N. E. 562.

[215] Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; Berry v. Foster, 22 Ky. Law Rep. 745, 58 S. W. 709.

[216] Fogg v. Gibbs, 8 Baxt. (Tenn.) 464.

[217] Welsh v. Childs, 17 Ohio St. 319. And see Cosby v. Powers, 137 Ind. 694, 37 N. E. 321; Holt County Bank v. Holt County, 53 Neb. 827, 74 N. W. 259; Crank v. Flowers, 4 Heisk. (Tenn.) 629.

[218] Sloan v. McKinstry, 18 Pa. 120.

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evidence in the record, that the judgment was rendered at a regular term duly fixed by law.[219] "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." [220] So also, if the record in a case does not show the situation of land affected by the decree, it will be presumed, in a collateral attack upon the judgment, that the land was within the territorial jurisdiction of the court.[221]

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 of them, it will be presumed that the court passed upon both.[222] 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.[223] It is also a rule that the fact that the record of a cause in a federal court fails to show affirmatively a ground of federal jurisdiction will not make its judgment a nullity, or render it subject to collateral attack; and this is true when the court assumes jurisdiction because it holds that the suit involves a federal question, such as the construction of an act of congress, even if it is mistaken in so holding.[224]

[219] Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565.
[220] Credit Foncier of America v. Rogers, 10 Neb. 184, 4 N. W. 1012.
[221] Foster v. Givens, 14 C. C. A. 625, 67 Fed. 684.
[222] Watson v. Hahn, 1 Colo. 385.
[223] Woodhouse v. Fillbates, 77 Va. 317.
[224] Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

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§ 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.[225] But on the other hand, there is not wanting authority for the view that the authority of the attorney may always be controverted.[226] The best and safest rule, in our judgment, is that formulated 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

[225] Brown v. Nichols, 42 N. Y. 26; Hamilton v. Wright, 37 N. Y. 502; Reed v. Pratt, 2 Hill (N. Y.) 64; Hoffmire v. Hoffmire, 3 Edw. Ch. (N. Y.) 174; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Finneran v. Leonard, 7 Allen (Mass.) 54, 83 Am. Dec. 665; Lowe v. Stringham, 14 Wis. 222; Baker v. Stonebraker, 34 Mo. 175; Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Carpentier v. City of Oakland, 30 Cal. 439; Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Brigot's Heirs v. Brigot, 47 La. Ann. 1304, 17 South. 825; Deegan v. Deegan, 22 Nev. 202, 37 Pac. 360; Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 21 L. R. A. 848, 34 Am. St. Rep. 513. Certain other cases hold that, while a judgment is voidable if obtained by an attorney acting without authority, yet it cannot be attacked collaterally. Its validity may be assailed in a direct proceeding; but it remains valid until set aside or vacated in a proper proceeding for that purpose. Sanders v. Price, 56 S. C. 1, 33 S. E. 731; Corbitt v. Timmerman, 95 Mich. 581, 55 N. W. 437, 35 Am. St. Rep. 586.

[226] Wiley v. Pratt, 23 Ind. 628; Hess v. Cole, 23 N. J. Law, 125; Shumway v. Stillman, 6 Wend. (N. Y.) 453; Shelton v. Tiffin, 6 How. 163, 12 L. Ed. 387; Wright v. Andrews, 130 Mass. 149; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 Pac. 862.

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a finding of the trial court that the appearance of the attorney is binding upon the defendant.[227] 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.[228]

§ 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.[229] 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 domestic 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 be-

[227] Reynolds v. Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86.

[228] Infra, vol. 2, § 903.

[229] McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Walker v. Cronkite (C. C.) 40 Fed. 133; Granger v. Clark, 22 Me. 128; Morse v. Presby, 25 N. H. 299; Cook v. Darling, 18 Pick. (Mass.) 393; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Hartman v. Ogborn, 54 Pa. 120, 93 Am. Dec. 679; Maples v. Mackey, 89 N. Y. 146; Clark v. Bryan, 16 Md. 171; Miller v. Ewing, 8 Smedes & M. (Miss.) 421; Dufour v. Camfranc, 11 Mart. O. S. (La.) 607, 13 Am. Dec. 360; Smith v. Wood, 37 Tex. 616; Simmons v. McKay, 5 Bush (Ky.) 25; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Rogers v. Beauchamp, 102 Ind. 33, 1 N. E. 185; Moffitt v. Moffitt, 69 Ill. 641; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; McCauley v. Fulton, 44 Cal. 355; Bigelow v. Chatterton, 10 U. S. App. 267, 2 C. C. A. 402, 51 Fed. 614; United States v. Gayle (D. C.) 45 Fed. 107; Letney v. Marshall, 79 Tex. 513, 15 S. W. 586; Perry v. King, 117 Ala. 533, 23 South. 783; Ward v. White, 66 Ill. App. 155; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20; Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94.

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cause 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." [230] 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.[231] We proceed to illustrate the rule here stated by an account of certain typical cases. In Reily v. Lancaster,[232] 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 attor-

[230] Wilcher v. Robertson, 78 Va. 602.

[231] Foster v. Givens, 14 C. C. A. 625, 67 Fed. 684; Steinhardt v. Baker, 20 Misc. Rep. 470, 46 N. Y. Supp. 707; Isley v. Boon, 113 N. C. 249, 18 S. E. 174; Sledge v. Elliott, 116 N. C. 712, 21 S. E. 797; Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; Gillon v. Wear, 9 Tex. Civ. App. 44, 28 S. W. 1014; Lyle v. Horstman (Tex. Civ. App.) 25 S. W. 802; Moore v. Perry, 13 Tex. Civ. App. 204, 35 S. W. 838; Mills v. Terry, 22 Tex. Civ. App. 277, 54 S. W. 780; Cooper v. Mayfield, 94 Tex. 107, 58 S. W. 827; Harris v. McClanahan, 11 Lea (Tenn.) 181; Law v. Grommes, 55 Ill. App. 312; Casey v. People, 165 Ill. 49, 46 N. E. 7; Allured v. Voller, 112 Mich. 357, 70 N. W. 1037; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064.

[232] 39 Cal. 354. And see Sharp v. Brunnings, 35 Cal. 528; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Branson v. Caruthers, 49 Cal. 375; Bateman v. Miller, 118 Ind. 345, 21 N. E. 292.

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ney, 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 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.[233]

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.[234] 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.[235] 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;"

[233] Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

[234] Pardon v. Dwire, 23 Ill. 572; Harris v. Sargeant, 37 Or. 41, 60 Pac. 608.

[235] Turner v. Jenkins, 79 Ill. 228. So, where the return set out in a docket shows that the citation was served before its issuance, and the original citation and return have been destroyed, the date shown in the record being an impossible one, it will be presumed, on collateral attack, that service was had on a date which would render the judgment valid. Stephens v. Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

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and it was held that the record disclosed a personal appearance of both defendants, and the recitals of the judgment were conclusive.[236] 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 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.[237]

§ 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.[238] 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.[239] So when a notice which is defective, or the

[236] Smith v. Wood, 37 Tex. 616.

[237] Treadway v. Eastburn, 57 Tex. 209.

[238] Otis v. The Rio Grande, 1 Woods, 279, Fed. Cas. No. 10,613; Reinach v. Atlantic & G. W. R. Co. (C. C.) 58 Fed. 33; Merritt's Lessee v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298; Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650; Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25; Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; International & G. N. R. Co. v. Moore (Tex. Civ. App.) 32 S. W. 379.

[239] City of Delphi v. Startzman, 104 Ind. 343, 3 N. E. 937; Dequindre v.

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service of which is informal, has been adjudged sufficient, the judgment rendered thereunder will not be held void in a collateral proceeding.[240] 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.[241] 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 the defendant to answer, is a judicial determination of the question of jurisdiction, and therefore binding until set aside or reversed.[242] 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.[243] 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.[244]

Williams, 31 Ind. 444; Flannery v. Baldwin Fertilizer Co., 94 Ga. 696, 21 S. E. 587. Thus, the decision of a federal judge that the interests of the only defendant who is a citizen of the same state with the plaintiff are identical with those of the plaintiff, and that, therefore, the suit is removable as one between citizens of different states, is not reviewable collaterally. Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520.

[240] Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330; 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. 122; Lyon v. Vanatta, 35 Iowa, 525; Woodbury v. Maguire, 42 Iowa, 339; Cincinnati, S. & C. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Goodell v. Starr, 127 Ind. 198, 26 N. E. 793; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Rotch v. Humboldt College, 89 Iowa, 480, 56 N. W. 658.

[241] Bonsall v. Isett, 14 Iowa, 309. Thus, a judgment by a state court, sustaining the validity of personal service made while the defendant (a nonresident) was within the jurisdiction of the court solely for the purpose of trying another suit in such court, to which he was a party, cannot be collaterally attacked in a federal court on the ground that such service was void. Sipe v. Copwell, 8 C. C. A. 419, 59 Fed. 970.

[242] Hotchkiss v. Cutting, 14 Minn. 537 (Gil. 408).

[243] Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

[244] Senichka v. Lowe, 74 Ill. 274. Goudy v. Hall, 30 Ill. 109, holds that, on the question of jurisdiction, the findings of the court are not conclusive. If the necessary notice has not been given, or if process has not been served, the court has no authority to act, and all its proceedings are absolutely void. The finding of the court as to proper notice having been given, or process served, is prima facie sufficient to establish the fact, and would not be disre-

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§ 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." [245] 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." [246] And the same rule is approved in several other states.[247] 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 suit

garded without very clear and satisfactory proof to the contrary. But see the later cases of Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589, and Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813.

[245] Fitzhugh v. Custer, 4 Tex. 391, 51 Am. Dec. 728; Thouvenin v. Rodrigues, 24 Tex. 468; Smith v. Tupper, 4 Smedes & M. (Miss.) 261, 43 Am. Dec. 483; Brown v. Balde, 3 Lans. (N. Y.) 283.

[246] Putnam v. Man, 3 Wend. 202, 20 Am. Dec. 686; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Bonnet v. Lachman, 65 Hun, 554, 20 N. Y. Supp. 514; Dutton v. Smith, 10 App. Div. 566, 42 N. Y. Supp. 80. But a judgment cannot be collaterally attacked by showing that there is a doubt about the jurisdiction; the want of jurisdiction must be made to appear clearly by a fair preponderance of the evidence. Hayes v. Kerr, 19 App. Div. 91, 45 N. Y. Supp. 1050.

[247] Tenney v. Taylor, 1 App. D. C. 223; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Balk v. Harris, 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Davis v. Hamilton, 53 Ill. App. 94.

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was brought, the defendant therein was a non-resident of the state and had no notice of its commencement or pendency.[248] 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.[249] 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.[250]

But the most important decision on this side of the question is that of Ferguson v. Crawford.[251] 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 directly opposed to it. As has been already

[248] Needham v. Thayer, 147 Mass. 536, 18 N. E. 429. And see Stanley v. Stanley, 35 S. C. 94, 584, 14 S. E. 675.

[249] Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149.

[250] Dozier v. Richardson, 25 Ga. 90.

[251] 70 N. Y. 253, 26 Am. Rep. 589.

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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,[252] have in their opinions made no discrimination between them.[253] 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.[254] 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

[252] Kerr v. Kerr, 41 N. Y. 272.

[253] Citing Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Noyes v. Butler, 6 Barb. (N. Y.) 613, and cases cited.

[254] Citing Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; Story, Comm. Const. § 183; Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411.

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states, in regard to the conclusiveness of the 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.[255] 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

[255] 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, 37 Am. Dec. 299; 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. Prac. 292.

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as follows: "In Bolton v. Jacks, 6 Rob. (N. Y.) 198, Jones, J., says that it 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. (N. Y.) 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.[256]

[256] Hill v. City Cab & Transfer Co., 79 Cal. 188, 21 Pac. 728.

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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 methods 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." [257] 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

[257] Lancaster v. Wilson, 27 Grat. (Va.) 629.

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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 welfare 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;

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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 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." [258]

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.[259] "Where the

[258] Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172.

[259] Galpin v. Page, 18 Wall. 350, 366, 21 L. Ed. 959; Messinger v. Kintner,

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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."[260] 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.[261] 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 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.[262]

4 Bin. (Pa.) 97; Blanton v. Carroll, 86 Va. 539, 10 S. E. 329; Penobscot R. Co. v. Weeks, 52 Me. 456; Dillard v. Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124; Pollard v. Wegener, 13 Wis. 569; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[260] Hering v. Chambers, 103 Pa. 175; Ely v. Tallman, 14 Wis. 28. And see Newman v. Crowls, 8 C. C. A. 577, 60 Fed. 220; Ritchie v. Sayers (C. C.) 100 Fed. 520; Bowler v. Ennis, 46 App. Div. 309, 61 N. Y. Supp. 686; Stuyvesant v. Well, 41 App. Div. 551, 58 N. Y. Supp. 697; Fowler v. Simpson, 79 Tex. 611, 15 S. W. 682, 23 Am. St. Rep. 370; Laney v. Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391.

[261] Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[262] Conrad v. Baldwin, 3 Iowa, 207.

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§ 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.[263] Thus when the defendant against whom a judgment was entered had no notice, and that appears from the proceedings, the judgment is void on its face.[264] 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

[263] Briscoe v. Stephens, 2 Bing. 213; Rogers v. Wood, 2 Barn. & Adol. 245; Whyte v. Rose, 3 Q. B. 493; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Moore v. Town Council of Edgefield (C. C.) 32 Fed. 498; Penobscot R. Co. v. Weeks, 52 Me. 456; Gay v. Smith, 38 N. H. 171; Mercier v. Chace, 9 Allen (Mass.) 242; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Latham v. Edgerton, 9 Cow. (N. Y.) 227; Gage v. Hill, 43 Barb. (N. Y.) 44; Fisher v. Longnecker, 8 Pa. 410; James v. Smith, 2 S. C. 183; Towns v. Springer, 9 Ga. 130; Central Bank v. Gibson, 11 Ga. 453; Parish v. Parish, 32 Ga. 653; Campbell v. Brown, 6 How. (Miss.) 106; Enos v. Smith, 7 Smedes & M. (Miss.) 85; McComb v. Ellett, 8 Smedes & M. (Miss.) 505; Richardson v. Hunter, 23 La. Ann. 255; Edwards v. Whited, 29 La. Ann. 647; Dorsey v. Kendall, 8 Bush (Ky.) 294; Summar v. Jarrett, 62 Tenn. 23; North v. Moore, 8 Kan. 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 Neb. 689, 28 N. W. 328; Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; Horner v. Doe, Smith (Ind.) 10; Frankel v. Satterfield, 9 Houst. (Del.) 201, 19 Atl. 898; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Hinton v. Penn Mut. Life Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; Woods v. Bryan, 41 S. C. 74, 19 S. E. 218, 44 Am. St. Rep. 688; McGehee v. Wilkins, 31 Fla. 83, 12 South. 228; Jewett v. Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555; Duxbury v. Dahle, 78 Minn. 427, 81 N. W. 198, 79 Am. St. Rep. 408; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436; Junkans v. Bergin, 64 Cal. 203, 30 Pac. 627; Smith v. Los Angeles & P. R. Co. (Cal.) 34 Pac. 242; Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67.

[264] Farmers' Loan & T. Co. v. McKinney, 6 McLean, 1, Fed. Cas. No. 4,667; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

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they are relied on in support of a claim of right.[265] 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."[266] 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.

It is also to be remarked that there is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those quasi jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. In the absence of the former, the judgment of the court is void and may be attacked in collateral proceedings, while, in respect to the latter, it is conclusive, and cannot be questioned except on a direct proceeding.[267]

[265] Withers v. Patterson, 27 Tex. 491, 86 Am. Dec. 643; J. B. Watkins Land Mortg. Co. v. Mullen, 8 Kan. App. 705, 54 Pac. 921; Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. 825.

[266] Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742.

[267] Reinach v. Atlantic & G. W. R. Co. (C. C.) 58 Fed. 33.

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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.[268] 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.[269] The same principle, under a slightly different aspect, is stated in a Connecticut case as follows: Where a statute confers upon a tri-

[268] Thatcher v. Powell, 6 Wheat. 119, 5 L. Ed. 221; Secombe v. Milwaukee & St. P. R. Co., 23 Wall. 108, 23 L. Ed. 67; Murray v. American Surety Co., 17 C. C. A. 138, 70 Fed. 341; Warren v. Union Bank, 157 N. Y. 259, 51 N. E. 1036, 43 L. R. A. 256, 68 Am. St. Rep. 777; Morse v. Presby, 25 N. H. 299; Carleton v. Washington Ins. Co., 35 N. H. 162; Town of Huntington v. Town of Charlotte, 15 Vt. 46; Striker v. Kelly, 7 Hill (N. Y.) 24; Denning v. Corwin, 11 Wend. (N. Y.) 647; Smith v. Fowle, 12 Wend. (N. Y.) 9; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Shivers v. Wilson, 5 Har. & J. (Md.) 130, 9 Am. Dec. 497; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Foster v. Glazener, 27 Ala. 391; Mitchell v. Runkle, 25 Tex. Supp. 132; Earthman's Admr's v. Jones, 2 Yerg. (Tenn.) 493; Barry v. Patterson, 3 Humph. (Tenn.) 313; Edmiston v. Edmiston, 2 Ohio, 251; Ludlow's Heirs v. Johnston, 3 Ohio, 553, 17 Am. Dec. 609; Adams' Lessee v. Jeffries, 12 Ohio, 253, 40 Am. Dec. 477; Cone v. Cotton, 2 Blackf. (Ind.) 82; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Wight v. Warner, 1 Doug. (Mich.) 384; Northcut v. Lemery, 8 Or. 317; Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808.

[269] Sanborn v. Fellows, 22 N. H. 473, 489.

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bunal of limited and statutory jurisdiction a special power, to be exercised under particular circumstances and in a particular manner, it is indispensable to 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.[270] 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."[271] 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.[272] So the proceeding by writ of ad quod damnum to as-

[270] Sears v. Terry, 26 Conn. 273.

[271] Pulaski Co. v. Stuart, 28 Grat. 872. And see Harvey v. Tyler, 2 Wall. 342, 17 L. Ed. 871; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

[272] Bush v. Hanson, 70 Ill. 480. The same is true of proceedings commenced by attachment. Van Wagenen v. Carpenter, 27 Colo. 444, 61 Pac.

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sess damages for land taken under its charter by a turnpike company is not in derogation of the common law.[273] Where the action is one for the collection of delinquent taxes, there is much difference of opinion as to whether or not the court exercises its jurisdiction in a special or summary manner, the majority of the cases inclining to the opinion that judgments in tax cases are not entitled to the same presumptions which attend ordinary judgments at law, but that all the facts essential to the jurisdiction must appear on the face of the record.[274]

§ 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.[275] 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.[276]

§ 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

698. Compare Mentzer v. Ellison, 7 Colo. App. 315, 43 Pac. 464; Star Brewery v. Otto, 63 Ill. App. 40. And of an action in partition. Nickrans v. Wilk, 161 Ill. 76, 43 N. E. 741. Probate courts, though their authority to appoint guardians for insane persons, to confirm the adoption of a child, and the like, is derived from statute, yet exercise a general jurisdiction in such matters, and their orders and judgments therein are upheld by the usual presumptions of validity. McKenzie v. Donnell, 151 Mo. 431, 52 S. W. 214; Crocker v. Balch, 104 Tenn. 6, 55 S. W. 307.

273 Nolensville Turnpike Co. v. Quimby, 8 Humph. (Tenn.) 476.

274 See Black, Tax Titles (2d Ed.) § 178, and the cases there cited.

275 Crockett v. Parkison, 3 Cold. (Tenn.) 219; Haynes v. Gates, 2 Head, (Tenn.) 598.

276 Graham v. Reynolds, 45 Ala. 578.

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majority of the earlier 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.[277] 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 judgment 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."[278] But on the other hand, most of the later 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.[279] Thus, it is not necessary,

[277] Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Neff v. Pennoyer, 3 Sawy. 298, Fed. Cas. No. 10,083; Gray v. Larrimore, 2 Abb. U. S. 542, Fed. Cas. No. 5,721; Brownfield v. Dyer, 7 Bush (Ky.) 505; Hallett v. Righters, 13 How. Prac. (N. Y.) 43; Boyland v. Boyland, 18 Ill. 552. And see Schissel v. Dickson, 129 Ind. 139, 28 N. E. 540; Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399; Fowler v. Lewis' Adm'r, 36 W. Va. 112, 14 S. E. 447.

[278] Galpin v. Page, 18 Wall. 364, 21 L. Ed. 959, per Field, J.

[279] Lawler's Heirs v. White, 27 Tex. 250; Stewart v. Anderson, 70 Tex.

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in order to support a judgment on service by publication, to show that an affidavit for publication was made, since the law will presume that much in aid of the judgment.[280] Nor will the judgment be open to collateral impeachment although the affidavit was defective, insufficient, or false.[281]

§ 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.[282] 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.[283] "Where one seeks

588, 8 S. W. 295; Buse v. Bartlett, 1 Tex. Civ. App. 335, 21 S. W. 52; Ilams v. Root, 22 Tex. Civ. App. 413, 55 S. W. 411; Gemmell v. Rice, 13 Minn. 400 (Gil. 371); Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Nash v. Church, 10 Wis. 312, 78 Am. Dec. 678; Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Hunter v. Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907; Bank of Colfax v. Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Co-operative Savings & Loan Ass'n v. McIntosh, 105 Iowa, 697, 75 N. W. 520; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20.

[280] Ilams v. Root, 22 Tex. Civ. App. 413, 55 S. W. 411; Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

[281] Stevens v. Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422; Laughlin v. Vogelsong, 5 Ohio Cir. Ct. 407; Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264.

[282] See, supra, §§ 270–273.

[283] Harris v. Willis, 15 C. B. 710; Turner v. Bank of North America, 4 Dall. 11, 1 L. Ed. 718; Kempe v. Kennedy, 5 Cranch, 173, 3 L. Ed. 70; Crawford v. Howard, 30 Me. 422; Walbridge v. Hall, 3 Vt. 114; Nye v. Kellam, 18 Vt. 594; Smith v. Rice, 11 Mass. 513; Sayles v. Briggs, 4 Metc. (Mass.) 421; Wells v. Stevens, 2 Gray (Mass.) 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. (N. Y.) 292; Simons v. De Bare, 4 Bosw. (N. Y.) 547; Wickes' Lessee v. Caulk, 5 Har. & J. (Md.) 36; Clark v. Bryan, 16 Md. 171; Harvey v. Huggins, 2 Bailey (S. C.) 267; Gray v. Mc-

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to enforce the judgment of a court of limited and special jurisdiction, its organization is open to inquiry, and its jurisdiction must be established." [284] 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. It has been held, in fact, that evidence extrinsic to the record cannot supply facts requisite to the jurisdiction.[285] 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.[286] 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.[287]

Neal, 12 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 (Ky.) 394; Hamilton v. Burum, 3 Yerg. (Tenn.) 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; Bersch v. Schneider, 27 Mo. 101; State v. Metzger, 26 Mo. 65; Chandler v. Nash, 5 Mich. 409; Beaudrias v. Hogan, 16 App. Div. 38, 44 N. Y. Supp. 785; Cockley v. Rehr, 12 Pa. Co. Ct. R. 343; McGehee v. Wilkins, 31 Fla. 83, 12 South. 228; Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924; Wilkerson v. Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Chaddock v. Barry, 93 Mich. 542, 53 N. W. 785.

[284] Crawford v. Howard, 30 Me. 422.

[285] Anderson v. Binford, 61 Tenn. 310.

[286] Jolley v. Foltz, 34 Cal. 321; Van Deusen v. Sweet, 51 N. Y. 381; Beaudrias v. Hogan, 23 App. Div. 83, 48 N. Y. Supp. 468.

[287] Moffitt v. Moffitt, 69 Ill. 641.

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§ 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 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." [288] But this, it will be perceived, does not so much answer the question as

[288] Grignon v. Astor, 2 How. 319, 341, 11 L. Ed. 283, per Baldwin, J. See, also, Kempe v. Kennedy, 5 Cranch, 185, 3 L. Ed. 70; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. "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

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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 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

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, 41 Minn. 325, 43 N. W. 385. And see Gridley v. College of St. Francis Xavier, 137 N. Y. 327, 33 N. E. 321.

"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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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.[289] 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.[290] 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 them, are not to be impeached in collateral proceedings.[291] And the same rule obtains in Illinois,[292] in Louisiana,[293] in South Dakota,[294] in Vermont,[295] in Alabama,[296] in Arkansas,[297] in Minnesota,[298] and in California.[299] 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

[289] McPherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Mussleman's Appeal, 65 Pa. 485; Lex's Appeal, 97 Pa. 289; Ferguson v. Yard, 164 Pa. 586, 30 Atl. 517.

[290] Shroyer v. Richmond, 16 Ohio St. 455; Woodward v. Curtis, 19 Ohio Cir. Ct. R. 15; State Nat. Bank v. Ellison (C. C.) 75 Fed. 354.

[291] Camden v. Plain, 91 Mo. 117, 4 S. W. 86; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276.

[292] People v. Medart, 166 Ill. 348, 46 N. E. 1095; Paullissen v. Loock, 38 Ill. App. 510.

[293] Grevemberg v. Bradford, 44 La. Ann. 400, 10 South. 786.

[294] Matson v. Swenson, 5 S. D. 191, 58 N. W. 570.

[295] Doolittle v. Holton, 28 Vt. 819, 67 Am. Dec. 745.

[296] Key v. Vaughn, 15 Ala. 497; Arnett's Ex'r v. Arnett, 33 Ala. 273; Duckworth v. Duckworth's Adm'r, 35 Ala. 70.

[297] Osborne v. Graham, 30 Ark. 67.

[298] Dayton v. Mintzer, 22 Minn. 393; Kurtz v. St. Paul & D. R. Co., 61 Minn. 18, 63 N. W. 1.

[299] Luco v. Commercial Bank, 70 Cal. 339, 11 Pac. 650; McCauley v. Harvey, 49 Cal. 497; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

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of validity.[300] 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.[301] 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.[302] 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.[303] 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.[304]

§ 285. Federal Courts.

The circuit, district, and territorial courts of the United States, though of limited jurisdiction, are not inferior courts in the technical 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.[305] It is

[300] Easley v. McClinton, 33 Tex. 288.

[301] Martin v. Robinson, 67 Tex. 368, 3 S. W. 550; Lyne v. Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Bouldin v. Miller, 87 Tex. 359, 28 S. W. 940; McSpadden v. Farmer (Tex. Civ. App.) 23 S. W. 814; Corley v. Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839; Grant v. Hill (Tex. Civ. App.) 30 S. W. 952; Stone v. Ellis (Tex. Civ. App.) 40 S. W. 1077; Hill v. Grant (Tex. Civ. App.) 44 S. W. 1016.

[302] Martin v. Williams, 42 Miss. 210, 97 Am. Dec. 456.

[303] Mercier v. Chace, 9 Allen, 242; Peters v. Peters, 8 Cush. 529.

[304] Rowe v. Parsons, 6 Hun, 338. And see Seymour v. Seymour, 4 Johns. Ch. 409; Chipman v. Montgomery, 63 N. Y. 236; In re Stillwell's Estate, 139 N. Y. 337, 34 N. E. 777; Bensen v. Manhattan Ry. Co., 14 App. Div. 442, 43 N. Y. Supp. 914; Taylor v. Syme, 17 App. Div. 517, 45 N. Y. Supp. 707.

[305] McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Kennedy v. Georgia State Bank, 8 How. 611, 12 L. Ed. 1209; Page v. United States, 11 Wall. 268, 20 L. Ed. 135; Evers v.

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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." [306] Thus, a judgment obtained in a federal circuit court cannot be treated as a nullity or as being open to collateral impeachment, although the record fails to show a ground of federal jurisdiction, such as diverse citizenship of the parties.[307] So, a judgment rendered in a federal court, in an action removed thereto from a state court, cannot be collaterally attacked for want of proper jurisdictional allegations in the petition for removal.[308]

§ 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 at-

Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Skirving v. National Life Ins. Co., 8 C. C. A. 241, 59 Fed. 742; Livingston v. Van Ingen, 1 Paine, 48, Fed. Cas. No. 8,420; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; Ruckman v. Cowell, 1 N. Y. 505; Matson v. Burt, 9 Hun, 470; Byers v. Fowler, 12 Ark. 218, 44 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. 38.

[306] Reed v. Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

[307] Cutler v. Huston, 158 U. S. 423, 15 Sup. Ct. 868, 39 L. Ed. 1040; Rice v. Adler-Goldman Commission Co., 18 C. C. A. 15, 71 Fed. 151.

[308] Washburn v. Pullman Palace-Car Co., 21 C. C. A. 598, 76 Fed. 1005; Haug v. Great Northern Ry. Co., 42 C. C. A. 167, 102 Fed. 74.

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tacked collaterally as void therefor.[309] 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,[310] Vermont,[311] Pennsylvania,[312] Mississippi,[313] Tennessee,[314] and Alabama.[315] 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."[316] But on the other hand, in Maryland and some other states, 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.[317] 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.[318]

[309] Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730; Watkins v. Davis, 61 Tex. 414; Holmes v. Buckner, 67 Tex. 107, 2 S. W. 432; Hambel v. Davis (Tex. Civ. App.) 33 S. W. 251.

[310] Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

[311] Wright v. Hazen, 24 Vt. 143; Farr v. Ladd, 37 Vt. 158.

[312] Billings v. Russell, 23 Pa. 189, 62 Am. Dec. 330; Clark v. McCommun, 7 Watts & S. (Pa.) 469; Tarbox v. Hays, 6 Watts (Pa.) 398, 31 Am. Dec. 478.

[313] Stevens v. Mangum, 27 Miss. 481.

[314] Turner v. Ireland, 11 Humph. (Tenn.) 447.

[315] Lightsey v. Harris, 20 Ala. 411.

[316] Hendrick v. Whittemore, 105 Mass. 28.

[317] Fahey v. Mottu, 67 Md. 250, 10 Atl. 68. In Missouri, while there is no presumption that a justice of the peace had jurisdiction of an action, yet if it has been appealed to a court of superior jurisdiction, there is a presumption that the latter court had jurisdiction, though such court would have none if the justice had none. Kellogg v. Linger, 1 Mo. App. Rep'r. 235, 60 Mo. App. 571. It is sufficient to the validity of a judgment of a justice if the jurisdictional facts appear anywhere on the face of the proceedings; they need not appear in his docket entries. Collins v. Kammann, 55 Mo. App. 464. In Kentucky, a judgment of a justice of the peace, relied on as a defense, must be shown to have been within his jurisdiction. Stewart v. Thomson, 97 Ky. 575, 31 S. W. 133. In Arkansas, a judgment rendered by a justice of the peace cannot be attacked collaterally for mere irregularities in process. Webster v. Daniel, 47 Ark. 131, 14 S. W. 550.

[318] Beach v. Botsford, 1 Doug. (Mich.) 199, 40 Am. Dec. 145.

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§ 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.[319] "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."[320] 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.[321] 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.[322] In that state, however, it will be remembered, want of jurisdiction may be shown collaterally against the judgment of any court.[323] 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 ad-

[319] Comstock v. Crawford, 3 Wall. 396, 18 L. Ed. 34; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 52; Reeves v. Townsend, 22 N. J. Law, 396; Wilson's Heirs v. Wilson's Adm'r, 18 Ala. 176; Paul v. Hussey, 35 Me. 97; Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Gray v. McNeal, 12 Ga. 424; Vincent v. Davidson, 1 Kan. App. 606, 42 Pac. 390; Alexander v. Gill, 130 Ind. 485, 30 N. E. 525; Jewett v. Sundback, 5 S. D. 111, 58 N. W. 20.

[320] Featherston v. Small, 77 Ind. 143.

[321] Gregory v. Bovier, 77 Cal. 121, 19 Pac. 232; Secombe v. Milwaukee & St. P. R. Co., 23 Wall. 108, 23 L. Ed. 67.

[322] Belden v. Meeker, 2 Lans. 470.

[323] Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589. See supra, § 275.

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judged sufficient, and the court judicially determined that such facts existed, then the judgment cannot be collaterally impeached or contradicted.[324]

§ 288. 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."[325] Thus, although a judgment 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.[326] 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.[327] 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

[324] Sheldon v. Wright, 5 N. Y. 497; Dyckman v. City of New York, 5 N. Y. 434; Porter v. Purdy, 29 N. Y. 106, 86 Am. Dec. 283; Bolton v. Brewster, 32 Barb. (N. Y.) 389; Agry v. Betts, 12 Me. 415; Waterhouse v. Cousins, 40 Me. 333; Betts v. Bagley, 12 Pick. (Mass.) 572; Angell v. Robbins, 4 R. I. 493; Bridgeport Savings Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Evansville, S. & C. Straight Line R. Co. v. City of 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.

[325] Duncan v. Gerdine, 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 jurisdiction 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.

[326] Newcomb v. Dewey, 27 Iowa, 381.

[327] McNeill v. Edie, 24 Kan. 108; Bond v. Wilson, 8 Kan. 229, 12 Am. Rep. 466; Chambers v. King Wrought-Iron Bridge Manufactory, 16 Kan. 270; Hanson v. Wolcott, 19 Kan. 207.

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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.[328] 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.[329] 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." [330]

§ 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.[331] A similar rule obtains in the case of judgments

[328] Harman v. City of Lynchburg, 33 Grat. (Va.) 37; Wright v. Smith, 81 Va. 777; Wynn v. Heninger, 82 Va. 172; Jencks v. Smith, 1 N. Y. 90; McGirk v. Chauvin, 3 Mo. 237.

[329] Singleton v. Boyle, 4 Neb. 414.

[330] Tebbetts v. Tilton, 31 N. H. 273, 286.

[331] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652. And see infra vol. 2, §§ 818, 835–838.

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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.[332]

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.[333] The

[332] Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959. And see infra vol. 2, §§ 897–901.

[333] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Kent v. Lake Superior Ship Canal, Ry. & Iron Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; Rhino v. Emery (C. C.) 65 Fed. 826; Granger v. Clark, 22 Me. 128; Hammond v. Wilder, 25 Vt. 342; McRae v. Mattoon, 13 Pick. 53; Boston & W. R. Corp. v. Sparhawk, 1 Allen, 448, 79 Am. Dec. 750; Greene v. Greene, 2 Gray, 361, 61 Am. Dec. 454; Taylor v. State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852; James Clark Co. v. Colton, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698; Sanders v. Price, 56 S. C. 1, 33 S. E. 731; Williams v. Martin, 7 Ga. 378; Porter v. Rountree, 111 Ga. 369, 36 S. E. 761; Smith v. Henderson, 23 La. Ann. 649; Bouldin v. Miller, 87 Tex. 359, 28 S. W. 940; Gains v. Johnston (Ky.) 15 S. W. 246; Kelley v. Mize, 3 Sneed, 59; Anderson v. Anderson, 8 Ohio, 109; Shultz v. Shultz, 136 Ind. 323, 36 N. E. 126, 43 Am. St. Rep. 320; Webster v. Reid, 1 Morris (Iowa) 467, Mason v. Messenger, 17 Iowa, 261; Smith v. Smith, 22 Iowa, 516; Edmundson v. Independent School Dist., 98 Iowa, 639, 67 N. W. 671, 60 Am. St. Rep. 224; Field v. Sanderson, 34 Mo. 542, 86 Am. Dec. 124; Cooper v. Duncan, 58 Mo. App. 5; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Cody v. Cody, 98 Wis. 445, 74 N. W. 217; In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514. Thus, stockholders cannot set up as a defense to an action by a judgment creditor of the corporation for unpaid subscriptions that the judgment was obtained in a federal court by one to whom the claim was collusively assigned for the

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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 and South Carolina, however, it is allowed to a party to show fraud against a judgment collaterally,[334] and the same doctrine is apparently held in New Hampshire.[335] 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.[336] 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 evidence of fraud, without being put to a direct suit to annul it, and notwithstanding it is regular upon its face.[337]

§ 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 practised 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

purpose of giving jurisdiction to that court. Tuthill Spring Co. v. Smith, 90 Iowa, 331, 57 N. W. 853.

[334] Hall v. Hamlin, 2 Watts, 354; Verner v. Carson, 66 Pa. 440; Phelps v. Benson, 161 Pa. 418, 29 Atl. 86; Sullivan v. Ball, 55 S. C. 343, 33 S. E. 486. Compare Otterson v. Middleton, 102 Pa. 78; City of Philadelphia v. Dobson, 10 Pa. Co. Ct. R. 34. See, also, Kirby v. Kirby, 142 Ind. 419, 41 N. E. 809.

[335] State v. Little, 1 N. H. 257.

[336] Mandeville v. Reynolds, 68 N. Y. 528.

[337] Murray v. Murray, 6 Or. 17. And see Glover v. Flowers, 101 N. C. 134, 7 S. E. 579.

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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 reverse or annul the judgment before he can claim to treat it as invalid."[338] 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.[339] 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.[340] 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.[341] 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 conse-

[338] Davis v. Davis, 61 Me. 398. See Boston & W. R. Corp. v. Sparhawk, 1 Allen (Mass.) 448, 79 Am. Dec. 750; Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95; Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. Rep. 557. Compare Carr v. Miner, 42 Ill. 179.

[339] Meckley's Appeal, 102 Pa. 536; In re Dougherty's Estate, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Thompson's Appeal, 57 Pa. 178; Clark v. Douglass, 62 Pa. 415; McCambridge v. Walraven, 88 Md. 378, 41 Atl. 928; Cotterell v. Koon, 151 Ind. 182, 51 N. E. 235; Storer v. Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

[340] Ellis v. Kelly, 8 Bush (Ky.) 621; First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Daniels v. Benedict (C. C.) 50 Fed. 347; Wheeler v. Sweet, 16 N. Y. Supp. 836. See Thomas v. Ireland (Ky.) 11 S. W. 653.

[341] Smith v. Abbott, 40 Me. 442; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527.

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quence 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.[342] 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.[343] 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 defendant, 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.[344]

§ 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.[345] And a judgment is not generally open to collateral attack because based on a fraudulent instrument or on perjured testimony.[346] 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

[342] Smith v. Palmer, 6 Cush. (Mass.) 513.

[343] Farwell v. Raddin, 129 Mass. 7; Home Nat. Bank v. Carpenter, Id. 1.

[344] Mannix v. State, 115 Ind. 245, 17 N. E. 565.

[345] Hatch v. Garza's Ex'r, 22 Tex. 176; Nevitt v. First Nat. Bank, 91 Hun, 43, 36 N. Y. Supp. 294; Turney v. Van Gelder, 63 Hun, 634, 18 N. Y. Supp. 547; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Bowman v. Wilson, 64 Ill. App. 73.

[346] United States v. Chung Shee (D. C.) 71 Fed. 277; Finley v. Houser, 22 Or. 562, 30 Pac. 494.

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of the fraudulent character of the deed had never been legally before the court and never adjudicated.[347]

§ 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.[348] "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."[349] 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.[350] Hence a judgment confessed without any consideration and with fraudulent intent, may be

[347] Jackson v. Summerville, 13 Pa. 359. And see Pray v. Jenkins, 47 Kan. 599, 28 Pac. 716.

[348] 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 Clark & F. 479; Gaines v. Relf, 12 How. 472, 13 L. Ed. 1071; Pierce v. Strickland, 26 Me. 277; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Great Falls Manuf'g 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. (Mass.) 483; Leonard v. Bryant, 11 Metc. (Mass.) 370; Downs v. Fuller, 2 Metc. (Mass.) 135, 35 Am. Dec. 393; Vose v. Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; Cook v. Town of Morris, 66 Conn. 137, 33 Atl. 594; Baker v. Byrn, 89 Hun, 115, 35 N. Y. Supp. 55; Bridgeport Fire & Marine Ins. Co. v. Wilson, 34 N. Y. 281; Hall v. Hamlin, 2 Watts (Pa.) 354; Mitchell v. Kintzer, 5 Pa. 216, 47 Am. Dec. 408; Caldwell v. Walters, 18 Pa. 79, 55 Am. Dec. 592; Thompson's Appeal, 57 Pa. 175; Second Nat. Bank's Appeal, 85 Pa. 528; Sager v. Mead, 164 Pa. 125, 30 Atl. 284; Norton v. Wallace, 2 Rich. Law (S. C.) 460; Hammock v. McBride, 6 Ga. 178; Faris v. Durham, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77; De Armond v. Adams, 25 Ind. 455; Callahan v. Griswold, 9 Mo. 775; Myers v. Miller, 55 Mo. App. 338; Hackett v. Manlove, 14 Cal. 85.

[349] Smith v. Cuyler, 78 Ga. 654, 3 S. E. 406.

[350] Palmer v. Martindell, 43 N. J. Eq. 90, 10 Atl. 802.

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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.[351] 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 property of the debtor may discharge as many of his liabilities as possible.[352] 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.[353] 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.[354]

§ 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.[355] "The

[351] Shallcross v. Deats, 43 N. J. Law, 177; Bryant v. Harding, 29 Mo. 347; Atlas Nat. Bank v. More, 40 Ill. App. 336; Chase v. Tuckwood, 86 Ill. App. 70.

[352] Karnes v. Lloyd, 52 Ill. 113.

[353] Faris v. Durham, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77.

[354] Clark v. Bailey, 2 Strob. Eq. 143; Hulverson v. Hutchinson, 39 Iowa, 316.

[355] Sheetz v. Hambest's Ex'rs, 81 Pa. 100; Miners' Trust Co. Bank v. Roseberry, 81 Pa. 309; In re Dougherty's Estate, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Lewis v. Rogers, 16 Pa. 18; Thompson's Appeal, 57 Pa. 175. So, while the holder of a junior judgment may collaterally impeach a senior judgment for fraud against himself, to the extent of defeating the priority of lien, he cannot do so on the ground merely that the judgment was fraud-

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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." [356] Nor can creditors thus set up any matter of defense original or subsequent.[357] 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.[358]

§ 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.[359] In New York it was formerly held that none but a judgment-creditor could 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, could not do so.[360] 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.[361] 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

ulent as against the defendant. Safe-Deposit & Trust Co. v. Wright, 44 C. C. A. 421, 105 Fed. 155.

[356] McAlpine v. Sweetser, 76 Ind. 78.

[357] Lewis v. Rogers, 16 Pa. 18; Johns v. Pattee, 55 Iowa, 665, 8 N. W. 663.

[358] Thompson's Appeal, 57 Pa. 175. And see Clark v. Douglass, 62 Pa. 408.

[359] Spicer v. Waters, 65 Barb. (N. Y.) 227; De Armond v. Adams, 25 Ind. 455; Hackett v. Manlove, 14 Cal. 85; Grant v. Hill (Tex. Civ. App.) 30 S. W. 952.

[360] 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.

[361] See Bates v. Plonsky, 28 Hun, 112; Bowe v. Arnold, 31 Hun, 256; Tannenbaum v. Rosswog, 22 Abb. N. C. 346, 6 N. Y. Supp. 578.

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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.[362] 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.[363]

§ 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 testimony was given at the trial, on which testimony the judgment was rendered.[364] 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.[365] 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.[366] 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,

[362] Lewis v. Peterkin, 39 La. Ann. 780, 2 South. 577.

[363] Dane v. Gilmore, 51 Me. 544; City of Lowell v. Parker, 10 Metc. (Mass.) 315, 43 Am. Dec. 436.

[364] Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Fisk v. Miller, 20 Tex. 579; The Acorn, 2 Abb. U. S. 434, Fed. Cas. No. 29; Greene v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Burton v. Perry, 146 Ill. 71, 34 N. E. 60; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033.

[365] Cunningham v. Brown, 18 Vt. 123, 46 Am. Dec. 140; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; Damport v. Sympson, Cro. Eliz. 520; Eyres v. Sedgewicke, Cro. Jac. 601.

[366] Lyford v. Demerritt, 32 N. H. 234.

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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.[367] It is also held that an award, like a judgment, cannot be collaterally impeached by evidence that one party introduced false testimony.[368] 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.[369]

[367] Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469.
[368] Woodrow v. O'Conner, 28 Vt. 776.
[369] Engstrom v. Sherburne, 137 Mass. 153.

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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] As between courts of co-ordinate jurisdiction, such as two county courts or circuit courts of the same state, the rule is that neither has power to vacate or set aside a judgment rendered by the other which is not void upon its face; relief must be sought in the court where the judgment was entered.[2] The power to vacate or open a judgment, or to set it aside, 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 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

[1] Grattan v. Matteson, 51 Iowa, 622, 2 N. W. 432.

[2] Dixon v. Baxter, 106 Ga. 180, 32 S. E. 24; Odom v. Burch, 52 S. C. 305, 29 S. E. 726; Wilsie v. Rooney, 62 Hun, 618, 16 N. Y. Supp. 471; Smithson v. Smithson, 37 Neb. 535, 56 N. W. 300, 40 Am. St. Rep. 504; Black v. Plunkett, 132 Ind. 599, 31 N. E. 567; Skinner v. Terry, 107 N. C. 103, 12 S. E. 118. In New York, it is said that a court exercising jurisdiction concurrent with that of another, by which an order has been made, is not without power to modify it or set it aside on new papers, or relieve from an order which has proved oppressive, where leave has been given to renew. The question is not one of power, but of practice and orderly procedure. Cruikshank v. Cruikshank, 30 App. Div. 381, 51 N. Y. Supp. 926. A change in the constitution of a court does not preclude a consideration of the question whether a judgment entered by the court before the change should be vacated. State v. Superior Court, 18 Wash. 277, 51 Pac. 365. And where a court has two or more judges, an application to vacate a judgment may be heard by whichever judge is sitting at the time the application is made. Dolen v. Buchanan, 43 Neb. 854, 62 N. W. 233. But a judge at chambers has no jurisdiction to vacate or modify orders or judgments of the district court. Kime v. Fenner, 54 Neb. 476, 74 N. W. 869.

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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.[3] 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.[4] 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.[5] 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.[6]

[3] Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Donnelly v. McArdle, 14 App. Div. 217, 43 N. Y. Supp. 560; In re Board of Directors of Broadway Ins. Co., 23 App. Div. 282, 48 N. Y. Supp. 299. This power belongs inherently to the courts of the United States, as well as to those of the states. United States v. Williams, 14 C. C. A. 440, 67 Fed. 384; Fisher v. Simon, 14 C. C. A. 443, 67 Fed. 387; United States v. Wallace (D. C.) 46 Fed. 569.

[4] See Frazier v. Griffie, 8 Md. 50; Rhodes v. De Bow, 5 Iowa, 260; Gallop v. Allen, 113 N. C. 24, 18 S. E. 55; State v. Duncan, 37 Neb. 631, 56 N. W. 214. 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. Boyd v. Miller, 52 Pa. 431; Lacock v. White, 19 Pa. 495; Littster v. Littster, 151 Pa. 474, 25 Atl. 117. As to the power of the court to strike the judgment from the record if void upon its face, see Weldy v. Young, 21 Pa. Co. Ct. R. 15; Ward v. Fannon, 7 Kulp, 488. A similar rule obtains in North Carolina and South Dakota. See Whitehurst v. Merchants' & Farmers' Transp. Co., 109 N. C. 342, 13 S. E. 937; Garlock v. Calkins, 14 S. D. 90, 84 N. W. 393. As to the practice in New York, see Daniels v. Southard, 23 Misc. Rep. 235, 51 N. Y. Supp. 1136.

[5] Hamberlin v. Terry, 1 Smedes & M. Ch. (Miss.) 589; In re Marquis, 85 Mo. 615; In re Coogan, 27 Misc. Rep. 563, 59 N. Y. Supp. 111; Hirshfeld v. Brown (Tex. Civ. App.) 30 S. W. 962.

[6] Edward's Appeal, 66 Pa. 89.

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§ 297a. As Between Federal and State Courts.

The federal courts have no jurisdiction of an action or proceeding to vacate or set aside a judgment rendered by a state court, on the ground that the same is void for want of jurisdiction, or is erroneous or irregular; for, in such case, the proper and sufficient remedy is by motion, appeal, or bill of review in the courts of the state.[7] But a federal court (where the jurisdictional requirements as to diverse citizenship and the amount involved are met) has power to entertain a suit and enter a decree which, as between the parties, shall set aside and vacate a judgment of a state court, and any proceedings taken or rights acquired thereunder, when the ground of objection is that the judgment was procured by fraud.[8] But the federal court should not act in such cases where the party injured has, or had, an opportunity to apply for relief to the state courts.[9] Similar rules govern an application to a state court for relief against a judgment of a federal court; it may be attacked as fraudulent, but cannot be reviewed as to any alleged errors or irregularities, or annulled for an alleged want of jurisdiction.[10]

§ 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

[7] Little Rock Junction Ry. v. Burke, 13 C. C. A. 341, 66 Fed. 83; Elder v. Richmond Gold & Silver Min. Co., 7 C. C. A. 354, 58 Fed. 536; Smith v Schwed (C. C.) 9 Fed. 483; Blythe v. Hinckley (C. C.) 84 Fed. 246.

[8] Davenport v. Moore (C. C.) 74 Fed. 945; Hatch v. Ferguson (C. C.) 52 Fed. 833; Young v. Sigler (C. C.) 48 Fed. 182; De Forest v. Thompson (C. C.) 40 Fed. 375; Bertha Zinc & Mineral Co. v. Vaughan (C. C.) 88 Fed. 566; Little Rock Junction Ry. v. Burke, 13 C. C. A. 341, 66 Fed. 83; Hunt v. Fisher (C. C.) 29 Fed. 801.

[9] Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; Nougue v. Clapp, 101 U. S. 551, 25 L. Ed. 1026; Randall v. Howard, 2 Black (U. S.) 585, 17 L. Ed. 269.

[10] See Kurtz v. Philadelphia & R. R. Co., 187 Pa. 59, 40 Atl. 988.

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when or how or for what causes, it cannot apply retrospectively to a 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.[11] A contrary rule obtains, however, in the state of Alabama.[12] 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.[13] 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

[11] Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; Lewis v. Webb, 3 Me. 326; Bates v. Kimball, 2 D. Chip. (Vt.) 77; State v. New York, N. H. & H. R. Co., 71 Conn. 43, 40 Atl. 925; De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570; Taylor v. Place, 4 R. I. 324; Miller v. State, 8 Gill (Md.) 145; Ratcliffe v. Anderson, 31 Grat. (Va.) 105, 31 Am. Rep. 716; Griffin's Ex'r v. Cunningham, 20 Grat. (Va.) 31; Weaver v. Lapsley, 43 Ala. 224; Lanier v. Gallatas, 13 La. Ann. 175; Beebe v. State, 6 Ind. 515, 63 Am. Dec. 391; Davis v. Village of Menasha, 21 Wis. 491; Arnold v. Kelley, 5 W. Va. 446; Burch v. Newbury, 10 N. Y. 374; Hill v. Town of Sunderland, 3 Vt. 507. An adjudication in bankruptcy, being a decree of the court, is beyond legislative control; so that congress could not invalidate or set aside an adjudication once made, by any retroactive legislation establishing new or different requisites to its validity. In re Raffauf, 6 Biss. 150, Fed. Cas. No. 11,525; In re Comstock, 3 Sawy. 128, Fed. Cas. No. 3,077; In re Obear, 3 Dill. 37, Fed. Cas. No. 10,395.

[12] Ex parte Bibb, 44 Ala. 140.

[13] White v. Herndon, 40 Ga. 493; Bonner v. Martin, Id. 501; Kite v. Lumpkin, Id. 506.

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judicial, it was not in violation of the constitution.[14] 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.[15] As remarked by Chief Justice Gibson: "It is not more 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."[16]

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.[17] It is a regular suit with its usual incidents, pleadings, issues of law and fact, trial, judgment, and error.[18] The writ must be directed to the court which rendered the judgment and retains the record,[19] and all the parties to the judgment against which relief is sought must join in the writ or be duly and regularly served.[20] 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 ex-

[14] Braddee v. Brownfield, 2 Watts & S. (Pa.) 271.

[15] For the history of this change of attitude, see remarks of Sharswood, J., in Grim v. Weissenberg School District, 57 Pa. 436, 98 Am. Dec. 237.

[16] De Chastellux v. Fairchild, 15 Pa. 18, 53 Am. Dec. 570.

[17] 1 Am. & Eng. Enc. Law, 1005.

[18] Brooks v. Hunt, 17 Johns. (N. Y.) 484.

[19] Harper v. Kean, 11 Serg. & R. (Pa.) 299; Town of Poultney v. Treasurer of State, 25 Vt. 168; Warner v. Crane, 16 Vt. 79.

[20] Melton v. Howard, 7 How. (Miss.) 103; Herrick v. Orange County Bank, 1 Williams (Vt.) 584; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329; Titlemore v. Wainwright, 16 Vt. 173; Starbird v. Moore, 21 Vt. 529.

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amination.[21] The judgment in this action cannot properly include affirmative relief to the defendant.[22] An appeal or writ of error will lie from it.[23] 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 erroneous judgments or acts of the court; it is a writ in which the plaint sounds in tort.[24] 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.[25] It will lie to vacate a judgment rendered against a non-resident defendant on constructive service of process, where the statutory prerequisites were omitted.[26] But not where an attorney, although without authority, has entered an appearance for such defendant.[27] 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;[28] or which was given against an infant who was not represented by his guardian;[29] or against a lunatic under similar circumstances.[30] 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.[31] This

[21] Folsom v. Connor, 49 Vt. 4; Paddleford v. Bancroft, 22 Vt. 529; Hill v. Warren, 54 Vt. 73.

[22] Foss v. Witham, 9 Allen (Mass.) 572.

[23] Fitch v. Scovel, 1 Root (Conn.) 56; White v. Clapp, 8 Allen (Mass.) 283; Gordonier v. Billings, 77 Pa. 498.

[24] Little v. Cook, 1 Aikens (Vt.) 363, 15 Am. Dec. 698; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159.

[25] Bryant v. Johnson, 24 Me. 304.

[26] Folan v. Folan, 59 Me. 566; Dingman v. Myers, 13 Gray (Mass.) 1; Marvin v. Wilkins, 1 Aikens (Vt.) 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.

[27] Spaulding v. Swift, 18 Vt. 214.

[28] 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.

[29] Judd v. Downing, Brayt. (Vt.) 27; Starbird v. Moore, 21 Vt. 529. See Barber v. Graves, 18 Vt. 290.

[30] Lincoln v. Flint, 18 Vt. 247.

[31] Merchants' Ins. Co. v. De Wolf, 33 Pa. 45, 75 Am. Dec. 577.

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writ may also be brought when the debtor has been discharged in bankruptcy subsequent to the judgment;[32] or to set aside a judgment from which an appeal was wrongfully denied by the inferior court.[33] 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.[34] 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 which he now sets up, or where his own negligence has brought about the injury complained of.[35] Nor can it be brought where the matter alleged would be a proper subject for a writ of error;[36] nor in respect to matters which constitute an equitable defense, not cognizable at law;[37] nor for irregularities which do not affect the substantial validity of the process in the action or the merits of the controversy;[38] nor on account of an erroneous taxation of costs or allowance of excessive interest.[39] 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.[40] For, as a general rule,

[32] Petit v. Seaman, 2 Root (Conn.) 178; Williams v. Butcher, 1 Wkly. Notes Cas. (Pa.) 304; Baker v. Judges of Ulster Common Pleas, 4 Johns. (N. Y.) 191.

[33] Edwards v. Osgood, 33 Vt. 224; Harriman v. Swift, 31 Vt. 385.

[34] Browne v. Joy, 9 Johns. (N. Y.) 221.

[35] Avery v. U. S., 12 Wall. 304, 20 L. Ed. 405; Lovejoy v. Webber, 10 Mass. 101; Barker v. Walsh, 14 Allen (Mass.) 175; Faxon v. Baxter, 11 Cush. (Mass.) 35; Barrett v. Vaughan, 6 Vt. 243; Griswold v. Rutland, 23 Vt. 324.

[36] Weeks v. Lawrence, 1 Vt. 433; Dodge v. Hubbell, Id. 491; Eleventh School Dist. in Alburgh 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. Town of Burlington, Brayt. (Vt.) 27; Dodge v. Hubbell, 1 Vt. 491; Spear v. Flint, 17 Vt. 497.

[37] Schott v. McFarland, 1 Phila. (Pa.) 58; Garfield v. Vermont University, 10 Vt. 536.

[38] Sawyer v. Doane, 19 Vt. 598; Lampson v. Bradley, 42 Vt. 165; Ball v. Sleeper, 23 Vt. 573.

[39] Johnson v. Roberts, 58 Vt. 599, 2 Atl. 482; Goodrich v. Willard, 11 Gray, 380; Clough v. Brown, 38 Vt. 179. See Rickard v. Fisk, 66 Vt. 675, 30 Atl. 93.

[40] Job v. Walker, 3 Md. 129; Huston v. Ditto, 20 Md. 305; Smock v.

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wherever this writ would lie at common law, the courts may now relieve on motion.[41] 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 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.[42] 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

Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Longworth v. Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Dunlap v. Clements, 18 Ala. 778; Chambers v. Neal, 13 B. Mon. (Ky.) 256; Marsh v. Haywood, 6 Humph. (Tenn.) 210; McMillan v. Baker, 20 Kan. 50; McDonald v. Falvey, 18 Wis. 571.

[41] Share v. Becker, 8 Serg. & R. (Pa.) 239; Witherow v. Keller, 11 Serg. & R. (Pa.) 274; Baker v. Judges of Ulster Common Pleas, 4 Johns. (N. Y.) 191.

[42] Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Mississippi & T. R. Co. v. Wynne, 42 Miss. 315; Milam Co. v. Robertson, 47 Tex. 222; Hurst v. Fisher, 1 Watts & S. (Pa.) 438; Beall v. Powell, 4 Ga. 525; Day v. Hamburgh, 1 Browne (Pa.) 75; McLemore v. Durivage, 92 Tenn. 482, 22 S. W. 207; Brady v. Washington Ins. Co., 82 Ill. App. 380; Holden v. Dunn, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; Castledine v. Mundy, 4 Barn. & Adol. 90; Beven v. Cheshire, 3 Dowl. 70; King v. Jones, 2 Ld. Raym. 1525; Evans v. Chester, 2 Mees. & W. 847. In West Virginia, it is said that a writ of error coram nobis is not a proper process to reverse a judgment because of defendant's insanity at the time of its rendition, as the judgment can be attacked for such cause only in equity. Withrow v. Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762. Entering an order of default without first passing upon a pending demurrer is an error of law, which cannot be revised on a writ of error coram nobis. Utley v. Cameron, 87 Ill. App. 71.

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lie to contradict or put in issue any fact that has been already adjudicated in the action.[43] 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.[44] 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.[45] In any case, the writ will not lie after affirmance of the judgment in the appellate court.[46]

§ 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 annulment 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.[47] 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 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

[43] Gould's Estate v. Watson, 80 Ill. App. 242.

[44] Richardson's Ex'x v. Jones, 12 Grat. (Va.) 53. But in Missouri, if a court commits an error of fact vital to its jurisdiction, such as finding defendant a nonresident, and making an order of publication against him, when in fact he is a resident, it will, on error coram nobis, set aside the judgment rendered on such publication. State v. White, 75 Mo. App. 257.

[45] Pickett's Heirs v. Legerwood, 7 Pet. 144, 8 L. Ed. 638; Sloo v. State Bank, 1 Scam. (Ill.) 428; McKindley v. Buck, 43 Ill. 488; Life Association v. Fassett, 102 Ill. 315; Beaubien v. Hamilton, 3 Scam. (Ill.) 213; Billups v. Freeman (Ariz.) 52 Pac. 367. In Illinois, this writ has been abolished, and a remedy by motion substituted; but the latter can reach only such mistakes of fact as might have been corrected by error coram nobis before it was abrogated. McPherson v. Wood, 52 Ill. App. 170.

[46] Lambell v. Pretty John, 1 Strange, 690.

[47] See Fries v. Fries, 1 MacArthur (D. C.) 291; Durant v. Duchesse D'Auxy, 107 Ga. 456, 33 S. E. 478; Kizer Lumber Co. v. Mosely, 56 Ark. 544, 20 S. W. 409; Carolina Nat. Bank v. Homestead Building & Loan Ass'n, 56 S. C. 12, 33 S. E. 781.

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shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."[48] 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.[49]

§ 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 annulment of the judgment complained of.[50] And in some, after the expiration of the statutory time for moving to vacate a judgment, the defendant may still proceed by an independent action, the ground of objection to the judgment being want of jurisdiction or fraud in obtaining it.[51] In other respects, the law and practice in these states, on the topic under consideration, does not differ materially from the rest. It must be remarked that all the

[48] Cawley v. Leonard, 28 N. J. Eq. 467; Smith v. Alton, 22 N. J. Eq. 572; Beekman v. Peck, 3 Johns. Ch. (N. Y.) 415; Bennett v. Winter, 2 Johns. Ch. (N. Y.) 205; Millspaugh v. McBride, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; Herbert v. Rowles, 30 Md. 271; Erwin v. Vint, 6 Munf. (Va.) 267; Carter v. Torrance, 11 Ga. 654.

[49] Harwood v. Cincinnati & C. Airline R. R. Co., 17 Wall. 78, 21 L. Ed. 558.

[50] See Hill's Code Wash. §§ 1393–1397; Whidby Land & Development Co. v. Nye, 5 Wash. St. 301, 31 Pac. 752; State v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; Roberts v. Shelton S. W. R. Co., 21 Wash. 427, 58 Pac. 576. In North Carolina, a judgment sought to be vacated on the ground of fraud cannot be attacked by motion in the cause, but only by an independent action. Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6. And in Indiana, where a final judgment is assailed for want of jurisdiction, it is proper to attack the proceedings by a complaint. Scudder v. Jones, 134 Ind. 547, 32 N. E. 221. An application for the vacation of a judgment, though in the form of a motion, may properly be treated as by petition, where it contains averments, statements, and demands proper in a petition. Council Bluffs L. & T. Co. v. Jennings, 81 Iowa, 470, 46 N. W. 1006; Callanan v. Aetna Nat. Bank, 84 Iowa, 8, 50 N. W. 69.

[51] People v. Temple, 103 Cal. 447, 37 Pac. 414; Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

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parties to the former suit must be made parties to an action to annul the judgment.[52]

§ 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.[53] 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, 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." [54] But on the other hand, it is said that

[52] See Haggerty v. Phillips, 21 La. Ann. 729; Green v. Grant, 108 Ga. 751, 32 S. E. 846.

[53] As to the circumstances under which an application for the vacation of a judgment should be made by motion, rather than by an independent action, or any other form of proceeding, see Frazier v. Williams, 18 Ind. 416; Grant v. Harrell, 109 N. C. 78, 13 S. E. 718; Everett v. Reynolds, 114 N. C. 366, 19 S. E. 233; Drake v. Steadman, 46 S. C. 474, 24 S. E. 458; Silberman v. Shuklansky, 172 Pa. 77, 33 Atl. 272; Pollock v. Boyd, 36 Neb. 369, 54 N. W. 560; Iba v. Central Ass'n of Wyoming, 5 Wyo. 355, 40 Pac. 527. An application by a wife to set aside, as rendered in fraud of her rights, a judgment by confession entered against her husband, pending her suit for divorce and alimony, is a suit for equitable relief, which cannot be granted on motion. Dullard v. Phelan, 83 Iowa, 471, 50 N. W. 204. Statutes authorizing the vacation of judgments on motion intend that the motion shall be in writing, and not made orally. Indianapolis, D. & W. Ry. Co. v. Crockett, 2 Ind. App. 136, 28 N. E. 222.

[54] Nuckolls v. Irwin, 2 Neb. 60. A decree declaring the rights of certain

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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.[55]

§ 304a. Other Remedies Available.

A motion to vacate or set aside a judgment will not be entertained by the court when the proper remedy of the party aggrieved is by an appeal,[56] or by a motion for a new trial in the court rendering the judgment,[57] or by mandamus requiring the court to take some action which would give the party what he seeks,[58] or by an independent action for damages.[59] Sometimes also, the case is such that chancery is the only forum competent to afford adequate relief; and then the party must seek his redress there, and not by motion to set aside the judgment.[60] And pending a suit in equity to restrain proceedings on a judgment, and have it declared void, the court in which it was rendered has no jurisdiction of a rule to set it aside.[61] Again, a defendant cannot move to set aside a judgment at the same time an action by him for the same purpose is pending in another court.[62]

persons in an action is not vacated by a subsequent decree declaring the rights of such persons to be as stated in the former decree, except as to a person who has since intervened; and hence, the subsequent decree being itself afterwards vacated, the former is revived. Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.

55 Lane v. Kingsberry, 11 Mo. 402.

56 Landry v. Bertrand, 48 La. Ann. 48, 19 South. 126; Philadelphia & R. R. Co. v. Snowdon, 161 Pa. 201, 28 Atl. 1067.

57 Folsom v. Ballard, 16 C. C. A. 593, 70 Fed. 12; Clark's Cove Guano Co. v. Steed, 92 Ga. 440, 17 S. E. 967.

58 Chappell v. Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

59 Chappell v. Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

60 Woodward v. Arlington Mills Manuf'g Co., 2 Pennewill (Del.) 189, 44 Atl. 620.

61 First Nat. Bank v. Lieberman, 1 Marv. (Del.) 367, 41 Atl. 90.

62 Hay v. Cole, 90 Hun, 258, 35 N. Y. Supp. 950.

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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.[63] It is commonly said that judgments and decrees remain in the breast of the court during the term of their rendition; and, for the purpose of modifying or vacating them, the whole term may be considered as one day.[64] This power may be exercised during the term on the court's own proper motion, as well as on application by a party, when there is a manifest error or inadvertence to be corrected, and even, in proper cases, without notice to the parties.[65] Its exercise is not prevented by the fact that a bill of exceptions has been taken or an appeal bond filed.[66] It is a power inherent in all courts of general jurisdiction, and is not dependent upon, or

[63] Aetna Life Ins. Co. v. Com'rs of Hamilton County, 25 C. C. A. 94, 79 Fed. 575; Wyler v. Union Pac. Ry. Co. (C. C.) 89 Fed. 4; Interstate Commerce Commission v. Louisville & N. R. Co., 101 Fed. 146; Fraley v. Feather, 46 N. J. Law, 429; Robinson v. Harford County Com'rs, 12 Md. 132; Rutherford v. Pope, 15 Md. 579; Townshend v. Chew, 31 Md. 247; Green v. Pittsburgh, W. & K. R. Co., 11 W. Va. 685; Kelty v. High, 29 W. Va. 381, 1 S. E. 561; Gwinn v. Parker, 119 N. C. 19, 25 S. E. 705; Cooley v. Tybee Beach Co., 99 Ga. 290, 25 S. E. 691; Blackburn v. Knight, 81 Tex. 326, 16 S. W. 1075; Manguno & Tomfocaro Co. v. Clymonts, 19 Ohio Cir. Ct. R. 237; Sagory v. Bayless, 13 Smedes & M. (Miss.) 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; Gingrich v. Gingrich, 146 Ind. 227, 45 N. E. 101; Taylor v. Lusk, 9 Iowa, 444; State v. Callaway County Treasurer, 43 Mo. 228; Rankin v. Lawton, 17 Mo. App. 574; Smith v. Perkins, 124 Mo. 50, 27 S. W. 574; Volland v. Wilcox, 17 Neb. 46, 22 N. W. 71; Taylor v. Trumbull, 32 Neb. 508, 49 N. W. 375; Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Ballard v. Purcell, 1 Nev. 342; Martin v. Skehan, 2 Colo. 614; State v. Sowders, 42 Kan. 312, 22 Pac. 425.

[64] Jordan v. Tarver, 92 Ga. 379, 17 S. E. 351; Woodward v. Woodward, 84 Mo. App. 328.

[65] Ray v. Moore, 19 Ind. App. 690, 49 N. E. 1083.

[66] Blackburn v. Knight, 81 Tex. 326, 16 S. W. 1075; Huber Manuf'g Co. v. Sweny, 57 Ohio St. 169, 48 N. E. 879.

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derived from, statutes.[67] Thus, a statute requiring applications for a new trial to be made within three days after the verdict or decision has no application to a motion to set aside a default, made at the same term.[68]

§ 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.[69] The supreme

[67] Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Manguno & Tomfocaro Co. v. Clymonts, 19 Ohio Cir. Ct. R. 237.

[68] Hall v. Houghton & Upp Mercantile Co., 8 C. C. A. 661, 60 Fed. 350; Bradley v. Slater, 58 Neb. 554, 78 N. W. 1069; Riglesberger v. Bailey (Ky.) 44 S. W. 118. The sustaining of an application to open a default judgment, though in the form of an ordinary motion for a new trial, where made after the time for granting a new trial, will be presumed to have been done in pursuance of the inherent jurisdiction of the court, and not as a demandable statutory right. Bradley v. Slater, supra.

[69] Bronson v. Shulten, 104 U. S. 410, 26 L. Ed. 997; Brush v. Robbins, 3 McLean, 486, Fed. Cas. No. 2,059; Bank v. Labitut, 1 Woods, 11, Fed. Cas. No. 842; Grames v. Hawley (C. C.) 50 Fed. 319; Loney v. Bailey, 43 Md. 10; Green v. Pittsburgh, W. & K. R. Co., 11 W. Va. 685; Barbour County Court v. O'Neal, 42 W. Va. 295, 26 S. E. 182; Ramsour v. Raper, 29 N. C. 346; Moore v. Hinnant, 90 N. C. 163; Trustees of Internal Imp. Fund v. Bailey, 10 Fla. 238; Ex parte Sims, 44 Ala. 248; Buchanan v. Thomason, 70 Ala. 401; Crothers v. Ross' Distributees, 15 Ala. 800; Cotten v. McGehee, 54 Miss. 621; Alabama & V. Ry. Co. v. Bolding, 69 Miss. 255, 13 South. 844, 30 Am. St. Rep. 541; Brewster v. Norfleet, 3 Tex. Civ. App. 103, 22 S. W. 226; 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. (Ky.) 95; McManama v. Garnett, 3 Metc. (Ky.) 517; Lovelace v. Lovell (Ky.) 55 S. W. 549; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; Rawdon v. Rapley, 14 Ark. 203, 58 Am. Dec. 370; Ashley v. Hyde, 6 Ark. 92, 42 Am. Dec. 685; Exposition Building & Loan Co. v. Spiegel, 12 Ohio Cir. Ct. R. 761; Blair v. Russell, 1 Smith (Ind.) 287; Bland v. State, 2 Ind. 608; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306; Cook v. Wood, 24 Ill. 295; Cox v. Brackett, 41 Ill. 222; Smith v. Wilson, 26 Ill. 186; Schmidt v. Thomas, 33 Ill. App. 109; Davies v. Coryell, 37 Ill. App. 505; Baldwin v. McClelland, 152 Ill. 42, 38 N. E. 143; McChesney v. City of Chicago, 161 Ill. 110, 43 N. E. 702; Stettauer v. Chicago Title & Trust Co., 62 Ill. App. 31; Kelley v. Heath & Milligan Manuf'g Co., 66 Ill. App. 528; Bristol v. Ross, 79 Ill. App. 261; Fish Furniture Co. v. Jenkins, 82 Ill. App. 551; Utley v. Cameron, 87 Ill. App. 71; Ashby v. Glasgow, 7 Mo. 320; Orvis

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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 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." [70] 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.[71] 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.[72] 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

v. Elliott, 65 Mo. App. 96; McBrien v. Riley, 38 Neb. 561, 57 N. W. 385; Fisk v. Thorp, 51 Neb. 1, 70 N. W. 498; Spafford v. City of 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; William Deering & Co. v. Creighton, 26 Or. 556, 38 Pac. 710; Exchange Bank v. Ford, 7 Colo. 449, 3 Pac. 449; Jones v. New York Life Ins. Co., 14 Utah, 215, 47 Pac. 74; Benson v. Anderson, 14 Utah, 334, 47 Pac. 142.

[70] Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 997.

[71] Klever v. Seawall, 12 C. C. A. 653, 65 Fed. 373; Austin v. Riley (C. C.) 55 Fed. 833; Allen v. Wilson (C. C.) 21 Fed. 881. The practice of a state court in opening judgments or decrees by default after the term at which they became absolute will not be observed in a suit in equity in a federal court in that state, under Rev. St. U. S. § 914, which requires the practice of the federal courts to conform to that of the state courts only in "civil cases other than equity and admiralty causes." Austin v. Riley (C. C.) 55 Fed. 833.

[72] Shaw v. McGregor, 8 Cal. 521; Robb v. Robb, 6 Cal. 21; Bell v. Thompson, 19 Cal. 706.

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at a previous term.[73] In Alabama and some other states, 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.[74] 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.[75] 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.[76] 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.[77] But here, as we have already said,[78] an exception must be made in the case of equity causes not heard upon 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.[79]

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

[73] Wood v. Payea, 138 Mass. 61.

[74] Kidd v. McMillan, 21 Ala. 325; Hair v. Moody, 9 Ala. 399; Gage v. City of Chicago, 141 Ill. 642, 31 N. E. 163; Royal Trust Co. v. Exchange Bank, 55 Neb. 663, 76 N. W. 425.

[75] City of Little Rock v. Bullock, 6 Ark. 282; Anderson v. Thompson, 7 Lea (Tenn.) 259.

[76] Egan v. Sengpiel, 46 Wis. 703, 1 N. W. 467.

[77] Brooks' Adm'r v. Love, 3 Dana (Ky.) 7; Bobb v. Bobb, 2 A. K. Marsh. (Ky.) 240; McMicken v. Perin, 18 How. 507, 15 L. Ed. 504.

[78] Supra, § 301.

[79] Donnell v. Hamilton, 77 Ala. 610.

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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.[80] 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 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.[81] This rule ap-

[80] See Breden v. Gilliland, 67 Pa. 36; Capen v. Inhabitants of Stoughton, 16 Gray (Mass.) 365.

[81] Thomas v. American Freehold Land & Mortg. Co. (C. C.) 47 Fed. 550, 12 L. R. A. 681; Couch v. Heffron, 15 Pa. Co. Ct. R. 636; In re College Street, 11 R. I. 472; Ladd v. Mason, 10 Or. 308; Bruce's Ex'x v. Strickland's Adm'r, 47 Ala. 192; Baker v. Barclift, 76 Ala. 414; Dazey v. Pennington, 10 Tex. Civ. App. 326, 31 S. W. 312; First Nat. Bank v. Wm. B. Grimes Dry-Goods Co., 45 Kan. 510, 26 Pac. 56; People v. Temple, 103 Cal. 447, 37 Pac. 414; Kaufmann v. Drexel, 56 Neb. 229, 76 N. W. 559. But a judgment which is merely voidable, for errors or irregularities, must be attacked in due time, by motion to vacate or by appeal. Einstein v. Davidson, 35 Fla. 342, 17 South. 563. And where jurisdiction is duly acquired by service of process, a judgment erroneously entered by default is not void, and the court cannot set it aside at a subsequent term. Maple v. Havenhill, 37 Ill. App. 311.

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plies not only where there is a want of jurisdiction over the parties, but also where jurisdiction of the subject-matter is lacking. A judgment which is outside of the issues, and on a matter not submitted for determination, is a nullity, and may be set aside at any time.[82] It is also said that the trial court has inherent power to vacate, after the term, a judgment obtained by fraud, or which is not in accord with that intended to be entered,[83] or one entered by the clerk without authority and in violation of law,[84] or one which has been rendered contrary to the course of law and practice.[85] But in some states 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.[86]

§ 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.[87] And in

[82] Gille v. Emmons, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609. 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. State v. Waupaca County Bank, 20 Wis. 640.

[83] Harper v. Barnett (Miss.) 16 South. 533; Ruenbuhl v. Heffron (Tex. Civ. App.) 38 S. W. 1028.

[84] Mickler v. Reddick, 38 Fla. 341, 21 South. 286.

[85] Orvis v. Elliott, 65 Mo. App. 96.

[86] Pettus v. McClannahan, 52 Ala. 55; Kohn v. Haas, 95 Ala. 478, 12 South. 577; People v. Dodge, 104 Cal. 487, 38 Pac. 203.

[87] Blythe v. Hinckley (C. C.) 84 Fed. 228; Miller v. Justice, 86 N. C. 26; Davis v. Roberts, Smedes & M. Ch. (Miss.) 543; State v. King, 46 La. Ann. 163, 15 South. 283; Patterson v. Hare, 74 Hun, 269, 26 N. Y. Supp. 626; Bent v. Miranda, 8 N. M. 78, 42 Pac. 91. This is the case, for example, with an order merely sustaining a demurrer, or striking out a count. Clarke v. Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696. Or an order appointing a receiver to take charge of mortgaged property pending foreclosure. Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370. Compare Morgan v. Ohio River R. Co., 39 W. Va. 17, 19 S. E. 588; Woffenden v. Woffenden, 1 Ariz. 328, 25 Pac. 666; Windes v. Earp, 150 Mo. 600, 51 S. W. 1044.

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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.[88] 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.[89] In California, a motion to vacate a default entered by the clerk may be made at any time 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.[90]

§ 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." [91] And

[88] Powell v. Jopling, 47 N. C. 400; Wilson v. Torbert, 3 Stew. (Ala.) 296, 21 Am. Dec. 632.

[89] Ordway v. Suchard, 31 Iowa, 487; Simmons v. Church, Id. 284; Harper v. Drake, 14 Iowa, 533.

[90] Willson v. Cleaveland, 30 Cal. 192.

[91] King v. Brooks, 72 Pa. 364. And see Bradley v. Towanda Tp., 133 Pa. 371, 20 Atl. 1060; Hill v. Egan, 2 Pa. Super. Ct. 596. A judgment may be set aside for fraud, after the term at which it was rendered, but the petition must set forth the essential facts of the fraud alleged, so that the jurisdiction of the court may appear. Fisher v. Hestonville, M. & F. Pass. Ry. Co., 185 Pa. 602, 40 Atl. 97. The power to open or set aside judgments is an equitable power, and should be based upon the exercise of a sound legal discretion by the court, not a mere arbitrary exercise of power. Fisher v. Hestonville, M. & F. Pass. Ry. Co., supra; Sullivan v. Sweeney, 189 Pa. 474, 42 Atl. 45. The petitioner must show adequate grounds for such action on the part of the court, and mere denial of the indebtedness charged against him will not generally be sufficient. Ware v. Baldwin, 7 Kulp, 278. It has been remarked

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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." [92]

§ 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.[93] But it is held that leave granted at the term in which the judgment is entered, to move in the next term to set it aside, is irregular and void.[94] Where a motion for a new trial is continued over the term, the proceedings are still in the breast of the judge, and he has jurisdiction to set aside the judgment for informality, and let the verdict stand.[95] So where a judgment is entered by default against two joint defendants, and at the same time

that the practice of opening a judgment to let the defendant in to a defense is not peculiar to Pennsylvania, although it is unknown to the common law. It is an appeal to the equitable powers of the court to allow a hearing on the merits from which the defendant, by adherence to the strict forms of law, would otherwise be precluded. McAnulty v. National Life Ass'n, 6 Lack. Leg. N. 128. A somewhat similar practice obtains in Illinois, in regard to judgments entered by confession. See Hall v. Jones, 32 Ill. 38. A judgment by default, regular and valid in fact, cannot be stricken from the record; the remedy is by motion to open the judgment and let the defendant in to a defense. North v. Yorke, 174 Pa. 349, 34 Atl. 620.

[92] Monroe v. Monroe, 93 Pa. 520. See Citizens' Trust & Surety Co. v. Goodchild, 195 Pa. 80, 45 Atl. 662.

[93] Windett v. Hamilton, 52 Ill. 180; Green v. Pittsburgh, W. & K. R. Co., 11 W. Va. 685; Niles v. Parks, 49 Ohio St. 370, 34 N. E. 735; Childs v. Kansas City, St. J. & C. B. R. Co., 117 Mo. 414, 23 S. W. 373; Babcock Hardware Co. v. Farmers' & Drovers' Bank, 50 Kan. 648, 32 Pac. 377. Compare Ashley v. Hyde, 6 Ark. 92, 42 Am. Dec. 685. In Kentucky, a court of continuous session cannot, by continuing from time to time a motion to set aside a judgment, retain control over such judgment beyond 60 days after its rendition. Williams v. Williams (Ky.) 54 S. W. 716.

[94] Hill v. City of St. Louis, 20 Mo. 584.

[95] Suddarth v. Empire Lime Co., 79 Mo. App. 585.

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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.[96]

§ 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.[97] 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 is generally considered that the control of the court over the judgment absolutely ceases upon the expiration of the time limited. Thereafter it is no longer within the discretion, or even the jurisdiction, of the court to vacate or modify the judgment; the right to apply for such relief is lost, and any order of the court setting the judgment aside or rendering a new judgment will be null and void.[98] In the next place, the common-law power

[96] Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850.

[97] For citations to these statutes, see, infra, section 334. And see Carlisle v. Wilkinson, 12 Ind. 91; Hunt v. Stevens, 26 Iowa, 399; Kenedy v. Jarvis (Tex.) 1 S. W. 191; People v. Lafarge, 3 Cal. 130.

[98] Elder v. Richmond Gold & Silver Min. Co., 7 C. C. A. 354, 58 Fed. 536; Beardsley v. Hilson, 94 Ga. 50, 20 S. E. 272; Schwarz v. Oppenheimer, 90 Ala. 462, 8 South. 36; Thomas v. Neel (Tex. App.) 18 S. W. 138; Wingfield v. Cotton (Ky.) 56 S. W. 813; Gresham v. Ellis, 92 Tenn. 471, 22 S. W. 1; Priestman v. Priestman, 103 Iowa, 320, 72 N. W. 535; Manning v. Nelson, 107 Iowa, 34, 77 N. W. 503; Petley v. Carpenter, 124 Mich. 14, 82 N. W. 666;

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of a court of record to set aside its judgments at the same term at which they were rendered is not abrogated by these statutes. During the term, the court may vacate a judgment for any cause which would be sufficient at common law, without regard to the grounds specified in the statute;[99] but after the close of the term, the remedy of a party aggrieved by the judgment must be sought under the statute, and is confined to the grounds therein enumerated.[100] In some states, however, the courts exercise authority to set aside judgments for causes (such as fraud) not specified in the statutes, and without regard to the lapse of the term in which the judgment was rendered. Where this practice obtains, it may be remarked that the two elements of the statute, 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.[101] Again, while unexcused delay will generally tell against an application of this sort, it is considered that laches cannot be imputed to a party who takes all the time which the statute allows him to bring his motion or application.[102] Where the statutory time begins to run from "notice" of the judgment, this is

Whitbeck v. Montana Cent. Ry. Co., 21 Mont. 102, 52 Pac. 1098; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Brackett v. Banegas, 99 Cal. 623, 34 Pac. 344; Bunnell & Eno Inv. Co. v. Curtis (Idaho) 51 Pac. 767. But in Georgia, it is held that Code, § 2914a, declaring that all proceedings to set aside judgments must be had within three years from the rendition of the judgment, is merely a statute of limitations, which must be raised at the trial to be available. Stewart v. Golden, 98 Ga. 479, 25 S. E. 528.

[99] Arlington Manuf'g Co. v. Mears, 65 Vt. 414, 26 Atl. 587.

[100] Milwaukee Mutual Loan & Bldg. Soc. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102; Hampton Lumber Co. v. Van Ness, 54 Neb. 185, 74 N. W. 587; State v. Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664; Turner v. Ottawa Circuit Judge, 123 Mich. 617, 82 N. W. 247; Yerkes v. McHenry, 6 Dak. 5, 50 N. W. 485.

[101] Cowles v. Hayes, 69 N. C. 406; McCloud v. Meehan, 30 Misc. Rep. 67, 62 N. Y. Supp. 852.

[102] Independent School Dist. v. Schreiner, 46 Iowa, 172; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 89 Cal. 332, 26 Pac. 825. Where the time is limited to a certain number of days, and the last day is Sunday, the party must present his application or motion on the day previous. Ex parte James, 125 Ala. 119, 28 South. 69.

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construed to mean knowledge of the rendition of such judgment, and the notice thereof need not be in writing.[103] 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.[104]

§ 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.[105] And the right thus given entitles the defendant, if he comes in within the prescribed time, to assert his rights as fully in every respect as he could have done if personally served before judgment, saving the intervening rights of third persons.[106] And the right of a defendant, under these statutes, to be let in to a defense

[103] Butler v. Mitchell, 17 Wis. 52; Turner v. Leathem, 84 Wis. 633, 54 N. W. 1001. Notice to the defendant's attorney of the entry of judgment against such defendant is notice to the defendant, within the meaning of such a statute. Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826. A plaintiff will be charged with notice of judgment in his action, entered at a regular term of the court, as of the time of the entry. Sluder v. Graham, 118 N. C. 835, 23 S. E. 924.

[104] Knox v. Clifford, 41 Wis. 458; Nicklin v. Robertson, 28 Or. 278, 42 Pac. 993, 52 Am. St. Rep. 790; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826.

[105] See Kinney v. O'Bannon's Ex'x, 6 Bush (Ky.) 692; Blanchard v. Hatch, 32 Mo. 261; Hirsh v. Weisberger, 44 Mo. App. 506; Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614; Davis v. Davis, 24 Tex. 187; Snow v. Hawpe, 22 Tex. 168; Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490; Waldo v. Thweatt, 64 Ark. 126, 40 S. W. 782; Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867; Norton v. Atchison, T. & S. F. R. Co., 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198; Blyth & Fargo Co. v. Swenson, 15 Utah, 345, 49 Pac. 1027. But in some states, it must be shown, by a preponderance of evidence, that the defendant had no actual notice of the pendency of the action in time to appear therein and make his defense. Stover v. Hough, 47 Neb. 789, 66 N. W. 825; Roller v. Ried (Tex. Civ. App.) 24 S. W. 655.

[106] Rhodes v. Rhodes, 125 N. C. 191, 34 S. E. 271.

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is an absolute right if he brings himself within the statute; the court has no discretion in the matter, but must grant his application.[107]

§ 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 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.[108] 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.[109] 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.[110] "In deciding

[107] Albright v. Warkentin, 31 Kan. 442, 2 Pac. 614; Francoviz v. Ireland, 35 Minn. 278, 28 N. W. 508; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766. But later cases in Minnesota hold that, while it is presumed that the defendant has been diligent after receiving actual notice of the pendency of the action, still this presumption may be rebutted; and that an unexplained delay of several months in making the application for leave to defend the action after judgment will justify the court in refusing the same, though the application is made within the year. Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Cutler v. Button, 51 Minn. 550, 53 N. W. 872. On the other hand, the court has a discretion to set aside the judgment and allow a defense to be made, good cause being shown, although more than a year may have elapsed since the rendition of the judgment. Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537.

[108] Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507; Maury's Trustee v. Fitzwater (C. C.) 88 Fed. 768; Stoutenborough v. Board of Education, 104 Cal. 664, 38 Pac. 449; Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750.

[109] Felkert v. Wilson, 38 Minn. 341, 37 N. W. 585.

[110] Cagger v. Gardner, 1 How. Prac. (N. Y.) 142; Nichols v. Nichols, 10 Wend. (N. Y.) 560; Bliss v. Treadway, 1 How. Prac. (N. Y.) 245; De Wandelaer v. Hager, Id. 63; McQuillan v. Hunter, 1 Phila. 49; Le Duc v. Slo-

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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." [111] 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 be set aside for irregularity." [112] 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.[113] It is also held that an unexplained delay

comb, 124 N. C. 347, 32 S. E. 726; Camp v. Phillips, 88 Ga. 415, 14 S. E. 580; Knauber v. Watson, 50 Kan. 702, 32 Pac. 349; Ammerman v. State, 98 Ind. 165; Ryder v. Twiss, 3 Scam. (Ill.) 4; Fischer v. Stiefel, 179 Ill. 59, 53 N. E. 407; Barrett v. Queen City Cycle Co., 179 Ill. 68, 53 N. E. 550; Altmann v. Gabriel, 28 Minn. 132, 9 N. W. 633; Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 72, 59 N. W. 828; Sanderson v. Dox, 6 Wis. 164; Welch v. May, 14 Wis. 200; Ætna Ins. Co. v. McCormick, 20 Wis. 265; Landon v. Burke, 33 Wis. 452; Reese v. Mahoney, 21 Cal. 305; Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 123 Cal. 535, 56 Pac. 453; Clark v. Perry, 17 Colo. 56, 28 Pac. 329. Mere delay in moving to have a judgment vacated will not preclude relief as against a party who knew of defendant's equities, and who, being obliged to pay the judgment, took an assignment of it. Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771. The rule of diligence in making application to set aside a default does not control the subsequent proceedings. If the motion is filed in due time, it may be heard at such time as the court may direct. Wm. Wolff & Co. v. Canadian Pac. Ry. Co., 123 Cal. 535, 56 Pac. 453.

[111] McCormick v. Hogan, 48 Md. 404.

[112] Thompson v. Skinner, 7 Johns. (N. Y.) 556.

[113] Wade v. De Leyer, 40 N. Y. Super. Ct. 541.

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of seven years,[114] or five years,[115] or two years,[116] or seventeen months,[117] or one year,[118] or eleven months,[119] 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.[120] 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.[121] The case is slightly different where a judgment has been irregularly entered against an infant. The question here is, what time should reasonably be al-

[114] Reese v. Mahoney, 21 Cal. 305. Or six years. De Camp v. Bates (Tex. Civ. App.) 37 S. W. 644; Tooker v. Booth, 7 Misc. Rep. 421, 27 N. Y. Supp. 974.

[115] Bostwick v. Perkins, 4 Ga. 47; In re Markle's Estate, 187 Pa. 639, 41 Atl. 304; Van Arsdale v. King, 87 Hun, 617, 33 N. Y. Supp 858; Drummond v. Matthews (N. Y.) 17 N. Y. Supp. 726. Or four years. Case v. Case, 137 Ind. 526, 37 N. E. 337; Bowling v. Blum (Tex. Civ. App.) 52 S. W. 97.

[116] People v. Judges, 1 Doug. (Mich.) 417; Wygant v. Brown, 7 N. Y. Supp. 490; In re Gilman's Estate (N. Y.) 17 N. Y. Supp. 494.

[117] Ammerman v. State, 98 Ind. 165. And see, for cases in which a delay of 14 or 15 months was held too long, City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Denton v. Merchants' Nat. Bank, 18 Wash. 387, 51 Pac. 473; Jones v. Jones, 71 Hun, 519, 24 N. Y. Supp. 1031.

[118] Sanderson v. Dox, 6 Wis. 164; In re Mutual Benefit Co., 190 Pa. 355, 42 Atl. 706.

[119] Altmann v. Gabriel, 28 Minn. 132, 9 N. W. 633.

[120] Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223.

[121] Zebley v. Storey, 8 Wkly. Notes Cas. 212. And see Lyons v. Green, 68 Ark. 205, 56 S. W. 1075. An application to open a default, made in good faith, and showing a meritorious defense, should not be denied for laches where made within two months of the entry of judgment. Lorzing v. Eisenberg, 5 Misc. Rep. 358, 25 N. Y. Supp. 750. But, on the other hand, a motion to open a default, made 19 days after the denial of two former motions, was held properly denied where no excuse or reason was given why the ground therefor was not sooner presented to the court. Ellis v. Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687.

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lowed 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.[122] 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.[123] 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.[124]

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.[125] 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

[122] Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681.

[123] Barnes v. Gill, 13 Abb. Prac. (N. S.) 169.

[124] In re Langan's Estate, 74 Cal. 353, 16 Pac. 188.

[125] Herdic v. Woodward, 75 Pa. 479; Downing v. Still, 43 Mo. 309; Graef v. Bernard, 7 Misc. Rep. 246, 27 N. Y. Supp. 263; McCredy v. Woodcock, 41 App. Div. 526, 58 N. Y. Supp. 656. See Porter v. Orient Ins. Co., 72 Conn. 519, 45 Atl. 7. Where a plaintiff has suffered a default, in consequence of accident, mistake, or excusable neglect, or by reason of the negligence or misunderstanding of his counsel, and thereupon a judgment for affirmative relief has been rendered in favor of the defendant, it may be set aside on plaintiff's motion and a new trial granted, for the plaintiff's situation should be governed by the same rules which are applicable to defaults of defendants. Trueheart v. Simpson (Tex. Civ. App.) 24 S. W. 842. But where defendant is satisfied with an interlocutory judgment rendered against him in an action, the judgment will not be vacated on plaintiff's motion, based merely on the ground that defendant's time to answer had not expired. Havemeyer v. Brooklyn Sugar Refining Co., 26 Abb. N. C. 157, 13 N. Y. Supp. 873.

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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.[126] 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.[127] 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.[128]

§ 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; and others give the courts power to relieve a party, or his "legal representatives" from a judgment taken against

[126] St. John v. Holmes, 20 Wend. (N. Y.) 609, 32 Am. Dec. 603; **Franks** v. Lockey, 45 Vt. 395; Fall v. Evans, 20 Ind. 210; Droham v. Norton, 1 Misc. Rep. 486, 21 N. Y. Supp. 579; First Nat. Bank v. Williams, 126 Ind. 423, 26 N. E. 75; Sikes v. Weatherly, 110 N. C. 131, 14 S. E. 511; Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; Stewart v. Parsons, 5 N. D. 273, 65 N. W. 672; Morse v. Callantine, 19 Mont. 87, 47 Pac. 635.

[127] Cyphert v. McClune, 22 Pa. 195.

[128] Supra, § 211. And see Furman v. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Calvert v. Ash, 47 W. Va. 480, 35 S. E. 887; Reynolds v. Barnard, 36 Ill. App. 218; Gould v. Sternburg, 69 Ill. 531; Clay v. Hildebrand, 44 Kan. 481, 24 Pac. 962; Steele v. Duncan, 47 Kan. 511, 28 Pac. 206; Martin v. Baugh, 1 Ind. App. 20, 27 N. E. 110; Neenan v. City of St. Joseph, 126 Mo. 89, 28 S. W. 963; Boyd v. Munson, 56 Neb. 269, 76 N. W. 552.

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him through his mistake, inadvertence, surprise, or excusable neglect. 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.[129] 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.[130] 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.[131] 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.[132]

§ 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.[133] It will

[129] Parsons v. Johnson, 66 Iowa, 455, 23 N. W. 921.

[130] Plummer v. Brown, 64 Cal. 429, 1 Pac. 703; Malone v. Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063; Thomas v. Morris, 8 Utah, 284, 31 Pac. 446. Compare Mueller v. Reimer, 46 Minn. 314, 48 N. W. 1120. The grantee in a deed purporting to convey land then in possession of defendant, under a judgment in favor of defendant against the grantor, rendered in an action to which such grantee was not a party, cannot sue to set aside the judgment. Whitney v. Kelley, 94 Cal. 146, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106. And one purchasing land subject to the lien of a judgment cannot, in Pennsylvania, have the judgment vacated for mere irregularities. Milleisen v. Senseman, 4 Pa. Super. Ct. 455.

[131] Corwin v. Bensley, 43 Cal. 253.

[132] The administrator of one against whom judgment on an unsealed judgment note has been entered may have the judgment opened and interpose the defense of the statute of limitations. Dick v. Mahoney, 21 Pa. Co. Ct. R. 241. As to the right of heirs to move for the vacation of a judgment taken by default against their ancestor after his death, see Nicholes v. City of Chicago, 184 Ill. 43, 56 N. E. 351.

[133] Cosgrove v. United States, 33 Ct. Cl. 167; Drexel's Appeal, 6 Pa. 272; In re Rowland's Estate, 4 Clarke (Pa.) 199; Gaehring v. Haedrich, 8 Pa.

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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.[134] And this will generally be an adequate protection to them. But there may be cases in which right and equity require that other persons should have the privilege of proceeding directly for the annulment of a judgment which fraudulently abridges their own rights or remedies. Accordingly the rule is stated that persons who were strangers to the record will have a standing to apply for the vacation of the judgment when the same was obtained by fraud or collusion, and they bear such a relation thereto, or to the subject-matter of the case, that their rights may be affected.[135] An invalid judgment by confession may be set aside at the instance of a junior judgment-creditor after notice to the plaintiff.[136] 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

Super. Ct. 507; Robinson v. Stevens' Adm'r, 63 Vt. 555, 22 Atl. 80; Smith v. City of Newbern, 73 N. C. 303; Hinsdale v. Hawley, 89 N. C. 87; Walton v. Walton, 80 N. C. 26; Jacobs v. Burgwyn, 63 N. C. 196; Uzzle v. Vinson, 111 N. C. 138, 16 S. E. 6; McGhee v. Romatka, 18 Tex. Civ. App. 436, 44 S. W. 700; s. c., 47 S. W. 282; Indianapolis, D. & W. Ry. Co. v. Crockett, 2 Ind. App. 136, 28 N. E. 222; Ex parte McKenzie, 162 Ill. 48, 44 N. E. 413; Packard v. Smith, 9 Wis. 184.

[134] See supra, §§ 293–295.

[135] Covey v. Wheeler, 23 Pa. Co. Ct. R. 467; Brettell v. Deffebach, 6 S. D. 21, 60 N. W. 167. Thus, where judgment in an action against a municipal corporation is entered by collusion between plaintiff and one of defendant's officers, the court may, on the proper application of another officer, set the judgment aside and allow an answer on the merits to be interposed. Sturm v. School District, 45 Minn. 88, 47 N. W. 462; Lowber v. Mayor of New York, 26 Barb. (N. Y.) 262. Or the judgment in such a case may be set aside at the suit of tax-payers of the municipality. Kane & Co. v. Independent School District, 82 Iowa, 5, 47 N. W. 1076. Again, bondholders secured by a railroad mortgage, who were not parties to an action by other bondholders to foreclose the mortgage, may sue to set aside the proceedings in such action on the ground that it was not a representative action, but was fraudulently brought. Stevens v. Central Nat. Bank, 144 N. Y. 50, 39 N. E. 68. Where a sheriff, indemnified as to property levied on, makes wilful default in replevin, so that judgment is taken against him, the default may be set aside on motion of the indemnitor. Jakobi v. Gorman, 2 Misc. Rep. 190, 21 N. Y. Supp. 762.

[136] Bernard v. Douglas, 10 Iowa, 370.

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shown that this debt was genuine.[137] 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.[138] 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.[139] 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.[140] 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.[141]

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 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.[142] The power is most commonly exercised in cases

137 Smith v. Schwed (C. C.) 9 Fed. 483. See Moore v. Dunn, 147 Pa. 359, 23 Atl. 596.

138 McClurg v. Schwartz, 87 Pa. 521.

139 McWillie v. Martin, 25 Ark. 556. See Pierce v. Probate Court, 19 R. I. 472, 34 Atl. 992.

140 Lowber v. Mayor of New York, 26 Barb. (N. Y.) 262.

141 Beards v. Wheeler, 76 N. Y. 213.

142 Crane v. Barry, 47 Ga. 476; Mills v. Dickson, 6 Rich. Law (S. C.) 487; Foreman v. Carter, 9 Kan. 674; Hervey v. Edmunds, 68 N. C. 243; City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Phœnix Bridge Co. v. Street, 9 Okl. 422, 60 Pac. 221.

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of judgments entered by default,[143] but it is equally applicable, proper grounds being shown, to such as are rendered upon trial and verdict.[144] Relief may be granted in this manner against judgments by confession,[145] and against probate orders and decrees,[146] and final settlements of administrators and trustees.[147] 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.[148] 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.[149]

§ 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.[150] And where, in compromise of a claim, judgment has been

[143] It is said that the laws relating to the opening of judgments by default should be liberally construed, in order that cases may be disposed of on their merits. Turner v. Coughran, 8 S. D. 419, 66 N. W. 810. In Pennsylvania, there is no authority for a rule to open a judgment of nonsuit, such a judgment not being within the meaning of the statutes; but the proper and only practice is to apply to the court to take off the nonsuit. Harvey v. Pollock, 148 Pa. 534, 23 Atl. 1127.

[144] But in North Carolina, it is said that the statute authorizing the courts to relieve a party from a judgment taken against him through his mistake, surprise, inadvertence, or excusable neglect, has no application where the judgment is entered on a verdict, as the verdict would stand even if the judgment were set aside, and the relief would therefore be worthless if granted. Flowers v. Alford, 111 N. C. 248, 16 S. E. 319; Brown v. Rhinehart, 112 N. C. 772, 16 S. E. 840.

[145] Hutchinson v. Ledlie, 36 Pa. 112; Goergen v. Schmidt, 69 Ill. App. 538.

[146] Whitaker v. Smith, 33 Ga. 237; Hirshfeld v. Brown (Tex. Civ. App.) 30 S. W. 962; Kalteyer v. Wipff, 92 Tex. 673, 52 S. W. 63.

[147] Sheetz v. Kirtley, 62 Mo. 417.

[148] Ætna Life Ins. Co. v. McCormick, 20 Wis. 265.

[149] Wakefield v. Moore, 65 Ga. 268.

[150] Kerchner v. McEachern, 93 N. C. 447; Stump v. Long, 84 N. C. 616; Deaver v. Jones, 114 N. C. 649, 19 S. E. 637; Morris' Adm'r v. Peyton's Adm'r, 29 W. Va. 201, 11 S. E. 954; Colwell v. Wehrly, 150 Pa. 523, 24 Atl. 737; Spiehler v. Asiel, 83 Hun, 223, 31 N. Y. Supp. 584; Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565; Stites v. McGee, 37 Or. 574, 61 Pac. 1129.

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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.[151] So, a judgment regularly entered pursuant to an agreement of the attorneys, filed in the case, cannot be opened, after final adjournment of the term, on the ground that the agreement was not authorized.[152]

§ 320. Judgments in Divorce.

It was the dotrine and rule of the ecclesiastical courts in England that "sententia contra matrimonium nunquam transit in rem judicatam."[153] 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.[154] Nevertheless this maxim was not universally assented to, for we find occasional expressions of a contrary opinion on the part of eminent ecclesiastical judges.[155] 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.[156] There are undoubtedly excellent reasons for

[151] Anderson v. Carr, 54 Hun, 634, 7 N. Y. Supp. 281. A voluntary settlement of a usurious loan by a debtor, and a confession of judgment by him for the amount, will not bar him from subsequently having the judgment opened so as to enable him to set up the defense of usury. Marr v. Marr, 110 Pa. 60, 20 Atl. 592.

[152] Craven v. Canadian Pacific R. Co. (C. C.) 62 Fed. 170; Jacobs v. Kastholm, 33 Ill. App. 164. See Smith v. Wilson, 87 Wis. 14, 57 N. W. 1115.

[153] Kenn's Case, 7 Coke, 43b.

[154] Bowzer v. Ricketts, 1 Hagg. Consist. 213; Morris v. Webber, 2 Leon. 169; Meadows v. Duchess of Kingston, Amb. 756; Poynt. Mar. & Div. 157; Shelf. Mar. & Div. 474; 2 Bish. Mar. & Div. §§ 748 et seq., where all the learning on this point is collected.

[155] Norton v. Seaton, 3 Phillim. Ecc. Judgm. 162; Meadowcroft v. Huguenin, 3 Curt. 403; Prudam v. Phillips, 2 Amb. 763.

[156] Parish v. Parish, 9 Ohio St. 534, 75 Am. Dec. 482; Cox v. Cox, 19 Ohio

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this distinction.[157] And it has at times seemed so important to legislative 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.[158] 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 mak-

St. 502, 2 Am. Rep. 415; Owens v. Sims, 3 Cold. (Tenn.) 544; McJunkin v. McJunkin, 3 Ind. 30; Woolley v. Woolley, 12 Ind. 663; Lewis v. Lewis, 15 Kan. 181; O'Connell v. O'Connell, 10 Neb. 390, 6 N. W. 467; Gilruth v. Gilruth, 20 Iowa, 225; Whitcomb v. Whitcomb, 46 Iowa, 437; Moster v. Moster, 53 Mo. 326; Tappan v. Tappan, 6 Ohio St. 64.

[157] "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 Bish. 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.

[158] Lawrence v. Lawrence, 73 Ill. 577; Smith v. Smith, 20 Mo. 166; Medina v. Medina, 22 Colo. 146, 43 Pac. 1001; Walrad v. Walrad, 55 Ill. App. 665.

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ing a timely and proper application and showing good cause.[159] And this is especially the case where both parties to be affected by the vacation of the judgment have been parties to the fraud.[160] 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.[161] 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.[162]

§ 320a. Adjudications in Bankruptcy.

An adjudication in bankruptcy, like other judgments, may be vacated or set aside by the court which rendered it, upon a motion made in due season by a competent party and based upon adequate cause. As to the parties who may move in this behalf, it is of course the right of an involuntary bankrupt to ask for the vacation of an adjudication against him. But where the adjudication passed by default, it will not be opened to allow the bankrupt to file an answer and contest the petition, where the answer proposed does not deny the act of bankruptcy charged, but merely denies that the petitioners are creditors, or denies that they are sufficient in number or amount.[163] Again, any creditor, whether he has proved his debt in bankruptcy or not, may move to set aside an adjudication of his debtor as a bankrupt, whenever such adjudication injuriously affects

[159] Holmes v. Holmes, 63 Me. 420; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Carley v. Carley, 7 Gray (Mass.) 545; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Allen v. Maclellan, 12 Pa. 328, 51 Am. Dec. 608; Gechter v. Gechter, 51 Md. 187; Rawlins v. Rawlins, 18 Fla. 345; Whitcomb v. Whitcomb, 46 Iowa, 437; Rush v. Rush, 46 Iowa. 649, 26 Am. Rep. 179; Mansfield v. Mansfield, 26 Mo. 163; 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. (N. Y.) 139; Klaes v. Klaes, 103 Iowa, 689, 72 N. W. 777; Magowan v. Magowan, 57 N. J. Eq. 195, 39 Atl. 364.

[160] Denton v. Denton, 41 How. Prac. (N. Y.) 221.

[161] 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. Prac. (N. Y.) 66; Allen v. Maclellan, 12 Pa. 328, 51 Am. Dec. 608; Crouch v. Crouch, 30 Wis. 667; Weatherbee v. Weatherbee, 20 Wis. 499.

[162] Holbrook v. Holbrook, 114 Mass. 568.

[163] In re Le Favour, 8 Ben. 43, Fed. Cas. No. 8,208.

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his interests.[164] Such a motion, for example, may be made by an attaching creditor whose lien will be dissolved by the adjudication,[165] or by the receiver of a bankrupt corporation, appointed under the laws of the state.[166]

Any person seeking to have an adjudication in bankruptcy vacated or set aside must make his application therefor with due diligence and promptness upon being informed of the facts; if he delays for so long a time as to be chargeable with laches, his motion will not prevail, more especially where the rights of others have meanwhile become fixed.[167] Notice must be given to the bankrupt of an application to annul the adjudication in an involuntary proceeding, as the bankrupt has an interest in the continuance of the proceeding which may result in his discharge.[168] As to the grounds which will justify the court in revoking the order of adjudication, it may be stated that such a course is warranted by proof of fraud and collusion between the bankrupt and the petitioning creditors,[169] or where the adjudication was made upon a waiver by the attorney of the alleged bankrupt of important rights of his client,[170] or even upon proof of the assent of all known creditors that the adjudication may be vacated and publication of the notice of the application for the annulment.[171] It is also held that the court of bankruptcy may open its order of adjudi-

[164] In re Derby, 6 Ben. 232, Fed. Cas. No. 3,815. But, to be entitled to move for the vacation of the adjudication, the creditor must own a provable debt or claim against the bankrupt. In re Columbia Real Estate Co. (D. C.) 101 Fed. 965. But it is said that when such a motion is based on a want of jurisdiction, it may be made by a stranger to the proceedings, appearing as amicus curiæ. Id.

[165] In re Donnelly (D. C.) 5 Fed. 783; In re Bergeron, 12 N. B. R. 385, Fed. Cas. No. 1,342.

[166] In re Atlantic Mutual Life Ins. Co., 9 Ben. 270, Fed. Cas. No. 628.

[167] In re Meade, 19 N. B. R. 335, Fed. Cas. No. 9,370; In re Republic Ins. Co., 8 N. B. R. 317, Fed. Cas. No. 11,706; In re Neilson, 7 N. B. R. 505, Fed. Cas. No. 10,090; In re Court, 17 N. B. R. 535, Fed. Cas. No. 3,284; In re Thomas, 11 N. B. R. 330, Fed. Cas. No. 13,891; In re Lalor, 19 N. B. R. 253, Fed. Cas. No. 8,001; In re Groome (D. C.) 1 Fed. 464; In re Penn, 4 Ben. 99, Fed. Cas. No. 10,926; In re Baltimore County Dairy Ass'n, 2 Hughes, 250, Fed. Cas. No. 828.

[168] In re Bush, 6 N. B. R. 179, Fed. Cas. No. 2,222.

[169] In re Lalor, 19 N. B. R. 253, Fed. Cas. No. 8,001.

[170] In re Republic Ins. Co., 8 N. B. R. 317, Fed. Cas. No. 11,706.

[171] In re Magee, Fed. Cas. No. 8,941.

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cation and grant a re-hearing in case of newly discovered evidence.[172] But, generally speaking, an adjudication in bankruptcy made upon due service of process, is final and will not be set aside on motion of the bankrupt, or of creditors, or of both, disputing the allegations of the petition, when no fraud or collusion is shown and they merely desire to retry the case.[173] The earlier cases held that the question of jurisdiction could not be raised on a motion to vacate the adjudication, creditors having an opportunity to dispute the jurisdiction when an application for discharge should be made.[174] But the later authorities favor the rule that an alleged want of jurisdiction is a question which the court should consider whenever and however it is raised.[175]

A discharge in bankruptcy may be revoked or vacated when it is made to appear that it was procured by the fraud of the bankrupt.[176] This action can be taken only by the court which granted the discharge; the authority conferred by the bankruptcy law upon the federal courts, in that behalf, is incompatible with the exercise of a like power by any state court.[177]

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.[178] It is specifically regulated in some of the states,

[172] In re Great Western Tel. Co., 5 Biss. 359, Fed. Cas. No. 5,739.

[173] In re McKinley, 7 Ben. 562, Fed. Cas. No. 8,864.

[174] In re Penn, 4 Ben. 99, Fed. Cas. No. 10,926; In re Harris, 6 Ben. 375, Fed. Cas. No. 6,111.

[175] In re Columbia Real Estate Co. (D. C.) 101 Fed. 965. See In re Kindt (D. C.) 98 Fed. 867.

[176] Bankruptcy Act 1898, § 15; In re Dietz (D. C.) 97 Fed. 563; In re Augenstein, 2 MacArthur (D. C.) 322; Coates v. Blush, 1 Cush. (Mass.) 564.

[177] Corey v. Ripley, 57 Me. 69, 2 Am. Rep. 19.

[178] Taylor v. Sindall, 34 Md. 38; Humphreys v. Rawn, 8 Watts (Pa.) 78;

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by laws which give the courts power to vacate judgments on the ground of "fraud practised by the successful party."[179] In some jurisdictions, it is thought 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.[180] But this rule should not be taken without qualifications. 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; as, where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defense and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time.[181] One of the strongest grounds on which to base an application for the vacation of a judgment is fraud practised upon the court in its procurement; as, where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which

Mayberry v. McClurg, 51 Mo. 256; Melick v. First Nat. Bank, 52 Iowa, 94, 2 N. W. 1021; Conn's Lessee v. Whiteside, 6 Humph. (Tenn.) 47; In re Fisher, 15 Wis. 511; Farrow v. Dial, 1 McMul. (S. C.) 292, 36 Am. Dec. 267.

[179] Code Iowa, § 3154; Manning v. Nelson, 107 Iowa, 34, 77 N. W. 503; 2 Ballinger's Ann. Codes & St. Wash. § 5153, subd. 4; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; Mansf. Dig. Ark. § 3909, subd. 4. 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 cannot be set aside on either of these grounds on motion. Dugan v. McGlann, 60 Ga. 353; Syme v. Trice, 96 N. C. 243, 1 S. E. 480.

[180] Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. 908; Fears v. Riley, 148 Mo. 49, 49 S. W. 836.

[181] See Furman v. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Bates v. Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Schweinfurter v. Schmahl, 69 Minn. 418, 72 N. W. 702. In Tennessee, it is said that when a judgment is to be set aside because of fraud, complainant must aver facts showing an intentional contrivance by one or more of the parties to the suit to keep complainant and the court in ignorance of the real facts touching the matter in litigation, whereby a wrong conclusion was reached, and positive injury done to complainant's rights. Smith v. Miller (Tenn. Ch. App.) 42 S. W. 182.

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would not have been given if the whole conduct of the case had been fair.[182] But fraud, sufficient to taint the judgment, may also be practised by one of the parties upon the other. Thus, a judgment should be annulled or vacated if it is shown that the instrument or the claim on which it is founded had been paid or satisfied before the institution of the suit and the fact of payment concealed.[183] So also, where the defendant was tricked into signing a judgment note, supposing it to be a simple promissory note, or was secretly made to assume obligations towards third persons which he had no intention of incurring, and thereupon judgment was entered up against him.[184] Again, where judgment is recovered upon an instrument to which the defendant's name was forged, it will be vacated on his motion, provided he is not chargeable with lack of diligence in failing to allege the forgery in defense to the action.[185] Again, fraud practised by one of the parties upon the other, and sufficient to warrant the vacation of the judgment, may consist in deceit as to the cause of action sued on, or as to the nature of the relief sought, or as to defendant's rights in the subject-matter of the litigation, whereby he is lulled into a fancied security and wronged by the judgment which is obtained against him.[186] And the same principle applies where the successful

[182] Rivers v. West, 103 Ga. 582, 30 S. E. 555. A false allegation by the plaintiff as to his residence is not ground for setting aside the judgment. Fears v. Riley, 148 Mo. 49, 49 S. W. 836. The joining of a defendant merely for jurisdictional purposes may or may not be a fraud on the court. Id. Taking a judgment while a motion for security for costs was pending is not a fraud on the court so as to authorize the setting aside of the judgment, since the court takes judicial notice of the status of a case as shown by its own records. Id. Bringing a defendant to a county under a criminal warrant, in order to have him there served with civil process, is not a fraud on the court, in this sense. Id.

[183] Noyes v. Loeb, 24 La. Ann. 48; Halladay v. Underwood, 75 Ill. App. 96. See Mitchell v. Kinnaird (Ky.) 52 S. W. 830.

[184] Anderson v. Field, 6 Ill. App. 307; United Security Life Ins. & Trust Co. v. Ott (N. J. Eq.) 26 Atl. 923.

[185] State v. Richardson, 1 Marv. (Del.) 372, 41 Atl. 75; Reeser v. Brenneman, 4 Pa. Dist. R. 143; Lindsley v. Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204; Fox v. Lima Nat. Bank, 25 Wkly. Law Bul. (Ohio) 28.

[186] In re O'Neill's Estate, 90 Wis. 480, 63 N. W. 1042; Guild v. Phillips (C. C.) 44 Fed. 461; Smallwood v. Trenwith, 110 N. C. 91, 14 S. E. 505. Where a decree of foreclosure, obtained by default, fraudulently included the mortgagor's homestead, the decree will be vacated as to the homestead,

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party has taken means to prevent proper service being made upon the other, or has procured the service of false or misleading papers, or a false return of service, or has made false representations as to the status of the case or the time of its trial.[187]

Collusion between some of the parties, working injury to the just rights of the others, will also be ground for setting aside the judgment. Thus, where suit is brought against a corporation, and the director or officer upon whom process is served covinously agrees with the plaintiff for the rendition of a judgment, it is a fraud upon the corporation which will warrant the vacation of the judgment, if it is shown that there was a good defense, or otherwise that injustice has been done.[188] So, where attorneys for one of the parties are induced to withdraw their appearance and suffer a judgment, without authorization from their client,[189] or where there was collusion between the counsel on the two sides of the case, and a wrongful judgment is consequently entered.[190] But there is no fraud in a judgment authorizing its annulment merely because the defendant fa-

where the mortgagor was not culpably negligent. Williams v. Lumpkin (Tex. Civ. App.) 26 S. W. 103. 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. Hayden v. Hayden, 46 Cal. 332. But mere failure by defendant voluntarily to disclose evidence which would tend to defeat his defense does not constitute such fraud as would authorize the vacation of a judgment. McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

187 Stillwell v. Stillwell, 47 N. J. Eq. 275, 20 Atl. 960, 24 Am. St. Rep. 408; Miller v. Neidzielska, 176 Pa. 409, 35 Atl. 225; Pattison v. Hughes, 80 Md. 559, 31 Atl. 320; Rodriguez v. Espinosa (Tex. Civ. App.) 25 S. W. 669; Wolf v. Butler, 81 Tex. 86, 16 S. W. 794. Where 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; 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 aside a judgment taken by default by A., and to admit C. to a defense. Barrett v. Graham, 19 Cal. 652.

188 Farrar v. Consolidated Apex Min. Co., 12 S. D. 237, 80 N. W. 1079; Willsie v. Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546; Nelson v. Blaisdell, 23 Or. 507, 32 Pac. 391.

189 Crescent Brewing Co. v. Cullins, 125 Ind. 110, 25 N. E. 159.

190 Smith v. Miller (Tenn. Ch. App.) 42 S. W. 182.

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vored other creditors, whereby it proved worthless.[191] A judgment by default, entered by fraud and collusion, may be opened after the death of the judgment-debtor, so as to allow his administrator to defend.[192]

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.[193] 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.[194] 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 the right to have the judgment set aside.[195]

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.[196] 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.[197] 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 was held that, as against such defendant, the plaintiff was estopped to enforce the judgment.[198]

[191] Gray v. Richmond Bicycle Co., 26 Misc. Rep. 165, 55 N. Y. Supp. 787.

[192] Hartigan v. Nagle, 11 Misc. Rep. 449, 32 N. Y. Supp. 220.

[193] Tacoma Lumber & Manuf'g Co. v. Wolff, 7 Wash. 478, 35 Pac. 115; Jones v. Brittan, 1 Woods, 667, Fed. Cas. No. 7,455; Caldwell v. Fifield, 24 N. J. Law, 150.

[194] Obermeyer v. Elnstein, 62 Mo. 341.

[195] Mahan v. Cavender, 77 Ga. 118.

[196] States v. Cromwell (N. Y.) 14 N. E. 448.

[197] Schenck's Appeal, 94 Pa. 37.

[198] Johnson's Adm'rs v. Unversaw, 30 Ind. 435.

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§ 322. Judgment taken contrary to Agreement.

Where a plaintiff or his counsel prevents an appearance and defense in an action by representations and promises, he is guilty of a species of fraud if, in violation of such promises or representations, he takes a default in a case where he knows there is a defense.[199] Consequently, where it is shown that there was an honest agreement between the parties that the case should be continued, or that defendant's time to answer should be extended, or that the action should be dismissed, as the result of a compromise, 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.[200] 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.[201] But the court will not on this ground set aside a judgment unless the alleged agreement was definite and specific, or unless the promises or representations of the plaintiff were such that the defendant could rely upon them and remain inactive, without being chargeable with any lack of diligence or vigilance in guarding his own interests.[202] And in some of the

199 Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715.

200 Binsse v. Barker, 13 N. J. Law, 263, 23 Am. Dec. 720; McIntosh v. Crawford County Com'rs, 13 Kan. 171; Perry v. Fisher (Ky.) 44 S. W. 378; Mitchell v. Knight, 7 Ohio Cir. Ct. R. 204; Cadwallader v. McClay, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496; Milwaukee Harvester Co. v. Schroeder, 72 Minn. 393, 75 N. W. 606; Heinemann v. Le Clair, 82 Wis. 135, 51 N. W. 1101; Stafford v. McMillan, 25 Wis. 566; Boutin v. Catlin, 101 Wis. 545, 77 N. W. 910; Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761; McGowan v. Kreling, 117 Cal. 31, 48 Pac. 980; Merchants' Ad-Sign Co. v. Los Angeles Bill-Posting Co., 128 Cal. 619, 61 Pac. 277. Such a case is within the statutes authorizing the vacation of a judgment taken against the defendant through his "surprise or excusable neglect." Thompson v. Connell, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818.

201 Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

202 Jenkins v. Gamewell Fire Alarm Tel. Co. (Cal.) 31 Pac. 570; Huntington v. Emery, 74 Md. 67, 21 Atl. 495; Funk v. Kansas Manuf'g Co., 53 Neb. 450,

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states it is the rule that a mere oral agreement between the parties to postpone the trial of a cause beyond the day set for trial, or to dismiss the action, which is not reduced to writing and filed, or not communicated to the court whose action it is to govern, will not be sufficient to justify the vacation of the judgment.[203]

§ 323. Perjury.

Another species of fraud which the plaintiff may practise 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 plaintiff himself is wholly guiltless.[204] 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." [205] In Minnesota, a stat-

73 N. W. 931; Holland Bank v. Lieuallen (Idaho) 53 Pac. 398. A judgment entered upon a cognovit will not be opened because of a verbal promise, alleged to have been made at the time of giving the cognovit, that the judgment would never be enforced. Heckscher v. Middleton, 54 N. J. Law, 312, 23 Atl. 943.

[203] Dixon v. Brophey, 29 Iowa, 460; Le Duc v. Slocomb, 124 N. C. 347, 32 S. E. 726; Mathews v. Bishop, 106 Ga. 564, 32 S. E. 631. See Johnson v. Sweeney, 95 Cal. 304, 30 Pac. 540.

[204] A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely. Pico v. Cohn, 91 Cal. 129, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077. But in New York, a judgment may be vacated if shown to be based on perjured testimony inspired and manufactured by an attorney for the successful party, who conspired with the witnesses to obtain the judgment. Nugent v. Metropolitan St. Ry. Co., 46 App. Div. 105, 61 N. Y. Supp. 476.

[205] Laithe v. McDonald, 12 Kan. 340; Humphreys v. Rawn, 8 Watts (Pa.) 78; Rowe v. Chicago Lumber & Coal Co., 50 La. Ann. 1258, 24 South. 235. Compare Baker v. Wadsworth, 67 Law J. Q. B. 301. The courts of the United

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ute 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."[206] 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.[207]

§ 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.[208] Thus where

States will not entertain a suit to vacate or annul a judgment of a court having jurisdiction to render it, solely on the ground that it was procured by means of the perjured testimony of the party whom it benefits. United States v. Throckmorton, 98 U. S. 66, 25 L. Ed. 93; United States v. Gleeson, 33 C. C. A. 272, 90 Fed. 778.

[206] Gen. St. Minn. 1878, c. 66, § 285.

[207] Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Wilkins v. Sherwood, 55 Minn. 154, 56 N. W. 591. In Washington, perjury does not constitute such fraud as will authorize the vacation of a judgment, except under circumstances which deceive the opposite party as to the nature of the testimony, and relieve him of the implication of want of diligence in discovering its falsity. McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

[208] Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; Shuford v. Cain, 1 Abb. U. S. 302, Fed. Cas. No. 12,823; Duhaime v. Monast, 20 R. I. 524, 40 Atl. 377; Kunes v. McCloskey, 10 Pa. Co. Ct. R. 542; Szerlip v. Baier, 21 Misc. Rep. 331, 47 N. Y. Supp. 133; People v. Dunn, 54 N. Y. Supp. 194; Florsheim Bros. Dry-Goods Co. v. Williams, 45 La. Ann. 1196, 14 South. 120; Simcock v. First Nat. Bank, 14 Kan. 529; Hanson v. Wolcott, 19 Kan. 207; Hunton v. Euper, 63 Ark. 323, 38 S. W. 517; Brady v. Washington Ins. Co., 67 Ill. App. 159; Davis v. Burt, 7 Iowa, 56; Allen v. Rogers, 27 Iowa, 106; Jamison v. Weaver, 84 Iowa, 611, 51 N. W. 65; In re Behrens' Estate, 104 Iowa, 29, 73 N. W. 351; Hurlburt v. Reed, 5 Mich. 30; Carr v. Commercial Bank, 16 Wis. 50; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Smith's Adm'r v. Rollins, 25 Mo. 408; Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143; Norton v. Atchison, T. & S. F. R. Co., 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198; People v. Temple, 103 Cal. 447, 37 Pac. 414; Lomax v. Besley, 1 Colo. App. 21, 27 Pac. 167.

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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.[209] So a judgment may be set aside at the instance of a defendant who shows that, although the summons was left at his residence, he was, at the time, absent or sick, and had no actual knowledge of the suit, or that it was forwarded to him by mail but never reached his hands.[210] A joint verdict and judgment against several defendants, some of whom were never served and have not waived service by appearance, may be set aside on motion.[211] So, in the case of a corporation, it will be good ground for vacating a judgment against it that the person upon whom service was made was not an officer of the corporation, or not authorized to accept service, or that he failed, through negligence or forgetfulness, or with a sinister motive, to give notice of the action to those charged with the duty of defending the action in behalf of the corporation.[212] It should be observed that the rule as to the presumptions in favor of the validity and regularity of proceedings had before judgment is applicable only in cases of collateral attack, and cannot be invoked to cure defects in the service of process, upon an application to set aside a default and permit a defense on the merits.[213] But it has been 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 pro-

[209] Smith v. Noe, 30 Ind. 117.

[210] Kolb v. Raisor, 17 Ind. App. 551, 47 N. E. 177; Burkhard v. Smith, 19 Misc. Rep. 31, 42 N. Y. Supp. 638; Osman v Wisted, 78 Minn. 295, 80 N. W. 1127; Malone v. Big Flat Gravel Min. Co., 93 Cal. 384, 28 Pac. 1063.

[211] Harralson v. McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; Carter v. Kaiser (Tenn. Ch.) 48 S. W. 265.

[212] Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053; Board of Education v. National Bank of Commerce, 4 Kan. App. 438, 46 Pac. 36; Glaeser v. City of St. Paul, 67 Minn. 368, 69 N. W. 1101. Compare Davis v. Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1.

[213] Blythe v. Hinckley (C. C.) 84 Fed. 228.

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ceedings preliminary to the judgment.[214] A judgment based on a false return of service may be attacked by motion in the same proceeding.[215] And 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, though the court may, in a proper case, allow the return to be amended and dismiss the motion to vacate.[216]

But want of notice, as a ground for vacating a judgment, means want of notice of the institution of the action,—want of that notice which is essential to give the court jurisdiction over the person of the defendant. When a defendant has been legally served with proper process, he is in court for every purpose connected with the action. It is then his duty to follow up his case, and take notice of the filing of subsequent papers in the action, such as demurrers, cross-petitions, and motions of various sorts; and he must ascertain for himself when the case is put on the calendar or docket for trial, or set down for hearing, and when it is likely to be reached. If he fails, through his own carelessness or lack of vigilant attention, to obtain notice of the various steps in the action, or of the time of trial, and consequently suffers a judgment, it will not be vacated merely on that ground.[217]

[214] Gray v. Gates, 37 Wis. 614.

[215] Du Bois v. Clark, 12 Colo. App. 220, 55 Pac. 750.

[216] Stotz v. Collins, 83 Va. 423, 2 S. E. 737. But a judgment will not be vacated years after its rendition because the record shows that the affidavit of service of summons therein was not sworn to, where it is not shown that the summons was not in fact served, as such a defect will not affect the jurisdiction of the court to render a judgment. State v. Superior Court of Pierce County, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

[217] Curry v. Janicke, 48 Kan. 168, 29 Pac. 319; Kamman v. Otto (Ky.) 34 S. W. 1070; Culver v. Brinkerhoff, 180 Ill. 548, 54 N. E. 585; Blaine v. Brisc e, 16 Mont. 582, 41 Pac. 1002. In California, it is held that, even if the defendant is a non-resident, he is bound to know the day fixed for setting cases for trial, and if there is no such day fixed he must ascertain the day of trial from the proceedings of the court or otherwise; and he cannot have a judgment vacated merely on the ground that neither he nor his attorney had notice that the case was set for trial. Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798. Compare Buell v. Emerich, 85 Cal. 116, 24 Pac. 644; Clark v. Ovharzabal, 129 Cal. 328, 61 Pac. 1119.

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§ 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.[218] 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.[219] In

[218] Bayley v. Buckland, 1 Exch. 1.

[219] American Aquol & Pyrodene Paint Co. v. Smith, 90 Hun, 609, 35 N. Y. Supp. 723; Post v. Charlesworth, 66 Hun, 256, 21 N. Y. Supp. 168; Woods v. Dickinson, 7 Mackey, 301; Longman v. Bradford, 108 Ga. 572, 33 S. E. 916; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Critchfield v. Porter, 3 Ohio, 518; Lyon v. Boilvin, 2 Gilman (Ill.) 629; Russell v. Pottawattamie Co., 29 Iowa, 256; Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116; McEachern v. Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922. In Pennsylvania, where judgment is entered against a defendant in an action of which he had no notice, service of the writ having been accepted for him by an attorney who had no authority to act for him, it is proper for the court, on defendant's motion, to strike off the judgment. Bryn Mawr Nat. Bank v. James, 152 Pa. 364, 25 Atl. 823. But if it is not admitted that the attorney's appearance for defendant was unauthorized, then the judgment cannot be stricken off, but can only be opened, and the disputed facts sent to a jury. Swartz v. D. S. Morgan & Co., 163 Pa. 195, 29 Atl. 975, 43 Am. St. Rep. 786. Defendant must act promptly; if he was aware that an attorney, though unauthorized, had appeared for him, a default judgment will not be vacated after the lapse of 10 years. Lytle v. Forest, 16 Pa. Co. Ct. R. 239.

In New York, it appears to be settled that relief against a judgment rendered against one not served with process, on the unauthorized appearance of an attorney in his name, may be sought and obtained by motion in the case in which such appearance was entered; that if, at the time of such motion, the attorney who entered such appearance is insolvent, it is no reason

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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.[220] At any rate, 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.[221] 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.[222] 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.[223]

for denying the motion that, at the time the judgment was given, the attorney was able to respond in damages; that it rests in the discretion of the court, according to the circumstances of the particular case, either to vacate the judgment entirely or to allow it to stand as security, with leave to the defendant to come in and defend; but that if the defendant was a non-resident, and was not served, he is entitled to have the judgment set aside absolutely. Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 771; City of New York v. Smith, 61 N. Y. Super. Ct. 374, 20 N. Y. Supp. 666.

220 University of North Carolina v. Lassiter, 83 N. C. 38; Chadbourn v. Johnston, 119 N. C. 282, 25 S. E. 705. And see Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Seale v. McLaughlin, 28 Cal. 668; Schirling v. Scites, 41 Miss. 644; Smith v. Bowditch, 7 Pick. (Mass.) 137; Powers v. Trenor, 3 Hun, 3.

221 Kenyon v. Shreck, 52 Ill. 382.

222 Russell v. Pottawottamie Co., 29 Iowa, 256. When the record shows that a defendant appeared by his attorney, it is conclusive of the appearance, but only prima facie evidence of the authority of the attorney to act, which may be denied and rebutted by proof. Blyth & Fargo Co. v Swenson, 15 Utah, 345, 49 Pac. 1027. The burden of proof is on the party denying the attorney's authority to appear. Connell v. Gallagher, 36 Neb. 749, 55 N. W. 229. And a party to an action cannot retry the question of the authority of an attorney to represent him therein, by a petition to vacate the judgment, when such question was adjudicated in the original action on a motion to dismiss. Roberts v. Shelton, S. W. R. Co., 21 Wash. 427, 58 Pac. 576.

223 See, infra, § 374.

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§ 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.[224] Thus a judgment entered in favor of the plaintiff, before the time for answering has expired, may properly be set aside;[225] and so may a judgment entered while there was an answer or demurrer on file and not yet disposed of.[226] So a judgment in a suit in equity, entered through inadvertence by the clerk on a special advisory verdict, while other issues of fact remain to be determined by the court, may be set aside, and a new judgment entered, after the adoption of the special verdict by the court and its findings on other issues.[227] On similar principles a judgment will be vacated which was rendered on issue joined without

[224] O'Hara v. Baum, 82 Pa. 416; Murdock v. Steiner, 45 Pa. 349; Craig v. Wroth, 47 Md. 281; Keaton v. Banks, 32 N. C. 381, 51 Am. Dec. 393; Dick v. McLaurin, 63 N. C. 185; Cowles v. Hayes, 69 N. C. 410; Winslow v. Anderson, 20 N. C. 9, 32 Am. Dec. 651; Hervey v. Edmunds, 68 N. C. 243; Wolfe v. Davis, 74 N. C. 597; Foreman v. Carter, 9 Kan. 674; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; Hunt v. Yeatman, 3 Ohio, 16; Huntington v. Finch, 3 Ohio St. 445; Braustetter v. Rives, 34 Mo. 318; Downing v. Still, 43 Mo. 309; Doan v. Holly, 27 Mo. 256; Kaufman v. Shain, 111 Cal. 16, 43 Pac. 393, 52 Am. St. Rep. 139; Butler v. Soule, 124 Cal. 69, 56 Pac. 601. But some of the cases hold that if the alleged irregularity is not apparent on the face of the record, it cannot be vacated on motion, unless during the term at which the judgment was rendered. Phillips v. Evans, 64 Mo. 17; Hall v. West Chester Pub. Co., 180 Pa. 561, 37 Atl. 106; Tuffree v. Stearns Ranchos Co. (Cal.) 54 Pac. 826; Busching v. Sunman, 19 Ind. App. 683, 49 N. E. 1091. As to raising questions of jurisdiction in this manner, see Parker v. Belcher, 87 Ga. 110, 13 S. E. 314; Richardson v. Stowe, 102 Mo. 33, 14 S. W. 810.

[225] Remnant v. Hoffman (Cal.) 11 Pac. 319; Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218; Mailhouse v. Inloes, 18 Md. 329; Hole v. Page, 20 Wash. 208, 54 Pac. 1123. See supra, § 85. But compare Williamson v. Nicklin, 34 Ohio St. 123. The fact that certain creditors in insolvency proceedings were adjudged in default, when they were not so in fact, and thereby denied a recovery to which they were entitled, is sufficient reason to set aside the judgment. Cooper v. Disbrow, 106 Iowa, 550, 76 N. W. 1013.

[226] Norman v. Hooker, 35 Mo. 366; Oliphant v. Whitney, 34 Cal. 25; Follett v. Alexander, 58 Ohio St. 202, 50 N. E. 720.

[227] Cummings v. Ross, 90 Cal. 68, 27 Pac. 62.

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any notice of trial or appearance at the trial,[228] or where a default was taken and final judgment entered on the first day of the term,[229] 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,[230] or where the judgment was taken before the case regularly came up for hearing.[231] So also, a judgment obtained on a complaint or petition which does not contain any averments showing liability on the part of the defendant will be set aside.[232] And the same course may be taken 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, unless the plaintiff remits the excess, or unless the judgment can be corrected, in this particular, from matter of record.[233] It will also be proper to set aside a judgment which was entered after the death of a party,[234] or which was rendered on a joint contract against a part only of the defendants, when it should have been against all,[235] or when a default was wrongly taken in consequence of a misnomer of the defendant.[236] A judgment entered on a declaration reciting a

[228] People v. Bacon, 18 Mich. 247; Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161.

[229] Clegg v. Fithian, 32 Ind. 90.

[230] Weatherford v. Van Alstyne, 22 Tex. 22.

[231] Beach v. McCann, 1 Hilt. (N. Y.) 256; Findley v. Johnson, 1 Overt. (Tenn.) 344. A judgment for plaintiff in assumpsit, after trial, should be set aside, and a new trial granted, if there was no plea by defendant. Johnson v. Fry, 88 Va. 695, 14 S. E. 183.

[232] Mason v. Kansas City C. Ry. Co., 58 Kan. 817, 51 Pac. 284. But where an amended complaint, on which judgment is rendered, is unobjectionable, the judgment will not be set aside because the original complaint did not state a cause of action. Hunter v. Bryant, 98 Cal. 247, 33 Pac. 51.

[233] Barnes v. Branch, 3 McCord (S. C.) 19; Andrews v. Monilaws, 8 Hun, 65. See F. A. Poth Brewing Co. v. Bernd (N. J.) 36 Atl. 664; Dickson v. Matheson, 12 Wash. 196, 40 Pac. 725; supra, § 138. When the proper remedy is by appeal, see Palmer v. Bank of Zumbrota, 65 Minn. 90, 67 N. W. 803. Adjudging interest on notes from the date they were due, instead of the last day of grace, is not such error as warrants setting aside the judgment, the amount being small. Ramsburg v. Kline, 96 Va. 465, 31 S. E. 608.

[234] Bowen v. Troy Portable Mill Co., 31 Iowa, 460; Holmes v. Honie, 8 How. Prac. 384; supra, § 199.

[235] Mullendore v. Silvers, 34 Ind. 98.

[236] Will v. Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

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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;[237] and so will a judgment taken by default when it appears that the real party in interest was not made a party to the action.[238] 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.[239] It is also proper to vacate a judgment entered where no findings of fact or law were made or filed by the court, as required by law, and findings were not waived,[240] and 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.[241]

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

[237] Lytle v. Colts, 27 Pa. 193. See, also, Knox Co. Bank v. Doty, 9 Ohio St. 505, 75 Am. Dec. 479.

[238] Ebell v. Bursinger, 70 Tex. 120, 8 S. W. 77. Where, in ejectment, judgment by default was rendered against a tenant without the knowledge of his landlord, a motion to vacate is proper. Mowry v. Nunez (Cal.) 33 Pac. 1122. Compare Chappell v. Real-Estate Pooling Co., 91 Md. 754, 46 Atl. 982.

[239] Grinnell v. Schmidt, 2 Sandf. Ch. 706.

[240] Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23.

[241] Moore v. Richardson, 5 S. C. 142.

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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." [242] 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.[243] A failure to give security for costs, under the general rule of the court, is no cause for setting aside the judgment.[244] 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.[245] An affidavit is not required to support a rule to strike off a judgment which, on the face of the record, appears to have been unlawfully and improvidently entered.[246]

§ 326a. Objections to Jury.

A motion to vacate or set aside a judgment will not generally be granted on the ground that one or more of the jury, upon whose verdict the judgment was rendered, was incompetent or disqualified, or on account of his alleged bias or hostility against the unsuccessful party, or by reason of any alleged misconduct on the part of the jury, the proper remedy, in such a case, being by challenge duly interposed at the trial, or by motion in arrest of judgment, or by a

[242] Williamson v. Hartman, 92 N. C. 236. And see Alexander v. Ling, 31 Or. 222, 50 Pac. 915; Crook v. Hamlin, 140 N. Y. 297, 35 N. E. 499. A judgment is not void, and subject to a motion to vacate, because the judgment roll, as made up, did not contain all the proper papers, the remedy being by motion to have such papers inserted. Breckenridge Co. v. Perkins, 14 App. Div. 629, 43 N. Y. Supp. 800.

[243] Cosgrove v. Butler, 1 S. C. 241; Crow v. American Mortgage Co., 92 Ga. 815, 19 S. E. 31; Slater v. Skirving, 45 Neb. 594, 63 N. W. 848.

[244] Lytle v. Fenn, 3 McLean, 411, Fed. Cas. No. 8,651.

[245] Challiss v. Headley, 9 Kan. 684.

[246] Allen v. Krips, 119 Pa. 1, 12 Atl. 759.

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motion for a new trial, according to the circumstances.[247] But it has been ruled that a verdict not rendered by the persons designated and selected according to law, but participated in by others, who, by fraudulent practices, obtained seats in the jury box, heard the evidence, and returned a verdict, having no right or authority to do so, and a judgment entered in pursuance of such verdict, should be set aside upon the motion of the injured party, if he was innocent of the fraud, without inquiry as to whether or not it was just as between the parties.[248]

§ 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;[249] and that the same is true of a judgment against an infant for whom no guardian was appointed or appeared.[250] 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 or a person under other disabilities, or a dead man, 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.[251]

[247] Bickel v. Kraus, 100 Ky. 728, 39 S. W. 414; Mize v. Americus Manuf'g & Imp. Co., 109 Ga. 359, 34 S. E. 583; supra, § 103.

[248] Illinois Steel Co. v. Szutenbach, 67 Ill. App. 280.

[249] Supra, § 190. Compare Littster v. Littster, 151 Pa. 474, 25 Atl. 117; Adams v. Grey, 154 Pa. 258, 26 Atl. 423.

[250] Supra, §§ 193–196.

[251] Powell v. Gott, 13 Mo. 458, 53 Am. Dec. 153; Levy v. Williams, 4 S. C. 515; Keaton v. Banks, 32 N. C. 381, 51 Am. Dec. 393; Bond v. Neuschwander, 86 Wis. 391, 57 N. W. 54; Consolidated Coal Co. v. Oeltjen, 189 Ill. 85, 59 N. E. 600; Rogers v. McMillen, 6 Colo. App. 14, 39 Pac. 891; State v. Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664. In Pennsylvania, it is said that the case of a judgment entered against a dead man is an exception to the rule that a motion to strike off a judgment must be on the ground of irregularity

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§ 328. Unauthorized Entries.

A judgment which was inadvertently or irregularly entered by the judge or the clerk of the court without any authority, may be vacated at any time.[252] 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.[253]

§ 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.[254] Thus, the reception of secondary or illegal evi-

appearing on the face of the record, and it may be stricken off. Stevenson v. Virtue, 21 Pa. Co. Ct. R. 229.

[252] Merrick v. City of Baltimore, 43 Md. 219; Wharton v. Harlan, 68 Cal. 422, 9 Pac. 727; United States v. McKnight, 1 Cranch, C. C. 84, Fed. Cas. No. 15,695; Murray v. Derrick, 101 Ga. 113, 28 S. E. 616; Wolf v. Shenandoah Nat. Bank, 84 Iowa, 138, 50 N. W. 561; Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Vanderpool v. Vanderpool, 162 Pa. 394, 29 Atl. 910. But in Illinois, it is said that a judgment entered for a bona fide debt, past due, will not be set aside at a subsequent term, although entered without authority. Reynertson v. Central Lumber Co., 69 Ill. App. 131.

[253] Drake v. Smythe, 44 Iowa, 410.

[254] State v. Horton, 89 N. C. 581; May v. Stimson Lumber Co., 119 N. C. 96, 25 S. E. 721; Hauscheld v. Hauscheld, 33 App. Div. 296, 53 N. Y. Supp. 831; 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, 12 L. Ed. 331; Wiggins v. Steiner, 103 Ala. 655, 16 South. 8; Coffey v. Proctor Coal

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dence in proof of a fact is no ground to annul the judgment rendered in the case.[255] 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.[256] 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.[257]

§ 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.[258] 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 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.[259] A judgment will not be stricken off because the warrant of attorney on which it was entered appears to be dated

Co. (Ky.) 20 S. W. 286; Sexton v. Rock Island Lumber & Manuf'g Co., 49 Kan. 153, 30 Pac. 164; Pierson v. Benedict, 5 Kan. App. 790, 48 Pac. 996; Davis v. Fields, 9 Wash. 78, 37 Pac. 281. But a trial court, being satisfied that its order for the distribution of a fund is not in accordance with the direction of the supreme court relative thereto, may vacate the order, to the end that the direction may be carried out. Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67, 58 N. W. 648.

[255] Elder v. City of New Orleans, 31 La. Ann. 500.

[256] Loomis v. Rice, 37 Wis. 262.

[257] Brown v. Bennett, 55 Ga. 189.

[258] Robichaud v. Nelson, 28 La. Ann. 578; Barksdale v. Greene, 29 Ga. 418; Easley v. Camp, 40 Ga. 698; Field v. Sisson, 40 Ga. 67; Purity Ice Works v. Rountree, 104 Ga. 676, 30 S. E. 885; Smith v. Wachob, 179 Pa. 260, 36 Atl. 221; Deering Harvester Co. v. Donovan, 82 Minn. 162, 84 N. W. 745, 83 Am. St. Rep. 417.

[259] Elder v. National Bank, 12 Kan. 242; Carlson v. Phinney, 56 Minn. 476, 58 N. W. 38; Gillespie v. Rogers, 184 Pa. 488, 39 Atl. 290.

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on Sunday; courts will not, on such grounds, interfere with an executed contract.[260] 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.[261] But in Pennsylvania, a judgment by confession on a warrant of attorney may be opened and the defendant let in to a defense, where it appears that the defendant was entitled to certain credits which should have been deducted from the amount of the judgment, or set off against it.[262]

§ 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.[263] But the general rule is wise and salutary, and exceptions of this kind should

[260] Baker v. Lukens, 35 Pa. 146.

[261] Council v. Willis, 66 N. C. 359.

[262] Bright v. Diamond, 189 Pa. 476, 42 Atl. 45; Helmgartner v. Stewart, 180 Pa. 500, 37 Atl. 93. So, where a bond with warrant of attorney is given with a mortgage for the purchase money of land, judgment entered thereon may be opened to permit the defendant to show a contemporaneous oral agreement that the bond should be collectible only out of the property conveyed. Schweyer v. Walbert, 190 Pa. 334, 42 Atl. 694. A judgment entered by the assignee of a judgment note will be opened where it appears that the defendant had paid the note to the payee without notice of the assignment. Walker v. Sallada, 17 Pa. Co. Ct. R. 371.

[263] Anderson's Appeal (Pa.) 1 Atl. 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. 246.

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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 authorize them to vacate a judgment already rendered on such a demand.[264] And in general, in accordance with the rule that, where both parties have equally participated in an immoral or illegal transaction the courts will refuse to aid either of them, but will leave them where they stand, it is held that a judgment taken by confession or default will not be opened or vacated to allow the defendant to escape from liability on an unlawful or immoral transaction in which he knowingly participated.[265]

§ 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.[266] 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.[267] And where a motion for a new trial has been overruled, on the ground that the

[264] Ransone v. Grist, 40 Ga. 241; Inman v. Jones, 44 Ga. 44; Bell v. Hanks, 55 Ga. 274.

[265] Fields v. Brown, 89 Ill. App. 287; Shumaker v. Reed, 13 Pa. Co. Ct. R. 547; Woelfel v. Hammer, 159 Pa. 446, 28 Atl. 146.

[266] Cooley v. Gregory, 16 Wis. 303; Wells, Fargo & Co. v. Wall, 1 Or. 295; Munro v. Callahan, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366; Krall v. Campbell Printing-Press & Manuf'g Co., 79 Tex. 556, 15 S. W. 565. Compare Ziegler v. Evans, 8 Kulp (Pa.) 180.

[267] Heathcote v. Haskins, 74 Iowa, 566, 38 N. W. 417. And see Merrifield v. Bell, 60 Hun, 576, 14 N. Y. Supp. 322; Robinson v. Davis, 66 Ark. 429, 51 S. W. 66.

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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.[268]

§ 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.[269] Similarly, where a judgment is entered on a warrant of attorney, and a transcript of it taken to another county, and afterwards the original judgment is stricken off for cause, the judgment in the other county falls with it.[270] 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.[271]

[268] Mayor, etc., of City of New York v. Brady, 115 N. Y. 599, 22 N. E. 237. In England, where it is sought to rescind a valid and final judgment on the ground of the discovery of new evidence, it must be shown that such evidence is both new and material; although evidence may have been withheld from the court at the original trial by one of the parties to the suit, with an improper intention, such conduct is not sufficient to set aside the judgment unless the evidence withheld would have had a material effect upon the decision of the court. Boswell v. Coaks, 6 Rep. 167. A change in the interpretation of a law applicable to a cause prosecuted to judgment does not entitle the unsuccessful party in the suit to reopen the controversy. Travis County v. King Iron Bridge & Manuf'g Co., 34 C. C. A. 620, 92 Fed. 690.

[269] Heckling v. Allen (C. C.) 15 Fed. 196; Aetna Ins. Co. v. Aldrich, 38 Wis. 107.

[270] Banning v. Taylor, 24 Pa. 297.

[271] Chisholm v. State, 42 Ala. 527.

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§ 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 several 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.[272] In several others 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.[273] In Connecticut, the statute authorizes the vacation of a judgment for mistake, accident, or other reasonable cause.[274] In Georgia, a judgment by default may be opened where the defendant was prevented by "providential cause" or "excusable neglect" from filing his defense at the proper time.[275] In Vermont, similar action may be taken when the defendant was unjustly deprived of a hearing by

[272] Code Civ. Proc. N. Y. § 724; Code Civ. Proc. N. C. § 274; Code Proc. S. C. § 195; Rev. St. Ind. 1894, § 399 (Rev. St. 1881, § 396); Rev. St. Wis. § 2832; Code Civ. Proc. Dak. § 143; Comp. Laws N. D. § 4939; Comp. Laws S. D. § 4939; Code Civ. Proc. Cal. § 473; Code Civ. Proc. Colo. § 75; 1 Hill's Ann. Laws Or. § 102; Code Civ. Proc. Mont. § 774; 2 Ballinger's Ann. Codes & St. Wash. § 5153; 2 Hill's Code Wash. § 221; Gen. St. Nev. 1885, § 3217; Rev. St. Idaho 1887, § 4229; Comp. Laws Utah, § 3256.

[273] Rev. St. Ohio, § 5354; Miller's Code Iowa, § 3154; Civ. Code Ky. § 518; Gen. St. Kan. 1889, par. 4669; Code Civ. Proc. Neb. § 602; Sand. & H. Dig. Ark. § 4197; Code Civ. Proc. Okl. § 588.

[274] Gen. St. Conn. 1888, § 1126.

[275] Civil Code Ga. § 5072.

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fraud, accident, or mistake.[276] In Minnesota, a judgment may be set aside which was obtained by means of perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party.[277] In Ohio, a judgment may be vacated for "irregularity in obtaining it."[278] The construction of these terms will mainly occupy our attention through 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.[279]

§ 335. Mistake.

When statutes authorize the vacation of a judgment entered against a party through his "mistake," it is to be understood that they mean a mistake of fact. Mistake of law—that is, the party's ignorance of the law, or mistake as to his legal rights or duties in the premises—will not warrant the setting aside of the judgment.[280] And even when the mistake is one of fact, there must be some reasonable and valid excuse for its having occurred, so that it cannot

[276] R. L. Vt. § 1422.

[277] Gen. St. Minn. 1878, c. 66, § 285; Gen. St. Minn. 1894, § 5434.

[278] Rev. St. Ohio, § 5357.

[279] Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; Cowles v. Hayes, 69 N. C. 406; Bond v. Epley, 48 Iowa, 600. See People v. O'Connell, 23 Cal. 281.

[280] Skinner v. Terry, 107 N. C. 103, 12 S. E. 118; Chaffin v. Fulkerson, 95 Ky. 277, 24 S. W. 1066; Jartman v. Pacific Fire Ins. Co., 69 Conn. 355, 37 Atl. 970; Thompson v. Harlow, 150 Ind. 450, 50 N. E. 474; In re Carr's Will, 64 Hun, 636, 19 N. Y. Supp. 647; Thacker v. Thacker, 125 Ind. 489, 25 N. E. 595. Compare Arnold v. Norfolk & New Brunswick Hosiery Co., 65 Hun, 621, 19 N. Y. Supp. 957.

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be said to be due merely to the party's heedlessness or indifference, and he must show a defense to the action and due diligence in seeking to vacate the judgment after discovering his mistake. These conditions being met, the judgment may be set aside on the ground of a mistake as to the identity of the suit, as where the party honestly became confused between different suits brought against him, or between a civil and a criminal action touching the same subject-matter and pending at the same time;[281] or a mistake as to the capacity in which he is sued, as, if he supposes the action to be against him in an official capacity when it was really the intention to sue him as an individual;[282] or a mistake as to the time when he is required to plead or answer, or as to the time of the trial.[283] But on the other hand, it is said that 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.[284] And courts are not much disposed to vacate judgments on the ground of misunderstandings between parties and their counsel. Thus, it is held that a party's mistaken belief that he had retained an attorney to take charge of the case does not entitle him to have a default judgment vacated, where the facts did not justify that belief.[285] But

[281] Bertline v. Bauer, 25 Wis. 486; Martin v. Curley, 70 Minn. 489, 73 N. W. 405. See Devlin v. Boyd, 69 Hun, 328, 23 N. Y. Supp. 523. One who suffers judgment by default in a suit to foreclose a mortgage, to which his name was forged, cannot afterwards have the judgment set aside on the ground that his failure to appear and defend was due to the fact that he thought the suit was to foreclose another mortgage given by him to a third person. Cleland v. Hamilton Loan & Trust Co., 55 Neb. 13, 75 N. W. 239.

[282] Capital Savings Bank & Trust Co. v. Swan, 100 Iowa, 718, 69 N. W. 1065. But one who is sued as administrator and individually, and who, when the summons is shown to him, says he knows all about it, walks away from the officer before it is read to him, and, supposing he is sued only as administrator, makes no defense, cannot have a judgment by default set aside. Williamson v. Cocke, 124 N. C. 585, 32 S. E. 963.

[283] Johnson v. Eldred, 13 Wis. 482; Manwaring v. Lippincott, 52 App. Div. 526, 65 N. Y. Supp. 428; Hanthorn v. Oliver, 32 Or. 57, 51 Pac. 440, 67 Am. St. Rep. 518; Titus v. Larsen, 18 Wash. 145, 51 Pac. 351; Miller v. Carr, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180; Coos Bay, R. & E. R. & Nav. Co. v. Endicott, 34 Or. 573, 57 Pac. 61. Compare Grosvenor v. Doyle, 50 Ill. App. 47.

[284] Robertson v. Bergen, 10 Ind. 402.

[285] Ames Iron Works v. Chinn, 20 Tex. Civ. App. 382, 49 S. W. 665; North-

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a mistake or misunderstanding as to the terms or effect of an agreement between the two parties to the suit may justify the opening of a default, or the modification of the judgment.[286] In an action to set 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.[287]

The "mistake" which will justify the vacation of a judgment may also be the mistake of the court or the judge. For instance, a mistake in the transmission of a telegram by the judge of the court, for which the party is in no way responsible, whereby he is deprived of a hearing on the trial, is ground for vacating the judgment.[288] 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." [289] 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.[290]

§ 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.[291] Nor is it enough that he was surprised by a decision hold-

ern Pac. & P. S. S. R. Co. v. Black, 3 Wash. St. 327, 28 Pac. 538. See Moore v. Kelly & Jones Co., 109 Ga. 798, 35 S. E. 168.

286 Benge v. Potter (Ky.) 55 S. W. 431.

287 Douglass v. Brooks, 38 Cal. 670.

288 Thum v. Pike (Idaho) 55 Pac. 864.

289 Cooper v. Duncan, 20 Mo. App. 355; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151.

290 Murphy v. Swadner, 34 Ohio St. 672.

291 Breed v. Ketchum, 51 Wis. 164, 7 N. W. 550. See Winter v. State, 18 Ga. 275.

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ing a complaint bad on other grounds than those urged,[292] nor that he was surprised by evidence produced at the trial, unless he asked for a continuance to procure testimony to meet it,[293] nor because he was absent from the trial in consequence of his belief that the case could not possibly be reached for trial that day, although it was reached only through the unexpected continuance of some of the preceding cases.[294] Nor can a party claim that he was legally "surprised" by the transfer of his case to a different court, though he was actually ignorant of it, if he might have discovered the fact by due diligence.[295] On the other hand, in a case in West Virginia, it appeared that an action was brought in a county court, and two years later 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 twelve years later 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 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.[296] 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, where, 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.[297] But it is probable that the species of "surprise" primarily contemplated by the statutes is that which results from the taking of a judgment contrary to an agreement or understand-

[292] Ean v. Chicago, M. & St. P. Ry. Co., 101 Wis. 166, 76 N. W. 329.
[293] Robinson v. Davis, 66 Ark. 429, 51 S. W. 66.
[294] Andres v. Kridler, 49 Neb. 535, 68 N. W. 938.
[295] Philip v. Davis (Iowa) 78 N. W. 810.
[296] Bennett v. Jackson, 34 W. Va. 62, 11 S. E. 734.
[297] Heilbron v. Campbell (Cal.) 23 Pac. 1032.

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ing that the case should be continued or not pressed, or not brought to trial,[298] though that is also a kind of fraud. It seems that there may also be legal "surprise" in the unexpected withdrawal from the case of a party's attorney,[299] though not where the judgment was given by consent of the party's attorney, and the contention merely is that he exceeded his authority.[300]

§ 337. Casualty or Misfortune.

In several of the states, as we have already stated, the statutes specify "unavoidable casualty or misfortune preventing the party from defending or prosecuting" as a ground for vacating judgments. 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. That the defendant was prevented from reaching the place of trial by a railroad accident, or by the impassable condition of the roads, or by storms or other insuperable obstacles, is a sufficient ground for vacating a default judgment against him, if he shows a good defense.[301] So also, the judgment should be vacated where it appears that the summons was served at his residence while he, with all the members of his family, was absent on a vacation, and that he had no knowledge of the action until he was requested to pay the judgment,[302] or where the civil docket was disarranged by the trial of the criminal docket, and defendant's case was disposed of while his attorney was temporarily absent from the court room,[303] or where, shortly before the trial, defendant's attorney absconded, without the knowledge of his client.[304] But the mere fact that the party wrote to an attorney to

[298] See, supra, § 322. And see Dunlop v. Schubert, 97 Wis. 135, 72 N. W. 350.

[299] Ex parte Rountree, 51 S. C. 405, 29 S. E. 66.

[300] Hairston v. Garwood, 123 N. C. 345, 31 S. E. 653.

[301] Town of Omro v. Ward, 19 Wis. 232; Decker v. Graves, 10 Ind. App. 25, 37 N. E. 550. Compare Malek v. Kodad, 92 Iowa, 763, 60 N. W. 491.

[302] Schnitzler v. Fourth Nat. Bank, 1 Kan. App. 674, 42 Pac. 496.

[303] Cooley v. Barbourville Land & Improvement Co.'s Assignee (Ky.) 43 S. W. 464.

[304] Ennis v. Fourth St. Bldg. Ass'n, 102 Iowa, 520, 71 N. W. 426.

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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.[305] Nor is it sufficient that the party failed to appear at the time his case was called in consequence of misunderstanding his attorney's statement as to when the court met,[306] nor that his absence from home on a business trip prevented him from receiving notices sent to him by his counsel, as to the progress of the case and the time of its trial.[307] On the other hand, mental unsoundness is such a "misfortune," within the meaning of the statutes, as will authorize the court to vacate or modify a judgment.[308] And if a party is deprived of the opportunity to 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.[309] 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.[310]

§ 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.[311] And in other states, this is considered a case of "excusable neglect." [312] But in some few jurisdictions there is a manifest reluctance

[305] School District No. 13 v. Lovejoy (C. C.) 16 Fed. 323; Ganzer v. Schiffbauer, 40 Neb. 633, 59 N. W. 98.

[306] Ross v. Louisville & N. R. Co., 92 Ky. 583, 18 S. W. 456.

[307] Bates v. Bates, 66 Minn. 131, 68 N. W. 845.

[308] Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138; Small v. Reeves, 104 Ky. 289, 46 S. W. 726.

[309] Bonnell v. Rome, W. & O. R. Co., 12 Hun (N. Y.) 218.

[310] Heisterhagen v. Garland, 10 Mo. 66.

[311] Gheer v. Huber, 32 Kan. 319, 4 Pac. 290; Luscomb v. Maloy, 26 Iowa, 444; French v. Eversole (Ky.) 32 S. W. 211.

[312] Sage v. Matheney, 14 Ind. 369; Flanagan v. Patterson, 78 Ind. 514; Monroe v. Paddock, 75 Ind. 422; Depriest v. Patterson, 85 N. C. 376; Good-

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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.[313] 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.[314] This seems to be the doctrine also in Illinois.[315] 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.[316] 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.[317]

§ 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.[318] This, however, has been fairly denied.[319] 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

hue v. Meyers, 58 Tex. 405; Holliman v. Pearlstone (Tex. Civ. App.) 29 S. W. 542; Carey v. Browne, 67 Hun, 516, 22 N. Y. Supp. 521; In re Traver, 9 Misc. Rep. 621, 30 N. Y. Supp. 851; Bank of Princeton v. Johnston, 41 W. Va. 550, 23 S. E. 517.

[313] Cannon v. Harrold, 61 Ga. 158.

[314] Jonsson v. Lindstrom, 114 Ind. 152, 16 N. E. 400.

[315] Shaffer v. Sutton, 49 Ill. 506; Edwards v. McKay, 73 Ill. 570.

[316] Gardenhire v. Vinson, 39 Ark. 270.

[317] Skinner v. Bryce, 75 N. C. 287; Seiberling v. Schuster, 83 Iowa, 747, 49 N. W. 844; Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 135. Compare Thornall v. Turner, 23 Misc. Rep. 363, 51 N. Y. Supp. 214.

[318] Wilmarth v. Gatfield, 1 How. Prac. 52; Bristor v. Galvin, 62 Ind. 352; Stout v. Lewis, 11 Mo. 438; Harralson v. McArthur, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689; Callanan v. Aetna Nat. Bank, 84 Iowa, 8, 50 N. W. 69; Southwestern Telegraph & Telephone Co. v. Jennings (Tex. Civ. App.) 51 S. W. 288.

[319] Clark v. Ewing, 93 Ill. 572; McFarland v. White, 13 La. Ann. 394. See Hittle v. Zelmer, 164 Ill. 64, 45 N. E. 419; Heaton v. Peterson, 6 Ind. App. 1, 31 N. E. 1133.

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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.[320] 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.[321] 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.[322]

§ 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 judgments may be set aside.[323] And under this designation may be classed the unavoidable absence of the party, when he is kept away from the trial of his case by the performance of duties which he cannot legally postpone or escape.[324] Thus, it is a good excuse for failure to attend if he was compelled, at that time, to appear

[320] Harvey v. Wilson, 44 Ind. 231; Goodhue v. Meyers, 58 Tex. 405.

[321] Compare Powell v. Washington, 15 Ala. 803, with Stout v. Lewis, 11 Mo. 438.

[322] Kivett v. Wynne, 89 N. C. 39.

[323] Supra, § 334. See Egan v. Rooney, 38 How. Prac. (N. Y.) 121; Keith v. McCaffrey, 145 Mass. 18, 12 N. E. 419.

[324] But the fact that defendant was a milkman, delivering milk every day in a city, and had no one to attend to his duties in his absence, is not sufficient excuse for his neglect to appear and defend an action against him. Landa v. McGehee (Tex.) 19 S. W. 516.

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before a grand jury,[325] or before another court,[326] or if he was necessarily absent in the actual military service of the United States.[327] Again, it is a case of "excusable neglect" if the party's failure to plead, or to follow up his case, or to be present at its trial, was due solely to his reliance upon assurances given him by those upon whom he had a right to depend (as, the adverse party, or counsel retained in the case, or a competent business adviser) that it would not be necessary for him to take an active part in the case, or that the suit would not be prosecuted.[328] 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.[329] But where the officer did not read or give a copy of the summons to the defendant, but told him it was a subpœna for him as a witness in a case pending in another court, and the defendant did not learn the truth until too late, this was held a sufficient excuse.[330]

An application to open or vacate a judgment on this ground must show the cause of the party's neglect of the case, and that it was

[325] Frazier v. Bishop, 29 Mo. 447.

[326] Tullis v. Scott, 38 Tex. 537. Compare Kitson v. Blake, 60 Hun. 579, 14 N. Y. Supp. 446.

[327] Piper v. Aldrich, 41 Mo. 421.

[328] Wicke v. Lake, 21 Wis. 410, 94 Am. Dec. 552; Rowland v. Jones, 2 Heisk. (Tenn.) 321; Birch v. Frantz, 77 Ind. 199; Hull v. Vining, 17 Wash. 352, 49 Pac. 537; City Block Directory Co. v. App, 4 Colo. App. 350, 35 Pac. 985; Craig v. San Bernardino Inv. Co., 101 Cal. 122, 35 Pac. 558; Henderson v. Lange, 71 Minn. 468, 74 N. W. 172. Compare State v. Casey, 9 S. D. 436, 69 N. W. 585; Craig v. Major, 139 Ind. 624, 35 N. E. 1098. The fact that defendant relied on the assurance of a constable, who had no authority to give such assurance, that the suit would be abandoned, does not excuse his neglecting the case. Harding v. R. S. Peale Co., 44 Ill. App. 344.

[329] White v. Snow, 71 N. C. 232. See State v. O'Neill, 4 Mo. App. 221.

[330] Hite v. Fisher, 76 Ind. 231. See Lowe v. Hamilton, 132 Ind. 406, 31 N. E. 1117. Where a summons was served on a director of a corporation, who neglected to notify the managing officers or attorneys until after the entry of a judgment by default, and they had no knowledge of the suit, and showed a defense to part of the claim, it was held that the default should be opened. G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co., 11 S. D. 376, 77 N. W. 1022.

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excusable.[331] If the papers disclose mere carelessness, lack of attention, or indifference to his rights, on the part of the applicant or his counsel, he cannot expect an opportunity to redeem the past. The law exacts diligent attention from all suitors. If the party's negligence is without excuse or justification, he must abide the consequences.[332] And as indicating the kind and amount of diligence required of him, it may be stated, first, that unless he means to try his own case, it is his duty to retain an attorney, more especially where the party himself is a non-resident.[333] He must see to it that the attorney understands and accepts the retainer. It will not be sufficient excuse for a default that a letter sent to an attorney, asking him to appear in the case, was not delivered until after the trial, if there was time to secure counsel by telegraphing.[334] If an attorney employed to represent the defendant dies or withdraws from the case, an effort to supply his place in due season must be shown.[335]

[331] Mitchell v. Allen, 110 Ga. 282, 34 S. E. 851. The mere fact that defendant reached the court half an hour too late, and after the case had been disposed of, constitutes no excuse for the default. Mullane v. Roberge, 21 Misc. Rep. 342, 47 N. Y. Supp. 155.

[332] Brand v. Stafford, 28 La. Ann. 51; Fritz v. Roney, 9 Pa. Dist. R. 27; Griffin v. Brewer, 96 Ga. 758, 22 S. E. 284; Athens Leather Manuf'g Co. v. Myers, 98 Ga. 396, 25 S. E. 503; Harms v. Jacobs, 160 Ill. 589, 43 N. E. 745; Nauer v. Benham, 45 Minn. 252, 47 N. W. 796; Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237; Myers v. Landrum, 4 Wash. St. 762, 31 Pac. 33. It is gross negligence to pay no attention to an action for 18 months after service of process. Grootemaat v. Tebel, 39 Wis. 576. In a case in North Carolina, where defendant retained counsel and fully informed him of his defense, and subpœnaed witnesses, but thought his own presence at the trial would not be necessary, and therefore did not attend, but the witnesses did not appear and there was no one to ask for a continuance, and judgment was taken against him, it was held that his negligence was inexcusable, and the judgment should not be opened. Waddell v. Wood, 64 N. C. 624. And see Oliver v. Gerstle, 58 Ill. App. 615.

[333] Union Cent. Life Ins. Co. v. Lipscomb (Tex. Civ. App.) 27 S. W. 307.

[334] Finlayson v. American Acc. Co., 109 N. C. 196, 13 S. E. 739. It is no ground for opening a judgment that the attorney did not receive the letter asking him to appear and defend the suit in time to do so, where the defendant himself, though several times in the town where the attorney lived, failed to inquire for him or seek information regarding the suit. Post v. Carr, 42 W. Va. 72, 24 S. E. 583.

[335] Simpson v. Brown, 117 N. C. 482, 23 S. E. 441. Compare Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41.

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Having retained counsel, it is the client's duty to inform him fully of the nature and grounds of his defense, to assist him in the preparation of the case, and to attend at the trial, unless advised by his counsel that his presence is not necessary. If he fails in these particulars, his negligence cannot be held to be excusable.[336] Undoubtedly a party has a right to depend on his attorney's keeping him informed of the progress of the case; and a judgment may be vacated for excusable neglect or surprise, although the defendant was represented by counsel.[337] But it is not sufficient excuse for a default that defendant's counsel did not notify him of the time of the trial, if the defendant himself had actual notice that the case would probably be tried at a given term, at which it actually was tried.[338]

But in all these cases, the party's failure to take the steps required of him was due to his own want of diligence or attention. The situation is entirely different where, in the exercise of all due vigilance and activity, he was prevented from filing a pleading or attending the trial by an accident or chain of accidents which he could not have controlled,[339] or by a genuine and excusable mistake or miscalculation.[340] It is not, however, 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.[341] And a judgment will not be set aside on the ground that the defendant was prevented from being represented at the trial and making his defense, when the defense set up in the affi-

[336] Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476; Sullivan v. Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894; Hahn v. Gates, 169 Ill. 299, 48 N. E. 398; Parker v. Belcher, 87 Ga. 110, 13 S. E. 314; Schroer v. Wessell, 89 Ill. 113; Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269.

[337] Ex parte Roundtree, 51 S. C. 405, 29 S. E. 66.

[338] Leader v. Dunlap, 6 Pa. Super. Ct. 243. And see Vick v. Baker, 122 N. C. 98, 29 S. E. 64.

[339] Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629; Mitchell & Lewis Co. v. Downing, 23 Or. 448, 32 Pac. 394; Blain v. Shaffner, 37 Ill. App. 394; Williams v. Richmond & D. R. Co., 110 N. C. 466, 15 S. E. 97.

[340] Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592. See, also, In re Davis' Estate, 15 Mont. 347, 39 Pac. 292.

[341] Bailey v. Taaffe, 29 Cal. 422.

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davit in support of his motion is entirely new and not disclosed by the original pleadings.[342]

§ 340a. Mistake, Ignorance, or Erroneous Advice of Counsel.

Certain of the cases lay down a broad general rule that the mistake or ignorance of a party's counsel will not relieve him from a judgment rendered against him.[343] But a majority of the decisions favor the principle that a mistake of the party's attorney may warrant the vacation of the judgment, as well as a mistake made by the party himself, provided it was a mistake of fact, and not of law, and provided it was such as might reasonably and genuinely have occurred. Thus, we find authorities justifying the grant of such relief where the judgment was entered in consequence of the attorney's mistake or misapprehension as to the real facts of the case, or the circumstances of the transaction out of which the suit arose,[344] or his mistake or miscalculation as to the time for pleading or for the trial, or as to the case being set for trial or placed on the calendar.[345]

[342] Kehler v. New Orleans Ins. Co. (C. C.) 23 Fed. 709.

[343] Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086.

[344] Underwood v. Underwood, 87 Cal. 523, 25 Pac. 1065; McCredy v. Woodcock, 41 App. Div. 526, 58 N. Y. Supp. 656.

[345] Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Springer v. Gillespie (Tex. Civ. App.) 56 S. W. 369; Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; Hermance v. Cunningham, 49 Neb. 897, 69 N. W. 311; Horton v. New Pass Gold & S. Min. Co., 21 Nev. 184, 27 Pac. 376; Scott v. Smith, 133 Mo. 618, 34 S. W. 864; Collier v. Fitzpatrick, 22 Mont. 553, 57 Pac. 181. But no sufficient excuse is shown by an affidavit of counsel that he had forgotten on what day the term began, when he admits receiving the summons before the term, and the summons itself showed when the term began. Baltimore & O. R. Co. v. Flinn, 2 Ind. App. 55, 28 N. E. 201. Nor is it sufficient ground for opening a judgment that a clerk in the office of defendant's attorneys inadvertently placed the cause on the office diary for the January term instead of the December term, when the attorneys knew, when the suit was begun, that the answer would have to be filed at the December term. Barrett v. Queen City Cycle Co., 179 Ill. 68, 53 N. E. 550. A custom in one section of the state for circuit courts not to try cases on the first day of the term is no excuse for the absence of an attorney whose case is set for trial on that day, where it is not shown that the custom is invariable. Wilson v. Scott, 50 Mo. App. 329. And see, as denying that the attorney's mistake or miscalculation of time is ground for vacating a judgment, Smith v. Watson, 28 Iowa, 218; People v. Rains, 23 Cal. 127.

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So, a showing that defendant, after receiving service, engaged an attorney to conduct his defense, and that the latter failed to find the case because it was docketed in a wrong name, and for that reason omitted to make any defense, is sufficient to warrant the setting aside of a default.[346] And the same rule applies where the attorney mistakenly advised his client that the action had been discontinued.[347]

But if the mistake made by the attorney was a mistake of law, such relief cannot be granted. This principle is applied not only where he was in error, legally speaking, as to the rights or duties of his client, or as to the legal effect of substantive facts in the case, but also where the attorney takes a wrong course or fails to take the right course in consequence of his ignorance or misunderstanding of the rules of procedure.[348] Where a defendant who really has a good defense to the action is dissuaded from setting it up and contesting the suit, and suffers a default, by reason of erroneous advice from his attorney, it is thought, in several of the states, that this will constitute a sufficient ground for vacating the judgment rendered against him.[349] But elsewhere, on the ground that such a mistake is one of law, it is ruled that an application to open or vacate the judgment cannot be based on such grounds.[350]

§ 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 or carelessness of the attorney for the party against whom it was rendered. The

[346] Clifford v. Gruelle (Ky.) 32 S. W. 937.

[347] Searles v. Christensen, 5 S. D. 650, 60 N. W. 29.

[348] In re Hoopes' Estate, 185 Pa. 167, 39 Atl. 840; Hicklin v. McClear, 19 Or. 508, 24 Pac. 992; Phifer v. Travellers' Ins. Co., 123 N. C. 405, 31 S. E. 715; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Harbaugh v. Honey Lake Valley Land & Water Co., 109 Cal. 70, 41 Pac. 792; Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863.

[349] Baxter v. Chute, 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633; Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247.

[350] Mouser v. Harmon, 96 Ky. 591, 29 S. W. 448; Cox v. Armstrong (Ky.) 43 S. W. 189; Milwaukee Mut. Loan & Bldg. Soc. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102.

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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.[351] This view has recently found expression in a case in Kansas, of which the circumstances 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.[352] It is generally

[351] Babcock v. Brown, 25 Vt. 550, 60 Am. Dec. 290; Davison v. Heffron, 31 Vt. 687; Burke v. Stokely, 65 N. C. 569; Foster v. Jones, 1 McCord (S. C.) 116; Tarrant Co. v. Lively, 25 Tex. Supp. 399; Welch v. Challen, 31 Kan. 696, 3 Pac. 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. Inhabitants of Town of 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 Nev. 447; United States v. Wallace (D. C.) 46 Fed. 569; Phillips v. Collier, 87 Ga. 66, 13 S. E. 260; Merrill v. Roberts, 78 Tex. 28, 14 S. W. 254; Woolley v. Sullivan (Tex. Civ. App.) 43 S. W. 919; Metropolitan Life Ins. Co. v. Bergen, 64 Ill. App. 685; Moore v. Horner, 146 Ind. 287, 45 N. E. 341; Parker v. Indianapolis Nat. Bank, 1 Ind. App. 462, 27 N. E. 659; Jackson v. Gould, 96 Iowa, 488, 65 N. W. 406; Church v. Lacy, 102 Iowa, 235, 71 N. W. 338; Anderson v. Green (Ky.) 55 S. W. 420; Wynn v. Frost, 6 Okl. 89, 50 Pac. 184.

[352] Welch v. Challen, 31 Kan. 696, 3 Pac. 314.

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held that the attorney's neglect to file a plea or answer in the action will not justify the setting aside of a judgment by default.[353] 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.[354] 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.[355] Moreover, it is the duty of an attorney to follow up with diligence the cases in which he is retained, to watch the progress of each cause with vigilance, to note carefully the various steps taken by his adversary or by the court, and to secure due notice of every successive development in the action which requires movement on his part. His carelessness or inattention in these respects is not excusable. If the client suffers a default, or otherwise loses his case, because of the failure of his attorney to pursue and follow up the action with due care and watchfulness, it will not be ground for vacating the judgment.[356]

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 di-

[353] Austin v. Nelson, 11 Mo. 192; Kerby v. Chadwell, 10 Mo. 392; Harper v. Mallory, 4 Nev. 447; Butler v. Morse, 66 N. H. 429, 23 Atl. 90; Bentley v. Finch, 86 Ga. 809, 13 S. E. 155; Schultz v. Meiselbar, 144 Ill. 26, 32 N. E. 550; Thomas v. Chambers, 14 Mont. 423, 36 Pac. 814; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Tarrant Co. v. Lively, 25 Tex. Supp. 399; Jones v. Leech, 46 Iowa, 186.

[354] Clark v. Lyon, 2 Hilt. 91.

[355] Schroer v. Wessell, 89 Ill. 113. Negligence of counsel is not excusable neglect, for which a judgment will be set aside, where the client took no interest in the case, did not attend the court, gave no instructions to his attorney, nor asked any from him. Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269.

[356] Brumbaugh v. Stockman, 83 Ind. 583; Norton v. McLaurin, 125 N. C. 185, 34 S. E. 269; McDaniel v. McLendon, 85 Ga. 614, 11 S. E 869; Padgitt v. Evans (Tex. Civ. App.) 51 S. W. 513; Pearson v. Drobaz Fishing Co., 99 Cal. 425, 34 Pac. 76; Haggin v. Lorentz, 13 Mont. 406, 34 Pac. 607; Liverpool & L. & G. Ins. Co. v. Perrin (N. M.) 61 Pac. 124.

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rectly in fault.[357] 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.[358] 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.[359] So where it was made to appear by affidavit of defendant's attorneys that the reason why 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.[360] So it is 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

[357] Nash v. Whetmore, 33 Barb. (N. Y.) 159; Curtis v. Ballagh, 4 Edw. Ch. (N. Y.) 639; Clark v. Lyon, 2 Hilt. (N. Y.) 91; Phillips v. Hawley, 6 Johns. (N. Y.) 129; Tripp v. Vincent, 8 Paige (N. Y.) 180; Millspaugh v. McBride, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; Meacham v. Dudley, 6 Wend. (N. Y.) 514; Gideon v. Dwyer, 17 Misc. Rep. 233, 40 N. Y. Supp. 1053; De Marco v. Mass, 31 Misc. Rep. 827, 64 N. Y. Supp. 768. And see, also, Thompson v. Goulding, 5 Allen (Mass.) 82; Bradford v. Coit, 77 N. C. 72; Griel v. Vernon, 65 N. C. 76; Hanson v. Michelson, 19 Wis. 498; Babcock v. Perry, 4 Wis. 31; Ashton v. Dashaway Ass'n (Cal.) 33 Pac. 446. 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. C. 569.

[358] Sharp v. Mayor of City of New York, 31 Barb. (N. Y.) 578.

[359] Allen v. Hoffman, 12 Ill. App. 573.

[360] Ordway v. Suchard, 31 Iowa, 481.

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after notice of the motion.[361] 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.[362] And where an attorney is engaged simply to employ counsel to appear at another place, he is a mere agent, and his negligence in failing to employ counsel is the negligence of his principal.[363] The burden is on a party seeking to be excused by the neglect of counsel to show that he employed counsel practising habitually in the particular court or who specially agreed to attend to the case.[364]

§ 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.[365] 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.[366] 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

[361] Benwood Iron-Works Co. v. Tappan, 56 Miss. 659.

[362] Davison v. Heffron, 31 Vt. 687; Webster v. McMahan, 13 Mo. 582.

[363] Finlayson v. American Acc. Co., 109 N. C. 196, 13 S. E. 739.

[364] Manning v. Roanoke & T. R. Co., 122 N. C. 428, 28 S. E. 963.

[365] Panesi v. Boswell, 12 Heisk. (Tenn.) 323; McKinley v. Tuttle, 34 Cal. 235; Beatty v. O'Connor, 106 Ind. 81, 5 N. E. 880. But see section 340, supra, as to the duty of the defendant to see to it that his attorney understands and accepts the retainer. It is said that the fact that defendant's counsel, through a misunderstanding, failed to appear at the trial, is no ground for setting aside a default, where defendant's only complaint is that the judgment is for more than he thinks it ought to be. McRae v. Adams, 85 Ill. App. 528.

[366] Dixon v. Lyne (Ky.) 10 S. W. 469.

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showed that those attorneys appeared for "the defendants" generally, and there was shown to be a good defense on the merits, it was held that good cause appeared for opening the judgment.[367]

§ 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.[368] Similar rulings have been made in cases where the attorney's absence was caused by the sudden and dangerous illness of a near relative,[369] or by his necessary attention to the duties of a public office which he holds.[370] On the other hand, there are decisions to the effect that it is not a sufficient excuse for the attorney's absence that he was "detained by important legal business elsewhere," or that he was in attendance upon the legislature as a member of that body.[371] But the rule which appears to rest upon the surest foundation of sound legal reason is that which requires proof that the attorney's absence was truly unavoidable, in the sense that he could not have prevented judgment going against his client, in his absence, by any vigilance, or precaution on his part. According to the decisions favoring this rule, if counsel has cases coming on in two different courts at the same time, he must obtain leave

[367] Kupferle v. Merchants' Nat. Bank, 32 Ark. 717. And see Heaps v. Hoopes, 68 Md. 383, 12 Atl. 882.

[368] McArthur v. Slauson, 60 Wis. 293, 19 N. W. 45; Beall v. Marietta Paper Mill Co., 45 Ga. 28; Stout v. Lewis, 11 Mo. 438; Smith v. Moreton Truck & Storage Co., 19 Ohio Cir. Ct. R. 628.

[369] Martin v. St. Charles Tobacco Co., 53 Mo. App. 655; Burns v. Scooffy, 98 Cal. 271, 33 Pac. 86. Compare Cresswell v. White, 3 Ind. App. 306, 29 N. E. 612.

[370] Hill v. Crump, 24 Ind. 291.

[371] Wilson v. Scott, 50 Mo. App. 329; Dick v. Williams, 87 Wis. 651, 58 N. W. 1029; Carr v. Dawes, 46 Mo. App. 351, 598; Butte Butchering Co. v. Clarke, 19 Mont. 306, 48 Pac. 303.

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of absence from one or other of the courts and arrange that his case shall not be proceeded with there in his absence.[372] If he is likely to be detained elsewhere by business of importance, legal or otherwise, he must apply to the opposing counsel for a continuance or an extension of time.[373] If, starting from a distant point, he finds that he cannot reach the place of trial in due season, he should telegraph to the judge and ask to have the case held until his arrival.[374] And it is quite clear that a judgment should not be set aside on this ground when no explanation or excuse for the attorney's absence is offered, or when it appears that he was guilty of carelessness or lack of attention, or that he withdrew from the court room in the mistaken belief that his case would not be reached before his return.[375]

§ 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 knowledge 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.[376] It has even been held that, where an attorney withdraws from the case, and judgment goes against his client, the mere fact that the latter did not consent to the withdrawal or know of it, will enable him to

[372] Western & A. R. Co. v. Pitts, 79 Ga. 532, 4 S. E. 921.

[373] Grove v. Bush, 86 Iowa, 94, 53 N. W. 88.

[374] Caughey v. Northern Pac. Elevator Co., 51 Minn. 324, 53 N. W. 545.

[375] Pitzele v. Lutkins, 85 Ill. App. 662; Huntington v. Emery, 74 Md. 67, 21 Atl. 495; Gray v. Sabin, 87 Cal. 211, 25 Pac. 422.

[376] Haverty v. Haverty, 35 Kan. 438, 11 Pac. 364; Beck v. Bellamy, 93 N. C. 129. But in Iowa, a judgment cannot be vacated for fraud and negligence of attorneys in not interposing a valid defense, under Code, § 4091, authorizing vacation of judgment for fraud in obtaining it. McCormick v. McCormick, 109 Iowa, 700, 81 N. W. 172.

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have the judgment opened.[377] A stronger case for such relief is of course made out where it is shown that the attorney's withdrawal was caused by hostility to his client for alleged nonpayment of his fees.[378] If the client consents to the withdrawal of his attorney's appearance, he precludes himself from moving for the vacation of the judgment.[379]

§ 345. Misinformation as to Time of Trial.

Where a party who seeks the vacation of a judgment rendered against him in the absence of his counsel and himself explains their failure to attend the trial by showing that they relied on a statement made by the judge of the court that the case would not be tried at the current term, or that it could not be reached before a distant date, or that nothing further would be done without notifying counsel, notwithstanding which a default was taken, it is generally held to be a case of "excusable neglect," such as will warrant the opening of the judgment.[380] And a similar rule is applied where counsel was misled by information or assurances given him by the clerk of the court, as to the time when the case would be reached in its order, or as to the time when the court would proceed with the business before it.[381] But some of the authorities maintain the rule

[377] Utah Commercial & Savings Bank v. Trumbo, 17 Utah, 198, 53 Pac. 1083. In South Carolina, it is not necessary to show fraud and collusion between an attorney who filed a demurrer for defendant and afterwards withdrew it, and allowed judgment by default, and the plaintiff, in order to authorize the court to set such judgment aside, since there was no trial. Ex parte Roundtree, 51 S. C. 405, 29 S. E. 66.

[378] Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. Rep. 540; Herbert v. Lawrence, 21 Civ. Proc. R. 336, 18 N. Y. Supp. 95.

[379] Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835; Dudley v. Broadway Ins. Co., 42 App. Div. 555, 59 N. Y. Supp. 668.

[380] Ratliff v. Baldwin, 29 Ind. 16, 92 Am. Dec. 330; Cruse v. Cunningham, 79 Ind. 402; Sanders v. Hall, 37 Kan. 271, 15 Pac. 197; Jean v. Hennessy, 74 Iowa, 348, 37 N. W. 771, 7 Am. St. Rep. 486; Buena Vista Co. v. I. F. & S. C. R. Co., 49 Iowa, 657; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Fleetwood v. Equitable Mortg. Co., 108 Ga. 811, 33 S. E. 1014.

[381] Hewitt v. Hazard, 33 App. Div. 630, 53 N. Y. Supp. 340; Nash v. Denton, 59 Kan. 771, 51 Pac. 896; Anaconda Min. Co. v. Saile, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472. But the fact that judgment is rendered in the absence of defendant's counsel, because he relied on the clerk of the court

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that even such official assurances will not relieve litigants (or their counsel) from the duty of exercising the utmost vigilance in watching the progress of their causes.[382]

§ 345a. Estoppel to Apply for Vacation of Judgment.

A party, against whom a judgment has been taken under circumstances which would ordinarily entitle him to apply for its vacation, may be estopped by his conduct to ask for such relief. This is held to be the case where he has been guilty of fraud in attempting to elude execution on the judgment by setting up a claim under a fictitious name to the goods sought to be levied on,[383] or where he has made a "declaration of no defense" to the note on which the judgment was entered and offered to pay it to the present holder before maturity,[384] or where a judgment by default, barring redemption, has been rendered against a junior incumbrancer through his excusable neglect, and he learns of the judgment while the period of redemption is running, but fails to redeem.[385] On the other hand, it is said, in New York, that a defendant is not estopped to apply to have a default opened and for leave to set up a meritorious defense, unless the plaintiff has been prejudiced by the loss of some substantial advantage which he would have had if the defense had been interposed at the proper time.[386] And it seems that the fact that a default judgment has been satisfied by a sale of the defendant's property does not deprive him of relief, unless it is shown that some one was misled by his failure to prevent the sale.[387]

to inform him of the day of trial, which the latter failed to do, does not make a case of "excusable neglect." Western Union Tel. Co. v. Griffin, 1 Ind. App. 46, 27 N. E. 113.

[382] National Fertilizer Co. v. Hinson, 103 Ala. 532, 15 South. 844; Wilson v. Smith, 17 Tex. Civ. App. 188, 43 S. W. 1086; Stewart v. Cannon, 66 Minn. 64, 68 N. W. 604; Elton v. Brettschneider, 33 Ill. App. 355; American Brewing Co. v. Jergens, 21 Ind. App. 595, 52 N. E. 820.

[383] Rohrbacker v. Schultz, 10 Pa. Co. Ct. R. 282.

[384] Humphrey v. Tozier, 154 Pa. 410, 26 Atl. 542.

[385] Becker v. Huthsteiner, 142 Ind. 99, 41 N. E. 323.

[386] Smith v. Weston, 81 Hun, 87, 30 N. Y. Supp. 649.

[387] Shepherd v. Marvel, 16 Ind. App. 417, 45 N. E. 526. Compare Coffey v. Carter, 47 Kan. 22, 27 Pac. 128.

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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 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.[388] 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.[389] 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.[390] 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 or for want of

[388] 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.

[389] Allison v. Whittier, 101 N. C. 490, 8 S. E. 338.

[390] Ingram v. Belk, 2 Rich. Law (S. C.) 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, 57 Am. Dec. 229; Nuckolls v. Irwin, 2 Neb. 60; Hettrick v. Wilson, 12 Ohio St. 136, 80 Am. Dec. 337; Regester v. Woodward Iron Co., 82 Md. 645, 33 Atl. 320; Chapdelaine v. Handy, 18 R. I. 706, 30 Atl. 342; Texas Land & Loan Co. v. Winter, 93 Tex. 560, 57 S. W. 39; Alliance Trust Co. v. Barrett, 6 Kan. App. 689, 50 Pac. 465; Brady v. Washington Ins. Co., 67 Ill. App. 159; Fisk v. Thorp, 51 Neb. 1, 70 N. W. 498. Where a motion to vacate a judgment is filed during the trial term, but no notice thereof is given to the adverse party until after the commencement of a subsequent term, it will be considered as made during the subsequent term. Morrell Hardware Co. v. Princess Gold Min. Co. (Colo. App.) 63 Pac. 807.

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jurisdiction will bind his client.[391] And no 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,[392] or when he appears by his counsel and takes part in the hearing on the motion.[393] 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.[394] Generally speaking, all the parties to a judgment should be made parties to a proceeding, either in equity or at law, under the statute, to annul it.[395] But a defendant mortgagor need not be served with notice of a motion by his co-defendant, a prior mortgagee, to set aside a default judgment in the foreclosure proceedings, under which the property was sold to the plaintiff.[396] And 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.[397]

391 Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990; Jordan v. Tarver, 92 Ga. 379, 17 S. E. 351; Pick v. Glickman, 54 Ill. App. 646. Where an attorney has appeared for a party in an action, and has prosecuted it to judgment, he remains attorney for the party until he has secured a judgment not liable to vacation for any cause provided by statute or established practice, and hence a motion made by a defendant to vacate a judgment, on the ground that no summons had been served on him, or on the ground of fraud, may properly be served on the attorney of record for the plaintiff. Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

392 Hill v. Crump, 24 Ind. 291; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 102.

393 Worth v. Wetmore, 87 Iowa, 62, 54 N. W. 56; Acock v. Halsey, 90 Cal. 215, 27 Pac. 193; Jennings v. Pearce, 101 Ala. 438, 14 South. 319.

394 Grier v. Jones, 54 Ga. 154.

395 Day v. Goodwin, 104 Iowa, 374, 73 N. W. 864, 65 Am. St. Rep. 465.

396 Schart v. Schart, 116 Cal. 91, 47 Pac. 927.

397 Perry v. Pearce, 68 N. C. 367.

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§ 346a. Requisites of Petition or Moving Papers.

Where the statute authorizes the vacation of judgments for certain causes "on complaint or motion filed within two years," a written complaint or motion must be filed, in order to obtain the relief desired.[398] The papers must show the existence of one of the statutory causes for setting aside the judgment, or must aver such facts as will be sufficient to warrant the court, in the exercise of its general jurisdiction, in taking such action.[399] It is not sufficient to allege, in the words of the statute, that the applicant was prevented from defending the suit by "unavoidable casualty or misfortune," or that the judgment was taken against him through his "inadvertence" or "excusable neglect;" but the facts constituting the casualty or misfortune, or relied on as excusing the inadvertence or neglect, must be fully set forth.[400] Furthermore, the applicant must show that he has a valid and meritorious defense to the action; and this must be made to appear, not by a mere averment that he has such a defense, but by setting forth fully the facts which constitute the proposed defense.[401] And in some of the states, it is provided by stat-

[398] Ohio Falls Car Co. v. Sweet & Clark Co., 7 Ind. App. 163, 34 N. E. 533.

[399] Kirkham v. Gibson, 52 Neb. 23, 71 N. W. 960.

[400] Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; American Brewing Co. v. Jergens, 21 Ind. App. 595, 52 N. E. 820; Combs v. Bentley (Ky.) 41 S. W. 8; Deane v. Loucks, 58 Hun, 555, 12 N. Y. Supp. 903. A statement that the defendant had reason to believe that his counsel would attend to the case, which the latter failed to do, is fatally defective in not setting forth the facts on which such belief was founded. Brown v. Warren, 17 Nev. 417, 30 Pac. 1078. Statements that the court was not legally in session when the judgment was rendered, and had no authority to hold a term at that time, are of conclusions of law, merely, and unavailing. Long v. Ruch, 148 Ind. 74, 47 N. E. 156.

[401] Mayer v. Mayer, 27 Or. 133, 39 Pac. 1002; Young v. Conklin, 3 Misc. Rep. 122, 23 N. Y. Supp. 993; Ellis v. Bonner, 7 Tex. Civ. App. 539, 27 S. W. 687; Provins v. Lovi, 6 Okl. 94, 50 Pac. 81; State v. Lockhart, 18 Wash. 531, 52 Pac. 315; Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; Brewster v. Boyle, 64 Hun, 636, 19 N. Y. Supp. 146; Hughes v. Housel, 33 Neb. 703, 50 N. W. 1127; Keator v. Case (Tex. Civ. App.) 31 S. W. 1099. An affidavit which merely states that the defense "is purely one of law," without setting out the facts, is not sufficient. Brewer & Hoffman Brewing Co. v. Lonergan, 63 Ill. App. 28. A judgment entered on a judgment note will not be opened on a petition by defendant alleging that, if he signed the note, it was when

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ute that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action, or, if the plaintiff seeks its vacation, that there is a valid cause of action.[402] Where this provision is in force, it is error for the court to render a judgment of vacation before it has adjudged that there is a valid defense.[403] Again, in some states, it is required that the applicant for the vacation of a judgment shall file with his moving papers a copy of the answer which he proposes to put in, in case the judgment is opened; and it is held that this provision is mandatory, and that such an application should by no means be granted unless the statute is complied with in this particular.[404] In New York, however, it has been said that where the moving papers show the nature of the defense and the good faith of the applicant, it is not absolutely necessary to serve the proposed answer with the motion.[405]

In general, it may be stated that while good practice requires a strict compliance with the statutes in these applications, mere irregularities in the method of obtaining the vacation of a judgment,—as where the showing in support of the motion, and the motion itself,

he was drunk, the indebtedness not being denied. Ford v. Tigue, 8 Kulp (Pa.) 428.

[402] Code Neb. § 606; Miller's Code Iowa, § 3159.

[403] Bond v. Wycoff, 42 Neb. 214, 60 N. W. 564; Western Assur. Co. v. Klein, 48 Neb. 904, 67 N. W. 873; Follett v. Alexander, 58 Ohio St. 202, 50 N. E. 720. Compare State v. Duncan, 37 Neb. 631, 56 N. W. 214.

[404] Richardson v. Sun Printing & Publishing Ass'n, 20 App. Div. 329, 46 N. Y. Supp. 814; Worth v. Wetmore, 87 Iowa, 62, 54 N. W. 56; McBrien v. Riley, 38 Neb. 561, 57 N. W. 385; Lawler v. Bashford-Burmister Co. (Ariz.) 46 Pac. 72. There is no difference between legal and equitable actions in respect to this requirement of the statute. Superior Consol. Land Co. v. Dunphy, 93 Wis. 188, 67 N. W. 428. A demurrer does not satisfy a rule requiring the applicant to file a copy of his proposed "answer." Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117. But he is not precluded from afterwards obtaining leave of court to file an additional paragraph to his answer. Bryant v. Richardson, 126 Ind. 145, 25 N. E. 807. In Washington, the party need not tender his answer until after the determination of the merits of his application. Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053. And in Indiana, the rule is complied with by filing the answer at the time of entry of the order opening the judgment. Bryant v. Richardson, 126 Ind. 145, 25 N. E. 807.

[405] Carey v. Browne, 67 Hun, 516, 22 N. Y. Supp. 521. And see Worth v. Wetmore, 87 Iowa, 62, 54 N. W. 56. But compare Richardson v. Sun Printing & Publishing Ass'n, 20 App. Div. 329, 46 N. Y. Supp. 814.

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are not strictly in conformity with the statute,—will not defeat the order vacating the judgment.[406] The motion should not be denied upon the particular grounds assigned thereby, and the mover left to make another motion for the same purpose, simply assigning in its support a ground not before specified, but which plainly appears in the record.[407] If the judgment has been affirmed on appeal, it will not be vacated on the application of the losing party, based on the same grounds which he urged in a motion for a new trial in the original suit.[408] If the motion is denied, the court should find the facts on which it bases its conclusion that no just and reasonable cause has been shown for the setting aside of the judgment.[409]

§ 347. Affidavit of Merits.

In order to justify the opening or vacation of a judgment, it is not sufficient to show that the applicant did not have an opportunity to be heard in the case; but there must also be a prima facie showing that, if he had presented his defense, it would have prevailed, so that the judgment, as it stands, works injustice. In addition, therefore, to setting forth some one of the statutory grounds for setting aside a judgment, and the nature of the cause which prevented a defense being made, or the party's excuse for not defending, as stated in the preceding section, the application must be supported by an affidavit alleging a good and meritorious defense to the action on the merits, called an "affidavit of merits." This is imperatively required under the statutes authorizing the vacation of judgments for specified causes.[410] And independently of statutes, it has always been the

[406] Boston Loan & Trust Co. v. Organ, 53 Kan. 386, 36 Pac. 733; Wilson & Toms Inv. Co. v. Hillyer, 50 Kan. 446, 31 Pac. 1064; Hoag v. Old People's Mut. Ben. Soc., 1 Ind. App. 28, 27 N. E. 438.

[407] Skinner v. Terry, 107 N. C. 103, 12 S. E. 118.

[408] Friedman v. Manley, 21 Wash. 675, 59 Pac. 490.

[409] Bacon v. Johnson, 110 N. C. 114, 14 S. E. 508.

[410] Van Horne v. Montgomery, 5 How. Prac. (N. Y.) 238; Hunt v. Wallis, 6 Paige (N. Y.) 371; Gold v. Hutchinson, 26 Misc. Rep. 1, 55 N. Y. Supp. 575; Cross v. Birch, 27 Misc. Rep. 295, 58 N. Y. Supp. 438; Cahill v. Lilienthal, 30 Misc. Rep. 429, 62 N. Y. Supp. 524; Thornall v. Turner, 23 Misc. Rep. 363, 51 N. Y. Supp. 214; Draper v. Bishop, 4 R. I. 489; Richardson v. Finney, 6 Dana (Ky.) 319; Grundy v. Kelley (Ky.) 41 S. W. 20; Foster v. Martin, 20 Tex. 118; Cook v. Phillips, 18 Tex. 31; Watson v. Newsham, 17 Tex. 437;

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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.[411] It may therefore be regarded as a universal requirement. But the rule is subject to a few well-defined exceptions in peculiar cases.[412] Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits.[413] So the rule does not apply where it was grossly irregular for the default to have been entered;[414] or where the defendant complains of irregularity amounting to denial of his substantial rights;[415] or where the judgment is alleged to have been procured by fraud.[416] 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

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; Gauthier v. Rusicka, 3 N. D. 1, 53 N. W. 80; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Judd v. Patton, 13 S. D. 648, 84 N. W. 199.

411 Miller v. Alexander, 1 N. J. Law, 400.

412 In Washington, no affidavit of merits is required of a defendant petitioning for the vacation of a judgment by default, and for leave to answer, since the petition must state the facts and be verified. Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053. In Colorado, it is said that an affidavit of merits is not a necessity to the setting aside of a judgment by default, though good practice requires it. State Board of Agriculture v. Meyers, 13 Colo. App. 500, 58 Pac. 879.

413 Rice v. Griffith, 9 Iowa, 539; Branstetter v. Rives, 34 Mo. 318; Norton v. Atchison, T. & S. F. R. Co., 97 Cal. 388, 32 Pac. 452, 33 Am. St. Rep. 198. Compare Kramer v. Gerlach, 28 Misc. Rep. 525, 59 N. Y. Supp. 855.

414 Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

415 Walla Walla Printing & Publishing Co. v. Budd, 2 Wash. T. 336, 5 Pac. 602.

416 Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Morris v. Kahn, 31 Misc. Rep. 25, 62 N. Y. Supp. 1040.

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discloses a defense apparently complete and meritorious, and although it is verified.[417] 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 not.[418] And the facts must be stated positively and affirmatively; allegations merely on "information and belief" are not sufficient.[419] But in some other states, it is a rule established by statute, or by the settled practice of the courts, 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.[420] But an affidavit framed under this rule must be very full and explicit, and must not omit any of the particulars just mentioned.[421] And it

[417] Mowry v. Hill, 11 Wis. 146; Jones v. Russell, 3 How. Prac. 324. Compare Town of Omro v. Ward, 19 Wis. 232. See Spencer v. Thistle, 13 Neb. 227, 13 N. W. 214. Where the court allowed a party to file an intervention, and afterwards an answer and cross-complaint, to authorize the opening of a judgment against such party an affidavit of merits is not required. Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797. An order opening a default will not be reversed solely because of the insufficiency of the affidavit of merits or of the answer, unless the answer is such that it could be stricken out on motion. Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.

[418] Palmer v. Rogers, 70 Iowa, 381, 30 N. W. 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; Toledo, W. & W. R. Co. v. Gates, 32 Ind. 238; Goldsberry v. Carter, 28 Ind. 59.

[419] Columbus Mut. Life Ass'n v. Plummer, 86 Ill. App. 446; Jenkins v. Gamewell Fire Alarm Tel. Co. (Cal.) 31 Pac. 570; Superior Consol. Land Co. v. Dunphy, 93 Wis. 188, 67 N. W. 428.

[420] Burnham v. Smith, 11 Wis. 258; Woodward v. Backus, 20 Cal. 137; Reidy v. Scott, 53 Cal. 69; Francis v. Cox, 33 Cal. 323; Kirschner v. Kirschner, 7 N. D. 291, 75 N. W. 252.

[421] The affidavit must allege that the party 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 his counsel it is not sufficient. Morgan v. McDonald, 70 Cal. 32, 11 Pac. 350; Burnham v. Smith, 11 Wis. 258. An affidavit that deponent is advised by his counsel that he has a good and sufficient defense, but without stating that he has fully and fairly stated the case to his counsel, will not answer. Gold v. Hutchinson, 26 Misc. Rep. 1, 55 N. Y. Supp. 575. And see Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037.

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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.[422] The affidavit should be made by the applicant himself, unless good reasons exist for having it made by another person.[423] It may be made by an attorney if he has personal knowledge of the facts to be sworn to in it.[424] 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.[425] 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.[426] It is also considered necessary, when the affidavit is made by the defendant's attorney, to set forth some good and sufficient reason why the party himself does not make it.[427] 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.[428]

§ 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.[429] It is considered in Pennsylvania that an ap-

[422] Goodhue v. Churchman, 1 Barb. Ch. 596; Winship v. Jewett, Id. 173; McGaffigan v. Jenkins, 1 Barb. 31.

[423] Bailey v. Taaffe, 29 Cal. 422.

[424] Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508; Horton v. New Pass Gold & Silver Min. Co., 21 Nev. 184, 27 Pac. 376; Pettigrew v. City of Sioux Falls, 5 S. D. 646, 60 N. W. 27; Will v. Lytle Creek Water Co., 100 Cal. 344, 34 Pac. 830.

[425] Stilson v. Rankin, 40 Wis. 527.

[426] Bailey v. Taaffe, 29 Cal. 422.

[427] Davis v. Solomon, 28 Civ. Proc. R. 420, 56 N. Y. Supp. 80; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219.

[428] Hitchcock v. Herzer, 90 Ill. 543.

[429] Welton v. Littlejohn, 163 Pa. 205, 29 Atl. 871; Daly v. Thompson, 5

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plication 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.[430] 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."[431] 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.[432] 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.[433] 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 suf-

Pa. Dist. R. 749; Jospe v. Lighte, 22 Misc. Rep. 146, 48 N. Y. Supp. 645; Phillips v. Equitable Life Assur. Soc., 26 N. Y. Supp. 522; Jeffries v. Aaron, 120 N. C. 167, 26 S. E. 696; Le Duc v. Slocomb, 124 N. C. 347, 32 S. E. 726; Reab v. Sherman, 93 Ga. 792, 20 S. E. 642; Pacific Mut. Life Ins. Co. v. Williams, 79 Tex. 633, 15 S. W. 478; Durham v. Moore, 48 Kan. 135, 29 Pac. 472; Becker v. Huthsteiner, 142 Ind. 99, 41 N. E. 323; West v. Miller, 125 Ind. 70, 25 N. E. 143; Davis v. Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1; Culver v. Brinkerhoff, 76 Ill. App. 679; Mann v. Warde, 64 Ill. App. 108; Kime v. Fenner, 54 Neb. 476, 74 N. W. 869; Gilbert v. Marrow, 54 Neb. 77, 74 N. W. 420; Clark v. Charles, 55 Neb. 202, 75 N. W. 563; Pettigrew v. City of Sioux Falls, 5 S. D. 646, 60 N. W. 27; Tacoma Lumber & Manuf'g Co. v. Wolff, 7 Wash. 478, 35 Pac. 115; Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061; White v. Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. The rule is sometimes stated in this form; that a judgment will not be set aside where, on a new trial, the judgment must be the same. Richardson Drug Co. v. Dunagan, 8 Colo. App. 308, 46 Pac. 227; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423.

[430] Knarr v. Elgren (Pa.) 9 Atl. 875.

[431] Rupert v. Martz, 116 Ind. 72, 18 N. E. 381.

[432] Storey v. Weaver, 66 Ga. 296.

[433] Dobbins v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; Roberts v. Pawley, 50 S. C. 491, 27 S. E. 913; Taylor v. Coughlan, 73 Ill. App. 378.

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fice.[434] 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.[435]

§ 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.[436] 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.[437] 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

[434] Ellis v. Jones, 6 How. Prac. (N. Y.) 296.

[435] Excise Com'rs v. Hollister, 2 Hilt. (N. Y.) 588. Before the court will set aside a judgment on a money judgment, it must be shown that the petitioner was not indebted to the judgment plaintiff; the defense of nul tiel record is not sufficient. Bank of Stratton v. Dixon, 105 Iowa, 148, 74 N. W. 919.

[436] 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. C. 131; Mulhollan v. Scoggin, 8 Neb. 202; Anderson v. Beebe, 22 Kan. 768; Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346); Pennington's Adm'x v. Gibson, 6 Ark. 447; Hazelrigg v. Wainwright, 17 Ind. 215; Marsh v. Lasher, 13 N. J. Eq. 253; Audubon v. Excelsior Ins. Co., 10 Abb. Prac. (N. Y.) 64; Bard v. Fort, 3 Barb. Ch. (N. Y.) 632; Gay v. Gay, 10 Paige (N. Y.) 374; Gourlay v. Hutton, 10 Wend. (N. Y.) 595; St. Paul & D. R. Co. v. Blackmar, 44 Minn. 514, 47 N. W. 172; Wyche v. Ross, 119 N. C. 174, 25 S. E. 878; Herald v. Hargis (Ky.) 54 S. W. 958. Compare Benedict v. Arnoux, 85 Hun, 283, 32 N. Y. Supp. 905.

[437] Farish v. Corlies, 1 Daly (N. Y.) 274; Lovett v. Cowman, 6 Hill (N. Y.) 226; Candler v. Pettit, 1 Paige (N. Y.) 427; Marsh v. Lasher, 13 N. J. Eq. 253; Morris v. Slatery, 6 Abb. Prac. (N. Y.) 74; Grant v. McCaughin, 4 How. Prac. (N. Y.) 216; Quincy v. Foot, 1 Barb. Ch. (N. Y.) 496; Hazelrigg v. Wainwright, 17 Ind. 215.

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in opening the judgment, at least if there is nothing to show that the debt is not still morally and honestly due.[438] 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.[439] 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 will agree to waive this defense, it is a manifest abuse of discretion.[440] 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.[441] 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.[442] 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.[443] A judgment should not be opened where the only defense set up is a technical objection to the plaintiff's capacity to sue, such objection not appearing on the face

[438] Pennington's Adm'x v. Gibson, 6 Ark. 447; Hawes v. Hoyt, 11 How. Prac. (N. Y.) 454; Haines v. Lytle, 4 West. Law J. 1; Douglas v. Douglas, 3 Edw. Ch. (N. Y.) 390; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

[439] Sheets v. Baldwin's Adm'rs, 12 Ohio, 120; Newsom's Adm'r v. Ran, 18 Ohio, 240.

[440] Ellinger's Appeal, 114 Pa. 505, 7 Atl. 180; Mitchell v. Campbell, 14 Or. 454, 13 Pac. 190; Garvie v. Greene, 9 S. D. 608, 70 N. W. 847. See, also, Gourlay v. Hutton, 10 Wend. (N. Y.) 595.

[441] Leahey v. Kingon, 22 How. Prac. (N. Y.) 209; Croop v. Dodson, 7 Kulp (Pa.) 13; Cresswell v. White, 3 Ind. App. 306, 29 N. E. 612; Boas v. Heffron, 40 Ill. App. 652.

[442] McCulloch v. Tapp, 4 West. Law Month. 575.

[443] Parker v. Grant, 1 Johns. Ch. (N. Y.) 630.

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of the complaint.[444] So where the judgment was entered on a mechanic's lien, and the defense offered is that the lien was defective as being for a lump sum, instead of setting out the articles furnished.[445] Where municipal officers are sued on a warrant drawn by them, a judgment by confession will not be struck off at the suit of a tax payer on the mere ground that the action should have been on the original debt, instead of on the warrant, where it is not denied that the debt was just.[446] Again, a judgment by default on a policy of insurance should not be set aside where the defense is a forfeiture of the policy, unless it is shown that the alleged forfeiture has not in any way been waived, and that, on a trial, the result would probably be different.[447] But on the other hand, a plea of a discharge in bankruptcy or insolvency is not technical, but goes to the merits as a plea in bar.[448] And the same is true of a plea of res judicata. To prohibit the defendant from pleading a former judgment in bar of the present action, as a condition to lifting a default against him, is error.[449] 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.[450] 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.[451]

§ 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 mer-

[444] Abram French Co. v. Marx, 8 Misc. Rep. 490, 28 N. Y. Supp. 749.

[445] Caldwell v. Carter, 153 Pa. 310, 25 Atl. 831.

[446] Maneval v. Jackson Tp., 141 Pa. 426, 21 Atl. 672, 28 Wkly. Notes Cas. 130.

[447] Union Cent. Life Ins. Co. v. Lipscomb (Tex. Civ. App.) 27 S. W. 307.

[448] Kahn v. Casper, 51 App. Div. 540, 64 N. Y. Supp. 838; Tuttle v. Scott, 119 Cal. 586, 51 Pac. 849.

[449] Audubon v. Excelsior Fire Ins. Co., 10 Abb. Prac. (N. Y.) 64.

[450] Ruckman v. Pitcher, 1 N. Y. 392; Bank of Kinderhook v. Gifford, 40 Barb. (N. Y.) 659; Grant v. McCaughin, 4 How. Prac. (N. Y.) 216.

[451] People v. Rains, 23 Cal. 127.

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its.[452] 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 if it had never been disturbed.[453] 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.[454] 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.[455] 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 ii 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.[456] 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.[457] The defendant can urge defenses existing at the time of the rendition of the judgment, but not those accruing subsequently.[458] 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.[459] And, generally, the rules stated in the preceding section will apply to this

[452] Cochran v. Eldridge, 49 Pa. 365.
[453] Gloninger v. Hazard, 4 Phila. (Pa.) 354.
[454] Wise's Appeal, 99 Pa. 193; Adam's Appeal, 101 Pa. 471.
[455] Bush v. Monteith, 2 Wkly. Notes Cas. (Pa.) 112.
[456] West v. Irwin, 74 Pa. 258; Collins v. Freas, 77 Pa. 493.
[457] Beaty v. Bordwell, 91 Pa. 438.
[458] Curtis v. Slosson, 6 Pa. 265.
[459] Ekel v. Snevily, 3 Watts & S. (Pa.) 272, 38 Am. Dec. 758.

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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.[460]

§ 351. Evidence.

The party who seeks the opening or vacation of a judgment must sustain the burden of proof, and must establish his right to the relief asked by clear and satisfactory evidence.[461] Where the ground alleged is irregularity or want of jurisdiction, there are some authorities showing a reluctance to permit contradiction of the record.[462] But the rule obtaining in the majority of the states is that the recitals of the record (as, for instance, a recital that the defendant was duly served with process) are presumed to be correct and will prevail in the absence of sufficient countervailing evidence; but that the defendant may contradict and overthow such recitals, the only question being upon the strength and clearness of his evidence.[463] Of course it is equally open to the adverse party to present affidavits sustaining the record and showing jurisdiction, and the issue will then be determined upon the preponderance of the evidence.[464] Where it is sought to have a judgment or decree set aside on the ground of fraud in procuring it, the evidence must be clear and cogent, so as to convince the court that the facts alleged to constitute the fraud existed, and were operative in procuring the decree.[465] If the evi-

[460] Marsh v. Nordyke & Marmon Co. (Pa.) 15 Atl. 875.

[461] Smith v. Black, 51 Md. 247.

[462] Pulliam v. Dillard, 71 Ga. 598; Stony Island Hotel Co. v. Johnson, 57 Ill. App. 608; Arnold v. Kilchmann, 80 Ill. App. 229.

[463] Shortz v. Quigley, 1 Bin. (Pa.) 222; Guernsey v. Froude, 13 Pa. Super. Ct. 405; Gay v. Grant, 101 N. C. 206, 8 S. E. 99; Atchison Sav. Bank v. Means, 61 Kan. 857, 58 Pac. 989; Kolb v. Raisor, 17 Ind. App. 551, 47 N. E. 177; Wolf v. Shenandoah Nat. Bank, 84 Iowa, 138, 50 N. W. 561; Jamison v. Weaver, 84 Iowa, 611, 51 N. W. 65; Farnsley v. Stillwell, 107 Iowa, 631, 78 N. W. 678; Whitney v. Daggett, 108 Cal. 232, 41 Pac. 471; McKinley v. Tuttle, 34 Cal. 235; Norton v. Atchison, T. & S. F. R. Co., 97 Cal. 388, 30 Pac. 585, 33 Am. St. Rep. 198; Whitfield v. Howard, 12 S. D. 355, 81 N. W. 727.

[464] Stover v. Hough, 47 Neb. 789, 66 N. W. 825; Provost v. Provost, 64 Hun, 634, 18 N. Y. Supp. 896; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459.

[465] Smith v. Miller (Tenn. Ch.) 42 S. W. 182; National Mut. Bldg. Ass'n v. Kondrak, 9 Kulp (Pa.) 14.

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dence presented by the applicant is not contradicted, it will justify the court in vacating the judgment, provided it is plain, positive, and specific.[466] But if his allegations are traversed by affidavits or testimony presented on behalf of the adverse party, then the applicant must establish his contention by a fair preponderance of evidence.[467] So, where the ground offered for the vacation of the judgment is the disability of the defendant (as, that he was insane when the action was commenced), he must assume the burden of proving the fact, by superior weight of testimony.[468]

Where a party moves for the vacation of a judgment taken against him by reason of "unavoidable casualty or misfortune," or through his "mistake, surprise, or excusable neglect," as provided by the statutes, he must furnish clear and satisfactory proof of the facts constituting the cause which prevented him from defending, or excusing his default;[469] affidavits may be filed contradicting the matters which he alleges:[470] and the motion will not be granted, where the evidence is conflicting, unless the applicant makes out his case by a fair preponderance of the testimony.[471]

An application for the vacation of a judgment, as has been already stated, must be accompanied by a showing that the defendant has a good defense on the merits. But while the court may inquire whether the proposed defense is meritorious, and whether it would be sufficient, if established, to defeat the plaintiff's claims,[472] the in-

[466] Yost v. Mensch, 141 Pa. 73, 21 Atl. 507, 27 Wkly. Notes Cas. 562.

[467] Tidioute & Tiona Oil Co. v. Shear, 161 Pa. 508, 29 Atl. 107; Lomison v. Faust, 145 Pa. 8, 23 Atl. 377; Oberly v. Oberly, 190 Pa. 341, 42 Atl. 1105; Layton v. Prewitt (Ky.) 25 S. W. 882; Brown v. Stegemann (Iowa) 81 N. W. 450. But in Pennsylvania, it is said that the rule that, the presumption being in favor of the validity of a judgment, the burden is on the defendant to establish invalidity by a preponderance of evidence, and when the proof is in equipoise the judgment will not be opened, does not apply where it was obtained by defendant's attorney or agent through fraud and abuse of trust relations. Gillespie v. Weiss, 22 Pa. Co. Ct. R. 177.

[468] Smith v. McClure, 146 Ind. 123, 44 N. E. 1004.

[469] Spalding v. Crawford, 3 App. D. C. 361.

[470] Butte Butchering Co. v. Clarke, 19 Mont. 306, 48 Pac. 303.

[471] Quick v. Lawrence Nat. Bank, 10 Ind. App. 523, 38 N. E. 73; Mogelberg v. Clevinger, 93 Iowa, 736, 61 N. W. 1092; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962.

[472] Gibbons v. Campbell, 66 Hun, 631, 21 N. Y. Supp. 283; Randall v. Unit-

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quiry does not include the truth of the defense. If the proposed plea or answer is investigated at all, on the motion to vacate or open the judgment, it is only to the extent of ascertaining whether the facts set up, 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 open or set aside the judgment. Hence, generally speaking, counter affidavits cannot be filed, nor counter evidence heard in any form as to the matters alleged as constituting a defense to the original action.[473] But in Pennsylvania, on a rule to open a judgment, evidence may be heard both for and against the proposed defense; and the judgment will not be disturbed if the defendant's assertion of the facts on which he relies is not corroborated and is traversed by an equally positive and comprehensive denial on the part of the plaintiff. If further testimony is introduced, the court will decide the motion according to the preponderance of evidence, or it may, in the exercise of a sound discretion, open the judgment and let the issue be decided by the verdict of a jury.[474] And a similar practice is observed in Illinois.[475]

ed Life & Accident Ins. Ass'n, 59 N. Y. Super. Ct. 587, 14 N. Y. Supp. 631; Pitzele v. Lutkins, 85 Ill. App. 662.

[473] Benedict v. Arnoux, 85 Hun, 283, 32 N. Y. Supp. 905; Buck v. Havens, 40 Ind. 221; Hill v. Crump, 24 Ind. 291; Pratt v. Kells, 28 Ala. 390; Masten v. Indiana Car & Foundry Co., 25 Ind. App. 175, 57 N. E. 148; Worth v. Wetmore, 87 Iowa, 62, 54 N. W. 56; Francis v. Cox, 33 Cal. 323; Gracier v. Weir, 45 Cal. 53; Douglass v. Todd, 96 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co., 11 S. D. 376, 77 N. W. 1022; Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

[474] Woods v. Irwin, 141 Pa. 278, 21 Atl. 603, 23 Am. St. Rep. 282, 28 Wkly. Notes Cas. 185; City of Philadelphia v. Weaver, 155 Pa. 74, 25 Atl. 876; Stockwell v. Webster, 160 Pa. 473, 28 Atl. 837; Steiner v. Scholl, 163 Pa. 465, 30 Atl. 159; Gillespie v. Webster, 180 Pa. 405, 36 Atl. 928; Burley v. Filby, 193 Pa. 374, 44 Atl. 453; Krebs v. Clark, 9 Pa. Co. Ct. R. 420; McNeal v. Banks, 6 Kulp, 371; Hildreth v. Davis, Id. 336; Fishblate v. McCullough, 7

[475] Hefling v. Van Zandt, 162 Ill. 162, 44 N. E. 424; Matzenbaugh v. Doyle, 156 Ill. 331, 40 N. E. 935; Sundberg v. Temple, 33 Ill. App. 633; Anderson v. Studebaker, 37 Ill. App. 532; Truby v. Case, 41 Ill. App. 153. Compare Dionne v. Matzenbaugh, 49 Ill. App. 527. In Brown v. Huber, 79 Ill. App. 109, it is said that, where the evidence on a motion to vacate a judgment by confession is conflicting, and the contested matter in doubt, the motion should be allowed.

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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.[476] But the converse of this rule is equally true. The imposition of terms is by no means a necessary condition to the opening of a judgment (unless made so by statute), and the judgment-creditor cannot complain that terms were not imposed, unless he can also show that the action of the court was arbitrary and unjust,[477] more especially where a judgment by default is opened at the same term at which it was entered.[478] 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. It is clearly within the power of the court to make the payment of costs a condition to granting the relief asked,[479] includ-

Pa. Dist. R. 364; Lee v. Sallada, 7 Pa. Super. Ct. 98; Heilner v. Falls Coal Co., 9 Pa. Super. Ct. 78. The rule as stated in Klopfer v. Ekis, 155 Pa. 41, 25 Atl. 785, is that a petition to open a judgment should not be granted unless there is more than oath against oath; but when there is more than this, and it comes to the question of weight of the evidence, it is for the court below, in the exercise of a sound discretion, to decide to which side the scales incline, and if it is in doubt on this question, or as to the credibility of the witnesses, a prudent course would be to open the judgment, and thus obtain the aid of a jury at the trial.

[476] Ensly v. Wright, 3 Pa. 501; McMurray's Heirs v. City of Erie, 59 Pa. 223; Huston Township Co-op. Mut. Fire Ins. Co. v. Beale, 110 Pa. 321, 1 Atl. 926; Hornthal v. Finelite, 9 Misc. Rep. 724, 29 N. Y. Supp. 686; Fowble v. Walker, 4 Ohio, 64; Hovey v. Middleton, 56 Ill. 468; Mason v. McNamara, 57 Ill. 274; Burhans v. Village of Norwood Park, 138 Ill. 147, 27 N. E. 1088; Young v. Bircher, 31 Mo. 136, 77 Am. Dec. 638; Magoon v. Callahan, 39 Wis. 141; Howe v. Coldren, 4 Nev. 171.

[477] Kelber v. Pittsburg Nat. Plow Co., 146 Pa. 485, 23 Atl. 335; Warder v. Patterson, 6 Dak. 83, 50 N. W. 484; Johnson v. McCurry, 102 Ga. 471, 31 S. E. 88.

[478] Boutin v. Catlin, 101 Wis. 545, 77 N. W. 910.

[479] Goodness v. Metropolitan St. Ry. Co., 49 App. Div. 76, 63 N. Y. Supp. 476; Szerlip v. Baier, 22 Misc. Rep. 351, 49 N. Y. Supp. 300; Schwartz v.

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ing, in a proper case and where justice appears to require it, the disbursements of the opposite party,[480] a proper fee to his attorneys,[481] and his reasonable personal expenses incurred in connection with the suit,[482] and also the costs of the motion itself.[483] But the imposition of costs 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.[484] And indeed, where the ground of the application is a want of jurisdiction in the court, no process having been served on the defendant, it would not be at all proper to require him to pay the costs, since, in that case, he is not chargeable with any kind or degree of fault or carelessness.[485] Another very common requirement, on the opening of a judgment, is

Schendel, 24 Misc. Rep. 701, 53 N. Y. Supp. 773; Cooper v. Borough of Kingston, 6 Kulp (Pa.) 344; Stewart v. Scully, 46 Kan. 491, 26 Pac. 957; Yost v. Minneapolis Harvester Works, 41 Ill. App. 556; Ueland v. Lynch, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698; Leake v. Gallogly, 34 Neb. 857, 52 N. W. 824; Howe v. Independence Consol. Gold & Silver Min. Co., 29 Cal. 72; Leet v. Grants, 36 Cal. 288; Bailey v. Taaffe, 29 Cal. 422; People v. O'Connell, 23 Cal. 281; Roland v. Kreyenhagen, 18 Cal. 455.

[480] Muller v. Post, 58 Hun, 604, 11 N. Y. Supp. 615; Traitteur v. Levingston, 59 N. Y. Super. Ct. 140, 13 N. Y. Supp. 603; Ketcham v. Elliott, 66 Hun, 627, 20 N. Y. Supp. 745; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

[481] McCarty v. Altonwood Stock Farm, 68 Hun, 551, 22 N. Y. Supp. 1091; Ormsby v. Conrad, 4 S. D. 599, 57 N. W. 778; Freiberg v. Le Clair, 78 Wis. 164, 47 N. W. 178.

[482] Behl v. Schuette, 95 Wis. 441, 70 N. W. 559; McCarty v. Altonwood Stock Farm, 68 Hun, 551, 22 N. Y. Supp. 1091.

[483] Richardson v. Sun Printing & Publishing Ass'n, 20 App. Div. 329, 46 N. Y. Supp. 814.

[484] Ryan v. Mooney, 49 Cal. 33; Robinson v. Merrill, 80 Cal. 415, 22 Pac. 260; Boutin v. Catlin, 101 Wis. 545, 77 N. W. 910. In Georgia, it is said that, while, under the rule of court, a judgment by default should never be opened without the payment of costs, yet where these terms are not insisted upon by opposite counsel, the court may, in its discretion and in conformity to local practice, for special reasons, allow pleas to be filed without the payment of costs, though such practice is unsound. Butler v. Richmond & D. R. Co., 88 Ga. 594, 15 S. E. 668.

[485] Waller v. Weston, 125 Cal. 201, 57 Pac. 892; Stanton-Thompson Co. v. Crane, 24 Nev. 171, 51 Pac. 116.

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that the party shall plead to the merits, or shall forbear to set up some particular defense which is considered unconscionable or purely technical. It cannot be doubted that this rests in the discretion of the court.[486] But it seems that the order requiring defendant to "answer" should not be so framed as to exclude his right to demur.[487] And requiring him to consent that the verdict on the trial shall be final and that no appeal shall be taken for any reason, is in excess of the court's authority.[488] Other conditions may be imposed where it is necessary to save to the judgment-creditor the fruits of the judgment he has already recovered. Thus, it is not an abuse of discretion, where the circumstances of the particular case warrant it, to require the defendant to consent to the appointment of a receiver of the property in question.[489] So also, the court may order that the judgment shall stand as security for the amount ultimately recovered by the plaintiff, or may require the defendant to give a bond with sureties conditioned for the payment of any judgment the plaintiff may recover,[490] or order him to give an undertaking not to sell or incumber any of his property to hinder the plaintiff in the collection of his claim.[491] It has even been held to be a fair exercise of the court's discretion, as a condition on opening a judgment by default, to require the defendant to deposit with the clerk of the court a sum of money sufficient to secure the plaintiff's claim, together with the costs and disbursements.[492] But in regard to all such conditions as

[486] Bailey v. Clayton, 20 Pa. 295; Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262; Dennison v. Chapman, 102 Cal. 618, 36 Pac. 943; Ridley v. Manhattan Ry. Co., 72 Hun, 164, 25 N. Y. Supp. 380. See Anaconda Min. Co. v. Salle, 16 Mont. 8, 39 Pac. 909.

[487] Berg v. Pohl, 24 Misc. Rep. 740, 53 N. Y. Supp. 799.

[488] Fuchs & Lang Manuf'g Co. v. Springer & Welty Co., 15 Misc. Rep. 443, 37 N. Y. Supp. 24.

[489] Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.

[490] Dudley v. Brinck, 8 Misc. Rep. 76, 28 N. Y. Supp. 527; Hart v. Washburn, 17 N. Y. Supp. 85, 62 Hun, 623; Halter v. Spokane Soap-Works Co., 12 Wash. 662, 42 Pac. 126. Compare Glickman v. Loew, 29 App. Div. 479, 51 N. Y. Supp. 1078; Brown v. Brown, 37 Minn. 128, 33 N. W. 546; Union Nat. Bank v. Benjamin, 61 Wis. 512, 21 N. W. 523.

[491] Schwartz v. Schendel, 24 Misc. Rep. 701, 53 N. Y. Supp. 773.

[492] Fuchs & Lang Manuf'g Co. v. Springer & Welty Co., 15 Misc. Rep. 443, 37 N. Y. Supp. 24. Compare Stivers v. Ritt, 29 Misc. Rep. 341, 60 N. Y. Supp. 507.

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these, it must be remembered that the question is not one of the court's power in the matter, but of the exercise of a sound judicial discretion; and therefore the conditions to be imposed in each individual case must rest upon the distinctive facts of that case. Onerous terms should not be imposed upon a defendant who is not greatly in fault. On the other hand, if the judgment is now good and collectible, it should not be set aside without adequate security furnished, where there is a prospect that a subsequent recovery on the same claim could not be enforced. Justice to both parties should guide the court, and all the pertinent facts of the particular case should be considered.

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.[493] And so, if an order is made setting aside a judgment on condition that the moving party pay to the other a sum of money 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 as if the order had never been made.[494]

§ 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 on one cause of action and improperly entered on the other, the court may sustain the motion in part and vacate 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.[495] But it is thought that a defendant cannot take advantage of so much of a decree as is favorable to him, and

[493] Gregory v. Haynes, 21 Cal. 443; Furman v. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629.

[494] Hartman v. Olvera, 49 Cal. 101.

[495] Weaver v. Leach, 26 Kan. 179. See Wise v. Schloesser, 111 Iowa, 16, 82 N. W. 439.

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have it set aside as to the residue.[496] A judgment may also be opened as to some of the defendants, and not as to the others, where their interests are severable and the judgment is not an entirety.[497] But in Texas, under a statute providing that only one final judgment shall be entered in any cause, a judgment in a suit by a seller to recover goods procured from him through fraud, entered against the vendee, his trustee in insolvency, a receiver of his property, and his sureties, is an entirety, and cannot be set aside as to a part of the judgment-debtors.[498] So an order setting aside a judgment enforcing a lien for street improvements against the lots of various owners goes to the entire judgment, and not merely to the judgment as against the persons who moved to set it aside.[499]

§ 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.[500] The nature of this discretion has been described, in a well-considered opinion of the

[496] Ross v. Ross, 21 Or. 9, 26 Pac. 1007.

[497] Wright v. Churchman, 135 Ind. 683, 35 N. E. 835.

[498] Levy v. Gill (Tex. Civ. App.) 46 S. W. 84.

[499] Bitzer v. O'Bryan (Ky.) 54 S. W. 951.

[500] Eldred v. Hazlett's Adm'r, 38 Pa. 16; Gilliland v. Bredin, 63 Pa. 393; Lamb's Appeal, 89 Pa. 407; Sweesey v. Kitchen, 80 Pa. 160; McClelland v. Pomeroy, 75 Pa. 410; Earley's Appeal, 90 Pa. 322; Wernet's Appeal, 91 Pa. 319; Leader v. Dunlap, 6 Pa. Super. Ct. 243; O'Brien v. Sylvester, 12 Pa. Super. Ct. 408; City of New York v. Smith, 138 N. Y. 676, 34 N. E. 400; Cunningham v. Hatch, 18 N. Y. Supp. 458; Seiffert v. Caverley, 19 N. Y. Supp. 520; St. Clair v. Conlon, 12 App. D. C. 161; Hudgins v. White, 65 N. C. 393; Herren v. Harralson, 97 Ga. 374, 24 S. E. 457; Bridges v. Blakeman, 108 Ga. 801, 34 S. E. 122; Elliston v. Bank of Commonwealth, 3 Dana (Ky.) 99; Hopkins v. Hopkins, 47 Kan. 103, 27 Pac. 822; Cavanaugh v. Toledo, W. & W. R. Co., 49 Ind. 149; Hoag v. Old People's Mut. Ben. Soc., 1 Ind. App. 28, 27 N. E. 438; Burke v. Ward, 50 Ill. App. 283; Carr v. School District of Belton, 42 Mo. App. 154; Hunt v. Jenney, 2 Mo. App. Rep'r, 1249; Merritt v. Putnam, 7 Minn. 493 (Gil. 399); Granse v. Frings, 46 Minn. 352, 49 N. W. 60; Pine Mountain Iron & Coal Co. v. Tabour, 55 Minn. 287, 56 N. W. 895; St. Mary's Hospital v. National Ben. Co., 60 Minn. 61, 61 N. W. 824; Seymour v. Board of

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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 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." [501] 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.[502] A doubt as to the propriety of allowing the motion may arise from the nature of the evidence or the

Sup'rs of Chippewa County, 40 Wis. 62; Wheeler & Wilson Manuf'g Co. v. Monahan, 63 Wis. 194, 23 N. W. 109; Evans v. Fall River County, 4 S. D. 119, 55 N. W. 862; Dougherty v. Nevada Bank, 68 Cal. 275, 9 Pac. 112; Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Williamson v. Cummings Rock Drill Co., 95 Cal. 652, 30 Pac. 762; Clarke v. Witram, 99 Cal. 50, 33 Pac. 798; Robert E. Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 Pac. 771; White v. Northwest Stage Co., 5 Or. 99; Askren v. Squire, 29 Or. 228, 45 Pac. 779; Lovejoy v. Willamette Transp. & Locks Co., 24 Or. 569, 34 Pac. 660; City of Spokane Falls v. Curry, 2 Wash. St. 541, 27 Pac. 477; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; Hagar v. Wikoff, 2 Okl. 580, 39 Pac. 281.

[501] Bailey v. Taaffe, 29 Cal. 422.

[502] Watson v. San Francisco & H. B. R. Co., 41 Cal. 17; Vermont Marble Co. v. Black (Cal.) 38 Pac. 512.

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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.[503] But if the relief is accorded, it will be presumed, in the court above, that there was sufficient evidence to justify the order.[504] 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.[505]

But it is only in cases of doubt as to the facts of the case, or as to the propriety of allowing the motion, that the discretion of the court comes into play. Where the case is plain and free from all uncertainty, it is not a question of discretion but of legal right. For instance, if absolutely no excuse is offered for the default of the moving party, an order vacating the judgment is not within the discretion of the court.[506] On the other hand, if adequate cause for setting aside the judgment is shown by the uncontradicted evidence or affidavits of the petitioner, the court must grant relief; it has no discretion to refuse;[507] and the petitioner may even have mandamus to compel the court to act, if the judgment or decree cannot be taken up on appeal.[508] 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."[509] 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 tendered showing a defense on the merits," the appellate

[503] Barton's Appeal (Pa.) 7 Atl. 168; Rieker v. Doerr, 16 Lanc. Law Rev. 59.

[504] Willett v. Millman, 61 Iowa, 123, 15 N. W. 866.

[505] Jefferson Co. Bank v. Robbins, 67 Wis. 68, 29 N. W. 893.

[506] Milwaukee Mut. Loan & Bldg. Soc. v. Jagodzinski, 84 Wis. 35, 54 N. W. 102.

[507] Hull v. Vining, 17 Wash. 352, 49 Pac. 537.

[508] Campbell v. Donovan, 111 Mich. 247, 69 N. W. 514; Bridgeport Electric & Ice Co. v. Bridgeport Land & Imp. Co., 104 Ala. 276, 16 South. 93.

[509] Craig v. Smith, 65 Mo. 536.

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court will not interfere with a refusal to open the judgment.[510] 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.[511] 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.[512] 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.[513]

§ 354a. Practice on Opening Default.

Where the relief sought by a judgment-debtor is not that the judgment should be stricken off or absolutely set aside as being void, but that a default should be opened, so that he may contest the case on the merits, and the application is granted, the proper practice is for the court to include in its order a direction that the party have leave to plead, or that a new trial be granted, or that the case be set down for trial or hearing, according to the situation of the particular case.[514] It is not proper to enjoin the enforcement of the judgment.[515] But where matters arise, in an application to vacate a confessed judgment, which are proper to be submitted to a jury,

[510] Union Lumbering Co. v. Board of Sup'rs of Chippewa Co., 47 Wis. 245, 2 N. W. 281.

[511] McCall v. McCall, 54 N. Y. 541.

[512] Hanson v. Hanson (Cal.) 20 Pac. 736.

[513] Gillespie v. Campbell (Pa.) 1 Atl. 665.

[514] Beck v. Juckett, 111 Iowa, 339, 82 N. W. 762; Belknap v. Groover (Tex. Civ. App.) 56 S. W. 249; Gormully & Jeffery Manuf'g Co. v. Catharine, 25 Misc. Rep. 338, 55 N. Y. Supp. 475. In Pennsylvania, where a judgment is set aside after the term at which it was rendered, it is better that the formal entry should be, "Judgment vacated, verdict set aside, and new trial granted," instead of merely "Rule absolute for new trial," which does not at once show all that has been done. Fisher v. Hestonville, M. & F. Pass. Ry. Co., 185 Pa. 602, 40 Atl. 97.

[515] Hunton v. Euper, 63 Ark. 323, 38 S. W. 517.

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further proceedings under the judgment may be stayed, and the matters accordingly submitted.[516] Where, after a judgment by default, leave is granted to the defendant to plead, "the judgment to stand," and, on trial of the general issue filed accordingly, plaintiff has a verdict for less than the amount of the original judgment, it is proper to let the judgment stand as of its original date for such reduced amount, rather than to enter it as of the date of the verdict.[517]

§ 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 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

[516] Rasmussen v. Smith, 82 Ill. App. 334.
[517] Dulle v. Lally, 167 Ill. 485, 47 N. E. 753.

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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." [518] Under the Pennsylvania practice, as already explained,[519] 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.[520] But in some other jurisdictions, the vacation of a judgment, especially at the same term at which it was rendered, leaves the case as if there had been no entry of judgment.[521] A more difficult question concerns the intervening rights of third persons. Some of the cases hold that a judgment by default may be opened on showing of an adequate cause, where the case has not been enrolled, though third parties have purchased in reliance on the judgment.[522] But the prevailing opinion appears to be that the setting aside of a judgment will not affect the title to property which was the subject of the judgment, or is affected by it,

[518] Simpson v. Hornbeck, 3 Lans. (N. Y.) 53.

[519] Supra, § 350.

[520] Steinbridge's Appeal, 1 Pen. & W. (Pa.) 481. A judgment is a judgment to all intents and purposes, and with all its incidents and attributes, after the allowance of a rule to open it, the same as before; and hence, when it is closed again, after a trial on the merits by a verdict for a sum due, an execution issues upon it for the amount so found as if it had not been disturbed. McAnulty v. National Life Ass'n, 6 Lack. Leg. N. 128.

[521] Ætna Life Ins. Co. v. Board of Com'rs of Hamilton County, 25 C. C. A. 94, 79 Fed. 575; Olson v. Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296. In Nebraska, a court has no power, on setting aside a mere money judgment, to continue in existence the statutory judgment lien so that it may attach to such judgment as may be subsequently rendered in the same cause. Farmers' Loan & Trust Co. v. Killinger, 46 Neb. 677, 65 N. W. 790, 41 L. R. A. 222.

[522] Benedict v. Auditor General, 104 Mich. 269, 62 N. W. 364.

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if it has passed to a purchaser in good faith, relying on the judgment.[528]

[528] Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073. In Minnesota, the matter is regulated by a statute which provides that the setting aside of a judgment shall not prevail against a bona fide purchaser, whose title was based thereon, where the judgment had been of record in the proper county for a period of not less than three years before the application to set aside the judgment was made. Gen. Laws Minn. 1887, c. 61; Drew v. City of St. Paul, 44 Minn. 501, 47 N. W. 158; Gowen v. Conlow, 51 Minn. 213, 53 N. W. 365.

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CHAPTER XV.

RELIEF IN EQUITY AGAINST JUDGMENTS AT LAW.

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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

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jurisdiction.[1] From that time down to this day the jurisdiction has 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.[7] 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.[8] 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.[9] 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."[10]

[1] Spence, Chanc. Jur. p. 674.

[2] Van Brough v. Cock, 1 Ch. Cas. 201; Bissel v. Axtell, 2 Vern. 47.

[3] Lonsdale v. Littledale, 2 Ves. Jr. 451.

[4] Williams v. Lee, 3 Atk. 223; Bateman v. Willoe, 1 Schoales & L. 201.

[5] Barnsley v. Powell, 1 Ves. Sr. 119; Gainsborough v. Gifford, 2 P. Wms. 424; Humphreys v. Humphreys, 3 P. Wms. 394.

[6] Cochran v. Eldridge, 49 Pa. 365, 368, citing Lloyd v. Mansell, 2 P. Wms. 73; Galley v. Baker, Cas. t. Talbot, 201; Bradish v. Gee, Amb. 229.

[7] The statutes limiting the time within which judgments may be set aside on motion or petition, for mistake, surprise, excusable neglect, etc., have no application to a suit in equity to enjoin or annul a judgment on the ground of fraud. McNeil v. McNeil (C. C.) 78 Fed. 834; Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Irvine v. Leyh, 102 Mo. 200, 16 S. W. 10.

[8] Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013.

[9] Kersey v. Rash, 3 Del. Ch. 321.

[10] Johnson v. Templeton, 60 Tex. 238.

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§ 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 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.[11] 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.[12] 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.[13] Thus relief of this character may be granted where the

[11] Yancey v. Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Richardson v. City of Baltimore, 8 Gill (Md.) 433; Contee v. Cooke, 2 Har. & J. (Md.) 179; Blight's Heirs v. Tobin, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219; Farmers' Bank v. Collins, 13 Bush (Ky.) 138; Harding v. Fiske, 25 Abb. N. C. 348, 12 N. Y. Supp. 139; Justice v. Scott, 39 N. C. 108. But equity may reform a judgment at law, by the addition of something omitted through mistake, when due cause therefor is shown. Hamburg-Bremen Fire Ins. Co. v. Pelzer Manuf'g Co., 22 C. C. A. 283, 76 Fed. 479. It is no objection to the maintenance of an action to enjoin the enforcement of a judgment that it is a collateral attack on the judgment. Ross v. Banta, 140 Ind. 120, 34 N. E. 865.

[12] Pelham v. Moreland, 11 Ark. 443; Lawless v. Reese, 3 Bibb (Ky.) 486; Gainty v. Russell, 40 Conn. 450; Yancey v. Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35.

[13] Knifong v. Hendricks, 2 Grat. (Va.) 212, 44 Am. Dec. 385; Carter v.

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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.[14] 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 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.[15] 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.[16]

§ 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 erro-

Bennett, 6 Fla. 214; Hoskins v. Hattenback, 14 Iowa, 314; Land v. Elliot, 1 Smedes & M. (Miss.) 608; How v. Mortell, 28 Ill. 478; Deputy v. Tobias, 1 Blackf. (Ind.) 311, 12 Am. Dec. 243. But equity will not set aside a judgment at law on grounds which were presented to the trial court in a motion for a new trial, and held insufficient. Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156; Hendrickson v. Bradley, 29 C. C. A. 303, 85 Fed. 508.

[14] Carrington v. Holabird, 17 Conn. 530.

[15] Hale v. Bozeman, 60 Miss. 965; Booth v. Kesler, 6 Grat. (Va.) 350; Barrow v. Robichaux, 14 La. Ann. 207; Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752. Or the court may order satisfaction of the judgment on payment of the amount actually due. Lindley v. Ross, 137 Pa. 629, 20 Atl. 944.

[16] Perry v. Kearney, 14 La. Ann. 400. And see Kamm v. Stark, 1 Sawy. 547, Fed. Cas. No. 7,604.

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neous it may be revised on appeal.[17] 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.[18] An injunction will lie to prevent the collection of a judgment which has been vacated or set aside by the court which rendered it.[19] And an execution issued on a judgment the record of which has been destroyed, there being no renewal by substitution, will be enjoined.[20] 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."[21] 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.[22] 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.[23] As a general rule, equity will not re-examine and re-

[17] Murphree v. Bishop, 79 Ala. 404; Lockridge v. Lyon, 68 Ga. 137; Sanchez v. Carriaga, 31 Cal. 170; St. Louis, I. M. & S. Ry. Co. v. Reynolds, 89 Mo. 146, 1 S. W. 208. See Fuller v. Townsley-Myrick Dry-Goods Co., 58 Ark. 314, 24 S. W. 635.

[18] Glass v. Smith, 66 Tex. 548, 2 S. W. 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; Tomlinson v. Litze, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458; Heath v. Halfhill, 106 Iowa, 131, 76 N. W. 522; Smith v. Morrill, 12 Colo. App. 233, 55 Pac. 824.

[19] Rickets v. Hitchens, 34 Ind. 348.

[20] Cyrus v. Hicks, 20 Tex. 483.

[21] Wells v. Smith, 13 Gray (Mass.) 207, 74 Am. Dec. 631.

[22] Thompson v. Hammond, 1 Edw. Ch. (N. Y.) 497.

[23] Davis v. Davis, 10 Bush (Ky.) 274.

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adjust 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.[24] There is also undoubted jurisdiction in equity to set aside an award, if good and equitable reasons are presented for such action.[25] 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.[26] 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.[27] The fact that a judgment has been affirmed on appeal does not exempt it from liability to attack by an original bill in equity for fraud, perjury, or mistake.[28] But equity will not interfere to set aside an interlocutory decree in a cause then pending in another court.[29]

§ 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,[30] or their privies,[31] or those whose rights 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.[32] So an execution in

[24] Hahn v. Hart, 12 B. Mon. (Ky.) 426; United States Electric Lighting Co. v. Leiter, 19 D. C. 575; Steiner v. Lenz, 110 Iowa, 49, 81 N. W. 190; Swanson v. Jordan (Tenn. Ch.) 52 S. W. 1102; City of Goliad v. Weisiger, 4 Tex. Civ. App. 653, 23 S. W. 694.

[25] Milnor v. Georgia R. & Banking Co., 4 Ga. 385.

[26] Mickles v. Thayer, 14 Allen (Mass.) 114.

[27] Oro Fino & Morning Star Min. Co. v. Cullen, 1 Idaho, 126.

[28] Nelson v. First Nat. Bank (C. C.) 70 Fed. 526.

[29] Furnald v. Glenn, 12 C. C. A. 27, 64 Fed. 49.

[30] Mayes v. Woodall, 35 Tex. 687; Marriner v. Smith, 27 Cal. 649.

[31] Bullock v. Winter, 10 Ga. 214.

[32] Marriner v. Smith, 27 Cal. 649; Shufelt v. Shufelt, 9 Paige (N. Y.) 137, 37 Am. Dec. 381; French v. Shotwell, 6 Johns. Ch. (N. Y.) 235.

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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.[33] 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.[34] 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.[35] 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.[36] It is certainly clear that a third person may maintain an action to enjoin perpetually the enforcement of a judgment which was procured through fraud and for the purpose of defrauding him.[37] 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.[38] 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 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.[39] So the receiver of a national bank, though not a party to a suit

[33] Harper v. Hill, 35 Miss. 63. And see Whitman v. Willis, 51 Tex. 429. Compare Alexander v. Mortgage Co. of Scotland (C. C.) 47 Fed. 131.

[34] Robinson v. Thompson, 30 Ga. 933. See Mentzer v. Ellison, 7 Colo. App. 315, 43 Pac. 464.

[35] Markley v. Rand, 12 Cal. 275.

[36] Hurd v. Eaton, 28 Ill. 122.

[37] Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245.

[38] Schuster v. Rader, 13 Colo. 329, 22 Pac. 505.

[39] Sumner v. Marcy, 3 Woodb. & M. 105, Fed. Cas. No. 13,609.

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against the bank in a state court, may appear in that court and contest the validity of the judgment.[40] The same rule applies to a holder of bonds of a corporation, the value of which is impaired by a collusive decree, to which he was not a party, establishing other claims against the corporation as liens upon its property superior to the lien of its bonds.[41] So also, the beneficiaries of a trust estate may maintain a bill to enjoin a fraudulent judgment against their trustee, to which they were not parties.[42] And the same principle applies as between a principal and guarantor, or principal and surety.[43] 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.[44] 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.[45] 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.[46] 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.[47]

§ 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.

[40] Denton v. Baker, 35 C. C. A. 187, 93 Fed. 46.

[41] Richardson v. Loree, 36 C. C. A. 301, 94 Fed. 375.

[42] Snelling v. American Freehold Land Mortg. Co., 107 Ga. 852, 31 L. R. A. 59, 33 S. E. 634, 73 Am. St. Rep. 160.

[43] Bradshaw v. Miners' Bank, 26 C. C. A. 673, 81 Fed. 902; Michener v. Springfield Engine & Thrasher Co., 142 Ind. 130, 40 N. E. 679.

[44] Kennedy v. Evans, 31 Ill. 258; Barnett v. Lynch, 1 Marv. (Del.) 114, 40 Atl. 666. See Fulliam v. Drake, 105 Iowa, 615, 75 N. W. 479.

[45] Gates v. Lane, 44 Cal. 392.

[46] Meixell v. Kirkpatrick, 25 Kan. 19.

[47] Hill v. United States, 9 How. 386, 13 L. Ed. 185.

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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. In several of the states it is held that one court has no jurisdiction of an action to enjoin or annul the judgment of another court of concurrent jurisdiction, or of a court of co-ordinate rank in another district or division of the same state.[48] And in some, this rule is established by statute.[49] But in others, it is thought that any court having jurisdiction of the parties and the subject-matter may issue its injunction to restrain the enforcement of a judgment, in a proper case, as where the judgment has been paid or satisfied, or was procured by fraud and conspiracy, though it was rendered by a court of concurrent or equal jurisdiction.[50] Thus, in Tennessee, it is held that one chancery court may enjoin the execution of a judgment wrongfully taken in another chancery court.[51] In the exercise of its jurisdiction over the parties, a court may enjoin the enforcement of a judgment rendered in another state,[52] and an execution issued upon a judgment of the supreme court of a state may be enjoined by the district court of the county in which it is sought to be enforced.[53] Also, chancery has jurisdiction to cancel,

[48] Plunkett v. Black, 117 Ind. 14, 19 N. E. 537; Beck v. Fransham, 21 Mont. 117, 53 Pac. 96; Reynolds v. Dunlap, 94 Ga. 727, 19 S. E. 906; Ellis v. Harrison, 24 Tex. Civ. App. 13, 57 S. W. 984; Corbin v. Casina Land Co., 26 App. Div. 408, 49 N. Y. Supp. 929; Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121.

[49] Civ. Code Prac. Ky. § 285, provides that "an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered." A similar rule is enacted in Iowa (Miller's Code, § 3396), and in Connecticut (Gen. St. § 775). See Jacobson v. Wernert (Ky.) 41 S. W. 281; Oberholtzer v. Hazen (Iowa) 70 N. W. 207; Smith v. Hall, 71 Conn. 427, 42 Atl. 86.

[50] Sayers v. Burkhardt, 29 C. C. A. 137, 85 Fed. 246; Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Holderman v. Tedford, 7 Kan. App. 657, 53 Pac. 887; Sheriff v. Judge of Twenty-First Judicial District Court, 46 La. Ann. 29, 14 South. 427.

[51] Douglass v. Joyner, 60 Tenn. 32.

[52] Davis v. Cornue, 151 N. Y. 172, 45 N. E. 449.

[53] Massie v. Mann, 17 Iowa, 131; Brown v. Walker (C. C.) 84 Fed. 532.

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and enjoin the enforcement of, a void judgment rendered by a justice of the peace.[54]

The federal courts are prohibited by statute from granting writs of injunction to stay proceedings in any of the state courts, and this prevents them from enjoining the enforcement of a judgment recovered in a state court.[55] But a federal circuit court, where the requisite diversity of citizenship exists, and the amount in controversy is sufficient, has jurisdiction to entertain a suit and enter a decree which, as between the parties, shall set aside, annul, and vacate a judgment of a state court, and the proceedings taken and rights acquired thereunder, on the ground that such judgment was procured by fraud or was void for want of jurisdiction.[56] A state court has no power or jurisdiction to restrain an action in any of the federal courts, nor to enjoin the enforcement of a judgment rendered by a court of the United States, though its injunction may be directed in personam against the parties entitled to the benefit of the decree or judgment.[57]

§ 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

[54] Leonard v. Capital Ins. Co., 101 Iowa, 482, 70 N. W. 629.

[55] Rev. St. U. S. § 720; Louisville Trust Co. v. City of Cincinnati (C. C.) 73 Fed. 716; Foote v. Glenn (C. C.) 52 Fed. 529. See Terre Haute & I. R. Co. v. Peoria & P. U. R. Co. (C. C.) 82 Fed. 943.

[56] Howard v. De Cordova, 177 U. S. 609, 20 Sup. Ct. 817, 44 L. Ed. 908; Davenport v. Moore (C. C.) 74 Fed. 945; McNeil v. McNeil (C. C.) 78 Fed. 834; Young v. Sigler (C. C.) 48 Fed. 182; Northern Pac. R. Co. v. Kurtzman (C. C.) 82 Fed. 241.

[57] Riggs v. Johnson Co., 6 Wall. 166, 18 L. Ed. 768; United States v. Keokuk, 6 Wall. 514, 18 L. Ed. 933; Central Nat. Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Prugh v. Portsmouth Sav. Bank, 48 Neb. 414, 67 N. W. 309; Strozier v. Howes, 30 Ga. 578; English v. Miller, 2 Rich. Eq. (S. C.) 320; Coster v. Griswold, 4 Edw. Ch. 364.

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is an adequate remedy at law.[58] Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief.[59] 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.[60] 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 might have moved the law court to vacate it, it is a case for equitable interference, merits being shown.[61]

§ 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 to open, vacate, or

[58] Wilkinson v. Rewey, 59 Wis. 554, 18 N. W. 513; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451; Bibend v. Kreutz, 20 Cal. 109; Hart v. Lazaron, 46 Ga. 396; Johnson v. Driver, 108 Ga. 595, 34 S. E. 158; Burch v. West, 134 Ill. 258, 25 N. E. 658; Missouri, K. & E. Ry. Co. v. Hoereth, 144 Mo. 136, 45 S. W. 1085; Bankers' Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N. W. 269; Cadwallader v. McClay, 37 Neb. 359, 55 N. W. 1054, 40 Am. St. Rep. 496.

[59] Grant v. Quick, 5 Sandf. (N. Y.) 612; Dufossat v. Berens, 18 La. Ann. 339.

[60] District Twp. of Newton v. White, 42 Iowa, 608; Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232.

[61] Spooner v. Leland, 5 R. I. 348.

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modify the judgment, or to stay or quash the execution, in the court which issued the execution or has control of it.[62] 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.[63] 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.[64] 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.[65] But the weight of author-

[62] Cowley v. Northern Pac. R. Co. (C. C.) 46 Fed. 325; Furnald v. Glenn (C. C.) 56 Fed. 372; Reed v. Prescott, 70 N. H. 88, 46 Atl. 457; Smith v. Kammerer, 152 Pa. 98, 25 Atl. 165; Brown v. Chapman, 90 Va. 174, 17 S. E. 855; Morrison v. Speer, 10 Grat. (Va.) 228; Howell v. Thomason, 34 W. Va. 794, 12 S. E. 1088; Henderson v. Moore, 125 N. C. 383, 34 S. E. 446; Crocker v. Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; Hart v. Lazaron, 46 Ga. 396; J. A. Roebling Sons Co. v. Stevens Electric Co., 93 Ala. 39, 9 South. 369; Hintrager v. Sumbargo, 54 Iowa, 604, 7 N. W. 92 (compare Connell v. Stelson, 33 Iowa, 147); Hulett v. Hamilton, 60 Minn. 21, 61 N. W. 672; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054; Imlay v. Carpentier, 14 Cal. 173; Bibend v. Kreutz, 20 Cal. 109; Logan v. Hillegass, 16 Cal. 201.

[63] Meyers v. Smith, 59 Neb. 30, 80 N. W. 273; Norwich Union Fire Ins. Soc. v. Stang, 18 Ohio Cir. Ct. R. 464; Landrum v. Farmer, 7 Bush (Ky.) 46; Hernandez v. James, 23 La. Ann. 484; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580.

[64] Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752; Larson v. Williams, 100 Iowa, 110, 63 N. W. 464, 62 Am. St. Rep. 544; Radzuweit v. Watkins, 53 Neb. 412, 73 N. W. 679; Spooner v. Leland, 5 R. I. 348. But if the party knew of the judgment against him in time to have moved for its vacation, that remedy being available, he cannot have relief in equity without showing some sufficient reason why he did not proceed at law. Woodward v. Pike, 43 Neb. 777, 62 N. W. 230; Rowlett v. Williamson, 18 Tex. Civ. App. 25, 44 S. W. 624; Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

[65] Simpson v. Hart, 14 Johns. (N. Y.) 63; Sherer v. Akers, 74 Mo. App. 217. Where a justice of the peace refuses to vacate a judgment obtained in his court through fraud, and no appeal lies, the judgment debtor is entitled to relief in equity. Merriman v. Walton, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50.

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ity is against this proposition. The best cases hold that equity will refuse to act by 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.[66] To show the disposition of the chancery courts in this regard, we cite the case of Dalhoff v. Keenan,[67] 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, Error, or Certiorari.

In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal, writ of error, or certiorari, 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.[68] Nor will a judgment be enjoined

[66] Wilson v. Buchanan, 170 Pa. 14, 32 Atl. 620; Matson v. Field, 10 Mo. 100; Davis v. Bass, 4 Ind. 313; Collins v. Butler, 14 Cal. 223; Critchfield v. Porter, 3 Ohio, 518; Gray v. Barton, 62 Mich. 186, 28 N. W. 813.

[67] 66 Iowa, 679, 24 N. W. 273.

[68] Leet v. Leet, 12 App. Div. 11, 42 N. Y. Supp. 174; Ludwig v. Lazarus, 10 App. Div. 62, 41 N. Y. Supp. 773; Rafferty v. Potter, 21 R. I. 517, 45 Atl. 152; Brumbaugh v. Schnebly, 2 Md. 320; Flanneken v. Wright, 64 Miss. 217, 1 South. 157; Long v. Smith, 39 Tex. 160; Texas-Mexican R. Co. v. Wright (Tex. Civ. App.) 29 S. W. 1134; McHugh v. Sparks, 15 Tex. Civ. App. 57, 38 S. W. 537; San Antonio & A. P. R. Co. v. Glass (Tex. Civ. App.) 40 S. W. 339; James' Adm'r v. Neal's Adm'r, 3 T. B. Mon. (Ky.) 369; Todd v. Jackson, 22 Ky. Law Rep. 1697, 61 S. W. 1; Evans v. International Trust Co. (Tenn. Ch.) 59 S. W. 373; Palmer v. Malone, 1 Heisk. (Tenn.) 549; Ward v. Derrick, 57 Ark. 500, 22 S. W. 93; Parsons v. Pierson, 128 Ind. 479, 28 N. E. 97; Ross v. Banta, 140 Ind. 120, 34 N. E. 865; Wyman v. Hardwick, 52 Mo. App. 621; Renfroe v. Renfroe, 54 Mo. App. 429; Brown

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when the complainant has neglected to except to it as he might have done.[69] 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.[70] Nor is the death of a party before judgment sufficient ground for an injunction; the proper remedy is by error coram nobis.[71] If the right of appeal has been lost by lapse of time, the party seeking the aid of equity must be able to show that such loss was not the result of his own negligence, default, or indifference.[72] If he has been deprived of his opportunity to appeal by the fraud or deceit of the adverse party, or by a trick played upon him, this will furnish a stronger ground for equity to interfere, but it must also appear that the complainant has no adequate remedy at law.[73] Where the right of appeal has been cut off by the death or resignation of the trial judge before signing the bill of exceptions, equity

v. Campbell, 110 Cal. 644, 43 Pac. 12; Daly v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; Mayer v. Nelson, 54 Neb. 434, 74 N. W. 841. See, per contra, Baldwin v. Davidson, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460; Williams v. Pile, 104 Tenn. 273, 56 S. W. 833.

[69] Dibble v. Truluck, 12 Fla. 185.

[70] Rountree v. Walker, 46 Tex. 200.

[71] Williamson's Adm'r v. Appleberry, 1 Hen. & M. (Va.) 206. And see Holman v. G. A. Stowers Furniture Co. (Tex. Civ. App.) 30 S. W. 1120.

[72] Waldo v. Thweatt, 64 Ark. 126, 40 S. W. 782; Hollenbeak v. McCoy, 127 Cal. 21, 59 Pac. 201. The fact that petitioner relied on a promise of the trial judge to inform him of his decision in time to enable petitioner to file a bill of exceptions for the purpose of appeal, and that the judge forgot to do so, is not sufficient ground for equity to set aside the judgment, for it shows that the petitioner was not free from default and neglect. Donaldson v. Roberts, 109 Ga. 832, 35 S. E. 277.

[73] In case of a default judgment, the mere fact that plaintiff did not notify defendant of the entry of judgment, and did not sue out execution until after the lapse of a year, in order that defendant might not petition for a writ of review, is not such fraud as will entitle defendant to restrain the enforcement of the judgment. Trustees of Amherst College v. Allen, 165 Mass. 178, 42 N. E. 570. So, where the successful party wrongfully obtained possession of a case made for appeal by the defeated party, and withheld it until the time for appeal had passed, it was held to be no ground to enjoin the judgment. For the remedy was by petition in error in the appellate court. Muse v. Wafer, 29 Kan. 279.

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may enjoin the enforcement of the judgment, if it is shown to be unjust and oppressive, and if the applicant for relief has not been guilty of any want of due diligence.[74] And if a meritorious bill of exceptions is dismissed because of a mistake made by the certifying judge, without the fault of counsel, an injunction may be granted against the judgment until the matters set up in the dismissed bill of exceptions can be heard.[75] But it is held that enforcement of a judgment should not be enjoined merely because the trial judge wrongfully refused to allow an appeal, or to sign the bill of exceptions, or to approve the bond offered for appeal; for in such cases there is an adequate remedy by mandamus.[76] On the other hand, equity may relieve against a judgment from which no appeal could be taken because the amount in controversy was too small, and will do so where a meritorious case for its interference is made out.[77] And so where the attempt to appeal was frustrated by the destruction of the records by fire, provided the complainant has been in no fault.[78]

In Illinois, it was at one time held that relief might be obtained against a judgment on the ground of fraud, though the party might have a remedy at law; and that, even if he had notice of the judgment in time to appeal, and made an abortive attempt to do so, this would not prevent him from applying to equity for an injunction.[79] But later decisions hold that, if a judgment is not the result of the negligence of the person against whom it is rendered, it is unjust; and if he cannot appeal from it, he may sue out a writ of certiorari,

[74] Kansas & A. V. Ry. Co. v. Fitzhugh, 61 Ark. 341, 33 S. W. 960, 54 Am. St. Rep. 211; Little Rock & F. S. Ry. Co. v. Wells, 61 Ark. 354, 33 S. W. 208, 30 L. R. A. 560, 54 Am. St. Rep. 216; Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799; Galbraith v. Barnard, 21 Or. 67, 26 Pac. 1110.

[75] Kohn v. Lovett, 43 Ga. 179.

[76] Houston, E. & W. T. Ry. Co. v. Ellisor, 14 Tex. Civ. App. 706, 37 S. W. 972; Boyd v. Weaver, 134 Ind. 266, 33 N. E. 1027. Compare Picket v. Morris, 2 Wash. (Va.) 255.

[77] Gulf, C. & S. F. Ry. Co. v. King, 80 Tex. 681, 16 S. W. 641; Gulf, C. & S. F. Ry. Co. v. Henderson, 83 Tex. 70, 18 S. W. 432.

[78] Bailey v. Stevens, 11 Utah. 175, 39 Pac. 828.

[79] Nelson v. Rockwell, 14 Ill. 375.

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and have a new trial; and therefore he cannot sue to enjoin its collection.[80]

§ 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 price of which the suit was brought.[81] 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.[82] 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.[83] 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.[84] Thus, injunction will not issue to restrain the execution of a void judgment, when replevin against the officer would furnish a full and adequate remedy.[85] But in some states it is held that a cause of action by a judgment defendant against the officer who falsely returned a service on defendant is not an adequate remedy at law, such as to prevent equity

[80] Booth v. Koehler, 51 Ill. App. 370; Reid v. Stock Yards L. Coal & F. Co., 88 Ill. App. 32.

[81] Ponder v. Cox, 26 Ga. 485; Henry v. Elliott, 59 N. C. 175; Gorman v. Young (Ky.) 18 S. W. 369. See Murphy v. Cuddihy, 111 Iowa, 645, 82 N. W. 999.

[82] Hudson v. Kline, 9 Grat. (Va.) 379.

[83] Beall v. Brown, 7 Md. 393.

[84] Drake v. Lyons, 9 Grat. (Va.) 54.

[85] Straub v. Simpson, 74 Mo. App. 230.

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from enjoining the enforcement of the judgment as obtained by the fraud of the officer.[86]

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.[87] Some of the elements which universally afford an attaching-point for the equitable jurisdiction must be present, making it unconscientious for the successful party 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.[88] Hence equity cannot relieve against the oper-

[86] Dowell v. Goodwin, 22 R. I. 287, 47 Atl. 693, 51 L. R. A. 873, 84 Am. St. Rep. 842.

[87] Questions which have been adjudicated in a court of law having jurisdiction of the parties and the subject-matter cannot be reviewed by the defeated party in a suit in equity, since equity has no power to review or correct errors in a proceeding at law. Fulliam v. Drake, 105 Iowa, 615, 75 N. W. 479.

[88] Little v. Price, 1 Md. Ch. 182; Bachelder v. Bean, 76 Me. 370; Mason v. House, 20 Tex. Civ. App. 500, 49 S. W. 911; Handley v. Jackson, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; Crocker v. Allen, 34 S. C. 452, 13 S. E. 650, 27 Am. St. Rep. 831; Perry v. Johnston (C. C.) 95 Fed. 322.

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ation of a judgment at law simply on account of its hardship.[89] It must first of all appear that it would be unjust and against conscience to enforce the judgment.[90] 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.[91] 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.[92] 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.[93] 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.[94]

§ 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.[95] 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

[89] Hill's Ex'x v. Rogers, Rice, Eq. 7; Hamilton v. Adams, 15 Ala. 596, 50 Am. Dec. 150.

[90] Fowler v. Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

[91] Taggart v. Wood, 20 Iowa, 236; Sauer v. City of Kansas, 69 Mo. 46.

[92] Sohier v. Merril, 3 Woodb. & M. 179, Fed. Cas. No. 13,158.

[93] Wells, Fargo & Co. v. Wall, 1 Or. 295; Nevins v. McKee, 61 Tex. 412.

[94] Carrington v. Holabird, 19 Conn. 84. See Shipman v. Fletcher's Adm'r, 95 Va. 585, 29 S. E. 325.

[95] 7 Cranch, 332, 3 L. Ed. 362.

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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.[96] "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."[97] "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 defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."[98] So speak all the authorities.

[96] Railroad Co. v. Neal, 1 Woods, 353, Fed. Cas. No. 11,534; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Pettes v. Whitehall Bank, 17 Vt. 435; Wingate v. Haywood, 40 N. H. 437; Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467; Vilas v. Jones, 1 N. Y. 274; Briesch v. McCauley, 7 Gill (Md.) 189; Little v. Price, 1 Md. Ch. 182; Kent v. Ricards, 3 Md. Ch. 392; Windwart v. Allen, 13 Md. 196; Alford v. Moore's Adm'r, 15 W. Va. 597; Braden v. Reitzenberger, 18 W. Va. 286; Ponder v. Cox, 26 Ga. 485; Watts v. Gayle, 20 Ala. 817; Lafon's Ex'rs v. Desessart, 1 Mart. N. S. (La.) 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. 346; Proctor v. Pettitt, 25 Neb. 96, 41 N. W. 131; Wells, Fargo & Co. v. Wall, 1 Or. 295; Mastick v. Thorp, 29 Cal. 444; Boston v. Haynes, 33 Cal. 31; Taggart v. Wood, 20 Iowa, 236; Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245; West v. Magness (Tenn. Ch.) 46 S. W. 469; Foshee v. McCreary, 123 Ala. 493, 26 South. 309; Wilson S. M. Co. v. Curry, 126 Ind. 161, 25 N. E. 896; Kaufman v. Schneider, 35 Ill. App. 256; Losey v. Neidig, 52 Neb. 167, 71 N. W. 1067; Kaufmann v. Drexel, 56 Neb. 229, 76 N. W. 559; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548, 77 N. W. 1078; McBride v. Wakefield, 58 Neb. 442, 78 N. W. 713. Equity will not enjoin the collection of a judgment against a municipal corporation, regularly obtained and supported by a moral obligation to pay, even though there may be a good technical defense. Skirving v. National Life Ins. Co., 8 C. C. A. 241, 59 Fed. 742.

[97] Vilas v. Jones, 1 N. Y. 274.

[98] Hendrickson v. Hinckley, 17 How. 443, 15 L. Ed. 123.

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§ 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.[99] A

[99] 2 Story's Eq. Jur. § 1572; Baker v. Morgan, 2 Dow, 526; Tarver v. Tarver, 9 Pet. 174, 9 L. Ed. 91; Ludlow v. Ramsey, 11 Wall. 581, 20 L. Ed. 216; Pettes v. Whitehall Bank, 17 Vt. 435; Fletcher v. Warren, 18 Vt. 45; Paddock v. Palmer, 19 Vt. 581; Stilwell 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; Bush v. O'Brien, 47 App. Div. 581, 62 N. Y. Supp. 685; Vanarsdelen v. Whitaker, 10 Phila. 153; Holmes v. Steele, 28 N. J. Eq. 173; Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Stout v. Slocum, 52 N. J. Eq. 88, 28 Atl. 7; Methodist Protestant Church v. Mayor of City of Baltimore, 6 Gill (Md.) 391, 48 Am. Dec. 540; Boyd v. Chesapeake & O. Canal Co., 17 Md. 195, 79 Am. Dec. 646; Slack v. Wood, 9 Grat. (Va.) 40; McDowall v. McDowall, Bailey, Eq. (S. C.) 324; Stockton v. Briggs, 58 N. C. 309; Grantham v. Kennedy, 91 N. C. 148; Cohen v. Dubose, 1 Harp. Eq. (S. C.) 102, 14 Am. Dec. 709; Hunt v. Coachman, 6 Rich. Eq. (S. C.) 286; Turpin v. Thomas' Representatives, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615; Robuck v. Harkins, 38 Ga. 174; Jones v. Watkins, 1 Stew. (Ala.) 81; Coffin v. McCullough's Adm'r, 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. (Ky.) 234; Burke v. Wheat, 22 Kan. 722; Missouri Pac. R. Co. v. Reid, 34 Kan. 410, 8 Pac. 846; Publishing House of Evangelical Ass'n v. Heyl, 61 Kan. 634, 60 Pac. 317; Ex parte Christian, 23 Ark. 641; Clopton v. Carloss, 42 Ark. 560; Dunn v. Fish, 8 Blackf. (Ind.) 407; Macy v. Lloyd, 23 Ind. 60; De Haven v. Covalt, 83 Ind. 344; Davis v. Clements, 148 Ind. 606, 47 N. E. 1056, 62 Am. St. Rep. 539; Fitch v. Byall, 149 Ind. 554, 49 N. E. 455; Hart v. O'Rourke, 151 Ind. 205, 51 N. E. 330; Chicago Waifs Mission & Training School v. Excelsior Electric Co., 44 Ill. App. 425; Hendron v. Kinner, 110 Iowa, 544, 81 N. W. 783; Drake v. Hanshaw, 47 Iowa, 291; Hazeltine v. Reusch, 51 Mo. 50; Corley v. McKeag, 57 Mo. App. 415; Missouri, K. & T. Ry. Co. v. Warden, 73 Mo. App. 117; Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902; Merritt v. Baldwin, 6 Wis. 439; Jilsun v. Stebbins, 41 Wis. 235; Ableman v. Roth, 12 Wis. 81; Pico v. Sunol, 6 Cal. 294; Logan v. Hillegass, 16 Cal. 200; Fox v. McClay, 48 Neb. 820, 67 N. W. 888.

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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 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." [100] 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.[101] 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.[102] 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.[103] Nor can a court of equity set aside a judgment, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings,[104] nor because there was no finding of fact

[100] Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442.

[101] Jones v. Watkins, 1 Stew. (Ala.) 81. And see Cassel v. Scott, 17 Ind. 514.

[102] Pryor v. Emerson, 22 Tex. 162.

[103] Pico v. Sunol, 6 Cal. 294; Hunt v. Coachman, 6 Rich. Eq. (S. C.) 286; Merritt v. Baldwin, 6 Wis. 439; Vaughn v. Johnson, 9 N. J. Eq. 173; Brigot's Heirs v. Brigot, 49 La. Ann. 1428, 22 South. 641; Geyer v. Douglass, 85 Iowa, 93, 52 N. W. 111; Nashville, C. & St. L. Ry. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673.

[104] Allen v. Allen, 38 C. C. A. 336, 97 Fed. 525; Hunter v. Kansas City Safe-Deposit & Savings Bank, 158 Mo. 262, 58 S. W. 1053; Moore v. Brit-

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to support the judgment,[105] nor for any irregularities as to the service of the summons, the judgment not being shown to be unjust.[106] So, an illegal allowance in a judgment, or an error in the calculation of interest, is no ground for an injunction.[107] 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.[108] 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.[109] Thus, where the defendant agreed that 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.[110] 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.[111]

§ 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.[112] "Fraud will vitiate a judg-

ton, 15 Tex. Civ. App. 237, 38 S. W. 528; Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; Reast v. Hughes (Tex. Civ. App.) 33 S. W. 1003.

[105] Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131.

[106] Garden City Wire & Spring Co. v. Kause, 67 Ill. App. 108.

[107] Davis v. Wade, 58 Mo. App. 641; Walker v. Villavaso, 26 La. Ann. 42; Baggett v. Watson, 70 Miss. 64, 11 South. 679. See Cohen v. Dubose, 1 Harp. Ch. 102.

[108] Katz v. Moore, 13 Md. 566.

[109] Smith v. Butler, 11 Or. 46, 4 Pac. 517.

[110] Gwinn v. Newton, 8 Humph. (Tenn.) 710.

[111] Smith v. Wallace, 1 Wash. (Va.) 254.

[112] White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; 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. (N. Y.) 221; Corwithe v. Griffing, 21 Barb. (N. Y.) 9; Whittlesey v.

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ment, 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." [113] 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." [114] 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 the defendant's property in that state has been attached.[115] So, the fact that one is solvent is no ground for refusing to enjoin proceedings on a judgment which he has obtained by fraud.[116] On the other hand, a judgment cannot be impeached in equity on the ground of fraud practised by the successful party, where it appears that the fraud, if attempted, was unsuccessful.[117] And equity will not interfere on the ground of fraud unless the fraud is clearly stated and proved.[118] And allegations that the judgment was obtained "through fraud and other ill practices" are too vague and general.[119]

Delaney, 73 N. Y. 571; Binsse v. Barker, 13 N. J. Law, 263, 23 Am. Dec. 720; Burch v. Scott, 1 Bland (Md.) 112; Kent v. Ricards, 3 Md. Ch. 392; Poindexter v. Waddy, 6 Munf. 418, 8 Am. Dec. 749; Smith v. Hays, 54 N. C. 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. (Ky.) 426; Crank v. Flowers, 4 Heisk. (Tenn.) 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; Burpee v. Smith, Walk. Ch. (Mich.) 327; Hayden v. Hayden, 46 Cal. 332; Smith v. Quarles (Tenn. Ch.) 46 S. W. 1035; Oliver v. Riley, 92 Iowa, 23, 60 N. W. 180; Larson v. Williams, 100 Iowa, 110, 69 N. W. 441, 62 Am. St. Rep. 544; Smith v. Taylor, 78 Mo. App. 630; Benson v. Anderson, 10 Utah, 135, 37 Pac. 256.

[113] Wingate v. Haywood, 40 N. H. 437.

[114] Moore v. Gamble, 9 N. J. Eq. 246.

[115] Edson v. Cumings, 52 Mich. 52, 17 N. W. 693.

[116] Sanderson v. Voelcker, 51 Mo. App. 328.

[117] Allen v. Allen, 38 C. C. A. 336, 97 Fed. 525.

[118] Jones v. South's Adm'rs, 3 A. K. Marsh. (Ky.) 352.

[119] Rooks v. Williams, 13 La. Ann. 374.

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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.[120] 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.[121] 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.[122] 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,[123] or so as to include a person not originally named in it nor made a party to the action.[124] 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.[125] Secondly, whatever was the character of the defense, sup-

120 White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; Hair v. Lowe, 19 Ala. 224; Pearce v. Olney, 20 Conn. 544; Ableman v. Roth, 12 Wis. 81; Way v. Lamb, 15 Iowa, 79; Atwater v. American Exch. Nat. Bank, 40 Ill. App. 501; Henkleman v. Peterson, Id. 540.

121 Dringer v. Receiver of Erie Ry. Co., 42 N. J. Eq. 573, 8 Atl. 811.

122 Inhabitants of Essex County v. Berry, 2 Vt. 161; Murdock v. De Vries, 37 Cal. 527.

123 Babcock v. McCamant, 53 Ill. 214.

124 Chester v. Miller, 13 Cal. 558.

125 Muscatine v. Mississippi & M. R. Co., 1 Dill. 536, Fed. Cas. No. 9,971; Gardiner v. Van Alstyne, 163 N. Y. 573, 57 N. E. 1110; Taylor v. Mallory, 70 Md. 1, 23 Atl. 1098; Adler v. Van Kirk Land & Const. Co., 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133; Covington v. Chamblin, 156 Mo. 574, 57 S. W. 728; Hamilton v. McLean, 139 Mo. 678, 41 S. W. 224; Link v. Link, 48 Mo. App. 345; Shufeldt v. Gandy, 34 Neb. 32, 51 N. W. 302; Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747. A bill to set aside a judgment for fraud must aver that the complainant had

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posing it to be good and meritorious, the successful party may have practised fraud or trickery in such wise as to prevent the other from 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.[126] 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." [127] Thus, in one case, a perpetual injunction was granted, in order to stay proceedings on a judgment at law obtained in a suit instituted in the name of a person

no knowledge of the fraud before final judgment was rendered. Noll v. Chattanooga Co. (Tenn. Ch.) 38 S. W. 287. And see infra, § 378.

[126] Huggins v. King, 3 Barb. (N. Y.) 616; Spencer v. Vigneaux, 20 Cal. 442; Cummins v. White, 4 Blackf. (Ind.) 356; Mack v. Doty, Harr. (Mich.) 366; Poindexter v. Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; De Louis v. Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Lazarus v. McGuirk, 42 La. Ann. 194, 8 South. 253; Dodge v. Williams, 107 Ga. 410, 33 S. E. 468; Mitchell v. Kirby (Ky.) 38 S. W. 507.

[127] 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. 313.

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not interested, whose name was used only for the purpose of preventing a defense which the defendant had against the real plaintiff in interest.[128] So, equity will relieve where, in ex parte proceedings in foreign attachment, advantage, after being waited for, has been deliberately taken of a complainant's absence to obtain, without his knowledge, a judgment upon a claim to which he has a sufficient defense either at law or in equity, and to sell his land for an inadequate price to the plaintiff in the attachment suit.[129] It is to be observed that the rule that a judgment silences all defenses which might have been urged against its rendition cannot be invoked in an action to enjoin its execution for fraud, when the fraud alleged consists in acts of the party which prevented his adversary from setting up his defenses.[130] At the same time, a party to an action at law must not be too credulous, nor rely too easily upon mere suggestions or representations made to him by his adversary. Though the conduct of his opponent may have been tricky or evasive, it is his own duty to be careful and vigilant, and he cannot obtain relief in equity, on this ground, unless he shows that he is free from the charge of negligence or lack of due attention to his case.[131]

§ 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.[132] The rule has been thus stated: "The question of fraud

[128] Greenleaf v. Maher, 2 Wash. C. C. 393, Fed. Cas. No. 5,780.

[129] Herbert v. Herbert, 47 N. J. Eq. 11, 20 Atl. 290.

[130] Lazarus v. McGuirk, 42 La. Ann. 194, 8 South. 253.

[131] See Hoey v. Jackson, 31 Fla. 541, 13 South. 459; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; German Fire Ins. Co. v. Perry, 45 Ill. App. 197.

[132] Muscatine v. Mississippi & M. R. Co., 1 Dill. 536, Fed. Cas. No. 9,971; California Beet Sugar Co. v. Porter, 68 Cal. 369, 9 Pac. 313; Lee v. Harmon, 84 Mo. App. 157; Watts v. Frazer, 80 Ala. 186; Hogg v. Link, 90 Ind. 346; Pearce v. Olney, 20 Conn. 544; Asbury v. Frisz, 148 Ind. 513, 47 N. E. 328;

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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." [133] Or, as otherwise stated, the fraud alleged must be extrinsic or collateral to the matters involved in the issues or the trial at law.[134] Where, as in some of the states, the statutes authorize the courts to vacate their own judgments for "fraud" practised by the successful party in obtaining them, it is held that the word "fraud" is used in its common and direct sense; it means fraud in fact, not fraud in law, and embraces only intentional wrong.[135] The fraud which will justify a court of equity in thus interfering may assume various shapes. It may consist in deceit and imposition practised upon the court, as a means of obtaining a judgment which

Turner v. Colson (Ky.) 55 S. W. 551; Schroer v. Pettibone, 163 Ill. 42, 45 N. E. 207.

[133] Stilwell v. Carpenter, 2 Abb. N. C. (N. Y.) 238; Seals v. Weldon, 121 Ala. 319, 25 South. 1021.

[134] Irvine v. Leyh, 124 Mo. 361, 27 S. W. 512; United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. A default judgment recovered by means of false statements in respect to a fact essential to the right of recovery, which deceived both the defendant and the court, cannot be set aside by a suit in equity, as this is not a collateral or extrinsic fraud. Ritchie v. McMullen, 25 C. C. A. 50, 79 Fed. 522. Equity cannot set aside an adjudication at law determining and locating the quantity of lands required for a public use merely because the parties who brought about the adjudication had a fraudulent or illegal intent; but it must appear that the court itself proceeded fraudulently, or in excess of its powers, or that it committed a gross mistake, or was imposed upon by fraudulent methods. Coe v. Aiken (C. C.) 61 Fed. 24. But it has been said that the rule that fraud for which equity will vacate a judgment must be fraud in procuring the judgment, is not to be applied in all its strictness to a judgment based on service by publication against one who had no actual notice; but relief will be given in such case on proof that the judgment was entered on a cause of action known to be without foundation. Irvine v. Leyh, 102 Mo. 200, 14 S. W. 715, 16 S. W. 10.

[135] Ohio & W. Mortgage & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040. And see Williams v. Lumpkin, 86 Tex. 641, 26 S. W. 493.

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never ought to have been rendered,[136] or in the act of the successful party in illegally tampering with the jury,[137] or in his wrongful conduct in obtaining a judgment and a sale of defendant's property by a surreptitious use of legal process and proceedings,[138] or in collusion. Thus, collusion between the plaintiff and the judge or justice who rendered the judgment will be ground for enjoining its execution.[139] So a judgment against an estate may be enjoined when it is shown to have been obtained by means of collusion between the executor or administrator and the alleged creditor or claimant.[140] And the same is true of a judgment against a corporation recovered by collusion between its president and the plaintiff.[141] Again, one not a party to an account, who causes an action to be begun thereon for his own benefit, but ostensibly for the plaintiff, by whom all interest in the action and in the judgment is disclaimed, should be enjoined from enforcing the judgment.[142] 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

[136] Benson v. Anderson, 10 Utah, 135, 37 Pac. 256; Larson v. Williams, 100 Iowa, 110, 69 N. W. 441, 62 Am. St. Rep. 544; Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358. But a court of equity will not set aside a judgment rendered by a court of competent jurisdiction, on the ground of fraud, because of false statements made by the defendants to the court as to their financial condition, by which the court was induced to render, and the plaintiff to accept, a judgment for less than the amount actually due. United States v. Beebe, 34 C. C. A. 321, 92 Fed. 244. So, an independent suit cannot be maintained in equity to set aside a decree allotting a homestead to the widow of a decedent, on the ground that, in procuring such decree, she misrepresented to the court the facts as to the property. Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. Again, proof that evidence which would go to prevent the recovery of a judgment was collusively withheld from the court is not alone sufficient to establish fraud or imposition; it must also appear that the judgment was in fact unjust. First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461.

[137] Platt v. Threadgill (C. C.) 80 Fed. 192.

[138] Herbert v. Herbert, 49 N. J. Eq. 565, 25 Atl. 366.

[139] Kimble v. Short, 2 Kan. App. 130, 43 Pac. 317; Mason v. Quinn, 9 Lrz. Leg. Reg. (Pa.) 543.

[140] Elting v. First Nat. Bank, 173 Ill. 368, 50 N. E. 1095; First Baptist Church v. Syms (N. J.) 31 Atl. 717; Ramsey v. Hicks, 53 Mo. App. 190.

[141] Babcock Hardware Co. v. Farmers' & Drovers' Bank, 54 Kan. 273, 38 Pac. 256.

[142] Marchman v. Sewell, 93 Ga. 653, 21 S. E. 172.

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court in equity granted an injunction against the execution.[143] 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.[144] 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.[145]

§ 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 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.[146]

[143] Devoll v. Scales, 49 Me. 320; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268.

[144] Dandridge v. Harris, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

[145] Barnett v. Barnett, 83 Va. 504, 2 S. E. 733.

[146] Tomkins v. Tomkins, 11 N. J. Eq. 512; Griffith v. Reynolds, 4 Grat. (Va.) 46; Pratt v. Northam, 5 Mason, 95, Fed. Cas. No. 11,376; Fish v. Lane, 3 N. C. 342; Spencer v. Vigneaux, 20 Cal. 442; Mosby v. Gisborn, 17 Utah, 257, 54 Pac. 121. But a defendant cannot claim fraud in the rendering of a judgment against him merely because the plaintiff therein did not volunteer information immaterial to the issues, and which could have been used only to affect the credibility of witnesses. Long v. Gilbert (Tenn.) 59 S. W. 414. A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property, and that nothing could be realized by execution against them, when no representations are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency. United States v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563.

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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.[147] So on account of a deficiency in the quantity of the land sold, which would entitle the vendee to a diminution of the price.[148] 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.[149] 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.[150] But equity will relieve against a judgment entered on an agreement to which one defendant's name was forged, although the co-defendant who forged it was the only culpable party, the judgment being entered under a mistake of fact.[151]

§ 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.[152] And in at least one state

[147] Walton v. Bonham, 24 Ala. 513; Wray's Adm'rs v. Furniss, 27 Ala. 471; Cox v. Jerman, 41 N. C. 526; Graham v. Tankersley, 15 Ala. 634; Jaynes v. Brock, 10 Grat. (Va.) 211; Gray v. Ward (Tenn.) 52 S. W. 1028.

[148] Davis v. Millaudon, 14 La. Ann. 868.

[149] Poe v. Decker, 5 Ind. 150. Compare Amick v. Bowyer, 3 W. Va. 7.

[150] Campbell v. Ketcham, 1 Bibb (Ky.) 406.

[151] Lindsley v. Sparks, 20 Tex. Civ. App. 56, 48 S. W. 204.

[152] Coddrington v. Webb, 2 Vern. 240; Tovey v. Young, Finch, Prec. Ch. 193; Peagram v. King, 9 N. C. 605; Burgess v. Lovengood, 55 N. C. 457. The United States supreme court has held that a court of equity may entertain a suit to enjoin the enforcement of a judgment at law when the bill alleges that the judgment was obtained by the use of a forged letter as evidence, the complainant being ignorant of the existence of such evidence before the trial, and not discovering its falsity until too late to move for a new trial, and not being guilty of any laches in the matter. Marshall v.

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(Minnesota) the statutes authorize a suit to be brought to set aside a judgment obtained by the fraud or perjury of the prevailing party.[153] In some other jurisdictions, it is thought that if a party to a suit intentionally procures and produces false testimony, suborning his witnesses to perjury and conspiring with them to secure a judgment, this amounts to such fraud as will enable the adverse party, if defeated in the suit, to secure an injunction against the judgment.[154] But this doctrine is denied in other states,[155] and indeed the general current of authority is now in favor of the rule that perjury committed by the successful party or his witnesses at the trial is no sufficient ground for vacating the judgment or enjoining its enforcement.[156]

§ 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 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

Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. A final decree which plaintiff permits to go against him because of false answers under oath by defendants, plaintiff being unable to present evidence to overcome the same, is vitiated by fraud and may be annulled. Graver v. Faurot, 22 C. C. A. 156, 76 Fed. 257.

[153] Gen. St. Minn. 1894, § 5434. See Watkins v. Landon, 67 Minn. 136, 69 N. W. 711.

[154] Barr v. Post, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Meyers v. Smith, 59 Neb. 30, 80 N. W. 273; Camp v. Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

[155] Maryland Steel Co. v. Marney, 91 Md. 360, 46 Atl. 1077; Noll v. Chattanooga Co. (Tenn.) 38 S. W. 287; Ross v. Wood, 70 N. Y. 8.

[156] Demerit v. Lyford, 27 N. H. 541; Gott v. Carr, 6 Gill & J. (Md.) 309; Smith v. Lowry, 1 Johns. Ch. (N. Y.) 320; Woodruff v. Johnston, 61 N. Y. Super. Ct. 348, 19 N. Y. Supp. 861; Cotzhausen v. Kerting (C. C.) 29 Fed. 821; Latimer v. Dean, 31 Pittsb. Leg. J. (N. S.) 192; Smedes v. Ilsley, 68 Miss. 590, 10 South. 75; Guthrie v. Doud, 33 Ill. App. 68; Barr v. Post, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Friese v. Hummel, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610.

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judgment, equity will grant relief by injunction.[157] 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.[158] 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.[159] 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.[160] Where a defendant suffers judgment to be taken against him in con-

[157] Pearce v. Olney, 20 Conn. 544; Chambers v. Robbins, 28 Conn. 552; Delaney v. Brown, 72 Vt. 344, 47 Atl. 1067; Hinckley v. Miles, 15 Hun (N. Y.) 170; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Moore v. Gamble, 9 N. J. Eq. 246; Miller v. Harrison, 32 N. J. Eq. 76; Chase v. Manhardt, 1 Bland (Md.) 333; Kent v. Ricards, 3 Md. Ch. 392; Holland v. Trotter, 22 Grat. (Va.) 136; Jarman v. Saunders, 64 N. C. 367; Markham v. Angier, 57 Ga. 43; Purviance v. Edwards, 17 Fla. 140; Brooks v. Whitson, 7 Smedes & M. (Miss.) 513; Newman v. Meek, Smedes & M. Ch. (Miss.) 331; Burnley v. Rice, 21 Tex. 171; Williams v. Fowler, 2 J. J. Marsh. (Ky.) 405; Broaddus v. Broaddus, 3 Dana (Ky.) 536; Edmondson v. Moseby's Heirs, 4 J. J. Marsh. (Ky.) 497; Newnan v. Stuart, 5 Hayw. (Tenn.) 78; Brandon v. Green, 7 Humph. (Tenn.) 130; Stone v. Lewman, 28 Ind. 97; Johnson's Adm'rs v. Unversaw, 30 Ind. 435; Wierich v. De Zoya, 2 Gilman (Ill.) 385; Beams v. Denham, 2 Scam. (Ill.) 58; How v. Mortell, 28 Ill. 479; Rogers v. Gwinn, 21 Iowa, 58; De Louis v. Meek, 2 G. 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; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891; Sanderson v. Voelcker, 51 Mo. App. 328; Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208; Heim v. Butin (Cal.) 40 Pac. 39; McLeran v. McNamara, 55 Cal. 508.

[158] Murphy v. Smith, 86 Mo. 333; Neallis v. Dicks, 72 Ind. 374; Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Rogers v. Gwinn, 21 Iowa, 58; Hibbard v. Eastman, 47 N. H. 507, 93 Am. Dec. 467; Kent v. Ricards, 3 Md. Ch. 392; Brake v. Payne, 137 Ind. 479, 37 N. E. 140.

[159] Markham v. Angier, 57 Ga. 43.

[160] Baker v. Redd, 44 Iowa, 179.

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sideration 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 plaintiff will not be permitted to exact payment in violation of the agreement.[161] 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.[162] 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.[163] 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.[164]

§ 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.[165] But in the progressive de-

[161] Moore v. Barclay, 16 Ala. 158.

[162] Cage v. Cassidy, 23 How. 109, 16 L. Ed. 430. And see Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116.

[163] Keighler v. Savage Manuf'g Co., 12 Md. 383, 71 Am. Dec. 600. See Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442.

[164] Blakesley v. Johnson, 13 Wis. 530.

[165] Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Smyth v. Balch, 40

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velopment of the law, this harsh and inequitable rule has fallen into desuetude. It has been abandoned by the English courts.[166] 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.[167] 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.[168] 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.[169]

N. H. 363; Hoffmire v. Hoffmire, 3 Edw. Ch. (N. Y.) 174; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561. See 1 Salk. 86.

[166] Bayley v. Buckland, L. R. 1 Exch. 1; Robson v. Eaton, 1 Term R. 62; Hubbart v. Phillips, 13 Mees. & W. 702.

[167] United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; De Louis v. Meek, 2 G. Greene (Iowa) 55, 50 Am. Dec. 491; Critchfield v. Porter, 3 Ohio, 518; Allen v. Stone, 10 Barb. (N. Y.) 547; Jones v. Williamson, 5 Cold. (Tenn.) 371; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 424; Gifford v. Thorn, 9 N. J. Eq. 702; Cassidy v. Automatic Time Stamp Co., 185 Ill. 431, 56 N. E. 1116; Handley v. Jackson, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; Kaufmann v. Drexel, 56 Neb. 229, 76 N. W. 559; Hollinger v. Reeme, 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402; Smith v. Johnson, 44 W. Va. 278, 29 S. E. 509. 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."

[168] Budd v. Gamble, 13 Fla. 265; Harris v. Gwin, 18 Miss. 563. Compare Mills v. Scott (C. C.) 43 Fed. 452.

[169] Smyth v. Balch, 40 N. H. 363; Robson v. Eaton, 1 Term R. 62.

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§ 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.[170] The fault is in such cases attributed 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.[171] 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.[172] Nor is it an adequate ground for relief that the counsel neglected to assign errors on an appeal in the case.[173] In a case in California it appeared that the defendant's attorney on the trial objected to the introduction of certain testimony, and the

[170] Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Village of Celina v. Eastport Sav. Bank, 15 C. C. A. 495, 68 Fed. 401; Trustees of Amherst College v. Allen, 165 Mass. 178, 42 N. E. 570; Scroggin v. Hammett Grocer Co., 66 Ark. 183, 49 S. W. 820; Funk v. Kansas Manuf'g Co., 53 Neb. 450, 73 N. W. 931; Sasser v. Olliff, 91 Ga. 84, 16 S. E. 312; Wynn v. Wilson, 1 Hemp. 698, Fed. Cas. No. 18,116; Rogers v. Parker, 1 Hughes, 148, Fed. Cas. No. 12,018; Warner v. Conant, 24 Vt. 351, 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. Marsh. (Ky.) 470; Morton's Ex'rs v. Nunnelly, 3 Hayw. (Tenn.) 210; Chester v. Apperson, 4 Heisk. (Tenn.) 639; Graham v. Roberts, 1 Head. (Tenn.) 56; Burton v. Hynson, 14 Ark. 32; White v. Bank of United States, 6 Ohio, 529; Winchester v. Grosvenor, 48 Ill. 517; Dinet v. Eigenmann, 96 Ill. 39; Kern v. Strausberger, 71 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 & Trust Co. v. Walworth County Bank, 23 Wis. 249; Boston v. Haynes, 33 Cal. 31; Quinn v. Wetherbee, 41 Cal. 247.

[171] Sharp v. Moffitt, 94 Ind. 240; Bardonski v. Bardonski, 144 Ill. 284, 33 N. E. 39; Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 31 L. R. A. 33, 53 Am. St. Rep. 437; Fears v. Riley, 148 Mo. 49, 49 S. W. 836.

[172] Jamison v. May, 13 Ark. 600.

[173] Miller v. Bernecker, 46 Mo. 194; Dinet v. Eigenmann, 96 Ill. 39.

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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.[174] 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 relief.[175] 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.[176]

§ 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.[177] And

174 Quinn v. Wetherbee, 41 Cal. 247.

175 Click v. Gillespie, 4 Hayw. (Tenn.) 4.

176 Sharp v. Mayor, etc., of City of New York, 31 Barb. 578.

177 Myers v. Daniels, 59 N. C. 1; Morgan v. Scott, Minor (Ala.) 81, 12 Am. Dec. 35; Brooks v. Harrison, 2 Ala. 209; Secor v. Woodward, 8 Ala. 500; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Stubbs v. Leavitt, 30 Ala. 352; Robinson v. Reid's Ex'r, 50 Ala. 69; Dunklin v. Wilson, 64 Ala. 162; Southern Ex. Co. v. Craft, 43 Miss. 508; McFaddin v. Spencer, 18 Tex. 440; Wofford v. Booker, 10 Tex. Civ. App. 171, 30 S. W. 67; Jennings v. Shiner (Tex. Civ. App.) 43 S. W. 276; Tucker v. Williams (Tex. Civ. App.) 56 S. W. 585; Walker

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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 read-judication of the question in an action to restrain execution of the judgment.[178] 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.[179] 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,[180] or that he erroneously supposed the suit was intended to be against another person.[181] 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.[182] 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.[183] Applications of this character are most commonly made in cases where, out of several defend-

v. Wynne, 3 Yerg. (Tenn.) 62; Ingle v. McCurry, 1 Heisk. (Tenn.) 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; Jamison v. Weaver, 84 Iowa, 611, 51 N. W. 65; Iowa Union Tel. Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122; United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571; Cobbey v. Wright, 34 Neb. 771, 52 N. W. 713; White v. Espey, 21 Or. 328, 28 Pac. 71; Roberson v. Crow (Ind. T.) 53 S. W. 534; Campbell v. Edwards, 1 Mo. 324; San Juan & St. L. Mining & Smelting Co. v. Finch, 6 Colo. 214; Martin v. Parsons, 49 Cal. 94; Jeffery v. Fitch, 46 Conn. 601. Per contra, Armsworthy v. Cheshire, 17 N. C. 234, 34 Am. Dec. 273.

178 State Ins. Co. v. Waterhouse (Iowa), 43 N. W. 611.

179 Jones v. Commercial Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419.

180 Cullum v. Casey, 1 Ala. 351; Dewees v. Richardson, 1 A. K. Marsh. (Ky.) 312.

181 Higgins v. Bullock, 73 Ill. 205.

182 Stein v. Burden, 30 Ala. 270.

183 Vastine v. Bast, 41 Mo. 493. Compare Grass v. Hess, 37 Ind. 193.

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ants, 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.[184] So a judgment confessed by one partner against the firm, without the consent of the others, will be enjoined.[185] 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.[186] 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.[187] So, where a suit between citizens of the same state has been brought in a federal court, by collusion or otherwise, on the ground of defendant's alienage, and a default decree entered, such proceedings are wholly without jurisdiction and void, and the execution of the decree may be enjoined.[188] The same remedy may also be sought where the failure of jurisdiction was in respect to the subject-matter of the controversy or the amount involved.[189] But in any case the complainant has the burden of proving affirmatively the facts constituting want of jurisdiction.[190] And he must show that he has not been negligent in failing to avail himself of such remedies as the law would afford him.[191] Although the general consensus of judicial opinion 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

184 Gerrish v. Seaton, 73 Iowa, 15, 34 N. W. 485.

185 Christy v. Sherman, 10 Iowa, 535.

186 Mason v. Miles, 63 N. C. 564.

187 Chester v. Miller, 13 Cal. 558.

188 Broadis v. Broadis (C. C.) 86 Fed. 951.

189 See Hill v. Gordon (C. C.) 45 Fed. 276; Donham v. Springfield Hardware Co., 10 C. C. A. 294, 62 Fed. 110.

190 Eichoff v. Eichoff, 107 Cal. 42, 40 Pac. 24, 48 Am. St. Rep. 110; Westbrook v. Thompson, 104 Tenn. 363, 58 S. W. 223.

191 Hamblin v. Knight, 81 Tex. 351, 16 S. W. 1082, 26 Am. St. Rep. 818.

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or otherwise, in the original cause.[192] Probably the true note of distinction is struck in the cases which rule that equity will not enjoin the judgment unless it is 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.[193]

§ 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.[194] 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 de-

[192] Fullan v. Hooper, 66 How. Prac. 75; Morris v. Morris, 76 Ga. 733; Partin v. Luterloh, 59 N. C. 341.

[193] Stokes v. Knarr, 11 Wis. 389; Gerrish v. Hunt, 66 Iowa, 682, 24 N. W. 274; Off v. Title G., A. & T. Co., 87 Ill. App. 472; Newman v. Taylor, 69 Miss. 670, 13 South. 831; Fickes v. Vick, 50 Neb. 401, 69 N. W. 951; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123.

[194] Miller v. Gorman, 38 Pa. 309; Brooks v. Harrison, 2 Ala. 209; Crafts v. Dexter, 8 Ala. 767, 42 Am. Dec. 666; Walker v. Gilbert, Freem. Ch. (Miss.) 85; Jones v. Commercial Bank, 5 How. (Miss.) 43, 35 Am. Dec. 419; Ridgeway v. Bank of Tenn., 11 Humph. (Tenn.) 522; Ingle v. McCurry, 1 Heisk. (Tenn.) 26; Bell v. Williams, 1 Head (Tenn.) 229; Estis v. Patton, 3 Yerg. (Tenn.) 382; Ryan v. Boyd, 33 Ark. 778; Owens v. Ranstead, 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; Dowell v. Goodwin, 22 R. I. 287, 47 Atl. 693, 51 L. R. A. 873, 84 Am. St. Rep. 842; Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49; Huntington v. Crouter, 33 Or. 408, 54 Pac. 208, 72 Am. St. Rep. 726; DuBois v. Clark, 12 Colo. App. 220, 55 Pac. 750. But equity will not enjoin the enforcement of a judgment merely because the return on the summons is defective, if it appears that the summons was properly served, and defendant had ample opportunity to defend. Peoria, D. & E. Ry. Co. v. Duggan, 32 Ill. App. 351; McFaddin v. Garrett, 49 La. Ann. 1319, 22 South. 358.

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cree 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.[195] 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 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.[196] 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.[197] 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;[198] others that it should be refused.[199] But at all events, before equity

[195] Martin v. Parsons, 49 Cal. 95.

[196] Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Johnson v. Jones, 2 Neb. 126; Taylor v. Lewis, 2 J. J. Marsh. (Ky.) 400, 19 Am. Dec. 135; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Gardner v. Jenkins, 14 Md. 58; Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

[197] In Walker v. Robbins, 14 How. 584, 14 L. Ed. 552, 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."

[198] Landrum v. Farmer, 7 Bush (Ky.) 46; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; McNairy v. Eastland, 10 Yerg. (Tenn.) 309; Connell v. Stelson, 33 Iowa, 147; Hernandez v. James, 23 La. Ann. 483; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

[199] Bibend v. Kreutz, 20 Cal. 109; Sanchez v. Carriaga, 31 Cal. 170; Comstock

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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.[200]

§ 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 nature, 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.[201] In

v. Clemens, 19 Cal. 77; Chambers v. King Wrought Iron Bridge Manufactory, 16 Kan. 270; Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.

[200] 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 Smedes & M. (Miss.) 563; Fowler v. Lee, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

[201] Hungerford v. Sigerson, 20 How. 156; Wynn v. Wilson, 1 Hempst. 698, Fed. Cas. No. 18,116; New Orleans v. Morris, 3 Woods, 103, Fed. Cas. No. 10,182; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Le Guen v. Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; Foster v. Wood, 6 Johns. Ch. (N. Y.) 86; Mills v. Van Voorhis, 10 Abb. Prac. (N. Y.) 152; Ingalls v. Merchants' Nat. Bank, 51 App. Div. 305, 64 N. Y. Supp. 911; 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's Adm'r v. Kinney, 13 Grat. (Va.) 511; Smith v. McLain, 11 W. Va. 654; Jackson v. Patrick, 10 S. C. 207; Robbins v. Mount, 3 Ga. 74; Pollock v. Gilbert, 16 Ga. 398; Vaughn v. Fuller, 23 Ga. 366; Neal v. Henderson, 72 Ga. 209; Bailey v. State Sav. Bank, 97 Ga. 398, 24 S. E. 40; Starnes v. Mutual Loan & Banking Co., 97 Ga. 400, 24 S. E. 138; Griffin v. Smyly, 105 Ga. 475, 30 S. E. 416; Foster v. State Bank, 17 Ala. 672; Thomas v. Phillips, 4 Smedes & M. (Miss.) 358; Williams v. Jones, 10 Smedes & M. (Miss.) 108; Semple v. McGatagan, 10 Smedes & M. (Miss.) 98; Scroggins v. Howorth, 23 Miss. 514; Shipp 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; Cowan v. Price, 1 Bibb (Ky.) 173; Paynter v. Evans, 7 B. Mon. (Ky.) 420; Galbraith v. Martin, 5 Humph. (Tenn.) 50; Brandon v. Green, 7 Humph. (Tenn.) 130;

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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." [202] 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 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.[203] 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.[204] Nor because the promissory note upon which judgment was rendered was without consideration.[205] 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.[206] And if the de-

Ohio & W. Mortg. & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040; Kimball v. Hutchison, 61 Kan. 191, 59 Pac. 275; 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's Adm'r v. Ball, 7 Ark. 520; Raburn v. Shortridge, 2 Blackf. (Ind.) 480; Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; Smith v. Powell, 50 Ill. 21; Higgins v. Bullock, 73 Ill. 205; Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328; Newman v. Schueck, 58 Ill. App. 328; Lewis v. Firemen's Ins. Co., 67 Ill. App. 195; Spraker v. Bartlett, 73 Ill. App. 522; Johnson v. Lyon, 14 Iowa, 431; Faulkner v. Campbell, Morris (Iowa) 148; Collier v. Easton, 2 Mo. 146; Kelly v. Hurt, 74 Mo. 561; Kelleher v. Boden, 55 Mich. 295, 21 N. W. 346; Sargeant v. Bigelow, 24 Minn. 370; Clark v. Lee, 58 Minn. 410, 59 N. W. 970; Snyder v. Vannoy, 1 Or. 344; Marsh v. Edgerton, 1 Chand. (Wis.) 198, 2 Pin. 230; Phelps v. Peabody, 7 Cal. 50; Agard v. Valencia, 39 Cal. 292.

202 Braden v. Reitzenberger, 18 W. Va. 286; Nevins v. McKee, 61 Tex. 412.

203 Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221.

204 Deaver v. Erwin, 42 N. C. 250; Harnsbarger's Adm'r v. Kinney, 13 Grat. (Va.) 511; Sullivan v. Shell, 36 S. C. 578, 15 S. E. 722, 31 Am. St. Rep. 894.

205 Garrison v. Cobb, 106 Ind. 245, 6 N. E. 332.

206 Lebanon Mut. Ins. Co.'s Appeal (Pa.) 1 Atl. 559.

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fendant 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.[207] 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.[208]

§ 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.[209] 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.[210] There are also precedents for the intervention of equity to annul gaming

[207] Bateman v. Willoe, 1 Schoales & L. 204; Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362; Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88; Hendrickson v. Hinckley, 17 How. 443, 15 L. Ed. 123; Forsythe v. McCreight, 10 Rich. Eq. (S. C.) 308; More v. Bagley, Breese, 94, 12 Am. Dec. 144; Yongue v. Billups, 23 Miss. 407; Briesch v. McCauley, 7 Gill (Md.) 189; Brown v. Wilson, 56 Ga. 534; White v. Cabal's Adm'r, 2 Swan (Tenn.) 550; Simpson v. Hart, 1 Johns. Ch. 97; Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604; Agard v. Valencia, 39 Cal. 292; Foster v. State Bank, 17 Ala. 672; Snyder v. Vannoy, 1 Or. 344; Sumner v. Whitley, 1 Mo. 708; Matson v. Field, 10 Mo. 100.

[208] Clute v. Potter, 37 Barb. (N. Y.) 199.

[209] Frierson v. Moody, 3 Humph. (Tenn.) 561; Greer v. Hale, 95 Va. 533, 28 S. E. 873, 64 Am. St. Rep. 814.

[210] Lucas v. Spencer, 27 Ill. 15; Chinn v. Mitchell, 2 Metc. (Ky.) 92; Brown v. Toell's Adm'r, 5 Rand. (Va.) 543, 16 Am. Dec. 759.

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contracts, though the defense could have been interposed at law.[211] 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.[212] 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.[213] But the supreme federal court holds, and with 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." [214]

[211] Woodson v. Barrett, 2 Hen. & M. (Va.) 86, 3 Am. Dec. 612; Skipwith v. Strother, 3 Rand. (Va.) 214; Clay v. Fry, 3 Bibb. (Ky.) 248, 6 Am. Dec. 654. Compare Owens v. Van Winkle Gin & Machinery Co., 96 Ga. 408, 23 S. E. 416, 31 L. R. A. 767.

[212] Rev. St. Ill. c. 38, § 135; West v. Carter, 129 Ill. 249, 21 N. E. 782; Mallett v. Butcher, 41 Ill. 382; Lucas v. Nichols, 66 Ill. 41; Harris v. McDonald, 79 Ill. App. 638. See also Lucas v. Waul, 12 Smedes & M. (Miss.) 157.

[213] Given's Appeal, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. And see Heath v. Cobb, 17 N. C. 187.

[214] Sample v. Barnes, 14 How. 70, 14 L. Ed. 330; Creath v. Sims, 5 How. 192, 12 L. Ed. 110.

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§ 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 prevented; mistake, surprise, or accident; and justifiable ignorance of the facts constituting a defense.[215] 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.[216] Nor can equity enjoin a judgment where the only reason alleged for the failure of the defendant to avail himself of a legal defense is an erroneous ruling of the law court excluding such defense.[217] 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.[218] 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 exe-

[215] A good statement of the rule is that, to entitle a party to relief in equity against a judgment on account of the loss of his defense, it must be shown that it was occasioned by the fraud or fault of the adverse party, or by his own mistake, unmixed with any negligence or fault of himself, his counsel, or agents. Telford v. Brinkerhoff, 163 Ill. 439, 45 N. E. 156.

[216] Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Brown v. Wilson, 56 Ga. 534; Shricker v. Field, 9 Iowa, 367.

[217] Griswold v. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; Edmanson v. Best, 6 C. C. A. 471, 57 Fed. 531; Ingwersen v. Buchholz, 88 Ill. App. 73.

[218] Kendall v. Winsor, 6 R. I. 453. A judgment in a suit by an administrator cannot be enjoined merely because, under the statute, the defendants were not competent to testify in the suit in which the judgment was entered, and there was no other evidence to sustain their defense. Williams v. Carr, 4 Colo. App. 368, 36 Pac. 646.

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cutes a deed of trust to secure its payment, equity will not enjoin the execution of the trust on account of such defense to the original note.[219] 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."[220] 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.[221]

§ 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.[222] 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

219 Fanning v. Farmers' & Merchants' Bank, 8 Smedes & M. (Miss.) 139.

220 Rice v. R. R. Bank, 7 Humph. (Tenn.) 39.

221 Turner v. Davis, 7 Leigh (Va.) 227, 30 Am. Dec. 502.

222 Bibend v. Kreutz, 20 Cal. 109; Chase v. Manhardt, 1 Bland (Md.) 350; Ford v. Ford, Walk. (Miss.) 505, 12 Am. Dec. 587; Drew v. Clarke, Cooke (Tenn.) 374, 5 Am. Dec. 698; Partridge v. Harrow, 27 Iowa, 96, 99 Am. Dec. 643; Wilson v. Boughton, 50 Mo. 17; Kohn v. Lovett, 43 Ga. 180; Lumpkin v. Williams, 1 Tex. Civ. App. 214, 21 S. W. 967; Clark v. Sayers, 48 W. Va. 33, 35 S. E. 882.

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against C.[223] 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, although it was a mutual mistake of both parties to the suit.[224] Nor that the defendant mistook his rights and so failed to make a defense which it was competent for him to present at law.[225] 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.[226] Nor because he misunderstood the nature of the action and because those interested in the matter were out of the county.[227] 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.[228] 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.[229]

§ 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

223 Bird v. Chaffin, 21 N. C. 55.

224 Richmond & P. R. Co. v. Shippen, 2 Pat. & H. (Va.) 327; Meem v. Rucker, 10 Grat. (Va.) 506; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548, 77 N. W. 1078.

225 Dickerson v. Board of Com'rs of Pipley Co., 6 Ind. 128, 63 Am. Dec. 373; Snider v. Rinehart, 20 Colo. 448, 39 Pac. 408.

226 Meem v. Rucker, 10 Grat. 506; English v. Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270.

227 State Bank v. Stanton, 2 Gilman (Ill.) 352.

228 Graham v. Roberts, 1 Head (Tenn.) 56.

229 Simmons v. Martin, 53 Ga. 620; Slappey v. Hodge, 99 Ala. 300, 13 South. 256.

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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 and defrauded out of their defense at law.[230] 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.[231] And a party seeking relief in equity on this ground must show that the surprise was not in consequence of his own negligence.[232] 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.[233] 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.[234] 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.[235]

§ 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.[236] 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.[237] It may be stated that equity is guided by

230 Post v. Boardman, 10 Paige, 580.

231 Fowler v. Roe, 11 N. J. Eq. 367; Shannon v. Reese, 38 Ala. 586.

232 Lawson v. Bettison, 12 Ark. 401.

233 Williams v. Lockwood, 1 Clarke, Ch. (N. Y.) 172.

234 Gibson v. Watts, 1 McCord, Eq. (S. C.) 490; Hall v. Griffin, 119 Ala. 214, 24 South. 27.

235 Farmers' Loan & Trust Co. v. Walworth Co. Bank, 23 Wis. 249.

236 Kersey v. Rash, 3 Del. Ch. 321; Radzuweit v. Watkins, 53 Neb. 412, 73 N. W. 679; Herbert v. Herbert, 49 N. J. Eq. 70, 22 Atl. 789.

237 Supra, §§ 337–340.

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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, or of his near relative, or the pendency of another suit against him requiring his attendance, will not authorize the interference of equity.[238] 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.[239] 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.[240] 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.[241] 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;[242] but it is no ground for an injunction that defendant's counsel was absent,

[238] Pharr v. Reynolds, 3 Ala. 521. See Hord v. Dishman, 5 Call (Va.) 279; Wood v. Lenox, 5 Tex. Civ. App. 318, 23 S. W. 812, Roller v. Ried (Tex.) 24 S. W. 655; Hopper v Davies, 70 Ill. App. 682; Owen v. Gerson, 119 Ala. 217, 24 South. 413.

[239] English v. Savage, 14 Ala. 342; Brooks v. Whitson, 15 Miss. 513.

[240] George v. Tutt, 36 Mo. 141. See Nye v. Sochor, 92 Wis. 40, 65 N. W. 854, 53 Am. St. Rep. 896.

[241] McCollum v. Prewitt, Ala. Sel. Cas. 498; Cole v. Hundley, 16 Miss. 473.

[242] McBroom v. Sommerville, 2 Stew. (Ala.) 515. See Sasser v. Olliff, 91 Ga. 84, 16 S. E. 312.

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when it appears that the defendant, if present at the trial, might have employed other counsel equally competent.[243] 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.[244] 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 could not be made;[245] 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.[246] 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.[247] 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.[248]

§ 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.[249] For example, where

[243] Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Mock v. Cundiff, 6 Port. (Ala.) 24.

[244] Powell v. Stewart, 17 Ala. 719.

[245] Vathir v. Zane, 6 Grat. (Va.) 246.

[246] Rogers v. Cross, 3 Chand. 34.

[247] Mack v. Doty, Har. (Mich.) 366.

[248] Stone v. Moody, 6 Yerg. (Tenn.) 31.

[249] Davis v. Tileston, 6 How. 114, 12 L. Ed. 366; Garrett v. Lynch, 45 Ala. 211; Wales v. Bank of Michigan, Har. (Mich.) 308; Hubbard v. Hobson, Breese (Ill.) 190; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 63; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Iglehart v. Lee, 4 Md. Ch. 514; Baltzell v. Randolph, 9 Fla. 366; Meek v. Howard, 10 Smedes & M. (Miss.) 502; Brown v. Luehrs, 79 Ill. 575; Wells, Fargo & Co. v. Wall, 1 Or. 295; Ludington v.

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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.[250] 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.[251] But it is an important corollary 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.[252] 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.[253] "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." [254] 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.[255] 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,

Handley, 7 W. Va. 269; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Rust v. Ware, 6 Grat. (Va.) 50, 52 Am. Dec. 100.

250 Crisman v. Beasley, 1 Smedes & M. Ch. (Miss.) 561.

251 Armistead v. Ward, 2 Pat. & H. (Va.) 504.

252 Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508; Avery v. U. S., 12 Wall. 304, 20 L. Ed. 405; Marine Ins. Co. v. Hodgson, 7 Cranch, 333, 3 L. Ed. 362; Metropolitan El. Ry. Co. v. Johnston, 158 N. Y. 739, 53 N. E. 1128; Devlin v. Boyd, 61 Hun, 625, 16 N. Y. Supp. 37; McCollum v. Prewitt, 37 Ala. 573; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Leggett v. Morris, 6 Smedes & M. (Miss.) 723; Slack v. Wood, 9 Grat. (Va.) 40; Taliaferro's Adm'r v. Branch Bank, 23 Ala. 755; Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; McCown v. Macklin's Ex'r, 7 Bush (Ky.) 308; Thompson v. Berry, 3 Johns. Ch. (N. Y.) 395; Tutt v. Ferguson, 13 Kan. 45; Garrett v. Lynch, 45 Ala. 204.

253 Carolus v. Koch, 72 Mo. 645.

254 Stinnett v. Branch Bank, 9 Ala. 120.

255 Shelmire v. Thompson, 2 Blackf. (Ind.) 270.

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is not sufficient to authorize an injunction against the judgment.[256] 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.[257]

§ 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.[258] This principle was once 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." [259]

[256] Falls v. Robinson, 5 Md. 365.

[257] McKean v. Read, 6 Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318.

[258] Norton v. Woods, 5 Paige (N. Y.) 249; Bartholomew v. Yaw, 9 Paige (N. Y.) 165; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Albritton v. Bird, R. M. Charlt. (Ga.) 93; Barker v. Elkins, 1 Johns. Ch. (N. Y.) 465. See also Norris v. Hume, 2 Leigh (Va.) 334, 21 Am. Dec. 631; Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508; Green v. Massie, 21 Grat. (Va.) 358.

[259] Norton v. Woods, 5 Paige (N. Y.) 249. An exactly opposite view was taken in Deputy v. Tobias, 1 Blackf. (Ind.) 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."

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§ 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.[260] 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 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.[261] 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.[262] 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.[263] It remains to be stated that the statutory provisions,

[260] Alley v. Ledbetter, 16 N. C. 449; Levan v. Patton, 2 Heisk. (Tenn.) 108; Cox v. Mobile & G. R. Co., 44 Ala. 611; McGehee v. Gold, 68 Ill. 215; Rust v. Ware, 6 Grat. (Va.) 50, 52 Am. Dec. 100; Iglehart v. Lee, 4 Md. Ch. 514; Foote v. Silsby, 1 Blatchf. 545, Fed. Cas. No. 4,918; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Mills v. Van Voorhis, 10 Abb. Prac. (N. Y.) 152; Melick v. First Nat. Bank, 52 Iowa, 94, 2 N. W. 1021; Wilson v. Wilson, 113 Ala. 670, 21 South. 67. Per contra, Gusman v. De Poret, 33 La. Ann. 333.

[261] Taylor v. Bradshaw, 6 T. B. Mon. (Ky.) 145, 17 Am. Dec. 132; Glover v. Hedges, 1 N. J. Eq. 113; McCaulis v. Duval, 69 Ga. 744.

[262] Miller v. McGuire, 1 Morris (Iowa) 150.

[263] Wynne v. Newman's Adm'r, 75 Va. 816; Willems v. Willems, 72 Ill. App. 200; Meyers v. Smith, 59 Neb. 30, 80 N. W. 273. The evidence must be

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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.[264]

§ 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.[265] That he omitted to defend the suit in consequence of being misled by the clerk of the court as to its character, is considered as inexcusable negligence.[266] 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.[267] 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 judg-

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.

[264] Horn v. Queen, 4 Neb. 108; Colyer v. Langford's Adm'rs, 1 A. K. Marsh. (Ky.) 237; Duncan v. Lyon, 3 Johns. Ch. 356, 8 Am. Dec. 513; Baltzell v. Randolph, 9 Fla. 366. See Snider v. Rinehart, 20 Colo. 448, 39 Pac. 408.

[265] Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Yancey v. Downer, 5 Litt. (Ky.) 8, 15 Am. Dec. 35; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Briggs v. Smith, 5 R. I. 213; McVicar v. Filer, 31 Mich. 304; Gardiner v. Van Alstyne, 22 App. Div. 579, 48 N. Y. Supp. 114; Berry v. Burghard, 111 Ga. 117, 36 S. E. 459; Barr v. Post, 59 Neb. 361, 80 N. W. 1041, 80 Am. St. Rep. 680; Ohio & W. Mortgage & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040; Mason v. Jones, 7 D. C. 247; Ivey v. McConnell (Tex. Civ. App.) 21 S. W. 403; Roots v. Cohen (Miss.) 12 South. 593; Hollinger v. Reeme, 138 Ind. 363, 36 N. E. 1114, 24 L. R. A. 46, 46 Am. St. Rep. 402.

[266] Hanna v. Morrow, 43 Ark. 107.

[267] Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389.

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ment.[268] 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.[269]

It is not only in making his defense at law that a party is required to exercise diligence. Though he may have a good excuse for failing to set up such defense at the proper time, still equity will refuse to give him an injunction against the judgment if he negligently omitted, having full knowledge of the facts, to apply in due season for such remedies as were open to him by appeal, motion for a new trial, or motion to vacate the judgment.[270] And aside from this, chancery will be slow to extend assistance to one who has been so dilatory or slothful in seeking its aid as to be chargeable with laches.[271]

§ 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 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.[272] And

[268] Stanard v. Rogers, 4 Hen. & M. (Va.) 438; Hill v. Bowyer, 18 Grat. (Va.) 364; Sanders v. Fisher, 11 Ala. 812.

[269] Rowland v. Jones, 2 Heisk. (Tenn.) 321.

[270] Heller v. Dyerville Manuf'g Co., 116 Cal. 127, 47 Pac. 1016; Perkins v. St. Louis, K. C. & C. R. Co., 143 Mo. 513, 45 S. W. 260; Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

[271] Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. Ed. 1103; Furnald v. Glenn, 12 C. C. A. 27, 64 Fed. 49; Cheney v. Hovey, 56 Kan. 637, 44 Pac. 605. See Raisin Fertilizer Co. v. McKenna, 114 Ala. 274, 21 South. 816.

[272] Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216; Hendrickson v. Hinckley, 17 How. 443, 15 L. Ed. 123; Ferriday v. Selcer, Freem. Ch. (Miss.) 258; Calloway v. McElroy, 3 Ala. 406; Clifton v. Livor, 24 Ga. 91; King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415; Vennum v. Davis, 35 Ill. 568; Dunham v. Downer, 31 Vt. 249; Kersey v. Rash, 3 Del. Ch. 321; Newton v. Field, 16 Ark. 216; Stevens v. Hertzler, 114 Ala. 563, 22 South. 121; Vanscoy v. Stinchcomb, 29

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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.[273] 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.[274] 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.[275]

§ 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 defense, and if he omits to do so at law, he may then have recourse to equity for relief against the judgment.[276] Thus, in some of the states, equity will relieve against a judgment at law, by default, for

W. Va. 263, 11 S. E. 927; Gillett v. Sullivan, 127 Ind. 327, 26 N. E. 827; Hawkins v. Harding, 37 Ill. App. 564. Compare Gentle v. Atlas Savings & Loan Ass'n, 105 Ga. 406, 31 S. E. 544.

[273] Cornelius v. Thomas, 1 Tenn. Ch. 283; Winchester v. Gleaves, 3 Hayw. (Tenn.) 213.

[274] Dorsey v. Reese, 14 B. Mon. (Ky.) 157.

[275] Kelly v. Hurt, 74 Mo. 561; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Savage v. Allen, 54 N. Y. 458.

[276] Harlan v. Wingate's Adm'r, 2 J. J. Marsh. (Ky.) 138; Dorsey v. Reese, 14 B. Mon. (Ky.) 157; Morrison's Ex'r v. Hart, 2 Bibb (Ky.) 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. (Tenn.) 50.

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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.[277] 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 occurred through fraud or accident.[278] 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." [279] 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.[280]

§ 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 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.[281] But payment made after the institution of suit, where it cannot be brought

[277] Clay v. Fry, 3 Bibb (Ky.) 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.

[278] Haughey v. Strang, 2 Port. (Ala.) 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's Ex'r v. Hart, 2 Bibb (Ky.) 4, 4 Am. Dec. 663; Dunham v. Downer, 31 Vt. 249; Farmers' Fire Ins. Co. v. Johnston, 113 Mich. 426, 71 N. W. 1074.

[279] Le Guen v. Gouverneur, 1 Johns. Cas. 505, 1 Am. Dec. 121.

[280] King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415.

[281] Foster v. Wood, 6 Johns. Ch. (N. Y.) 90; Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 356, 8 Am. Dec. 513.

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to the notice of the court before judgment, under the local practice, is good ground for enjoining the judgment.[282] 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.[283] 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.[284] 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.[285]

§ 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.[286] 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-

[282] Humphreys v. Leggett, 9 How. 297, 13 L. Ed. 145; Florat v. Handy, 35 La. Ann. 816.

[283] Bowen v. Clark, 46 Ind. 405; Shaw v. Dwight, 16 Barb. 536; Mallory v. Norton, 21 Barb. 424; Texas Land & Mortg. Co. v. Worsham, 5 Tex. Civ. App. 245, 23 S. W. 938; Smith v. Taylor, 78 Mo. App. 630; Kallander v. Neidhold, 98 Mich. 517, 57 N. W. 571; Johnson v. Huber, 106 Wis. 282, 82 N. W. 137; Phillips v. Kuhn, 35 Neb. 187, 52 N. W. 881; Marks v. Willis, 36 Or. 1, 58 Pac. 526, 78 Am. St. Rep. 752; Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752.

[284] McRae v. Davis, 58 N. C. 140; Perrine v. Carlisle, 19 Ala. 686; Lansing v. Eddy, 1 Johns. Ch. (N. Y.) 49; Robinson v. McDowell, 125 N. C. 337, 34 S. E. 550; Rollins v. National Casket Co., 40 W. Va. 590, 21 S. E. 722.

[285] Peatross v. McLaughlin, 6 Grat. (Va.) 64.

[286] McClellan v. Kinnaird, 6 Grat. (Va.) 352. And see also Hinrichsen v. Reinback, 27 Ill. 295; Sumner v. Whitley, 1 Mo. 708; Capehart v. Etheridge, 63 N. C. 353; Jarrett v Goodnow, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321; Dunham Lumber Co. v. Holt, 124 Ala. 181, 27 South. 556.

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ered.[287] 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.[288] 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.[289]

§ 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.[290] 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.[291] But if, on the other hand, as many decisions hold, such a status as coverture amounts to a ne-

[287] Wolcott v. Jones, 4 Allen (Mass.) 367; Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224; Twigg v. Hopkins, 85 Md. 301, 37 Atl. 24; Zinn v. Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772.

[288] Jackson v. Bell, 31 N. J. Eq. 554.

[289] Levy v. Steinbach, 43 Md. 212.

[290] See, as to married women, §§ 188–191; as to infants, §§ 193–197; and as to lunatics, § 205.

[291] See Wyman v. Hardwick, 52 Mo. App. 621; Evans v. Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606; Levystein v. O'Brien, 106 Ala. 352, 17 South. 550, 30 L. R. A. 707, 54 Am. St. Rep. 56.

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gation 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 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.[292] 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.[293]

PART III. PRACTICE ON APPLICATION TO ENJOIN JUDGMENT.

§ 393. Nature and Requisites of Bill.

A bill in equity for the vacation of a judgment, or to enjoin its enforcement, should always show that the merits of the controversy are with the complainant. If it fails to allege a good and meritorious defense to the claim on which the judgment was rendered, so that it would be inequitable and unjust to allow the enforcement of the judgment as it stands, the bill states no cause of action and must be dismissed.[294] Nor is it enough to aver that complainant has stat-

[292] Griffith v. Clarke, 18 Md. 457; Medart v. Fasnatch, 15 La. Ann. 621

[293] Peters v. League, 13 Md. 58, 71 Am. Dec. 622.

[294] White v. Crow, 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; Massachusetts Benefit Life Ass'n v. Lohmiller, 20 C. C. A. 274, 74 Fed. 23; Home Life Ins. Co. v. Caulk, 86 Md. 385, 38 Atl. 901; Anderson v. Oldham, 82 Tex. 228, 18 S. W. 557; Rotan's Heirs v. Springer, 52 Ark. 80, 12 S. W. 156; Buntain v. Blackburn, 27 Ill. 406; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123; Tompkins v. Lang, 74 Ill. App. 500; Ableman v. Roth, 12 Wis. 81; Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131; Janes v. Howell, 37 Neb. 320, 55 N. W.

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ed the facts to his attorney and is advised by him that he has a good defense; he must allege explicitly that he has such a defense, and set out the facts constituting it.[295] Even a void judgment will not be set aside in equity where no meritorious defense to the action is shown, if the invalidity is not apparent on its face.[296] So, on a bill in equity to vacate a judgment and obtain a new trial, the relief will be denied where it appears that the evidence on a new trial would be in direct conflict, and might properly result in a second judgment identical with the first.[297]

Again, the bill must show, by sufficient averments, that there is some adequate ground for equity to interfere with the judgment at law, such as fraud, accident, or mistake, want of jurisdiction, excusable failure of the complainant to present his defense at law, or the like, and it must set forth the facts constituting the fraud or other ground on which he means to rely.[298] Thus, where it is alleged that the adverse party practised fraud in obtaining the judgment, the facts showing such fraud must be stated in a plain and concise manner, as in other cases, mere knowledge of certain facts not being sufficient; the fraudulent acts and proceedings of such party, designed and practised for the purpose of securing an unfair and unjust judgment, must be clearly shown.[299] But a petition to set aside

965, 40 Am. St. Rep. 494; Eldred v. White, 102 Cal. 600, 36 Pac. 944. A joint complaint to review a judgment for newly-discovered matter must state a cause of action as to all the complainants. Warne v. Irwin, 153 Ind. 20, 53 N. E. 926. The rule above stated does not apply where the plaintiff himself is seeking affirmatively to enforce the judgment. Campbell Printing Press & Manuf'g Co. v. Marder, Luse & Co., 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573.

[295] Eldred v. White, 102 Cal. 600, 36 Pac. 944.

[296] Pilger v. Torrence, 42 Neb. 903, 61 N. W. 99.

[297] Roots v. Cohen (Miss.) 12 South. 593.

[298] Willems v. Willems, 72 Ill. App. 200; Young v. Sigler (C. C.) 48 Fed. 182; Handley v. Jackson, 31 Or. 552, 50 Pac. 915, 65 Am. St. Rep. 839; Camp v. Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; McDonald v. Pearson, 114 Ala. 630, 21 South. 534. A bill to enjoin the enforcement of a judgment rendered by a court of competent jurisdiction must state facts sufficient to overcome the presumption that the judgment is valid. Davis v. Clements, 148 Ind. 605, 47 N. E. 1056, 62 Am. St. Rep. 539.

[299] Ohio & W. Mortgage & Trust Co. v. Carter, 9 Kan. App. 621, 58 Pac. 1040. A bill attacking a judgment as fraudulent by reason of the judge's having been counsel before the trial should state on whose behalf he so acted.

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a judgment obtained by fraud, which sets out the facts showing the fraud, is sufficient though it lacks a specific allegation of fraud.[300] Where the ground of attack on the judgment is want of jurisdiction, a petition alleging that there was no service of process on the judgment-defendant, that he did not employ counsel or authorize any one to retain counsel to represent him in the suit, and that he knew nothing about the suit or the judgment rendered therein, is good on demurrer.[301]

In the next place, the complainant in such a suit must exonerate himself; that is, he must introduce proper averments to show that the judgment against him was not attributable to his own negligence or lack of attention to the progress of the case, and that he has been diligent in seeking to make his defense, and he must set forth the facts which he relies on as showing such diligence.[302] For instance, a statement that complainant used all the diligence in his power to procure the evidence necessary to defeat the suit at law is not sufficient; the facts in regard to the diligence used must be set out, so that the court can determine whether proper diligence has been exercised.[303]

Further, the complainant must allege that he has no adequate remedy at law against the judgment, or (if the case be so) that he has unavailingly exhausted his legal remedies; or, if he failed to seek redress at law, he must show the reason for such failure and clear himself of the charge of negligence or carelessness.[304]

Finally, a bill seeking to enjoin the collection of a judgment and

and that the complainant objected to his sitting, or failed to object by reason of ignorance of the judge's disqualification. Griffith v. Griffith (Tenn.) 46 S. W. 340.

[300] Oliver v. Riley, 92 Iowa, 23, 60 N. W. 180.

[301] Graham v. East Texas Land & Imp. Co. (Tex.) 50 S. W. 579.

[302] Ratliff v. Stretch, 130 Ind. 282, 30 N. E. 30; Combs v. Hamlin Wizard Oil Co., 58 Ill. App. 123; Gulf, C. & S. F. Ry. Co. v. Henderson, 33 Tex. 70, 18 S. W. 432; Griffith v. Griffith (Tenn.) 46 S. W. 340; East Texas Land & Improvement Co. v. Graham, 24 Tex. Civ. App. 521, 60 S. W. 472; Warne v. Irwin, 153 Ind. 20, 53 N. E. 926.

[303] Brady v. Horvath, 79 Ill. App. 17.

[304] Eldred v. White, 102 Cal. 600, 36 Pac. 944; Lininger v. Glenn, 33 Neb. 187, 49 N. W. 1128; National Fertilizer Co. v. Hinson, 103 Ala. 532, 15 South. 844; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054.

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execution, which does not so identify them as to make it appear what judgment and execution are meant, and which does not limit the prayer to any particular judgment and execution, is demurrable.[305] A bill to vacate a decree for fraud may be filed without leave of court first obtained, unless that is made necessary by local statute or rule of court.[306]

§ 393a. Evidence.

In a proceeding in equity to enjoin the enforcement of a judgment at law, the presumption is in favor of the regularity and the justness of the judgment attacked, and the burden is upon the complainant to show that he is equitably entitled to be relieved from the obligation of the judgment.[307] While there is no rule as to the precise measure of proof which will justify a court of equity in opening or enjoining a judgment, it is stated that the weight of the evidence should be clearly with the party seeking relief against the judgment.[308] Or, as stated with reference to a judgment alleged to have been procured through fraud, the evidence of the fraud must be clear and convincing.[309] Where the answer is a general denial, evidence of matters occurring after the rendition of the judgment is not admissible.[310]

§ 393b. Joinder of Parties.

In a bill in equity to enjoin or set aside a judgment or decree, it is generally necessary to join as parties defendant all persons whose rights would or might be affected by the grant of the relief asked.[311] But where one of several joint judgment-debtors sues to restrain the enforcement of the judgment as against himself alone, he need not join the others as parties plaintiff.[312] Where the action is

[305] Adams v. White, 23 Fla. 352, 2 South. 774.

[306] McDonald v. Pearson, 114 Ala. 630, 21 South. 534.

[307] Tompkins v. Lang, 74 Ill. App. 500; Mutual Nat. Bank v. Moore, 104 La. 150, 29 South. 103; Adams School Tp. v. Irwin, 150 Ind. 12, 49 N. E. 806.

[308] Fisher v. Holbrook, 7 Pa. Super. Ct. 647.

[309] Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Evans v. International Trust Co. (Tenn.) 59 S. W. 373.

[310] Burnett v. Milnes, 148 Ind. 230, 46 N. E. 464.

[311] Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830.

[312] Merriman v. Walton, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50.

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brought against the sheriff or other officer holding process under the judgment, to restrain him from proceeding for its collection, it is said that the person in whose favor the judgment was rendered should be made a defendant.[313] But on the other hand, in Texas, if the suit is against the judgment-creditor, neither the justice of the peace who rendered the judgment, nor the officer who is about to levy execution under it, is a proper party, notice to them of the injunction being sufficient.[314]

§ 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.[315] 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.[316] An order for

[313] East Riverside Irr. District v. Holcomb, 126 Cal. 315, 58 Pac. 817. Unknown heirs of a former grantee, made parties in proceedings leading to a decree affecting the title to real estate, are proper, but not necessary, parties defendant in a later action to set aside such decree on the ground of fraud, where such unknown heirs are not parties to the fraud attacked. Kannally v. Renner, 84 Ill. App. 51.

[314] Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331.

[315] Creed v. Scruggs, 1 Heisk. (Tenn.) 590; Reeves v. Cooper, 12 N. J. Eq. 223; Baragree v. Cronkhite, 33 Ind. 192; Yonge v. Shepperd, 44 Ala. 315; Overton v. Stevens, 8 Mo. 622; Flickinger v. Hull, 5 Gill (Md.) 60; Shelton v. Gill, 11 Ohio, 417; Hill v. Harris, 42 Ga. 412.

[316] Yonge v. Shepperd, 44 Ala. 315; Jordan v. Chester (Tex.) 43 S. W. 904; Keifer v. Summers, 137 Ind. 106, 35 N. E. 1103; Tompkins v. Lang, 74 Ill. App. 500; Herwick v. Koken Barber Supply Co., 61 Mo. App. 454; Brewer v. Mock, 14 Colo. App. 454, 60 Pac. 578. Code N. Y. § 613, provides that an order staying proceedings on a money judgment shall not be granted unless the full amount of the judgment is paid into court, or an undertaking given in lieu thereof, as well as an undertaking to secure payment of damages; and this applies to a motion for an injunction restraining the sheriff from paying over the proceeds of a sale under a judgment. Ingalls v. Merchants' Nat. Bank, 51 App. Div. 305, 64 N. Y. Supp. 911. In Alabama, where a bill to restrain the enforcement of a judgment admits that a certain amount of

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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.[317] 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.[318] 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.[319] 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 when the injunction is removed."[320] 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.[321] 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.[322] 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.[323] Where a judgment upon a bill of exchange against an acceptor was

it is due, such amount should be paid into court. A simple offer to pay is insufficient. J. A. Roebling Sons Co. v. Stevens Electric Light Co., 93 Ala. 39, 9 South. 369.

317 Pell v. Lander, 8 B. Mon. (Ky.) 554.

318 St. Louis, A. & T. H. R. Co. v. Todd, 40 Ill. 89.

319 Smith v. Everly, 4 How. (Miss.) 178.

320 Lynn v. Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591.

321 Newlin v. Murray, 63 N. C. 566.

322 Richardson's Adm'r v. Prince George Justices, 11 Grat. (Va.) 190.

323 Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549.

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enjoined, it was held not to enjoin suits against the other parties to the bill.[324]

§ 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.[325] On dissolving an injunction shown to be groundless, damages may be given against the complainant according to the amount of the judgment enjoined.[326]

[324] Bohannon v. Combs, 12 B. Mon. (Ky.) 563.

[325] Maulden v. Armistead, 18 Ala. 500.

[326] Stewart v. Robinson, 24 La. Ann. 182. See Off v. Title G., A. & T. Co., 87 Ill. App. 472.

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CHAPTER XVI.

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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 fieri facias against the goods and chattels of the defendant, or else a writ

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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 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]

[1] Hutcheson v. Grubbs, 80 Va. 254; Jones v. Jones, 1 Bland (Md.) 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 Grat. (Va.) 423; Price v. Thrash, 30 Grat. (Va.) 515; Leake v. Ferguson, 2 Grat. (Va.) 420; Taylor's Adm'r v. Spindle, Id. 44. See, also, Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236.

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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 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

[3] Walker v. Elledge, 65 Ala. 51; Carlisle v. Godwin, 68 Ala. 137; Mitchell v. Wood, 47 Miss. 231; Converse v. Michigan Dairy Co. (C. C.) 45 Fed. 18; Thompson v. Avery, 11 Utah, 214, 39 Pac. 829.

[4] United States v. Morrison, 4 Pet. 124, 7 L. Ed. 804.

[5] Groves' Appeal, 68 Pa. 143.

[6] Tarpley v. Hamer, 9 Smedes & M. (Miss.) 310; Spencer v. Rippe, 7 Okl. 608, 56 Pac. 1070. Compare Rock Island Nat. Bank v. Thompson, 74 Ill. App. 54.

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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 to be considered ex post facto, nor does it impair the obligation of contracts.[8] But the latest decisions regard the statute giving the right to a judgment lien as a part of the contract on which the judgment is based; and hence it is now held that a law which absolutely destroys the lien of a judgment, or provides that it shall cease and determine at the end of a limited period after the date of the judgment, is unconstitutional and void, so far as it relates to judgments rendered prior to its passage, as impairing the obligation of contracts and invading vested rights.[9] But 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 enactment.[10] And conversely, it is entirely competent for the legislature to invest existing judgments, as well as future judgments, with the incidents of a lien, by retrospective laws.[11]

[7] Whitehead v. Latham, 83 N. C. 232.

[8] McCormick v. Alexander, 2 Ohio, 65; Bank of United States v. Longworth, 1 McLean, 35, Fed. Cas. No. 923; Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696.

[9] Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Raught v. Lewis, 24 Wash. 47, 63 Pac. 1104.

[10] Moore v. Holland, 16 S. C. 15. A statute is valid which provides that a judgment recovered for money won by defendant from another at gaming shall be a lien on the property where the gambling took place, provided it was with the knowledge of the owner; for the reason of the statute has reference to the discouragement of gambling, rather than to the natural justice of the case as between parties. Trout v. Marvin, 62 Ohio St. 132, 56 N. E. 655.

[11] Moore v. Letchford, 35 Tex. 185, 14 Am. Rep. 363.

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§ 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." [12] 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.[13] 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.[14] 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.[15] But on the other hand, a judgment-creditor has the right to proceed by ancillary proceedings, 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.[16] 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

[12] Reed's Appeal, 13 Pa. 476.

[13] Finch v. Winchelsea, 1 P. Wms. 277; Brace v. Duchess of Marlborough, 2 P. Wms. 491; Conard v. Atlantic Ins. Co., 1 Pet. 443, 7 L. Ed. 189; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Cover v. Black, 1 Pa. 493; Reed's Appeal, 13 Pa. 476; Sill v. Swackhammer, 103 Pa. 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 Kan. 236, 85 Am. Dec. 588; Ashton v. Slater, 19 Minn. 347 (Gil. 300.)

[14] Dail v. Freeman, 92 N. C. 351; Bruce v. Sugg, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562.

[15] Logan v. Hale, 42 Cal. 645.

[16] Scottish-American Mortg. Co. v. Follansbee (C. C.) 14 Fed. 125.

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it is a lien or the real estate is not affected by it.[17] 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.[18] 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.[19]

§ 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."[20] 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.[21] It should also be noted, that the lien being 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.[22]

§ 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 con-

17 St. Joseph Manuf'g Co. v. Daggett, 84 Ill. 556.

18 Independent School Dist. v. Werner, 43 Iowa, 643.

19 Crane v. Penny (D. C.) 2 Fed. 187.

20 Rodgers v. Bonner, 45 N. Y. 379; Lanning v. Carpenter, 48 N. Y. 408; Dozier v. Lewis, 27 Miss. 679; Mansfield v. Gregory, 11 Neb. 297, 9 N. W. 87.

21 Snyder v. Stafford, 11 Paige (N. Y.) 71.

22 Esterly's Appeal, 109 Pa. 222.

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trol it in any way, as by restricting it to certain described property.[23] 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."[24] 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.[25]

§ 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.[26] Unless this requirement is complied with, the judgment will not attach as a lien upon the debtor's property.[27] And it is the

[23] Castro v. Illies, 13 Tex. 229; Hadwin v. Fisk, 1 La. Ann. 43. Where a judgment is a legal lien upon real estate, such lien is enforceable by sale of the property, and does not require the aid of a court of equity to enforce it. Davis v. Harper, 14 App. D. C. 463.

[24] Houston v. Houston, 67 Ind. 276.

[25] Lanning v. Carpenter, 48 N. Y. 408.

[26] But it is held that a judgment, though undocketed, is good against 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. 31.

[27] Callanan v. Votruba, 104 Iowa, 672, 74 N. W. 13, 40 L. R. A. 375, 65 Am.

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duty of the judgment creditor to see to it that his judgment is rightly and properly entered; for if a mistake is made, it may prevent the judgment from binding the land in the hands of a subsequent purchaser, though it would remain binding as between the original parties.[28] The statutory provisions in the different states, as to the time and manner of entering judgments upon the docket, and as to the nature and contents of the docket entries, differ so widely that it would not be profitable to discuss them in this place; but the reader is referred to certain illustrative cases cited in the margin.[29]

§ 105. 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.[30] And the judgment, though duly filed and recorded, creates no lien if it is not indexed.[31] Where the

St. Rep. 538; Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901; Act Ga. Dec. 20, 1890 (St. 1890, No. 72, p. 17). Compare Johnson v. Schlosser, 146 Ind. 509, 45 N. E. 702, 36 L. R. A. 59, 58 Am. St. Rep. 367.

[28] Wood v. Reynolds, 7 Watts & S. (Pa.) 406. See Hesse v. Mann, 40 Wis. 560.

[29] Spence v. Brown, 86 Tex. 430, 25 S. W. 413; Gullett Gin Co. v. Oliver, 78 Tex. 182, 14 S. W. 451; Gunter v. Buckler (Tex. Civ. App.) 32 S. W. 229; Reynolds v. Collier, 103 Ala. 245, 15 South. 603; Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682.

[30] Metz v. State Bank, 7 Neb. 165; Sterling Manuf'g Co. v. Early, 69 Iowa, 94, 28 N. W. 458. But where a subsequent mortgagee of land belonging to a judgment debtor has actual notice that a judgment against the latter is defectively indexed, the mortgage is subject to such judgment. Butts v. Cruttenden, 14 Pa. Super. Ct. 449. A judgment rendered and entered against two defendants jointly, but indexed as to only one of them, creates a lien on such defendant's property. Blum v. Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561; Whitacre v. Martin, 51 Minn. 421, 53 N. W. 806.

[31] Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Oppenheimer v. Robinson (Tex. Civ. App.) 26 S. W. 320.

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original index of a judgment is not sufficient to create a lien, a new index, made on the transfer of the record of judgments to a new book, will not, as an original index, render the judgment a lien as of the date of the transfer.[32] And when two indices of abstracts of judgments are kept by the clerk of the court, it is necessary that each abstract should be entered in each index.[33] But when the index entry is properly made, the lien is not affected by the failure of the clerk to note on the face of the record that he has indexed it.[34] And 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 properly indexed, as against a purchaser who has been led to buy by the omission in the index.[35]

§ 406. Certainty required in Docket and Index as to Names of Parties.

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." [36]

[32] Glasscock v. Stringer (Tex. Civ. App.) 32 S. W. 920.

[33] Central Coal & Coke Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

[34] Gullett Gin Co. v. Oliver, 78 Tex. 182, 14 S. W. 451.

[35] Old Dominion Granite Co. v. Clarke, 28 Grat. 617.

[36] Metz v. State Bank, 7 Neb. 165. A record of a judgment against one whose Christian name is indicated only by initial letters is effectual to put upon inquiry a subsequent purchaser of lands, the title to which appears of record in a person of the same surname as such judgment debtor, and whose Chris-

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Since the principal object of such an index is to afford information concerning judgment debtors and the liens on their property, it is generally held that subsequent purchasers and incumbrancers will be charged with notice of a judgment which is correctly indexed under the name of the defendant, although the plaintiff's name may be placed under a wrong letter, or not indexed at all.[37] But the entry of the judgment must be placed under the letter which begins the defendant's surname, not under the initial of his first name.[38] It is not, however, necessary to specify the character in which the parties sued or defended; and the law is sufficiently complied with by placing the defendant's name in its proper alphabetical position, followed by the plaintiff's name, though neither party is designated as defendant or plaintiff, and though neither the word "versus" or "against," nor any abbreviation thereof, is placed after either name.[39]

A description of a person by the name by which he is commonly known is sufficient for the purposes of a docket entry.[40] 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.[41] But there must be such a degree of approximation as to be readily understood. For instance, a judgment rendered against "Bankhead," and recorded and

tian name has the same initial. Pinney v. Russell & Co., 52 Minn. 443, 54 N. W. 484.

[37] Franke v. Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861; Central Coal & Coke Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383. But in Alabama, under the statute, the record of a judgment creates no lien on the defendant's property unless the name of the plaintiff or the owner of the judgment is shown therein. Duncan v. Ashcraft, 121 Ala. 552, 25 South. 735; Appling v. Stovall, 123 Ala. 398, 26 South. 212; Ivy Coal & Coke Co. v. Alabama Nat. Bank, 123 Ala. 477, 26 South. 213.

[38] Willis v. Downes (Tex. Civ. App.) 46 S. W. 920.

[39] Willis v. Smith, 66 Tex. 31, 17 S. W. 247; Von Stein v. Trexler, 5 Tex. Civ. App. 299, 23 S. W. 1047.

[40] In re Jones' Estate, 27 Pa. 336.

[41] Myer v. Fegaly, 39 Pa. 429, 80 Am. Dec. 534.

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indexed as against "Burkhead," confers no lien.[42] 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."[43] Again, the statute requiring record notice of judgment-liens intends 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."[44] Although it is true, as a general rule, that the law recognizes but one Christian name, and there are decisions to the effect that the omission of the initial letter of the defendant's middle name will not render the entry invalid or prevent the judgment from becoming a lien as against subsequent purchasers,[45] yet most of the authorities hold that the entry cannot be considered complete or sufficient unless it designates, at least by an initial, each of the names of the defendant preceding his surname, especially where the statute requires his name to be set out "at length."[46]

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.[47] A judgment against a firm, docketed without setting out the Christian names of the individual partners, is held in Pennsylvania and Texas to be of no effect as a lien, so far as regards subsequent purchasers and incumbrancers in good faith.[48] But an opposite view

[42] Anthony v. Taylor, 68 Tex. 403, 4 S. W. 531.

[43] Thomas v. Desney, 57 Iowa, 58, 10 N. W. 315. So, a judgment docketed and indexed as against "May Alley" is not notice to a purchaser from "Mary A. Allely." Phillips v. McKaig, 36 Neb. 853, 55 N. W. 259.

[44] Heil's Appeal, 40 Pa. 453, 80 Am. Dec. 590.

[45] Clute v. Emmerich, 26 Hun, 10.

[46] Crouse v. Murphy, 140 Pa. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. Rep. 232; Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Davis v. Steeps, 87 Wis. 472, 58 N. W. 769, 23 L. R. A. 818, 41 Am. St. Rep. 51. See Butts v. Cruttenden, 14 Pa. Super. Ct. 449.

[47] Bidwell v. Coleman, 11 Minn. 78 (Gil. 45).

[48] York Bank's Appeal, 36 Pa. 458; Ridgway's Appeal, 15 Pa. 177, 53 Am. Dec. 586; Smith's Appeal, 47 Pa. 128; Hamilton's Appeal, 103 Pa. 368; Gullett Gin Co. v. Oliver, 78 Tex. 182, 14 S. W. 451; Pierce v. Wimberly, 78 Tex.

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obtains in California.[49] And it appears to be immaterial that a mistake was made in setting out the firm name of the defendants, if their individual names are correctly given in the docket and index.[50] If there are several defendants (not partners), but some of them are merely formal or nominal parties, it is sufficient if the index contains the names of those only against whom a personal judgment, or judgment for money, is rendered.[51] But if all the defendants are equally affected by the judgment, as real and substantial parties, no lien will be created upon the lands of any one of them whose name is omitted from the docket and index, as against subsequent purchasers or incumbrancers, or as against creditors whose subsequent judgments are duly entered and indexed.[52] It must finally 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.[53]

§ 406a. Same; As to Amount.

The record of a money judgment should always show the amount for which it was rendered, and the rate of interest which it bears, so as to convey definite and precise information to subsequent lienors or purchasers. In some states, this is explicitly required by statute; and a failure to comply with the law in this respect will deprive the judgment of its character as a lien. Thus, if the amount for which the judgment was rendered is incorrectly stated, or if it

187, 14 S. W. 454; Steffens v. Cameron (Tex.) 19 S. W. 1068; Glasscock v. Price (Tex. Civ. App.) 45 S. W. 415. But it seems that if the name of the defendant is correctly given, it is not a material mistake that the names of the plaintiffs (a firm) are set forth only in the style of the partnership. Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209; Openheimer v. Robinson, 87 Tex. 174, 27 S. W. 95.

[49] Hibberd v. Smith, 50 Cal. 511.

[50] Willis v. Downes (Tex. Civ. App.) 46 S. W. 920; Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

[51] W. P. Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666.

[52] Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923, 14 L. R. A. 393; Noble v. Barner, 22 Tex. Civ. App. 357, 55 S. W. 382.

[53] Fuller v. Nelson, 35 Minn. 213, 28 N. W. 511.

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is not expressed in dollars and cents (either by words or by the appropriate marks or abbreviations), it will not create any lien on the property of the judgment debtor.[54] As to interest on the judgment, it is enough if the rate of interest which the judgment bears is correctly specified, so that the amount of interest due at any given time can be ascertained by mere calculation.[55] But an abstract which fails to show credit for an amount recovered on an execution sale does not create a lien.[56]

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.[57] A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon.[58] So a judgment against a municipal corporation is not a lien on its real estate, because no execution can issue against the land.[59] 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

[54] Bush v. Farris, 18 C. C. A. 315, 71 Fed. 770; In re Boyd, 4 Sawy. 262, Fed. Cas. No. 1,746; Glasscock v. Stringer (Tex. Civ. App.) 32 S. W. 920. Failure of the record of the judgment to include the amount of the costs will defeat the lien only to the extent of the costs. Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682.

[55] P. J. Willis & Bro. v. Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781; First Nat. Bank v. Cloud, 2 Tex. Civ. App. 627, 21 S. W. 770. But where the abstract of a judgment erroneously states the date of a credit thereon, so that a proper calculation of the interest due on the judgment as recorded would not show the amount actually due, it is defective and creates no lien. Noble v. Barner, 22 Tex. Civ. App. 357, 55 S. W. 382.

[56] Willis v. Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229.

[57] Hagan v. Chapman, 1 Pennewill (Del.) 445, 41 Atl. 974; Heff v. Cox, 5 Ohio N. P. 413.

[58] In re Boyd, 4 Sawy. 262, Fed. Cas. No. 1,746.

[59] Schaffer v. Cadwallader, 36 Pa. 126; People v. Superior Court of Cook County, 55 Ill. App. 376.

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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.[60] Later decisions, it is true, have recognized a higher degree of validity in such judgments;[61] 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 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.[62] 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.[63] 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

[60] 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).

[61] Parks v. Coffey, 52 Ala. 42; Hill v. Huckabee, 52 Ala. 155; Hill v. Armistead, 56 Ala. 118. See supra, § 173.

[62] Paxton v. Boyce, 1 Tex. 317.

[63] Foot v. Dillaye, 65 Barb. 521; Meyer v. Campbell, 12 Mo. 603; Oliver v. Lansing, 57 Neb. 352, 77 N. W. 802. The subsequent rendition of another judgment in the same cause will not revive the lien of a judgment reversed on appeal, so as to make it effective from the date of the original judgment. Id. But where an injunction against a judgment is perpetuated only as to a part of it, or a reversal is only as to part of a judgment, the lien of the part not affected continues from the date of the judgment. Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. 1028, 72 Am. St. Rep. 799.

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yet reversed, was so erroneous that it was "legally certain" that it would be reversed.[64]

In the next place, it is requisite that the judgment should be for a definite and certain sum of money.[65] 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.[66] 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.[67] And a final judgment of a court of record is a lien, although for costs only.[68]

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,[69] 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.[70] A decree for alimony has only the lien of an ordinary judgment for money, as to any property of the defendant not specifically dealt with in the decree.[71] In some states, a forfeited forthcoming bond has the force of a judg-

[64] Borden v. Borden, 5 Mass. 67, 4 Am. Dec. 32.

[65] Hamberger v. Easter, 57 Ga. 71; Lirette v. Carrane, 27 La. Ann. 298; Eames v. Germania Turn Verein, 74 Ill. 54; Roane v. Hamilton, 101 Iowa, 250, 70 N. W. 181.

[66] Lirette v. Carrane, 27 La. Ann. 298.

[67] Geery v. Geery, 63 N. Y. 252.

[68] Bobb v. Graham, 15 Mo. App. 289.

[69] Gilman v. Hovey, 26 Mo. 280.

[70] Stephen's Ex'rs' Appeal, 38 Pa. 9. An 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. 152. Under a statute in Pennsylvania, directing the amount of a verdict to be entered in the judgment docket, the lien of a verdict partakes of the nature of a judgment lien. Fuellhart v. Blood, 21 Pa. Co. Ct. R. 601.

[71] Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. Rep. 679; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358.

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ment, 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.[72] 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.[73] 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.[74] 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.[75]

§ 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.[76] 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.[77] But a judgment by confession for a sum to be ascertained by the prothonotary binds the real estate of the

[72] Cabell v. Given, 30 W. Va. 760, 5 S. E. 442.

[73] Commonwealth v. Adkins, 8 B. Mon. (Ky.) 380. See Thompson v. Avery, 11 Utah, 214, 39 Pac. 829.

[74] Speer v. McPherson, 24 Ga. 146.

[75] Unger v. Leiter, 32 Ohio St. 210.

[76] De Saussure v. Zeigler, 6 Rich. (S. C.) 12; Davidson v. Myers, 24 Md. 538; Citizens' Loan Ass'n v. Martin, 1 Marv. (Del.) 213, 40 Atl. 1108. But a judgment for money in an action on a note and to foreclose the mortgage securing it is final, so as to be a lien on other property of the defendant, though the judgment of foreclosure is not final. McCaskill v. Graham, 121 N. C. 190, 28 S. E. 264.

[77] Sellers v. Burk, 47 Pa. 344; Hays v. Tryon, 2 Miles, 208; Bryan v. Eaton, 4 Wkly. Notes Cas. 493.

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defendant only from the time of the liquidation of the sum by the prothonotary.[78]

§ 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.[79] 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.[80]

§ 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.[81] 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,

[78] Philadelphia Bank v. Craft, 16 Serg. & R. (Pa.) 347.

[79] Laidley v. Kline, 8 W. Va. 218; Woodyard v. Polsley, 14 W. Va. 211; Di Lorenzo v. Dragone, 25 Misc. Rep. 26, 54 N. Y. Supp. 420; Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Applegate v. Applegate, 107 Iowa, 312, 78 N. W. 34; Mott v. Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757.

[80] Flynn v. Morgan, 55 Conn. 130, 10 Atl. 466.

[81] Miller v. Wolf, 63 Iowa, 233, 18 N. W. 889; McNamara v. New York, L. E. & W. R. Co., 56 N. J. Law, 56, 28 Atl. 313; Ferrell v. Hales, 119 N. C. 199, 25 S. E. 821.

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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.[82] An amendment of a judgment which was originally incomplete cannot relate back so as to impair the title of one who purchased the judgment-debtor's land, prior to the order of amendment, in good faith and for a valuable consideration.[83]

§ 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.[84] 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 fore-

[82] Sheldon v. Arnold, 17 Ind. 165.

[83] Lea v. Yates, 40 Ga. 56.

[84] Scriba v. Deane, 1 Brock. 166, Fed. Cas. No. 12,559; Enmes v. Germania Turn Verein, 74 Ill. 54; Blake v. Heyward, 1 Bailey, Eq. (S. C.) 208; Close v. Close, 28 N. J. Eq. 472.

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closure is not a decree for the payment of money." [85] 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.[86] 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.[87] "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." [88] 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.[89] It should be added that chancery may create a lien directly by decree for that purpose.[90]

[85] Myers v. Hewitt, 16 Ohio, 449, 454, per Read, J. And see Hamberger v. Easter, 57 Ga. 71; Karnes v. Harper, 48 Ill. 527; Kirby v. Runals, 140 Ill. 289, 29 N. E. 697; Huntington v. Meyer, 92 Wis. 557, 66 N. W. 500; Kraner v. Chambers, 92 Iowa, 681, 61 N. W. 373.

[86] Linn v. Patton, 10 W. Va. 187.

[87] 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. See Roll v. Rea, 57 N. J. Law, 647, 32 Atl. 214. Per contra, Fletcher v. Holmes, 25 Ind. 458; Blum v. Keyser, 8 Tex. Civ. App. 675, 28 S. W. 561; W. P. Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666.

[88] Chapin v. Broder, 16 Cal. 403.

[89] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70.

[90] Carmichael v. Abrahams, 1 Desaus. (S. C.) 114. See Branley v. Dambly, 69 Minn. 282, 71 N. W. 1026.

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§ 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 court, and binds the same property which would have been affected by a judgment of the latter court.[91] And this is so, although the clerk may neglect to enter such judgment in the docket of the court.[92] 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.[93] The statutes generally limit the time within which

[91] Hawkins v. Wills, 4 U. S. App. 274, 1 C. C. A. 339, 49 Fed. 506; Brown v. Hyman, 27 N. Y. Supp. 436; Dysart v. Branderth, 118 N. C. 968, 23 S. E. 966; Bunding v. Miller, 10 Mo. 445; Tracy v. Whitsett, 51 Mo. App. 149; Work v. Brown, 38 Neb. 498, 56 N. W. 1082. The Pennsylvania Act of June 24, 1885, which gives to judgments of justices of the peace, aldermen, etc., the same force as if originally obtained in the court of common pleas, where a transcript thereof has been filed in the office of the prothonotary, was intended to give the judgment creditor the right to levy execution on the personal estate as well as the real estate of the debtor, which right had been doubtful under the prior statutes, and was not intended to repeal Act May 5, 1854, which provides that "no execution shall be issued on a judgment rendered before a justice of the peace or alderman, after five years from the rendition of such judgment, unless the same shall have been revived by scire facias or amicable confession." Smith v. Wehrly, 157 Pa. 407, 27 Atl. 700; Inquirer Printing & Publishing Co. v. Same, 157 Pa. 415, 27 Atl. 703. In Nebraska, under Code Civ. Proc. § 561, the docketing in the district court of a judgment rendered by a county court or a justice of the peace, does not make such judgment one of the district court, so as to entitle the judgment creditor to a pro rata distribution of funds with a creditor under a contemporaneous district court judgment. Moores v. Peycke, 44 Neb. 405, 62 N. W. 1072.

[92] Petray v. Howell, 20 Ark. 615.

[93] Pemberton v. Pollard, 18 Neb. 435, 25 N. W. 582; Bowman v. Silvus, 6 Kulp (Pa.) 496.

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such a transcript of a justice's judgment may be filed, but unless there is an explicit restriction of the time, it may be done at any time during the life of the judgment.[94] The transcript may be filed before the time to appeal from the judgment has expired.[95] But in order to obtain the advantage of a lien by this method of proceeding, it is necessary to comply fully with the requirements of the statute. If the law contemplates the filing of a complete transcript of the justice's record, it is not satisfied by a mere abstract of the judgment.[96]

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.[97]

§ 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.[98]

§ 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

[94] Rhoad v. Patrick, 37 S. C. 517, 16 S. E. 536.

[95] Dawson v. Cunning, 50 Ill. App. 286.

[96] White v. Espey, 21 Or. 328, 28 Pac. 71.

[97] Kennerly v. Shepley, 15 Mo. 648, 57 Am. Dec. 219; Stone v. Wood, 16 Ill. 177.

[98] Massingill v. Downs, 7 How. 760, 12 L. Ed. 903; Williams v. Benedict, 8 How. 107, 12 L. Ed. 1007; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Cropsey v. Crandall, 2 Blatchf. 341, Fed. Cas. No. 3,418; Lombard v. Bayard, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; Carroll v. Watkins, 1 Abb. U. S. 474, Fed. Cas. No. 2,457; Barth v. Makeever, 4 Biss. 206, Fed. Cas. No. 1,069; Shrew v. Jones, 2 McLean, 78, Fed. Cas. No. 12,818; Sellers' Lessee v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301; Lawrence v. Belger, 31 Ohio St. 175; Byers v. Fowler, 12 Ark. 218, 44 Am. Dec. 271; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Manhattan Co. v. Evertson, 6 Paige (N. Y.) 457; Andrews v. Wilkes, 6 How. (Miss.) 554, 38 Am. Dec. 450; Simpson v. Niles, Smith (Ind.) 104; Pollard v. Cocke, 19 Ala. 188.

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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 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."[99] 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

[99] Baker v. Morton, 12 Wall. 150, 20 L. Ed. 262, Clifford, J. See, also, Koning v. Bayard, 2 Paine, 251, Fed. Cas. No. 7,924. 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." Rev. St. U. S. § 967. This was substantially a re-enactment of the act of July 4, 1840 (5 Stat. 393) c. 43, § 4. In a territory, the judgments of the federal courts are liens on the debtor's land only when judgments are liens by the laws of the territory. Thompson v. Avery, 11 Utah, 214, 39 Pac. 829.

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this sovereign right in the other." [100] 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.[101] Thus it is ruled that a verdict alone, without the entry of a judgment, in a federal court, gives no lien upon land in Pennsylvania.[102] 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.[103] So judgment-liens of the federal courts are subject to the state statute of limitations like the liens of domestic judgments.[104] 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.[105]

§ 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 circuit.[106] To this effect was a decision of the chief federal

100 Corwin's Lessee v. Benham, 2 Ohio St. 36.

101 Perkins v. Brierfield Iron & Coal Co., 77 Ala. 403.

102 Estate of Morris, 6 Phila. 134.

103 Jones v. Guthrie, 23 Ill. 421.

104 Abbey v. Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401.

105 United States v. Sturgis (D. C.) 14 Fed. 810.

106 Conard v. Atlantic Ins. Co., 1 Pet. 453, 7 L. Ed. 189; Shrew v. Jones, 2 McLean, 78, Fed. Cas. No. 12,818; Cropsey v. Crandall, 2 Blatchf. 341, Fed. Cas. No. 3,418; Carroll v. Watkins, 1 Abb. U. S. 474, Fed. Cas. No. 2,457; Lombard v. Bayard, 1 Wall. Jr. 196, Fed. Cas. No. 8,469; Barth v. Makeever,

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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 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." [107] 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.[108] 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.[109] The purport of this statute appears to be as follows: 1. The judgment of a

4 Biss. 206, Fed. Cas. No. 1,069; Byers v. Fowler, 12 Ark. 218, 44 Am. Dec. 271; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Doyle v. Wade, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334; Hall v. Green, 60 Miss. 47; Branch v. Lowery, 31 Tex. 96; United States v. Duncan, 12 Ill. 523, Fed. Cas. No. 15,003; Sellers' Lessee v. Corwin, 5 Ohio, 398, 24 Am. Dec. 301; Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137.

[107] Massingill v. Downs, 7 How. 760, 12 L. Ed. 903.

[108] Doyle v. Wade, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334; Carroll v. Watkins, 1 Abb. U. S. 474, Fed. Cas. No. 2,457. Compare Hall v. Green, 60 Miss. 47.

[109] Act Cong. August 1, 1888 (25 Stat. 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 con-

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federal court will become a lien upon real property situated in the 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. If the laws of the state restrict the liens of judgments rendered by its own courts, in the first instance, to property within the county where the court has jurisdiction, but provide that a judgment lien may attach to property situate in another county in the same state, when the judgment is docketed, or a transcript of it filed, in the proper office in such other county, and if the statute authorizing such transfers of judgments, for purposes of lien, from one county to another, expressly includes judgments of the federal courts in the description of judgments which may be so transferred, or if there is a separate statute assimilating judgments of the federal courts, in this respect, to the judgments of the courts of the state, then the lien of a judgment rendered by a United States court in such state will be primarily restricted to property within the county where the court was sitting at the time the judgment was rendered, but may be ex-

formed 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."

In several of the states, since 1888, statutes have been enacted to meet and carry into effect the provisions of the above act of congress. They authorize judgments and decrees of the federal courts to be docketed (or transcripts to be filed) in the clerks' offices in the different counties of the state, in the same manner as judgments of the domestic courts, so as to attach as liens upon realty in the several counties where they are so recorded. See Alsop v. Moseley, 104 N. C. 60, 10 S. E. 124, construing an act of North Carolina of 1889; Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137, construing Laws Ill. 1889, p. 197. See, also, Laws Or. 1891, p. 41. In Kansas, the existing statute (Gen. St. 1868, c. 80, § 419) is held to satisfy the requirements of the act of congress. Dartmouth Sav. Bank v. Bates (C. C.) 44 Fed. 546. On the other hand, the statute of Ohio (Rev. St. § 5056) does not apply to judgments rendered in the United States courts. Stewart v. Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

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tended to other counties of the state upon compliance with the requirements of the state statute in regard to docketing or filing judgments in other counties. 3. If the laws of the state limit the lien of its own judgments to the county where rendered, and authorize the transfer of such judgments to other counties for purposes of lien, but make no provision for the transfer of judgments of the United States courts, then the act of congress of 1888 does not apply at all, and the extent of the lien of judgments of the federal courts in such state will remain precisely as before the passage of that act; that is to say, the lien of a judgment rendered by a federal court within such state will be co-extensive with the territorial jurisdiction of the court rendering it.[110]

In Kansas, where the statute in force before 1888, providing for the transfer of judgments from one county to another, for purposes of lien, was already applicable to judgments of the federal courts, it was held that a creditor who had obtained a judgment in a federal court in that state before the passage of the act of congress of 1888, would be obliged, if he wished to bind realty in other counties, to file transcripts of his judgment therein within a reasonable time after the enactment of the act of congress; and that if he neglected for more than four months after the passage of the law to take such action, he would lose his lien.[111] But elsewhere it has been held that the act of congress does not affect the lien of a judgment which had attached prior to the passage of the act.[112]

It has also been held that a judgment in favor of the United States, recovered in one of the federal courts outside of a given state, 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.[113]

[110] Dartmouth Sav. Bank v. Bates (C. C.) 44 Fed. 546.
[111] First Nat. Bank v. Clark, 55 Kan. 219, 40 Pac. 270.
[112] Commercial Bank v. Eastern Banking Co., 51 Neb. 766, 71 N. W. 1024.
[113] Manhattan Co. v. Evertson, 6 Paige (N. Y.) 457.

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§ 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." [114]

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.[115] 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

[114] Ward v. Chamberlain, 2 Black, 430, 17 L. Ed. 319.

[115] Billan v. Hercklebrath, 23 Ind. 71; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Smith v. Eyre, 149 Pa. 272, 24 Atl. 288. 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's Adm'r v. Goode, 23 Grat. (Va.) 880.

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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.[116] 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.[117] "It is supposed that when a new 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."[118]

§ 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.[119] Such a transfer, however, does not destroy the

[116] King v. Portis, 77 N. C. 25; Baker v. Chandler, 51 Ind. 85; State Bank v. Carson, 4 Neb. 498; Goodell v. Blumer, 41 Wis. 436; Farmers' Bank v. Heighe, 3 Md. 357. See Barnett v. East Tennessee, V. & G. R. Co. (Tenn.) 48 S. W. 817. 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, 1 L. Ed. 330.

[117] Davidson v. Root, 11 Ohio, 98, 37 Am. Dec. 411; People v. Hovious, 17 Cal. 471; Hays' Appeal, 8 Pa. 182; West's Appeal, 5 Watts (Pa.) 87; Garvin v. Garvin, 34 S. C. 388, 13 S. E. 625; Dermott v. Carter, 109 Mo. 21, 18 S. W. 1121.

[118] Davidson v. Root, 11 Ohio, 98, 37 Am. Dec. 411.

[119] Farmers' Bank v. Heighe, 3 Md. 357; Goodell v. Blumer, 41 Wis. 436; Perry v. Morris, 65 N. C. 221; Neil v. Colwell, 66 Pa. 216; Code Civ. Proc. Cal. § 674; Acts Ark. 1891, No. 56, p. 92, § 1; Comp. Laws S. D. § 5104; Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 78; Code Civ. Proc. Mont. § 1200; A. M. Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

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lien of the judgment on the debtor's property in the county where it was originally docketed.[120] 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.[121] 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.[122] 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.[123] And when a judgment is so transferred, its merits cannot be inquired into at all by the court to which it is taken; it is there only for purposes of enforcement and satisfaction.[124] 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.[125] 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.[126] And under a statute worded as above, a decree of a court of equity cannot be thus trans-

120 Perry v. Morris, 65 N. C. 221.

121 Donner v. Palmer, 23 Cal. 40. Compare Bradfield v. Newby, 130 Ind. 59, 28 N. E. 619.

122 Brandt's Appeal, 16 Pa. 343.

123 Mellon v. Guthrie, 51 Pa. 116.

124 King v. Nimick, 34 Pa. 297.

125 Wilson v. Patton, 87 N. C. 318.

126 Bailey v. Eder, 90 Pa. 446.

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ferred to another county, although it be for the payment of a definite sum of money.[127] 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.[128]

§ 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.[129] 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.[130] 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.[131] But if the laws of the particular state

[127] Brooke v. Phillips, 83 Pa. 183.

[128] Walt's Adm'rs v. Swinehart, 8 Pa. 97.

[129] A judgment does not create a lien upon personal property belonging to the debtor. McNamara v. New York, L. E. & W. R. Co., 56 N. J. Law, 36, 28 Atl. 313; Stahlman v. Watson (Tenn.) 39 S. W. 1055. The lien does not bind choses in action. Fidelity & Deposit Co. v. Exchange Bank, 100 Ga. 619, 28 S. E. 393; Stahlman v. Watson, supra. Nor the right of a licensee under an oil lease. Meridian Nat. Bank v. McConica, 8 Ohio Cir. Ct. R. 442. Nor the interest of one holding a parol license to mine, at least while the license remains revocable. Blindert v. Kreiser, 81 Wis. 174, 51 N. W. 324. On the other hand, machinery permanently attached to realty may become subject to the lien of a judgment against the owner of the land, although sold under an agreement that title should remain in the seller until full payment. Raymond v. Schoonover, 181 Pa. 352, 37 Atl. 524. See also, as to permanent improvements on the land partaking of the character of realty, Lessert v. Sieberling, 59 Neb. 309, 80 N. W. 900. A judgment lien existing at the time an executor sells real estate is transferred from the land to the fund arising from such sale. Barkman v. Hain, 5 Ohio N. P. 508. The lien of a judgment against a corporation whose assets consist partly in real estate is an incumbrance on such real estate. Willsie v. Rapid Valley Horse-Ranch Co., 7 S. D. 114, 63 N. W. 546.

[130] Beam's Appeal, 19 Pa. 453.

[131] Scogin v. Perry, 32 Tex. 21.

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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.[132]

§ 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.[133] "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."[134] "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

[132] Milwaukee & M. R. Co. v. James, 6 Wall. 750, 18 L. Ed. 854.

[133] Baker v. Morton, 12 Wall. 150, 20 L. Ed. 262; In re Estes (D. C.) 6 Sawy. 459, 3 Fed. 134; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Ex parte Trenholm, 19 S. C. 126; Blankenship v. Douglas, 26 Tex. 225, 82 Am. Dec. 608; Holden v. Garrett, 23 Kan. 98; Doswell v. Adler, 28 Ark. 82; Unknown Heirs of Whitney v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Sharpe v. Davis, 76 Ind. 17; Heberd v. Wines, 105 Ind. 237, 4 N. E. 457; Churchill v. Morse, 23 Iowa, 229, 92 Am. Dec. 422; Union Bank v. Manard, 51 Mo. 548; Uhl v. May, 5 Neb. 157; Galway v. Malchow, 7 Neb. 285; Colt v. Du Bois, 7 Neb. 391; Berkley v. Lamb, 8 Neb. 392, 1 N. W. 320; Nessler v. Neher, 18 Neb. 649, 26 N. W. 471; Id., 23 N. W. 345. And see Robisson v. Miller, 158 Pa. 177, 27 Atl. 887; Cleavenger v. Felton, 46 W. Va. 249, 33 S. E. 117; Hawley v. Smelding, 3 Kan. App. 159, 42 Pac. 841.

[134] Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 207, 47 Am. Dec. 305.

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as against all other persons deriving title through or under him subsequent to 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." [135] 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.[136] 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.[137] 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.[138]

§ 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.[139] And transitory seisin of lands by the judgment-debtor, in trust for another, will not subject the lands to the judgment-lien.[140] 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

[135] Morris v. Mowatt, 2 Paige (N. Y.) 586, 22 Am. Dec. 661.

[136] Jackson v. Town, 4 Cow. (N. Y.) 599, 15 Am. Dec. 405.

[137] Uhl v. May, 5 Neb. 157; Lumbard v. Abbey, 73 Ill. 177; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740.

[138] Massey v. Westcott, 40 Ill. 160.

[139] Ells v. Tousley, 1 Paige (N. Y.) 280; Lounsbury v. Purdy, 11 Barb. (N. Y.) 490; Withnell v. Courtland Wagon Co. (C. C.) 25 Fed. 372; Hays v. Reger, 102 Ind. 524, 1 N. E. 386. See, also, Fulton's Estate, 51 Pa. 204; Moore v. Thomas, 137 Ind. 218, 36 N. E. 712; Dodd v. Bond, 88 Ga. 355, 14 S. E. 581. In Iowa, the doctrine is that a judgment is not a lien upon land to which the judgment debtor holds only the naked legal title, when the fact that a third person owns the equitable title is either disclosed by the record or is known to the judgment creditor (Brebner v. Johnson, 84 Iowa, 23, 50 N. W. 35); and that, as an express trust cannot be established by parol evidence, such evidence is not admissible to show that the title of real estate in the name of a judgment defendant is held in trust for another, and that therefore the property is not subject to the lien of the judgment. Brown v. Barngrover, 82 Iowa, 204, 47 N. W. 1082.

[140] Alcardi v. Craig, 42 Ala. 311.

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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 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." [141] 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.[142] 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.[143] 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.[144]

The same rule also applies in the case where the judgment debtor, though having the legal title to lands, holds it subject to a resulting trust in favor of another. Thus, where one person pays the purchase

[141] Atkinson v. Hancock, 67 Iowa, 452, 25 N. W. 701; Dimmick v. Rosenfeld, 34 Or. 101, 55 Pac. 100.

[142] Boardman v. Willard, 73 Iowa, 20, 34 N. W. 487. But property conveyed to an insolvent purchaser as trustee for his wife, the consideration being paid by the husband, becomes subject to the lien of a judgment against him, which is not divested by a return and cancellation of the deed, the same not having been recorded. Kline v. Triplett (Va.) 25 S. E. 886.

[143] Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. 751.

[144] Watkins v. Wassell, 15 Ark. 73.

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money for a parcel of realty, and procures the title to be placed in the name of another, if the latter has no substantial interest in the property, a judgment against him will not be a lien on the land.[145] So where one conveys land to another by a deed absolute in form, but intended as security for the payment of money, or subject to a parol agreement to reconvey, the grantee has no such interest in the property as will be bound by the lien of a judgment recovered against him.[146]

§ 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.[147] 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.[148] 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.[149] 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.[150]

[145] Wade v. Sewell (C. C.) 56 Fed. 129; Carter v. Challen, 83 Ala. 135, 3 South. 313; Bucknell v. Deering, 99 Iowa, 548, 68 N. W. 825; Coldiron v. Asheville Shoe Co., 93 Va. 364, 25 S. E. 238; Baird v. Williams, 4 Okl. 173, 44 Pac. 217. See Blackburn v. Lake Shore Traffic Co., 90 Wis. 362, 63 N. W. 289.

[146] Main v. Bosworth, 77 Wis. 660, 46 N. W. 1043; Michael v. Knapp, 4 Tex. Civ. App. 464, 23 S. W. 280.

[147] Holmes' Appeal, 108 Pa. 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, 23 Pa. 477.

[148] Morrison v. Wurtz, 7 Watts (Pa.) 437; Slater's Appeal, 28 Pa. 169.

[149] Levi v. Thompson, 4 How. 17, 11 L. Ed. 856; Landes v. Brant, 10 How. 348, 13 L. Ed. 449; Huntingdon v. Grantland, 33 Miss. 453; Jackson's Lessee v. Williams, 10 Ohio, 69; Rogers v. Brent, 5 Gilman (Ill.) 573, 50 Am. Dec. 422; Cavender v. Smith's Heirs, 5 Iowa, 157.

[150] Harrington v. Sharp, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365. In this

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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.[151] 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

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." So also, a general judgment is not a lien on a locator's interest in a mining claim on public lands for which no patent has been issued. Phœnix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 777.

[151] Miller v. Sherry, 2 Wall. 249, 17 L. Ed. 827; Brooks v. Wilson, 53 Hun, 173, 6 N. Y. Supp. 116; Manhattan Co. v. Evertson, 6 Paige (N. Y.) 465; McKee v. Gilchrist, 3 Watts (Pa.) 230; Mulford v. Peterson, 35 N. J. Law, 127; Neal v. Foster (C. C.) 36 Fed. 29; Rappleye v. International Bank, 93 Ill. 396; In re Estes (D. C.) 3 Fed. 134; United States v. Eisenbeis (D. C.) 88 Fed. 4; Sawtelle v. Weymouth, 14 Wash. 21, 43 Pac. 1101; Doster v. Manistee Nat. Bank, 67 Ark. 325, 55 S. W. 137; Joyce v. Perry, 111 Iowa, 567, 82 N. W. 941; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

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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 act directed against this specific property. It is the creature of the statute, and cannot have effect beyond it." [152]

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.[153] According to an-

[152] In re Estes (D. C.) 3 Fed. 134, 141.

[153] Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683; 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; First Nat. Bank v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64. In re Lowe (D. C.) 19 Fed. 589; Slattery v. Jones, 96 Mo. 216, 8 S. W. 554, 9 Am. St. Rep. 344. 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

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other view, if the debtor has fraudulently conveyed away or incumbered his real estate, so as to interpose an obstacle which embarrasses 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.[154] 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.[155] And in any other case where the fraudulent purpose was clearly wanting, the judgment would be no lien.

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. Prac. N. S. (N. Y.) 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, 3 How. Prac. (N. Y.) 185; Wiswall v. Sampson, 14 How. 67, 14 L. Ed. 322." In Pennsylvania, it is said that a judgment creditor, who advises the debtor to make a fraudulent conveyance in order to cheat another creditor, does not thereby lose the lien of his judgment. Fidler v. John, 178 Pa. 112, 35 Atl. 976.

[154] Dunham v. Cox, 10 N. J. Eq. 437, 64 Am. Dec. 460.

[155] Benson v. Maxwell (Pa.) 14 Atl. 161.

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§ 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.[156]

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, except as to the surplus value of the property, if any, over the amount limited as a homestead exemption. 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.[157] But a judgment-lien against property acquired before the 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.[158] And if

[156] Dumbould v. Rowley, 113 Ind. 353, 15 N. E. 463; King v. Easton, 135 Ind. 353, 35 N. E. 181.

[157] 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 Kan. 466; Gapen v. Stephenson, 17 Kan. 613; Lorimer v. Marshall, 44 Ill. App. 645; Farmers' Loan & Trust Co. v. Schwenk, 54 Neb. 657, 74 N. W. 1063; Traders' Nat. Bank v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; Lamb v. Shays, 14 Iowa, 567; Wiggins v. Chance, 54 Ill. 175; Black v. Epperson, 40 Tex. 162; Briggs v. Briggs, 45 Iowa, 318; Grimes v. Portman, 99 Mo. 229, 12 S. W. 792.

[158] Kennerley v. Swartz, 83 Va. 704, 3 S. E. 348; Smith v. Richards, 2 Idaho, 464, 21 Pac. 419, citing Freem. Ex'ns, §§ 249, 249d, 249e; Thomp. Homest. & Exemp. § 317; Smyth. Homest. § 35; Platt, Mar. Wom. , . . Kelly v. Dill, 23 Minn. 435; Bullene v. Hiatt, 12 Kan. 98; Robinson v. Wil-

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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.[159] 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.[160] 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.[161] 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.[162] This view is based

son, 15 Kan. 595, 22 Am. Rep. 272; Bartholomew v. Hook, 23 Cal. 278; Rix v. McHenry, 7 Cal. 89; Elston v. Robinson, 21 Iowa, 532.

[159] Kellerman v. Aultman (C. C.) 30 Fed. 888. Compare Horbach v. Smiley, 54 Neb. 217, 74 N. W. 623.

[160] Bliss v. Clark, 39 Ill. 596, 89 Am. Dec. 330; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112. But in Virginia, it is said that the lien of a judgment which attached before the homestead was claimed will have priority, after the abandonment of the homestead, over a deed of trust or mortgage executed during the occupancy of the land as a homestead. Blose v. Bear, 87 Va. 177, 12 S. E. 294, 11 L. R. A. 705.

[161] Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; Marriner v. Smith, 27 Cal. 649; Green v. Marks, 25 Ill. 222.

[162] Kellerman v. Aultman (C. C.) 30 Fed. 888; Eaton v. Ryan, 5 Neb. 47; State Bank v. Carson, 4 Neb. 498; Moore v. Granger, 30 Ark. 574; Jackson v. Allen, 30 Ark. 110; Folsom v. Carli, 5 Minn. 335 (Gil. 264), 80 Am. Dec. 429; Tillotson v. Millard, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; Hoyt v. Howe, 3 Wis. 752, 62 Am. Dec. 705; Whitworth v. Lyons, 39 Miss. 467. Compare Roberts v. Robinson, 49 Neb. 717, 68 N. W. 1035, 59 Am. St. Rep. 567.

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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.[163]

§ 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.[164] 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.[165] 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.[166] 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.[167]

§ 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.[168] And a judgment against a tenant by the curtesy initiate after issue

[163] Stanley v. Sullivan, 71 Wis. 585, 37 N. W. 801, 5 Am. St. Rep. 245; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358.

[164] Bridge v. Ward, 35 Wis. 687.

[165] Verdin v. Slocum, 71 N. Y. 345.

[166] Moore v. Pitts, 53 N. Y. 85.

[167] Leggett v. Doremus, 25 N. J. Eq. 122.

[168] Anderson v. Tydings, 8 Md. 427, 63 Am. Dec. 708; Beard v. Deitz, 1 Watts (Pa.) 309.

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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.[169]

§ 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.[170] 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." [171] A reversion after an estate for life is bound by a judgment obtained against the ancestor from whom it immediately descended.[172] 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.[173] 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.[174]

[169] Lancaster County Bank v. Stauffer, 10 Pa. 398.

[170] Williams v. Amory, 14 Mass. 20; Brown v. Gale, 5 N. H. 416; Woodgate v. Fleet, 44 N. Y. 1; Sayles v. Best, 140 N. Y 368, 35 N. E. 636; Humphreys' Lessee v. Humphreys, 1 Yeates (Pa.) 427; Rickey v. Hillman, 7 N. J. Law, 180; Bockover v. Ayres, 22 N. J. Eq. 13.

[171] Bockover v. Ayres, 22 N. J. Eq. 13.

[172] Burton v. Smith, 13 Pet. 464, 10 L. Ed. 248.

[173] Allston v. Bank of South Carolina, 2 Hill, Eq. (S. C.) 235; Watson v. Dodd, 68 N. C. 528; Jackson v. Middleton, 52 Barb. (N. Y.) 9.

[174] Ogden v. Knepler, 1 Pears. 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.[175] And this view is still held in some of the states.[176] 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.[177] 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.[178] 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.[179] And judgments do not attach to leasehold premises unless where there is possession in the lessee.[180] 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 of 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

[175] Merry v. Hallet, 2 Cow. (N. Y.) 497; Vredenburg v. Morris, 1 Johns. Cas. (N. Y.) 223; Northern Bank v. Roosa, 13 Ohio, 334.

[176] Krause's Appeal, 2 Whart. (Pa.) 398; Bismark Building & Loan Ass'n v. Bolster, 92 Pa. 123; Lefever v. Armstrong, 15 Pa. Super. Ct. 565.

[177] Northern Bank v. Roosa, 13 Ohio, 334; First Nat. Bank v. Bennett, 40 Iowa, 537; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891; Steers v. Daniel (C. C.) 4 Fed. 587. In the case last cited this construction is given to the statutes of Tennessee.

[178] Hayden v. Goppinger, 67 Iowa, 106, 24 N. W. 743.

[179] Taylor v. Wynne, 55 Hun, 610, 8 N. Y. Supp. 759, construing Code Civ. Proc. N. Y. § 1430.

[180] Crane v. O'Connor, 4 Edw. Ch. (N. Y.) 409.

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years or convey the land to the lessee, his heirs and assigns, at a valuation, and the 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."[181] And a similar ruling has recently been made in Illinois.[182] 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.[183]

§ 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.[184] 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.[185] 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

181 Ely v. Beaumont, 5 Serg. & R. 124.

182 Gorham v. Farson, 119 Ill. 425, 10 N E. 1.

183 Sweezy v. Jones, 65 Iowa, 272, 21 N. W. 603.

184 Eldridge v. Post, 20 Fla. 579; Garvin v. Garvin, 1 S. C. 55. As to judgment liens on community property, under the laws of Texas and Louisiana, see Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Boyd v. Ghent, 93 Tex. 543, 57 S. W. 25; Abat v. Atkinson, 21 La. Ann. 239; Healey v Ashbey, 47 La. Ann. 636, 17 South. 195.

185 Bavington v. Clarke, 2 Pen. & W. (Pa.) 115, 21 Am. Dec. 432; Longwell v. Bentley, 23 Pa. 103; Williard v. Williard, 56 Pa. 127; Inhabitants of Argyle v. Dwinel, 29 Me. 45.

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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 rendered subsequent to that period, H. was entitled to relief by perpetual injunction against them.[186]

§ 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.[187] 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.[188] Conversely, a judgment against the firm is a lien on the separate real estate of the individual partners.[189] 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.[190]

[186] Hollida v. Shoop, 4 Md. 465, 59 Am. Dec. 88.

[187] In re Codding (D. C.) 9 Fed. 849.

[188] Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788. And see, also, Melly v. Wood, 71 Pa. 488, 10 Am. Rep. 719; Hoskins v. Johnson, 24 Ga. 625.

[189] Cummings' Appeal, 25 Pa. 268, 64 Am. Dec. 695; Pitts v. Spotts, 86 Va. 71, 9 S. E. 501. A contrary view is maintained in Stadler v. Allen, 44 Iowa, 198. And see Baldridge v. Eason, 99 Ala. 516, 13 South. 74. Individual creditors of a partner are not entitled to priority of payment out of proceeds of his individual real estate, as against a judgment creditor of the firm, who, by docketing his judgment, has acquired a prior lien on such real estate. MacDonald v. MacDonald, 62 Hun, 621, 17 N. Y. Supp. 230.

[190] Fox's Appeal (Pa.) 11 Atl. 228.

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§ 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 docketing of the judgment; it being either so provided by statute, or by following the doctrines of the English common law.[191] 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.[192] And this doctrine has also been accepted in a few other states.[193] By the English common law the lien attached to subsequently acquired realty without a levy.[194] 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

[191] Ridgely v. Gartrell, 3 H. & McH. (Md.) 449; McClung v. Beirne, 10 Leigh (Va.) 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. 235; Franke v. Lone Star Brewing Co., 17 Tex. Civ. App. 9, 42 S. W. 861; Greenway v. Cannon, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161; Chapron v. Cassaday, 3 Humph. (Tenn.) 661; Davis v. Benton, 2 Sneed (Tenn.) 665; Babcock v. Jones, 15 Kan. 296; Bank v. Watson, 13 Ark. 74; Ridge v. Prather, 1 Blackf. (Ind.) 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 Neb. 391; Duell v. Potter, 51 Neb. 241, 70 N. W. 932; Lessert v. Sieberling, 59 Neb. 309, 80 N. W. 900; Leonard v. White Cloud Ferry Co., 11 Neb. 340, 7 N. W. 538.

[192] Colhoun v. Snider, 6 Bin. (Pa.) 135; Rundle v. Ettwein, 2 Yeates (Pa.) 23; Packer's Appeal, 6 Pa. 277; Lea v. Hopkins, 7 Pa. 492; Moorehead v. McKinney, 9 Pa. 265; Waters' Appeal, 35 Pa. 523, 78 Am. Dec. 354; Ross' Appeal, 106 Pa. 82; Torrence v. Torrence, 24 Pa. Co. Ct. R. 408; Roads v. Symmes, 1 Ohio, 281, 13 Am. Dec. 621; McCormick v. Alexander, 2 Ohio, 65; Stiles v. Murphy, 4 Ohio, 92.

[193] Harrington v. Sharp, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365. See H. Herman Sawmill Co. v. Martin, 22 Ky. Law Rep. 651, 58 S. W. 524.

[194] 4 Kent, Comm. *435–6.

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is issued thereon within a year, no lien will exist.[195] 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.[196]

§ 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.[197] 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.[198] 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.[199] On the other hand, in Maryland, it is considered that a judgment is a

[195] Breed v. Gorham, 108 Ill. 81.

[196] Cayce v. Stovall, 50 Miss. 396. See infra, § 460.

[197] Morsell v. First Nat. Bank, 91 U. S. 357, 23 L. Ed. 436; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; Withnell v. Courtland Wagon Co., 25 Fed. 372; Jackson v. Chapin, 5 Cow. (N. Y.) 485; Bogart v. Perry, 1 Johns. Ch. 52; Truesdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233; Dixon v. Dixon, 81 N. C. 323; Powell v. Knox, 16 Ala. 364; Kirkwood v. Koester, 11 Kan. 471; Baird v. Kirtland, 8 Ohio, 21; Russell v. Houston, 5 Ind. 180; Jeffries v. Sherburn, 21 Ind. 112; Harrington v. Sharp, 1 G. Greene (Iowa) 131, 48 Am. Dec. 365; Trask v. Green, 9 Mich. 358; Nessler v. Neher, 18 Neb. 649, 26 N. W. 471; Woolworth v. Parker, 57 Neb. 417, 77 N. W. 1090; Smith v. Ingles, 2 Or. 43; Bloomfield v. Humason, 11 Or. 229, 4 Pac. 332.

[198] Russell v. Houston, 5 Ind. 180. See, a similar case, Terrell v. Prestell, 68 Ind. 86.

[199] Smith v. Ingles, 2 Or. 43.

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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.[200] 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.[201] In 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." [202]

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.[203] "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." [204] 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.[205]

[200] McMechen v. Marman, 8 Gill & J. (Md.) 57.

[201] Lathrop v. Brown, 23 Iowa, 40; Blain v. Stewart, 2 Iowa, 378.

[202] Auwerter v. Mathiot, 9 Serg. & R. 402; Carkhuff v. Anderson, 3 Bin. 4; Semple v. Mown, 4 Phila. 85.

[203] Unknown Heirs v. Kimball, 4 Ind. 546, 58 Am. Dec. 638; Lee v. Stone, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; Haleys v. Williams, 1 Leigh (Va.) 140, 19 Am. Dec. 743; Michaux's Adm'r v. Brown, 10 Grat. (Va.) 612; Roach v. Bennett, 24 Miss. 98.

[204] Lee v. Stone, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589.

[205] Chapron v. Cassaday, 3 Humph. 661. See Weaver v. Smith, 102 Tenn. 47, 50 S. W. 771.

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§ 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.[206] And a judgment-debtor cannot, by conveying his equity of redemption to a prior mortgagee, cut off the lien of a judgment.[207] So a judgment 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.[208] 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.[209] 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.[210] 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 dis-

[206] Bank v. Morsell, 1 McArthur, 155; Julian v. Beal, 26 Ind. 220, 89 Am. Dec. 460; Taylor v. Cornelius, 60 Pa. 187; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997. Compare Blair v. Chamblin, 39 Ill. 526, 89 Am. Dec. 322.

[207] Walters v. Defenbaugh, 90 Ill. 241.

[208] Sweet v. Jacocks, 6 Paige, 355, 31 Am. Dec. 252. See Sullivan v. Leckie, 60 Iowa, 326, 14 N. W. 355.

[209] Kinports v. Boynton, 120 Pa. 306, 14 Atl. 135, 6 Am. St. Rep. 706.

[210] Chautauqua Co. Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

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charging the trusts and which would result to the grantor's benefit, paramount to that of the latter.[211] 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.[212] But in many of the states, under the statutes or settled precedents of the courts, before adverted to, which have changed the 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.[213] 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.[214] 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.[215]

Where the statutes authorize the sale of land for delinquent taxes, but provide that the owner shall have a limited period within which to redeem from such sale, his interest in the property, during the

[211] Freedman's Savings Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301; Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; 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.

[212] Morsell v. Bank, 91 U. S. 357, 23 L. Ed. 436; Marlow v. Johnson, 31 Miss. 128. See Johnston v. Lemmonds, 109 N. C. 643, 14 S. E. 86.

[213] Trimble v. Hunter, 104 N. C. 129, 10 S. E. 291; Hale v. Horne, 21 Grat. (Va.) 112; Pahlman v. Shumway, 24 Ill. 127; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

[214] Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

[215] Warner v. Veitch, 2 Mo. App. 459; Cook v. Dillon, 9 Iowa, 407, 74 Am. Dec. 354.

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running of such period, is subject to the lien of judgments rendered against him.[216]

§ 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.[217] 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.[218]

§ 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 such an interest in the estate as will be bound by the lien of a judgment against him.[219] In a case in New York, it appeared that cer-

[216] McNeill v. Carter, 57 Ark. 579, 22 S. W. 94; Appeal of Singer (Pa.) 7 Atl. 800; Hill v. Gordon, 45 Fed. 276. It is otherwise where land is absolutely forfeited to the state for nonpayment of taxes. Wiant v. Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

[217] Huntt v. Townshend, 31 Md. 336, 100 Am. Dec. 63.

[218] Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[219] Brandies v. Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760. 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 Barn. & 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 Mylne & C. 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,

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tain 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.[220]

§ 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.[221] 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.[222] 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

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 Sugd. Powers (7th Lond. Ed.) 33; Burt. Real Prop. (8th Lond. Ed.) 283; Hotham v. Somerville, 9 Beav. 63."

220 Tallmadge v. Sill, 21 Barb. 34.

221 Doe dem. McMullen v. Lank, 4 Houst. (Del.) 648.

222 Flanagin v. Daws, 2 Houst. (Del.) 476; Beckett v. Dean, 57 Miss. 232.

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by means of an equitable execution.[223] In an early Virginia case, it appeared that a deed of marriage settlement vested certain real estate in a trustee, in trust to pay the wife an annuity out of the profits,

[223] Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301. 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, 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 applied 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, 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, 17 L. Ed. 553); 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

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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.[224] In Indiana, judgments are by statute liens on lands held in trust for the judgment debtor in their chronological 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 iudgment is not a party.[225]

§ 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 judg-

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."

224 Coutts v. Walker, 2 Leigh (Va.) 268.

225 Maxwell v. Vaught, 96 Ind. 136.

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ment 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.[226] 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.[227] In this divided condition of the title, judgments against vendor and vendee

[226] Minneapolis & St. Louis R. Co. v. Wilson, 25 Minn. 382; Young v. Devries, 31 Grat. (Va.) 304; Stewart v. Coder, 11 Pa. 90; Ware v. Jackson, 19 Ga. 452; Gaar v. Lockridge, 9 Ind. 92; McMullen v. Wenner, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543; Fasholt v. Reed, 16 Serg. & R. (Pa.) 266; Lefferson v. Dallas, 20 Ohio St. 68; Filley v. Duncan, 1 Neb. 134, 93 Am. Dec. 337; Uhl v. May, 5 Neb. 157; Courtnay v. Parker, 16 Neb. 311, 20 N. W. 120 (s. c. 21 Neb. 582, 33 N. W. 262); Olander v. Tighe, 43 Neb. 344, 61 N. W. 633; Wehn v. Fall, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Wells v. Baldwin, 28 Minn. 408, 10 N. W. 427. Per contra, Woodward v. Dean, 46 Iowa, 499; Hampson v. Edelen, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; Georgetown v. Smith, 4 Cranch, C. C. 93, Fed. Cas. No. 5,347; Moore v. Byers, 65 N. C. 240; Money v. Dorsey, 7 Smedes & M. 15.

[227] Filley v. Duncan, 1 Neb. 134, 93 Am. Dec. 337; Moyer v. Hinman, 17 Barb. 137. "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, 42 Minn. 279, 44 N. W. 251.

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respectively, by their different creditors, bind the right of each in the land, whether legal or equitable.[228] 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.[229] 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.[230] 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.[231] The purchaser at an execution sale under the judgment would take 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.[232] 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

[228] Chahoon v. Hollenback, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587.

[229] Manley v. Hunt, 1 Ohio, 257; Lounsbury v. Purdy, 11 Barb. (N. Y.) 490; Thomas v. Kennedy, 24 Iowa, 397, 95 Am. Dec. 740. See Brown v. Butler, 87 Va. 621, 13 S. E. 71.

[230] Foster v. Foust, 2 Serg. & R. (Pa.) 11.

[231] Hampson v. Edelen, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; Lane v. Ludlow, 2 Paine, 591, Fed. Cas. No. 8,052.

[232] Bell v. McDuffie, 71 Ga. 264.

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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.[233] 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.[234] 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.[235] 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.[236]

§ 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,[237] the common law rule

233 Riddle's Appeal (Pa.) 7 Atl. 232; Logan's Adm'r v. Pannill, 90 Va. 11, 17 S. E. 744. In Moore v. Byers, 65 N. C. 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.

234 Adickes v. Lowry, 15 S. C. 128; Elwell v. Hitchcock, 41 Kan. 130, 21 Pac. 109. And see Snyder v. Botkin, 37 W. Va. 355, 16 S. E. 591; Hecker v. Mourer, 8 Pa. Super. Ct. 43.

235 Moyer v. Hinman, 13 N. Y. 180; Parks v. Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656.

236 Siter's Appeal, 26 Pa. 178; Crouse's Appeal, 28 Pa. 139.

237 Supra, § 433.

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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.[238] 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.[239] 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 instante 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.[240]

[238] Adams v. Harris, 47 Miss. 144; Foster's Appeal, 3 Pa. 79; Auwerter v. Mathiot, 9 Serg. & R. (Pa.) 402; Catlin v. Robinson, 2 Watts (Pa.) 373; Ralston v. Field, 32 Ga. 453; Harp v. Patapsco Guano Co., 99 Ga. 752, 27 S. E. 181; McFarland v. Fish, 34 W. Va. 548, 12 S. E. 548; Damron v. Smith, 37 W. Va. 580, 16 S. E. 807; Davis v. Vass, 47 W. Va. 811, 35 S. E. 826; Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Jackson v. Parker, 9 Cow. (N. Y.) 73; Russell's Appeal, 15 Pa. 319; Pugh v. Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534; Waters' Appeal, 35 Pa. 523, 78 Am. Dec. 354; Rand v. Garner, 75 Iowa, 311, 39 N. W. 515.

[239] Ellsworth v. Cuyler, 9 Paige (N. Y.) 418; Boughton v. Bank of Orleans, 2 Barb. Ch. (N. Y.) 458; Cooper v. Cutshall, Smith (Ind.) 128; Gentry v. Allison, 20 Ind. 481; Roddy v. Elam, 12 Rich. Eq. (S. C.) 343. And see Sweeney v. Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 101; Rosenberger v. Jones, 118 Mo. 559, 24 S. W. 203; Nelson v. Turner, 97 Va. 54, 33 S. E. 390; Merchants' Nat. Bank v. Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

[240] Lamprey v. Pike (C. C.) 28 Fed. 30. Compare Van Camp v. Peerenboom, 14 Wis. 65.

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§ 439a. Sale of Land After Entry of Judgment.

When the lien of a judgment has once attached to land, it cannot be divested by any voluntary alienation of the property by the owner thereof; that is to say, any purchaser from the judgment debtor, who has actual or constructive notice of the lien of the judgment on the property, will take the estate charged with the lien.[241] And if a purchaser has knowledge that a judgment debtor is the real owner of the land, he will take it subject to the lien of the judgment, although the record title was in a trustee when the judgment was rendered, and the sale was not fraudulent as to creditors.[242] But he will take the property subject only to the amount called for by the judgment as recorded, and not subject to an usurious increase under a subsequent agreement between the creditor and the judgment debtor.[243] Of course the land is charged only with the liens of such judgments as existed at the time of the purchase. A bona fide sale of real property for a fair price, with no fraudulent intent, leaves no rights in the vendor subject to the lien of a judgment subsequently recovered.[244] But where the lien of an existing judgment is specifically excepted from the covenants of warranty in the deed, the purchaser cannot insist that his grantor's chattels shall be exhausted before the land is sold on execution under the judgment.[245]

Where the statutes provide that the lien of a judgment shall endure only for a limited period, or shall expire, or cease to be effective, after the lapse of a certain number of years, this limitation will enure to the benefit of a purchaser from the judgment debtor, so that, at the end of the statutory time, such purchaser's title will be freed from the lien of the judgment.[246] Where a sale of a judgment debt-

241 Lessert v. Sieberling, 59 Neb. 309, 80 N. W. 900; First Nat. Bank v. Hays (Idaho) 61 Pac. 287; Minnich v. Shaffer, 135 Ind. 634, 34 N. E. 987; Stewart v. Perkins, 110 Mo. 660, 19 S. W. 989.

242 Armstrong v. Elliott, 20 Tex. Civ. App. 41, 48 S. W. 605.

243 Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

244 Appeal of State Line & S. R. Co., 171 Pa. 12, 32 Atl. 1126.

245 Wollam v. Brandt, 56 Neb. 527, 76 N. W. 1081.

246 McCaskill v. Graham, 121 N. C. 190, 28 S. E. 264. In Georgia, a statute provides that, when any person has purchased real property, in good faith and for a valuable consideration, and has been in possession of the same

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or's property is effected by order of court, it is competent for the court (as to all parties within its jurisdiction and whose claims are before it) to direct that the sale shall be made free from all incumbrances, and that the existing liens shall be transferred to the fund arising from the sale.[247]

What has been said of voluntary conveyances in fee by a judgment debtor applies equally to conveyances by way of mortgage. When a judgment for money has attached as a lien upon real estate, a mortgage thereafter executed will not invest the mortgagee with a lien superior to that of the judgment.[248]

§ 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.[249] 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.[250] A judg-

for four years, it shall be discharged from the lien of any judgment against his grantor. Civ. Code Ga. § 5355. See this statute construed in Hale v. Robertson, 100 Ga. 168, 27 S. E. 937; Blalock v. Denham, 85 Ga. 646, 11 S. E. 1038.

[247] Nelson v. Jenks, 51 Minn. 108, 52 N. W. 1081. Judgments rendered before a void assignment for the benefit of creditors and the appointment of a receiver become liens on the lands of the assignor. Younger v. Massey, 41 S. C. 50, 19 S. E. 125.

[248] Beach v. Reed, 55 Neb. 605, 76 N. W. 22. As to judgment liens in the case of a deed absolute in form but intended as a security, see Omaha Coal, Coke & Lime Co. v. Suess, 54 Neb. 379, 74 N. W. 620; Main v. Bosworth, 77 Wis. 660, 46 N. W. 1043; Michael v. Knapp, 4 Tex. Civ. App. 464, 23 S. W. 280.

[249] James v. Hubbard, 1 Paige (N. Y.) 228.

[250] National Sav. Bank v. Creswell, 100 U. S. 630, 25 L. Ed. 713; Relfe v. Bibb, 43 Ala. 519; McClung v. Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739 (overruling Beverley v. Brooke, 2 Leigh [Va.] 425); Nailer v. Stanley, 10 Serg. & R. (Pa.) 450, 13 Am. Dec. 691; Clowes v. Dickenson, 5 Johns. Ch. (N.

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ment-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.[251]

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.[252] "This general 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

Y.) 235; Rodgers v. McCluer's Adm'rs, 4 Grat. (Va.) 81, 47 Am. Dec. 715; Kelly v. Hamblen, 98 Va. 383, 36 S. E. 491; Meek v. Thompson, 99 Tenn. 732, 42 S. W. 685; Bank of Hamburg v. Howard, 1 Strob. Eq. (S. C.) 173; James v. Hubbard, 1 Paige (N. Y.) 228; Merritt v. Richey, 97 Ind. 236; Day v. Patterson, 18 Ind. 114; Sidener v. White, 46 Ind. 588; Houston v. Houston, 67 Ind. 276; Jones v. Myrick's Ex'rs, 8 Grat. (Va.) 179.

[251] Jones v. Myrick's Ex'rs, 8 Grat. (Va.) 179.

[252] Johnson v. Smith, 2 Burrows, 967; Bragner v. Langmead, 7 Term R. 20; Waghorne v. Langmead, 1 Bos. & P. 571; Fann v. Atkinson, Will. 427; Odes v. Woodward, 2 Ld. Raym. 766; Robinson v. Tonge, 3 P. Wms. 397; Farley v. Lea, 20 N. C. 307, 32 Am. Dec. 680; Foust v. Trice, 53 N. C. 494; Harding v. Spivey, 30 N. C. 63; Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642; Colt v. Du Bois, 7 Neb. 391; Mutual Assurance Soc. v. Stanard, 4 Munf. (Va.) 539; Brockenbrough's Ex'x v. Brockenbrough's Adm'r, 31 Grat. (Va.) 580; Hooton v. Will, 1 Dall. 450, 1 L. Ed. 218; Sturgess v. Bank of Cleveland, 3 McLean, 140, Fed. Cas. No. 13,571.

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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 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 Burrows, 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." [253]

[253] Coutts v. Walker, 2 Leigh (Va.) 268.

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§ 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.[254] 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.[255] 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.[256] 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.[257] 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 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." [258] As against intervening purchasers, it may be regarded

254 Swann v. Broome, 3 Burrows, 1596; Yates v. Robertson, 80 Va. 475; Withers v. Carter, 4 Grat. (Va.) 407, 50 Am. Dec. 78.

255 Welsh v. Murray, 4 Dall. 320, 1 L. Ed. 850. And see Hockman v. Hockman, 93 Va. 455, 25 S. E. 534, 57 Am. St. Rep. 816.

256 Norwood v. Thorp, 64 N. C. 682.

257 Skipwith's Ex'r v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642.

258 Follett v. Hall, 16 Ohio, 111, 47 Am. Dec. 365; Holliday v. Franklin Bank, 16 Ohio, 533. The lien of a judgment creditor, under a judgment rendered after the service of summons in a foreclosure suit against the debtor, instituted at the same term of court, is subject to the decree of foreclosure, though the judgment, by force of the statute, has a retroactive effect from

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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.[259] And in at least one state the common law rule 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." [260]

§ 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,[261] Nebraska,[262] Ohio,[263] and Wyoming,[264] the lien at-

the first day of the term. Appleby v. Mullaney, 7 Ohio N. P. 120. Where a levy on land is made after the judgment is revived, the lien dates from the seizure on execution, and not from the time of the revivor. Smith v. Hogg, 52 Ohio St. 527, 40 N. E. 406.

[259] Morgan v. Sims, 26 Ga. 283; Pope v. Brandon, 2 Stew. (Ala.) 401, 20 Am. Dec. 49. And see Emporia Mut. Loan & Sav. Ass'n v. Watson, 45 Kan. 132, 25 Pac. 586.

[260] Welch v. Murray, 4 Yeates, 197.

[261] Civil Code Kan. § 419; Bowling v. Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377.

[262] Code Civ. Proc. Neb. § 477; Ocobock v. Baker, 52 Neb. 447, 72 N. W. 582, 66 Am. St. Rep. 519; Hayden v. Huff, 60 Neb. 625, 83 N. W. 920. A judgment, not confessed, rendered at a term subsequent to that in which the action was commenced, is superior to a mortgage or conveyance of the debt-

[263] Rev. St. Ohio, § 5375; Jeffrey v. Moran, 101 U. S. 285, 25 L. Ed. 785; Urbana Bank v. Baldwin, 3 Ohio, 65; National Bank of Columbus v. Tennessee Coal, Iron & R. Co., 62 Ohio St. 564, 57 N. E. 450.

[264] Rev. St. Wyo. § 3829; Coad v. Cowhick, 9 Wyo. 316, 63 Pac. 584.

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taches "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."

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." [265]

In seven states and territories (Arkansas, Indiana, Iowa, Missouri, New Mexico, North Carolina, and Wisconsin), the lien commences on the day of the "rendition" of the judgment.[266]

In nine states (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." [267]

In Alabama and Texas, it begins from the date on which the judgment is "registered." [268]

or's land, executed after the commencement of the term at which the judgment is rendered, though before the actual rendition of the judgment. Hoagland v. Green, 54 Neb. 164, 74 N. W. 424; Norfolk State Bank v. Murphy, 40 Neb. 735, 59 N. W. 706, 38 L. R. A. 243. A judgment revived is a lien from the date of the order of revivor. Horbach v. Smiley, 54 Neb. 217, 74 N. W. 623.

[265] Code Va. § 3567; New South Building & Loan Ass'n v. Reed, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; Yates v. Robertson, 80 Va. 475; Code W. Va. p. 863, § 5; Smith v. Parkersburg Co-Operative Ass'n, 48 W. Va. 232, 37 S. E. 645.

[266] Dig. St. Ark. 1884, p. 801, § 3918; Code Civil Proc. Ind. § 608; 2 McClain's Code Iowa 1888, p. 1177, § 4089; Rev. St. Mo. 1889, § 6012 (this statute provides that judgments shall be a lien on lands after their rendition, but if two or more judgments are rendered at the same term against the same person, their lien shall commence on the last day of the term. See Bradley v. Heffernan, 156 Mo. 653, 57 S. W. 763; Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095); Code Civil Proc. N. M. § 2133; Code N. C. § 435; Rev. St. Wis. 1878, § 2902. See Friar v. Ray, 5 Mo. 511.

[267] Civil Code Colo. § 211; Code Civil Proc. Dak. § 300; Code Civil Proc. Cal. § 671; Rev. St. Idaho 1887, § 4457; Comp. St. Mont. 1887, p. 139, § 307; Gen. St. Minn. 1878, c. 66, § 277; Code Civil Proc. N. Y. § 1250; Hill's Ann. Laws Or. p. 342; 2 Comp. Laws Utah 1888, p. 300, § 3414. See Stannis v. Nicholson, 2 Or. 332.

[268] Act Ala. Feb. 28, 1887, § 1; Rev. St. Tex. art. 3159; Willis v. Smith, 66 Tex. 31, 17 S. W. 247. See Quinn v. Wiswall, 7 Ala. 645; Ala. C. & N. Co. v. State, 54 Ala. 36; Ex parte Dillard, 68 Ala. 594; Powe v. McLeod, 76 Ala. 418.

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In Arizona, from the day when the judgment is "recorded and indexed." [269]

In New Jersey, from the date of its "actual entry." [270]

In Florida, the lien commences when the judgment is "entered and pronounced in any court." [271]

In Pennsylvania, the lien attaches from the date of entry or revival of the judgment.[272]

In Georgia and Illinois, judgments rendered at the same term are all of equal date.[273]

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.[274]

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 conveyance made for value before that time, for it only attaches upon that which is then or afterwards becomes the property of the debtor." [275] 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.[276]

§ 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

[269] Rev. St. Ariz. § 2252.

[270] Revision N. J. p. 520, § 2. See Hunt v. Swayze, 55 N. J. Law, 33 25 Atl. 850.

[271] McClel. Dig. Laws Fla. p. 618, § 1.

[272] 1 Brightley, Purd. Dig. Pa. p. 946, § 5.

[273] Code Ga. 1882, § 3578; Rev. St. Ill. 1889, p. 840, § 1. See Morgan v. Sims, 26 Ga. 283; Ryhiner v. Frank, 105 Ill. 326.

[274] Chase v. Gilman, 15 Me. 64; Goodall v. Harris, 20 N. H. 363; New Hampshire Strafford Bank v. Cornell, 2 N. H. 324; Bradish v. State, 35 Vt. 452; Town of Huntington v. Town of Charlotte, 15 Vt. 46.

[275] Dyson v. Simmons, 48 Md. 207, 215; Anderson v. Tuck, 33 Md. 225.

[276] Murfree's Heirs v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232.

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title in the purchaser under the execution.[277] 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.[278] 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."[279] 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.[280] 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.[281] 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.[282]

PART V. PRIORITY AND PRECEDENCE OF JUDGMENT-LIENS.

§ 445. Lien is Subject to Prior Rights and 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 subordinate and inferior to conveyances, mortgages, or other judgment liens, previously made or procured without fraud,[283] but

277 Cockey v. Milne's Lessee, 16 Md. 200. In West Virginia, on the rendition of a judgment on an attachment, the lien of the attachment is merged in the judgment, and the priority of the lien is referred back to the first day of the term. Smith v. Parkersburg Co-Operative Ass'n, 48 W. Va. 232, 37 S. E. 645.

278 Berry v. Shuler, 25 Tex. Supp. 140; Shane v. Francis, 30 Ind. 92.

279 Small's Appeal, 24 Pa. 398.

280 Evans v. Evans, 1 Phila. 113.

281 United States Bank v. Winston's Ex'r, 2 Brock. 252, Fed. Cas. No. 944.

282 White v. K. & D. M. R. Co., 52 Iowa, 97, 2 N. W. 1016; Lentz v. Lamplugh, 12 Pa. 344.

283 Horne v. Seisel, 92 Ga. 683, 19 S. E. 709; Martinez v. Lindsey, 91 Ala. 334, 8 South. 787; Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272; Wynne v. State Nat. Bank, 82 Tex. 378, 17 S. W. 918; Willis v. Heath (Tex.) 18 S. W.

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superior to a conveyance or incumbrance of real property of the debtor, to which the judgment lien had already attached before such conveyance or incumbrance was made,[284] the last proposition being subject to the proviso that the judgment will not prevail against a subsequent sale or lien on the property unless it has been docketed, filed, registered, or otherwise made a matter of public record, as the local statute may provide.[285]

The lien of a judgment is also 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.[286] Thus a

801; Anglo-American Land, Mortgage & Agency Co. v. Bush, 84 Iowa, 272, 50 N. W. 1063. As to prior fraudulent or invalid conveyances or mortgages, see Miller v. Cox, 38 W. Va. 747, 18 S. E. 960. A chattel mortgage filed before a judgment in a justice's court will prevail over an execution issued on such judgment. Woolner v. Levy, 48 Mo. App. 469. A deed made by an insane person not under guardianship is voidable only; it passes title so that a judgment thereafter rendered will not be a specific lien on the property conveyed until the conveyance is actually avoided. French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

[284] Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644; Gulley v. Thurston, 112 N. C. 192, 17 S. E. 13. Where land is omitted from a mortgage by mistake, the lien of a judgment subsequently filed against the mortgagor is subject to the equity of the mortgagee. Chadron Building & Loan Ass'n v. Hamilton, 45 Neb. 369, 63 N. W. 808. That one buys land for a full price, in good faith, and without notice, is of no avail against the lien of a prior judgment. Oates v. Munday, 127 N. C. 439, 37 S. E. 457.

[285] See Sweetland v. Buell, 164 N. Y. 541, 58 N. E. 663, 79 Am. St. Rep. 676; McKenna v. Van Blarcom, 109 Wis. 271, 85 N. W. 322, 83 Am. St. Rep. 895.

[286] Finch v. Earl of Winchelsea, 1 P. Wms. 277; Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Sweet v. Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Ellis v. Tousley, 1 Paige (N. Y.) 280; Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Floyd v. Harding, 28 Grat. (Va.) 401; Walke v. Moody, 65 N. C. 599; Coster's Ex'rs 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. 950; Wells v. Benton, 108 Ind. 585, 8 N. E. 444; Goodell v. Blumer, 41 Wis. 436.

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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.[287] 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 against the vendee which was a lien upon his estate in the land.[288] 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.[289] Nor are judgment-creditors protected against

[287] Doswell v. Adler, 28 Ark. 83.

[288] Arnold v. Patrick, 6 Paige (N. Y.) 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. In Valentine v. Seiss, 79 Md. 187, 28 Atl. 892, it is held that an unrecorded contract for the sale of land, made in good faith for a valuable consideration, takes precedence of the general lien of a subsequent judgment.

[289] Dwight v. Newell, 3 N. Y. 185.

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trusts of which they have no notice, or allowed in equity to hold against the cestui que trust.[290] 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.[291]

§ 446. As against Prior Unrecorded Conveyance.

In many of the states there are statutes which make a deed or mortgage invalid, as against subsequent bona fide purchasers and creditors, 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.[292] "As a

[290] Shryock v. Waggoner, 28 Pa. 430.

[291] Harner's Appeal, 94 Pa. 489.

[292] United States v. Devereux, 32 C. C. A. 564, 90 Fed. 182; Lash v. Hardick, 5 Dill. 505, Fed. Cas. No. 8,097; Hunt v. Swayze, 55 N. J. Law, 33, 25 Atl. 850; McClure v. Thistle's Ex'rs, 2 Grat. (Va.) 182; Young v. Devries, 31 Grat. (Va.) 304; Robinson v. Commercial & Farmers' Bank (Va.) 17 S. E. 739; Blakemore v. Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Price v. Wall's Ex'r, 97 Va. 334, 33 S. E. 599, 75 Am. St. Rep. 788; Anderson v. Nagle, 12 W. Va. 98; Andrews v. Mathews, 59 Ga. 466; Motley v. Jones, 98 Ala. 443, 13 South. 782; Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co., 58 Miss. 846; Cavanaugh v. Peterson, 47 Tex. 198; Firebaugh v. Ward, 51 Tex. 409; Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. 901; Hawkins v. Files, 51 Ark. 417, 11 S. W. 681; Cleveland v. Shannon (Ark.) 12 S. W. 497; Mayham v. Coombs, 14 Ohio, 428; Guiteau v. Wisely, 47 Ill. 433; Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Vause v. Templeton, 87 Ill. App. 455; Reed v. Austin's Heirs, 9 Mo. 722, 45 Am. Dec. 336; Frothingham v. Stacker, 11 Mo. 77; Belcher v. Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497; Lewis v. Atherton, 5 Okl.

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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." [293] 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.[294] And this notice may very well be constructive, or inferred from circumstances. Whatever is sufficient to charge a purchaser with notice is sufficient to charge a judgment creditor.[295] Thus, an unrecorded deed will take precedence over a subsequent judgment against the grantor, where the grantee was in actual, open, and notorious possession under the deed, and especially where he has given a purchase-money mortgage for part of the price, and the same is duly recorded.[296] But the mere fact that the land, being unimproved, is inclosed, and is advertised as being for sale, by signs posted on the property, is not sufficient to put the judgment creditor on inquiry.[297] If the latter had no notice of the unrecorded deed at the time the judgment was rendered or placed on the docket, his rights are not affected by the fact that he acquires knowledge of such deed at the time he sells the

90, 47 Pac. 1070. This rule does not apply (in Illinois) to holders of judgments on claims allowed against the estate of a decedent, such judgments not being liens on lands left by the latter. Noe v. Montray, 170 Ill. 169, 48 N. E. 709. And a statute placing judgment creditors on the same footing with bona fide purchasers, as against unrecorded conveyances, does not give them priority over a resulting trust which cannot be made a matter of record. School District No. 10 v. Peterson, 74 Minn. 122, 76 N. W. 1126, 73 Am. St. Rep. 337.

[293] Calvert v. Roche, 59 Tex. 463.

[294] Lamberton v. Merchants' Nat. Bank, 24 Minn. 281; Stovall v. Odell, 10 Tex. Civ. App. 169, 30 S. W. 66; Barnett v. Squyres (Tex. Civ. App.) 52 S. W. 612. Compare Winston v. Hodges, 102 Ala. 304, 15 South. 528.

[295] H. C. Tuck Co. v. Ayers, 56 N. J. Eq. 56, 38 Atl. 194.

[296] Adam v. Tolman, 180 Ill. 61, 54 N. E. 174. And see Powell v. Allred, 11 Ala. 318; Northwestern Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085; Gardom v. Chester, 60 N. J. Eq. 238, 46 Atl. 602. Compare Hill v. Gordon (C. C.) 45 Fed. 276.

[297] Clark v. Butts, 73 Minn. 467, 76 N. W. 263.

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land under an execution on his judgment.[298] And although, as stated, an unrecorded deed will take precedence as against a 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 unrecorded conveyance, is not affected by the notice to his assignor.[299] 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.[300]

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.[301] 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.[302]

[298] Smith v. Willard, 174 Ill. 538, 51 N. E. 835, 66 Am. St. Rep. 313; Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. 901.

[299] Duke v. Clark, 58 Miss. 465.

[300] Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

[301] Sparks v. State Bank, 7 Blackf. (Ind.) 469; Schroeder v. Gurney, 73 N. Y. 430; Mellon's Appeal, 32 Pa. 121; Larimer's Appeal, 22 Pa. 41; Norton v. Williams, 9 Iowa, 528; Bell v. Evans, 10 Iowa, 353; Wilcoxson v. Miller, 49 Cal. 193; Hampton v. Levy, 1 McCord Eq. (S. C.) 107; Farley v. McAlister, 39 Tex. 602; Smith v. Savage, 3 Kan. App. 556, 43 Pac. 847; Stanhilber v. Graves, 97 Wis. 515, 73 N. W. 48; Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841. For the rule in Georgia, see Bailey v. Bailey, 93 Ga. 768, 21 S. E. 77; Donovan v. Simmons, 96 Ga. 340, 22 S. E. 966; Lytle v. Black, 107 Ga. 386, 33 S. E. 414.

[302] Evans v. McGlasson, 18 Iowa, 150; Paine's Lessee v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585.

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§ 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.[303] In such case, the purchaser acquires only a temporary 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.[304] 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.[305] 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.[306] 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 distinct debt or liability, and not to secure the purchase-money of the land, the judgment will be the elder lien.[307]

[303] Cake's Appeal, 23 Pa. 186, 62 Am. Dec. 328; Parsons v. Hoyt, 24 Iowa, 154; Scott v. Warren, 21 Ga. 408; Straus v. Bodeker's Ex'x, 86 Va. 543, 10 S. E. 570; Cowardin v. Anderson, 78 Va. 88; Summers v. Darne, 31 Grat. (Va.) 791; Clark v. Munroe, 14 Mass. 351; Clark v. Butler, 32 N. J. Eq. 664; Curtis v. Root, 20 Ill. 53; Courson v. Walker, 94 Ga. 175, 21 S. E. 287. Compare Roane v. Baker (Ill.) 2 N. E. 501.

[304] Cowardin v. Anderson, 78 Va. 88.

[305] Haywood v. Nooney, 3 Barb. (N. Y.) 643; Cowardin v. Anderson, 78 Va. 88; Clark v. Munroe, 14 Mass. 351; Kaiser v. Lembeck, 55 Iowa, 244, 7 N. W. 519.

[306] Ransom v. Sargent, 22 Kan. 516.

[307] Root v. Curtis, 38 Ill. 192; Weil v. Casey, 125 N. C. 356, 34 S. E. 506, 74 Am. St. Rep. 644.

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§ 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." [308] It may now be regarded as settled that the priority of the United States, given by these statutes, "does not overrule any liens upon the debtor's property which existed before the event occurred which gives the statutory priority; that is, before the insolvency." [309]

It is competent for the legislature of a state to enact that taxes assessed against real property shall constitute a paramount lien or claim upon the same, and shall take precedence of all other liens, however created, whether by mortgage, judgment, or otherwise. When such a law is in force (as is the case in several of the states), the lien of a judgment against the owner will be subordinated and postponed to the statutory lien of taxes on the property, even though the judgment was recovered before the levy or assessment of the taxes; and a valid and completed sale for the taxes will divest the lien of the judgment, leaving to the creditor only the right to come upon the surplus, if any, or to redeem from the tax sale.[310]

In some states, it is held that a judgment obtained against one in his lifetime has the preference over a debt or specialty passed to the

[308] And see Bankr. Act 1898, § 64, par. "b," cl. 5.

[309] United States v. Lewis, 13 N. B. R. 38, Fed. Cas. No. 15,595; Cottrell v. Pierson (C. C.) 12 Fed. 805; Hoppock v. Shober, 69 N. C. 153; Conard v. Atlantic Ins. Co., 1 Pet. 438, 7 L. Ed. 189; Brent v. Bank of Washington, 10 Pet. 596, 9 L. Ed. 547. In so far as the early case of Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271, may have asserted a different doctrine, it must be regarded as overruled by the later decisions above cited.

[310] See Black, Tax Titles, §§ 185, 186, 426; First Nat. Bank v. Hendricks, 134 Ind. 361, 33 N. E. 110; Eaton's Appeal, 83 Pa. 152; Jenkins v. Newman, 122 Ind. 99, 23 N. E. 683; Dunlap v. Gallatin Co., 15 Ill. 7; Keating v. Craig, 73 Mo. 507; Hardenbergh v. Converse, 31 N. J. Eq. 500; Staunton v. Harris, 9 Heisk. (Tenn.) 579.

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state after such judgment, in the settlement of the estate of the decedent.[311]

§ 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.[312] 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.[313] 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.[314] As between a judgment in another county and a mortgage, priority of lien is deter-

[311] Hollingsworth v. Patten's Adm'x, 3 Har. & McH. (Md.) 125.

[312] Johnson v. Mitchell, 17 Ga. 593; Puryear v. Taylor, 12 Grat. (Va.) 401; Stewart v. Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; Hagadorn v. Hart, 62 Hun, 94, 16 N. Y. Supp. 625; Max Meadows Land & Imp. Co. v. McGavock, 98 Va. 411, 36 S. E. 490; Osborne v. Hill, 91 Ga. 137, 16 S. E. 965. Under a statute providing that entries on the judgment docket "shall be so made that one shall follow the other in the order of time in which the said judgments shall have been rendered," priority of position on the page of the docket prima facie implies priority of date. In re Kann's Estate, 171 Pa. 262, 32 Atl. 1095. But a judgment which, on its face, is prior in date to another judgment, anterior in position on the judgment docket, will have priority over such judgment in distribution. Buhl v. Wagner, 22 Pa. Co. Ct. R. 608; In re Kann's Estate, supra. Where two judgments are erroneously docketed and indexed, the one first entered has priority. In re Shaver, 18 Pa. Co. Ct. R. 202.

In Illinois, where the statute provides that "there shall be no priority of the lien of one judgment over that of another rendered at the same term of court or on the same day in vacation," it is held that executions on judgments confessed on different days in vacation are entitled to priorities. Coe v. Hallam, 173 Ill. 461, 50 N. E. 1072.

[313] Haleys v. Williams, 1 Leigh (Va.) 140, 19 Am. Dec. 743.

[314] McKee v. Gayle, 46 Miss. 676.

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mined by priority of registration in the county where the land is situated.[315] A judgment for a firm debt has no priority over a judgment previously 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.[316] 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.[317] It should also be remarked that the lien of a judgment depends upon the condition of the record at the time of its entry, and cannot be affected by a subsequent revival of an earlier judgment giving such senior judgment creditor rights which did not exist at the time of the entry of the junior judgment.[318]

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.[319] 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 exe-

[315] Firebaugh v. Ward, 51 Tex. 409.

[316] Davis v. Delaware & H. Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. Rep. 418. 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. (N. Y.) 290.

[317] Hamlin's Lessee v. Bevans, 7 Ohio, 161, pt. 1, 28 Am. Dec. 625.

[318] Young v. Young, 20 Pa. Co. Ct. R. 45. But the equitable right of a judgment creditor, whose judgment is recovered after an entry of satisfaction entitling him to priority over a senior judgment creditor, which satisfaction is set aside, can be enforced only where the property of the debtor is more than sufficient to pay intermediate judgments between his and that of the senior judgment creditor. McCune v. McCune, 164 Pa. 611, 30 Atl. 577.

[319] Under Code N. C. § 435, which makes a docketed judgment a lien on "all the land" of the debtor in the county where it is docketed, from the date of the docketing, the lien of a judgment has priority over the liens of mortgages on the homestead executed subsequently to the docketing of such judgment. Vanstory v. Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483.

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cuted in November is superior to a judgment rendered in the preceding August and docketed in the following July.[320] 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.[321] 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.[322] 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, 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.[323] 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.[324]

§ 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

320 Holman v. Miller, 103 N. C. 118, 9 S. E. 429.
321 Wait's Ex'r v. Savage (N. J.) 15 Atl. 225.
322 Grand Gulf Bank v. Henderson, 5 How. (Miss.) 292.
323 Aaron v. Warner, 62 Miss. 370.
324 Anderson v. Nagle, 12 W. Va. 98.

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be made in satisfaction of the judgments.[325] 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.[326] In New York, the statute requires the clerk of the court to docket a judgment by entering upon the docket book certain particulars, including "the day, hour, and minute when the judgment roll was filed, and the day, hour, and minute when the judgment was docketed in his office." [327] And judgments entered the same day will take rank according to the exact time when they were placed upon the docket. In 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 execution, 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.[328] In Mississippi, the question of the priority of the rendition of two judgments in the same court 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.[329]

[325] Claason's Appeal, 22 Pa. 359; Metzler v. Kilgore, 3 Pen. & W. (Pa.) 245, 23 Am. Dec. 76; Ladley v. Creighton, 70 Pa. 490; Mechanics' Bank v. Gorman, 8 Watts & S. (Pa.) 304; Clawson v. Eichbaum, 2 Grant, Cas. (Pa.) 130; Emerick v. Garwood, 1 Browne (Pa.) 20; Rockhill v. Hanna, 4 McLean, 554, Fed. Cas. No. 11,980; McLean v. Rockey, 3 McLean, 235, Fed. Cas. No. 8,891; Bruce v. Vogel, 38 Mo. 100; Janney's Ex'r v. Stephen's Adm'r, 2 Pat. & H. 11; Burney v. Boyett, 1 How. (Miss.) 39.

[326] Bates v. Hinsdale, 65 N. C. 423; Lemon v. Staats' Heirs, 1 Cow. (N. Y.) 592; Biggam v. Merritt, Walk. (Miss.) 430, 12 Am. Dec. 576.

[327] Code Civ. Proc. § 1246. A similar rule prevails in Alabama. See German Security Bank v. Campbell, 99 Ala. 249, 12 South. 436, 42 Am. St. Rep. 55.

[328] Lippencott v. Wilson, 40 Iowa, 425; Tilford v. Burnham, 7 Dana, 109; Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76; Kesterson v. Tate, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419.

[329] Johnson v. Edde, 58 Miss. 664; Herron v. Walker, 69 Miss. 707, 12 South. 259.

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§ 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.[330] 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."[331] 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 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."[332] 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 rec-

[330] Hollingsworth v. Thompson, 5 Har. (Del.) 432. See Boyer's Estate, 51 Pa. 432, 91 Am. Dec. 129.

[331] Clawson v. Eichbaum, 2 Grant, Cas. (Pa.) 130; Mechanics' Bank v. Gorman, 8 Watts & S. (Pa.) 304; Small's Appeal, 24 Pa. 398; Ladley v. Creighton, 70 Pa. 490; Murfree's Heirs v. Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

[332] Mechanics' Bank v. Gorman, 8 Watts & S. 304; Hoppock's Ex'rs v. Ramsey, 28 N. J. Eq. 413.

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ord, 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.[333] 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.[334]

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.[335] 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.[336] "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 debtor is not sufficient to pay both, the loss must be divided in equal proportions." [337]

§ 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 obtain-

[333] Murfree v. Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232; Berry v. Clements, 9 Humph. (Tenn.) 312.

[334] Clark v. Duke, 59 Miss. 575.

[335] Murfree v. Carmack, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232; Berry v. Clements, 9 Humph. (Tenn.) 312.

[336] Clawson v. Eichbaum, 2 Grant, Cas. (Pa.) 130; Claason's Appeal, 22 Pa. 359; Hendrickson's Appeal, 24 Pa. 363. And see Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257.

[337] Hendrickson's Appeal, 24 Pa. 363.

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ed, 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.[338] 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.[339]

§ 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.[340] 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.[341] But if a judgment is actually recorded, the fact that a party is ignorant of it is due to his own negligence, against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault.[342]

[338] Walker v. Arthur, 9 Rich. Eq. (S. C.) 397.

[339] Kerr's Appeal, 92 Pa. 236.

[340] Corley v. Renz (Tex. Civ. App.) 24 S. W. 935; Dotterer v. Harden, 88 Ga. 145, 13 S. E. 971.

[341] Bell v. Davis, 75 Ind. 314. It has even been held that actual notice by a purchaser of land of an undocketed judgment does not render the judgment a lien on the land, as against him. Glasscock v. Stringer (Tex. Civ. App.) 32 S. W. 920; Sklower v. Abbott, 19 Mont. 228, 47 Pac. 901.

[342] Bunn v. Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48.

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§ 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.[343] But if the lien attaches subsequent to the marriage, it will be subordinate to the wife's right of dower.[344]

§ 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.[345] 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.[346] On similar principles, an

[343] Brown v. Williams, 31 Me. 403; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Lane v. Gover, 3 Har. & McH. (Md.) 394; Queen Anne's Co. v. Pratt, 10 Md. 5; Davidson v. Frew, 14 N. C. 3, 22 Am. Dec. 708; Hodges v. McCabe, 10 N. C. 78; Bisland v. Hewett, 11 Smedes & M. (Miss.) 164; Robbins v. Robbins, 8 Blackf. (Ind.) 174; Elceman v. Finch, 79 Ind. 511.

[344] Gould v. Luckett, 47 Miss. 96, 116.

[345] Supra, § 450.

[346] Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657; Bridgman v. McKissick, 15 Iowa, 260; Howland v. Knox, 59 Iowa, 46, 12 N. W. 777; Lyon v. Robbins, 46 Ill. 276; Armington v. Rau, 100 Pa. 165; Haak's Appeal, 100 Pa. 59. But a very vigorous dissent from this opnion has been expressed in a recent case in Minnesota. Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683. And see Wilkinson v. Paddock, 125 N. Y. 748, 27 N. E. 407; Matula v. Lane, 22 Tex. Civ. App. 391, 55 S. W. 504.

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attachment is a valid charge upon land from the moment it is levied, 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.[347] 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.[348]

§ 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.[349] 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

347 Lackey v. Seibert, 23 Mo. 85; Langdon v. Raiford, 20 Ala. 532. Compare Lichton v. McDougald, 5 Ga. 176.

348 Field v. Liverman, 17 Mo. 218; Patton v. Hayter, 15 Ala. 18; Andrus v. Burke (N. J. Ch.) 48 Atl. 228.

349 Lamme v. Schilling, 25 Kan. 92. And see Excelsior Manuf'g Co. v. Boyle, 46 Kan. 202, 26 Pac. 408; Kisterson v. Tate, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419. 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 (D. C.) 6 Fed. 269; Bish v. Burns, 7 Ohio Cir. Ct. R. 285.

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judgment must be postponed to both. The difficulties of the question, 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."[850] 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.[851]

[850] Holliday v. Franklin Bank, 16 Ohio, 535; Brazee v. Lancaster Bank, 14 Ohio, 318; Fitch v. Mendenhall, 17 Ohio, 578.

[851] 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.[352] 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.[353]

§ 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.[354] And the same consequence will result although the record shows that the elder judgment was for purchase-money.[355]

§ 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.[356] 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

[352] Marshall v. Moore, 36 Ill. 321.

[353] Sanford v. Ogden, 34 Ala. 118.

[354] Pennsylvania Agricultural & Manuf'g Bank v. Crevor, 2 Rawle (Pa.) 224; Miller v. Miller, 147 Pa. 545, 548, 23 Atl. 841; Kaminsky v. Trantham, 45 S. C. 393, 23 S. E. 132; Colson v. Kennedy, 88 Ga. 174, 14 S. E. 119; Brady v. Creditors, 43 La. Ann. 165, 9 South. 59; Davisson v. Mackay, 22 Or. 247, 29 Pac. 791; Smith v. Schwartz, 21 Utah, 126, 60 Pac. 305.

[355] Ruth's Appeal, 54 Pa. 173.

[356] 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. C. 300, 2 S. E. 136; Matthews v. Nance, 49 S. C. 389, 27 S. E. 408.

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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 mortgage, 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.[357] 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.[358] 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.[359]

§ 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.[360] This general rule

[357] Lambertville Nat. Bank v. Boss (N. J.) 13 Atl. 18. Compare Holliday v. Franklin Bank, 16 Ohio, 535; supra, § 456.

[358] Commercial Bank v. Yazoo Co., 6 How. (Miss.) 530, 38 Am. Dec. 447; Rankin v. Scott, 12 Wheat. 177, 6 L. Ed. 592; Littlefield v. Nichols, 42 Cal. 372; Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512; Bruce v. Vogel, 38 Mo. 100; Lathrop v. Brown, 23 Iowa, 40; Hiestand v. Williamson, 128 Pa. 122, 18 Atl. 427; Paddack v. Staley, 13 Colo. App. 363, 58 Pac. 363.

[359] Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512.

[360] In re Hazard's Estate, 141 N. Y. 586, 36 N. E. 739; Moore v. Jordan, 117 N. C. 86, 23 S. E. 259, 42 L. R. A. 209, 53 Am. St. Rep. 576; Belknap v. Greene, 56 S. C. 119, 34 S. E. 26; Moody v. Harper, 25 Miss. 484; Cayce v. Stovall, 50 Miss. 396; Willis v. Downes (Tex. Civ. App.) 46 S. W. 920; Matula v. Lane, 22 Tex. Civ. App. 391, 55 S. W. 504; Relfe v. McComb, 2 Head (Tenn.) 558, 75 Am. Dec. 748; Davis v. Benton, 2 Sneed (Tenn.) 665; Michaels v. Boyd, Smith

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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.[361] 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 such defendant, the eldest judgment creditor who has preserved his lien will have the prior right.[362] It has also been thought that, where a statute requires an executor to pay judgments docketed against the deceased, according to their priority, a creditor whose judgment was first docketed will be entitled to priority of payment, though the property sought to be applied was acquired by the judgment debtor after all the judgments had been docketed.[363] Again, where a debtor has made a fraudulent and simulated sale of property, and afterwards several judgments are recovered against him, and the property is then returned to him, the liens of the judgments will rank according to their several dates of recordation.[364] So also, where land has been appropriated for a right of way, a prior judgment creditor of the owner of the land has a lien on the money awarded superior to that of an assignee of the judgment of award.[365]

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;[366]

(Ind.) 100; Ware v. Purdy (Iowa) 60 N. W. 526; Kisterson v. Tate, 94 Iowa, 665, 63 N. W. 350, 58 Am. St. Rep. 419; Ware v. Delahaye, 95 Iowa, 667, 64 N. W. 640.

361 Creighton v. Leeds, 9 Or. 215.

362 Wood v. Gary, 5 Ala. 43.

363 In re Foster's Estate, 8 Misc. Rep. 344, 29 N. Y. Supp. 316.

364 Schwabacher v. Leibrook, 48 La. Ann. 821, 19 South. 758.

365 Yakima Water, Light & Power Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471.

366 A sale may be made under the judgment on the tenth anniversary of the day on which it was rendered, or, if the ten years expire on a Sunday,

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sometimes the lien runs for five years, with the privilege of renewal for an equal period, and successive revivals after that;[867] 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.[868] A judg-

then on the following day. Spencer v. Haug, 45 Minn. 231, 47 N. W. 794. But the issuance of an execution and the making of a levy within the 10 years will not be effectual to continue the lien of the judgment to the time of sale, where the sale does not take place until after the expiration of the 10 years; and the purchaser at such sale will take subject to liens placed on the land since the rendition of the judgment. Wells v. Bower, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; Albee v. Curtis, 77 Iowa, 644, 42 N. W. 508; Lakin v. C. H. McCormick & Bro., 81 Iowa, 545, 46 N. W. 1061. So in South Dakota, where the statute makes a judgment lien continue for ten years from the time of its docketing, and provides for an action to enforce the lien on real estate, if such an action is commenced and brought to issue within the ten years, but not reached for trial until after the expiration thereof, the lien is lost. Ruth v. Wells, 13 S. D. 482, 83 N. W. 568.

[867] See Wetmore v. Wetmore, 155 Pa. 507, 26 Atl. 694. The statute in South Carolina provides that a judgment shall be a lien on real estate for 10 years from the date of its entry, but the plaintiff may, within three years "after its active energy has expired, revive the judgment, with like liens as in the original for a like period." It is held that a judgment revived within the three years has a continuous lien from the date of its entry, and its priority is preserved as against all liens which existed against the judgment debtor during the period of its original active energy. Verner v. Bookman, 53 S. C. 398, 31 S. E. 283, 69 Am. St. Rep. 870; Woodward v. Woodward, 39 S. C. 259, 17 S. E. 638, 39 Am. St. Rep. 716. Under the present statute in Arkansas, judgment liens continue in force only for three years unless renewed. Acts Ark. 1891, No. 56, § 2, p. 92.

[868] Reynolds v. Cobb, 15 Neb. 378, 19 N. W. 502; Flagg v. Flagg, 39 Neb. 229, 58 N. W. 109; Cotton v. First Nat. Bank, 51 Neb. 751, 71 N. W. 711; Dillon v. Chicago, K. & N. R. Co., 58 Neb. 472, 78 N. W. 927. See Pasour v. Rhyne, 82 N. C. 149; Pipkin v. Adams, 114 N. C. 201, 19 S. E. 105; McCarty v. Ball, 82 Va. 872, 1 S. E. 189; Benbow v. Boyer, 89 Iowa, 494, 56 N. W. 544. The statute in New York, which provides that execution may be had upon real estate after the 10 years by filing a notice, subscribed

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ment, 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.[369] In cases where the judgment must be periodically revived, it is held that the question, 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.[370] The lien of a judgment in favor of the state is never lost by lapse of time.[371]

§ 462. Dormant Judgment Acts.

In several of the states there are statutes 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, such as the levy of an execution on property of the defendant.[372] These statutes are

by the sheriff, describing the judgment, the execution, and the property levied upon, does not extend the original lien of the judgment. Floyd v. Clark, 16 Daly, 528, 17 N. Y. Supp. 848. But a judgment for foreclosure and sale of mortgaged premises may be enforced even after 20 years or more from its entry. Wing v. De La Rionda, 125 N. Y. 678, 25 N. E. 1064.

[369] Muir v. Leitch, 7 Barb. 341. The statute of limitations begins to run on a judgment by default from the entry of the judgment, and not from the entry of the default. Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218.

[370] Duffey v. Houtz, 105 Pa. 96.

[371] Comm. v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33.

[372] In Georgia, the Code, § 2914, provides that no domestic judgment shall be enforced after the expiration of seven years from the time of its rendition, where no execution has been issued on it, or where execution has been issued and seven years have expired from the time of the last entry on the execution made by an officer authorized to execute and return the same. See Smith v. Williams, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67; Formby v. Shackleford, 94 Ga. 670, 21 S. E. 711. An entry on an execution signed by a person as "Former Sheriff" does not satisfy the statute, as an ex-sheriff is not authorized to execute and return executions. Orr v. Morrow, 91 Ga. 148, 17 S. E. 287. Nor will the judgment be saved by an entry on the execution docket, made by the clerk without being thereto requested by the judgment creditor, that on a certain day the execution was handed by him to the sheriff. Daniel v. Haynes, 91 Ga. 123, 16 S. E. 649. In Texas, the law provides that a judgment whereon execution has not issued within

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called "dormant judgment acts," and unless their terms are complied with, the lien of a judgment will expire and give place to junior liens.[873] They are not merely statutes of limitations, and a judgment will not be saved from dormancy by the mere fact that partial payments are made and receipted for within the limited time,[874] nor by the payment of the costs of the action to the clerk and his entry of the fact upon the execution.[875] An officer's indorsement on the writ that he had received directions from the plaintiff's attorney to collect it is not sufficient to keep the judgment alive,[876] nor can that object be accomplished by making upon the execution a nunc pro tunc entry of a levy alleged to have been made before the judgment became dormant.[877] In Tennessee, where the statute requires an execution to be taken out and the land sold within twelve months, the lien is not saved by the levy of an execution and the filing of a creditor's bill, nor by a stipulation contained in the judgment that execution shall not issue for a certain time after its rendition.[878] On the other hand, an execution regularly issued within the limited time will stop the running of the statute against the judgment, though it was issued for that sole purpose and without any expectation of collecting the money,[879] as, where the execution is levied on defendant's homestead, and a claim of exemption is successfully inter-

12 months after its rendition may be revived within 10 years after its date, and not thereafter. It is not necessary that an execution should issue every 12 months, in order to keep alive a judgment on which an execution had been taken out within the first year after its rendition. Central Coal Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383; Davis v. Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086. See Mundine v. Brown (Tex. Civ. App.) 23 S. W. 90; Adams v. Crosby, 84 Tex. 99, 19 S. W. 355.

873 Thomas v. Van Meter, 164 Ill. 304, 45 N. E. 405; Horbach v. Smiley, 54 Neb. 217, 74 N. W. 623; Smith v. Hogg, 52 Ohio St. 527, 40 N. E. 406; Thompson v. Hubbard, 3 Kan. App. 714, 44 Pac. 1095.

874 Stanley v. McWhorter, 78 Ga. 37, 1 S. E. 260; Lewis v. Smith, 99 Ga. 603, 27 S. E. 162; Blue v. Collins, 109 Ga. 341, 34 S. E. 598; Nelson v. Gill, 56 Ga. 536.

875 Lewis v. Smith, 99 Ga. 603, 27 S. E. 162.

876 Hanks v. Pearce, 96 Ga. 159, 22 S. E. 676.

877 Lewis v. Smith, 99 Ga. 603, 27 S. E. 162.

878 Gardenhire v. King, 97 Tenn. 585, 37 S. W. 548.

879 Murphy v. Klein, 71 Miss. 908, 15 South. 658.

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posed.[380] A decree in equity which merely prescribes the performance of a duty is not within either the letter or the spirit of these acts,[381] but the filing of an equitable petition, for the purpose of enforcing the collection of a judgment, is sufficient to prevent the running of the dormancy statute, as against such judgment, so long as the equitable action is pending.[382] An order by a justice of the peace for the sale of property attached in a suit before him is an "execution," within the meaning of these statutes.[383] And since the usual method of enforcing the payment of a judgment against a municipal corporation is by the writ of mandamus, issued to enforce the levy and collection of taxes for that purpose, this writ is to be considered the equivalent of a writ of execution, within the meaning and purpose of the statutes relating to the dormancy of judgments, when the question concerns a judgment against a municipality.[384] When a judgment has become dormant by the laws of the state where it was rendered, and has not been revived or renewed, it cannot be fastened as a lien upon lands of the judgment debtor in another state.[385]

§ 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 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

[380] McClarin v. Anderson, 104 Ala. 201, 16 South. 639. Compare Wuest v. James, 51 Ohio St. 230, 36 N. E. 832.

[381] Butler v. James, 33 Ga. 148.

[382] Conley v. Buck, 100 Ga. 187, 28 S. E. 97.

[383] Webber v. Harshbarger, 5 Kan. App. 185, 47 Pac. 166.

[384] Dempsey v. Township of Oswego, 2 C. C. A. 110, 51 Fed. 97.

[385] Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071.

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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.[386] 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.[387]

§ 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.[388] 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 judgment, a transcript of which is filed in another county, is in force for ten

[386] Henry v. Henry, 31 S. C. 1, 9 S. E. 726; McCormick v. Alexander, 2 Ohio, 65; supra, § 399.

[387] King v. Belcher, 30 S. C. 381, 9 S. E. 359; Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216.

[388] Knauss' Appeal, 49 Pa. 419.

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years after its rendition, and not ten years from the time of filing the transcript.[389]

§ 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.[390] 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.[391] 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.[392]

§ 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 continues, the judgment being unsatisfied, against the judgment-

[389] Brown v. Wuskoff, 118 Ind. 569, 19 N. E. 463. See a later decision in the same case in 21 N. E. 243.

[390] Applegate v. Edwards, 45 Ind. 329. And see Patterson v. Baxley, 33 S. C. 354, 11 S. E. 1065.

[391] Savings & Trust Co. v. Bear Valley Irr. Co., 89 Fed. 82.

[392] Peirce v. Black, 105 Pa. 342.

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debtor himself.[393] 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.[394] 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.[395] 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.[396] 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.[397]

[393] McCahan v. Elliott, 103 Pa. 634; Fetterman v. Murphy, 4 Watts (Pa.) 424, 28 Am. Dec. 729; Aurand's Appeal, 34 Pa. 151; Bank of North America v. Fitzsimons, 3 Bin. (Pa.) 342; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

[394] Hinds v. Scott, 11 Pa. 19, 51 Am. Dec. 506; Tufts v. Tufts, 18 Wend. (N. Y.) 621; Yeager v. Davis, 112 Ind. 230, 13 N. E. 707.

[395] Brown's Appeal, 91 Pa. 485. Compare Nutt v. Cuming, 22 App. Div. 92, 47 N. Y. Supp. 800; Floyd v. Clark, 16 Daly, 528, 17 N. Y. Supp. 848.

[396] Pettit v. Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437.

[397] Gridley v. Watson, 53 Ill. 186.

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§ 467. Death of Judgment-Debtor.

In most of the states, the lien of a judgment on real estate is not destroyed by the death of the judgment debtor, but continues in force for the same length of time as if he had remained in life.[398] But in Pennsylvania, a statute provides that a judgment against a decedent at the time of his death "shall not continue a lien on the real estate of such decedent as against a bona fide purchaser, mortgagee, or other judgment creditor of such decedent, or of his heirs or devisees." This, however, does not limit the lien as against the heirs and devisees of the judgment debtor; as to such persons, the land will continue to be bound by the lien of the judgment for five years after the death of the decedent.[399] In New York, the statutes give to docketed judgments a lien on land for ten years, and provide that a judgment lien, if existing at the death of the judgment debtor, shall "continue for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll." This is not an abridgment of the life of the lien, and it will not be limited to three years and a half from the debtor's death, if the original ten years would not expire within that time.[400]

§ 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.[401] But if the judgment creditor, during the life of the judgment, files his bill in equity against the judgment debtor and an-

[398] Morton v. Adams, 124 Cal. 229, 56 Pac. 1038, 71 Am. St. Rep. 53; Barrett v. Furnish, 21 Or. 17, 26 Pac. 861; Enslen v. Wheeler, 98 Ala. 200, 13 South. 473; Lewis v. Smith, 99 Ga. 603, 27 S. E. 162; Ritchey v. Buricke's Adm'rs, 21 Ky. Law Rep. 1120, 54 S. W. 173; McAfee v. Reynolds (Ind.) 28 N. E. 423, 18 L. R. A. 211, 30 Am. St. Rep. 194.

[399] See Fuellhart v. Blood, 7 Pa. Dist. R. 575; Biesecker v. Cobb, 13 Pa. Super. Ct. 56; Konigmaker v. Brown, 14 Pa. 269; Nicholas v. Phelps, 15 Pa. 36; Shearer v. Brinley, 76 Pa. 300; Baxter v. Allen, 77 Pa. 468; Stevenson v. Black (Pa.) 1 Atl. 312.

[400] In re Holmes, 59 Hun, 369, 13 N. Y. Supp. 100, affirmed 131 N. Y. 80, 29 N. E. 1003.

[401] Smith v. Meredith, 30 Md. 429; Hutcheson v. Grubbs, 80 Va. 251.

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other, to subject property to the payment of his judgment, he does not lose his lien on such property if he allows his judgment to become dormant (or if the general lien of the judgment expires by statutory limitation) before the entry of a final decree in the equity suit.[402] But if the creditor has lost his lien by his failure to take the proper steps to enforce it in due season, he cannot change the result by the mere act of issuing an execution.[403] But it is not necessary that a judgment should be revived in order to maintain its lien on money in the sheriff's hands.[404]

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 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.[405] Thus a voluntary assignment for the benefit of creditors does not affect liens on the land assigned created by existing judgments against the assignor.[406] Nor, after such an assignment, does the failure of a creditor to sue

[402] City of Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367.

[403] Roe v. Swart, 5 Cow. (N. Y.) 294.

[404] Commonwealth v. Gleim, 3 Pen. & W. (Pa.) 417.

[405] Morris v. Mowatt, 2 Paige (N. Y.) 586, 22 Am. Dec. 661; Decker v. Gilbert, 80 Ind. 107; Brooker v. Sprague, 99 Ind. 169; Rodgers v. McCluer, 4 Grat. (Va.) 81, 47 Am. Dec. 715; Agricultural Bank v. Pallen, 8 Smedes & M. (Miss.) 357, 47 Am. Dec. 92; Tinney v. Wolston, 41 Ill. 215; Edmunds v. Smith, 52 N. J. Eq. 212, 27 Atl. 827.

[406] Shaeffer's Appeal, 101 Pa. 45.

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out and levy execution impair the lien of his judgment.[407] 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.[408]

§ 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.[409] 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 the plaintiff is restrained by an injunction."[410] 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.[411] 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

[407] Scott v. Dunn, 26 Ohio St. 63.

[408] Howse v. Judson, 1 Fla. 133.

[409] Smith v. Everly, 4 How. (Miss.) 178; Lynn v. Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591; supra, § 395.

[410] Applegate v. Edwards, 45 Ind. 329.

[411] Tucker v. Shade, 25 Ohio St. 355.

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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.[412] 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.[413]

§ 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.[414] 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.[415]

§ 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.[416] 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

[412] Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549.

[413] Bartlett v. Gayle, 6 Ala. 305, 41 Am. Dec. 52.

[414] Brewster v. Clamfit, 33 Ark. 72; Love v. Harper, 4 Humph. (Tenn.) 113; Ayers v. Waul, 44 Tex. 549.

[415] Barroilhet v. Hathaway, 31 Cal. 395, 89 Am. Dec. 193; Isler v. Brown, 66 N. C. 556; Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., 69 Fed. 193; Hobbs v. Simmonds, 61 Conn. 235, 23 Atl. 962.

[416] Cope's Appeal, 96 Pa. 294. See Smith v. De Lanty, 11 Wash. 386, 39 Pac. 638. Compare Crane v. Richardson, 73 Miss. 254, 18 South. 542.

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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.[417]

§ 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.[418] "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." [419] 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.[420]

§ 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." [421]

[417] King v. Harris, 34 N. Y. 330; Id., 30 Barb. 471; Smith v. De Lanty, 11 Wash. 386, 39 Pac. 638.

[418] Hardee v. Stovall, 1 Ga. 92; Montgomery v. McGimpsey, 7 Smedes & M. (Miss.) 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. 180; Gottlieb v. Thatcher, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. Ed. 157; Rock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; Schafer v. Buck, 76 Ill. App. 464. Compare Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301; Wronkow v. Oakley, 133 N. Y 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661; Gruner v. Westin, 66 Tex. 209, 18 S. W. 512; Rubinsky v. Patrick, 2 Pa. Dist. R. 695.

[419] Planters' Bank v. Calvit, 3 Smedes & M. (Miss.) 143, 41 Am. Dec. 616.

[420] Thomson's Adm'r v. Chapman's Adm'r, 83 Va. 215, 2 S. E. 273.

[421] Jackson v. Allen, 30 Ark. 110; McCance v. Taylor, 10 Grat. (Va.) 580. But see Bankr. Act 1898, § 67.

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§ 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;[422] though of course he must apply to the court appointing the receiver for leave to levy on the property in the latter's hands. And the lien of a judgment will not be continued beyond the statutory period by the mere fact that, during such period, all the judgment debtor's property is in the hands of a receiver, under the control of a court having jurisdiction; and if, during this period, the judgment creditor does not ask permission of the court appointing the receiver to levy his execution, he loses his lien by his own neglect.[423]

§ 476. Taking Defendant on Capias.

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."[424] 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 suspension."[425] Where a judgment is recovered against several, and a

[422] Southern Bank v. Ohio Ins. Co., 22 Ind. 181; Central Coal & Coke Co. v. Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

[423] Savings & Trust Co. v. Bear Valley Irr. Co. (C. C.) 89 Fed. 32. Compare Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

[424] 3 Bl. Comm. 414.

[425] Rockhill v. Hanna, 15 How. 189, 14 L. Ed. 656.

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capias 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.[426]

§ 477. Payment.

The lien of a judgment is discharged by payment of the judgment.[427] But a tender of the amount of the judgment, if not accepted, does not extinguish its lien.[428] 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.[429] 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.[430] But after it is thus discharged, it is said that the lien cannot be restored by any subsequent agreement between the parties;[431] although, in some jurisdictions, it appears that it may be kept alive for the purpose of securing further advances.[432]

§ 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.[433] And so a judgment, when cancelled by order of

[426] Leake v. Ferguson, 2 Grat. (Va.) 419.

[427] Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734. But where a judgment is given to secure the payment of an accommodation note, the renewal of the note at maturity does not constitute payment, so as to discharge the lien of the judgment. Laucks v. Michael, 154 Pa. 355, 26 Atl. 314. A judgment plaintiff in lawful possession of lands on which his judgment is a lien has not the right to apply the rents and profits therefrom to the satisfaction of his judgment as against the owner, who is not a judgment defendant. Boggs v. Douglass, 105 Iowa, 344, 75 N. W. 185.

[428] People v. Beebe, 1 Barb. (N. Y.) 379; Law v. Jackson, 9 Cow. (N. Y.) 641.

[429] Nell v. Staten, 7 Heisk. (Tenn.) 290.

[430] German-American Sav. Bank v. Fritz, 68 Wis. 390, 32 N. W. 123.

[431] De La Vergne v. Evertson, 1 Paige (N. Y.) 181, 19 Am. Dec. 411.

[432] Peirce v. Black, 105 Pa. 342.

[433] Page v. Benson, 22 Ill. 484; Branch Bank v. Ford, 13 Ala. 431. But a senior judgment creditor, who erroneously enters satisfaction of his judg-

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the court, ceases to be a lien on real estate owned by the debtor during the life of the judgment.[434] On the same principle, where the defendant executed his notes for the amount of the judgment rendered 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.[435]

§ 479. Sale of the Land.

A sale of land under an execution extinguishes the lien of the judgment on the land sold.[436]

§ 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.[437] 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.[438] It is said that a release of a judgment-lien may be by parol, but the proof thereof must be clear, satisfactory,

ment, is still entitled to priority, on such satisfaction being set aside, as against subsequent judgment creditors, whose judgments were recovered prior to the entry of satisfaction, and who have in no way been misled by such entry. McCune v. McCune, 164 Pa. 611, 30 Atl. 577.

[434] Worthington v. Nelson, 75 Iowa, 648, 36 N. W. 911.

[435] Polk Co. v. Nelson (Iowa) 43 N. W. 80.

[436] People v. Easton, 2 Wend. 297.

[437] Caley v. Morgan, 114 Ind. 350, 16 N. E. 790. And see Sellers v. Floyd, 24 Colo. 484, 52 Pac. 674; In re Voorhies, 46 S. C. 114, 24 S. E. 170.

[438] Wolfe v. Gardner, 4 Har. (Del.) 338.

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and conclusive.[439] 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, 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.[440] 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.[441]

[439] Dalby v. Cronkhite, 22 Iowa, 222.

[440] Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625.

[441] Ingalls v. Morgan, 10 N. Y. 178. So, where the owner of a judgment which was a lien on personal property, and on real property subject to an attachment, sold the personal property, but made no attempt to enforce his claim against the realty, and two years thereafter the debtor conveyed it to the attaching creditor in payment of his claim, which was more than the value of the land; and the grantee thereafter, with the judgment creditor's knowledge, paid the taxes thereon, claiming to own it, for a period of eight years, it was held that the judgment creditor had abandoned his lien. Call v. Cozart (Tenn.) 48 S. W. 312. But judgment creditors, by bringing suits in equity to have fraudulent transfers of land set aside, and by having receivers appointed therein, not of the real estate of the judgment debtors, but of the personal property and the rents and profits of the real estate only, do not thereby waive their legal liens on the lands, or on the surplus fund arising from the sale of the land under a mortgage thereon. Wilkinson v. Paddock, 125 N. Y. 748, 27 N. E. 407.

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CHAPTER XVII.

REVIVAL OF JUDGMENTS.

§ 482. Revival by Motion or Suit.
482a. Revival by Scire Facias.
483. Venue of the Action.
484. Right to sue out Scire Facias
485. Time of Issuing the Writ.
486. Pleadings.
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490. Same; Judgment against Decedent.
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494. Same; Payment, Release, Set-Off.
495. Same; Discharge in Bankruptcy.
496. Same; Invalidity of Original Judgment.
497. Same; Collateral Agreements.
498. Judgment on Scire Facias.
499. Practice in Pennsylvania.

§ 482. Revival by Motion or Suit.

In several of the states, when a judgment has become dormant, or has lost its lien by the expiration of the statutory period of limitation, it may be revived, for purposes of lien and execution, by a formal suit or action brought for that purpose, having all the characteristics of a plenary proceeding.[1] In South Carolina, the proper proceeding to revive a judgment is to issue a summons to renew execution, although an order giving permission to issue execution on a judgment will revive it.[2] In California, the statute provides that "in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion

[1] Ingraham v. Champion, 84 Wis. 235, 54 N. W. 398; Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

[2] Lawton v. Perry, 40 S. C. 255, 18 S. E. 861; Ex parte Graham, 54 S. C. 163, 32 S. E. 67.

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or by judgment for that purpose." [3] But a judgment which has become barred by statute cannot be revived by a parol promise to pay it.[4] Nor will supplementary proceedings on a judgment be effectual to keep it alive or take the place of an action to revive it.[5] In some jurisdictions, it is necessary for the personal representatives of a deceased judgment creditor to revive it, in order to be able to enforce it as against the judgment debtor; and whether this should be done by a formal action, or may be effected merely on motion, will depend upon the local statute.[6]

§ 482a. Revival by Scire Facias.

The statutes of several 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.[7] The purpose of a proceeding by scire facias to revive a personal judgment is not to raise the issue of the validity of the original judgment, but to give the debtor an opportunity to show, if he can, that it has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against it, and to give the creditor a new right of enforcement from the date of the judgment of revival. Such a proceeding is not a substitute for an action of debt on the judgment, but one which may be maintained concurrently with such action, and without regard to its pendency.[8]

[3] Code Civ. Proc. Cal. § 685. See Cortez v. Superior Court, 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37.

[4] Ludwig v. Huck, 45 Ill. App. 651.

[5] Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

[6] See Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Reynolds v. Crook, 95 Ala. 570, 11 South. 412; Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105; Selders v. Boyle, 5 Kan. App. 451, 49 Pac. 320.

[7] Wonderly v. Lafayette County (C. C.) 74 Fed. 702; City Building & Loan Ass'n v. Nickey, 21 Pa. Co. Ct. R. 226.

[8] Lafayette County v. Wonderly, 34 C. C. A. 360, 92 Fed. 313. An action

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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.[9] Each successive writ of scire facias to revive a judgment, or to recover damages for the breach of the condition 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.[10] 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.[11]

brought on a judgment by regular summons and complaint, wherein a money judgment alone is prayed for, is not in the nature of a scire facias. Lawton v. Perry, 40 S. C. 255, 18 S. E. 861.

[9] Hatch v. Eustis, 1 Gall. 160, Fed. Cas. No. 6,207; Fitzhugh v. Blake, 2 Cranch, C. C. 37, Fed. Cas. No. 4,840; Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266; State Treasurer v. Foster, 7 Vt. 52; Comstock v. Holbrook, 16 Gray (Mass.) 111; Gray v. Thrasher, 104 Mass. 373; Eldred v. Hazlett's Adm'r, 38 Pa. 16; Irwin v. Nixon's Heirs, 11 Pa. 419, 51 Am. Dec. 559; Kirkland v. Krebs, 34 Md. 93; Ingram v. Belk, 2 Strob. (S. C.) 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's Adm'rs, 3 Yerg. (Tenn.) 411, 24 Am. Dec. 585; Blackwell v. State, 3 Ark. 320; Wolf v. Pounsford, 4 Ohio, 397; Challenor v. Niles, 78 Ill. 78; Denegre v. Haun, 13 Iowa, 240; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Bankers' Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484; Long v. Thormond, 83 Mo. App. 227. 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.

[10] Collingwood v. Carson, 2 Watts & S. (Pa.) 220; Custer v. Detterer, 8 Watts & S. (Pa.) 28.

[11] Humiston v. Smith, 21 Cal. 129.

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§ 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.[12] 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.[13] 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.[14] 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.[15] This writ cannot be brought in a court of chancery to enforce or revive a

[12] Vallance v. Sawyer, 4 Me. 62; State v. Brown, 41 Me. 535; State v. Kinne, 39 N. H. 129; Carlton v. Young, 1 Aikens (Vt.) 332; Gibson v. Davis, 22 Vt. 374; Osgood v. Thurston, 23 Pick. (Mass.) 110; In re Dougherty's Estate, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Boylan v. Anderson, 3 N. J. Law, 529; Tindall v. Carson, 16 N. J. Law, 94; Conner v. Neff, 2 Ind. App. 364, 27 N. E. 645; City Nat. Bank v. Swink (Tex. Civ. App.) 49 S. W. 130; Grimke's Ex'rs v. Mayrant, 2 Brevard (S. C.) 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. 638; Challenor v. Niles, 78 Ill. 78; Carnes v. Crandall, 4 Iowa, 151; Wilson v. Tiernan, 3 Mo. 577.

[13] Thompson v. Parker, 83 Ind. 96. Compare Kendig v. North, 7 Del. Co. R. (Pa.) 574.

[14] Dickinson v. Allison, 10 Ga. 557.

[15] Brannan v. Kelley, 8 Serg. & R. (Pa.) 479; Smith v. Wehrly, 157 Pa. 407, 27 Atl. 700. An action to revive a judgment may be brought in the trial court on a judgment of the supreme court rendered in favor of plaintiff on reversal of a judgment in favor of defendant in an action on a money demand, though the judgment of the supreme court was never certified to the trial court, nor entered in its minutes, as, in such case, the judgment of the supreme court will be considered as the judgment of the trial court. Carothers v. Lange (Tex. Civ. App.) 55 S. W. 580.

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decree, unless there be a statute authorizing executions to issue upon decrees in equity.[16]

§ 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.[17] 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.[18] 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.[19] Complete satisfaction of the judgment will alone suffice to prevent its revival in this manner.[20] 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.[21] 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

[16] Jeffreys v. Yarborough, 16 N. C. 510; Curtis v. Hawn, 14 Ohio, 185; Logan v. Cloyd, 1 A. K. Marsh. (Ky.) 201.

[17] Harmon v. Dedrick, 3 Barb. (N. Y.) 192.

[18] Stewart v. Peterson's Ex'rs, 63 Pa. 230; Stille v. Wood, 1 N. J. Law, 118; Rogers v. Hollingsworth, 95 Tenn. 357, 32 S. W. 197. The right to a mandamus for the enforcement of a judgment is equivalent to the right to issue an execution thereon for the purposes of an application to revive the judgment on scire facias. Wonderly v. Lafayette County (C. C.) 74 Fed. 702.

[19] Lambson v. Moffett, 61 Md. 426.

[20] A judgment which has been paid and extinguished by the owner of land on which it was a lien cannot be afterwards revived to cut out other liens. Henry & Coatsworth Co. v. Halter, 58 Neb. 685, 79 N. W. 616. A judgment which has become barred by the statute of limitations cannot be revived by scire facias. Browne & Manzanares Co. v. Chavez, 9 N. M. 316, 54 Pac. 234.

[21] Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338.

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not been fulfilled.[22] 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.[23] But the writ cannot be used to revive a judgment on which no execution could ever have issued.[24]

§ 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.[25] 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.[26] 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.[27] And if the process of scire facias to revive issues a

[22] Masser v. Dewart, 46 Pa. 534.

[23] Boyer v. Rees, 4 Watts (Pa.) 201.

[24] Turner v. Dupree's Adm'r, 19 Ala. 198; Horton v. Clark, 40 Ga. 412. But in Missouri, the statutes having provided for the revival of judgments by scire facias, without making any exceptions, the courts cannot except a judgment from their operation on the ground that it is not a lien on property, or because no execution could issue thereon. Lafayette County v. Wonderly, 34 C. C. A. 360, 92 Fed. 313.

[25] Scott v. Seelye, 39 La. Ann. 749, 2 South. 309; Ayre v. Burke, 82 Va. 338, 4 S. E. 618; Browne & Manzanares Co. v. Chavez, 9 N. M. 316, 54 Pac. 234. The general law as to the limitation of actions does not apply to the proceeding to revive dormant judgments. Bankers' Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N. W. 484. As to retrospective operation of statutes limiting the time within which scire facias may be brought to revive judgments, see Wrightman v. Boone County, 31 C. C. A. 570, 88 Fed. 435. As to the effect of nonresidence or personal disabilities of the parties in suspending the running of the statute of limitations, see Bartol v. Eckert, 50 Ohio St. 31, 33 N. E. 294. Where a judgment has been already revived on scire facias, the period of limitation begins to run from the date of the revival instead of the date of the original judgment. Kratz v. Preston, 52 Mo. App. 251.

[26] Green's Appeal, 6 Watts & S. (Pa.) 327; Lutz's Appeal, 124 Pa. 273, 16 Atl. 858.

[27] Lutz's Appeal, 124 Pa. 273, 16 Atl. 858.

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single day within the time, it saves the bar;[28] 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.[29] 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.[30] 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.[31] 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.[32] In the same state is was formerly 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.[33] But this was afterwards changed by a statute.[34]

§ 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

[28] The issuance of a writ of scire facias to revive a judgment suspends the running of the statute of limitations against it for the purposes of the proceeding, and the fact that the judgment would have become ineffective for any purpose, by limitation, before the hearing, had the proceeding not been commenced, is no defense to a revival. Lafayette County v. Wonderly, 34 C. C. A. 360, 92 Fed. 313; Fitzpatrick v. Leake, 47 La. Ann. 1643, 18 South. 649.

[29] Lichty v. Hochstetler, 91 Pa. 444; Porter v. Hitchcock, 98 Pa. 625; Silverthorn v. Townsend, 37 Pa. 263.

[30] Handy v. Smith's Adm'r, 30 W. Va. 195, 3 S. E. 604.

[31] Fursht v. Overdeer, 3 Watts & S. 470.

[32] Allen v. Liggett, 81 Pa. 486. See Stewart v. Justices of St. Clair County Court (C. C.) 47 Fed. 482.

[33] Pennock v. Hart, 8 Serg. & R. 369.

[34] Act Pa. March 26, 1827.

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continuation of the former action, the plaintiff is not required to file a new declaration or rule the defendant to plead.[35] 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.[36] 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.[37] 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.[38] 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.[39] 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.[40] So a scire facias against the heir, on a judgment recovered against the ancestor, need not aver ineffectual proceedings against the personal representatives;

[35] Blake v. Dodemead, 2 Strange, 775; Governor and Company of Bank of Scotland v. Fenwick, 1 Exch. 792; Nunn v. Claxton, 3 Exch. 712; Nesbit v. Manro, 11 Gill & J. (Md.) 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. (Tenn.) 370; Calhoun v. Adams, 43 Ark. 238; Farris v. People, 58 Ill. 26; Merchants' Mut. Ins. Co. v. Hill, 17 Mo. App. 590.

[36] McKinney v. Mehaffey, 7 Watts & S. (Pa.) 276.

[37] Richter v. Cummings, 60 Pa. 441; Wolf v. Pounsford, 4 Ohio, 397; Warfield v. Brewer, 4 Gill (Md.) 265.

[38] Ward v. Prather's Adm'r, 1 J. J. Marsh. (Ky.) 4; Davidson v. Hunter, 22 Utah, 117, 61 Pac. 556. Though the scire facias must correctly recite the original judgment, irregularities not misleading will not avoid it; and where defendant has suffered a default thereon, and execution has issued, no mere junior creditor can object. Landon v. Brown, 160 Pa. 538, 28 Atl. 921.

[39] Albin v. People, 46 Ill. 372. But if the statement accompanying the scire facias shows on its face that the judgment is more than 20 years old, and avers merely that no part of the debt has been paid, it does not rebut the presumption of payment of the judgment. Hummel v. Lilly, 188 Pa. 463, 41 Atl. 613, 68 Am. St. Rep. 879. Compare National Sav. Bank v. Welcker, 21 D. C. 324.

[40] Brown v. Chesapeake & O. Canal Co. (C. C.) 4 Fed. 770.

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but if no such proceedings have been had, such defense must be set up by plea.[41] 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.[42] 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.[43]

§ 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.[44] 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.[45] And the revival of a judgment by scire facias for purposes of execution, on two returns of nihil, operates merely to keep in force the local lien, and does not stop the running of the statute of limitation in another state, where the defendant resides, nor support a new action against the defendant in another state.[46] The common-law rule is

[41] Rogers v. Denham's Heirs, 2 Grat. (Va.) 200.

[42] Gibson v. Davis, 22 Vt. 374.

[43] In re Dougherty's Estate, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326.

[44] Randal v. Wale, Cro. Jac. 59; Barret v. Cleydon, 2 Dyer, 168; Bromley v. Littleton, Yel. 112; Andrews v. Harper, 8 Mod. 227; Warder v. Tainter, 4 Watts (Pa.) 270; Chambers v. Carson, 2 Whart. (Pa.) 9; Cumming v. Eden's Devisees & Terre-Tenants, 1 Cow. (N. Y.) 70; Woodfork v. Bromfield, 5 N. C. 187; Ingram v. Belk, 2 Strob. (S. C.) 207, 47 Am. Dec. 591; Barrow v. Bailey, 5 Fla. 9; Dunlevy v. Ross, Wright (Ohio) 287; Sans v. People, 3 Gilman (Ill.) 327; Choate v. People, 19 Ill. 63; Brown v. Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284; Kratz v. Preston, 52 Mo. App. 251.

[45] Barrow v. Bailey, 5 Fla. 9; Kratz v. Preston, 52 Mo. App. 251; Jones v. George, 80 Md. 294, 30 Atl. 635.

[46] Owens v. McCloskey, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Betts

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still adhered to in some of the states. Thus, in 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 his rights.[47] But in some other states it is held that the writ of scire facias must be served personally.[48] And where there is a terre-tenant of the land, he must also be served with process; although, if he appears and confesses judgment on the scire facias, he thereby waives the objection that he was not served.[49] 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.[50] But where the judgment to be revived is against two defendants jointly, the scire facias must be served on both; if served on only one of the joint debtors, it cannot afterwards be amended so as to include both, so as to save the bar of the statute.[51]

§ 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

v. Johnson, 68 Vt. 549, 35 Atl. 489; Robb v. Anderson, 43 Ill. App. 573; Rice v. Moore, 48 Kan. 590, 30 Pac. 10, 16 L. R. A. 198, 30 Am. St. Rep. 318; Hepler v. Davis, 32 Neb. 556, 49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457. But in Louisiana, when the defendant resides in another state, the court may appoint a curator ad hoc, upon whom service can be made, and thereupon a judgment may be rendered binding on the defendant; a suit to revive a judgment being considered one quasi in rem. Bertron v. Stewart, 43 La. Ann. 1171, 10 South. 295.

[47] Comstock v. Holbrook, 16 Gray, 111.

[48] Feeter v. McCombs, 1 Wend. (N. Y.) 19; Rice v. Talmadge, 20 Vt. 378; Betts v. Johnson, 68 Vt. 549, 35 Atl. 489; Mendenhall v. Robinson, 56 Kan. 633, 44 Pac. 610. See Phillips v. Wait, 106 Ga. 580, 32 S. E. 842.

[49] Dickerson's Appeal, 7 Pa. 255; White v. Harden, 154 Pa. 387, 26 Atl. 312.

[50] In re Dohner's Assignees, 1 Pa. 101.

[51] Lyon v. Ford, 20 D. C. 530.

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the lien of a judgment against her husband, the judgment having been entered in her favor before they were married.[52] 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 substituting that of the administrator.[53] Where the judgment creditor has become a bankrupt, the right to procure a revival of the judgment devolves upon his trustee in bankruptcy.[54] 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 the property of a third person.[55]

§ 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." [56] It is also a rule that all persons must be joined who have

[52] Kinkade v. Cunningham, 118 Pa. 501, 12 Atl. 410.

[53] Challenor v. Niles, 78 Ill. 78.

[54] See Brown v. Wygant, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284.

[55] See Marbury v. Pace, 30 La. Ann. 1330; McRoberts v. Lyon, 79 Mich. 25, 44 N. W. 160; Wells v. Graham, 39 W. Va. 605, 20 S. E. 576; Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698; Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717. Where scire facias is brought upon a judgment which has been assigned to third persons in unequal portions, separate judgments of revival may be entered thereon in favor of the several assignees for the amounts respectively due to them. In re Ernst's Estate, 164 Pa. 87, 30 Atl. 371. But one who obtains a judgment against a garnishee, based on the latter's indebtedness to the principal debtor on another judgment, cannot of his own volition, and without attempting to levy execution on the judgment recovered in the garnishment proceedings, substitute himself as use plaintiff in the judgment which his debtor holds against the garnishee, and issue process for its revival and collection. Wherry v. Wherry, 179 Pa. 84, 36 Atl. 165.

[56] Funderburk v. Smith, 74 Ga. 515. See Messmore v. Williamson, 189 Pa. 78, 41 Atl. 1110.

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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.[57] 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.[58] A number of judgments against the same person may be consolidated and revived in one 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.[59]

§ 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.[60] 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

[57] Bowers v. Harner, 3 Phila. (Pa.) 146. A judgment against a former husband cannot be revived, after his death, against his wife and her second husband, over the latter's objection, merely because he is the husband of decedent's wife. Wessell v. Gross (Tenn. Ch. App.) 57 S. W. 372.

[58] Grantland v. City of Memphis, 12 Fed. 287.

[59] Yeager's Appeal, 129 Pa. 268, 18 Atl. 137.

[60] Commercial Bank v. Kendall, 21 Miss. 278.

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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.[61] In Pennsylvania, and some other states, 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.[62] 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.[63] 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.[64] In Maryland, where the original defendant in a judgment is dead, and scire facias is issued to revive the judgment as against his land, it must be issued against the terre-tenant and also the personal representatives.[65] 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.[66]

[61] Tessier v. Wyse, 3 Bland (Md.) 40; Walden v. Craig, 14 Pet. 147, 10 L. Ed. 393; Stewart v. Gibson, 71 Mo. App. 232. A judgment of revivor of a judgment against an intestate imposes no personal liability on the heirs, though they are necessary parties defendant to the action. Stewart v. Gibson, supra.

[62] Middleton's Ex'rs v. Middleton, 106 Pa. 252; Grover v. Boon, 124 Pa. 399, 16 Atl. 885; McMillan v. Red, 4 Watts & S. 237; United States v. Houston (D. C.) 48 Fed. 207; Hauck v. Gundaker, 21 Pa. Co. Ct. R. 12; Cheraw & C. R. Co. v. Marshall, 40 S. C. 59, 18 S. E. 247. See Colenburg v. Venter, 173 Pa. 113, 33 Atl. 1046; Callahan v. Fahey, 10 Pa. Co. Ct. R. 488; In re Davey's Estate, 9 Pa. Co. Ct. R. 125.

[63] Brown v. Webb, 1 Watts, 411.

[64] Graves v. Skeels, 6 Ind. 107.

[65] Tiers v. Codd, 87 Md. 447, 39 Atl. 1044.

[66] Adams v. Stake, 67 Md. 447, 10 Atl. 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.[67] 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.[68] 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.[69]

§ 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

[67] Sainsbury v. Pringle, 10 Barn. & C. 751; Fowler v. Rickerby, 9 Dowl. 682; Panton v. Hall, 2 Salk. 598; Rex v. Chapman, 3 Anst. 811; Grenell v. Sharp, 4 Whart. (Pa.) 344; Commonwealth v. Mateer, 16 Serg. & R. (Pa.) 416; Dowling v. McGregor, 91 Pa. 410; McAfee v. Patterson, 2 Smedes & M. (Miss.) 593; Henderson v. Vanhook, 24 Tex. 358; Bolinger v. Fowler, 14 Ark. 27; Calloway's Heirs v. Eubank, 4 J. J. Marsh. (Ky.) 280; Gray's Adm'r v. McDowell, 5 T. B. Mon. (Ky.) 501; Murray's Adm'r v. Baker, 5 B. Mon. (Ky.) 172; Huey's Adm'r v. Redden's Heirs, 3 Dana (Ky.) 488; Mitchell's Heirs v. Smith's Heirs, 1 Litt. (Ky.) 243; Hallowell v. Brown, 8 Houst. (Del.) 500, 32 Atl. 392; Rowland v. Harris (Tex. Civ. App.) 34 S. W. 295.

[68] Carson v. Moore, 23 Tex. 450. But compare Patterson v. Walton, 119 N. C. 500, 26 S. E. 43; National Exchange Bank v. Preston, 97 Va. 222, 33 S. E. 546.

[69] Greer v. State Bank, 10 Ark. 455; Coleman v. Edwards, 2 Bibb (Ky.) 595. Compare Hanson v. Jacks, 22 Ala. 549.

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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 proceeding.[70] In Pennsylvania, however, under the wording 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.[71] 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.[72] 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.[73] 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.[74]

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

[70] Lusk v. Davidson, 3 Pen. & W. (Pa.) 229; McCray v. Clark, 82 Pa. 457; Long v. Miller, 158 Pa. 573, 28 Atl. 233; Suter v. Findley, 5 Pa. Super. Ct. 163; Morton's Ex'rs v. Croghan's Terre-Tenants, 20 Johns. (N. Y.) 106; Von Puhl v. Rucker, 6 Iowa, 187. In Pennsylvania, under the act of April 16, 1840, 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. 109.

[71] McInweiser v. Hains, 110 Pa. 468, 2 Atl. 431.

[72] Baum v. Custer (Pa.) 13 Atl. 771; Armstrong's Appeal, 5 Watts & S. (Pa.) 352. But the lien of a judgment on a farm which defendant owned and lived on when judgment was entered is continued by a revival of the judgment by an amicable scire facias, signed by defendant alone, the record title and the possession remaining the same, notwithstanding a secret conveyance by defendant to his wife. Lyon v. Cleveland, 170 Pa. 611, 33 Atl. 143, 30 L. R. A. 400, 50 Am. St. Rep. 782.

[73] Sames's Appeal, 26 Pa. 184; Landon v. Brown, 160 Pa. 538, 28 Atl. 921.

[74] Day v. Willy, 3 Brewst. 43; Duncan v. Flynn, 9 Pa. Co. Ct. R. 321.

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the defendant, need not be made a party to the writ.[75] 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.[76] 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 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."[77] 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.[78] The

[75] Clippinger v. Miller, 1 Pen. & W. 64.

[76] Kepler v. Erie Dime Savings & Loan Co., 101 Pa. 602. Similarly, assignees in bankruptcy are not terre-tenants who must have notice of the revival of a judgment. In re Huddell (C. C.) 47 Fed. 207.

[77] Polk v. Pendleton, 31 Md. 118.

[78] Dengler v. Kiehner, 13 Pa. 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

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re of a judgment-creditor to preserve his lien, by neglecting to the terre-tenant notice of a scire facias to revive, will not disge the liability of a surety on the bond upon which the judgt was entered.[79]

§ 493. Defenses.

1 the general principle of res judicata (which applies equally to eedings by scire facias as to any other action or suit), and on the er ground that this method of reviving a judgment is merely a lementary step in the original action, the defendant is absolutely uded from going behind the judgment and offering in defense to cire facias any matter which existed before the rendition of the nal judgment and might have been presented in the former prong.[80] In no case and under no circumstances can the merits of

e which directs notice to be given to occupants, but only to let the of a terre-tenant in to a defense, which his landlord may have neg- to make, for his protection. The facts of this case are, that the estate een bound by the judgment, but that the lien of it had expired when the tor of the plaintiffs purchased it. It had ceased to be a judgment of r effect against the land than it was against the debtor's chattels, and rchaser's title was paramount to it. He was not a terre-tenant or the of a terre-tenant, and as he had not a day in court, the judgment, inter alios, was not an estoppel. The case is clearly within the prinf Mitchell v. Hamilton [8 Pa. 496], and is ruled by it."
indt's Appeal, 102 Pa. 441.
liens v. Andrews, Cro. Eliz. 283; Cook v. Jones, Cowp. 727; Thomas v. ms, 3 Dowl. P. C. 655; Baylis v. Hayward, 4 Adol. & E. 256; Dickson v. ison, 3 How. 57, 11 L. Ed. 491; United States v. Thompson, Gilp. 614, as. No. 16,487; Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746; Springard Manuf'g Co. v. West, 1 Cush. (Mass.) 388; Thayer v. Tyler, 10 Gray) 164; Sigourney v. Stockwell, 4 Metc. (Mass.) 518; Stephens v. Howe, ass. 164; Robbins v. Bacon, 1 Root (Conn.) 548; Bradford v. Bradford, a. 127; McFarland v. Irwin, 8 Johns. (N. Y.) 77; Cardesa v. Humes, 5 & R. (Pa.) 65; Davidson v. Thornton, 7 Pa. 128; Carr v. Townsend's 63 Pa. 202; Weaver v. Wible, 72 Pa. 469; Pittsburgh, C. & St. L. o. v. Marshall, 85 Pa. 187; Wurzberger v. Carroll, 8 Kulp (Pa.) 266; an v. Devlin, 12 Pa. Co. Ct. R. 465; Loeber v. Moore, 20 D. C. 1; Wil- Otterback, Id. 324; Kemp v. Cook, 6 Md. 305; May v. State Bank, 2 Va.) 56, 40 Am. Dec. 726; Ferebee v. Doxey, 28 N. C. 448; Koon v. 3 Rich. 37; Camp v. Baker, 40 Ga. 148; Miller v. Shackelford, 16 Ala. etancourt v. Eberlin, 71 Ala. 461; Mathews v. Mosby, 13 Smedes & M. 422; Anderson v. Williams, 2 Cushm. (Miss.) 684; Pollard v. Eckford,

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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.[81] Thus the objection that a bond and warrant were usurious cannot be taken to a scire facias on the judgment confessed on the warrant.[82] Nor can the invalidity of the consideration for the contract on which the judgment was rendered be shown in defense,[83] nor the coverture or other disability of one of the parties,[84] nor is it permissible to set up in defense that the judgment sought to be revived was obtained by fraud,[85] or that there was fraud in the negotiation of the note on which the judgment was given, before suit was begun on it.[86] Again, the pendency of an action of debt on a judgment concurrently with a proceeding by scire facias for its revival is not a defense to the latter proceeding, nor is a judgment for the plaintiff in the former action before the hearing on the writ.[87] A general denial of each and every allegation of the writ not admitted in the answer is not a form of defense permitted in scire facias to revive a judgment.[88] But of course the statute of limitations is a good defense to the scire facias, though it must be specially pleaded,[89] and also the defendant may show that his position with reference to the judgment is that

50 Miss. 631; Baxter v. Dear, 24 Tex. 17, 76 Am. Dec. 89; City Nat. Bank v. Swink (Tex. Civ. App.) 49 S. W. 130; Nestlerode v. Foster, 8 Ohio Cir. Ct. R. 70; Bell v. Williams, 4 Sneed (Tenn.) 196; Love v. Allison, 2 Tenn. Ch. 111; Vredenburgh v. Snyder, 6 Iowa, 39; Watkins v. State, 7 Mo. 334; Riley's Adm'r v. McCord's Adm'r, 24 Mo. 265.

81 Blackburn v. Beall, 21 Md. 208; Dowling v. McGregor, 91 Pa. 410; McCracken v. Swartz, 5 Or. 62.

82 Lysle v. Williams, 15 Serg. & R. 135; Bickel v. Cleaver, 13 Pa. Co. Ct. R. 314.

83 Mulligan v. Devlin, 2 Pa. Dist. R. 685.

84 Lauer v. Ketner, 162 Pa. 265, 29 Atl. 908, 42 Am. St. Rep. 833.

85 Bruno v. Oviatt, 48 La. Ann. 471, 19 South. 464.

86 Supplee v. Halfmann, 161 Pa. 33, 28 Atl. 941.

87 Lafayette County v. Wonderly, 34 C. C. A. 360, 92 Fed. 313.

88 Wonderly v. Lafayette County (C. C.) 77 Fed. 665.

89 Jones v. George, 80 Md. 294, 30 Atl. 635.

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surety only.[90] Where the charter of a corporation makes the kholders personally liable for all debts except loans, and a ;ment is obtained against the corporation and a scire facias sued against the stockholders to charge them personally, there are lefenses open to them except, first, that they are not stockholders, second, that the debt on which the judgment was founded was a loan.[91]

ut there may be exceptional cases in which the general rule ld not be strictly enforced. Thus, if the defendant dies after ict and before judgment, and his administrator becomes a party ıe suit and judgment passes against him, and execution is issued returned unsatisfied, then, on scire facias against the adminis- ›r, he may well plead no assets or insolvency, for he had no time ıake such plea in the original suit.[92] And indeed, in one state, held that a defendant may set up any grounds he has in opposi- to a motion to revive a judgment and to have execution.[93]

§ 494. Same; Payment, Release, Set-Off.

; we have already stated, payment, satisfaction, or release of the nal judgment is one of the defenses available in an action by scire s to revive it.[94] It is also permissible for the defendant to avail elf, in such a proceeding, by proper allegations, of the presump- of payment which arises from the lapse of a great period of time : the rendition of the judgment without payments on it or steps ı to enforce it.[95] And it is said that he may plead both payment

Nestlerode v. Foster, 8 Ohio Cir. Ct. R. 70.

Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424.

Hatch v. Eustis, 1 Gall. 160, Fed. Cas. No. 6,207. And see Colwell v. well, 100 Pa. 133.

McLeod v. Williams, 122 N. C. 451, 30 S. E. 129.

Hayden v. Slaughter, 43 La. Ann. 385, 8 South. 919; Smith v. Coray, 196 02, 46 Atl. 855. If the defendant fails to appear and set up a defense rt payment, the question of payment is res judicata. Babb v. Sullivan, C. 436, 21 S. E. 277. The plea (or affidavit of defense) must allege ent of the judgment sought to be revived; if it alleges payment of the ıal debt, it is not sufficient. Nealon v. McNeal, 3 Lack. Jur. (Pa.) 117.

Steltzer v. Steltzer, 10 Pa. Super. Ct. 310; Wittstruck v. Temple, 58 16, 78 N. W. 456. Where the judgment is more than 20 years old, it not be revived, the presumption being that it has been paid. Green v.

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and presumption of payment.[96] Accord and satisfaction is also a proper plea to a scire facias to revive a judgment.[97] But evidence is not admissible of payment anterior to the rendition of the original judgment.[98] And so, where a separate judgment has been rendered against one obligor on a joint and several obligation, and 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.[99] Set-off or counterclaim is in no case available as a defense.[100] A terre-tenant, but no one else, may plead that the land is discharged from the lien of the original judgment.[101]

§ 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 the rendition of the original judgment; if before, he ought to have pleaded it in the principal suit.[102] 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.[103] In the case of a scire facias to revive a judgment of revival, a plea that

Plattsburg, 13 Pa. Co. Ct. R. 335. In Nebraska, the lapse of 14 years after the entry of a judgment and before a proceeding to revive is instituted, without the issuance of an execution, raises the presumption of payment, which, however, is not conclusive. Wittstruck v. Temple, supra.

[96] De Ford v. Green, 1 Marv. (Del.) 316, 40 Atl. 1120.

[97] McCullough v. Franklin Coal Co., 21 Md. 256.

[98] McVeagh v. Little, 7 Pa. 279; Trader v. Lawrence, 182 Pa. 233, 37 Atl. 812.

[99] United States v. Thompson, Gilp. 614. Fed. Cas. No. 16,487.

[100] Jenkins v. Anderson (Pa.) 11 Atl. 558; Anderson v. Gage, Dud. (S. C.) 319.

[101] Silverthorn v. Townsend, 37 Pa. 263.

[102] Spring Run Coal Co. v. Tosier, 102 Pa. 342; Stewart v. Colwell, 24 Pa. 67; Duncan v. Hargrove, 22 Ala. 150; In re Wesson (D. C.) 4 Hughes, 522, 88 Fed. 855.

[103] Walters v. Oyster (Pa.) 1 Atl. 430.

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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.[104]

§ 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.[105] 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.[106] 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.[107] 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 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.[108] But judgments which are absolute nullities cannot be revived. They cannot be continued in existence when they never had any life.[109]

104 Stewart v. Colwell, 24 Pa. 67.

105 Campbell's Appeal, 118 Pa. 128, 12 Atl. 299; Hauer's Appeal, 5 Watts & S. (Pa.) 473; Davidson v. Thornton, 7 Pa. 128; Tripp v. Potter, 33 N. C. 121; McFadden v. Lockhart, 7 Tex. 573; Anthony v. Humphries, 9 Ark. 176; Bell v. Williams, 4 Sneed (Tenn.) 196; Haynes v. Aultman, Miller & Co., 36 Neb. 257, 54 N. W. 511; Loeber v. Moore, 20 D. C. 1; Harper v. Cunningham, 8 App. D. C. 430; Ulmer v. Frankland (Tex. Civ. App.) 27 S. W. 766.

106 Betancourt v. Eberlin, 71 Ala. 461.

107 Kennedy v. Bambrick, 20 Mo. App. 630.

108 Weber v. Detwiller (Pa.) 8 Atl. 910.

109 In re Board of Administrators, 37 La. Ann. 916; Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765, 22 L. R. A. 573, 42 Am. St. Rep. 557; Wittstruck v. Temple, 58 Neb. 16, 78 N. W. 456.

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§ 497. Same; Collateral Agreements.

It is no defense to the revival of a judgment that the plaintiff had agreed not to issue execution.[110] 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.[111] 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.[112] 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.[113] 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.[114]

§ 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 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.[115] It is, however, held

110 Ladd v. The Church, 6 Phila. (Pa.) 591.

111 Codding v. Wood, 112 Pa. 371, 3 Atl. 455.

112 Hartzell v. Reiss, 1 Bin. (Pa.) 289. See Smith v. Smith, 135 Pa. 48, 21 Atl. 168.

113 Downey v. Forrester, 35 Md. 117.

114 Sankey v. Reed, 12 Pa. 95.

115 Denegre v. Haun, 13 Iowa, 240; Humphreys v. Lundy, 37 Mo. 320; Hanly v. Adams, 15 Ark. 232; Camp v. Gainer, 8 Tex. 372; Murray's Adm'r v. Baker, 5 B. Mon. (Ky.) 172; Rogers v. Hollingsworth, 95 Tenn. 357, 32

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in some jurisdictions that the judgment on scire facias must recite the original judgment with such particularity as to identify it, and that any substantial variance will break the continuity of the lien.[116] And in some states, the judgment on this writ should declare the amount presently due, by liquidating the amount of principal and accrued interest on the original judgment, and, if the new judgment is to bear interest, it should specify the date from which such interest is to begin.[117]

In Vermont, the law requires that the court shall give judgment for the plaintiff for the amount of the original judgment with interest, and costs on the scire facias; and this requires a new judgment which merges the original judgment, and is the judgment to be described in the execution.[118] But in those states where the entry on a scire facias is but a reiteration of the former judgment, and not an independent sentence, it follows that if the original judgment is reversed, a judgment on a scire facias to revive it will likewise fall.[119]

An order that a judgment be revived, made in a proceeding therefor, in which all proper parties are before the court, is conclusive of the question of the right to revive, as against any objection based

S. W. 197. See Marx v. Sanders, 98 Ala. 500, 11 South. 764. A judgment for the possession of land may be revived the same as a judgment in a personal action, and the judgment as revived should be that plaintiff have execution, and be given the possession as against defendants and their successors. Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. A judgment purporting to revive the execution issued on a judgment sought to be revived is amendable so as to make it recite that the judgment itself is revived. Phillips v. Walt, 105 Ga. 848, 32 S. E. 647.

[116] See Worman's Appeal, 110 Pa. 25, 20 Atl. 415; Zelders' Appeal, 137 Pa. 457, 20 Atl. 805. In a proceeding to revive a judgment by scire facias, a judgment awarding an execution in favor of different parties, for a different sum than that recited in the writ, will be set aside. Zumbro v. Stump, 38 W. Va. 325, 18 S. E. 443.

[117] Kistler v. Mosser, 140 Pa. 367, 21 Atl. 357. See Bludworth v. Poole, 21 Tex. Civ. App. 551, 53 S. W. 717. In Missouri, the judgment in proceedings by scire facias to revive should simply declare that the judgment revived is still in force for the amount remaining unpaid thereon; and a finding of the aggregate amount of principal and interest due at the date of revivor will be treated as surplusage. Sappington v. Lenz, 53 Mo. App. 44.

[118] Slayton v. Smillie, 66 Vt. 197, 28 Atl. 871.

[119] Mills v. Conner, 1 Blackf. (Ind.) 7; Eldred v. Hazlett, 38 Pa. 16.

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on a condition of facts existing prior to that time which could then have been made; and such matters are res judicata on application for a subsequent revival.[120]

§ 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."[121] 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.[122]

[120] Witherspoon v. Twitty, 43 S. C. 348, 21 S. E. 256.

[121] Duff v. Wyncoop, 74 Pa. 300; Buehler's Heirs v. Buffington, 43 Pa. 278; Custer v. Detterer, 3 Watts & S. 28. But a judgment so revived in Pennsylvania, without service or appearance, has no binding force as against a defendant who resides in another state. Owens v. McCloskey, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837.

[122] McCleary's Appeal, 1 Watts & S. (Pa.) 299.

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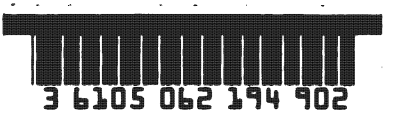
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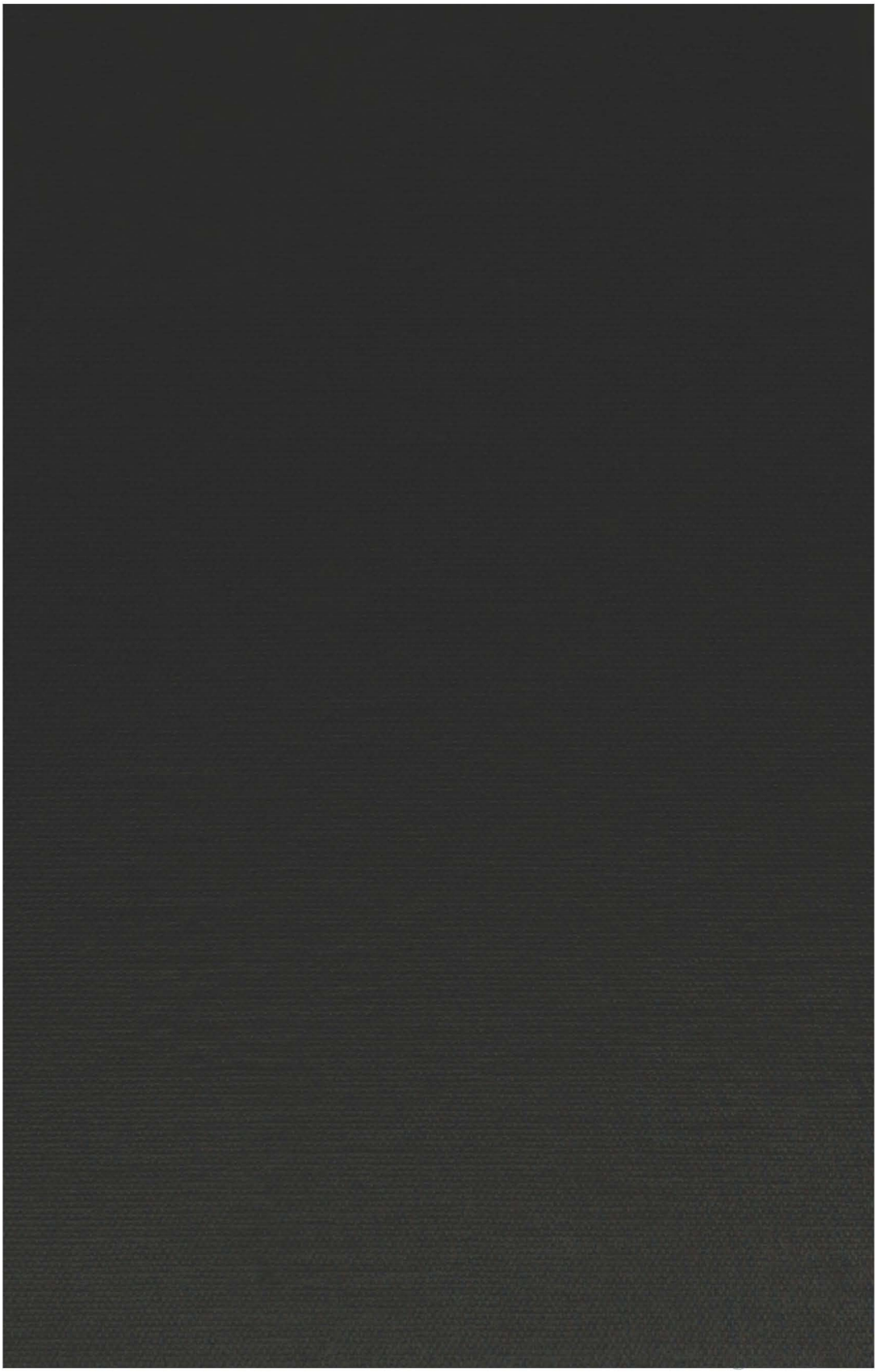


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A TREATISE

ON

THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

By HENRY CAMPBELL BLACK, M. A.

Author of "Black's Law Dictionary" and of Treatises on "Tax Titles," "Constitutional Law," "Interpretation of Laws," "Bankruptcy," etc.

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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

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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 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

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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 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

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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 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 be-

[1] Dig. 1, 5, 25. See Broom, Leg. Max. 827; Gaius, 4, 106.
[2] Dig. 44, 2, 7, 4.
[3] See Tomk. & J. Comp. 94.

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tween 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 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

[4] Section 1351.
[5] 20 How. St. Tr. 355; 2 Smith, Lead. Cas. *424.
[6] Outram v. Morewood, 3 East, 346.

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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 character 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] As stated

[7] Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518.
[8] Jeter v. Hewitt, 22 How. 352, 16 L. Ed. 345, Campbell, J.
[9] Aislin v. Parkin, 2 Burr. 665; Outram v. Morewood, 3 East, 346; Hopkins

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by the supreme court of the United States: "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their

v. Lee, 6 Wheat. 109, 5 L. Ed. 218; Smith v. Kernochen, 7 How. 198, 12 L. Ed. 666; Parrish v. Ferris, 2 Black, 606, 17 L. Ed. 317; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 41 L. Ed. 312; Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690; Society v. Hartland, 2 Paine, 536, Fed. Cas. No. 13,155; Campbell v. Strong, 1 Hempst. 265, Fed. Cas. No. 2,367a; 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; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; Spencer v. Dearth, 43 Vt. 98; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Dennison v. Hyde, 6 Conn. 508; Church v. Leavenworth, 4 Day (Conn.) 274; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Burhans v. Van Zandt, 7 N. Y. 523; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058; Hyatt v. Bates, 35 Barb. (N. Y.) 308; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Finley v. Hambest, 30 Pa. 190; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Smith v. Smith, 55 N. J. Eq. 222, 37 Atl. 49; Whitehurst v. Rogers, 38 Md. 503; Currie v. Chowning (Va.) 21 S. E. 809; Harrison v. Walton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Moore v. Garner, 109 N. C. 157, 13 S. E. 768; Willoughby v. North Eastern R. Co., 52 S. C. 166, 29 S. E. 629; La Motte v. Harper, 88 Ga. 26, 13 S. E. 804; 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; Carson v. McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406; Estill v. Taul, 2 Yerg. (Tenn.) 466, 24 Am. Dec. 498; Sanford v. Oberlin College, 50 Kan. 342, 31 Pac. 1088; Peay v. Duncan, 20 Ark. 85; Grant v. Ramsey, 7 Ohio St. 157; Babcock v. Camp, 12 Ohio St. 11; Hixson v. Ogg, 53 Ohio St. 361, 42 N. E. 32; Hargus v. Goodman, 12 Ind. 629; Webber v. Mackey, 31 Ill. App. 369; Reynolds v. Mandel, 73 Ill. App. 379; Helchew v. Hamilton, 4 G. 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; Johnson v. Johnson, 57 Minn. 824, 58 N. W. 824; Chase v. Miles, 43 Neb. 686, 62 N. W. 35; Dillon v. Chicago, K. & N. R. Co., 58 Neb. 472, 78 N. W. 927; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Jackson v. Lodge, 36 Cal. 37; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

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privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." [10] The second 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.[11] 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." [12]

§ 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.[13]

[10] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

[11] Young v. Black, 7 Cranch, 567, 3 L. Ed. 440; Ramsey v. Herndon, 1 McLean, 450, Fed. Cas. No. 11,546; Hughes v. Blake, 1 Mason, 515, Fed. Cas. No. 6,845; Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 37 C. C. A. 146, 95 Fed. 457; Linton v. National Life Ins. Co., 44 C. C. A. 54, 104 Fed. 584; Woodbury v. Portland Marine Soc., 94 Me. 122, 46 Atl. 797; Smith v. Whiting, 11 Mass. 445; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Rice v. King, 7 Johns. (N. Y.) 20; Baker v. Rand, 13 Barb. (N. Y.) 152; Kent v. Hudson River R. Co., 22 Barb. (N. Y.) 278; Beall v. Pearre, 12 Md. 550; Jones v. Wetherbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653; Thornton v. Eppes, 6 Fla. 546; Hayden v. Boothe, 2 A. K. Marsh. (Ky.) 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.

[12] Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125.

[13] Bethlehem v. Watertown, 51 Conn. 490. Compare Clapp's Ex'rs v. Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

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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." [14] For example, where it was necessary, to the plaintiff's right to recover, in the former suit, that he should

[14] Spencer v. Dearth, 43 Vt. 98, 105; Lindsey v. Town of Danville, 46 Vt. 144; Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205; Merriam v. Whittemore, 5 Gray (Mass.) 316; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L.

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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.[15] 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.[16] 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

Ed. 355; Stufflebeam v. De Lashmutt, 101 Fed. 367; Taylor v. Taylor, 26 Abb. N. C. 360, 14 N. Y. Supp. 420; Stevens v. Wadleigh (Ariz.) 57 Pac. 622.

[15] Lynch v. Swenton, 53 Me. 100.

[16] See McAleer v. Lewis, 75 Fed. 734; Lawrence v. Stearns, 70 Fed. 878; Wentworth v. Racine County, 99 Wis. 26, 74 N. W. 551.

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passed into judgment, cannot again be brought into 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." [17] 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." [18] 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 succeed-

[17] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195. To the same effect, see Nesbit v. Independent District of Riverside, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Board of Com'rs of Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Chicago, R. I. & P. Ry. Co. v. St. Joseph Union Depot Co., 92 Fed. 22; City of Paterson v. Baker, 51 N. J. Eq. 49, 26 Atl. 324; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Noyes v. Belding, 6 S. D. 629, 62 N. W. 953; Radford v. Folsom, 3 Fed. 199; Laird v. City of De Soto, 32 Fed. 652; Foye v. Patch, 132 Mass. 105; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Jones v. Commercial Bank, 78 Ky. 413.

[18] Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

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ing 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.

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.[19] For instance, where the rights of a party are fully determined upon exceptions to a sheriff's return on sale of real property under execution, the decision is as conclusive as any other judgment.[20] The essential thing is that there should have been a judicial determination of rights in controversy, with a final decision thereon. Mere findings of fact by a court, upon which no judgment has been entered, though directed, do not constitute a judgment nor raise an estoppel.[21] So, a decision by a court of equity that it will not interfere between the parties, but will leave them to their legal remedies, determines nothing with respect to their rights in any such sense as to be binding upon them in a subsequent action at law.[22] Again, an

[19] In re Roberts, 59 How. Prac. 136.

[20] Comm. v. Comrey, 174 Pa. 355, 34 Atl. 581. But an order allowing execution to issue upon a judgment against a deceased defendant, on the ground that he had fraudulently conveyed his property, is not conclusive upon the question whether the conveyance was fraudulent. In re Holmes, 131 N. Y. 80, 29 N. E. 1003.

[21] Child v. Morgan, 51 Minn. 116, 52 N. W. 1127. A special finding in an equitable action, distinct from the judgment, and made to facilitate the taking of an appeal, is not conclusive in any collateral suit, except so far as resort may be had to it to explain the scope of the judgment. Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[22] Lewis v. Baker, 151 Pa. 529, 25 Atl. 99. But the refusal of a court, when within its equitable discretion, to award costs or disbursements to a

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order auditing and settling a claim against a municipality is not a judicial act, though performed by a court under statutory authority.[23] Further, as we shall see more fully in a later section, a judgment is not conclusive upon matters which were collaterally drawn in question, or were only incidentally considered by the court.[24] Thus, a decision, in contempt proceedings, that a certain device is not an infringement of a patent, is not an estoppel in a subsequent suit between the same parties for infringement by the manufacture or use of the same device.[25]

On the other hand, the application of the doctrine of res judicata is not affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate court.[26] Nor is it always necessary that the former judgment should have been in favor of the party who afterwards invokes it as an estoppel. Thus, where the owner of real property brings an action to set aside a contract for the sale of the land, alleging that it constitutes a cloud on his title, a decree dismissing his complaint on the ground that the contract was void, and therefore constituted no cloud, is a bar to a subsequent action against him for the specific performance of the contract.[27] Neither is it necessary that a former judgment, set up as an estoppel, should have been rendered upon an actual trial of the case. A judgment by default is just as conclusive between the parties, upon all matters necessary to support the judgment, as one rendered after

successful party, is an adjudication which precludes him from maintaining an independent action for their recovery. Munson v. Straits of Dover S. S. Co., 99 Fed. 787.

[23] Sears v. Stone County, 105 Mo. 236, 16 S. W. 878, 24 Am. St. Rep. 378.

[24] Infra, § 611.

[25] Mack v. Levy, 59 Fed. 468. A judgment rendered in another state, in habeas corpus proceedings for the custody of a child, is not conclusive where there has been a material change of conditions and circumstances. In re Barnes, 30 Wkly. Law Bul. (Ohio) 164.

[26] Johnson Steel Street Rail Co. v. William Wharton & Co., 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429. The failure of the prevailing party to appeal from part of a decree against him seemingly inconsistent with the part favorable to him does not affect his rights under the decree, there being nothing in the pleading to justify such unfavorable portion. Custer v. Russey (Tenn. Ch. App.) 51 S. W. 126.

[27] Gordon v. Johnson, 3 Colo. App. 139, 32 Pac. 347.

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answer and contest.[28] So also, a judgment entered by consent or agreement of the parties, operates as an estoppel between them, as much as a judgment arrived at by the court after exercising its mind upon the matters in controversy.[29] 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." [30]

§ 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

[28] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. See, infra, § 697.

[29] In re South American & Mexican Co., 1 Ch. 37, 12 Rep. 1; Lemmon v. Osborn, 153 Ind. 172, 54 N. E. 1058; West Philadelphia Pass. Ry. Co. v. Philadelphia & W. Turnpike-Road Co., 186 Pa. 459, 40 Atl. 787. Where the liability is several, and not joint, a decree against one of several defendants, upon a trial by agreement of the issues affecting him only, is final as to such defendant, though the suit is continued as to the other parties. Minneapolis Trust Co. v. Verhulst, 74 Ill. App. 350. But a decree entered by consent is not res judicata on a subsequent bill to carry it into execution by enforcing it against a successor of the former defendant. Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005.

[30] Earl of Bandon v. Becher, 3 Clark & F. 510; Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; Central Trust Co. v. Bridges, 6 C. C. A. 539, 57 Fed. 753; Thomas v. McDaneld, 88 Iowa, 374, 55 N. W. 499; Shannon v. Shannon, 4 Allen (Mass.) 134. But it is proper for a court to give full faith and credit to a judgment of a domestic court of co-ordinate jurisdiction, fair on its face, though the judgment was in fact fraudulent. Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25.

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time.[31] This principle is also an accepted doctrine of the modern Roman law.[32] It is true that, so far as concerns the further prosecution of the same case, an interlocutory judgment for the plaintiff (as, upon a default, where the damages remain to be assessed) determines every fact alleged in the declaration which, but for such judgment, the 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.[33] Also, where a decree in equity passes upon the issues between the parties, and finally determines their rights in respect to the main facts in controversy, or the principal object of the action, though it orders a reference as to specific items, or reserves a right to apply for further relief, or continues the cause for such further action as may prove to be necessary, it is conclusive as to the matters judicially and finally determined, though the reserved or postponed questions may still be open.[34] Again, a decree is none the less conclusive because it was merely interlocutory at the time of instituting the suit in which it is set up as a bar, where it subsequently ripened into a final decree.[35] But at the same time, a judgment by default only admits for the purposes 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

[31] McGourkey v. Toledo & O. C. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; In re Vetterlein, 44 Fed. 57; Harmon v. Struthers, 48 Fed. 260; Webb v. Buckelew, 82 N. Y. 555; Metropolitan El. Ry. Co. v. Manhattan Ry. Co., 14 Abb. N. C. 215; Collins v. Jennings, 42 Iowa, 447; Clariday v. Reed (Tenn. Ch. App.) 53 S. W. 302; Thompson v. Thompson (Tenn. Ch. App.) 54 S. W. 145; First Nat. Bank v. Linville (Kan. App.) 62 Pac. 165. And see, infra, § 695.

[32] 1 Evans, Poth. Obl. 534.

[33] Morey v. King, 49 Vt. 304; supra, § 91.

[34] See Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061; O'Brien v. Wheelock, 78 Fed. 673; Low v. Low, 177 Mass. 306, 59 N. E. 57; Christie v. Iowa Life Ins. Co., 111 Iowa, 177, 82 N. W. 499; Younkin v. Younkin, 44 Neb. 729, 63 N. W. 31; Lawton v. Perry, 45 S. C. 319, 23 S. E. 53. But it is held that a decree awarding a perpetual injunction in a patent suit, but with an order of reference to a master to ascertain the damages suffered by the infringement, is an interlocutory decree, and not final, and therefore does not operate as an estoppel in a subsequent suit. Brush Electric Co. v. Western Electric Co., 22 C. C. A. 543, 76 Fed. 761.

[35] David Bradley Mfg. Co. v. Eagle Mfg. Co., 6 C. C. A. 661, 57 Fed. 980.

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an action upon a different claim.[36] And where there are two conflicting judgments in the same case, the later in point of time must prevail.[37] An order admitting an alien to citizenship is in the nature of a judgment, and is conclusive upon the question of the length of his residence within the United States.[38]

§ 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.[39] 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.[40] 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 final.[41]

[36] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.

[37] Stoltz v. Coward, 10 Tex. Civ. App. 295, 30 S. W. 935.

[38] The Acorn, 2 Abb. U. S. 434, Fed. Cas. No. 29.

[39] Sharon v. Hill (C. C.) 26 Fed. 337; Woodbury v. Bowman, 13 Cal. 634; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Sherman v. Dilley, 3 Nev. 21 (compare Rogers v. Hatch, 8 Nev. 35); Day v. De Jonge, 66 Mich. 550, 33 N. W. 527; Haynes v. Ordway, 52 N. H. 284; Small v. Haskins, 26 Vt. 209; Ketchum v. Thatcher, 12 Mo. App. 185; Byrne v. Prather, 14 La. Ann. 653; Glenn v. Brush, 3 Colo. 26; Smith v. Farmers' Bank (Ky.) 51 S. W. 451; Hall v. Calvert (Tenn.) 46 S. W. 1120; Delk v. Yelton, 103 Tenn. 476, 53 S. W. 729; Texas Trunk R. Co. v. Jackson, 85 Tex. 607, 22 S. W. 1030; Maxwell v. First Nat. Bank (Tex.) 24 S. W. 848; Cunningham v. Holt, 12 Tex. Civ. App. 150, 33 S. W. 981; Buckner v. Lancaster (Tex.) 40 S. W. 631. Compare Thompson v. Giffin, 69 Tex. 139, 6 S. W. 410; Westmoreland v. Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167.

[40] Souter v. Baymore, 7 Pa. 415, 47 Am. Dec. 518.

[41] Sage v. Harpending, 49 Barb. (N. Y.) 166; Parkhurst v. Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; Stevens v. Stevens, 69 Hun, 332, 23 N. Y. Supp. 520; Mercantile Nat. Bank v. Corn Exchange Bank,

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In the practice of the federal courts, the rule appears to be that, when a case removed to an appellate court by a writ of error or appeal is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, nor prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, in the absence of a local statute providing that it shall not be so used pending an appeal; a supersedeas bond merely stays process for enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel.[42] But it is said that the judgment of the supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by writ of error, and is there pending and undetermined.[43] It should be remarked that the mere fact that a judgment is liable to be appealed from cannot strip it of its conclusive character. It remains in force as final, unless actually suspended by an appeal, and will, in the mean time, be competent evidence in support of a plea in estoppel.[44]

§ 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

73 Hun, 78, 25 N. Y. Supp. 1068; Burton v. Burton, 28 Ind. 342; Scheible v. Slagle, 89 Ind. 328; Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Allen v. Mayor, etc., of City of Savannah, 9 Ga. 286; Moore v. Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; Cloud v. Wiley, 29 Ark. 80; Paine v. Schenectady Ins. Co., 11 R. I. 411; Day v. Holland, 15 Or. 464, 15 Pac. 855; Willard v. Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331; Smith v. Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869; In re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856.

[42] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 27 Fed. 277.

[43] Eastern Building & Loan Ass'n v. Welling (C. C.) 103 Fed. 352.

[44] Cook v. Rice, 91 Cal. 664, 27 Pac. 1081.

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wise.[45] And the same is true of a judgment or order of the court which has been vacated or revoked; it is stripped of any conclusive character it may have possessed.[46] And an appeal from an order vacating a judgment does not reinstate the judgment so as to give it operation as an estoppel.[47] But the fact that a judgment is liable, under the local statute, to be opened at any time within five years after its entry (as, where it was rendered without any other notice than by publication in a newspaper), will not impair its conclusive force so long as it remains unopened.[48] And it is held that payment of the judgment rendered in a suit for foreclosure, or redemption from the foreclosure sale, does not extinguish the judgment, nor affect its conclusiveness as to the questions tried and determined in the action.[49]

§ 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.[50]

[45] Reg. v. Drury, 3 Car. & K. 193; Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834; Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; McCallister v. Bridges (Ky.) 40 S. W. 70; Stewart v. Register, 108 N. C. 588, 13 S. E. 234; Mills County v. Brown County, 10 Tex. Civ. App. 356, 30 S. W. 476; Rosenbaum v. Davis, 106 Tenn. 51, 60 S. W. 497; Pells v. People, 159 Ill. 580, 42 N. E. 784; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111. And see, infra, § 683.

[46] Graef v. Bernard, 162 Mass. 300, 38 N. E. 503; Small's Appeal (Pa.) 15 Atl. 807.

[47] Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

[48] Stevens v. Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

[49] Ferris v. Udell, 139 Ind. 579, 38 N. E. 180.

[50] Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Young v. Brehl, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892. See infra, § 684. But in Utah, a judgment is not final while a motion for a new trial, made within the time allowed by law, is pending and undisposed of. Snow v. Rich, 22 Utah, 123, 61 Pac. 336. And in Iowa, it is said that a judgment is conclusive as against parties thereto unless grounds exist for a new trial or for equitable interference. Fulliam v. Drake, 105 Iowa, 615, 75 N. W. 479.

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§ 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 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.[51] The former kind are of no effect whatever, either by way of estoppel or for any other purpose.[52] Hence if the court from which the judgment proceeds had no jurisdiction over the parties to the suit;[53] or if the subject-matter of the controversy was beyond its lawful cognizance;[54] 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;[55] 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

[51] As to the distinction between void and voidable judgments, see, supra, vol. 1, §§ 170, 215, 218.

[52] Attorney General v. Eriche, 1 Reporter, 440 (1893) App. Cas. 518; Gage v. Hill, 43 Barb. (N. Y.) 44; Hancock v. Flynn, 8 N. Y. Supp. 133; Miller v. Barkeloo, 8 Ark. 318; Agnew v. Adams, 26 S. C. 101, 1 S. E. 414; Dunklin v. Wilson, 64 Ala. 162; Moore v. O'Barr, 87 Ga. 205, 13 S. E. 464; Thaxton v. Smith (Tex. Civ. App.) 38 S. W. 820; Portsmouth Sav. Bank v. Gratiot Circuit Judge, 83 Mich. 646, 47 N. W. 595; In re Smith's Estate, 122 Cal. 462, 55 Pac. 249; In re Christiansen, 17 Utah, 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794.

[53] Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; Franz Falk Brewing Co. v. Hirsch, 78 Tex. 192, 14 S. W. 450; Abbott v. Union Mut. Life Ins. Co., 127 Ind. 70, 26 N. E. 153; Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

[54] McMaster v. Arthur, 33 S. C. 513, 12 S. E. 308; Ingram v. Phillips, 10 Tex. Civ. App. 17, 29 S. W. 915; Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704.

[55] In re Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; Houston v. Musgrove, 35 Tex. 594; supra, vol. 1, § 242.

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in law or fact, is binding and conclusive upon the parties until its effect is destroyed in some regular proceeding for that purpose.[56] It is also to be remarked that a judgment rendered upon constructive service of process, when the statute has been fully complied with, is as conclusive as if there had been personal service on the defendant.[57] And a doubt expressed by the court as to its right to entertain jurisdiction of the particular suit will not lessen the effect of its judgment, as res judicata, if in fact it does exercise jurisdiction and determine the controversy.[58]

§ 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.[59] "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."[60] 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

[56] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Elliott v. Piersol, 1 Pet. 340, 7 L. Ed. 164; Gunn v. Plant, 94 U. S. 664, 24 L. Ed. 304; 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. (N. Y.) 257; Wilkinson v. Vorce, 41 Barb. (N. Y.) 370; Camberford v. Hall, 3 McCord (S. C.) 345; Lancaster v. Wilson, 27 Grat. (Va.) 624; White v. Albertson, 14 N. C. 241, 22 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. (Ala.) 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. Strausberger, 71 Ill. 303; Reed v. Wright, 2 G. Greene (Iowa) 15; Delaney v. Reade, 4 Iowa, 292; Hart v. Jewett, 11 Iowa, 276; Haygood v. McKoon, 49 Mo. 79; Rogan v. Walker, 1 Wis. 597; supra, vol. 1, § 261.

[57] McCotter v. Flynn, 61 N. Y. Supp. 786, 30 Misc. Rep. 119.

[58] Williams v. Tomlin (Va.) 28 S. E. 883.

[59] State v. Ramsburg, 43 Md. 325.

[60] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

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it is made affirmatively to appear that the court which rendered it had no jurisdiction of parties or subject-matter.[61]

§ 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.[62] 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.[63]

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 judgment should have been rendered by a legally constituted court,—one known to and recognized by the law.[64] 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

[61] Manley v. Mickle, 53 N. J. Eq. 155, 32 Atl. 210; Preiss v. Cohen, 117 N. C. 54, 23 S. E. 162; Police Jury of Lafourche v. Police Jury of Terrebonne, 49 La. Ann. 1331, 22 South. 376; Watson v. Hopkins, 27 Tex. 637; Kelley v. Mize, 3 Sneed (Tenn.) 59; Phillips v. Lewis, 109 Ind. 62, 9 N. E. 395; Fiscus v. Guthrie, 125 Ind. 598, 25 N. E. 285; Eckert v. Binckley, 134 Ind. 614, 33 N. E. 619; McCrillis v. Harrison Co., 63 Iowa, 592, 19 N. W. 679; Bank of Santa Fe v. Haskell County Bank, 51 Kan. 50, 32 Pac. 627; Carr v. Brick, 113 Mich. 664, 71 N. W. 1103; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Keech v. Beatty, 127 Cal. 177, 59 Pac. 837.

[62] Hoggatt's Heirs v. Crandall, 39 La. Ann. 976, 3 South. 89.

[63] Davidson v. City of New Orleans, 32 La. Ann. 1245.

[64] Rogers v. Wood, 2 B. & Adol. 245.

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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." [65] 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.[66] 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.[67] 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 be dismissed, was held to be a good defense to an action at law by him to recover the same claims.[68] 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

[65] Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608.

[66] State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Anone, 2 Nott & McC. (S. C.) 27; Gilliam v. Reddick, 26 N. C. 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.

[67] See supra, vol. 1, § 173.

[68] Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492, 16 N. W. 576. See, also, State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; Sale v. First Baptist Church, 1 Am. & Eng. Corp. Cas. 169. As to college orders, see Rex v. Grundon, 1 Cowp. 315.

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parties, the judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly at issue.[69]

§ 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.[70] "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." [71]

§ 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.[72] Thus, subject to certain limitations to be hereafter noticed, a judgment at law on the 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

[69] Duchess of Kingston's Case, 20 How. St. Tr. 355; Mackintosh v. Smith, 4 Macq. H. L. Cas. 913, 924. Where a court is composed of several branches or divisions, or presided over by several judges, a ruling or decision in either division, or by either judge, is binding on the other. City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Marvin v. Weider, 31 Neb. 774, 48 N. W. 825.

[70] McDonald v. Mobile Life Ins. Co., 65 Ala. 358; Evans v. Tatem, 9 Serg. & R. (Pa.) 261, 11 Am. Dec. 717; Bank of United States v. Beverley, 1 How. 148, 11 L. Ed. 75; Poole v. Seney, 70 Iowa, 275, 24 N. W. 520; Low v. Mussey, 41 Vt. 393; Meyer v. Meyer, 40 Ill. App. 94.

[71] Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847.

[72] Strang v. Moog, 72 Ala. 460; Western Min. & Manuf'g Co. v. Virginia Cannel Coal Co., 10 W. Va. 250.

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shown upon which the jurisdiction of equity is peculiarly based.[73] 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.[74] 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.[75] 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.[76] 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

[73] Mayor v. Lord, 9 Wall. 409, 19 L. Ed. 704; Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Tompkins v. Drennen, 6 C. C. A. 83, 56 Fed. 694; Alley v. Chase, 83 Me. 537, 22 Atl. 393; Cowan v. Wheeler, 25 Me. 267, 43 Am. Dec. 283; Lane v. Lane, 80 Me. 570, 16 Atl. 323; Hollister v. Barkley, 11 N. H. 501; Shottenkirk v. Wheeler, 3 Johns. Ch. (N. Y.) 275; Donovan v. Finn, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531; Hendrickson v. Norcross' Ex'rs, 19 N. J. Eq. 417; West New York Silk-Mill Co. v. Laubsch, 53 N. J. Eq. 65, 30 Atl. 814; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Brinkerhoff v. Telford, 58 Ill. App. 56; Pratt v. Weyman, 1 McCord, Eq. (S. C.) 156; Tilson v. Davis, 32 Grat. (Va.) 92; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; McCampbell v. McCampbell, 5 Litt. (Ky.) 92, 15 Am. Dec. 48; Triplett v. Gill, 7 J. J. Marsh. (Ky.) 432; Hunt v. Terril's Heirs, 7 J. J. Marsh. (Ky.) 67; Rogers v. Waller, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758; Robbins v. Collier, 3 N. M. (Gild.) 342, 5 Pac. 538; Baldwin v. McCrea, 38 Ga. 650.

[74] Alabama Warehouse Co. v. Jones, 62 Ala. 550.

[75] Rachal v. Smith, 42 C. C. A. 297, 101 Fed. 159; Codde v. Mahlat, 109 Mich. 186, 66 N. W. 1093.

[76] For a full discussion of this point, see supra, vol. 1, §§ 365–392.

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have been in a new suit at law in relation to the same matter.[77] "To 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."[78] 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."[79]

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.[80] 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.[81] Thus, for example, where the maker of a promissory note brings an action in equity to enjoin the negotiation of the

[77] Orcutt v. Orms, 3 Paige (N. Y.) 459; Southgate v. Montgomery, 1 Paige (N. Y.) 41.

[78] Overton v. Searcy, Cooke (Tenn.) 36, 5 Am. Dec. 665.

[79] Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Bryant v. Hunter, 3 Wash. C. C. 48, Fed. Cas. No. 2,068; City of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Hawkins v. Depriest, 4 Munf. (Va.) 469.

[80] Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658; Parker v. Kane, 22 How. 1, 16 L. Ed. 286; Stewart v. Village of Ashtabula (C. C.) 98 Fed. 516; Fidelity Insurance, T. & S. D. Co. v. Fridenberg, 175 Pa. 500, 34 Atl. 848, 52 Am. St. Rep. 851; Young v. Farwell, 165 N. Y. 341, 59 N. E. 143; H. B. Claflin Co. v. De Vaughn, 106 Ga. 282, 32 S. E. 108; Terre Haute & I. R. Co. v. Peoria & P. U. Ry. Co., 81 Ill. App. 435; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Hall v. Dodge, 38 N. H. 346; Pierson v. Catlin, 18 Vt. 77; Bigelow v. Winsor, 1 Gray (Mass.) 299; Powers v. Chelsea Sav. Bank, 129 Mass. 44; Williams v. Row, 62 Pa. 118; Westcott v. Edmunds, 68 Pa. 34; Baldwin v. McCrea, 38 Ga. 650; Putnam v. Clark, 34 N. J. Eq. 532; Pleasants v. Clements, 2 Leigh (Va.) 474; Morgan's Heirs v. Patton, 4 T. B. Mon. (Ky.) 453.

[81] Where a suit in equity is dismissed on the ground that it appears from the facts found that the complainant has an adequate remedy at law, the facts found and the court's conclusions of law thereon are not determinations

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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 injunction allowed, save only that the dismissal was a bar to the bringing of another action [i. e., in equity] for the same matter." [82]

§ 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.[83]

§ 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, 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.[84] The courts of the United States, though possessing a special and lim-

estopping defendant from asserting otherwise in a subsequent action at law. Barnett v. Smart, 158 Mo. 167, 59 S. W. 235.

[82] Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, Id. 471.

[83] See infra, §§ 633-646.

[84] Infra, §§ 938, 939.

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ited 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.[85]

§ 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.[86] 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.[87] 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.[88]

[85] Supra, vol. 1, § 285. Nil debet is not a good plea to an action brought in one federal court upon a judgment rendered by another federal court. Reed v. Ross, Baldw. 36, Fed. Cas. No. 11,652. Where a federal court has exercised jurisdiction on the ground of diverse citizenship, the proceedings cannot be attacked in another action between different parties, on the ground that the citizenship was not diverse. Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368.

[86] Goodrich v. City of Chicago, 5 Wall. 566, 18 L. Ed. 511. But see Carmody v. City of Rome (D. C.) 49 Fed. 392.

[87] Cupisino v. Perez, 2 Dall. 194, 1 L. Ed. 345; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013.

[88] People v. Judge of Wayne Circuit, 27 Mich. 406, 15 Am. Rep. 195; 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

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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.[89] 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.[90] 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 landowners, which determination was partially acted upon, and boundary-lines fixed, and afterwards an entirely different determination, as to

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.

[89] Flitters v. Allfrey, L. R. 10 C. P. 29; Spaulding v. Chamberlin, 12 Vt. 538, 36 Am. Dec. 358; Pease v. Howard, 14 Johns. (N. Y.) 479; Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Boyer v. Schofield, *41 N. Y. 631; Hallock v. Dominy, 69 N. Y. 238; Emery v. Nelson, 9 Serg. & R. (Pa.) 12; Hazelett v. Ford, 10 Watts (Pa.) 101; Cumberland Coal & Iron Co. v. Jeffries, 27 Md. 526; Burke v. Elliott, 26 N. C. 355, 42 Am. Dec. 142; Ludwick v. Fair, 29 N. C. 422, 47 Am. Dec. 333; Shaver v. Shell, 24 Ark. 122; Bernal v. Lynch, 36 Cal. 135; Thompson v. Multnomah Co., 2 Or. 34. See, supra, vol. 1, § 250. Compare Leonard v. Sparks, 63 Mo. App. 585; Pettus v. Atlantic Sav. & Loan Ass'n, 94 Va. 477, 26 S. E. 834.

[90] Van Doren v. Horton, 25 N. J. Law, 205.

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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.[91]

§ 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 law or equity.[92] 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.[93] 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.[94]

§ 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

[91] Amerman v. Briggs, 50 N. J. Law, 114, 11 Atl. 423. See Stone v. City of Augusta, 46 Me. 127; Galbraith v. Black, 4 Serg. & R. (Pa.) 207.

[92] Meadows v. Duchess of Kingston, Amb. 756; Kenn's Case, 7 Coke, 43b.

[93] Connitt v. Reformed Protestant Dutch Church, 54 N. Y. 551. See Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Gable v. Miller, 10 Paige (N. Y.) 627; Shannon v. Frost, 3 B. Mon. (Ky.) 258; German Reformed Church v. Commonwealth, 3 Pa. 291.

[94] Watson v. Garvin, 54 Mo. 353.

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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.[95] 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-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."[96] 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.[97]

It is true that the civil courts may, in any case, by means of the writ of habeas corpus, inquire into the jurisdiction of a court martial, and if the person condemned was not amenable to its jurisdiction, may discharge him from the sentence; but the civil courts cannot, by means of this writ, exercise any supervisory or correcting power over the proceedings of a court martial, and no mere errors in its proceedings are open to consideration.[98]

[95] Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Swaim v. United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; In re White (C. C.) 17 Fed. 723; In re Davison (C. C.) 21 Fed. 618; In re McVey (D. C.) 23 Fed. 878; In re Zimmerman (C. C.) 30 Fed. 176; Vanderheyden v. Young, 11 Johns. (N. Y.) 150; Mills v. Martin, 19 Johns. (N. Y.) 7; Duffield v. Smith, 3 Serg. & R. (Pa.) 590; Brown v. Wadsworth, 15 Vt. 170, 40 Am. Dec. 674; Chesterfield v. Perkins, 58 N. H. 573.

[96] Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838.

[97] Wooley v. United States, 20 Law Rep. 631.

[98] United States v. Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Johnson v.

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§ 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.[99] This

Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; Barrett v. Hopkins (C. C.) 7 Fed. 312; In re Esmond, 5 Mackey (D. C.) 64.

[99] Hefferman v. Porter, 6 Cold. (Tenn.) 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. (Tenn.) 554, 91 Am. Dec. 299; Isbell v. Farris, 5 Cold. (Tenn.) 426.] . . . . Government of such territory, while so held in military occupation, is not 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

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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.[100] 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.

§ 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.[101] And the opinion has been expressed,

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."

[100] Walt v. Thomasson, 10 Heisk. (Tenn.) 151. Reliance is mainly placed on the ruling of the Judge Advocate General (Holt) in two cases before the said commission, apparently not reported.

[101] Greene v. Darling, 5 Mason, 201, Fed. Cas. No. 5,765; 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 Metc. (Mass.) 131; Armstrong v. Masten, 11 Johns. (N. Y.) 189; Brazill v. Isham, 2 Kern. (N. Y.) 9; Prentiss v. Farnham, 22 Barb. (N. Y.) 519; Sinclair v. Tallmadge, 35 Barb. (N. Y.) 602; Hostetter v. City of Pittsburgh, 107 Pa. 419; Lloyd v. Barr, 11 Pa. 41; Richardson v. Lanning, 26 N. J. Law, 130; Corbin v. Adams, 76 Va. 58; Ballard

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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.[102] 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.[103] 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 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.[104] 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.[105] 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

v. Mitchell, 53 N. C. 153; Whitlock v. Crew, 28 Ga. 289; Anders v. Anders, 31 N. C. 214; Penisten v. Somers, 15 La. Ann. 679; Groat v. Pracht, 31 Kan. 656, 3 Pac. 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. City of Fond du Lac, 40 Wis. 495.

[102] Wheeler v. Van Houten, 12 Johns. (N. Y.) 311; Bunnel v. Pinto, 2 Conn. 431; Owen v. Boerum, 23 Barb. (N. Y.) 187; McJimsey v. Traverse, 1 Stew. (Ala.) 244, 18 Am. Dec. 43; Robinson v. Morse, 26 Vt. 392; Lowenstein v. McIntosh, 37 Barb. (N. Y.) 251.

[103] Webster v. Lee, 5 Mass. 334; Newnan v. Wood, Mart. & Y. (Tenn.) 190; Whittemore v. Whittemore, 2 N. H. 26; Buck v. Buck, 2 Vt. 417; Hewitt v. Furman, 16 Serg. & R. (Pa.) 135; Bixby v. Whitney, 5 Me. 192; Edwards v. Stevens, 1 Allen (Mass.) 315; Hodges v. Hodges, 9 Mass. 320; King v. Savory, 8 Cush. (Mass.) 300; Elliott v. Quimby, 13 N. H. 181.

[104] Connelly v. Arnold, 6 Watts (Pa.) 312.

[105] Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

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at common law for any such matter in dispute.[106] 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.[107] 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.[108] 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.[109] 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.[110] 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, "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."[111] On principles similar to those which govern the law of awards, it is held that when parties have agreed to refer a case to

106 Hostetter v. City of Pittsburgh, 107 Pa. 419.

107 Todd v. Old Colony & F. R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49; Taylor v. Sindall, 34 Md. 38; Shelbina Hotel Association v. Parker, 58 Mo. 327.

108 Green v. Fricker, 7 Watts & S. (Pa.) 171.

109 Shackelford v. Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

110 Crabtree v. Green, 8 Ga. 8.

111 Baker v. Merrifield, 13 N. H. 357.

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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.[112]

§ 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.[113] 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.[114]

§ 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.[115]

[112] Stelle v. Shannon, 62 Tex. 198.

[113] Chouteau v. Gibson, 76 Mo. 38; Lucas v. City of San Francisco, 28 Cal. 591; Sturgis v. Rogers, 26 Ind. 1. See Baker v. Hess, 53 Ill. App. 473. But it is only where the parties and the subject-matter are the same that an appellate court is absolutely and technically bound by its own former decision. For instance, a decision of such a court holding a statute to be constitutional, when attacked in one action, does not prevent the court from declaring it to be unconstitutional, when assailed in another action, between different parties, on other grounds. City Council of Anderson v. Fowler, 48 S. C. 8, 25 S. E. 900. If, in such a case, the court should decide to abide by its former decision, without re-examination of the validity of the statute, it would be an application of the rule of "stare decisis," not that of "res judicata."

[114] Miller v. Bernecker, 46 Mo. 194.

[115] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154.

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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.[116] 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.[117] And generally, where the facts set up as a ground for plaintiff's recovery in an action for damages are such as would also constitute a criminal offense, the defendant cannot prevent a recovery by showing the record of his trial and acquittal under an indictment charging the same facts as a crime.[118] 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

[116] Jones v. White, 1 Strange, 68; Petrie v. Nuttall, 11 Exch. 569; Chamberlain v. Pierson, 31 C. C. A. 157, 87 Fed. 420; Mead v. City of Boston, 3 Cush. (Mass.) 404; Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317; Betts v. Town of New Hartford, 25 Conn. 180; Hutchinson v. Merchants' & Mechanics' Bank, 41 Pa. 42, 80 Am. Dec. 596; Johnson v. Girdwood, 7 Misc. Rep. 651, 28 N. Y. Supp. 151; People v. Board of Excise Com'rs, 64 Hun, 634, 18 N. Y. Supp. 884; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 30 S. W. 574; Chesapeake, O. & S. W. R. Co. v. Dyer Co., 87 Tenn. 712, 11 S. W. 943; Clark v. Irvin, 9 Ohio, 131; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Illinois Cent. R. Co. v. Quirk, 51 Ill. App. 607; Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856. Thus, a judgment of conviction for assault before a justice is not admissible, in an action for damages by the person assaulted against defendant, to show the fact of assault. Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

[117] Cottingham v. Weeks, 54 Ga. 275.

[118] United States v. Jaedicke (D. C.) 73 Fed. 100; Virgo v. Virgo, 69 Law T. 460; Summers v. Bergner & Engle Brewing Co., 143 Pa. 114, 22 Atl. 707, 24 Am. St. Rep. 518; Morch v. Raubitschek, 159 Pa. 559, 28 Atl. 369; Von Hoffman v. Kendall, 63 Hun, 628, 17 N. Y. Supp. 713.

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prove that the condition was broken.[119] 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.[120] For another example, in an 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.[121] In respect to the general rule thus stated and exemplified, the Roman law agrees with our own.[122] 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.[123]

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.[124] 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 judg-

[119] Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317.
[120] Rohm v. Borland (Pa.) 7 Atl. 171.
[121] Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98.
[122] 1 Whart. Ev. § 777, citing L. 3 Cod. de Ord. Jud. lii. 8.
[123] Marcadé, Explication du Code Napoléon, t. 5, pp. 192–199.
[124] Caddy v. Barlow, 1 Man. & Ry. 275; Arundell v. Tregono, Yel. 116; Legatt v. Tollervey, 14 East, 301; Basebe v. Matthews, L. R. 2 C. P. 684.

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ment 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.[125]

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

[125] Skidmore v. Bricker, 77 Ill. 164. See Wilson v. Manhattan Ry. Co., 2 Misc. Rep. 127, 20 N. Y. Supp. 852. Compare Maybee v. Avery, 18 Johns. (N. Y.) 352.

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upon this record, as we have already seen, the parties and the matter in issue are the same." [126]

In the next place, a criminal sentence may be admissible in evidence as a species of admission, although, strictly, it is not proper to 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. [127] 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.[128]

[126] Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. See also Starkie, Ev. pt. 2, § 80; Cooke v. Sholl, 5 Term R. 255. But an acquittal of a person indicted under Rev. St. § 2461, for taking timber from public lands, is not a bar to a civil action against him by the United States to recover the value of such timber, as the civil case turns wholly upon the issue of ownership, and does not involve any question of criminal intent, or of forfeiture for prohibited acts. Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127. On the other hand, it is said that judgment in a criminal case by the state against an individual, that certain liquors were not kept at a certain date with intent to dispose of them unlawfully, is res judicata, as to the intent at that time, in a proceeding by the state to condemn the liquor, though one proceeding is criminal and the other civil, and though the second is in rem, it being, as to the defendant, on his coming in as claimant, a proceeding inter partes. State v. Intoxicating Liquors, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937. That even where the parties are the same, a criminal judgment is not always and necessarily admissible evidence in a civil issue, may be seen from the case of United States v. Schneider (C. C.) 35 Fed. 107.

[127] Moses v. Bradley, 3 Whart. (Pa.) 272.

[128] Green v. Bedell, 48 N. H. 546; Clark v. Irvin, 9 Ohio, 131; Bradley v.

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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.[129]

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.[130] 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.[131] 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.[132] But in one case, in a prosecution 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

Bradley, 11 Me. 367; Woodruff v. Woodruff, Id. 475; Reg. v. Fontaine Moreau, 11 Q. B. 1033. Where one pleaded guilty to a charge of assault and battery, and paid a nominal fine, to avoid expense and loss of time in a trial, he may show, on the subsequent trial of an action for damages, that he was not in fact guilty of the offense. Crawford v. Bergen, 91 Iowa, 675, 60 N. W. 205. So the record of conviction of a wife for manslaughter in causing the death of her husband, and her plea admitting guilt of manslaughter, is no defense to a suit by her as beneficiary of a policy of insurance on his life, and is no evidence of anything to be inferred or argued from it, but only evidence of the conviction. Schreiner v. High Court of Order of Foresters, 35 Ill. App. 576.

[129] Comm. v. Horton, 9 Pick. (Mass.) 206.

[130] State v. Bradneck, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620; People v. Leland, 73 Hun, 162, 25 N. Y. Supp. 943; Dunagain v. State, 38 Tex. Cr. App. 614, 44 S. W. 148; People v. Kenyon, 93 Mich. 19, 52 N. W. 1033; People v. Beevers, 99 Cal. 286, 33 Pac. 844.

[131] Britton v. State, 77 Ala. 202.

[132] Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646.

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rendition, a judgment is always admissible, even against strangers.[133] 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.[134]

§ 530. Decisions of United States Land Department.

The rulings and decisions of the land department of the United States government (including in that term the secretary of the interior, the commissioner of the land office, and the registers and receivers), upon questions of fact presented for their determination, in cases within their jurisdiction in the official business of the land office, and in the absence of fraud or misrepresentation, are final and conclusive and cannot be reviewed or re-examined by the courts.[135]

[133] Dorrell v. State, 83 Ind. 357.

[134] Commonwealth v. Feldman, 131 Mass. 588.

[135] Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Ballance v. Forsyth, 24 How. 183, 16 L. Ed. 733; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Warren v. Van Brunt, 19 Wall. 646, 22 L. Ed. 219; Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264; Lytle v. Arkansas, 9 How. 314, 13 L. Ed. 153; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Barnard v. Ashley, 18 How. 44, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Shepley v. Cowan, 91 U. S. 340, 23 L. Ed. 424; Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848; Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605, 28 L. Ed. 427; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; Scott v. Lockey Inv. Co. (C. C.) 60 Fed. 34; Mitchell v. Cobb, 13 Ala. 137; Boatner v. Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; Robbins v. Bunn, 54 Ill. 48, 5 Am. Rep. 75; Porter v. Bishop, 25 Fla. 749, 6 South. 863; Bracken v. Parkinson, 1 Pin. (Wis.) 685; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Boyce v. Danz, 29 Mich. 146; State v. Batchelder, 7 Minn. 121 (Gil. 79); Hosmer v. Wallace, 47 Cal. 461; Powers v. Leith, 53 Cal. 711; Valentine v. Sloss, 103 Cal. 215, 37 Pac. 326; Irvine v. Tarbot, 105 Cal. 237, 38 Pac. 896; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596; Rush v. Valentine, 12 Neb. 513, 11 N. W. 746; Van Sant v. Butler, 19 Neb. 351, 27 N. W. 299; Sanford v. Sanford, 19 Or. 1, 13 Pac. 602; Jeffords v. Hine (Ariz.) 11 Pac. 351; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Tatro v.

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But to have this conclusive force and effect, it is necessary that such decisions should be made in accordance with the regular rules of practice in the department, and they must be based on legal evidence, or upon some formal inquiry, at which the parties have a fair opportunity of presenting evidence to support the rights which they assert.[136] And it must be noted that the rulings of the land department are binding upon the courts only in so far as they determine questions of fact; their decisions upon points of law are not final in such sense as to preclude a review by the courts when properly presented for their consideration.[137] But although a decision of the land office may be plainly erroneous, as a matter of law, yet it is not for that reason void, but only voidable; and it will support rights claimed under it until duly reversed or set aside,[138] and will not be impeachable collaterally.[139] And where there was a mixed question

French, 33 Kan. 49, 5 Pac. 426; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669. Among the officers whose rulings are conclusive are also to be included the surveyor general (Pin v. Morris, 1 Or. 230), and the board of commissioners of Mexican land claims. Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88. Decisions of the land office are binding not only on the courts of the federal system, but also upon those of the states. Stewart v. McHarry, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290. Among the questions of fact finally determinable by the land department may be mentioned the following, as examples: Whether given lands are "swamp and overflowed lands," within the meaning of an act of congress (Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063); whether given lands are "unfit for cultivation" (United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384); whether or not certain lands in question are within the description of "mineral lands" (Buena Vista Petroleum Co. v. Tulare Oil & Mining Co. [C. C.] 67 Fed. 226); whether land is of such a character as to allow of a homestead entry. Johnson v. Bridal Veil Lumbering Co., 24 Or. 182, 33 Pac. 528.

[136] Puget Mill Co. v. Brown (C. C.) 54 Fed. 987; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

[137] Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Glidden v. Union Pac. R. Co. (C. C.) 30 Fed. 660; Southern Pac. R. Co. v. Wiggs (C. C.) 43 Fed. 333; Tate v. Carney, 24 How. 357, 16 L. Ed. 693; Hartman v. Smith, 7 Mont. 19, 14 Pac. 648; Tatro v. French, 33 Kan. 49, 5 Pac. 426; Hosmer v. Wallace, 47 Cal. 461; Hess v. Bolinger, 48 Cal. 349; Shelton v. Keirn, 45 Miss. 106. But the decisions of the officers of the land department are not reviewable for mere errors of judgment upon the weight of evidence in a contested case before them. Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.

[138] United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948.

[139] Aurora Hill Con. Min. Co. v. Eighty-Five Min. Co. (C. C.) 34 Fed. 515.

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of law and fact to be determined by the land department, and the court cannot separate it so as to ascertain what error of law was committed, the decision of the department will be accepted as conclusive.[140]

A patent to land, issued by the proper office of the federal government, is both a conveyance and an adjudication upon the right of the patentee. Hence when no question is successfully made as to the jurisdiction of the officers of the land department, a patent issued by them is final and conclusive evidence of title in all proceedings at law. It cannot be impeached or attacked collaterally, nor directly in any court of law, although a court of equity may grant relief where fraud is shown.[141]

But in order that the rulings of the land office should be entitled to the character and effect of res judicata, it is vitally necessary that they should have kept strictly within their jurisdiction. If, for example, they had no jurisdiction or authority to issue a particular patent, —either because the sale of the land was not authorized by law, or it had been reserved from sale, or already patented to another, for any other reason,—the patent is void and may be collaterally impeached in an action at law.[142] It is also an important and well-settled

[140] Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

[141] Meader v. Norton, 11 Wall. 442, 20 L. Ed. 184; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; United States v. Marshall Silver Min. Co., 129 U. S 579, 9 Sup. Ct. 343, 32 L. Ed. 734; Barden v. Northern Pac. R. Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; Turner v. Donnelly, 70 Cal. 597, 12 Pac. 469; Green v. Barker, 47 Neb. 934, 66 N. W. 1032; Hosmer v. Wallace, 47 Cal. 461; Boyce v. Danz, 29 Mich. 146; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Sanford v. Sanford, 19 Or. 1, 13 Pac. 602; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Pin v. Morris, 1 Or. 230; Mitchell v. Cobb, 13 Ala. 137; Ard v. Pratt, 43 Kan. 419, 23 Pac. 646; Kinney v. Degman, 12 Neb. 237, 11 N. W. 318.

[142] Wilcox v. Jackson, 13 Pet. 511, 10 L. Ed. 264; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; Knight v. United Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849; Foss v. Hinkell, 78 Cal. 158, 20 Pac. 393; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Northern Pac. R. Co. v. McCormick, 19 C. C. A. 165, 72 Fed. 736; Webber v. Pere Marquette

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rule that when the grant of a patent from the land office has been procured through fraud, mistake, imposition, or misconstruction of the law of the case, the United States, or any contesting claimant for the land, may have relief in a court of equity.[143] But the fraud

Boom Co., 62 Mich. 626, 30 N. W. 469; Danforth v. Morrical, 84 Ill. 456; Havard v. Atkins, 24 La. Ann. 511; Doe v. Watts, 7 Smedes & M. (Miss.) 363, 45 Am. Dec. 308; Cummings v. Powell, 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Kean v. Roby (Ind.) 42 N. E. 1011; Crapo v. Township of Troy, 98 Mich. 635, 57 N. W. 806; Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Schwenke v. Union Depot & R. Co., 7 Colo. 512, 4 Pac. 905.

[143] Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; United States v. Maxwell Land-Grant Co., 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290; Germania Iron Co. v. United States, 7 C. C. A. 256, 58 Fed. 344; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; United States v. Williams (C. C.) 30 Fed. 309; United States v. Rose (C. C.) 24 Fed. 196; Wynn v. Garland, 16 Ark. 440; Bisson v. Curry, 35 Iowa, 72; State v. Bachelder, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; Corbett v. Wood, 32 Minn. 509, 21 N. W. 734; Empey v. Plugert, 64 Wis. 603, 25 N. W. 560; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Rogers v. Brent, 10 Ill. 573, 50 Am. Dec. 422; Porter v. Bishop, 25 Fla. 749, 6 South. 863; Doe v. Watts, 7 Smedes & M. (Miss.) 363, 45 Am. Dec. 308. In the case of Johnson v. Towsley, supra, it is said that, when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive. On this principle, the action of the land department in issuing a patent for land is conclusive in all courts, and in all proceedings, where, by the rules of law, the legal title must prevail. But courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both executive and judicial action, founded in fraud, mistake, or other special ground of equity, when private rights are invaded. In this manner the most solemn judgments of courts of law have been annulled, and patents and other important instruments issuing from the crown or other executive branch of the government have been reformed, corrected, declared void, or other appropriate relief granted. The land office, dealing as it does with private rights of great value in a manner where it is particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and the necessity of this equitable jurisdiction. If a patent has been obtained by

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for which a patent may be cancelled or set aside is such as is extrinsic or collateral to the matters contested, and not a fraud which was in issue before the land department.[144] The right of the United States to bring suit to set aside or cancel a patent for land issued in its name, for fraud or mistake, exists only when the government has an interest in the remedy sought by reason of its interest in the land, or when the fraud has been practised on the government and operates to its prejudice, or when it is under some obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action. When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the government has no interest in the matter, the suit must fail.[145] Further, patents will not be set aside on the ground of fraud, unless the proof of fraud is clear and strong.[146] And when the United States sues for the cancellation of a patent, it must assume the burden of proving the fraud charged, even though this involves proving a negative.[147]

fraud and perjury, the successful claimant will be regarded in equity as trustee for the true owner, who may, by proper proceedings in equity, compel a conveyance to himself of the legal title. Plummer v. Brown, 70 Cal. 544, 12 Pac. 464; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669; Boyce v. Danz, 29 Mich. 146.

[144] United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; United States v. San Jacinto Tin Co. (C. C.) 23 Fed. 279; United States v. White (C. C.) 17 Fed. 561. And "it is not enough that fraud and imposition have been practised upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected the determination, which, otherwise, would have been in favor of the plaintiff." Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570.

[145] United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747. See United States v. Iron Silver Min. Co. (C. C.) 16 Fed. 810; San Pedro & C. Co. v. United States, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911; United States v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766.

[146] United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384.

[147] Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

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§ 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.[148] 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.[149] 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 right to pre-emption.[150] 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.[151]

[148] Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co., 11 Wall. 488, 20 L. Ed. 209; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

[149] Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307. In New York, it is held that the decision of a superintendent of the banking department of the state, in refusing an application for a certificate of compensation alleged to be due to a special bank examiner, is binding on a succeeding superintendent, in case of a second application by the same person on the same state of facts, as res judicata of the claim in question. People v. Preston, 62 Hun, 185, 16 N. Y. Supp. 488.

[150] Megerle v. Ashe, 33 Cal. 74.

[151] United States v. McDowell (D. C.) 21 Fed. 563.

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§ 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.[152] "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." [153] 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 judgments of other tribunals, so long as they act within their jurisdiction, and cannot be attacked collaterally.[154] 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

[152] Osterhoudt v. Rigney, 98 N. Y. 222; Placer County v. Campbell (Cal.) 11 Pac. 602; Colusa Co. v. De Jarnett, 55 Cal. 375; Carroll v. Board of Police of Tishamingo County, 28 Miss. 38; Kelly v. Wimberly, 61 Miss. 548; State v. Board of Com'rs of Buffalo County, 6 Neb. 454; Maxwell v. Board of Com'rs of Fulton County, 119 Ind. 20, 19 N. E. 617; Sioux County v. Jameson, 43 Neb. 265, 61 N. W. 596; Longinette v. Shelton (Tenn. Ch.) 52 S. W. 1078. Compare Board of Com'rs of Jackson County v. Nichols, 12 Ind. App. 315, 40 N. E. 277, 54 Am. St. Rep. 528; Chapman v. State, 104 Cal. 690, 38 Pac. 457.

[153] Osterhoudt v. Rigney, 98 N. Y. 222.

[154] Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525. Compare Winchester v. Board of Com'rs of Cecil County, 78 Md. 266, 27 Atl. 1075.

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assessment of benefits and damages to property-owners, do not constitute a court, nor have their reports the effect of judgments.[155] 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."[156] 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.[157] 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.[158]

§ 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 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

[155] City of Elkhart v. Simonton, 71 Ind. 7.
[156] Hadley v. Mayor, etc., of City of Albany, 33 N. Y. 603, 88 Am. Dec. 412.
[157] Queen v. City of Atlanta, 59 Ga. 318.
[158] Regina v. Leigh, 10 Adol. & E. 398.

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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." [159] 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.[160] 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.[161]

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.[162] And, in the case of a former adjudication set up in defense, it is no bar unless the parties to the

[159] Williamson's Case, 26 Pa. 9, 17, 67 Am. Dec. 374. See, also, Doyle v. Commonwealth, 107 Pa. 20; State v. Bechdel, 37 Minn. 360, 34 N. W. 334, 5 Am. St. Rep. 854; Ex parte Adams, 25 Miss. 883, 59 Am. Dec. 234; In re Graham, 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174; In re Gut Lun, 83 Fed. 141; State v. Adler, 67 Ark. 469, 55 S. W. 851; In re Sneden, 105 Mich. 61, 62 N. W. 1009, 55 Am. St. Rep. 435; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86; In re Graham, 7 Wash. 237, 34 Pac. 931. Compare Bradley v. Beetle, 153 Mass. 154, 26 N. E. 429.

[160] Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7,597.

[161] Supra, vol. 1, §§ 254–259.

[162] Day v. Combination Rubber Co., 2 Fed. 570; Ainslie v. Mayor of City of New York, 1 Barb. (N. Y.) 168; In re Lightner's Estate, 187 Pa. St. 237, 41 Atl. 46; Ellis v. Crowl, 46 Kan. 100, 26 Pac. 454; Jarrell v. Brubaker, 150 Ind. 260, 49 N. E. 1050; Heffron v. Knickerbocker, 51 Ill. App. 291; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6.

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first judgment are the same as those to the second proceeding.[163] 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.[164] 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.[165] 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."[166] 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

[163] Degelos v. Woolfolk, 21 La. Ann. 706.

[164] Appeal of Chandler's Ex'r, 11 Wkly. Notes Cas. 421. See, infra, § 548. But in considering whether an issue is res judicata, it is immaterial that such issue was raised in the former suit by the party who now insists that it is concluded by the judgment, or that he supported the issue by evidence and induced the court to rule and charge in his favor on it. Brown v. Tillman, 121 Ala. 626, 25 South. 836.

[165] Bank of Mobile v. Mobile & O. R. Co., 69 Ala. 305. Where there are several plaintiffs, and a decree is made in favor of some of them only, it is conclusive that the others are not entitled to relief, though it does not expressly so declare, where it is clearly inferable, from the decree as a whole, that such was the intention of the judge who framed it. H. B. Claflin Co. v. De Vaughn, 106 Ga. 282, 32 S. E. 108.

[166] 1 Greenl. Ev. § 535; Peterson v. Lothrop, 34 Pa. 223; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626.

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and testator. All others not included in either of these classes are of course strangers." [167] 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." [168] "To ascertain the 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." [169] 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.[170] 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 to be remarked that the adjudication of a matter in a suit in which a person is named as a party, but of whose person the court acquires no jurisdiction, by service of pro-

[167] Brown v. Chaney, 1 Kelly (Ga.) 412, Lumpkin, J. Further as to the question who are privies, see infra, § 549.

[168] Same's Appeal, 26 Pa. 184; Walters v. Wood, 61 Iowa, 290, 16 N. W. 116.

[169] Allin v. Hall's Heirs, 1 A. K. Marsh. (Ky.) 525.

[170] Barry v. Carothers, 6 Rich. Law (S. C.) 331. See McCormick v. Brannan, 24 Pa. Co. Ct. R. 497. And see, supra, vol. 1, § 213.

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cess or otherwise, cannot be considered as res judicata as to such person.[171]

§ 534a. Judgment as Estoppel against United States or State.

While there are cases in which it may be questioned whether the government will be concluded by an estoppel in pais, and while there are varying decisions as to whether it will be bound by an estoppel by deed, it has never been successfully contended that the United States would not be subject, like any ordinary suitor, to the principle of res judicata when it voluntarily goes into the courts as a litigant.[172] The rule is the same in regard to a state. When a state invokes the judgment of a court for any purpose, it lays aside its sovereignty and consents to be bound by the decision of the court, whether such decision be favorable or adverse, since the state is bound by the doctrine of res judicata to the same extent as any private litigant.[173] Thus, a judgment in a suit for the collection of taxes operates as an estoppel against the state, or any agency of the state, in suits concerning the same taxes or those subsequently accruing under the same statute.[174] A more difficult question arises when we inquire whether a state will be bound by a judgment against one of its municipal corporations, concerning public interests, property, or rights. Ordinarily, it would appear, such a judgment will be conclusive only on the corporation immediately involved in the suit.[175] But in California, it is held that, where a municipal corporation is endowed with full power and jurisdiction over the public parks within its territory, a judgment adverse to the corporation, in a suit prosecuted by it, wherein it claims the legal title to land as

[171] Garrigue v. Arnott, 80 Ill. App. 24; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

[172] Fendall v. United States, 14 Ct. Cl. 247; United States v. O'Grady, 22 Wall. 641, 22 L. Ed. 772; Atlantic Dredging Co. v. United States, 35 Ct. Cl. 463. Compare The John Shillito Co. v. McClung, 2 C. C. A. 526, 51 Fed. 868.

[173] State v. Kennedy, 60 Neb. 300, 83 N. W. 87; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

[174] Stone v. Bank of Kentucky, 174 U. S. 799, 19 Sup. Ct. 881, 43 L. Ed. 1187; Bank of Kentucky v. Stone, 88 Fed. 383; Bridge Co. v. Douglass, 12 Bush (Ky.) 673.

[175] See People v. Loeffler, 175 Ill. 585, 51 N. E. 785.

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part of a public park and as trustee of the people of the state, will be a bar to any subsequent action by the people of the state for the same land.[176] But the state cannot be bound by a judgment between private parties, although a question affecting the public was adjudicated therein, as, whether the land in controversy was public land of the state or not.[177] A municipal corporation is not in any sense sovereign; and such a corporation is as fully bound by a judgment for or against it, in any suit to which it was a party, as a private person would be.[178] But of course it is not estopped by a judgment for or against another municipal corporation of the same state, though the same question is at issue.[179]

§ 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 considered 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.[180]

[176] People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Id., 102 Cal. 661, 36 Pac. 927. And see People v. Beaudry, 91 Cal. 213, 27 Pac. 610.

[177] Platt v. Vermillion, 39 C. C. A. 535, 99 Fed. 356. Judgment in an action between citizens to test the constitutionality of a statute is not res judicata, as to the validity of such act, in a subsequent action by the state. Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

[178] Illinois Cent. R. Co. v. City of Champaign, 163 Ill. 524, 45 N. E. 120.

[179] In a suit by a bank to enjoin a county from collecting a tax, an adjudication that the bank had an irrevocable contract with the state for exemption from such taxes is not conclusive, in a subsequent suit involving the right of other counties to collect taxes from the bank under the same statute. Northern Bank of Kentucky v. Stone, 88 Fed. 413.

[180] As to married women, see supra, vol. 1, §§ 188–192; Ketchum v. Christman, 128 Mo. 38, 30 S. W. 313; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. As to infants, see vol. 1, §§ 193–198; as to insane persons, § 205.

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§ 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.[181] "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."[182] This rule is one of the fundamentals of the jurisprudence of the subject. For it is found in the Roman law,[183] as well as our own, and is also a familiar principle of the modern French and other continental systems.[184] 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 or next friend, 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 judgment.[185] So, a judgment against one sued in his individual capacity, and who, as an individual, disclaims any interest in the property in controversy, will not estop him to claim the property in the capacity of a trustee of others, for whom he held it when the suit

[181] 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. 206; Sample v. Coulson, 9 Watts & S. (Pa.) 62; Brooking v. Dearmond, 27 Ga. 58; Erwin v. Garner, 108 Ind. 488, 9 N. E. 417; Mansfield v. Hoagland, 46 Ill. 359; Stoops v. Woods, 45 Cal. 439.

[182] Rathbone v. Hooney, 58 N. Y. 463; Jennings v. Jones, 2 Redf. Sur. (N. Y.) 95.

[183] "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 Evans Poth. Obl. p. 556.

[184] Code Civil, art. 1351; Marcadé, Explication du Code Napoléon, t. 5, pp. 175–180.

[185] McBurnie v. Seaton, 111 Ind. 56, 12 N. E. 101; Gerstein v. Fisher, 12 Misc. Rep. 211, 33 N. Y. Supp. 1120; Furlong v. Banta, 80 Hun, 248, 29 N. Y. Supp. 985. See Baker v. Flint & P. M. R. Co., 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471.

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was commenced.[186] A judgment for trespass in cutting trees on lands of a church, recovered by one who sued as a deacon of the church, cannot be pleaded by defendant in bar of an action for the same trespass by the trustees of the church.[187] Again, the judgment rendered in an action in which one of the parties appeared in the capacity of an executor or administrator is not binding upon him in a subsequent suit, in which he appears in his private and individual capacity, or as an heir, legatee, or trustee under the will, or vice versa, unless it appears that the rights claimed by him in the second action were actually put in issue and litigated in the former suit.[188] For the same reason, a judgment in an action for property against a party suing as the heir of one person is not a bar to another action by the same party, for the same property, but claiming in a different right, as the heir of another person.[189] So, a decree in chancery affecting the rights of legatees of a decedent is not binding upon them as his heirs at law, in a subsequent action of ejectment against them.[190] On similar principles, an equity of redemption owned by an assignee in bankruptcy, as such, is not barred 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 way mentioned.[191] Again, a judgment by default against a garnishee, where no issue was made

[186] Sonnenberg v. Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885.

[187] Allison v. Little, 93 Ala. 150, 9 South. 388.

[188] Carey v. Roosevelt, 43 C. C. A. 320, 102 Fed. 569; Hall v. Richardson, 22 Hun, 444; In re Yetter, 44 App. Div. 404, 61 N. Y. Supp. 175; Appeal of Clarke, 70 Conn. 195, 39 Atl. 155; Gibson v. Willis (Tenn. Ch. App.) 36 S. W. 154; Sutton v. Read, 176 Ill. 69, 51 N. E. 801. See Braswell v. Hicks, 106 Ga. 791, 32 S. E. 861.

[189] Caruth v. Grigsby, 57 Tex. 259; Downing v. Diaz, 80 Tex. 436, 16 S. W. 49; Kitts v. Willson, 140 Ind. 604, 39 N. E. 313; Melton v. Pace, 103 Tenn. 484, 53 S. W. 939; Pollock v. Cox, 108 Ga. 430, 34 S. E. 213; Johnson v. Graves, 129 Ind. 124, 28 N. E. 315.

[190] Wooster v. Fitzgerald, 61 N. J. Law, 687, 40 Atl. 599.

[191] Landon v. Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; Id., 129 N. Y. 166, 29 N. E. 71. Judgment against a plaintiff in an action by him in his representative capacity, as trustee for creditors, to set aside a conveyance as in fraud of creditors, based on the ground that the conveyance was free from fraud, is not conclusive against him on the question of fraud, in an action by him individually on his own account merely, against the same defendant for the same purpose. Collins v Hydron, 135 N. Y. 320, 32 N. E. 69.

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as to the garnishee's right to the property in question in the capacity of an assignee for the benefit of creditors, is not binding upon him in a subsequent action which he brings as such assignee, to recover the value of the property.[192] 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 another 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 deed, he will not be regarded as a party to said suit in his capacity as trustee in the former deed.[193] 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, in which 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.[194] Again, a judgment in a mandamus proceeding against a corporate board, compelling them to restore a discharged workman to his employment on the ground that the discharge was in violation of law, is not res judicata in an action of tort by the workman against the members of the board individually for damages for his dismissal.[195]

But it may sometimes happen that 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.[196] 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,

[192] Schneider-Davis Co. v. Brown (Tex. Civ. App.) 46 S. W. 108. See Santleben v. Alamo Cement Co. (Tex. Civ. App.) 25 S. W. 143.

[193] McNutt v. Trogdon, 29 W. Va. 469, 2 S. E. 328. A person suing as a stockholder of a corporation is not estopped by a decree in a prior suit, brought by him as trustee of a mortgage. Henry v. Pittsburgh, C., C. & St. L. Ry. Co., 2 Ohio N. P. 118.

[194] Stoops v. Woods, 45 Cal. 439.

[195] Nuttall v. Simis, 22 Misc. Rep. 19, 47 N. Y. Supp. 1097.

[196] See Cornell v. Green, 43 Fed. 105; Colt v. Colt, 48 Fed. 385; Brown v. Howard, 92 Fed. 537; Heyl v. Donifelser, 59 Kan. 779, 54 Pac. 1059; Sparks v. Etheredge, 89 Ga. 790, 15 S. E. 672.

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and cannot be re-examined in a subsequent suit between them.[197] And so, if a devisee of land, in possession thereof pending 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.[198] 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.[199]

§ 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.[200] 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.[201] 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.[202] 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

[197] Manigault v. Holmes, 1 Bailey, Eq. (S. C.) 283.

[198] Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, citing Stewart v. Montgomery, 23 Pa. 412; Atherton v. Atherton, 2 Pa. 112. And see Comm. v. Cochran, 146 Pa. 223, 23 Atl. 203.

[199] Corcoran v. Chesapeake & Ohio Canal Co., 94 U. S. 741, 24 L. Ed. 190. And see Daniel v. Gum (Tenn.) 45 S. W. 468.

[200] Follansbee v. Walker, 74 Pa. 306; Manly v. Kidd, 33 Miss. 141; Verplanck v. Van Buren, 76 N. Y. 247; Lowry v. McMurtry, Sneed (Ky.) 251; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887; McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Bass Foundry & Machine Works v. Board of Com'rs of Parke County, 141 Ind. 68, 32 N. E. 1125.

[201] Taylor v. Cornelius, 60 Pa. 187; Johnston's Devisees v. Churchills, Litt. Sel. Cas. (Ky.) 177; Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322.

[202] Wright v. Tatham, 1 Adol. & El. 3, 19.

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a plaintiff or defendant, the suit is for or against his interest.[203] An analogous principle governed the decision of the case of Foust v. City of Huntington.[204] 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 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. Again, in a suit in which the government has no interest, but which is brought in its name by a private party, to enforce his own rights, a prior adjudication by a state court, determining the same issues adversely to him, is available as a defense, notwithstanding the formal presence of the United States as a party.[205] So, where a writ of prohibition was brought to prevent the judge of a city court from proceeding in a criminal case to enforce the collection of a tax, and, from the judgment entered, an appeal was taken, to which the city, being the real party in interest, became also a formal party, and the judgment was affirmed, it was held that this judgment was conclusive, in a subsequent proceeding, upon the city itself.[206] 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.[207] And in general, where the principal parties and the thing demanded in the

[203] Rogers v. Haines, 3 Me. 362.

[204] 113 Ind. 139, 15 N. E. 337.

[205] United States v. Des Moines Val. R. Co., 28 C. C. A. 267, 84 Fed. 40.

[206] Stone v. Bank of Kentucky, 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1187. And see Keller v. City of Mt. Vernon, 23 App. Div. 46, 48 N. Y. Supp. 370.

[207] Dodge v. Zimmer, 110 N. Y. 43, 17 N. E. 399.

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two suits are different, the judgment in one cannot be pleaded as res judicata in the other.[208]

§ 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.[209] So where suit on a note is prosecuted in the name of one, at the instance or for the benefit of another person, the adjudication will be conclusive as against such other person, not only as to what was determined in the suit, but also as to all other matters involved, or which could have been raised and determined in it.[210] 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.[211] Where a mortgagee assigns the note and mortgage for the purpose of having the mortgage foreclosed by his assignee, and regains title thereto after a decree has been rendered against the assignee in the foreclosure suit, the decree is conclusive against him as to all matters which were or might have been litigated therein.[212] But if the plaintiff of record in the former suit had no real interest in the subject-matter of the

[208] White v. Gaines, 29 La. Ann. 769. A judgment in an action upon a written instrument against a plaintiff, who in no event could recover thereon, is not a bar to a subsequent action by the party in whom the right of action really lies. McLean v. Hansen, 37 Ill. App. 48.

[209] Sanders v. Peck, 30 C. C. A. 580, 87 Fed. 61; Gill v. United States, 7 Ct. Cl. 522; Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177; Citizens' Bank v. Miller, 45 La. Ann. 493, 12 South. 516. Where a water company assigns its contract to furnish the city with water, and then brings suit against the city on the contract for the use of the assignee, a judgment against it for costs is no bar to a subsequent suit on the same contract by the assignee. City of Carlyle v. Carlyle Water, Light & Power Co., 36 Ill. App. 28.

[210] Cheney v. Cross, 80 Ill. App. 640; Jackson v. West, 22 Tex. Civ. App. 483, 54 S. W. 297.

[211] Follansbee v. Walker, 74 Pa. 306.

[212] Cheney v. Patton, 144 Ill. 373, 34 N. E. 416. That a judgment in such a case may not be conclusive as between the assignor and the assignee of the mortgage see Winegard v. Fanning, 76 Hun, 170, 27 N. Y. Supp. 566. And see O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L. R. A. 650, 40 Am. St. Rep. 486.

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litigation, either personally or as trustee of the title for the benefit of the true owner, so that he was not entitled to represent the latter for the purposes of the action, then the real owner will not be concluded by the result of the suit.[213]

§ 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." [214] 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.[215] 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.[216] 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

[213] Stephens v. Motl, 82 Tex. 81, 18 S. W. 99. See, also, Board of Trustees of School District No. 1 v. Whalen, 17 Mont. 1, 41 Pac. 849.

[214] Claflin v. Fletcher (C. C.) 7 Fed. 851; Roby v. Eggers, 130 Ind. 415, 29 N. E. 365; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; McDonald v. Western Refrigerating Co., 35 Ill. App. 283; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877. A judgment is conclusive against an assignee of a chose in action, where he employed an attorney who brought suit thereon in the assignor's name with the assignee's consent. Cleveland v. Heidenheimer (Tex. Civ. App.) 44 S. W. 551.

[215] Conger v. Chilcote, 42 Iowa, 18.

[216] Burns v. Gavin, 118 Ind. 320, 20 N. E. 799.

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asserting a prior dedication of the same land for public use as a street.[217]

§ 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.[218] 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.[219] 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.[220] Again, where, in a suit against a guardian to set aside for fraud a release given by the ward,

[217] Landis v. Hamilton, 77 Mo. 554. On the same principle, see Palmer v. Hayes, 112 Ind. 289, 13 N. E. 882.

[218] Frank v. Wedderin, 16 C. C. A. 1, 68 Fed. 818; Eagle Manuf'g Co. v. David Bradley Manuf'g Co. (C. C.) 50 Fed. 193; Theller v. Hershey (C. C.) 89 Fed. 575; Carey v. Roosevelt (C. C.) 91 Fed. 567; Castle v. Noyes, 14 N. Y. 329; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Baxter v. Myers, 85 Iowa, 328, 52 N. W. 234, 39 Am. St. Rep. 298; Grant Tp. v. Reno Tp., 107 Mich. 409, 65 N. W. 376; Reed v. McGregor, 62 Minn. 94, 64 N. W. 88; Hurd v. McClellan, 1 Colo. App. 327, 29 Pac. 181; Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760; Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50. A corporation which assumes the defense of a patent infringement suit, brought against one who purchased the infringing articles from it, is estopped by the judgment to the same extent as if it had been a party. Empire State Nail Co. v. American Solid Leather Button Co. (C. C.) 71 Fed. 588. So where, on a libel in rem for collision, the master of the libelee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question res judicata, as against a subsequent libel in personam against him. Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583.

[219] Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867.

[220] Estelle v. Peacock, 48 Mich. 469, 12 N. W. 659. And see Wood v. Ensel, 63 Mo. 193.

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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.[221] 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,[222] or it may consist in a responsibility over to the 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.[223] 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.[224]

[221] Parr v. State, 71 Md. 220, 17 Atl. 1020.

[222] The case of persons having similar interests and uniting in the prosecution 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.

[223] Andrews v. National Foundry & Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139; Cramer v. Singer Manuf'g Co., 35 C. C. A. 508, 93 Fed. 636; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286.

[224] Lacroix v. Lyons (C. C.) 33 Fed. 437; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801; Cannon River Mfrs.' Ass'n v. Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Central Baptist Church & Society v. Manchester, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893; Brady v. Brady, 71 Ga. 71; Turpin v. Thomas' Representatives, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615; Majors v. Cowell, 51 Cal. 478; Allin's Heirs v. Hall's Heirs, 1 A. K. Marsh. (Ky.) 525; Koehring v. Aultman, Miller & Co. (Ind. App.) 35 N. E. 30; Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345; Williams v. Cooper, 134 Cal. 666, 57 Pac. 577; State v. Johnson, 123 Mo. 43, 27 S. W. 399.

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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.[225]

§ 541. Person Submitting his Interest is Bound.

Numerous cases show that a judgment may be binding as an estoppel upon a person who, although not nominally or formally a party to the action in which it was rendered, submitted his interest in the subject-matter of the litigation to the consideration of the court and invited its adjudication thereon.[226] 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.[227] And so, an adjudication which settles a disputed boundary line of lands is binding, not only upon parties of record, but also upon one who was interested in the defense of the action, and who in fact conducted the defense, though in the name of another.[228] And of course all persons who are brought into the suit, as additional parties, on account of interests claimed by them in the subject of the litigation, either by original process or by order of court on motion of the

[225] Lownsdale v. City of Portland, 1 Or. 381, Deady, 1, Fed. Cas. No. 8,578.

[226] Sevey v. Chick, 13 Me. 141; Conant v. Jones, 50 App. Div. 336, 64 N. Y. Supp. 189; Van Koughnet v. Dennie, 68 Hun, 179, 22 N. Y. Supp. 823; Parker v. Moore, 59 N. H. 454; Albert v. Hamilton, 76 Md. 304, 25 Atl. 341; Hidell v. Funkhouser, 89 Ga. 532, 16 S. E. 79; Reinach v. New Orleans Imp. Co., 50 La. Ann. 497, 23 South. 455; Goss v. Singleton, 2 Head (Tenn.) 67; Bomar v. Ft. Worth Bldg. Ass'n, 20 Tex. Civ. App. 603, 49 S. W. 914; Sandoval v. Rosser, 86 Tex. 682, 26 S. W. 933; Converse v. Davis (Tex. Civ. App.) 37 S. W. 247; Hawkins v. Taylor, 128 Ind. 431, 27 N. E. 1117; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129. Compare Gulf City Trust Co. v. Hartley, 20 Tex. Civ. App. 180, 49 S. W. 902.

[227] Jay v. De Groot, 2 Hun (N. Y.) 205.

[228] McNamee v. Moreland, 26 Iowa, 96.

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original parties, or by interpleader or cross-petition, will be as conclusively bound by the result of the litigation as if they had been parties from the inception of the suit.[229] But an assignee of 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.[230] And in general, a judgment is not an estoppel for or against persons who, though interested in the subject-matter of the litigation, are not parties to the case; and this rule is not affected by the fact that such persons may have been present at the trial or hearing, and may have assisted to some extent in the prosecution or defense of the action.[231]

[229] Riley v. First Nat. Bank, 81 Md. 14, 31 Atl. 585; Desnoyers v. Dennison, 19 Ohio Cir. Ct. R. 320; Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122; Gardner v. Stratton's Adm'r, 89 Va. 900, 17 S. E. 553; Brown v. Walker, 108 N. C. 387, 13 S. E. 8; Swope v. Schwartz (Ky.) 15 S. W. 251; Satterwhite v. Sherley, 127 Ind. 59, 25 N. E. 1100; Isbell v. Stewart, 125 Ind. 112, 25 N. E. 160. Where a nonresident of the state, in compliance with an order of court, requiring him to interplead in an action, appears and pleads to the merits, he is concluded by the court's judgment. German Bank v. American Fire Ins. Co., 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316. So, where an adverse claimant was cited to show cause why certain judgments should not be enforced against land in dispute, he cannot afterwards be permitted to say that the judgment of the court ordering the sale of the land for such purpose was not a bar to his title. Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25. See Scott v. Wagner, 2 Kan. App. 386, 42 Pac. 741. But where persons who were not parties to the action in the lower court were named as appellees on an appeal, they did not thereby become parties, so as to entitle them, in a subsequent action between them and the appellant, to plead in bar the judgment which was affirmed on that appeal. Owingsville & Mt. S. Turnpike Road Co. v. Hamilton (Ky.) 54 S. W. 175.

[230] Swamscot Machine Co. v. Walker, 22 N. H. 457, 55 Am. Dec. 172. And see Woods v. White, 97 Pa. 222; Sergeant's Ex'rs v. Ewing, 30 Pa. 75.

[231] Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Williamson v. White, 101 Ga. 276, 28 S. E. 846, 65 Am. St. Rep. 302; Koehring v. Aultman, Miller & Co., 7 Ind. App. 475, 34 N. E. 30; Fifth Mut. Bldg. Soc. v. Holt, 184 Pa. 572, 39 Atl. 293; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; State v. Anderson, 26 Fla. 240, 8 South. 1; Leftwich Lumber Co. v. Florence Mut. Building, Loan & Savings Ass'n, 104 Ala. 584, 18 South. 48. See Northern Bank of Kentucky v. Stone (C. C.) 88 Fed. 413.

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§ 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.[232]

§ 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.[233] "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." [234] "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

[232] Yorks v. Steele, 50 Barb. (N. Y.) 397; In re Miller's Estate, 159 Pa. 562, 28 Atl. 441; Wright v. Andrews, 130 Mass. 149; Blackwood v. Brown, 32 Mich. 104; Goodin v. Newcomb, 6 Kan. App. 431, 49 Pac. 821; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801.

[233] Thompson v. Roberts, 24 How. 233, 16 L. Ed. 648; Lawrence v. Hunt, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; Dows v. McMichael, 6 Paige (N. Y.) 139; Tauziede v. Jumel, 133 N. Y. 614, 30 N. E. 1000; Palmer v. Great Western Ins. Co., 10 Misc. Rep. 167, 30 N. Y. Supp. 1044; Fowler v. Osborne, 111 N. C. 404, 16 S. E. 470; Hawkins v. Lambert, 18 B. Mon. (Ky.) 99; Peterson v. Warner, 6 Kan. App. 298, 50 Pac. 1091; Davenport v. Barnett, 51 Ind. 329; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Parker v. Straat, 39 Mo. App. 616; Glasner v. Weisberg, 43 Mo. App. 214; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Delano v. Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; Neppach v. Jones, 28 Or. 286, 42 Pac. 519; Leggett v. Ross, 14 Wash. 41, 44 Pac. 111.

[234] Girardin v. Dean, 49 Tex. 243.

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this defendant 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." [235] 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.[236] 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.[237] 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.[238] But generally speaking, a party to a pending action, who was not a party to a former one, and therefore not bound by the adjudication therein, is not entitled to plead such adjudication as an estoppel against a party

[235] Larum v. Wilmer, 35 Iowa, 244.

[236] French v. Neal, 24 Pick. (Mass.) 55.

[237] Brizendine v. Frankfort Bridge Co., 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587. And see Fell v. Bennett, 110 Pa. 181, 5 Atl. 17.

[238] Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186.

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who was a party to the former action.[239] This is on the principle that estoppels must be mutual. And the estoppel arising from a judgment or decree does not apply in a subsequent suit where a new plaintiff comes in, seeking to litigate matters not determined in the former suit, though otherwise the parties are the same.[240]

§ 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.[241] 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.[242] 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.[243] 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.[244] By a com-

[239] Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Kelly v. Hamblen, 98 Va. 383, 36 S. E. 491.

[240] Cleveland v. Spencer, 19 C. C. A. 559, 73 Fed. 559.

[241] Berber v. Kerzinger, 23 Ill. 346; Browner v. Davis, 15 Cal. 9.

[242] Missouri v. Teidermann (C. C.) 10 Fed. 20.

[243] Bloch v. Price (C. C.) 32 Fed. 447.

[244] McReynolds v. McReynolds, 74 Iowa, 89, 36 N. W. 903.

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bination 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.[245]

§ 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.[246] 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.[247] A judgment

[245] Eikenberry v. Edwards, 71 Iowa, 82, 32 N. W. 183; Thompson v. Chicago, St. P. & K. C. Ry. Co., 71 Minn. 89, 73 N. W. 707.

[246] Carpenter v. Canal Co., 35 Ohio St. 307; Hurlbutt v. Butenop, 27 Cal. 50; Kerr v. Blodgett, 48 N. Y. 66. But an action brought by an individual bondholder to enforce a lien on railroad equipment bonds, in which no relief is sought or obtained in behalf of other bondholders, and in which they were not permitted to become parties, is not a bar to a subsequent action by other holders of such equipment bonds to enforce their liens. Adelbert College v. Toledo, W. & W. Ry. Co., 3 Ohio N. P. 15.

[247] O'Brien v. Browning, 49 How. Prac. (N. Y.) 100; Brower v. Bowers, 1 Abb. Dec. (N. Y.) 214. A judgment in an action to set aside a general assignment as in fraud of creditors is not conclusive in a subsequent action by another creditor, suing in behalf of himself and all creditors similarly situated, to set aside the assignment. McNaney v. Hall, 159 N. Y. 544, 54 N. E. 1093; Heywood v. Thacher, 65 Hun, 619, 19 N. Y. Supp. 882. Compare Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

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in a suit brought by one of a class for the benefit of all members of the class who come in and contribute to the expenses of the suit is not binding on one who does not come in or contribute.[248] 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.[249]

§ 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 (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.[250]

[248] Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 263. As to judgments in test cases, see Bank of Commerce v. City of Louisville (C. C.) 88 Fed. 398.

[249] Ex parte Howard, 9 Wall. 175, 19 L. Ed. 634; Williams v. Gibbs, 17 How. 239, 15 L. Ed. 135. See Hansen's Empire Fur Factory v. Teabout, 104 Iowa, 360, 73 N. W. 875.

[250] Nash v. Church, 10 Wis. 303, 78 Am. Dec. 678; Cook v. Allen, 2 Mass. 462. And see Burlingham v. Vandevender, 47 W. Va. 804, 35 S. E. 835. Compare Skinner v. Franklin County, 6 C. C. A. 118, 56 Fed. 783.

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§ 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.[251] 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.[252] 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 party in interest, had the sole management of the case, put his title in issue, and is therefore bound by the judgment.[253]

§ 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.[254]

[251] Garwood v. Garwood, 29 Cal. 514; Greely v. Smith, 3 Woodb. & M. 236, Fed. Cas. No. 5,750; Bailey v. Crittenden (Tex.) 44 S. W. 404.

[252] Warner v. Mullane, 23 Wis. 450.

[253] Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515.

[254] Wenman v. Mackenzie, 5 El. & Bl. 447; Wood v. Davis, 7 Cranch, 271, 3 L. Ed. 339; Wright v. Stanard, 2 Brock. 311, Fed. Cas. No. 18,094; Biddle & Smart Co. v. Burnham, 91 Me. 578, 40 Atl. 669; Parker v. Moore, 59 N. H. 454; Van Camp v. Fowler, 133 N. Y. 600, 30 N. E. 1147; Hardy v. Eagle, 25

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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.[255] 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, 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.[256] 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.[257]

Misc. Rep. 471, 54 N. Y. Supp. 1045; Southgate v. Montgomery, 1 Paige (N. Y.) 41; Deck v. Johnson, 30 Barb. (N. Y.) 283; Todd v. Kerr, 42 Barb. (N. Y.) 317; Coney v. Harney, 53 N. J. Law, 53, 20 Atl. 736; Groshon v. Thomas, 20 Md. 234; Payne v. Coles, 1 Munf. (Va.) 373; Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; Redmond v. Coffin, 17 N. C. 443; Bradley v. Johnson, 49 Ga. 412; Phillips v. Thompson, 3 Stew. & P. (Ala.) 369; Gwynn v. Hamilton's Adm'r, 29 Ala. 233; Louisville & N. R. Co. v. Brinckerhoff, 119 Ala. 606, 24 South. 892; Harris v. Plant, 31 Ala. 639; Bridges v. McAlister (Ky.) 51 S. W. 603, 45 L. R. A. 800; Simpson v. Jones, 2 Sneed (Tenn.) 36; Bell v. Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370; Lamar Ins. Co. v. Pennell, 19 Ill. App. 212; Woodward v. Jackson, 85 Iowa, 432, 52 N. W. 358; Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226; Nowack v. Knight, 44 Minn. 241, 46 N. W. 348; Densmore v. Tomer, 14 Neb. 392, 15 N. W. 734; Valentine v. Mahoney, 37 Cal. 389.

[255] Groshon v. Thomas, 20 Md. 234; Harris v. Plant, 31 Ala. 639.

[256] Moore v. City of Albany, 98 N. Y. 396.

[257] Board of School Directors v. Hernandez, 31 La. Ann. 158. 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 Ed.] 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.

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§ 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.[258] 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."[259] 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 successive relationship to the same rights of property."[260] 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.[261]

[258] Beebe v. Elliott, 4 Barb. (N. Y.) 457; Ludington's Petition, 5 Abb. N. C. (N. Y.) 307; Bush v. Knox, 5 Thomp. & C. (N. Y.) 130; Towers v. Tuscarora Academy, 8 Pa. 297; Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688; Soward v. Coppage (Ky.) 9 S. W. 389; Cole v. Favorite, 69 Ill. 457; Sobey v. Beiler, 28 Iowa, 323; Adams County v. Graves, 75 Iowa, 642, 36 N. W. 889; Stoutimore v. Clark, 70 Mo. 471; Finney v. Boyd, 26 Wis. 366; Grunert v. Spalding (Wis.) 78 N. W. 606; Cunningham v. Harris, 5 Cal. 81.

[259] Dig. 44, 2, 28.

[260] Bouv. Law Dict.; 2 Greenl. Ev. § 189. But one who is in possession of land under an agreement of another to sell it to him, and to convey it to him on payment of the purchase price, is not bound by a decree in an action against his vendor to quiet title, if he was not a party to the suit. Steel v. Long, 104 Iowa, 39, 73 N. W. 470. On the other hand, a plea of res judicata, good against a judgment creditor, is good against a party to whom the judgment has been assigned, and who seeks to enforce it against the pleader. Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058.

[261] Other questions than that of the title to property may be concluded by a judgment so as to be binding on successive owners of the property. Thus, in a suit against a manufacturer of a machine for infringing a patent, a judg-

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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.[262] 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.[263] 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.[264] 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

ment for defendant, on the merits, on the question of infringement, is conclusive in a suit by the same complainant against a purchaser of the identical machine from such manufacturer. Norton v. San Jose Fruit-Packing Co., 25 C. C. A. 194, 79 Fed. 793. But while the decision in an action becomes a rule of property as to the subject-matter thereof, and passes with it to all persons subsequently claiming under the parties to the action, it does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, right, subject-matter, or thing involved in the litigation. Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[262] Calderwood v. Brooks, 28 Cal. 151; Thompson v. Clark, 4 Hun (N. Y.) 164. A claimant of land under the homestead donation laws is not concluded by judgments against prior claimants, holding the land to be owned by a private person under a former grant, the state, through whom such settler claims, not being bound by the judgment. Coleman v. Davis (Tex.) 36 S. W. 103. And see Miller v. Wills, 95 Va. 337, 28 S. E. 337. Where one claiming under a tax sale is not made a party to proceedings to foreclose a mortgage made previous to the levy of the taxes for which the sale was made, he is not affected by a decree foreclosing the mortgage, or by a sale and conveyance thereunder. Chard v. Holt, 136 N. Y. 30, 32 N. E. 740.

[263] Scott v. Drennen, 9 Daly, 226.

[264] Lloyd v. Barr, 11 Pa. 41.

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or interest attached before that fact, they are not bound unless made parties.[265] Thus a tenant of the defendant in ejectment, 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.[266]

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.[267] 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.[268] Where, in an action of trover, the defendant justifies the taking by the command of a third person, and under the

[265] Foster v. Derby, 1 Adol. & E. 768; Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733; Cook v. Lasher, 19 C. C. A. 654, 73 Fed. 701; Southern Bank & Trust Co. v. Folsom, 21 C. C. A. 568, 75 Fed. 929; Carroll v. Goldschmidt, 27 C. C. A. 566, 83 Fed. 508; Hunt v. Haven, 52 N. H. 162; Wilson v. Davol, 5 Bosw. (N. Y.) 619; Bennett v. Gray, 92 Hun, 86, 36 N. Y. Supp. 372; Moreland v. H. C. Frick Coke Co., 170 Pa. 33, 32 Atl. 634; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Hodge v. Hodge, 56 S. C. 263, 34 S. E. 517; Garrard v. Hull, 92 Ga. 787, 20 S. E. 357; Elwell v. New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833; Patapsco Guano Co. v. Hurst, 106 Ga. 184, 32 S. E. 136; Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97; Gregory v. Clabrough's Ex'rs, 129 Cal. 475, 62 Pac. 72. Matters adjudicated against complainant on a supplemental bill filed after he had conveyed the land in controversy, and relating to matters which arose after the filing of the original bill, are not res judicata as to the title of the grantee, if he was not privy to the filing of the supplemental bill, or to the proceedings thereunder. Gage v. Parker, 178 Ill. 455, 53 N. E. 317. Compare Powell v. Heckerman, 6 Tex. Civ. App. 304, 25 S. W. 166.

[266] Satterlee v. Bliss, 36 Cal. 489.

[267] Central Nat. Bank v. Hazard (C. C.) 30 Fed. 484; Collins v. Goldsmith (C. C.) 71 Fed. 580; Eakin v. McCraith, 2 Wash. T. 112, 3 Pac. 838; Cushing v. Edwards, 68 Iowa, 145, 25 N. W. 940; Bell v. Peterson, 105 Wis. 607, 81 N. W. 279; Provident Loan Trust Co. v. Marks, 6 Kan. App. 34, 49 Pac. 625; Riverside Land & Irr. Co. v. Jensen, 108 Cal. 146, 41 Pac. 40.

[268] Ruppel v. Patterson (C. C.) 1 Fed. 220.

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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.[269] 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.[270] 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.[271] Tenants who enter under other tenants, on whom notice in ejectment has been served, will be concluded by the judgment.[272]

§ 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.[273] "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

[269] Calkins v. Allerton, 3 Barb. (N. Y.) 171.

[270] Whitford v. Crooks, 54 Mich. 261, 20 N. W. 45.

[271] A judgment for the recovery of land is as binding on a purchaser from the heirs of the party against whom it was rendered as if he had been himself a party. Ross v. Banta, 140 Ind. 120, 34 N. E. 865.

[272] Smith's Lessee v. Trabue's Heirs, 1 McLean, 87, Fed. Cas. No. 13,116.

[273] Murray v. Ballou, 1 Johns. Ch. 566; Craig v. Ward, 1 Abb. Dec. (N. Y.) 454; Wickliffe v. Bascom, 7 B. Mon. (Ky.) 681; Diamond v. Lawrence Co., 37 Pa. 353, 78 Am. Dec. 429; Hersey v. Turbett, 27 Pa. 418; American Exch. Bank v. Andrews, 12 Heisk. (Tenn.) 306; Haynes v. Calderwood, 23 Cal. 409; Gregory v. Haynes, 13 Cal. 591; Sawyer v. McAdie, 70 Mich. 386, 38 N. W. 292; Snowman v. Harford, 62 Me. 434; Jackson v. Stone, 13 Johns. (N. Y.) 447; Moon's Adm'r v. Crowder, 72 Ala. 79; Jinks v. Lewis, 94 Ga. 677, 20 S. E. 6; Buckner v. Geodeker (Tenn. Ch.) 45 S. W. 448.

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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." [274] "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." [275] 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.[276] So one who becomes the purchaser and assignee of a mortgage, pending a suit to set the same aside as void for fraud, 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.[277] 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.[278] 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 neces-

[274] Brightman v. Brightman, 1 R. I. 112.

[275] Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Inloe v. Harvey, 11 Md. 524; Salisbury v. Morss, 7 Lans. (N. Y.) 359; 1 Story, Eq. Jur. § 406.

[276] Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290; Williams v. Terrell, 54 Ga. 463; Guerin v. Danforth, 45 Ga. 493; Barden v. Grady, 37 Ga. 665; Stokes v. Maxwell, 59 Ga. 78; Malone v. Marriott, 64 Ala. 486; Daniels v. Henderson, 49 Cal. 242; Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887.

[277] Craig v. Ward, 36 Barb. 377. See Wild v. Noblesville Bldg. Loan Fund & Savings Inst., 153 Ind. 5, 53 N. E. 944.

[278] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70. See Drinkhouse v. Spring Valley Water-Works, 87 Cal. 253, 25 Pac. 420.

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sarily 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.[279] 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.[280] 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 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.[281] It is also conclusive, without such notice, upon a purchaser who has actual knowledge of the pendency of the suit.[282]

§ 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.[283] But a mortgagee is not bound by any

[279] Houston v. Timmerman, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848.

[280] Leitch v. Wells, 48 N. Y. 585; Murray v. Ballou, 1 Johns. Ch. 566.

[281] Sheridan v. Andrews, 49 N. Y. 478.

[282] Sampson v. Ohleyer, 22 Cal. 200.

[283] Cook v. Parham, 63 Ala. 456; Schnepf's Appeal, 47 Pa. 37; Wilson v. Tompkins, 24 Misc. Rep. 598, 54 N. Y. Supp. 6.

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proceedings against his mortgagor which were not begun until after the execution of the mortgage, unless he was made a party thereto.[284] Thus a mortgagee of street-railroad franchises is not concluded by a decree affecting their validity in a suit to which the mortgagor only was a party.[285] And so, in an action for divorce, a finding that the defendant husband had fraudulently mortgaged his property to a brother to defeat the wife's rights does not affect the title of the mortgagee, who is not a party to the action.[286] Again, in a suit between a mortgagee and an attaching creditor of the mortgagor, a judgment in the attachment suit in favor of the attaching creditor is not admissible in evidence as against the mortgagee, who was not a party thereto.[287] A 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.[288] And a judgment for plaintiff in ejectment, brought by a purchaser of land at foreclosure sale against the mortgagor, does not conclude the latter on a claim of usury in the debt secured.[289] 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 the latter was made a party to the proceedings.[290]

[284] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Campbell v. Hall, 16 N. Y. 575; Damm v. Mason, 102 Mich. 545, 61 N. W. 3; Vincent v. Hansen, 113 Mich. 173, 71 N. W. 488; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; Provident Loan Trust Co. v. Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349. A judgment in replevin against a mortgagor of chattels is not binding on the mortgagee, not being a party thereto, even though he defended the suit as attorney for his mortgagor. Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394.

[285] Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296.

[286] Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988.

[287] Haller v. Parrott, 82 Iowa, 42, 47 N. W. 996. And see Foster v. Andrews, 4 Tex. Civ. App. 429, 23 S. W. 610.

[288] Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. 283. See Williams v. Cooper, 124 Cal. 666, 57 Pac. 577.

[289] Upchurch v. Anderson (Tenn.) 52 S. W. 917.

[290] Gamble v. Voll, 15 Cal. 507. See Wabash, St. L. & P. Ry. Co. v. Central Trust Co. (C. C.) 33 Fed. 238.

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§ 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 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." [291] 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.[292] 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.[293]

[291] Prentiss v. Holbrook, 2 Mich. 372.

[292] Strayer v. Johnson, 110 Pa. 21, 1 Atl. 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, Tax Titles (2d Ed.) § 420.

[293] Hawley v. Dawson, 16 Or. 344, 18 Pac. 592.

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§ 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.[294] 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 declaration, judgment, and writ embrace the whole of the premises and treat the defendant as sole occupant.[295] 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.[296] But the record of a suit in which damages for a nuisance were recovered by one of two tenants in common is admissible in evidence, in a subsequent suit, for the same cause, by both tenants, for the time covered by the continuando, and is conclusive that the nuisance existed at that time, when the declaration includes the time covered by the former adjudication but plaintiffs state that they claim no damages prior to the former suit.[297] And a judgment in ejectment in favor of a tenant in common against his

[294] Bass v. Sevier, 58 Tex. 567; Walker v. Perryman, 23 Ga. 314; Stokes v. Morrow, 54 Ga. 597; Miller v. Blackett (D. C.) 47 Fed. 547; Preston v. Fitch, 64 Hun, 636, 19 N. Y. Supp. 849; New York Cent. & H. R. R. Co. v. Brennan, 12 App. Div. 103, 42 N. Y. Supp. 529; Levy v. Winter, 43 La. Ann. 1049, 10 South. 198. Compare Hanson v. Armstrong, 22 Ill. 442.

[295] Stokes v. Morrow, 54 Ga. 597.

[296] Walker v. Read, 59 Tex. 187; Read v. Allen, 56 Tex. 182; Williams v. Sutton, 43 Cal. 65; Johnson v. Foster (Tex. Civ. App.) 34 S. W. 821.

[297] Fell v. Bennett, 110 Pa. 181, 5 Atl. 17.

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co-tenant, claiming adversely, is conclusive on the parties and their privies in a subsequent suit for partition.[298]

§ 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."[299] 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.[300] 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 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."[301] It is indeed a general rule that estates limited over to persons not in esse are represented by the living owner of the first estate of in-

[298] Estes v. Nell, 140 Mo. 639, 41 S. W. 940.

[299] Pyke v. Crouch, 1 Ld. Raym. 730; Rushworth v. Pembroke, Hardr. 472; Teynham 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. 649; Johnson v. Jacob, 11 Bush (Ky.) 646. Compare Pedon v. Davie, 144 U. S. 142, 12 Sup. Ct. 665, 36 L. Ed. 380.

[300] Johnson v. Jacob, 11 Bush (Ky.) 659.

[301] Baylor's Lessee v. Dejarnette, 13 Grat. (Va.) 152.

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heritance; and hence a decree in a suit to which the first remainderman, a living person, is made a party will conclude the rights of after-born remaindermen.[302] But a decree for or against a life-tenant is not conclusive on a remainderman, not made a party to the action, at least where their interests in the subject of the litigation are antagonistic.[303] In some states it is also held that 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 comes in upon aid prayer.[304] 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.[305]

§ 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.[306]

[302] Gray v. Smith (C. C.) 76 Fed. 525; Kent v. Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693; Kirk v. Kirk, 137 N. Y. 510, 33 N. E. 552; Dunham v. Deremus, 55 N. J. Eq. 511, 37 Atl. 62; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776. Compare In re De Leon's Estate, 102 Cal. 537, 36 Pac. 864.

[303] Hull v. Chaffin, 4 C. C. A. 414, 54 Fed. 437; Allen v. De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; Caldwell v. Jacob (Ky.) 22 S. W. 436; Nevitt v. Woodburn, 82 Ill. App. 649. But a judgment in favor of a remainder-man, as to his right to property as against the representative of the life-tenant, is conclusive on persons claiming under such representative. Simms v. Freiherr, 100 Ga. 607, 28 S. E. 288.

[304] Adams v. Butts, 9 Conn. 79. But see, per contra, Willey v. Laraway, 64 Vt. 559, 25 Atl. 436.

[305] Hubbell v. Hubbell, 22 Ohio St. 208; Lineberger v. Newkirk, 179 Pa. 117, 36 Atl. 193.

[306] Morris v. Lucas, 8 Blackf. (Ind.) 9; Levi v. McCraney, Morris (Iowa) 91; Jordan v. Ford, 7 Ark. 416; Fenn v. Dugdale, 31 Mo. 580; Barker v. Cassidy, 16 Barb. (N. Y.) 177; Wells v. Coyle, 20 La. Ann. 396; Carter, Rice & Co. v. Howard, 17 Misc. Rep. 381, 39 N. Y. Supp. 1060. Compare Illinois Conference of Evangelical Ass'n v. Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Cressey v. Kimmel, 78 Ill. App. 27.

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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.[307] But a judgment on a bill lost after its maturity is a complete bar to another action brought by any person 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.[308] 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.[309]

§ 556. Husband and Wife.

There is no privity, in the sense in which we now use the term, between a man and his wife; so that a judgment for or against the one will not be conclusive on the other, unless, in respect to the subject of the action, they claim through or under each other.[310] Thus, a judgment recovered in an action by the wife alone for personal injuries to her is not conclusive on the question of the defendant's liability, in an action by the husband for damages to him by reason of the same injuries.[311] On similar principles, in a statutory action by

[307] Crabb v. Larkin, 9 Bush (Ky.) 154.

[308] Elliott v. Woodward, 18 Ind. 183.

[309] Leslie v. Bonte, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62.

[310] See Michan v. Wyatt, 21 Ala. 813; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Black v. Black (Ky.) 51 S. W. 456; Greer v. Simrall, 23 Ky. Law Rep. 1037, 59 S. W. 759; Owen v. New York & T. Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Seay v. Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181. But in Anderson v. Watts, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078, it is said that the husband of a defendant who has not been made a party to a foreclosure suit, but who joins his wife in an answer, will be bound by a decree.

[311] Neeson v. City of Troy, 29 Hun (N. Y.) 173; Groth v. Washburn, 39 Hun (N. Y.) 324; Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892; Walker v. City of Philadelphia, 195

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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.[312] So, 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.[313] In an action by a married woman to recover for services rendered and board furnished to a decedent, a judgment by which she recovered for the services, but which denied a recovery for the board on the ground that it would be presumed to have been furnished by her husband, does not bar an action by the husband for the board, there being no privity between the plaintiffs in the two actions.[314] So again, an adjudication awarding the custody of a child to the respondent in a habeas corpus proceeding sued out by a married man is not binding on his wife, and does not estop her from prosecuting a like proceeding against the same respondent to obtain the custody of the child.[315] But of course this rule does not apply where the wife claims through or under her husband; in such case there is privity of estate between the parties, and a judgment binding on one concludes the other.[316] And it is held that a judgment in an action against a husband only, to determine adverse claims to land, bars an action by the husband and wife against the plaintiff therein, involving the same questions, though the land is community property.[317]

Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801. But see Ballou v. Ballou, 110 N. Y. 394, 18 N. E. 118, 1 L. R. A. 462.

[312] Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

[313] Read v. Allen, 56 Tex. 182.

[314] Stamp v. Franklin, 75 Hun, 373, 27 N. Y. Supp. 84.

[315] Taylor v. Neither, 108 Ga. 765, 33 S. E. 420.

[316] Campbell v. Ayres, 18 Iowa, 252; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; Tanguey v. O'Connell, 132 Ind. 62, 31 N. E. 469; Mexia v. Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016; Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405.

[317] Lichty v. Lewis, 23 C. C. A. 59, 77 Fed. 111.

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§ 557. Guardian and Ward.

Where a suit is brought in the name of an infant by his guardian or next friend, the ward is concluded by the judgment, as to all issues raised and determined in the action.[318] But where the suit is instituted in the name of the guardian, describing himself as guardian, the ward is not a party, in such sense as to be bound by the decree.[319] 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.[320] 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.[321]

§ 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.[322] 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.[323] Of course in such a case as this the conditions of privity are fully met. For the heir or devisee

[318] Chudleigh v. Chicago, R. I. & P. Ry. Co., 51 Ill. App. 491; Ross v. Enaut, 46 La. Ann. 1250, 15 South. 803.

[319] Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589.

[320] Morris v. Garrison, 27 Pa. 226.

[321] Porche v. Ledoux, 12 La. Ann. 350.

[322] Avegno v. Schmidt, 113 U. S. 293, 5 Sup. Ct. 487, 28 L. Ed. 976; Shields v. Shiff, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. Ed. 445; Wadsworth v. Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265; Williams v. Tomlin (Va.) 28 S. E. 883; Boykin v. Cook, 61 Ala. 472; Ladd v. Durkin, 54 Cal. 395; Christie v. Bishop, 1 Barb. Ch. (N. Y.) 105.

[323] Sharkey v. Bankston, 30 La. Ann. 891. But judgments against plaintiff's ancestor, in suits for partition and for specific performance in relation to land in suit, do not estop plaintiff from claiming the same under a subsequently accruing title. Whitney v. Nelson, 33 Wis. 365.

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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.[324] 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.[325] Where, pending an action, one of the defendants dies, and on the plaintiff's motion his executor is substituted, 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.[326]

§ 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.[327] "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

[324] Steele v. Lineberger, 59 Pa. 313.

[325] Manigault v. Deas' Adm'rs, Bailey, Eq. (S. C.) 283; Ladd v. Durkin, 54 Cal. 395.

[326] McCreery v. Everding, 44 Cal. 284.

[327] Osgood v. President, etc., of Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Steele v. Lineberger, 59 Pa. 313; McCoy v. Nichols, 4 How. (Miss.) 31; Stewart v. Montgomery, 23 Pa. 410; Garnett v. Macon, 6 Call (Va.) 308, Fed. Cas. No. 5,245; Stone v. Wood, 16 Ill. 177; Jones v. Wilkey (C. C.) 78 Fed. 532; In re Vedder's Estate, 62 Hun, 275, 17 N. Y. Supp. 93; Eayrs v. Nason, 54 Neb. 143, 74 N. W. 408; Andrews v. Anderson (Miss.) 16 South. 346; Beck v. Kallmeyer, 42 Mo. App. 563; Clark v. Bettelheim, 144 Mo. 258, 46 S. W. 135; Hunt v. Russ, 7 Mackey (D. C.) 527; Merchants' Nat. Bank v. Good, 21 W. Va. 455; Dorr v. Stockdale, 19 Iowa, 269; Moss v. McCullough, 5 Hill (N. Y.) 131; Alston v. Munford, 1 Brock. 266, Fed. Cas. No. 267; 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.

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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."[328] 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 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.[329] 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

[328] Steele v. Lineberger, 59 Pa. 313.

[329] Stone v. Wood, 16 Ill. 177; Gaither v. Welch's Estate, 3 Gill & J. (Md.) 250; 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. C. 160.

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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.[330] 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.[331] However, the heir is not estopped to set up the defense of the statute of limitations.[332] 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 the heirs are not parties, is not competent evidence as against them.[333] But it is said that a judgment of the probate court, in an action against an administrator, allowing, as a valid claim against the estate, a purchase note given by the intestate, secured by a vendor's lien, is conclusive on the heirs, as well as the administrator, in an action by the vendor to foreclose his lien.[334] But 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.[335] 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.[336]

330 Sharpe v. Freeman, 45 N. Y. 802; Wood v. Byington, 2 Barb. Ch. (N. Y.) 387; Burnham v. Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120; 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's Adm'r, 80 Va. 627; Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599; Hobbs v. McMakin (Ky.) 4 S. W. 793.

331 Buntyn v. Holmes, 9 Lea (Tenn.) 319.

332 Starke v. Wilson, 65 Ala. 576.

333 Robertson v. Wright, 17 Grat. (Va.) 534. And see Gairdner v. Tate, 110 Ga. 456, 35 S. E. 697.

334 Moody v. Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

335 Randle v. Carter, 62 Ala. 95.

336 Dorr v. Stockdale, 19 Iowa, 269; Forbes v. Douglass, 175 Mass. 191, 55 N. E. 847. But see Hardaway v. Drummond, 27 Ga. 221, 73 Am. Dec. 730.

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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 several of the states 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.[337] In Florida, under statutes making real estate of a decedent assets in the hands of his personal representative for the payment of debts, a decree foreclosing a mortgage executed by an intestate, rendered in a suit to which the administrator only was a defendant, is binding on the heir.[338] In Louisiana, the claim of a creditor of a succession, established by a judgment obtained against the executor after a contestatio litis, cannot be examined at the suit of the heirs, but must be classed as a liquidated debt of the succession.[339] In Indiana, a similar rule obtains;[340] and in North Carolina, in the absence of fraud or collusion, a judgment against a personal representative of a decedent is conclusive against the heirs or devisees.[341]

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 scire facias against the heirs brought for the purpose of charging the realty.[342] So it is held that in a suit for specific performance of

[337] Cunningham v. Ashley, 45 Cal. 485; Lloyd v. Ball (D. C.) 77 Fed. 365.

[338] Merritt v. Daffin, 24 Fla. 320, 4 South. 806.

[339] Neal v. Faggert, 28 La. Ann. 322; Genella v. McMurray, 49 La. Ann. 988, 22 South. 198; Texas & P. R. Co. v. Smith, 33 C. C. A. 648, 91 Fed. 483; Woodward v. Thomas, 38 La. Ann. 238.

[340] Chicago & E. R. Co. v. Harshman, 21 Ind. App. 23, 51 N. E. 343.

[341] Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

[342] Sergeant's Heirs v. Ewing, 36 Pa. 156; Stone v. Wood, 16 Ill. 177. So,

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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.[343] 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.[344] 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.[345] 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.[346] Of course it will be understood that if heirs or devisees are joined as parties in a suit to which the executor or administrator is the principal defendant (or plaintiff), they will be equally concluded by the adjudication.[347]

§ 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

in a proceeding by the representative of a deceased partner for a settlement of the affairs of the firm, the court may determine whether or not there is any real property which could descend to the heirs, and its decision as to such a matter is conclusive on the heirs, though they were not parties to the proceeding. Darrow v. Calkins, 6 App. Div. 28, 39 N. Y. Supp. 527.

[343] Shannon v. Taylor, 16 Tex. 413.

[344] Harvey v. Wilde, L. R. 14 Eq. 438.

[345] Barclay v. Kimsey, 72 Ga. 725. See People v. Lease, 71 Ill. App. 380; Pittel v. Fidelity Mut. Life Ass'n, 30 C. C. A. 21, 86 Fed. 255. Compare Wright v. Phillips, 56 Ala. 69.

[346] Valsain v. Cloutier, 3 La. 170, 22 Am. Dec. 179.

[347] Judd v. Ross, 146 Ill. 40, 34 N. E. 631; Lantz v. Maffett, 102 Ind. 23, 26 N. E. 195; Martin v. Barnhill (Ky.) 56 S. W. 160.

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by a judgment against the former.[348] Thus a judgment regularly 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.[349] But a judgment against an executor is not binding on legatees when the suit is commenced or revived after the executor's accounts have been settled and all the property in his hands paid over to distributees, pursuant to a decree of the proper court; for the trust is then practically terminated, the executor is devested of all control over the property, and privity between him and the legatees is terminated.[350] Nor is a judgment against an executor conclusive upon legatees so far as their legacies are charged upon and payable out of realty.[351] And it has been held that a judgment, rendered in a suit brought by an executor for the construction of the will, holding a certain bequest to be valid, is not binding on other legatees who were not parties to the proceeding.[352]

§ 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,[353]—yet, as there is no technical privity between an admin-

[348] Redmond v. Coffin, 17 N. C. 437; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 937; Morris v. Murphey, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; Bell v. Bell, 25 S. C. 149.

[349] Castellaw v. Guilmartin, 54 Ga. 299.

[350] Carey v. Roosevelt (C. C.) 81 Fed. 608. But if legatees make themselves privies to an action brought against the executor or administrator after his discharge, voluntarily assuming the expense of its defense, they are bound by the judgment against him. Carey v. Roosevelt (C. C.) 83 Fed. 242.

[351] First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461.

[352] Shipman v. Rollins, 98 N. Y. 311. But compare Appeal of Buckingham, 60 Conn. 63, 22 Atl. 509.

[353] Martin v. Ellerbe's Adm'r, 70 Ala. 326.

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istrator 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.[354] 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.[355] And conversely, a judgment against the administrator de bonis non of a debtor, is not evidence of the debt as against the representative of the administrator in chief.[356] 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 his authority, and has no connection with his successor, further than that they both represent the same decedent.[357]

§ 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 ancil-

[354] Martin v. Ellerbe's Adm'r, 70 Ala. 326; Thomas v. Sterns, 33 Ala. 137; Rogers v. Grannis, 20 Ala. 247; Coleman v. McMurdo, 5 Rand. (Va.) 51; Graves' Adm'r v. Flowers, 51 Ala. 402, 23 Am. Rep. 552; Hummel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72. Compare Green v. Huggins (Tenn.) 52 S. W. 675; Yocum v. Commercial Nat. Bank, 195 Pa. 411, 46 Atl. 94.

[355] Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703.

[356] Thomas v. Sterns, 33 Ala. 137.

[357] Bigelow, Estop. 100.

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lary administrator.[358] 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."[359] 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 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 independent-

[358] Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337; Hill v. Tucker, 13 How. 466, 14 L. Ed. 223; McLean v. Meek, 18 How. 16; Dent v. Ashley, 1 Hempst. 54, Fed. Cas. No. 3,809a; Taylor v. Barron, 35 N. H. 484; Grout v. Chamberlin, 4 Mass. 613; Talmage v. Chapel, 16 Mass. 71; Pond v. Makepeace, 2 Metc. (Mass.) 114; Low v. Bartlett, 8 Allen (Mass.) 259; Ela v. Edwards, 13 Allen (Mass.) 48, 90 Am. Dec. 174; Merrill v. New England Mut. Life Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; Brodie v. Bickley, 2 Rawle (Pa.) 431; King v. Clarke, 2 Hill, Eq. (S. C.) 611; Latine v. Clements, 3 Kelly (Ga.) 426; Jones v. Jones' Heirs, 15 Tex. 463, 65 Am. Dec. 174; Carrigan v. Semple, 72 Tex. 306, 12 S. W. 178; Rosenthal v. Renick, 44 Ill. 202; Story, Confl. Laws, § 522; Bigelow, Estop. 255. Compare Suarez v. City of New York, 2 Sandf. Ch. 173.

[359] McLean v. Meek, 18 How. 16, 15 L. Ed. 277.

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ly."[860] 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.[861]

§ 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.[862]

§ 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 persons do not claim through or under one another, and hence a judgment against a part should not prevent the rest from being heard.[863]

§ 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

[860] Low v. Bartlett, 8 Allen, 259.

[861] Hill v. Tucker, 13 How. 458, 14 L. Ed. 223.

[862] Crandall v. Gallup, 12 Conn. 365.

[863] Walker v. Perryman, 23 Ga. 309; Farmer v. Farmer, 93 Ind. 435; Weeks v. Downing, 30 Mich. 4; Purdy v. Doyle, 1 Paige, 558; Weeks v. Ostrander, 52 N. Y. Super. Ct. 512; Good v. Good, 7 Watts, 195; Murray v. Stephens, 4 Strob. 352; Allegheny Nat. Bank v. Hays (C. C.) 12 Fed. 663.

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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.[864] But such judgment would be admissible to prove the simple fact of a recovery against such surviving partner.[865] 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.[866] More precisely, "a person holding a covenant running with

[864] Trustees of Leake & Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. 411; Runkel v. Phillips, 9 Phila. (Pa.) 619; Buckingham v. Ludlum, 37 N. J. Eq. 137.

[865] Sturges v. Beach, 1 Conn. 507.

[866] Smith v. Compton, 3 Barn. & Adol. 407; Williamson v. Williamson, 71 Me. 442; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Knapp v. Town of Marlboro, 34 Vt. 235; Turner v. Goodrich, 26 Vt. 707; Pitkin v. Leavitt, 13 Vt. 379; Chamberlain v. Preble, 11 Allen (Mass.) 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. (N. Y.) 425; Kelly v. Dutch Church of Schenectady, 2 Hill (N. Y.) 105; Adams v. Conover, 22 Hun, 424; Swenk v. Stout, 2 Yeates (Pa.) 470; Collingwood v. Irwin, 3 Watts (Pa.) 310; Ives v. Niles, 5 Watts (Pa.) 323; Terry's Ex'r v. Drabenstadt, 68 Pa. 400; Chapman v. Holmes' Ex'rs, 10 N. J. Law, 20; Wilson v. McElwee, 1 Strob. (S. C.) 65; Middleton v. Thompson, 1 Spears (S. C.) 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; Hanrick v. Gurley, 93 Tex. 458, 56 S. W. 330; Thiele v. Axell,

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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." [367] 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.[368] 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 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.[369] It is further to be observed

5 Tex. Civ. App. 548, 24 S. W. 552; Graham v. Dyer (Ky.) 29 S. W. 346; Lord v. Cannon, 75 Ga. 300; Jones v. Waggoner's Adm'r, 7 J. J. Marsh. (Ky.) 144; Cox v. Strode, 4 Bibb (Ky.) 4; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143; Williams v. Burg, 9 Lea (Tenn.) 455; Boyd v. Whitfield, 19 Ark. 469; King v. Kerr's Adm'rs, 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. 576; City of St. Louis v. Bissell, 46 Mo. 157; Wendel v. North, 24 Wis. 223; Mason v. Kellogg, 38 Mich. 132; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 N. W. 349; Fleckton v. Spicer, 63 Minn. 454, 65 N. W. 926; Dalton v. Bowker, 8 Nev. 190; Rawle on Cov. for Title, § 117.

The only state in which this rule is distinctly repudiated is North Carolina. See Martin v. Cowles, 19 N. C. 101; Shober v. Robinson, 6 N. C. 33; Wilder v. Ireland, 53 N. C. 85.

[367] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221.

[368] See Chamberlain v. Preble, 11 Allen (Mass.) 370; Jackson v. Marsh, 5 Wend. 44. And see Brown v. Hearon, 66 Tex. 63, 17 S. W. 395.

[369] Callis v. Cogbill, 9 Lea (Tenn.) 137.

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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.[870]

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.[871]

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.[872] But "the right of a plaintiff to give notice may be limited to cases where, in some form, a defense involving the title

[870] Colburn v. Pomeroy, 44 N. H. 19.

[871] Adams v. Conover, 22 Hun, 424. Compare Poley v. Lacert, 35 Or. 166, 58 Pac. 37.

[872] Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565; Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Brown v. Taylor, 13 Vt. 631. 37 Am.

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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." [373] In at least one state, the right to thus call in the warrantor is secured to the plaintiff by statute.[374]

§ 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.[375] 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.[376] 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, 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

Dec. 618; Pitkin v. Leavitt, 13 Vt. 379; Gragg v. Richardson, 25 Ga. 566, 71 Am. Dec. 190; White v. Williams, 13 Tex. 258; Rawle, Cov. § 118. A contrary view is maintained in Tennessee. Ferrell v. Alder, 8 Humph. (Tenn.) 44.

[373] Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565.

[374] Code La., art. 2495.

[375] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143; Twambly v. Henley, 4 Mass. 441.

[376] Monks v. McGrady, 71 Tex. 134, 8 S. W. 617.

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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.[377] 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.[378]

§ 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.[379] 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.[380] Although if he actually appears and openly and actively assumes the defense, it will be presumed that he was duly notified.[381] 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 form of words is required.[382] Whether the notice must

[377] Middleton v. Thompson, 1 Spears (S. C.) 67.
[378] Vancourt v. Moore, 26 Mo. 92; Brady v. Spurck, 27 Ill. 478.
[379] Paul v. Witman, 3 Watts & S. 409.
[380] Lebanon v. Mead, 64 N. H. 8, 4 Atl. 392.
[381] Harding v. Larkin, 41 Ill. 413.
[382] Greenlaw v. Williams, 2 Lea (Tenn.) 533; Williams v. Burg, 9 Lea (Tenn.) 455; Paul v. Witman, 3 Watts & S. (Pa.) 410; Boyd v. Whitfield,

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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.[383] But the prevalent opinion appears to be that a parol notice, if certain, explicit, and otherwise good, will be fully sufficient.[384] 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." [385]

§ 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

19 Ark. 447; Davis v. Wilbourne, 1 Hill (S. C.) 27, 26 Am. Dec. 154; Somers v. Schmidt, 24 Wis. 421, 1 Am. Dec. 191; Collins v. Baker, 6 Mo. App. 588; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360. But the notice must not only inform the covenantor of the pendency of the action, but must also call upon him to defend the title. Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41; Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409.

[383] Mason v. Kellogg, 38 Mich. 132; Rawle, Cov. § 119. And see Somers v. Schmidt, 24 Wis. 417, 1 Am. Dec. 191.

[384] Ferrea v. Chabot, 63 Cal. 564; Miner v. Clark, 15 Wend. (N. Y.) 427; Cummings v. Harrison, 57 Miss. 275; Walton v. Campbell, 51 Neb. 788, 71 N. W. 737. See Richmond v. Ames, 164 Mass. 467, 41 N. E. 671.

[385] Hersey v. Long, 30 Minn. 114, 14 N. W. 508.

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legal means of avoiding an adverse judgment.[886] 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 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."[887] 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

[886] Saveland v. Green, 36 Wis. 612; Axford v. Graham, 57 Mich. 422, 24 N. W. 158.

[887] Eaton v. Lyman, 26 Wis. 61.

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warrantor to make any defenses he can against the judgment and to show (assuming the burden of proof) the validity of his own title.[388] But this position is not generally approved. According to the decided 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.[389]

§ 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.[390] "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

[388] Collingwood v. Irwin, 3 Watts (Pa.) 310; Paul v. Witman, 3 Watts & S. (Pa.) 407.

[389] Cox v. Strode, 4 Bibb (Ky.) 4; Booker's Adm'r v. Bell's Ex'rs, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Knapp v. Town of Marlboro, 31 Vt. 674; Everling v. Holcomb, 74 Iowa, 722, 39 N. W. 117; Sisk v. Woodruff, 15 Ill. 15; Stephens v. Jack, 3 Yerg. (Tenn.) 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. Cox, 67 Ind. 164; Clements v. Collins, 59 Ga. 124; Hanson v. Buckner's Ex'r, 4 Dana (Ky.) 254, 29 Am. Dec. 401; McGregor v. Tabor (Tex. Civ. App.) 26 S. W. 443; Ryerson v. Chapman, 66 Me. 557; Wilder v. Ireland, 53 N. C. 87.

[390] Boyd v. Whitfield, 19 Ark. 447; Brown v. McMullen, 1 Hill (S. C.) 29; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Pickett's Ex'rs v. Ford, 4 How. (Miss.) 246; Blasdale v. Babcock, 1 Johns. (N. Y.) 517; Marlatt v. Clary, 20 Ark. 251; Salle v. Light's Ex'rs, 4 Ala. 700, 39 Am. Dec. 317; Thurston v. Spratt, 52 Me. 204; Baltimore Steam Packet Co. v. Garrison, 6 Daly (N. Y.) 246; Buchanan v. Kauffman, 65 Tex. 235; Fallon v. Murray, 16 Mo. 168; Kelly v. Forty-Second St., M. & St. N. Ave. R. Co., 37 App. Div. 500, 55 N. Y. Supp. 1096.

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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 property 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." [391] 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.[392] 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.[393] 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 up-

[391] Thurston v. Spratt, 52 Me. 204.

[392] Smith v. Moore, 7 S. C. 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 (Tenn.) 472.

[393] Walker v. Ferrin, 4 Vt. 523.

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on him the burden of proving his title.[394] But this doctrine has been denied.[395] 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.

§ 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.[396] 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.

[394] Marlatt v. Clary, 20 Ark. 251.

[395] Roper v. Rowlett, 7 Lea (Tenn.) 320.

[396] City of Troy v. Troy & Lansingburgh R. Co., 3 Lans. (N. Y.) 270; Id., 49 N. Y. 657; Kip v. Brigham, 6 Johns. (N. Y.) 158; Trustees of Newburgh v. Galatian, 4 Cow. (N. Y.) 340; Beers v. Pinney, 12 Wend. (N. Y.) 309; Mehaffy v. Lytle, 1 Watts (Pa.) 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 Union Assur. Co. v. American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712.

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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.[397] 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 foreclose will be conclusive evidence against the assignor, in an action on the covenant, to show the amount of the deficiency.[398] 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.[399] 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.[400] 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

[397] Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275.

[398] Rapelye v. Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267. See Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354.

[399] Reed v. Orton (Pa.) 6 Atl. 369. See Taylor v. Barnes, 69 N. Y. 430.

[400] King v. Norman, 4 C. B. 884.

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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.[401]

§ 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 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." [402] 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.[403] So a judgment on the merits against an assignee, based upon matter prior to the assignment, the as-

[401] Burrill v. West, 2 N. H. 190; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Miller v. Rhoades, 20 Ohio St. 494; Boynton v. Morrill, 111 Mass. 4; Stewart v. Thomas, 45 Mo. 44.

[402] Davis v. Smith, 79 Me. 351, 10 Atl. 55. Other cases holding this rule are Bailey v. Sundberg (D. C.) 44 Fed. 807; Lawrence v. Stearns (C. C.) 79 Fed. 878; Vigeant v. Scully, 35 Ill. App. 44; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 124; Hardy v. Nelson, 27 Me. 530; City of Boston v. Worthington, 10 Gray (Mass.) 498, 71 Am. Dec. 678; Littleton v. Richardson, 34 N. H. 187, 66 Am. Dec. 759; Spencer v. Dearth, 43 Vt. 106; Inhabitants of Shrewsbury v. Inhabitants of Boylston, 1 Pick. (Mass.) 105; Prichard v. Farrar, 116 Mass. 213; Salle v. Light's Ex'rs, 4 Ala. 700, 39 Am. Dec. 317; Clark v. Carrington, 7 Cranch, 322, 3 L. Ed. 354; Hamilton v. Cutts, 4 Mass. 353, 3 Am. Dec. 222; Ward v. Bond, 1 Nott & McC. (S. C.) 201; Kip v. Brigham, 6 Johns. (N. Y.) 158; Walker v. Ferrin, 4 Vt. 523; Mehaffy v. Lytle, 1 Watts (Pa.) 314; Tyree v. Magness, 1 Sneed (Tenn.) 276.

[403] Commissioners of Brown Co. v. Butt, 2 Ohio, 348.

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signor having been notified so that he might litigate, is a bar to a subsequent suit by the assignor.[404] 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.[405] 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.[406]

Further, the privity thus existing between the parties will enable the person secondarily liable to take advantage of an unsuccessful attempt to recover damages from the person primarily responsible. For example, a judgment on the merits in favor of the defendant in an action for injuries caused by an obstruction on a turnpike, against the person who placed the obstruction there, and in which the defendant pleaded contributory negligence on the part of the plaintiff, will bar a subsequent action against the turnpike company for the same injuries.[407]

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,

[404] Tyree v. Magness, 1 Sneed (Tenn.) 276.

[405] Hagerthy v. Bradford, 9 Ala. 567; Brown v. Chaney, 1 Kelly (Ga.) 410; Morgan v. Simmons, 3 J. J. Marsh. (Ky.) 611.

[406] Bone v. Torry, 16 Ark. 83; Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

[407] Featherson v. President, etc., of Newburgh & C. Turnpike Co., 71 Hun, 109, 24 N. Y. Supp. 603. And see Hill v. Bain, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873.

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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.[408]

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.[409] 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 party to the action, have set up the defenses available as

[408] 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." And see Missouri Pac. R. Co. v. Twiss, 35 Neb. 267, 53 N. W. 76, 37 Am. St. Rep. 437; Mayor, etc., of City of New York v. Brady, 70 Hun, 250, 24 N. Y. Supp. 296.

[409] See Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685; Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409. A judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the property owner as to the amount of his loss, as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment. Ætna Ins. Co. v. Confer, 158 Pa. 598, 28 Atl. 153.

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against the shipper.[410] This point is further illustrated by the case of Churchill v. Holt,[411] 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." [412]

§ 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.[413]

[410] Garrison v. Babbage Transp. Co., 94 Mo. 130, 6 S. W. 701.

[411] 127 Mass. 165, 34 Am. Rep. 355.

[412] See, also, St. John v. St. John's Church, 15 Barb. (N. Y.) 346.

[413] Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759; Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 119; City of Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Village of Seneca Falls v. Zalinski, 8 Hun (N. Y.) 571; Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; Washington Gaslight Co. v.

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To illustrate,—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.[414] 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."[415] 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

District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; Mayor, etc., of City of New York v. Brady, 151 N. Y. 611, 45 N. E. 1122; Catterlin v. City of Frankfort, 79 Ind. 547, 41 Am. Rep. 627; City of Boston v. Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678; Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550.

[414] Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

[415] Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298. Compare City of Oskaloosa v. Pinkerton, 51 Iowa, 697, 1 N. W. 689; Lebanon v. Mead, 64 N. H. 8, 4 Atl. 392.

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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 the notice, would have been conclusively established by the judgment.[416] 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.[417] 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." [418] In other words, while

[416] 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."

[417] City of Cohoes v. Morrison, 42 Hun (N. Y.) 216.

[418] Western & Atlantic R. R. v. City of Atlanta, 74 Ga. 774. And see City of St. Joseph v. Union Ry. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626;

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the indemnitor could not show that the injured individual was guilty of negligence, but 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.

§ 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.[419] And conversely, if the issue raised by an intervener is decided in his favor, he may take advantage of the judgment in any subsequent litigation in which the same question is mooted and the same parties concerned.[420] But the intervener must actively and substantially make himself a party, in order to be bound.[421] 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.[422] In equity, where one not originally a party is permitted to file a petition in a pending suit, and to set up new and different rights from any involved in the original bill, such petition (at least as against a stranger to the suit, who,

Schaefer v. City of Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287; Hearn v. Boston & M. R. R., 67 N. H. 320, 29 Atl. 970.

[419] Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128; Order of Solon v. Gaskill, 192 Pa. 484, 43 Atl. 1085; Berry v. Chamberlain, 53 N. J. Law, 463, 23 Atl. 115; Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; First Nat. Bank v. Clements, 87 Iowa, 542, 54 N. W. 197; Stoddard v. Thompson, 31 Iowa, 80; Richardson v. Watson, 23 Mo. 34; Richardson v. Jones, 16 Mo. 177; Shelton v. Brown, 22 La. Ann. 162; Aleix v. Derbigny, Id. 385; Markham v. O'Connor, 23 La. Ann. 688; State v. Spikes, 33 Ark. 801. Compare Dilley v. McGregor, 24 Kan. 361.

[420] Austin v. Hamilton County, 22 C. C. A. 128, 76 Fed. 208.

[421] China Mut. Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Treadwell v. Pitts, 64 Ark. 447, 43 S. W. 142.

[422] Wilson v. Trowbridge, 71 Iowa, 345, 32 N. W. 373; Guthrie v. Pierson (Tex. Civ. App.) 35 S. W. 405.

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during its pendency and before the filing of the petition, has acquired possession of the property in litigation) must be treated as the commencement of a new suit; and such person must be brought in by process in accordance with the established practice, or he will not be concluded by a decree in favor of the petitioner.[423]

§ 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.[424] 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 of record in that litigation.[425] The ground of this doctrine is that

[423] Hook v. Mercantile Trust Co., 36 C. C. A. 645, 95 Fed. 41.

[424] Chambers v. Lapsley, 7 Pa. 24; Ryerss v. Rippey, 25 Wend. (N. Y.) 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. (N. Y.) 326; Hanson v. Armstrong, 22 Ill. 442; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Clark v. Perdue, 40 W. Va. 300, 21 S. E. 735. See Goodman v. Halles, 59 Ohio St. 342, 52 N. E. 829.

[425] Boles v. Smith, 5 Sneed (Tenn.) 105; Stout v. Taul, 71 Tex. 438, 9 S. W. 329; Orthwein v. Thomas (Ill.) 13 N. E. 564; Smith v. Gayle, 58 Ala. 600; Brush v. Cook, Brayton (Vt.) 89; Bennett v. Leach, 25 Hun (N. Y.) 178; Kent v. Lasley, 48 Wis. 257, 4 N. W. 23; Baxter v. Carrol (N. J. Ch.) 41 Atl. 407; Penfield v. Harris, 7 Tex. Civ. App. 659, 27 S. W. 762; Wilson v. State, 115 Ala. 129, 22 South. 567. In Samuel v. Dinkins, 12 Rich. Law (S. C.) 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

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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.[426] 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.[427]

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 reversioner to recover for the injury to the inheritance.[428] 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,

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."

[426] Stridde v. Saroni, 21 Wis. 173; Read v. Allen, 58 Tex. 380; Chant v. Reynolds, 49 Cal. 213; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830; Stanley v. Johnson, 113 Ala. 344, 21 South. 823; Redden v. Tefft, 48 Kan. 302, 29 Pac. 157.

[427] Fogarty v. Sparks, 22 Cal. 142; Bradley v. McDaniel, 48 N. C. 128.

[428] Freer v. Stolenbur, 2 Abb. Dec. (N. Y.) 189. Compare Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

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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." [429]

§ 578. Principal and Agent.

Although, as a general principle, it is undoubtedly true that there is no privity of estate between principal and agent,[430] 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.[431] So where the plaintiff sues the agent and is defeated, and then sues the principal, the latter may take advantage of the estoppel against the plaintiff.[432] But a judgment against a principal for damages caused by the negligence

[429] Bartlett v. Boston Gas Light Co., 122 Mass. 209.

[430] Groundie v. Northampton Water Co., 7 Pa. 233; Fogg v. Plumer, 17 N. H. 112; Phillips v. Jamieson, 51 Mich. 153, 16 N. W. 318.

[431] McKinzie v. Baltimore & O. R. Co., 28 Md. 161; Warfield v. Davis, 14 B. Mon. (Ky.) 40; Lippman v. Campbell, 40 Mo. App. 564; Guidry v. Jeanneaud, 25 La. Ann. 634. Compare Warner v. Comstock, 55 Mich. 615, 22 N. W. 64; McCallister v. Bridges (Ky.) 40 S. W. 70.

[432] Emma Silver Min. Co. v. Emma Min. Co. (C. C.) 7 Fed. 401.

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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.[433] 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.[434] 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.[435] A judgment for or against a public officer, in an action brought against him in his official capacity, is, as a general rule, conclusive on the municipal corporation which he represents and under which he serves, it being the real party in interest.[436] But the United States cannot be estopped by proceedings against its tenants or agents, and is not bound by judgments against its officers.[437]

§ 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 transaction which forms the basis of the suit, or where he has a right and opportunity so to 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 judg-

[433] Baynard v. Harrity, 1 Houst. (Del.) 200.

[434] Pico v. Webster, 12 Cal. 140.

[435] Green v. Clarke, 12 N. Y. 343.

[436] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Ashton v. City of Rochester, 133 N. Y. 187, 31 N. E. 334, 28 Am. St. Rep. 619; Bank of Kentucky v. Stone (C. C.) 88 Fed. 383; Town of Lyons v. Cooledge, 89 Ill. 529; Millikan v. City of La Fayette, 118 Ind. 323, 20 N. E. 847. Compare Town of Clay v. Hart, 25 Misc. Rep. 110, 55 N. Y. Supp. 43; People v. Zundel, 157 N. Y. 513, 52 N. E. 570.

[437] Carr v. United States, 98 U. S. 433, 25 L. Ed. 209.

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ment, as being in privity with the nominal defendant.[438] 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.[439] But there is no privity between master and servant, such as to make a judgment against one binding on the other, where the subject of the litigation does not concern the employment, or the relation of employer and employé is not a feature of the case.[440] In the admiralty law, it is held that no privity (in this sense) exists between the master of a vessel and her owners.[441]

§ 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.[442] 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

[438] Castle v. Noyes, 14 N. Y. 329.

[439] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627. But compare Alexander v. Taylor, 4 Denio (N. Y.) 302.

[440] McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358.

[441] Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583; Swett v. Black, 1 Spr. 574, Fed. Cas. No. 13,690; Gillingham v. Charleston Towboat & T. Co. (D. C.) 40 Fed. 649.

[442] Geekie v. Kirby Carpenter Co., 106 U. S. 379, 1 Sup. Ct. 315, 27 L. Ed. 157.

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other.[443] And where, in an action against a sheriff for the negligence of his deputy, judgment is recovered against him by default, this judgment is not conclusive against the deputy in another action, brought on his official bond, but he may make any defense which the sheriff could have made in the first suit.[444] But a verdict and judgment for the defendant, in an action against a deputy sheriff, may be given in evidence by the sheriff, in a subsequent action against him for the same alleged act or default of the deputy.[445]

§ 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.[446] 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.[447] 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.[448]

[443] Campbell v. Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139. But compare Morgan v. Chester, 4 Conn. 387.

[444] Wilkins v. Dingley, 29 Me. 73.

[445] King v. Chase, 15 N. H. 9, 41 Am. Dec. 675.

[446] Green v. Clarke, 12 N. Y. 343. But it is said that a judgment in replevin against the bailee of an article is not conclusive on the bailor. Standard Foundry Co. v. Schloss, 43 Mo. App. 304.

[447] The Farmer v. McCraw, 26 Ala. 189, 62 Am. Dec. 718; Id., 31 Ala. 659; Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 142. See Story, Bailm. § 94.

[448] Hughes v. United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042.

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§ 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.[449] 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, or to force the payment of a balance due on their subscriptions for the stock, what 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.[450] "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."[451] This doctrine has also the sanction of the United States supreme court and the other federal courts;[452] and is approved and

[449] Brounker v. Atkyns, Skin. 15; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Vance v. Wesley, 29 C. C. A. 63, 85 Fed. 157; Holsworth v. O'Chander, 49 Neb. 42, 68 N. W. 334; State v. Kennedy, 60 Neb. 300, 83 N. W. 87. Compare Greenleaf v. Board of Com'rs of Pasquotank County, 123 N. C. 30, 31 S. E. 264.

[450] Inhabitants of Brewer v. Inhabitants of New Gloucester, 14 Mass. 216; Gaskill v. Dudley, 6 Metc. 546, 39 Am. Dec. 750; Lane v. Inhabitants of Fourth School District, 10 Metc. 462; Holyoke Bank v. Goodman Paper Manuf'g. Co., 9 Cush. 576; Farnum v. Ballard Vale Machine Shop, 12 Cush. 507; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Thayer v. New England Lithographic Steam Printing Co., 108 Mass. 523.

[451] Gaskill v. Dudley, 6 Metc. 546, 39 Am. Dec. 750.

[452] Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Wilson

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accepted in many of the states,[453] as well as in England.[454] 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 proceedings."[455] There are, however, certain 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

v. Seymour, 22 C. C. A. 477, 76 Fed. 678; Hendrickson v. Bradley, 29 C. C. A. 303, 85 Fed. 508; James v. Central Trust Co., 39 C. C. A. 126, 98 Fed. 489; National Foundry & Pipe Works v. Oconto Water Co. (D. C.) 68 Fed. 1006.

[453] Came v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 529; Merrill v. President, etc., of Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Willoughby v. Chicago Junction R. & U. S. Co., 50 N. J. Eq. 656, 25 Atl. 277; Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424; Castleman v. Templeman, 87 Md. 546, 40 Atl. 275, 41 L. R. A. 367, 67 Am. St. Rep. 363; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Cole v. Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052; Calloway v. Glenn (Ky.) 49 S. W. 440; Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Hatfield v. Cummings, 152 Ind. 537, 53 N. E. 761; Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Schertz v. First Nat. Bank, 47 Ill. App. 124; Donworth v. Coolbaugh, 5 Iowa, 300; Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 45 Am. St. Rep. 514; Holland v. Duluth Iron Min. & Development Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[454] Bank of Australasia v. Nias, 16 Q. B. 717.

[455] Mor. Priv. Corp. § 619.

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in the suit against the stockholders; that matter is not conclusively established by the first judgment.[456] 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.[457] But stockholders thus sued upon a judgment recovered against the corporation will not be permitted to show that the indebtedness for which the judgment was recovered arose upon a contract which was ultra vires; for that is a defense which the corporation might have interposed in the original suit.[458] On the other hand, it is always open to a stockholder, as a means of avoiding the personal liability sought to be fixed upon him, to show that the judgment against the corporation was procured through fraud and collusion.[459]

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

[456] Hudson v. Carman, 41 Me. 84.

[457] Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424; Conant v. Van Schaick, 24 Barb. (N. Y.) 87; Larrabee v. Baldwin, 35 Cal. 155.

[458] Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 29 Am. St. Rep. 158. But in Kansas, where it is settled law that a corporation which has received the benefit of a contract is estopped to contest it on the ground that it is ultra vires, it is held that a judgment against a corporation is not conclusive on a stockholder in an action to charge him with individual liability, in such sense as to preclude him from showing the nature of the original claim, and that the contract sued on was ultra vires, and hence not of the class for which he is liable. Ward v. Joslin, 44 C. C. A. 456, 105 Fed. 224.

[459] James v. Central Trust Co., 39 C. C. A. 126, 98 Fed. 489; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Schertz v. First Nat. Bank, 47 Ill. App. 124; Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488.

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ground of fraud or mistake."[460] 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.[461] The final result appears to be that, in that jurisdiction, the judgment is not conclusive and not even prima facie evidence against the stockholders,[462]—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.[463] 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.[464] But a pledgee of

[460] Merchants' Bank v. Chandler, 19 Wis. 434; Grund v. Tucker, 5 Kan. 70; Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1,341.

[461] Slee v. Bloom, 20 Johns. 669; Moss v. Oakley, 2 Hill, 265; Moss v. McCullough, 5 Hill, 131; Id., 7 Barb. 279; Hoagland v. Bell, 36 Barb. 57; Miller v. White, 59 Barb. 434; Hall v. Sigel, 13 Abb. Prac. (N. S.) 178; Lowry v. Inman, 46 N. Y. 119; Belmont v. Coleman, 21 N. Y. 96; Conkling v. Furman, 8 Abb. Prac. (N. S.) 161; Strong v. Wheaton, 38 Barb. 616; Wheeler v. Miller, 24 Hun, 541; Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Stephens v. Fox, 83 N. Y. 313.

[462] McMahon v. Macy, 51 N. Y. 155; Torbett v. Godwin, 62 Hun, 407, 17 N. Y. Supp. 46; Wetter v. Lewis, 22 Misc. Rep. 122, 48 N. Y. Supp. 617.

[463] Handrahan v. Cheshire Iron Works, 4 Allen (Mass.) 396.

[464] Lamar Ins. Co. v. Gulick, 102 Ill. 41. See Stewart v. Marion Trust Co., 155 Ind. 174, 57 N. E. 911.

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stock of a corporation to secure a debt of the stockholder is a stockholder, and not a creditor, of the corporation, and is therefore bound by a judgment for a debt against the corporation.[465] The fact that a general receiver for the corporation, who was made defendant and served with process in the action against the corporation, suffered a default, will not affect the conclusive character of the adjudication.[466] But it must be observed that, in respect to all rights arising out of contracts other than subscriptions for stock, a shareholder is not bound by a judgment or judicial proceeding against the corporation to which he was not a party.[467]

§ 583a. Corporation and Bondholders.

There is in general no privity between a corporation and the holders of its bonds. The latter, though creditors of the company, are not members of it, and are not represented by it in suits in which it is a party, in such sense as to be bound by the judgment rendered.[468] For example, a judgment against a railroad company is not binding on its bondholders or mortgage trustees who were not parties thereto, and they may relitigate the plaintiff's right to recover, as well as the amount of the recovery, when it is sought to establish such judgment as a lien superior to the mortgage.[469] But a bondholder who intervenes in litigation against the corporation, and so makes himself a party, will of course be bound by the result of the suit.[470] And bondholders of a corporation whose bonds are secured by a mortgage or deed of trust are represented by the trustee in any litigation involving the validity of the mortgage or its foreclosure, and will be concluded by the decree, though not formally made parties.[471] The same rules hold good in regard to

[465] Farmers' Bank v. Ohio River Line Steamboat Co. (Ky.) 56 S. W. 719.

[466] Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747.

[467] Andrews v. National Foundry & Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139.

[468] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Central Trust Co. v. Condon, 14 C. C. A. 314, 67 Fed. 84; State v. Board of Com'rs of Wichita County, 59 Kan. 512, 53 Pac. 526.

[469] Central Trust Co. v. Hennen, 33 C. C. A. 189, 90 Fed. 593.

[470] First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 168.

[471] Woods v. Woodson, 40 C. C. A. 525, 100 Fed. 515; Pollitz v. Farmers' Loan & T. Co. (C. C.) 53 Fed. 210.

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the holders of municipal bonds. For instance, such holders, if not made parties to a suit brought by tax-payers to enjoin the proper officers from levying and collecting a tax to pay them, are in no manner affected by a judgment granting the injunction.[472]

§ 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." [473] 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 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.[474] 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

[472] Chilton v. Town of Gratton (C. C.) 82 Fed. 873; Coler v. Com'rs of Stanly County (C. C.) 89 Fed. 257. And see City of New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96.

[473] State v. Rainey, 74 Mo. 229; Clark v. Wolf, 29 Iowa, 197; Sauls v. Freeman, 24 Fla. 209, 4 South. 525, 12 Am. St. Rep. 190; Bear v. Com'rs of Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Taxpayers v. O'Kelley, 49 La. Ann. 1039, 22 South. 311; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033.

[474] Scotland County v. Hill, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692. Compare Atchison, T. & S. F. R. Co. v. Com'rs of Jefferson County, 12 Kan. 127. And see Laird v. City of De Soto (C. C.) 22 Fed. 421.

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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.[475] 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.[476] 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.[477]

In general, also, where the litigation concerns public property, a judgment for or against the municipality will bind the property-owners and tax-payers. Thus, a decree adjudicating the rights of a village in a highway is binding on parties claiming rights therein under a subsequent ordinance of the village.[478] So, where, in an action of trespass against a village, the defendant justifies by pleading title in itself by virtue of a dedication to the public, a judgment against it is conclusive against the right of any property holder to assert that the land is a public square.[479] But in Indiana, it is said that a judgment in an action wherein the commissioners of a county are plaintiffs is not a bar to another action based on the same facts, but brought by a tax-payer as plaintiff.[480] And it seems that, in mandamus on the relation of a county attorney to compel the county officers to hold their offices at a certain place as the permanent county-seat, a judgment in a suit by electors and tax-payers that said place was not the county-seat is not conclusive.[481]

[475] State v. Chester & L. N. G. R. Co., 13 S. C. 290; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

[476] Zink v. City of Buffalo, 6 Hun (N. Y.) 611; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037.

[477] State v. Batt, 40 La. Ann. 582, 4 South. 495.

[478] O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355. Compare James v. City of Louisville (Ky.) 40 S. W. 912.

[479] Elson v. Comstock, 150 Ill. 303, 37 N. E. 207. And see Xiques v. Bujac, 7 La. Ann. 498.

[480] Price v. Gwin, 144 Ind. 105, 43 N. E. 5.

[481] State v. Stock, 38 Kan. 154, 16 Pac. 106; State v. Burton, 47 Kan. 44, 27 Pac. 141.

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§ 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.[482] But some of the decisions hold that a suit prosecuted or defended in good faith by a trustee for the beneficiaries, with their knowledge and consent,[483] or more particularly, at their request,[484] will be conclusive upon them in its result. Whether, in an action to redeem or to foreclose a mortgage of the trust estate, or to enforce a debt of the trust which is specifically chargeable upon, or payable out of, particular property, it is necessary that all the cestuis que trustent should be joined as parties, is not fully settled. The English cases apply the general rule in this instance.[485] 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.[486]

[482] Bifield v. Taylor, 1 Moll. 198; Adams v. St. Leger, 1 Ball. & B. 184; Morse v. Sadler, 1 Cox Ch. 352; Calverley v. Phelp, 6 Madd. 229; Caldwell v. Taggart, 4 Pet. 190, 202, 7 L. Ed. 828; Piatt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115; Collins v. Hydorn, 135 N. Y. 320, 32 N. E. 69; Fish v. Howland, 1 Paige (N. Y.) 20; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Whelan v. Whelan, 3 Cow. 537; Williams v. Tozer, 185 Pa. 302, 39 Atl. 947, 64 Am. St. Rep. 650; Stillwell v. McNeely, 2 N. J. Eq. 305; Dunn v. Seymour, 11 N. J. Eq. 220; Collins v. Lofftus, 10 Leigh (Va.) 5, 34 Am. Dec. 719; Mebane v. Mebane, 66 N. C. 334; Sprague v. Tyson, 44 Ala. 338; Lebeck v. Ft. Payne Bank, 115 Ala. 447, 22 South. 75, 67 Am. St. Rep. 51; Helm v. Hardin, 2 B. Mon. (Ky.) 231; Evangelical Synod v. Schoeneich, 143 Mo. 652, 45 S. W. 647. In New York, the Code Civ. Proc. § 449, authorizes the trustee of an express trust to sue without joining the beneficiary.

[483] Hornsby v. City Nat. Bank (Tenn.) 60 S. W. 160.

[484] Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506.

[485] Henley v. Stone, 3 Beav. 355; Lowe v. Morgan, 1 Bro. Ch. 368; Palmer v. Carlisle, 1 Sim. & S. 423; Calverley v. Phelp, 6 Madd. 229; Thomas v. Dunning, 5 De Gex & S. 618.

[486] Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; Van Vechten v. Terry, 2 Johns. Ch. 197; Tauziede v. Jumel, 60 Hun, 583, 15 N. Y. Supp. 24; New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377; Johnson v. Robertson, 31 Md. 476; Henderson v. Williams, 97 Ga. 709, 25 S. E. 395; Clark v. Flan-

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But when suit is brought against a trustee, seeking to charge the trust estate with a debt for which the trustee is only personally liable, this fact being known to the plaintiff, a judgment rendered therein against the trustee is not conclusive on the beneficiaries, unless the latter, being sui juris, were parties to the suit or consented to the judgment.[487] An exception to the general rule exists in cases where the cestuis que trustent 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.[488] 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.[489]

§ 585a. Assignees and Receivers.

It is generally considered that a receiver and the person or corporation whose property is under his charge are so far in privity that a judgment for or against the latter will be conclusive on the former.[490] So also, a judgment on a note, against the maker there-

nery, 99 Ga. 239, 25 S. E. 312; Wegman Piano Co. v. Irvine, 107 Ga. 65, 32 S. E. 898, 73 Am. St. Rep. 109; Robertson v. Van Cleave, 129 Ind. 217, 26 N. E. 899, 15 L. R. A. 68. Compare Coe v. Ritter, 86 Mo. 277; Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145.

[487] Snelling v. American Freehold Land Mortg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

[488] Platt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115; Franklin Savings Bank v. Taylor, 9 U. S. App. 406, 4 C. C. A. 55, 53 Fed. 854; Kerr v. Blodgett, 48 N. Y. 62; Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377; Shaw v. Norfolk County R. Co., 5 Gray (Mass.) 170.

[489] Evans v. Stokes, 1 Keen, 24; Newton v. Egmont, 4 Sim. 574; Richardson v. Larpent, 2 Younge & C. Ch. 507; Long v. Yonge, 2 Sim. 385; Bainbridge v. Burton, 2 Beav. 539.

[490] See Stearns v. Lawrence, 28 C. C. A. 66, 83 Fed. 738; United States Exp. Co. v. Smith, 35 Ill. App. 90. Compare Abbey v. International & G. N. R. Co.'s Receivers, 5 Tex. Civ. App. 261, 23 S. W. 934.

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of, is conclusive against his general assignee for the benefit of creditors, as establishing both the relation of debtor and creditor and fixing the amount of the debt.[491] But an assignee in insolvency represents the creditors rather than the insolvent, although it is held that they are not privies in law to such an extent that a creditor will be bound by all the findings of the court in a suit between the assignee and another creditor as to the validity of the latter's claim against the estate.[492] But in Alabama, it is said that where an assignee replevies property attached by certain creditors, and judgment goes against him, the judgment is conclusive against the beneficiaries of his trust.[493] On similar principles, a trustee in bankruptcy who procures himself to be substituted for the bankrupt in a pending action begun by the latter, and prosecutes the suit to final judgment, will be bound by the result, and cannot reopen the questions adjudicated, by any subsequent proceeding in the court of bankruptcy.[494] So where an assignee in insolvency or a trustee in bankruptcy brings suit to set aside an alleged fraudulent conveyance by the bankrupt or insolvent, the latter being a party, the judgment in such action will be conclusive against the bankrupt or insolvent (or conclusive in his favor, as the case may be), when the same alleged act of fraud is set up by the creditors as a ground of opposition to his discharge.[495]

§ 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

[491] Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52, 38 N. Y. Supp. 626. Compare Sweetser v. Davis, 26 App. Div. 398, 49 N. Y. Supp. 874.

[492] Farrel v. National Shoe & Leather Bank (C. C.) 43 Fed. 123. Compare Farrell Foundry & Mach. Co. v. Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831.

[493] Frank v. Myers, 97 Ala. 437, 11 South. 832.

[494] In re Van Alstyne (D. C.) 100 Fed. 929.

[495] In re Skinner (D. C.) 97 Fed. 190; In re Baird, 84 Cal. 95, 24 Pac. 167.

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to the creditor. And conversely, when the judgment is against the principal, the creditor may avail himself of the same exception as against the surety.[496] 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.[497] 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.[498] 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.[499] 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.[500] 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.[501] On the whole, the best rule which can be deduced from the authorities is, that the judgment is conclusive upon

[496] 1 Evans' Poth. Obl. p. 562. See the French law followed and applied, in this respect, in Brush v. Wilson, 2 L. C. R. 249.

[497] Stoops v. Wittler, 1 Mo. App. 420; McFall v. Dempsey, 43 Mo. App. 369; Oberbeck v. Mayer, 59 Mo. App. 289.

[498] King v. Norman, 4 C. B. 884; United States v. Ingate (C. C.) 48 Fed. 251; Douglass v. Howland, 24 Wend. 35; Beall v. Beck, 3 Har. & McH. (Md.) 242; McKellar v. Bowell, 11 N. C. 34; Lartigue v. Baldwin, 5 Mart. O. S. (La.) 193; Browne v. French, 3 Tex. Civ. App. 445, 22 S. W. 581; Phœnix Mut. Life Ins. Co. v. Landis, 50 Mo. App. 116; Stevens v. Pendleton, 83 Mich. 342, 47 N. W. 1097; American Building & L. Ass'n v. Stoneman, 53 Minn. 212, 54 N. W. 1115.

[499] Curry v. Mack, 90 Ill. 606.

[500] Jackson v. Griswold, 4 Hill (N. Y.) 522; Moss v. McCullough, 5 Hill (N. Y.) 131.

[501] Moses v. United States, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119; Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1,341; Union Guaranty & Trust Co. v. Robinson,

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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.[502] For the purpose of our further discussion of this subject it will be 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.[503] On this principle, a judgment against a de-

24 C. C. A. 650, 79 Fed. 420; Howgate v. United States, 3 App. D. C. 277; Respublica v. Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366; State v. Banks (Md.) 24 Atl. 540; Bradwell v. Spencer, 16 Ga. 578; Haddock v. Perham, 70 Ga. 572; Jacobs v. Hill (Va.) 2 Leigh, 393; Munford v. Overseers of Poor of Nottoway, 2 Rand. (Va.) 313; Baker v. Preston, 1 Gilmer (Va.) 235; Moulding v. Wilhartz, 169 Ill. 422, 48 N. E. 189; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

[502] Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036; Towle v. Towle, 46 N. H. 432; Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Way v. Lewis, 115 Mass. 26; State v. Nutter, 44 W. Va. 385, 30 S. E. 67.

[503] Giltinan v. Strong, 64 Pa. 242. Compare Macready v. Schenck, 41 La. Ann. 456, 6 South. 517. See Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399. It is competent for the legislature to enact that the appellate court, in case of affirmance of the judgment below, shall enter judgment not only against the appellant, but also against the sureties on his appeal bond. Such a law is not unconstitutional. See Beall v. New Mexico, 16 Wall. 535, 21 L. Ed. 292; Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617; White v. Prigmore, 29 Ark. 208; Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Hanna v. Savage, 7 Wash. 414, 35 Pac. 127.

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fendant 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.[504] 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.[505] 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.[506] 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 cannot set up any defense which could with reasonable diligence have been interposed in the replevin action.[507] 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.[508] Again, the sureties on an injunction bond are conclusively bound by the decree against their principal.[509] And the same is true of the sureties on a bond to secure the payment of costs in the action.[510] So also, the order on the settlement of a receiver as to the amount due by him on account of his receivership is binding on his sureties;[511] and a judgment against an assignee for the benefit

[504] Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Way v. Lewis, 115 Mass. 26, citing Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Tracy v. Goodwin, 5 Allen (Mass.) 409; Tracy v. Maloney, 105 Mass. 90; Cutter v. Evans, 115 Mass. 27. See, also, Riddle v. Baker, 13 Cal. 295; Keane v. Fisher, 10 La. Ann. 261.

[505] Respublica v. Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

[506] Harvey v. Head, 68 Ga. 247.

[507] Boyd v. Huffaker, 40 Kan. 634, 20 Pac. 459; Craig v. Herring, 80 Ga. 709, 6 S. E. 283; Thomson v. Joplin, 12 S. C. 580; Cheatham v. Morrison, 37 S. C. 187, 15 S. E. 924; Richardson v. People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100; Schott v. Youree, 142 Ill. 233, 31 N. E. 591.

[508] Lyon v. Northrup, 17 Iowa, 314.

[509] Towle v. Towle, 46 N. H. 431; Methodist Churches of N. Y. v. Barker, 18 N. Y. 463; Jones v. Mastin, 1 Mo. App. Rep'r, 251, 60 Mo. App. 578; Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96.

[510] Washburn v. Pullman's Palace-Car Co., 21 C. C. A. 598, 76 Fed. 1005; McClaskey v. Barr (C. C.) 79 Fed. 408.

[511] Clark v. First Nat. Bank, 57 Mo. App. 277.

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of creditors is prima facie evidence against the sureties on his bond.[512] 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.[513] 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.[514] 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.[515]

§ 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 evidence 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.[516] 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.[517] In one of the cases cited it was said: "The con-

[512] Pierpoint v. McGuire, 13 Misc. Rep. 70, 34 N. Y. Supp. 150.

[513] Cutter v. Evans, 115 Mass. 27; Tapley v. Goodsell, 122 Mass. 176.

[514] Riddle v. Baker, 13 Cal. 295.

[515] Shepard v. Pebbles, 38 Wis. 373.

[516] Governor v. Shelby, 2 Blackf. (Ind.) 26; White v. State, 1 Blackf. (Ind.) 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 Bin. (Pa.) 184; Rodini v. Lytle, 17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165. 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.

[517] Crawford v. Word, 7 Ga. 445; Taylor v. Johnson, 17 Ga. 521; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kan. 439;

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tract 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." [518] 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.[519] Without committing themselves to a generalization upon 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.[520] And this view has much plausibility and good legal reason to commend it.

Hursey v. Marty, 61 Minn. 430, 63 N. W. 1090; Fire Ass'n of Philadelphia v. Ruby, 49 Neb. 584, 68 N. W. 939; Mullen v. Scott, 9 La. Ann. 173; Treasurers v. Temples, 2 Spears (S. C.) 48; Treasurers of State v. Bates, 2 Bailey (S. C.) 362; Atkins v. Baily, 9 Yerg. (Tenn.) 111; Munford v. Overseers of Poor of Nottoway, 2 Rand. (Va.) 313; City of Lowell v. Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; State v. Cason, 11 S. C. 392.

[518] State v. Cason, 11 S. C. 392.

[519] Masser v. Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668; Evans v. Commonwealth, 8 Watts (Pa.) 398, 34 Am. Dec. 477; Eagles v. Kern, 5 Whart. (Pa.) 144; Snapp v. Commonwealth, 2 Pa. 49; Musselman v. Commonwealth, 7 Pa. 240; McMicken v. Commonwealth, 58 Pa. 213; Dane v. Gilmore, 51 Me. 544; McBroom v. Governor, 4 Port. (Ala.) 90; Tracy v. Goodwin, 5 Allen (Mass.) 409; Dennie v. Smith, 129 Mass. 143; Tute v. James, 50 Vt. 124; Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206; Lewis v. Mills, 47 Neb. 910, 66 N. W. 817.

[520] 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

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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 sheriff 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 ac-

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 inure 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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tion against the sheriff.[521] 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.[522] 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.[523]

§ 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 collusion.[524] Thus it is not competent for the surety to impeach the

[521] Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619. See the same case in 35 N. Y. 120.

[522] 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. (N. Y.) 327. See Jacobs v. Hill, 2 Leigh, 393.

[523] Brown v. Bradford, 30 Ga. 927; Inhabitants of Lower Alloways Creek v. Moore, 15 N. J. Law, 146.

[524] Stovall v. Banks, 10 Wall. 588, 19 L. Ed. 1036; Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; White v. Weatherbee, 126 Mass. 450; McKim v. Haley, 173 Mass. 112, 53 N. E. 152; Judge of Probate v. Quimby, 89 Me. 574, 36 Atl. 1049; Willey v. Paulk, 6 Conn. 74; Baggott v. Boulger, 2 Duer (N. Y.) 160; Casoni v. Jerome, 58 N. Y. 315; McMahon v. Smith, 24 App. Div. 25, 49 N. Y. Supp. 93; In re Gall's Estate, 42 App. Div. 255, 59 N. Y. Supp. 254; Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Garber v. Commonwealth, 7 Pa. 265; Cureton v. Shelton, 3 McCord (S. C.) 412; Williamson v. Howell, 4 Ala. 693; Ragland v. Calhoun, 36 Ala. 606; Perkins v. Moore, 16 Ala. 9; Jones v. Ritter's Adm'r, 56 Ala. 270; Martin v. Tally,

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judgment by merely showing that the administrator had paid the debt before the judgment was rendered.[525] 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.[526] 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.[527] 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 an appeal has been taken, or the judgment has been reversed upon a proceeding in error." [528]

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

72 Ala. 23; Holley v. Acre, 23 Ala. 603; Furguson v. Glaze, 12 La. Ann. 667; McCalla's Adm'r v. Patterson, 18 B. Mon. (Ky.) 201; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176; Governor v. Shelby, 2 Blackf. (Ind.) 29; Goodwin v. Wilson, 1 Blackf. (Ind.) 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.

[525] Boyd v. Caldwell, 4 Rich. Law (S. C.) 117.

[526] Martin v. Tally, 72 Ala. 23.

[527] Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80; Robinson v. Hodge, 117 Mass. 222.

[528] Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. 675; Fuller v. Cushman, 170 Mass. 286, 49 N. E. 631; Power v. Speckman, 126 N. Y. 354, 27 N. E. 474; Commonwealth v. Smith, 6 Pa. Dist. R. 416; Clark v. Newman's Adm'x (Ky.) 49 S. W. 310; Kenck v. Parchen, 22 Mont. 519, 57 Pac. 94, 74 Am. St. Rep. 625; Meyer v. Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124; Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; Biggins v. Raisch, 107 Cal. 210, 40 Pac. 333; Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517. A final adjudication of the accounts of an executor cannot be questioned in a proceeding by a surety on the bond, for contribution, against his co-sureties. Thompson v. Dekum, supra.

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the judgment is at best but prima facie evidence against them.[529] And in some of the states, it is held that, where an administrator is sued on an alleged debt of his intestate, and fails to plead a want of assets, a judgment against him is conclusive, so far as he is concerned, of the question of a sufficiency of assets to pay the debt; but, as to a surety on his bond, the judgment is merely prima facie evidence, and not conclusive on this question; and the surety, when sued on the bond, may plead and prove a deficiency of assets in the hands of his principal liable to the payment of the debt.[530] 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.[531]

§ 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.[532] This general rule, however, is

[529] Annett v. Terry, 35 N. Y. 256; Hayes v. Seaver, 7 Me. 237; Iglehart v. State, 2 Gill & J. (Md.) 235; Lyles v. Caldwell, 3 McCord (S. C.) 225; Craddock v. Turner's Adm'x, 6 Leigh (Va.) 116; Hobson v. Yancey, 2 Grat. (Va.) 73; Armistead v. Harramond, 11 N. C. 341; Norton v. Wallace, 1 Rich. Law (S. C.) 507; Ordinary of Charleston Dist. v. Condy, 2 Hill (S. C.) 313; Simkins v. Cobb, 2 Bailey (S. C.) 60; Bennett v. Graham, 71 Ga. 211; Means v. Hicks' Adm'r, 65 Ala. 241; Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; Verret v. Belanger, 6 La. Ann. 109; Canal & Banking Co. v. Brown, 4 La. Ann. 545; Fauntleroy v. Lyle, 5 T. B. Mon. (Ky.) 266; Seat v. Cannon, 1 Humph. (Tenn.) 470; Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Bird v. Mitchell, 101 Ga. 46, 28 S. E. 674; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905.

[530] Gibson v. Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Banks v. Speers, 97 Ala. 560, 11 South. 841.

[531] State v. Coste, 36 Mo. 437, 88 Am. Dec. 148.

[532] Hailey v. Boyd's Adm'r, 64 Ala. 399; Commonwealth v. Rhoads, 37 Pa. 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, 7 N. E. 155; Corbin v. Westcott, 2 Dem. Sur. (N. Y.) 559; McWilliams v. Kalbach, 55 Iowa, 110, 7 N. W. 463; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Martin v. Porter, 32 App. Div. 602, 53 N. Y. Supp. 186; Eberle v. Bryant, 31 Misc. Rep. 814, 63 N. Y. Supp. 963; Botkin v. Klein-

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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.[533] 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 surety, although, by the code, it is made "presumptive" evidence.[534] So, in Louisiana, the surety is not concluded by a judgment against the tutor, though it is prima facie evidence against him.[535] In those states, however, where the generally accepted rule is in force, it is also held that a judgment removing a guardian is conclusive on his sureties, unless reversed or modified by some proceeding impeaching it.[536]

§ 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

schmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641. But an order of the probate court merely granting leave to sue on a guardian's bond is not res judicata of the liability of the sureties. Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

533 State v. Hull, 53 Miss. 626; Brodrib v. Brodrib, 56 Cal. 563. See Weaver v. Thornton, 63 Ga. 655; In re Scott's Account, 36 Vt. 297; McKellar v. Bowell, 11 N. C. 34. And see Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

534 Moore v. Alexander, 96 N. C. 34, 1 S. E. 536.

535 Fuselier v. Babineau, 14 La. Ann. 764.

536 Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

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defenses he might have had, and in the suit for contribution the matter is res judicata.[537]

§ 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 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.[538] 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.[539] 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

[537] Love v. Gibson, 2 Fla. 598; Preslar v. Stallworth, 37 Ala. 402; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98. But compare Means v. Hicks' Adm'r, 65 Ala. 241; Clark v. Norman, 68 Hun, 372, 22 N. Y. Supp. 849.

[538] Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Spencer v. Dearth, 43 Vt. 98, 106; Robinson v. Lane, 14 Smedes & M. (Miss.) 161; Douglass v. Howland, 24 Wend. (N. Y.) 35; Ayres v. Findley, 1 Pa. 501. And see Eaton v. Harth, 45 Ill. App. 355; Crawford v. Pyle, 190 Pa. 263, 42 Atl. 687; Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. 130, 35 L. Ed. 925.

[539] Woodward v. Moore, 13 Ohio St. 136.

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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.[540] 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 coguarantor for contribution, but the latter may make every defense which could have been presented in the original suit.[541]

§ 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.[542] But in 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.[543] 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.[544] Or, as the rule is expressed by a well-known

[540] Sterns v. Marks, 35 Barb. (N. Y.) 565.

[541] Kramph's Ex'x v. Hatz's Ex'rs, 52 Pa. 525.

[542] King v. Vance, 46 Ind. 246; Coburn v. Currens, 1 Bush (Ky.) 242; Sessions v. Stevens, 1 Fla. 233, 46 Am. Dec. 339; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; Noble v. Merrill, 48 Me. 140.

[543] Meriam v. Rundlett, 13 Pick. (Mass.) 511; Farmer v. Simpson, 6 Tex. 303; Cook v. Field, 3 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 Watts & S. (Pa.) 210.

[544] Killsa v. Lermond, 6 Me. 116; 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 (Mass.) 286; Foster v. Jones, 15 Mass. 185; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Moore v. Spackman, 12 Serg. & R. (Pa.) 287; Coates v. Roberts, 4 Rawle (Pa.) 100; Anderson v. Young's Ex'rs, 21 Pa. 443; Noble v. Thompson Oil Co., 69 Pa. 409; Morgan v. Neville, 74 Pa. 52; Hitt v. Lacey, 3 Ala. 104, 36 Am. Dec. 440; Ross v. Pitts, 39 Ala. 606; Mills v. Stewart, 12 Ala. 90;

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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." [545] 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 made.[546] But this rule is not universal.[547] 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

Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Chealrs v. Slaten, 3 Humph. (Tenn.) 101; Baltimore & 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. 239; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[545] Drake, 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 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."

[546] Scamahorn v. Scott, 42 Iowa, 529; Abell v. Simon, 49 Md. 318; Gracy v. Coates, 2 McCord (S. C.) 224; Jones v. Tracy, 75 Pa. 417; Laughlin v. January, 59 Mo. 383.

[547] Hibernia Savings & Loan Soc. v. Superior Court, 56 Cal. 265.

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up any defense to a suit by the attaching creditor for the garnished debt that he might have made before garnishment.[548] 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.[549] 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.[550] 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." [551] So where, after the institution of the garnishment suit, but before its final determination, an action is commenced by the 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.[552] 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.[553] 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 judg-

[548] Penyan v. Berry, 52 Ark. 130, 12 S. W. 241.

[549] Powell v. Gelsendorff, 23 Kan. 538.

[550] Webster v. City of Lowell, 2 Allen (Mass.) 123.

[551] Ruff v. Ruff, 85 Pa. 333. Compare Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405; Joseph v. Boldridge, 43 Mo. App. 333.

[552] Webster v. Adams, 58 Me. 317. Compare Scarritt Furniture Co. v. Moser, 48 Mo. App. 543.

[553] Puffer v. Graves, 26 N. H. 256.

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ment-debtor, and to subject the property to a judgment against the grantor.[554] 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.[555] 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.[556]

§ 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.[557] 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." [558]

[554] Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657.

[555] 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."

[556] Moyer v. Lobengeir, 4 Watts (Pa.) 390, 28 Am. Dec. 723.

[557] Barton v. Allbright, 29 Ind. 489; Tams v. Bullitt, 35 Pa. 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, 59 Am. Dec. 380; Carpenter v. McClure, 37 Vt. 127.

[558] Drake, Attachm. § 707.

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§ 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 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." [559] And in this doctrine the authorities generally agree.[560]

§ 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 dis-

[559] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405.

[560] Earl v. Matheney, 60 Ind. 202; Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3; Whitehead v. Henderson, 4 Smedes & M. (Miss.) 704; Matheny v. Galloway, 12 Smedes & M. (Miss.) 475; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Schoppenhast v. Bollman, 21 Ind. 285; Iroquois Furnace Co. v. Wilkin Manuf'g Co., 77 Ill. App. 59; Summers v. Oberndorf, 73 Md. 312, 20 Atl. 1068.

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close 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.[561] 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.[562] If the 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.[563] 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.[564] 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.[565] The duty of a garnishee who

[561] Bunker v. Gilmore, 40 Me. 88; Larrabee v. Knight, 69 Me. 320; Milliken v. Loring, 37 Me. 408; Drake, Attachm. § 717, and cases cited. See McPhail v. Hyatt, 29 Iowa, 137; Anderson v. Young's Ex'rs, 21 Pa. 443.

[562] Seward v. Heflin, 20 Vt. 144.

[563] Glanton v. Griggs, 5 Ga. 424.

[564] King v. Vance, 46 Ind. 246.

[565] Wood v. Partridge, 11 Mass. 488.

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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.[566] 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.[567]

§ 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.[568] 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.[569] 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

[566] Lewis v. Dunlop, 57 Miss. 130.

[567] Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

[568] Strauss v. Ayres, 87 Mo. 348; Wheeler v. Aldrich, 13 Gray (Mass.) 51; Lewis v. Tams, 4 Phila. (Pa.) 276; Breading v. Siegworth, 29 Pa. 396; King v. Faber, 51 Pa. 387; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[569] Tams v. Bullitt, 35 Pa. 308.

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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.[570] 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.[571] 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." [572]

§ 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.[573] 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 pay-

[570] Somerville v. Brown, 5 Gill (Md.) 399.

[571] Coates v. Roberts, 4 Rawle (Pa.) 100.

[572] Ockington v. Richey, 41 N. H. 275.

[573] Meriam v. Rundlett, 13 Pick. (Mass.) 511; Hull v. Blake, 13 Mass. 153; Wilkinson v. Hall, 6 Gray (Mass.) 568; Barrow v. West, 23 Pick. (Mass.) 270; Taylor v. Phelps, 1 Har. & G. (Md.) 492.

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ment of the money by the garnishee, or levy of his goods upon an execution, can be pleaded in bar.[574]

§ 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.[575] "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 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."[576] 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

[574] Lowry v. Lumbermen's Bank, 2 Watts & S. (Pa.) 210.

[575] McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Buffington v. Cook, 35 Ala. 312, 73 Am. Dec. 491; Montgomery v. Road, 34 Kan. 122, 8 Pac. 253; Gardner v. Raisbeck, 28 N. J. Eq. 71; McCrory v. Parks, 18 Ohio St. 1; Cox's Adm'rs v. Hill, 3 Ohio, 412; Duncan v. Holcomb, 26 Ind. 378; Cleveland v. Chambliss, 64 Ga. 352; Wagstaff v. Marcy, 25 Misc. Rep. 121, 54 N. Y. Supp. 1021; Mahoney v. Prendergast, 58 Hun, 611, 12 N. Y. Supp. 869; O'Connor v. New York & Y. Land Imp. Co., 8 Misc. Rep. 243, 28 N. Y. Supp. 544; Denike v. Denike, 44 App. Div. 621, 60 N. Y. Supp. 110; Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Koelsch v. Mixer, 52 Ohio St. 207, 39 N. E. 417; Westfield Gas. & Milling Co. v. Noblesville & E. Gravel-Road Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244; Voss v. Lewis, 126 Ind. 155, 25 N. E. 892; O'Rourke v. Lindell Ry. Co., 142 Mo. 342, 44 S. W. 254; State Bank v. Bartle, 114 Mo. 276, 21 S. W. 816; Pioneer Sav. & Loan Co. v. Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; In re Heydenfeldt's Estate, 127 Cal. 456, 59 Pac. 839.

[576] Harvey v. Osborn, 55 Ind. 535.

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surety only, in a subsequent action by him against the other maker to recover the amount of the judgment paid by him.[577] 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.[578] 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.[579] 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 successful party, or those claiming through him, by his co-defendant.[580]

§ 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,

[577] 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. 638; Harvey v. Osborn, 55 Ind. 535.

[578] Lloyd v. Barr, 11 Pa. 41.

[579] Corcoran v. Chesapeake & O. Canal Co., 94 U. S. 741, 24 L. Ed. 190; O'Hara v. Mobile & O. R. Co. (C. C.) 75 Fed. 130; Leavitt v. Wolcott, 95 N. Y. 212; Ostrander v. Hart, 130 N. Y. 406, 29 N. E. 744; Baugert v. Blades, 117 N. C. 221, 23 S. E. 179; Osage City Bank v. Jones, 51 Kan. 379, 32 Pac. 1096; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Goldschmidt v. Mills, 37 Minn. 49, 33 N. W. 544.

[580] Devin v. City of Ottumwa, 53 Iowa, 461, 5 N. W. 552.

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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,[581] 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.[582] It was

[581] Codex, 7, 56, 2. See Broom, Leg. Max. 954; Wing. Max. 372.

[582] United States. Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Mutual Ben. Life Ins. Co. v. Tisdale, 91 U. S. 244, 23 L. Ed. 314; Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51; Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909; Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732; Cleveland v. Spencer, 25 U. S. App. 626, 19 C. C. A. 559, 73 Fed. 559; Jones v. Wilkey (C. C.) 78 Fed. 532; Lenox v. Notrebe, Hempst. 251, Fed. Cas. No. 8,246c.

Alabama. McLelland v. Ridgeway, 12 Ala. 482; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Miller v. Vaughan, 73 Ala. 312.

Arkansas. Garland County v. Hot Spring County, 68 Ark. 83, 56 S. W. 636; Memphis & L. R. R. Co. v. State, 37 Ark. 632.

California. Roman Catholic Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Town of Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851.

Colorado. Schuster v. Rader, 13 Colo. 329, 22 Pac. 505.

Connecticut. Dennison v. Hyde, 6 Conn. 508; Cook v. Town of Morris, 66 Conn. 137, 33 Atl. 594.

Delaware. Burton v. Hazzard, 4 Har. 100.

Florida. Reddick v. Meffert, 32 Fla. 409, 13 South. 894; Marvin v. Hampton, 18 Fla. 131; Knox v. Spratt, 19 Fla. 817.

Georgia. Mays v. Compton, 13 Ga. 269; Brock v. Garrett, 16 Ga. 487; Clayton v. West, 97 Ga. 328, 22 S. E. 901.

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said, in the leading case on this subject: "What has been said at the bar is certainly true as a general principle, that a transaction

Illinois. Kelley v. Chapman, 13 Ill. 530, 56 Am. Dec. 474; Gaytes v. Franklin Sav. Bank, 85 Ill. 256.

Indiana. Maple v. Beach, 43 Ind. 51; Cray v. Wright, 16 Ind. App. 258, 44 N. E. 1009; Goss v. Wallace, 140 Ind. 541, 39 N. E. 920.

Iowa. Baxter v. Myers, 47 N. W. 879; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293.

Kansas. Kansas Pac. Ry. Co. v. McBratney, 12 Kan. 9.

Kentucky. Marshall v. Rough's Heirs, 2 Bibb, 628; Newson v. Lycan, 3 J. J. Marsh. 440, 20 Am. Dec. 156; Norton v. Norton, 25 S. W. 750.

Louisiana. Lefebvre v. De Montilly, 1 La. Ann. 42; Mestier v. New Orleans, O. & G. W. R. Co., 16 La. Ann. 354.

Maine. Jackson v. Myrick, 29 Me. 490; Sheldon v. White, 35 Me. 233; Trustees of Putnam Free School v. Fisher, 34 Me. 172; Snow v. Russell, 94 Me. 322, 47 Atl. 536.

Maryland. Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688; McClellan v. Kennedy, 8 Md. 230; Niller v. Johnson, 27 Md. 6.

Massachusetts. Hood v. Hood, 110 Mass. 463; Andrews v. Herring, 5 Mass. 210; Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Shores v. Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308.

Michigan. Aultman, Miller & Co. v. Sloan, 115 Mich. 151, 73 N. W. 123; Fisher v. Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192.

Minnesota. Nowack v. Knight, 44 Minn. 241, 46 N. W. 348; Kurtz v. St. Paul & D. Ry. Co., 65 Minn. 60, 67 N. W. 808.

Mississippi. Moore v. Cason, 1 How. 53; McPike v. Wells, 54 Miss. 136; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200.

Missouri. Norcross v. Hudson, 32 Mo. 227; Dugge v. Stumpe, 73 Mo. 513; Hunt v. Lucas, 68 Mo. App. 518; Bonnell v. Pack, 79 Mo. App. 496.

Nebraska. McCord-Brady Co. v. Krause, 36 Neb. 764, 55 N. W. 215; Connell v. Galligher, 36 Neb. 749, 55 N. W. 229.

New Hampshire. Lawrence v. Haynes, 5 N. H. 33, 20 Am. Dec. 554; Stevens v. Thompson, 17 N. H. 103; Wingate v. Haywood, 40 N. H. 437.

New Jersey. Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 55 N. J. Law, 350, 26 Atl. 920; Ransom v. Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

New York. Lawrence v. Hunt, 10 Wend. 80, 25 Am. Dec. 539; Jackson v. Vedder, 3 Johns. 8; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

North Carolina. Bennett v. Holmes, 18 N. C. 486.

Ohio. Stewart v. Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

Oregon. De Lashmutt v. Sellwood, 10 Or. 319.

Pennsylvania. Morrison's Adm'r v. Mullin, 34 Pa. 12; Mackey's Adm'r v. Coates, 70 Pa. 350.

South Carolina. Hardin v. Clark, 32 S. C. 480, 11 S. E. 304; Koogler v. Huffman, 1 McCord, 495.

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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." [583] 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." [584] 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." [585] The same rule holds good in chancery as well as at law. Strangers to a decree are not bound by it.[586] From the foregoing quotations, as also

Tennessee. Simpson v. Jones, 2 Sneed, 36; Arnold v. Harris (Ch. App.) 52 S. W. 715.

Texas. Morrison v. Loftin, 44 Tex. 16; Hardin v. Blackshear, 60 Tex. 132; Black v. Black, 62 Tex. 296; Bassett v. Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312.

Vermont. Nason v. Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Wright v. Hazen, 24 Vt. 143.

Virginia. Frazier v. Frazier's Ex'rs, 2 Leigh, 642; Downer v. Morrison, 2 Grat. 250.

West Virginia. Renick v. Ludington, 20 W. Va. 511.

Wisconsin. Cameron v. Cameron, 15 Wis. 1, 82 Am. Dec. 652; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[583] Duchess of Kingston's Case, 20 How. St. Trials, 355, 2 Smith, Lead. Cas. *424.

[584] Morrison's Adm'r v. Mullin, 34 Pa. 12.

[585] Foster v. Powers, 64 Tex. 247.

[586] McCall v. Harrison, 1 Brock. 126, Fed. Cas. No. 8,671; Bailey's Adm'x v. Robinson, 1 Grat. (Va.) 4, 42 Am. Dec. 540; Loop v. Summers, 3 Rand. (Va.) 511; Manigault v. Deas' Adm'rs, Bailey, Eq. (S. C.) 283; Buford v. Rucker, 4 J. J. Marsh. (Ky.) 551; Brown v. Wyncoop, 2 Blackf. (Ind.) 230; Rowland v. Day, 17 Ala. 681; Lang's Heirs v. Waring, Id. 145; Cockey v.

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from our previous discussion of the question, who are to be considered parties and privies, it will be possible to derive a sufficiently 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.[587] "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."[588] 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.[589] 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.[590] 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

Milne's Lessee, 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. C. 1.

[587] Wilkie v. Howe, 27 Kan. 518; Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732. See Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80.

[588] McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809.

[589] Helprey v. Redick, 21 Neb. 80, 31 N. W. 256.

[590] McLelland v. Ridgeway, 12 Ala. 482.

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the proceeding.[591] In an action against a county to recover the amount of bonds issued in aid of the construction of a railroad, plaintiff is not concluded by a judgment in an action to enjoin the collection of the tax levied for the payment of the bonds, to which he was not a party.[592] Again, in a suit by a husband for divorce on the ground of adultery, a decree of divorce granted in another court, in an action by the co-respondent's wife against him for divorce on the ground of adultery with defendant, in which suit defendant was not a party, is not competent evidence.[593] The finding and judgment of a court granting a wife a decree of divorce from her husband, on the ground of cruelty, are not evidence that she was justified in leaving her husband's home and living apart from him, in an action brought by a third person against the husband for board and lodging furnished to the wife while she was so living separate from the husband.[594] The issuance of letters of administration on a petition reciting that petitioner was the husband of the intestate is not conclusive as to such recital against a person who had no notice of the proceeding.[595] Where an infant is injured in an accident, and sues for damages, and an action is also brought by his father for the loss of the child's services, the judgment rendered in one of the suits is not competent evidence in the other suit, on the question whether the accident was due to the negligence or fault of the defendant.[596] The record of a suit by the United States on the bond of a surveyor who was claimed to have made a fraudulent survey, in which a verdict was found for the defendant, is not admissible in a suit between other parties to prove that the survey was correct.[597] So a judgment, in an action by a creditor against his debtor, that an assignment by the latter is void,

[591] McDonald v. Matney, 82 Mo. 358; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

[592] Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899.

[593] Rice v. Rice (N. J. Ch.) 23 Atl. 946.

[594] Belknap v. Stewart, 38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729; Inhabitants of Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669.

[595] In re Patterson's Estate, 79 Hun, 371, 29 N. Y. Supp. 451.

[596] Malsky v. Schumacher, 7 Misc. Rep. 8, 27 N. Y. Supp. 331; Guy v. Fisher & Burnett Lumber Co., 93 Tenn. 213, 23 S. W. 972.

[597] Michigan Land & Lumber Co. v. Rust, 15 C. C. A. 335, 68 Fed. 155.

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in no way affects the rights of the assignee, who is not a party to such action.[598] 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.[599] It is immaterial that the United 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.[600]

§ 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."[601] 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.

[598] Avera v. Rice, 64 Ark. 330, 42 S. W. 409.
[599] Winston v. Starke, 12 Grat. (Va.) 317.
[600] Barton v. Long, 45 N. J. Eq. 841, 14 Atl. 565, 19 Atl. 623.
[601] Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740.

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§ 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 of facts and presenting precisely the same question, in the absence of a showing that the former decision was manifestly erroneous.[602] 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.[603] 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 neces-

[602] Kolb v. Swann, 68 Md. 516, 13 Atl. 379. And see People v. Board of Sup'rs of Erie County, 26 Misc. Rep. 233, 56 N. Y. Supp. 318.

[603] Groesbeck v. Golden, 7 S. W. 362.

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sary 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 judgment, becomes material." [604] 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." [605] 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

[604] 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. 260; Southern R. Co. v. Bouknight, 17 C. C. A. 181, 70 Fed. 442, 30 L. R. A. 823; Gillett v. Landis, 17 La. 470; Harrington v. Wadsworth, 63 N. H. 400; Key v. Dent, 14 Md. 86; Stephens v. Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; Maple v. Beach, 43 Ind. 51; Koren v. Roemheld, 7 Ill. App. 646.

[605] Spencer v. Dearth, 43 Vt. 98, 105.

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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.[606] The record of the judgment, for example, is the only legitimate evidence of the termination of a cause.[607] 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.[608] 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.[609] 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.[610] 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.[611] 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.[612] 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.[613]

[606] Key v. Dent, 14 Md. 86.

[607] Baker v. Dellesseline, 4 McCord (S. C.) 372.

[608] Love v. Gibson, 2 Fla. 598, 616. See, also, Walsh v. Ostrander, 22 Wend. (N. Y.) 178; Atkinson v. Parks, 84 Me. 414, 24 Atl. 891.

[609] Shanks v. Lancaster, 5 Grat. (Va.) 110, 50 Am. Dec. 108. And see Burdick v. Chicago, M. & St. P. Ry. Co., 87 Iowa, 384, 54 N. W. 439.

[610] Anderson v. Bright, 12 Ala. 478.

[611] Naylor v. Mettler (N. J.) 11 Atl. 859. Compare Hartman v. Weiland, 36 Minn. 223, 30 N. W. 815.

[612] Hardwick v Hook, 8 Ga. 354; Goodhue v. Daniels, 54 Iowa, 19, 6 N. W. 129.

[613] Lloyd v. Tracy, 53 Mo. App. 175; Falconer v. Cochran, 68 Minn. 495, 71 N. W. 386; Landauer v. Espenhain, 95 Wis. 169, 70 N. W. 287.

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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.[614] 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 purchased the property from his vendor in good faith and for a full consideration, and had exclusive possession before other creditors obtained a lien.[615] 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.[616]

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.[617] 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.[618]

[614] Quinn v. Quinn, 16 Vt. 426.

[615] Snyder v. Berger (Pa.) 9 Atl. 147.

[616] Heyman v. Landers, 12 Cal. 107. And see Ilg v. Burbank, 59 Ill. App. 291; Scott v. Hall (N. J.) 46 Atl. 611; McDonald v. Hannah (C. C.) 51 Fed. 73.

[617] 1 Whart. Ev. § 824.

[618] Lee's Adm'x v. Lee, 21 Mo. 531, 64 Am. Dec. 247; 1 Whart. Ev. § 828. See Young v. Harrison, 21 Ga. 584; Whitmore v. Johnson's Heirs, 10 Humph. (Tenn.) 610.

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§ 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 where such indebtedness is called in question.[619] 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.[620] 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.[621] And a judgment obtained without fraud

[619] Strong v. Lawrence, 58 Iowa, 56, 12 N. W. 74; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Mowry v. Davenport, 6 Lea (Tenn.) 80; First Nat. Bank v. Oldham, 6 Lea (Tenn.) 718; Cox v. Thomas' Adm'x, 9 Grat. (Va.) 323; Raymond v. Richmond, 78 N. Y. 351; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Ledoux v. Bank of America, 24 App. Div. 123, 48 N. Y. Supp. 771; Moore & Handley Hardware Co. v. Curry, 106 Ala. 284, 18 South. 46; Bain v. Wells, 107 Ala. 562, 19 South. 774; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384; Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 490. Where a distress warrant for rent is levied on goods found on the leased premises, and the landlord recovers in the action, the judgment is, in the absence of fraud or collusion, conclusive evidence of the rent due when the writ issued, as against a third person who claims the goods and sues for their conversion. Conwell v. Hartsell (Tex.) 16 S. W. 541; Lehman v. Stone (Tex.) 16 S. W. 784.

[620] New York & Harlem R. Co. v. Kyle, 5 Bosw. (N. Y.) 587; Vogt v. Ticknor, 48 N. H. 242; Church v. Chapin, 35 Vt. 231; Inman v. Mead, 97 Mass. 310; Goodnow v. Smith, Id. 69; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79. Per contra, Troy v. Smith, 33 Ala. 469.

[621] Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324.

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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.[622] Where a person has been compelled 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.[623]

§ 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 pro-

[622] 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 the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, 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."

[623] Barkaloo's Adm'r v. Emerick, 18 Ohio, 268. And see Dempsey v. Schawacker, 140 Mo. 680, 38 S. W. 954.

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nounced, 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." [624] 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.[625] On the same ground, the judgment is competent when the issue turns upon a question of pedigree.[626] 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.[627] 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.[628] 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

[624] Pile v. McBratney, 15 Ill. 314; Brisco v. Lomax, 8 Adol. & E. 198; Evans v. Rees, 10 Adol. & E. 151; Patterson v. Gaines, 6 How. 599, 12 L. Ed. 553; Chirac v. Reinecker, 2 Pet. 613, 7 L. Ed. 538; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Reed v. Jackson, 1 East, 355; Pim v. Curell, 6 Mees. & W. 266; Carnarvon v. Villebois, 13 Mees. & W. 313; 1 Starkie, Ev. 251; 1 Greenl. Ev. § 555; 1 Whart. 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 Adol. & E. 151.

[625] Pile v. McBratney, 15 Ill. 314.

[626] Chirac v. Reinecker, 2 Pet. 613, 7 L. Ed. 538. But see Chamberlain v. City of New Orleans, 48 La. Ann. 1055, 20 South. 169; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

[627] Pim v. Curell, 6 Mees. & W. 234.

[628] Carnarvon v. Villebois, 13 Mees. & W. 313.

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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.[629]

§ 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.[630] 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.[631] 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.[632] Again, on a trial touching the right to lands, decrees in chancery between other parties, concerning the same lands, are admissible in evidence to show the character in which the possessor holds the premises.[633] 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

[629] Vaughan v. Phebe, 1 Mart. & Y. (Tenn.) 5, 17 Am. Dec. 770.

[630] Webb v. Den, 17 How. 577, 15 L. Ed. 35; Barr v. Gratz, 4 Wheat. 213, 4 L. Ed. 553; Bussey v. Dodge, 94 Ga. 584, 21 S. E. 151; Kurtz v. St. Paul & D. R. Co., 61 Minn. 18, 63 N. W. 1; Railroad Equipment Co. v. Blair, 145 N. Y. 607, 39 N. E. 962; Turpin v. Brannon, 3 McCord (S. C.) 261; Fowler v. Savage, 3 Conn. 90; Chamberlain v. Bradley, 101 Mass. 188, 3 Am. Rep. 331; Martin v. Rutt, 127 Pa. 380, 17 Atl. 993; Baylor's Lessee v. Dejarnette, 13 Grat. (Va.) 152; Cravens v. Jameson, 59 Mo. 68; Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Bowe v. McNab, 11 App. Div. 386, 42 N. Y. Supp. 938; Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Skelly v. Jones, 33 Misc. Rep. 304, 68 N. Y. Supp. 422.

[631] Masters v. Varner's Ex'rs, 5 Grat. (Va.) 168, 50 Am. Dec. 114.

[632] Hartman v. Stahl, 2 Pen. & W. (Pa.) 223.

[633] Davies v. Lowndes, 1 Bing. N. C. 597, 607.

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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.[634] 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.[635]

§ 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 such facts, whenever proper and relevant.[636] But in such case it is not conclusive, possessing no other weight or dignity than attaches to any other kind of admission.

[634] Fogg v. Plumer, 17 N. H. 112.

[635] McClung v. Steen (C. C.) 32 Fed. 373.

[636] Ellis v. Jameson, 17 Me. 235; Cragin v. Carleton, 21 Me. 492; St. Louis Mut. Life Ins. Co. v. Cravens, 69 Mo. 72; Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

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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.[637] 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.[638] 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 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.[639] Again, in a suit upon an appeal-bond given by the defendant to a

[637] Morse v. Elms, 131 Mass. 151; Barber v. Kendall, 158 N. Y. 401, 53 N. E. 1; Bulkly v. Healy, 58 Hun, 608, 12 N. Y. Supp. 54; Diehl v. Marchant, 87 Va. 447, 12 S. E. 803; Hurst v. Combs (Ky.) 14 S. W. 378; Courier-Journal Job Printing Co. v. Columbia Fire Ins. Co. (Ky.) 54 S. W. 966; City of Cincinnati v. Hosea, 19 Ohio Cir. Ct. R. 744; Reynolds v. Mandel, 175 Ill. 615, 51 N. E. 649; Jenkinson v. Wysner, 125 Mich. 89, 83 N. W. 1012; Allis v. Davidson, 23 Minn. 442; McClung v. Condit, 27 Minn. 45, 6 N. W. 399; Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107. And see supra, § 504, and cases there cited.

[638] Parnell v. Hahn, 61 Cal. 131.

[639] Harris v. Harris, 36 Barb. (N. Y.) 88. See, also, Vaughn v. Drewry, 79 Ga. 761, 4 S. E. 879.

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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.[640] 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.[641] 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.[642]

The exact scope of an estoppel by judgment may be made more clear by the statement of the following subsidiary rules:

1. It is not material whether the scope of the former action (in which the judgment in question was rendered) was wider or narrower than that 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.[643]

2. It does not 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 to litigate it further.[644]

[640] Morris v. Horrell, 35 Mo. 467. See, further, Sipe v. Holliday, 62 Ind. 4.

[641] Sparhawk v. Wills, 5 Gray (Mass.) 423; Burke v. Miller, 4 Gray (Mass.) 114. See Jamaica Pond Aqueduct Corp. v. Chandler, 121 Mass. 1.

[642] Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383.

[643] Rucker v. Steelman, 97 Ind. 222; Peterson v. Warner, 6 Kan. App. 298, 50 Pac. 1091; Dyer v. Cranston Print Works, 21 R. I. 63, 41 Atl. 1015. Compare Starling v. Weir Plow Co. (C. C.) 49 Fed. 637.

[644] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Shoe Machinery Co. v. Cutlan (1896) 1 Ch. 667; Dubois v. Philadelphia, W. & B. R. Co., 5 Fish. Pat. Cas. 208, Fed. Cas. No. 4,109; Bailey v. Laws, 3 Tex. Civ. App. 529, 23 S. W. 20; Grunert v. Spalding (Wis.) 78 N. W. 606.

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3. The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined. When new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment cannot be invoked as an estoppel.[645] But the change of facts will not affect the estoppel, if no new element is introduced, and the legal rights or relations of the parties remain as before.[646]

4. Though two distinct pieces of property, or two distinct kinds of property, or two separate claims or rights, may be involved in the two suits, yet if the right or title of a party to such property or claims rests upon one and the same common instrument or source of title, and the validity of his title or claim was directly adjudicated in the first suit, it is an estoppel in the second.[647]

5. It is immaterial that the questions alleged to have been settled by a former adjudication were determined in a different kind of proceeding, or a different form of action, from that in which the estoppel is set up,[648] provided, of course, that the parties and the issues are the same.

[645] Memphis City Bank v. State of Tennessee, 161 U. S. 186, 16 Sup. Ct. 468, 40 L. Ed. 664; Martin v. Walker, 43 La. Ann. 1019, 10 South. 365; Reynolds v. Ætna Life Ins. Co., 160 N. Y. 635, 55 N. E. 305; State v. Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056; Shepherd v. Willis, 19 Ohio, 142; Ligare v. Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. 803; Village of Wayzata v. Great Northern Ry. Co., 67 Minn. 385, 69 N. W. 1073; Ryan v. Town of Sumner, 17 Wash. 228, 49 Pac. 487; Wright v. City of Cincinnati, 6 Ohio N. P. 450; Irish-American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927.

[646] Canal & C. R. Co. v. Crescent City R. Co., 47 La. Ann. 314, 16 South. 844; Broussard v. Broussard, 43 La. Ann. 921, 9 South. 910; Rarey v. Lee, 7 Ind. App. 518, 34 N. E. 749.

[647] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; New Orleans v. Citizens' Bank of Louisiana, 167 U.

[648] Andrews Bros. Co. v. Youngstown Coke Co., 30 C. C. A. 293, 86 Fed. 585; State of New Jersey v. Boller (C. C.) 47 Fed. 415; Beach v. City of Elmira, 58 Hun, 606, 11 N. Y. Supp. 913; McNeely v. Hyde, 46 La. Ann. 1083, 15 South. 167; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Carbiener v. Montgomery, 97 Iowa, 659, 66 N. W. 900; Seattle Nat. Bank v. School Dist., 20 Wash. 368, 55 Pac. 317.

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6. 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; it is not conclusive as to other matters which might have been, but were not, litigated or decided.[649]

7. The force of the estoppel resides in the judgment itself. It is not the finding of the court, or the verdict of the jury rendered in an action, which concludes the parties in subsequent litigation, but the judgment entered thereon.[650] And while it is proper for a court, in rendering judgment, to state the grounds on which it acted, it is error for the court to state the extent to which the judgment may or may not prejudice the rights of the parties in prosecuting other actions.[651] On the same principle, the reasons given by an appellate court for affirming a judgment are not an estoppel binding on the parties, as the conclusiveness of a judgment springs from the judgment itself and not from the reasons of the court in pronouncing it.[652]

S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Baxter v. Myers, 85 Iowa, 328, 52 N. W. 234, 39 Am. St. Rep. 298; Thayer v. Cable, 19 App. Div. 558, 46 N. Y. Supp. 850; Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331; Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355; Robb v. Van Horn, 150 Pa. 508, 24 Atl. 756. Compare West v. Cole (Tex. Civ. App.) 50 S. W. 151; Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

649 Dennison v. United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. Ed. 453; Fidelity Trust & Safety-Vault Co. v. City of Louisville, 174 U. S. 429, 19 Sup. Ct. 875, 43 L. Ed. 1034; Linton v. National Life Ins. Co., 44 C. C. A. 54, 104 Fed. 584; Union Mill & M. Co. v. Dangberg (C. C.) 81 Fed. 73; Geneva Nat. Bank v. Independent School Dist. (C. C.) 25 Fed. 629; Duncan v. Holcomb, 26 Ind. 378; Spurlock v. Missouri Pac. Ry. Co., 76 Mo. 67; People v. Johnson, 37 Barb. (N. Y.) 502; Burdick v. Post, 12 Barb. (N. Y.) 168; Scully v. Lowenstein, 56 Miss. 652; Lord v. Thomas (Cal.) 36 Pac. 372.

650 Denike v. Denike, 44 App. Div. 621, 60 N. Y. Supp. 110.

651 Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23; Holland v. Preston (Tex. Civ. App.) 41 S. W. 374.

652 Citizens' Bank v. Brigham, 61 Kan. 727, 60 Pac. 754.

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§ 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."[653] 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,[654] and that it binds a person only in the character in which he appears,[655] 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 observe properly 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

[653] Bouv. Law Dict., "Res Judicata;" State v. Jumel, 30 La. Ann. 861; Benz v. Hines, 3 Kan. 397, 89 Am. Dec. 594; Semple v. Scarborough, 44 La. Ann. 257, 10 South. 860; State v. Kaye, 83 Mo. App. 678; Mershon v. Williams, 63 N. J. 398, 44 Atl. 211.

[654] Supra, § 534.

[655] Supra, § 536; Huyghe v. Brinkman, 34 La. Ann. 1179.

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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.[656] 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 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.[657] "The estoppel of a judgment ex-

[656] See Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Police Jury of Jefferson v. United States, 8 C. C. A. 607, 60 Fed. 249; Norton v. Jensen, 33 C. C. A. 141, 90 Fed. 415; Rocker Spring Co. v. William D. Gibson Co. (C. C.) 58 Fed. 217; Gallagher v. Kingston Water Co., 164 N. Y. 602, 58 N. E. 1087; Gregg v. Page Belting Co., 69 N. H. 247, 46 Atl. 26; Smith v. Smith, 55 S. C. 507, 33 S. E. 583; West Chicago Park Com'rs v. Farber, 171 Ill. 146, 49 N. E. 427; Bachman v. Schertz, 73 Ill. App. 479; Thomas v. McDanald, 102 Iowa, 564, 71 N. W. 572; Bierman v. Crecelius, 135 Mo. 386, 37 S. W. 121; Lawless v. Lawless, 47 Mo. App. 523; Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823.

[657] Duchess of Kingston's Case, 20 How. St. Tr. 538; Hopkins v. Lee, 6

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tends 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." [658] "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." [659] 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 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.[660] So again,

Wheat. 109, 5 L. Ed. 218; Howard v. Kimball, 65 Me. 308; Hotchkiss v. Nichols, 3 Day (Conn.) 138; Kennedy v. Scovil, 14 Conn. 61; Dickinson v. Hayes, 31 Conn. 417; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Gilbert v. Thompson, 9 Cush. (Mass.) 348; Jennison v. Inhabitants of West Springfield, 13 Gray (Mass.) 544; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Lawrence v. Hunt, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515; Tams v. Lewis, 42 Pa. 402; Stevenson v. Kleppinger, 5 Watts (Pa.) 420; Blackmore v. Gregg, 10 Watts (Pa.) 222, 36 Am. Dec. 171; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Forcey's Appeal, 106 Pa. 508; Brady v. Pryor, 69 Ga. 691; Watts v. Rice, 75 Ala. 289; Land v. Keirn, 52 Miss. 341; Union & Planters' Bank v. Allen, 77 Miss. 442, 27 South. 631; Faires v. McLellan (Tex. Civ. App.) 24 S. W. 365; Miehle Printing Press & Mfg. Co. v. Andrews-Jones Printing Co., 18 Ohio Cir. Ct. R. 158; Shall v. Biscoe, 18 Ark. 142; Wahle v. Wahle, 71 Ill. 510; Smith v. Rountree, 185 Ill. 219, 56 N. E. 1130; Ryan v. Potwin, 62 Ill. App. 134; Zabel v. Harshman, 68 Mich. 273, 42 N. W. 44; Wilson v. Stripe, 4 G. Greene (Iowa) 551, 61 Am. Dec. 138; Haight v. City of 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; Chapman v. Hughes (Cal.) 60 Pac. 974; King v. Brigham, 23 Or. 262, 31 Pac. 601, 18 L. R. A. 361.

[658] Lewis' Appeal, 67 Pa. 153.

[659] Horton v. Hamilton, 20 Tex. 606.

[660] Ford v. Ford's Adm'r, 68 Ala. 141.

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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.[661] 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.[662] 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.[663] So where the respondent in a petition in involuntary bankruptcy took issue on the question of his insolvency, and the petitioning creditor, for the purpose of proving insolvency, offered in evidence certain promissory notes made by the debtor to third parties, and the debtor contested their validity and consideration, but the court found the allegations of the petition to be true and made an adjudication of bankruptcy, it was held that, as such notes were not directly in issue, but only collaterally brought in question, and as the holders thereof were not parties to the proceeding, the adjudication of bankruptcy was not conclusive as to their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate.[664]

An important analogy to the rule under consideration is found in the case of opinions of the appellate courts considered as au-

[661] Cavanaugh v. Buehler, 120 Pa. 441, 14 Atl. 391.
[662] Potter v. Baker, 19 N. H. 166.
[663] Bosquett v. Crane, 51 Cal. 505.
[664] In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409.

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thoritative 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 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.[665]

§ 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.[666] 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.[667] 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

[665] Hawes v. Contra Costa Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235.

[666] Belleville & St. L. Ry. Co. v. Leathe, 28 C. C. A. 279, 84 Fed. 103; Mack v. Levy (C. C.) 60 Fed. 751; California & O. Land Co. v. Worden (C. C.) 85 Fed. 94; Mallett v. Foxcroft, 1 Story, 474, Fed. Cas. No. 8,989; Crandall v. Gallup, 12 Conn. 365; Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; In re Thomas' Will, 111 N. C. 409, 16 S. E. 226; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194; Evans v. Birge, 11 Ga. 272; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253.

[667] Sawyer v. Boyle, 21 Tex. 28; Eans v. Sawyer, 27 Tex. 448.

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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.[668] The same principle furnished the rule for the decision in Williams v. Williams,[669]—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 the plaintiff. In the meantime 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

[668] Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569.
[669] 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

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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." [670] For example, where a plaintiff has recovered in an action of trespass quare clausum fregit, such recovery is conclusive, as between the parties, that the plaintiff's possession, before the trespass in that suit complained of, was peaceable, and prior to defendant's, and of such a character as to entitle the plaintiff to retake it if it could be done peaceably.[671] Again, where an action of tort was brought for damages for the obstruction of an easement, and, under a plea of not guilty, a recovery was had, plaintiff's right to the easement at that time was established as between the parties to the suit.[672] So, a decree for the specific performance by a railroad company of a contract by it to convey the lands granted to it is a conclusive adjudication that, at the time the suit was commenced, the full equitable title had passed under the contract.[673] So where the plaintiff

[670] Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733. And see Werlein v. City of New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817; Buchanan v. Knoxville & O. R. Co., 18 C. C. A. 122, 71 Fed. 324; Carter v. Couch, 28 C. C. A. 520, 84 Fed. 735; Perkins v. Walker, 19 Vt. 144; Duncan v. Bancroft, 110 Mass. 267; Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179; Tuska v. O'Brien, 68 N. Y. 446; Conant v. Jones, 50 App. Div. 336, 64 N. Y. Supp. 189; Case v. Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Supp. 724; Dorris v. Erwin, 101 Pa. 239; School Dist. No. 28 v. Stocker, 42 N. J. Law, 115; Blake v. Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953; Willis v. Tozer, 44 S. C. 1, 21 S. E. 617; Daniel v. Gum (Tenn.) 45 S. W. 468; Ashmead v. Hurt, 125 Ind. 566, 25 N. E. 709; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Hayes v. Shattuck, 21 Cal. 51; Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25. Further as to the distinction between matters necessarily determined by a judgment and matters which are only possibly or probably inferable from it, see Virginia-Carolina Chemical Co. v. Kirven, 57 S. C. 445, 35 S. E. 745; Commonwealth v. Order of Solon, 166 Pa. 33, 30 Atl. 930; Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355.

[671] Illinois & St. L. R. & Coal Co. v. Cobb, 82 Ill. 183.

[672] Manning v. Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

[673] Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247.

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recovers judgment in an action for damages for maintaining a causeway over the waters of a cove so as to obstruct access to plaintiff's land, the jury must have found that the waters of the cove were navigable, and the verdict renders that fact res judicata.[674] Again, where an injunction suit is brought on behalf of a county to enjoin the payment of a claim against it, and the court adjudges that defendant has a valid claim and is entitled to a warrant, this judgment is conclusive that the claimant has substantially complied with the statutory requirements.[675] So, a judgment against a city for an amount due on a contract cannot be defeated by showing that the contract was void as in violation of the constitutional limitation upon the power of municipalities to create indebtedness, such question being res judicata, whether raised on the trial or not.[676]

§ 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.[677] 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

[674] Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459.

[675] State v. Headlee, 18 Wash. 220, 51 Pac. 369.

[676] Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803.

[677] Smith v. Town of Ontario (C. C.) 4 Fed. 386; Billing v. Gilmer, 8 C. C. A. 645, 60 Fed. 332; House v. Lockwood, 137 N. Y. 259, 33 N. E. 595; Lythgoe v. Lythgoe, 75 Hun, 147, 26 N. Y. Supp. 1063; Ledoux's Heirs v. Lavedan, 49 La. Ann. 913, 22 South. 214; Neilson v. Pennsylvania Coal & Oil Co., 78 Minn. 113, 80 N. W. 859; McLeod v. Lee, 17 Nev. 103, 29 Pac. 124.

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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.[678] 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,[679] 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.[680]

[678] 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.

[679] 15 N. H. 9, 41 Am. Dec. 675.

[680] See, also, Sanderson v. Peabody, 58 N. H. 116; Vaughan v. Morrison, 55 N. H. 580; Western M. & Manuf'g Co. v. Virginia Cannel Coal Co., 10 W. Va. 250; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Garwood v. Garwood, 29 Cal. 521; Perkins v. Oliver, 110 Mich. 402, 68 N. W. 245; O'Brien v. Manwaring, 79 Minn. 86, 81 N. W. 746, 79 Am. St. Rep. 426; Keesey v. Old, 3 Tex. Civ. App. 1, 21 S. W. 693; Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668, 20 L. R. A. 590. 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

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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 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.[681] 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,[682] and many attempts

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, within 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, 41 Am. Dec. 675.

681 This is the line of reasoning adopted, in this connection, by Mr. Bigelow in his excellent treatise on Estoppel (3d Ed.) p. 112.

682 Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Bissell v. Kellogg, 60 Barb. (N. Y.) 617; Florida Cent. R. Co. v. Schutte, 103 U. S. 143, 26 L. Ed. 327; Chamberlain v. Gaillard, 26 Ala. 504; Sherman v. Dilley, 3 Nev. 21; Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Trayhern v. Colburn,

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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.[683] 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, it may be connected with the record by evidence aliunde.[684] 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." [685] "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." [686] 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

66 Md. 277, 7 Atl. 459; Quinn v. Jenks, 88 Hun, 428, 34 N. Y. Supp. 962; Reiner v. Jones, 38 App. Div. 441, 56 N. Y. Supp. 423; Breckenridge v. Delaware, L. & W. R. Co., 58 N. J. Eq. 581, 43 Atl. 1097; Redden v. Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97; Shepard v. Stockham, 45 Kan. 244, 25 Pac. 559; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Territory v. Hopkins, 9 Okl. 133, 59 Pac. 976.

[683] Smith v. Town of Ontario (C. C.) 4 Fed. 386.

[684] Chamberlain v. Gaillard, 26 Ala. 504.

[685] Sherman v. Dilley, 3 Nev. 21, 24.

[686] 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. 459.

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issues, might have been litigated and decided in that suit.[687] 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 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." [688]

§ 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.[689] 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.[690] For example, an

[687] 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; Beale's Adm'r v. Gordon (Va.) 21 S. E. 667; Boyd v. Robinson, 93 Tenn. 1, 23 S. W. 72; Roberts v. Moody, 107 Wis. 245, 83 N. W. 307.

[688] Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

[689] Leonard v. Whitney, 109 Mass. 265.

[690] Town v. Lamphere, 34 Vt. 365; Hunter v. Davis, 19 Ga. 413; Church v. Chapin, 35 Vt. 223. See, also, St. Joseph Union Depot Co. v. Chicago, R. I. & P. Ry. Co., 32 C. C. A. 284, 89 Fed. 648; Louisville Trust Co. v. City of Cincinnati (C. C.) 73 Fed. 716; Burlen v. Shannon, 14 Gray (Mass.) 433; Withington v. Warren, 12 Metc. (Mass.) 114; Palmer v. Hussey, 87 N. Y. 303; Burns v. Monell, 7 N. Y. Supp. 624; Merritt v. Peirano, 10 App. Div. 563, 42 N. Y. Supp. 97; Blake v. Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953; Wilkinson v. Brinn, 124 N. C. 723, 32 S. E. 966; Bradford v. Knowles, 78 Tex. 109, 14 S. W. 307; Carlisle v. Howes (Ky.) 43 S. W. 191; John V. Farwell Co. v. Lykins, 59 Kan. 96, 52 Pac. 99; Ferris v. Udell, 139 Ind. 579, 38 N. E. 180; McIntyre v. Storey, 80 Ill. 127; Bowe v. Minnesota Milk Co., 44

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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.[691] 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.[692] 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.[693]

§ 616. Points in Issue but not Decided.

Numerous cases (particularly among the earlier decisions) have held that the judgment of a court of competent jurisdiction is conclusive as to all questions within the issues raised in the case, whether or not they were formally contested or argued before the court or jury, or specifically included in the decision,[694] and that the force of the adjudication cannot be explained away, as to any such question, by testimony of jurors who tried the cause, that that question was not

Minn. 460, 47 N. W. 151; Morrill v. Little Falls Manuf'g Co., 46 Minn. 260, 48 N. W. 1124; Grunert v. Spalding (Wis.) 78 N. W. 606; Reed v. Cross, 116 Cal. 473, 48 Pac. 491.

[691] Waite v. Teeters, 36 Kan. 604, 14 Pac. 146.

[692] Almy v. Daniels, 15 R. I. 312, 4 Atl. 753. And see Empire State Nail Co. v. American Solid Leather Button Co., 21 C. C. A. 152, 74 Fed. 864; Franklin County v. German Sav. Bank, 142 U. S. 93, 12 Sup. Ct. 147, 35 L. Ed. 948.

[693] Bergeron v. Richardott, 55 Wis. 129, 12 N. W. 384. And see, infra, § 728.

[694] Barrett v. Failing, 8 Or. 152; Schmidt v. Zahensdorf, 30 Iowa, 498; Sicard v. Buffalo, N. Y. & P. R. Co., 15 Blatchf. 525, Fed. Cas. No. 12,831; Blodgett v. Dow, 81 Me. 197, 16 Atl. 660; Keokuk County v. Alexander, 21 Iowa, 377; McGregor v. McGregor, Id. 441; Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; Flippen v. Dixon, 83 Tex. 421, 18 S. W. 803, 29 Am. St. Rep. 653; Flewellen v. Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775.

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considered by the jury.[695] But of late, the courts manifest a disposition to hold that no question or contention is finally settled by a judgment, although it may have been fairly within the issues, as raised by the pleadings, if it was not actually litigated, that is, supported or attacked by evidence, made the subject of the trial, submitted to the jury, or pressed upon the consideration of the court.[696] Thus, where a former judgment was pleaded as an estoppel against proving certain facts in a 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.[697] 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.[698] But of course this doctrine is subject to the limitation, explained in an earlier section,[699] that the judgment is conclusive of all questions necessarily inferable from it, or which were essential to the adjudication, in such sense that they must have been assumed or determined in a particular way before any such judgment could have been rendered, whether they were formally litigated or not. And it must also be observed that a judgment by default, where there is no actual trial of the issues, is nevertheless conclusive of all matters which were well and properly pleaded and necessary or material to the plaintiff's case.[700]

§ 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

[695] Underwood v. French, 6 Or. 66, 25 Am. Rep. 500.

[696] Central Trust Co. v. Clark, 26 C. C. A. 397, 81 Fed. 269; Fayerweather v. Ritch (C. C.) 88 Fed. 713; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084; Barber v. Kendall, 1 App. Div. 247, 37 N. Y. Supp. 141; Brury v. Smith, 8 Kan. App. 52, 53 Pac. 74; Kern v. Wilson, 82 Iowa, 407, 48 N. W. 919; Sweet v. Tuttle, 14 N. Y. 465; Teal v. Terrell, 48 Tex. 491.

[697] Colwell v. Bleakley, 1 Abb. Dec. 400.

[698] Thomas v. Hite, 5 B. Mon. (Ky.) 590.

[699] Supra, § 613.

[700] See, infra, § 697.

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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.[701] 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.[702] So where mortgagors sue for the cancellation of a mortgage on their homestead, alleging lack of proper execution, the judgment will not estop them from urging, as a defense to a suit subsequently brought for foreclosure of the mortgage, such questions as partial want of consideration, partial payments, and the right to require that other securities shall first be exhausted.[703] 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 such notes, the defense of illegality of consideration.[704] Again, a bailee having con-

[701] Dennison v. United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. Ed. 453; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C.) 50 Fed. 151; Burton v. Barlow's Estate, 55 Vt. 434; Comm. v. Sutherland, 109 Mass. 342; Matthews v. Duryee, 45 Barb. (N. Y.) 69; Sweet v. Tuttle, 14 N. Y. 465; Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Skinner v. Walter A. Wood M. & R. Mach. Co., 65 Hun, 622, 20 N. Y. Supp. 251; Howe v. First Nat. Bank (Pa.) 1 Atl. 787; Eaves v. Vial, 98 Va. 134, 34 S. E. 978; Stoddard v. McIlwain, 9 Rich. Law (S. C.) 451; Davidson v. Shipman, 6 Ala. 27; Rake's Adm'r v. Pope, 7 Ala. 161; Hart v. Picard, 75 Miss. 651, 23 South. 450; Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499; Gray v. Edwards, 3 Tex. Civ. App. 361, 22 S. W. 537; Coulter v. Davis, 13 Lea (Tenn.) 451; Johnston v. Osmont (Tenn.) 59 S. W. 644; Bentley v. O'Bryan, 111 Ill. 53; Foote v. Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Boutin v. Lindsley, 84 Wis. 644, 54 N. W. 1017; Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46; Nickum v. Danvers, 28 Or. 322, 42 Pac. 130; Applegate v. Dowell, 15 Or. 513, 16 Pac. 651; Meredith v. Santa Clara Min. Ass'n, 56 Cal. 178; Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380.

[702] Campbell v. Consalus, 25 N. Y. 613.

[703] Des Moines Nat. Bank v. Harding, 86 Iowa, 153, 53 N. W. 99.

[704] Adams v. Adams, 25 Minn. 72.

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verted 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; and it was held that the former judgment raised no presumption that the lienor's claim was adjudicated and allowed in estimating damages.[705] So, a judgment for the possession of shares of stock held by a trustee is no bar to an action for damages for the depreciation in value of the stock, while it was unlawfully detained, where no issue as to damages was involved in the previous litigation.[706] 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.[707] For similar reasons, a judgment establishing the contention that a bank is not liable to taxation on its capital and its banking house and furniture does not settle the question of its immunity from the payment of a license tax.[708] And the recovery of judgment for taxes provided for by an unconstitutional act, in an action in which the validity of the statute is not questioned, does not estop the successful party from alleging, in a subsequent suit between the same parties upon a different cause of action, that the act is unconstitutional.[709] Where, in a patent infringement suit, the defendant did not deny the validity of the patent, but claimed a license under it to sell the patented articles, and the existence of such license was the only issue litigated, it was held that a decision in favor of complainant did not estop defendant

[705] Longstreet v. Phile, 39 N. J. Law, 63.

[706] Bracken v. Atlantic Trust Co., 23 Misc. Rep. 579, 51 N. Y. Supp. 1007. Where bonds were deposited with plaintiff as security for loans and other liabilities, and it was agreed that defendant should deposit more bonds as additional security, and that plaintiff should perform a certain contract; and plaintiff brought an action for specific performance of the contract to deliver the additional bonds, and judgment went against him on the ground that he had failed to perform said contract; it was held that the judgment was not conclusive as to his right to hold the bonds deposited as security for the loans. Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

[707] Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 294, 312.

[708] City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202.

[709] City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 142 Pa. 484, 21 Atl. 982, 28 Wkly. Notes Cas. 106.

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from questioning the validity of the patent in a subsequent suit.[710] So, a judgment rendered in a case wherein the question was as to prior rights of purchasers of a tract of land, no issue being formed as to boundaries, does not operate as an estoppel in a suit where the line is in issue.[711] For the same reason, the right to sue for damages caused by the operation of a railroad is not cut off by a decree in a former suit establishing the right to build the road.[712] A 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.[713] 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.[714] 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.[715] 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.[716] And although a de-

[710] Lublin v. Stewart, Howe & May Co. (C. C.) 75 Fed. 294. Where a decree sustains one claim of a patent, but there is nothing in either the decree or the opinion showing whether another claim is or is not valid, the defendant in a second suit is not estopped from contesting its validity. Thompson v. N. T. Rushnell Co. (C. C.) 80 Fed. 332.

[711] Linney v. Wood, 66 Tex. 22, 17 S. W. 244; Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179; Peterson v. Sohl, 141 Ind. 466, 40 N. E. 910.

[712] Louisville & N. R. Co. v. Orr (Ky.) 15 S. W. 8.

[713] Whaley v. Stevens, 24 S. C. 479.

[714] Lindell v. Liggett, 1 Mo. 432, 14 Am. Dec. 298.

[715] Mitchell v. French, 100 Ind. 334. And see Gore v. Gore, 101 Tenn. 620, 49 S. W. 737; Franke v. Franke, 15 Ind. App. 529, 43 N. E. 468; supra, § 609.

[716] Hobbs v. Parker, 31 Me. 143. A refusal by the court to dissolve an attachment obtained by a creditor on the ground that the debtor had fraudulently omitted to include a judgment by confession in a statement of liabilities, on the faith of which the goods were furnished, is not equivalent to an adjudication that the judgment was fraudulently obtained, and does not estop the judgment creditor from enforcing it against the debtor's property. Reese v. Reese, 157 Pa. 200, 27 Atl. 703.

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cree 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.[717] 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.[718]

§ 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.[719] "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 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

[717] People v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770.

[718] Indianapolis & C. R. Co. v. Clark, 21 Ind. 150.

[719] City and County of San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096; Harding v. Hale, 2 Gray (Mass.) 399; Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534; Baker v. Rand, 13 Barb. (N. Y.) 152; Mershon v. Williams, 63 N. J. Law, 398, 44 Atl. 211; Jenkins v. Harrison, 66 Ala. 345; McLane v. Miller, 12 Ala. 643; Bates v. Crowell, 122 Ala. 611, 25 South. 217; Teal v. Terrell, 48 Tex. 491; Scully v. Lowenstein, 56 Miss. 652; Stringer v. Adams, 98 Ind. 539; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386; People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Ramsbottom v. Bailey, 124 Cal. 259, 56 Pac. 1036.

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a position that establishing his demand would entitle him to a judgment in his favor." [720] 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.[721]

But the rule applies not only where questions affecting the relative rights of the parties could not be litigated on account of the form of the action, or the scope of the issues as determined by the pleadings, but also in cases where such questions were excluded from consideration because the particular court had no jurisdiction to pass upon them. Thus, where the powers of probate courts are limited to particular inquiries, or particular kinds of proceedings, instances of the application of the rule may be found,[722] and matters which are cognizable only in equity are not concluded by the judgment in an action at law, where they could not be set up or tried.[723]

§ 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.[724] 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.[725] Thus, in an action to restrain defendant's use

[720] Fifield v. Edwards, 39 Mich. 264.

[721] Athearn v. Brannan, 8 Blackf. (Ind.) 440.

[722] Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263; Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N. E. 808; Doddridge's Estate v. Doddridge, 24 Ind. App. 60, 56 N. E. 112.

[723] White v. Crew, 16 Ga. 416.

[724] Supra, vol. 1, § 242.

[725] Spoors v. Cowen, 44 Ohio St. 497, 9 N. E. 132; Semple v. British Columbia Bank, 5 Sawy. 394, Fed. Cas. No. 12,660; Mitchell v. Insley, 33 Kan.

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of a name which plaintiff claims as his trade-mark, where the judgment is that defendant be restrained as prayed, and that he account to plaintiff for all the contracts procured by him under the name in question, a finding of fact that defendant had been employed to sell plaintiff's goods at a certain commission is irrelevant, and is not res judicata upon the rate of commissions in a subsequent action by defendant for such commissions.[726] So where, in an action of ejectment, the consideration of the character of the title is foreign to the case and unnecessary for its disposition, any declaration in the decree as to that title is without binding force as an adjudication, either upon parties, privies, or strangers.[727] And a judgment obtained in an action to have a deed declared to be merely a mortgage, which further declares that the grantor is tenant of the grantee, is not evidence on the latter question, the same not having been in issue in the suit, and the fact being wholly immaterial to the judgment.[728]

§ 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 abandoned, or stricken out on motion, or ruled out by the court as irrelevant, and so withheld from the consideration of the jury, and therefore constituted no part of the verdict or judgment.[729] Thus, if a plaintiff sues for several distinct causes of action,

654, 7 Pac. 201; People v. Johnson, 37 Barb. (N. Y.) 502; Hume v. Commercial Bank, 1 Lea (Tenn.) 220; McIntire v. Linehan, 178 Mass. 263, 59 N. E. 767; In re Metropolitan Ry. Co., 58 Hun, 563, 12 N. Y. Supp. 859; Fox v. McComb, 63 Hun, 630, 17 N. Y. Supp. 783; Gillim v. Daviess County (Ky.) 14 S. W. 838; East Tennessee, V. & G. Ry. Co. v. Mahoney, 89 Tenn. 311, 15 S. W. 652; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

[726] Springer v. Bien, 128 N. Y. 99, 27 N. E. 1076.

[727] Fulton v. Hanlow, 20 Cal. 450.

[728] People v. Johnson, 14 Abb. Prac. (N. Y.) 416.

[729] Seddon v. Tutop, 6 Term R. 607; McComb v. Frink, 149 U. S. 629, 13 Sup. Ct. 993, 37 L. Ed. 876; Croft v. Steele, 6 Watts (Pa.) 373; Kaster v. Welsh, 157 Pa. 590, 27 Atl. 668; Salinas v. C. Aultman & Co., 45 S. C. 283, 22 S. E. 889; Brothers v. Beck, 75 Miss. 482, 22 South. 944; Haas v. Taylor, 80 Ala. 459, 2 South. 633; Patrick v. Commissioners' Court (Tex.) 6 S. W. 625;

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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.[730] 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.[731] 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.[732] The rule, as thus understood, applies equally to matters of defense first set up and then withdrawn.[733] For instance, a judgment for the plaintiff in an action

Wood v. Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071; Smith v. Talbot, 11 Ark. 666; Parker v. Shannon, 137 Ill. 376, 27 N. E. 525; Busch v. Jones, 94 Mich. 223, 53 N. W. 1051; Johnson v. Johnson, 20 Colo. 143, 36 Pac. 898; McNicholas v. Lake, 13 Colo. App. 164, 56 Pac. 987; Bingham v. Honeyman, 32 Or. 129, 52 Pac. 755; Johnson v. Vance, 86 Cal. 110, 24 Pac. 862. Compare Barrett v. Failing, 8 Or. 152; Glenn v. Savage, 14 Or. 567, 13 Pac. 442; Stern v. Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37.

[730] Killion v. Wright, 34 Pa. 91; Steelman v. Sites' Ex'rs, 35 Pa. 216; Wood v. Corl, 4 Metc. (Mass.) 203; Boston Blower Co. v. Brown, 149 Mass. 421, 21 N. E. 883; Louw v. Davis, 13 Johns. (N. Y.) 227.

[731] Jones v. Underwood, 35 Barb. (N. Y.) 211. See Crebbin v. Bryce, 24 Tex. Civ. App. 532, 60 S. W. 587; Rackley v. Fowlkes (Tex. Civ. App.) 36 S. W. 75. But a party may not present issues for determination, and avoid the effect of an estoppel by withholding proof thereof. Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

[732] Thompson v. Myrick, 24 Minn. 4.

[733] Where a right to redeem from a tax sale was pleaded as an equitable defense to an action of ejectment brought by the purchaser, but the defense was withdrawn at the trial, it was held that a judgment for the plaintiff would be no bar to a suit to redeem. Cockerill v. Stafford, 102 Mo. 57, 14 S. W. 813. So where, in an action for the recovery of land, two defenses are set up,—the second being only as to a part of the land,—and the judge limits the verdict to the second defense, and the jury returns a general verdict for

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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 allegations 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.[734] 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.[735]

§ 621. Entire Demands cannot be Severed.

Growing out of the rule which forbids the splitting up of an indivisible claim or demand,[736] 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.[737] 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.[738] But where the cause of action is severable in its nature, or where several distinct causes of action

the defendant, the judgment is res judicata only as to the land included in the second defense. Duren v. Kee, 41 S. C. 171, 19 S. E. 492.

[734] Finnegan v. Campbell, 74 Iowa, 158, 37 N. W. 127. And see Shaw v. Broadbent, 129 N. Y. 114, 29 N. E. 238.

[735] Muirhead v. Kirkpatrick, 2 Pa. 425.

[736] Infra, § 734.

[737] Brockway v. Kinney, 2 Johns. (N. Y.) 210; Farrington v. Payne, 15 Johns. (N. Y.) 432; Hess v. Heeble, 4 Serg. & R. (Pa.) 246; Carvill v. Garrigues, 5 Pa. 152; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Duffy v. Lytle, 5 Watts (Pa.) 120; Miller v. Manice, 6 Hill (N. Y.) 114; Ramsey v. Herndon, 1 McLean, 450, Fed. Cas. No. 11,546; O'Neal v. Brown, 21 Ala. 482; Warren v. Comings, 6 Cush. (Mass.) 103; Converse v. Colton, 49 Pa. 346.

[738] Hess v. Heeble, 6 Serg. & R. (Pa.) 57.

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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.[739]

§ 622. Facts Assumed or Admitted.

In pursuance of the general principle that a former judgment or decree between the same parties is conclusive evidence only of the facts which were in issue and decided, it is held that such an adjudication is not proof of facts which were assumed or admitted for the purposes of the former suit, but which were only incidentally or collaterally in question there, or were not necessary to its determination.[740] But in respect to facts which were essential to the judgment, —facts without which the judgment could not legally have been given as it was given,—the adjudication is as conclusive in subsequent litigation between the same parties, when such facts were confessed or admitted in the pleadings, as it would be if they had been contested and found by the verdict.[741] Thus, an admission by defendant of an allegation in the complaint that a deed made by plaintiff to defendant was in fact a mortgage is equivalent to a finding on that point, and is decisive in a subsequent action between the parties.[742] On the same principle, a proposition assumed or decided by the court to be true, and which must be so assumed to establish another proposition, which expresses the conclusion of the court, is as effectually passed on as the matter directly decided.[743]

[739] 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. (Mass.) 409, 26 Am. Dec. 611; Croft v. Steele, 6 Watts, 373; Converse v. Colton, 49 Pa. 346; Paine v. Schenectady Ins. Co., 12 R. I. 440.

[740] Mason's Ex'rs v. Alston, 9 N. Y. 28, 59 Am. Dec. 515; Dickinson v. Price, 64 Hun, 149, 18 N. Y. Supp. 801; Bolleau v. Rutlin, 2 Exch. 665.

[741] Harper v. Harper, 3 C. C. A. 415, 53 Fed. 35; Miller v. Union Switch & Signal Co., 59 Hun, 624, 13 N. Y. Supp. 711; Davenport v. Buffington (Ind. T.) 45 S. W. 128.

[742] Fowler v. Osborne, 111 N. C. 404, 16 S. E. 470.

[743] Trustees of School District No. 28 v. Stocker, 42 N. J. Law, 115.

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§ 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, 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.[744] 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.[745]

[744] Sintzenick v. Lucas, 1 Esp. N. P. 43; The Vincennes, 3 Ware, 171, Fed. Cas. No. 16,945; Church v. Leavenworth, 4 Day (Conn.) 281; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Jackson v. Wood, 3 Wend. (N. Y.) 27; Davis v. Talcott, 14 Barb. (N. Y.) 611; Manny v. Harris, 2 Johns. (N. Y.) 29, 3 Am. Dec. 386; Clemens v. Murphy, 40 Mo. 121.

[745] Ricardo v. Garcias, 12 Clark & F. 368; Langmead v. Maple, 18 C. B. (N. S.) 255; Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; Ricaud v. Tysen (C. C.) 78 Fed. 561; Fayerweather v. Ritch (C. C.) 88 Fed. 713; Newton Manuf'g Co. v. Wilgus (C. C.) 90 Fed. 483; Dunlap v. Glidden, 34 Me. 519; Rogers v. Libbey, 35 Me. 200; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Aiken v. Peck, 22 Vt. 255; Post v. Smilie, 48 Vt. 185; Gage v. Holmes, 12 Gray (Mass.) 428; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hood v. Hood, 110 Mass. 483; Supples v. Cannon, 44 Conn. 424; Snider v. Croy, 2 Johns. (N. Y.) 227; Stowell v. Chamberlain, 3 Thomp. & C. 374; Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. 422; Tams v. Lewis, 42 Pa. 402; Follansbee v. Walker, 74 Pa. 306; Richmond v. Hays, 3 N. J. Law, 492; Hughes v. Jones, 2 Md. Ch. 178; Whitehurst v. Rogers, 38 Md. 503; Gist v. McJunkin, 1 Speers (S. C.) 157; Newton Manuf'g Co. v. White, 47 Ga. 490; Rake's Adm'r v. Pope, 7 Ala. 161; Robinson v. Lane, 22

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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." [746] 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.[747] 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.[748]

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

Miss. 161; Foster v. Wells, 4 Tex. 101; Reast v. Donald, 84 Tex. 648, 19 S. W. 795; Davis v. Schaffner, 3 Tex. Civ. App. 121, 22 S. W. 822; Gates v. Bennett, 33 Ark. 475; Bottorff v. Wise, 53 Ind. 32; Barger v. Hobbs, 67 Ill. 592; George v. Gillespie, 1 G. Greene (Iowa) 421; Amsden v. Dubuque & S. C. R. Co., 32 Iowa, 288; Sweet v. Maupin, 65 Mo. 65; Driscoll v. Damp, 16 Wis. 106; Mahaffey v. Rogers, 10 Ohio Cir. Ct. R. 24; Leopold v. City of Chicago, 150 Ill. 568, 37 N. E. 892; Irish-American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927; McLeod v. Lee, 17 Nev. 103, 28 Pac. 124; Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12.

[746] Washington A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L. Ed. 650.

[747] Young v. Rummell, 2 Hill, 478, 38 Am. Dec. 594.

[748] Briggs v. Wells, 12 Barb. 567.

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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."[749] A good illustration of this rule is found in the case of McDowell v. Langdon,[750] 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.[751] 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.[752]

[749] Chrisman's Adm'x v. Harman, 29 Grat. (Va.) 494, 26 Am. Rep. 387; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Clark v. Blair (C. C.) 14 Fed. 812; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248; Morgan v. Mitchell, 52 Neb. 667, 72 N. W. 1055; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Lillis v. People's Ditch Co. (Cal.) 29 Pac. 780; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[750] 3 Gray (Mass.) 513.

[751] Alabama Iron & R. Co. v. Austin, 36 C. C. A. 536, 94 Fed. 897; Fuller v. Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84; In re Broderick, 25 Misc. Rep. 534, 56 N. Y. Supp. 99; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959; Pilcher v. Ligon, 91 Ky. 228, 15 S. W. 513; Winans v. Rosecrans, 8 Kan. App. 455, 54 Pac. 508; Eaton v. Harth, 45 Ill. App. 355.

[752] Lander v. Arno, 65 Me. 28; Empire State Nail Co. v. American Solid

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"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." [753] 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.[754]

§ 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." [755] 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.[756] 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.

Leather Button Co., 21 C. C. A. 152, 74 Fed. 864; Sargent & Co. v. New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543.

[753] Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550.

[754] Campbell v. Butts, 3 N. Y. 173.

[755] Jones v. Perkins, 54 Me. 393. See, also, Manny v. Harris, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386; Topliff v. Topliff, 8 Ohio Cir. Ct. R. 55.

[756] Supra, § 614.

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§ 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, 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.[757] "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

[757] Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Perkins v. Walker, 19 Vt. 144; Atwood v. Robbins, 35 Vt. 530; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Merritt v. Morse, 108 Mass. 270; Supples v. Cannon, 44 Conn. 424; Belleville & St. L. Ry. Co. v. Leathe, 28 C. C. A. 279, 84 Fed. 103; Sawyer v. Nelson, 160 Ill. 629, 43 N. E. 728; Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301; Stedman v. Patchin, 34 Barb. (N. Y.) 218; Haller v. Pine, 8 Blackf. (Ind.) 175, 44 Am. Dec. 762.

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or considered."[758] 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.[759] But still, in an action where there are numerous 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.[760] 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.[761]

§ 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.[762] "It is a well settled rule of law that if a verdict, award, or judgment of a court of com-

[758] Bridge v. Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358. See, also, Hungerford's Appeal, 41 Conn. 322; Ingwersen v. Buchholz, 88 Ill. App. 73.

[759] Taylor v. Dustin, 43 N. H. 493.

[760] Hall v. Zeller, 17 Or. 381, 21 Pac. 192. And see Slater v. Skirving, 51 Neb. 408, 70 N. W. 493, 66 Am. St. Rep. 444; Downing v. Missouri, K. & T. Ry. Co., 70 Mo. App. 657; Topliff v. Topliff, 8 Ohio Cir. Ct. R. 55.

[761] Aiken v. Stewart, 4 Wkly. Notes Cas. 180. See, also, Fendall v. United States, 14 Ct. Cl. 247.

[762] 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. (Mass.) 429; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Coleman's Appeal, 62 Pa. 252; Swayne v. Lyon, 67 Pa. 436; Southside R. Co. v. Daniel, 20 Grat. (Va.) 363; Allebaugh v. Conkley, 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.

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petent 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." [763] 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.[764] Where a plea of former recovery is put in, and the 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.[765]

§ 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.[766] Thus, where an action is brought for goods sold and on a note, and the

[763] Cunningham v. Foster, 49 Me. 68. And see Susquehanna Mut. Fire Ins. Co. v. Mardorf, 152 Pa. 22, 25 Atl. 234; Sans v. City of New York, 31 Misc. Rep. 559, 64 N. Y. Supp. 681; Palmer v. Sanger, 143 Ill. 34, 32 N. E. 390; West v. Moser, 49 Mo. App. 201.

[764] Perkins v. Parker, 10 Allen (Mass.) 22.

[765] Haak v. Breidenbach, 6 Bin. (Pa.) 12.

[766] Pruitt v. Holly, 73 Ala. 369; Hanchey v. Croskrey, 81 Ala. 149, 1 South. 259; McKnight v. Dunlop, 4 Barb. (N. Y.) 36; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Bennett v. Holmes, 18 N. C. 486; Rowland v. Hobby, 26 App. Div. 522, 50 N. Y. Supp. 629; Eden v. Hartt, 25 Misc. Rep. 493, 54 N. Y. Supp. 1040; Holden v. O'Donohue, 61 Hun, 618, 15 N. Y. Supp. 402; Davis v. Sexton, 35 Ill. App. 407; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Anderson v. Kreidler, 56 Neb. 171, 76 N. W. 581; Smalley v. Edey, 19 Ill. 207; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Van Valkenburgh v. City of Milwaukee, 43 Wis. 574.

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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.[767] 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.[768] 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 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.[769] 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.[770] And this appears to be the better rule.

[767] Cummings v. Colgrove, 25 Pa. 150.

[768] Morgan v. Burr, 58 N. H. 470.

[769] White v. Simonds, 33 Vt. 178, 78 Am. Dec. 620; Hollis v. Morris, 2 Har. (Del.) 128; Day v. Vallette, 25 Ind. 42, 87 Am. Dec. 353; Rockwell v. Langley, 19 Pa. 502.

[770] Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Thompson v. N. T. Bushnell Co. (C. C.) 80 Fed. 332; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Chrisman's Adm'x v. Harman, 29 Grat. (Va.) 494, 26 Am.

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§ 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.[771] 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.[772] 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.[773] In determining what has been adjudged, courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion.[774] But if the

Rep. 387; Ryan v. Potwin, 62 Ill. App. 134; Dygert v. Dygert, 4 Ind. App. 276, 29 N. E. 490.

[771] Lytle v. Chicago G. W. Ry. Co., 75 Minn. 330, 77 N. W. 975. In determining what was in fact decided, findings of fact filed by the court are not to be ignored, even though the statutes do not provide for such findings; on the contrary, the findings, if not conclusive as against all testimony, are at least to be regarded as very persuasive evidence of what the court decided. Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. So, where the former judgment was rendered pursuant to the findings and conclusions of a referee, the court may examine the entire report of the referee, as well as the pleadings, for the purpose of ascertaining what issues were in fact raised and decided, and upon what theory the former judgment proceeded. Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690.

[772] Miller v. Deaver, 30 Ind. 371.

[773] Winans v. Dunham, 5 Wend. (N. Y.) 47.

[774] New Orleans, M. & C. R. Co. v. City of New Orleans (C. C.) 14 Fed. 373. But where (as in Michigan) constitutional or statutory provisions require the decisions of the supreme court to be in writing, signed by the judges, and filed in the clerk's office, the opinion of that court, so filed in a case, is competent evidence of the questions adjudicated therein, in a subsequent action wherein the decision is sought to be used as an estoppel. Stearns v. Lawrence, 28 C. C. A. 66, 83 Fed. 738. On the other hand, in

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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.[775] 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.[776] 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.[777] While the issues litigated at the trial may be shown by the testimony of persons who were present,[778] 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

California, a written opinion filed by the trial court in a case, being no part of the record, is not competent evidence to show what the issues were. Keech v. Beatty, 127 Cal. 177, 59 Pac. 837. And see Police Jury of Lafourche v. Police Jury of Terrebonne, 48 La. Ann. 1299, 20 South. 708.

[775] Legrand v. Rixey's Adm'r, 83 Va. 862, 3 S. E. 864.

[776] Merchants' International Steam-Boat Line v. Lyon (C. C.) 12 Fed. 63. But where the record of another suit is offered to show an estoppel as against the plaintiff in ejectment, recitals in a deed to the defendant from a third party are not evidence of the identity of the land sued for with the land referred to in the other suit. Garrison v. Tinley, 112 N. C. 652, 17 S. E. 423.

[777] Greenlee v. Lowing, 35 Mich. 63.

[778] Briggs v. Wells, 12 Barb. (N. Y.) 567. The deposition of the judge who tried the former action as to the issues therein tried is admissible, where the facts do not appear by the unaided record. Perkins v. Brazos, 66 Conn. 242, 33 Atl. 908.

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their consideration, and then the record furnishes the only proper proof of the verdict." [779]

§ 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 be determined by them upon the evidence adduced.[780] 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." [781] 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.[782]

[779] Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550. See, also, Rockwell v. Langley, 19 Pa. 502.

[780] Amsden v. Dubuque & S. C. R. Co., 32 Iowa, 288; Tutt v. Price, 7 Mo. App. 194; Birdseye v. Shaeffer (Tex. Civ. App.) 57 S. W. 987; Otis v. Sweeney, 43 La. Ann. 1073, 10 South. 247.

[781] Bitzer v. Killinger, 46 Pa. 44; Finley v. Hanbest, 30 Pa. 190; Coulter v. Davis, 13 Lea (Tenn.) 451; Tutt v. Price, 7 Mo. App. 194; New York & T. Land Co. v. Votaw (Tex. Civ. App.) 52 S. W. 125. A plea of former judgment in bar, replied to by "No such judgment," should be tried by an inspection of the record by the court. Davis v. Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

[782] Ehle v. Bingham, 7 Barb. (N. Y.) 494; Mum v. Shannon, 86 Iowa, 363, 53 N. W. 263. Where, in an action on a note by an assignee, the maker pleads a judgment rendered against him as garnishee in an action against plaintiff's assignor, in which the plaintiff was not a party, the question whether plaintiff did not in fact defend in the garnishment suit, so as to render the judgment binding upon him, the evidence being conflicting, is for the jury. Wolverton v. Glasscock, 15 Wash. 279, 46 Pac. 253.

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§ 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.[783] 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.[784] So where the 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.[785] 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

[783] Lilley v. Adams, 108 Mass. 50; Hanley v. Foley, 18 B. Mon. (Ky.) 519; Louisiana Levee Co. v. State, 31 La. Ann. 250; Himmelmann v. Sullivan, 40 Cal. 125; Jefferies v. Allen, 34 S. C. 189, 13 S. E. 365; Gee v. Burt (Tex. Civ. App.) 33 S. W. 553; Holt v. Schneider, 61 Neb. 370, 85 N. W. 280; Miller v. Bailey, 19 Or. 539, 25 Pac. 27.

[784] Thomas v. Joslyn, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624. See, also, Martin v. Boyce, 49 Mich. 122, 13 N. W. 386; Buckmaster v. Grundy, 3 Gilman (Ill.) 626.

[785] Toope v. Prigge, 7 Daly (N. Y.) 208.

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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.[786] And it is a general rule that a party who has obtained the benefit of a contract in one suit is estopped to deny its validity in a subsequent suit.[787] On the same principle, the holder of a promissory note, secured by an instrument purporting to be a deed to land, who, under an allegation that the instrument in question is a deed, obtains a judgment embracing a special lien upon the land, cannot afterwards allege that the instrument securing the debt is not in fact a deed passing title, but a mortgage only.[788] 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.[789]

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 or any other court.[790] Thus in Pennsylvania, the orphans'

[786] McDonald v. Rainor, 8 Johns. (N. Y.) 442.

[787] Baltimore & O. Ry. Co. v. Pittsburgh, C. & St. L. Ry. Co. (C. C.) 55 Fed. 701; Ellis v. The Lyceum, 62 Hun, 622, 16 N. Y. Supp. 924.

[788] McCandless v. Yorkshire Guarantee & Securities Corp., 101 Ga. 180, 28 S. E. 663.

[789] McQueen's Appeal, 104 Pa. 595, 49 Am. Rep. 592. See Chaffe v. Morgan, 30 La. Ann. 1307.

[790] Caujolle v. Curtiss, 13 Wall. 465, 20 L. Ed. 507; 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. 897; Adams' Heirs v. Adams, 22 Vt. 50;

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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.[791] 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.[792] The character of conclusiveness is attached to their judgments by the decisions in Maryland.[793] So in South Carolina, the

Lawrence v. Englesby, 24 Vt. 42; Jennison v. Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; Paine v. Stone, 10 Pick. (Mass.) 75; Sever v. Russell, 4 Cush. (Mass.) 513, 50 Am. Dec. 811; Crippen v. Dexter, 13 Gray (Mass.) 330; Cummings v. Cummings, 123 Mass. 270; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Bush v. Sheldon, 1 Day (Conn.) 170; Goodrich v. Thompson, 4 Day (Conn.) 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; King v. Ross, 21 R. I. 413, 45 Atl. 146; Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Seymour v. Seymour, 4 Johns. Ch. (N. Y.) 409; Chipman v. Montgomery, 63 N. Y. 236; Thompson v. McGaw, 2 Watts (Pa.) 161; McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; Lex's Appeal, 97 Pa. 289; In re Brinton's Estate, 10 Pa. 408; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Connolly v. Connolly, 32 Grat. (Va.) 657; Harris v. Colquit, 44 Ga. 663; Davie v. McDaniel, 47 Ga. 195; King v. Smith, 15 Ala. 264; Herbert v. Hanrick, 16 Ala. 581; Arnett's Ex'r v. Arnett, 33 Ala. 273; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Morrow v. Allison, 39 Ala. 70; Hutton v. Williams, 60 Ala. 107; Turner v. Malone, 24 S. C. 298; Bailey v. Dilworth, 10 Smedes & M. (Miss.) 494, 48 Am. Dec. 760; Fort v. Battle, 13 Smedes & M. (Miss.) 133; McKee v. Whitten, 25 Miss. 31; 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; Covington v. Chamblin, 156 Mo. 574, 57 S. W. 728; Williams v. Reed, 74 Mo. App. 331; Huebschmann v. Cotzhausen, 107 Wis. 64, 82 N. W. 720; Dayton v. Mintzer, 22 Minn. 393; Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[791] McPherson v. Cunliff, 11 Serg. & R. (Pa.) 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 March 29, 1832. See Mussleman's Appeal, 65 Pa. 485, for remarks upon it, and for a review of the history of the orphans' court in that state.

[792] Davie v. McDaniel, 47 Ga. 195.

[793] 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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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 as an inferior court in respect to the dignity of its records.[794] In California, the probate court is regarded as an inferior court, and it cannot take jurisdiction or administer remedies except as provided by statute;[795] yet its adjudications upon matters which are within its jurisdiction, are binding and conclusive.[796] 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;[797] 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.[798] 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

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."

[794] Turner v. Malone, 24 S. C. 398.

[795] Grimes' Estate v. Norris, 6 Cal. 621, 65 Am. Dec. 545.

[796] Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[797] Gordon v. Kennedy, 36 Iowa, 167; Wright v. Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

[798] Mickel v. Hicks, 19 Kan. 578, 21 Am. Rep. 161; Crosley v. Calhoon, 45 Iowa, 557; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224.

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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.[799] 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 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[800] 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;[801] 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.[802] In this country we have a few rulings and some dicta

[799] Supra, vol. 1, §§ 270, 282–284.

[800] Supra, vol. 1, §§ 290–295.

[801] 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 Gex, M. & G. 301; Jones v. Gregory, 2 De Gex, J. & S. 83; Barnesley v. Powell, Ambl. 102.

[802] Barnesley v. Powell, 1 Ves. Sr. 284; Kennell v. Abbott, 4 Ves. 802; Bigelow, Estop. pp. 157–160.

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to the effect that fraud may be collaterally alleged against the order or judgment of a probate court.[803] But where a party relies upon fraud, it is said, it ought to be distinctly and positively alleged, and not merely inferred from circumstances.[804]

§ 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.[805] "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

[803] President of Orphans' Court v. Groff, 14 Serg. & R. (Pa.) 181; McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; Tebbets v. Tilton, 24 N. H. 120; Kilgore v. Kilgore, 103 Ala. 614, 15 South. 897.

[804] President of Orphans' Court v. Groff, 14 Serg. & R. (Pa.) 181.

[805] 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. (Mass.) 524; Loring v. Arnold, 15 R. I. 428, 8 Atl. 335; Tozer v. Jackson, 164 Pa. 373, 30 Atl. 400; Carpenter v. Cameron, 7 Watts (Pa.) 51; Holliday v. Ward, 19 Pa. 485, 57 Am. Dec. 671; Lovett's Ex'rs v. Mathews, 24 Pa. 330; Loy v. Kennedy, 1 Watts & S. (Pa.) 396; Hegarty's Appeal, 75 Pa. 503; Whitaker's Estate, 10 Wkly. Notes Cas. (Pa.) 106; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Davis v. Blevins, 123 N. C. 379, 31 S. E. 826; Schultz v. Schultz, 10 Grat. (Va.) 358, 60 Am. Dec. 335; Ballow v. Hudson, 13 Grat. (Va.) 682; Norvell v. Lessueur, 33 Grat. (Va.) 222; Wills v. Spraggins, 3 Grat. (Va.) 555; Sawyer v. Dozier's Heirs, 27 N. C. 97; Anderson v. Green, 46 Ga. 361; Deslonde v. Darrington's Heirs, 29 Ala. 92; Brock's Adm'r v. Frank, 51 Ala. 85; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Moore v. Tanner's Adm'r, 5 T.

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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." [806] 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 assent of the husband where such assent is necessary to give it effect.[807] So also the probate is conclusive of the sanity of the testator,[808] 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.[809] 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.[810] 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

B. Mon. (Ky.) 42, 27 Am. Dec. 35; Bowen v. Allen, 113 Ill. 53, 55 Am. Rep. 398; Jourden v. Meier, 31 Mo. 40; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Hubbard v. Hubbard, 7 Or. 42.

[806] Woodruff v. Taylor, 20 Vt. 65.

[807] Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330; Cassels v. Vernon, 5 Mason, 332, Fed. Cas. No. 2,503. And see Barnes v. Vincent, 5 Moore, P. C. 201.

[808] Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Town of Poplin v. Town of Hawke, 8 N. H. 124; Sly v. Hunt, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403. But a decree of the probate court refusing probate of a will, on the ground of the mental incapacity of the testator, is only prima facie evidence of such incapacity, as against the grantee in a deed executed by the testator on the same day he made the will. Baxter v. Baxter, 76 Hun, 98, 27 N. Y. Supp. 834. And see Arnold's Devisees v. Arnold's Ex'rs (Ky.) 16 S. W. 585.

[809] Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Succession of Justus, 45 La. Ann. 190, 12 South. 130. Compare Robertson v. Caw, 3 Barb. (N. Y.) 410.

[810] Satterlee v. Bliss, 36 Cal. 489.

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will discharge the same, notwithstanding the spurious character of the instrument probated.[811] 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.[812] But this particular point has lately been ruled otherwise.[813] It is also approved doctrine that the sentence of probate in the proper tribunal of the testator's domicile 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.[814]

But, as in every other case of an estoppel by judgment, the probate 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."[815] Further, letters testamentary and the proof of a will before a probate court are only evidence in proceedings

[811] Moore v. Tanner's Adm'r, 5 T. B. Mon. 42, 27 Am. Dec. 35; Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Noell v. Wells, Lev. 235; Allen v. Dundas, 3 T. R. 125.

[812] Rex v. Vincent, 1 Strange, 481.

[813] Rex v. Butterly, Russ. & R. 342.

[814] Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13.

[815] Greenwood v. Murray, 26 Minn. 259, 2 N. W. 945; Craine v. Edwards, 92 Ky. 109, 17 S. W. 211.

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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.[816]

§ 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.[817] "There was in fact no such thing as a probate of wills of land, properly 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."[818] 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.[819] 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.[820] 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.[821] But a judgment ad-

[816] Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144.

[817] Doe v. Calvert, 2 Camp. 389; Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091.

[818] Rowland v. Evans, 6 Pa. 435, per Lowrie, J.

[819] Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713; Spangler v. Rambler, 4 Serg. & R. (Pa.) 192; Smith v. Bonsall, 5 Rawle (Pa.) 86; Rowland v. Evans, 6 Pa. 435.

[820] Folmar's Appeal, 68 Pa. 482; Act Pa. April 22, 1856.

[821] Parker v. Parker, 11 Cush. (Mass.) 519, 524; Judson v. Lake, 3 Day

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mitting 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.[822]

§ 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, 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." [823]

§ 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

(Conn.) 318; Scott v. Calvit, 3 How. (Miss.) 148; Brock's Adm'r v. Frank, 51 Ala. 85; Norvell v. Lessueur, 33 Grat. (Va.) 222; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433.

[822] Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. See, also, Story, Confl. Laws, § 474.

[823] Schultz v. Schultz, 10 Grat. (Va.) 358, 60 Am. Dec. 335. See, also, Laughton v. Atkins, 1 Pick. (Mass.) 535.

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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.[824] This distinction appears to be still preserved in a few of our states.[825] But as a general rule, in this 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

[824] Redmond v. Collins, 15 N. C. 430, 27 Am. Dec. 208.

[825] 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 except minor heirs at law. Anderson v. Green, 46 Ga. 361.

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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.[826] 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.[827] 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.[828] But most commonly the statutes favor such 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.[829]

§ 638a. Construction of Will.

Where an action is brought for the judicial construction of a will (in a court of probate, if the statutes give those courts juris-

[826] Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265.

[827] Folmar's Appeal, 68 Pa. 482; Warfield v. Fox, 53 Pa. 382.

[828] 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.

[829] Holt v. Lamb, 17 Ohio St. 374; Valsain v. Cloutier, 3 La. 170, 22 Am. Dec. 179.

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diction of such proceedings, or in any other competent court), the judgment rendered therein is conclusive and binding on all parties who were properly before the court.[830] Thus, a decree construing a will, finding that the lands therein disposed of are personalty, to be sold and divided, is a bar to an action by the beneficiaries under the will for partition of the real estate.[831] But such a judgment is not conclusive upon any interested parties who were not brought into the action in some proper manner,[832] and it does not finally determine the status of any property (or the rights of parties in or concerning any property) other than that involved in the parts of the will as to which construction is asked.[833]

§ 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.[834] 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.[835] So, where the

[830] John v. Smith (C. C.) 91 Fed. 827; Leavens v. Ewins, 67 Vt. 256, 31 Atl. 297; Allen v. Shepard, 11 N. Y. St. Rep. 561; Corprew v. Corprew, 84 Va. 599, 5 S. E. 798; Malona v. Schwing (Ky.) 39 S. W. 523; Westbrook v. Thompson, 104 Tenn. 363, 58 S. W. 223.

[831] Stoff v. McGinn, 178 Ill. 46, 52 N. E. 1048.

[832] Morgan v. Halsey (Ky.) 31 S. W. 866. But where a devisee has actual notice of the pendency of proceedings for the construction of the will, which involved his right to an annuity, he will be bound by the decree therein, though the service of process was defective. Westbrook v. Thompson, 104 Tenn. 363, 58 S. W. 223.

[833] Malona v. Schwing (Ky.) 39 S. W. 523; Gaffield v. Plumber, 175 Ill. 521, 51 N. E. 749.

[834] McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325; Lawrence v. Englesby, 24 Vt. 42; Naylor's Adm'r v. Moffatt, 29 Mo. 126; Savage v. Benham, 17 Ala. 119; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

[835] Holmes v. Oregon & C. R. Co. (C. C.) 9 Fed. 229; Appeal of Willetts, 50 Conn. 330.

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grant of administration turns on the question as to which of the parties is next of kin to the decedent, the judgment is conclusive on that question in a suit between the same parties for distribution.[836] 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.[837]

§ 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.[838] 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.[839] 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."[840] In New York and New

[836] Garwood v. Garwood, 29 Cal. 514; Howell v. Budd, 91 Cal. 342, 27 Pac. 747.

[837] In re Shaw's Estate, 81 Me. 207, 16 Atl. 662.

[838] Clayton v. Gresham, 10 Ves. 288; Thompson v. Donaldson, 3 Esp. 63; Moons v. De Bernales, 1 Russ. 301; Newman v. Jenkins, 10 Pick. (Mass.) 515; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87; Cunningham v. Smith's Adm'r, 70 Pa. 458; French v. Frazier's Adm'r, 7 J. J. Marsh. (Ky.) 425; English's Adm'r v. Murray, 13 Tex. 366; Tisdale v. Connecticut Mut. Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

[839] Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314.

[840] See 1 Whart. Ev. § 810; 2 Phil. Ev. 93.

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Jersey, 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.[841]

§ 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.[842] 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.[843] Thus a decree of the probate court, in the

[841] Roderigas v. East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555; Plume v. Howard Sav. Inst., 46 N. J. Law, 211.

[842] State v. Bowen, 45 Miss. 347; Levering v. Levering, 64 Md. 399, 2 Atl. 1.

[843] Kendall v. Hardenbergh (C. C.) 94 Fed. 911; Campbell v. Strong, Hemp. 265, Fed. Cas. No. 2,367a; Wilcox v. Gilchrist, 85 Hun, 1, 32 N. Y. Supp. 608; In re Bradley, 25 Misc. Rep. 261, 54 N. Y. Supp. 555; Neill v. Hodge, 5 Tex. 489; Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118; Giddings v. Steele, 28 Tex. 756, 91 Am. Dec. 336; Cannon v. McDaniel, 46 Tex. 309; Swan v. House, 50 Tex. 650; Ford v. Newcomer, 14 La. Ann. 706; Shoemaker v. Brown, 10 Kan. 383; Dooley v. Watkins, 5 Ark. 705; Cossitt v. Biscoe, 12 Ark. 97; Biscoe v. Butts, 5 Ark. 305; Carter v. Engles, 35 Ark. 205; Brown v. Darrah, 95 Ind. 86; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Tarplee v. Capp, 25 Ind. App. 56, 56 N. E. 270; Mason v. Bair, 33 Ill. 194; Snelling v. Kroger, 89 Iowa, 247, 56 N. W. 446; Gault v. Sickles, 85 Iowa, 266, 52 N. W. 206; Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219; Jones v. Brinker, 20 Mo. 87; Tutt v. Boyer, 51 Mo. 425; Smith v. Sims, 77 Mo. 269; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608; Barber v. Bowen, 47 Minn. 118, 49 N. W. 684; Price v. Dietrich, 12 Wis. 626; Jameson v. Barber, 56 Wis. 630, 14 N. W. 859; Deck's Estate v. Gherke, 6 Cal. 666; Beckett v. Selover, 7 Cal. 239, 68 Am. Dec. 237; Estate of Schroeder, 46 Cal. 319. Compare Louis v. Triscony, 58 Cal. 304.

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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.[844] So also the rejection of a claim by the probate court is final and has all the attributes of a judgment.[845] 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.[846] 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,[847] for these, as we have already seen, are not in privity with the personal representatives.[848] 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.[849] But the rule

[844] Coffin v. McCullough's Adm'r, 30 Ala. 107.

[845] McKinney's Adm'r 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. 307, 4 N. W. 352; Dullard v. Hardy, 47 Mo. 403; State v. Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; In re High's Estate, 136 Pa. 222, 20 Atl. 422.

[846] 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's Adm'r v. Rutherford, 30 Ala. 253.

[847] 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. See Burnham v. Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120; Rice v. Ward, 93 Tex. 532, 56 S. W. 747.

[848] Supra, § 560.

[849] Neill v. Hodge, 5 Tex. 487; Bell's Adm'r 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. See Bement v. Ohio Valley Banking & Trust Co., 99 Ky. 109, 35 S. W. 139.

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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.[850]

§ 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.[851] 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.[852] 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.[853] 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

[850] Deck's Estate v. Gherke, 6 Cal. 666; Gurnee v. Maloney, 38 Cal. 88, 99 Am. Dec. 352; Douglas v. Yost, 28 Abb. N. C. 370, 18 N. Y. Supp. 830.

[851] 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 (Tenn.) 528; Doe ex dem. Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Earle v. Earle, 33 S. C. 498, 12 S. E. 164. Compare Snyder's Lessee v. Snyder, 6 Bin. (Pa.) 483, 6 Am. Dec. 493.

[852] Ford v. Ford's Adm'r, 68 Ala. 141; McDonald v. Berry, 90 Ala. 464, 7 South. 838; Anderson v. Anderson, 89 Md. 1, 42 Atl. 207.

[853] Brummagim v. Ambrose, 48 Cal. 366.

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removed from such possession until his title is adjudged defective in the regular and established course of judicial proceedings.[854] 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 are estopped from insisting upon it in another suit concerning the same land.[855]

§ 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.[856] 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.[857] 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,

[854] Tongue v. Morton, 6 Har. & J. (Md.) 21.

[855] Kelly v. Donlin, 70 Ill. 378.

[856] Loring v. Steineman, 1 Metc. (Mass.) 204; Bradshaw's Appeal, 3 Grant. Cas. (Pa.) 109; In re Stillwell's Estate, 139 N. Y. 337, 34 N. E. 777; Brown v. Wheeler, 53 App. Div. 6, 65 N. Y. Supp. 436; Prouty v. Matheson, 107 Iowa, 259, 77 N. W. 1039; Byrne v. Hume, 86 Mich. 546, 49 N. W. 576; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; McKenzie v. Budd, 125 Cal. 600, 58 Pac. 199. In Minnesota, a decree of the probate court assigning the residue of an estate is conclusive on all persons interested in the estate, although not then in being. Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99. But in Pennsylvania, an order of distribution is not conclusive as to a nonresident infant legatee, who has no notice of the proceeding and is not represented therein, where the auditor is the attorney of the other legatees and devisees, who claim the infant's legacy under a codicil to the will, and is appointed by agreement among them, and on representation that they are all the persons interested in the estate. In re White's Estate, 163 Pa. 388, 30 Atl. 192.

[857] Exton v. Zule, 14 N. J. Eq. 501.

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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.[858] 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.[859] 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.[860] A decree making a partial distribution of an estate is conclusive only as to the disposition of the funds then distributed.[861]

§ 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.[862] In

[858] Judge of Probate v. Robins, 5 N. H. 246.

[859] Torrey v. Pond, 102 Mass. 355.

[860] Ruth v. Overbrunner, 40 Wis. 238.

[861] Kline's Appeal, 86 Pa. 363. A decree of a surrogate in relation to the distribution of the personal estate under a will is not conclusive in an action in the supreme court in relation to the disposition of real estate under the same provisions. Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812.

[862] Sparhawk v. Buell's Adm'r, 9 Vt. 41; Jones v. Chase, 55 N. H. 234; Bulkley v. Andrews, 39 Conn. 523; McPherson v. Hamilton, 2 Yeates (Pa.) 40; App v. Dreisbach, 2 Rawle (Pa.) 287, 21 Am. Dec. 447; McFadden v. Geddis, 17 Serg. & R. (Pa.) 336; McLenachan v. Commonwealth, 1 Rawle

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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.[863] 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.[864] 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.[865] Thus, where the widow has no notice of the proceedings, other than such constructive notice as arises from the pub-

(Pa.) 357; Burd's Ex'rs v. McGregor's Adm'r, 2 Grant, Cas. (Pa.) 353; Hartzell v. Commonwealth, 42 Pa. 453; Hatcher v. Dillard's Adm'rs, 70 Ala. 343; Slatter v. Glover, 14 Ala. 648, 48 Am. Dec. 118; Shackleford v. Cunningham, 41 Ala. 203; Stubblefield v. McRaven, 5 Smedes & M. (Miss.) 130, 43 Am. Dec. 502; Shoemaker v. Brown, 10 Kan. 383; Ringgold v. Stone, 20 Ark. 526; Holden v. Lathrop, 65 Mich. 562, 32 N. W. 879; Searcy v. Creditors, 46 La. Ann. 376, 14 South. 910; Succession of Allen, 49 La. Ann. 1096, 22 South. 319; Ledoux's Heirs v. Lavedan, 49 La. Ann. 913, 22 South. 214; Lycan v. Miller, 56 Mo. App. 79; Cooper v. Duncan, 58 Mo. App. 5; Young v. Byrd, 124 Mo. 590, 28 S. W. 83, 46 Am. St. Rep. 461. But the judgment of a probate court approving an administrator's accounts is not a bar to a suit against him for an accounting, where, on appeal from such judgment, the accounts have been disapproved and disallowed, except as to commissions allowed him. Appleton v. Marx, 10 C. C. A. 555, 62 Fed. 638. In Canada, the judgment of a court of probate on passing the accounts of executors and trustees is not, so far as the latter are concerned, binding on a court of equity in a suit to remove such trustees. Grant v. Maclaren, 23 Can. Sup. Ct. 310.

[863] People v. Townsend, 37 Barb. 520.

[864] Durham v. Williams, 32 La. Ann. 968; Greenwood v. Warren, 120 Ala. 71, 23 South. 686; Barker v. Laney, 90 Hun, 108, 35 N. Y. Supp. 626.

[865] Clarke v. Perry, 5 Cal. 58, 63 Am. Dec. 82; Belloc v. Rogers, 9 Cal. 129; Van Llew v. Barrett & Barrett Beverage Co., 144 Mo. 509, 46 S. W. 202; Deck v. Gerke, 12 Cal. 433, 73 Am. Dec. 555; Townsend v. Gordon, 19 Cal. 189; Butterfield v. Smith, 101 U. S. 570, 25 L. Ed. 868; Ritchey v. Withers, 72 Mo. 556.

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lication 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.[866] 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.[867] 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.[868]

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.[869] 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.[870] 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 extrajudicial 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.[871]

[866] Adams v. Adams (N. J.) 17 Atl. 775.

[867] McCullough v. Montgomery, 7 Serg. & R. (Pa.) 17; Sparhawk v. Buell's Adm'r, 9 Vt. 41. See Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388.

[868] Mount v. Slack, 45 N. J. Eq. 129, 17 Atl. 297. See Oakley v. Oakley, 111 Ala. 506, 20 South. 335.

[869] Brodrib v. Brodrib, 56 Cal. 563; Garton v. Botts, 73 Mo. 274; Shackleford v. Cunningham, 41 Ala. 203; Commonwealth v. Gracey, 96 Pa. 70; Smith v. Lewis, 45 La. Ann. 1457, 14 South. 221; Commonwealth v. Patterson, 13 Pa. Super. Ct. 136.

[870] Abbott v. Bradstreet, 3 Allen (Mass.) 587.

[871] Abbott v. Foote, 146 Mass. 333, 15 N. E. 773, 4 Am. St. Rep. 314.

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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.[872] 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.[873]

§ 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.[874] 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.[875] 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.[876] And in general it may be said that a partition by the

[872] Shroyer v. Richmond, 16 Ohio St. 455.

[873] Succession of Keller, 39 La. Ann. 579, 2 South. 553.

[874] Herr v. Herr, 5 Pa. 428, 47 Am. Dec. 416; Burghardt v. Van Deusen, 4 Allen (Mass.) 374; In re Gedney's Estate, 33 Misc. Rep. 160, 68 N. Y. Supp. 627; Burton v. Gagnon, 180 Ill. 345, 54 N. E. 279.

[875] Merklein v. Trapnell, 34 Pa. 42, 75 Am. Dec. 634.

[876] Mehaffy v. Dobbs, 9 Watts (Pa.) 363.

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probate court is binding only upon those parties who are before the court or those whom they virtually represent.[877] 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.[878] The decree is conclusive only as to the lands actually embraced in it.[879] And, in jurisdictions where the probate court has no equity powers, it is not conclusive of equities between the parties.[880]

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 appears 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.[881]

[877] Cryer v. Andrews, 11 Tex. 170.

[878] Wills v. Slade, 6 Ves. 498; Nodine v. Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363.

[879] Ihmsen v. Ormsby, 32 Pa. 198.

[880] Caperton v. Hall, 83 Ala. 171, 3 South. 234.

[881] Ferrer's Case, 6 Coke, 7; Mattox v. Helm, 5 Litt. (Pa.) 185, 15 Am. Dec.

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As was remarked 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." [882] 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." [883] 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.[884]

64; Arnold v. Arnold, 17 Pick. (Mass.) 4; Viner, Abr. "Judgment" Q; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

[882] Outram v. Morewood, 3 East, 346, 357.

[883] Rosc. R. Act. 213.

[884] Ransley v. Stott, 26 Pa. 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.[885] 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.[886] 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.[887]

§ 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.[888] Such actions might be continued indefinitely, unless

[885] 3 Bl. Comm. 180.

[886] Stevens v. Taft, 8 Gray, 419. Compare Batchelder v. Robinson, 6 N. H. 12.

[887] Melvin v. Proprietors of Locks and Canals on Merrimack River, 5 Metc. 15, 38 Am. Dec. 384. A judgment on a writ of entry, putting in issue the legal title only, does not bar a suit to obtain a deed of the property, in which only the equitable title is in issue. Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836.

[888] Atkins v. Horde, 1 Burrows, 114; Doe v. Harlow, 12 Adol. & E. 40; Doe v. Thomas, 1 Tyrw. 410; Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Rogers v. Haines, 8 Me. 362; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec.

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equity interfered, after a sufficient number of trials had taken place to determine fairly the validity of the title, and by injunction, directed to the unsuccessful litigant, compelled him to cease from harassing his opponent by useless litigation.[889] 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

143; Bradford v. Bradford, 5 Conn. 127; Bailey v. Fairplay, 6 Bin. (Pa.) 450, 6 Am. Dec. 486; White v. Kyle's Lessee, 1 Serg. & R. (Pa.) 515; Brown v. Nickle, 6 Pa. 390; Weller v. Dilley, 12 Pa. Co. Ct. R. 84; Eichert v. Schaffer, 161 Pa. 519, 29 Atl. 393; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Van Blarcom v. Kip, 26 N. J. Law, 351; King v. Townshend, 141 N. Y. 358, 36 N. E. 513; Chapman v. Armistead, 4 Munf. (Va.) 382; Pollard v. Baylors, 6 Munf. (Va.) 433; Mitchell v. Robertson, 15 Ala. 412; Jones v. De Graffenreid, 60 Ala. 145; Camp v. Forrest, 13 Ala. 114; Harper v. Campbell, 102 Ala. 342, 14 South. 650; Sutton v. Pollard, 96 Ky. 640, 29 S. W. 637; Driver v. White (Tenn. Ch. App.) 51 S. W. 994; Kimmel v. Benna, 70 Mo. 52; McKenzie v. Renshaw, 55 Md. 299; Troutman v. Vernon, 1 Bush (Ky.) 482; Hawkins' Lessee v. Hayes, 3 Har. (Del.) 489; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98; Hinton v. McNeil, 5 Ohio, 209, 24 Am. Dec. 315.

[889] Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755. See Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

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result of a former trial." [890] 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.[891] And the New Jersey court of 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.[892] 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." [893] 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

[890] Stevens v. Hughes, 31 Pa. 381, 384.

[891] Van Wyck v. Seward, 1 Edw. Ch. 327.

[892] Obert v. Obert, 10 N. J. Eq. 98. And see Delaware, L. & W. R. Co. v. Breckenridge (N. J. Err. & App.) 43 Atl. 1097.

[893] Cecil v. Johnson, 11 B. Mon. (Ky.) 35. See, also, Troutman v. Vernon, 1 Bush (Ky.) 482.

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not be departed from by this court." [894] 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." [895]

§ 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.[896] And this rule has ever since been recognized as settled law in that state.[897] 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.[898] But the rule applies only where the action is to be regarded as a bill in equity and not as a pos-

[894] Avery v. Fitzgerald, 94 Mo. 207, 7 S. W. 6. Earlier cases holding the same rule are Slevin v. Brown, 32 Mo. 176; Holmes v. City of 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.

[895] City of St. Louis v. Schulenburg & Boeckler Lumber Co., 98 Mo. 613, 12 S. W. 248. And see Sutton v. Dameron, 100 Mo. 141, 13 S. W. 497; Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045.

[896] Seitzinger v. Ridgway, 9 Watts, 496.

[897] Peterman v. Huling, 31 Pa. 432; Meyers v. Hill, 46 Pa. 9; Taylor v. Abbott, 41 Pa. 352; Amick v. Oyler, 25 Pa. 506; Winpenny v. Winpenny, 92 Pa. 440. See, also, Schive v. Fausold, 137 Pa. 82, 20 Atl. 403; Budd v. Finley, 151 Pa. 540, 25 Atl. 129; Nelson v. Nelson, 117 Pa. 278, 11 Atl. 61.

[898] Sparks v. Walton, 4 Phila. 93.

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sessory ejectment at common law.[899] 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.[900] 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.[901]

§ 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.[902] 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

[899] Taylor v. Abbott, 41 Pa. 352.

[900] Meyers v. Hill, 46 Pa. 9.

[901] Preston v. Chadwick, 91 Mo. 320, 2 S. W. 793; Chouteau v. Gibson, 76 Mo. 58; Emmel v. Hayes (Mo.) 12 S. W. 521; Clark v. Bettelheim, 144 Mo. 258, 46 S. W. 135.

[902] Aslin v. Parkin, 2 Burr. 668; Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Postens v. Postens, 3 Watts & S. (Pa.) 182, 38 Am. Dec. 752; Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195; Man v. Drexel, 2 Pa. 202; Kille v. Ege, 82 Pa. 102; Graves v. Joice, 5 Cow. (N. Y.) 261; Lion v. Burtis, 5 Cow. (N. Y.) 406; Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 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 (N. Y.) 328; Den d. Bray v. McShane, 13 N. J. Law, 35; Mershon v. Williams (N. J. Eq.) 31 Atl. 778; Gillum v. Case, 71 Miss. 848, 16 South. 236; Whittington v. Christian, 2 Rand. (Va.) 353; Poston v. Jones, 19 N. C. 295; Brothers v. Hurdle, 32 N. C. 490, 51 Am. Dec. 400; Shumake v. Nelms' Adm'r, 25 Ala. 126; Brewer v. Beckwith, 35 Miss. 467; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 531, 17 Am. Dec. 98; Clark v. Boyreau, 14 Cal. 634; Avery v. Superior Court, 57 Cal. 247; 3 Bl. Comm. 205.

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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." [903] 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.[904] 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.[905] 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." [906] 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.[907] 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

[903] Postens v. Postens, 3 Watts & S. (Pa.) 182, 38 Am. Dec. 752.
[904] Wilkinson v. Kirby, 15 C. B. 430.
[905] Matthew v. Osborne, 13 C. B. 919.
[906] Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113.
[907] Bailey v. Fairplay, 6 Bin. (Pa.) 450, 6 Am. Dec. 486.

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title at the date of the writ.[908] 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."[909] But where the statute allows a recovery of mesne profits in an action 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.[910]

§ 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.[911] 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."[912] A similar effect has been attributed to the defendant's disclaimer of title. This, it is said, admits the plain-

[908] Harris v. Mulkern, 1 Ex. Div. 31.

[909] Van Alen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113.

[910] Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. Compare Pacquette v. Pickness, 19 Wis. 219. A judgment for rents and profits against defendant in ejectment is not a bar to an action of trover for the cutting and removal of standing timber from the premises by defendant while in possession. Wilson v. Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485.

[911] Botts v. Shields' Heirs, 3 Litt. 32; Hawkins' Lessee v. Hayes, 3 Har. (Del.) 489.

[912] Secrist v. Zimmerman, 55 Pa. 446; Dwyer v. Wright, 14 Pa. Co. Ct. R. 408.

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tiff'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.[913]

§ 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 (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.[914] 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.[915] It will be observed that,

[913] Wootters v. Hall, 67 Tex. 513, 3 S. W. 725.

[914] Code Civ. Proc. Colo. § 254; Code Ala. 1886, § 2714; Gen. St. Minn. 1878, c. 75, § 12; Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195; Williamson v. Mayer, 117 Ala. 253, 23 South. 3.

[915] Mercer v. Watson, 1 Watts, 330.

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under this statute, the effect of one judgment in ejectment remains precisely as at common law.[916] 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.[917] 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 suit between the parties, as that rule applies only to a subsequent suit in ejectment.[918] 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."[919] This statute does not apply to an action to set aside a conveyance of real estate on the ground of fraud.[920] 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

[916] Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195.
[917] Kinter v. Jenks, 43 Pa. 445.
[918] Carlisle v. Killebrew, 89 Ala. 329, 6 South. 756, 6 L. R. A. 617.
[919] Faze v. Arper, 6 Minn. 220, 233 (Gil. 142).
[920] Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808.

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federal courts sitting within the state.[921] 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.[922]

§ 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 resembles 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,[923] New York,[924] North Carolina,[925] Georgia,[926] Mississippi,[927] Ar-

[921] Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; Equator Mining & Smelting Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755.

[922] Strayer v. Johnson, 110 Pa. 21, 1 Atl. 222.

[923] Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Edwards v. Roys, 18 Vt. 473; Hunt v. Payne, 29 Vt. 172, 70 Am. Dec. 402; Hodges v. Eddy, 52 Vt. 434; Marvin v. Dennison, 1 Blatchf. 159, Fed. Cas. No. 9,180.

[924] Code Civ. Proc. N. Y. § 1524; King v. Townshend, 65 Hun, 567, 20 N. Y. Supp. 602; 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. 88; Campbell v. Hall, 16 N. Y. 575.

[925] Johnson v. Pate, 90 N. C. 334; Benton v. Benton, 95 N. C. 559. See Jordan v. Farthing, 117 N. C. 181, 23 S. E. 244.

[926] Sims v. Smith, 19 Ga. 124; Dickerson v. Powell, 21 Ga. 143; McCurry

[927] See note 927 on following page.

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kansas,[928] Kentucky,[929] Illinois,[930] Iowa,[931] California,[932] Oregon,[933] Nevada,[934] Indiana,[935] Kansas,[936] Colorado,[937] Tennessee,[938] Connecticut,[939] and probably in some others not here enumerated.[940]

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 by the court, which the court had power

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).

[927] Moring v. Ables, 62 Miss. 271, 52 Am. Rep. 186; Gaines v. Kennedy, 53 Miss. 103.

[928] Sturdy v. Jackaway, 4 Wall. 174, 18 L. Ed. 387. But see Dawson v. Parham, 55 Ark. 286, 18 S. W. 48.

[929] Troutman v. Vernon, 1 Bush, 482.

[930] Barger v. Hobbs, 67 Ill. 592; Regan v. West, 115 Ill. 603, 4 N. E. 365; Hawley v. Simons, 102 Ill. 118; Oetgen v. Ross, 54 Ill. 79; Gage v. Eddy, 186 Ill. 432, 57 N. E. 1030. But, by statute in this state, the party against whom the verdict in ejectment is rendered is entitled, on payment of costs, to have the judgment vacated, and a new trial granted; and when this is done, the judgment in the original action becomes wholly inoperative, and the doctrine of res judicata does not apply. Hammond v. Carter, 161 Ill. 621, 44 N. E. 274.

[931] Sobey v. Beiler, 28 Iowa, 323.

[932] Marshall v. Shafter, 32 Cal. 176; Amesti v. Castro, 49 Cal. 325; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Phelan v. Tyler, 64 Cal. 80, 28 Pac. 114; Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12.

[933] Code Civ. Proc. § 329; Hill v. Cooper, 8 Or. 254; Collins v. Goldsmith (C. C.) 71 Fed. 580. See Spaur v. McBee, 19 Or. 76, 23 Pac. 818.

[934] Sherman v. Dilley, 3 Nev. 21.

[935] Millikan v. Werts, 14 Ind. App. 223, 42 N. E. 820; Jarboe v. Severin, 112 Ind. 572, 14 N. E. 490. But in this state, as in Illinois, the unsuccessful party in an action of ejectment may have the judgment vacated and a new trial granted. See Stafford v. Cronkhite, 114 Ind. 220, 16 N. E. 596.

[936] Hentig v. Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91; Peterson v. Albach, 51 Kan. 150, 32 Pac. 917. See Neuber v. Shoel, 8 Kan. App. 345, 55 Pac. 350.

[937] New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 97 Fed. 150.

[938] Shannon's Code, § 5000; Gordon v. Weaver, 53 S. W. 740.

[939] Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[940] See Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

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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."[941] 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.[942] 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.[943]

§ 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.[944] Thus a judgment recovered against a demandant who has an equitable title only, will not estop him if he afterwards acquires the legal title.[945] "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,

[941] Hawley v. Simons, 102 Ill. 115. And see Sturdy v. Jackaway, 4 Wall. 174, 18 L. Ed. 387.

[942] Dawley v. Brown, 79 N. Y. 390.

[943] Bazille v. Murray, 40 Minn. 48, 41 N. W. 238.

[944] Barrows v. Kindred, 4 Wall. 399, 18 L. Ed. 383; Northern Pac. R. Co. v. Smith, 16 C. C. A. 336, 69 Fed. 579; Hawley v. Simons, 102 Ill. 115; Burns v. Hodgdon, 64 Cal. 72, 28 Pac. 61; People's Sav. Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; 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.

[945] Brown v. Roberts, 24 N. H. 131.

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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 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." [946]

§ 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.[947] 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." [948] 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; [949] although such judgment may be admissible (not conclusive) evidence to show that the plaintiff has a right to the

[946] Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475.

[947] Pleak v. Chambers, 7 B. Mon. (Ky.) 565.

[948] Morse v. Marshall, 97 Mass. 519; Morrison v. Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395; Hunter v. Carroll, 67 N. H. 262, 29 Atl. 639; Holloway v. Jones, 143 Pa. 564, 22 Atl. 710; Rice v. West (Ky.) 42 S. W. 116; Cherry v. York (Tenn.) 47 S. W. 184; Millett v. Lagomarsino (Cal.) 38 Pac. 308; Keyser v. Sutherland, 59 Mich. 455, 26 N. W. 865; Masten v. Olcott, 101 N. Y. 152, 4 N. E. 274.

[949] Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393.

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way.[950] 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.[951]

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 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.[952] Thus judgment for the plaintiff, when put in evidence in a subsequent action against the same defend-

[950] Parker v. Standish, 3 Pick. (Mass.) 288.

[951] Parker v. Hotchkiss, 25 Conn. 321.

[952] Outram v. Morewood, 3 East, 346; Parker v. Leggett, 13 Rich. Law (S. C.) 171; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Small v. Haskins, 26 Vt. 209; Dunckle v. Wiles, 5 Denio (N. Y.) 296; Illinois & St. L. R. & Coal Co. v. Cobb, 82 Ill. 183; Campbell v. Cross, 39 Ind. 155; City of Providence v. Adams, 11 R. I. 190; Fritz v. Tompkins, 39 App. Div. 73, 56 N. Y. Supp. 847; Rhoads v. City of Metropolis, 36 Ill. App. 123. In Stevens v. Hughes, 31 Pa. 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, 26 Am. Dec. 600; Dutton v. Woodman, 9 Cush.

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ant 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.[953] 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.[954] According to the doctrine 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.[955] 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." [956] 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.[957] 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.[958]

255, 57 Am. Dec. 46; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733."

[953] Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402.

[954] Parker v. Leggett, 13 Rich. Law (S. C.) 171. Compare Kimball v. Hilton, 92 Me. 214, 42 Atl. 394.

[955] Potter v. Baker, 19 N. H. 166; Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; Parker v. Hotchkiss, 25 Conn. 321; Stevens v. Hughes, 31 Pa. 381; Dunckle v. Wiles, 5 Denio (N. Y.) 296. See, also, Rogers v. Ratcliff, 48 N. C. 225; Walker v. Leslie, 90 Ky. 642, 14 S. W. 682; Young v. Pritchard, 75 Me. 513.

[956] Stapleton v. Dee, 132 Mass. 279.

[957] Shettlesworth v. Hughey, 9 Rich. Law (S. C.) 387. And see Rhoads v. City of Metropolis, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468.

[958] See supra, § 614.

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§ 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.[959] But it is denied in Pennsylvania;[960] although it is thought, in that state, that the judgment in trespass might be admissible as "persuasive" evidence in favor of the successful party.[961] 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.[962] 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.[963] 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.[964]

[959] Campbell v. Cross, 39 Ind. 155; Hargus v. Goodman, 12 Ind. 629; Rice v. King, 7 Johns. (N. Y.) 20; McKnight v. Dunlop, 4 Barb. (N. Y.) 36; Parker v. Leggett, 13 Rich. Law (S. C.) 171.

[960] Kerr v. Chess, 7 Watts, 367; Sabins v. McGhee, 36 Pa. 453.

[961] Hoey v. Furman, 1 Pa. 295, 44 Am. Dec. 129.

[962] Stokes v. Fraley, 50 N. C. 377.

[963] 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.

[964] Keyser v. Sutherland, 59 Mich. 455, 26 N. W. 865.

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§ 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 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.[965] 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.[966] 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.[967] Further, the judgment in this action is res judicata only as to the land in issue, though plaintiff's claim thereto is based on his claim to a larger tract including it.[968] Where the record shows a judgment in favor of the plaintiff because the defendant in possession was plaintiff's tenant, and therefore estopped to deny his title, such judgment is no bar to a subsequent action by the other defendants against said plaintiff to recover the same land.[969] And where the action is trespass to try title and for partition, and the defendant does not dispute the title, but defends only against the trespass and partition, a judgment in his favor does not bar the plaintiff from again asserting title, because it shows on its face that the title was not adjudicated.[970]

[965] Fisk v. Miller, 20 Tex. 579; Cotton v. Jones (Tex. Civ. App.) 27 S. W. 191; Rackley v. Fowlkes, 89 Tex. 613, 36 S. W. 77; New York & T. Land Co. v. Votaw, 16 Tex. Civ. App. 585, 42 S. W. 138; Zapeda v. Rahm, 19 Tex. Civ. App. 648, 48 S. W. 212; Birdseye v. Shaeffer (Tex. Civ. App.) 57 S. W. 987; Dyson v. Leek, 5 Strob. (S. C.) 141.

[966] Mitchell v. Robertson, 15 Ala. 412; Camp v. Forrest, 13 Ala. 114.

[967] Bank of State v. Bridges, 11 Rich. Law (S. C.) 87.

[968] Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347.

[969] Linberg v. Finks, 7 Tex. Civ. App. 391, 25 S. W. 789.

[970] Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

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§ 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.[971] But nevertheless the action of partition forms no exception to the general rule that a judgment is conclusive of every 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.[972] 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.[973] "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."[974] The rule in New York is, that a judgment in an

[971] Mallett v. Foxcroft, 1 Story, 474, Fed. Cas. No. 8,989; Pierce v. Oliver, 13 Mass. 211; Nash v. Cutler, 16 Pick. (Mass.) 500; Goundie v. Northampton Water Co., 7 Pa. 238; McClure v. McClure, 14 Pa. 136; Richman v. Baldwin, 21 N. J. Law, 398; Nicely v. Boyles, 4 Humph. (Tenn.) 177, 40 Am. Dec. 638; Whillock v. Hale's Heirs, 10 Humph. (Tenn.) 64; Freem. Coten. § 529.

[972] Foxcroft v. Barnes, 29 Me. 128; Burghardt v. Van Deusen, 4 Allen (Mass.) 375; Herr v. Herr, 5 Pa. 428, 47 Am. Dec. 416; Ihmsen v. Ormsby, 32 Pa. 200; Dixson v. Warters, 53 N. C. 449; Rabb v. Aiken, 2 McCord, Eq. (S. C.) 125; Ferris v. Fisher, 67 Hun, 134, 21 N. Y. Supp. 1114; McAlexander v. Coopwood (Miss.) 25 South. 488; Rice v. Aiken, 3 Tex. Civ. App. 143, 22 S. W. 101; Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331; Pennell v. Felch, 55 Kan. 78, 39 Pac. 1023.

[973] Whittemore v. Shaw, 8 N. H. 393; Clapp v. Bromagham, 9 Cow. (N. Y.) 569; Jenkins v. Fahey, 73 N. Y. 355; Short v. Prettyman, 1 Houst. (Del.) 334; Stean v. Anderson, 4 Har. (Del.) 209; Mills v. Witherington, 19 N. C. 433; Edgerton v. Muse, Dud. Eq. (S. C.) 179; Reese v. Holmes, 5 Rich. Eq. (S. C.) 540; Dabney v. Manning, 3 Ohio, 321, 17 Am. Dec. 597; Doolittle v. Don Maus, 34 Ill. 457; Telford v. Barney, 1 G. Greene (Iowa) 575; Forder v. Davis, 38 Mo. 107; Pentz v. Kuester, 41 Mo. 450; Hart v. Steedman, 98

[974] Fleenor v. Driskill, 97 Ind. 27.

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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.[975] 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.[976] 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.[977] It is conclusive evidence upon the parties and their privies that the land set off to the petitioner, together with a spring of water situated thereon, was formerly held by the parties in common.[978] 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.[979] 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.[980] In some few states, the rules hitherto stated do not apply, or are accepted only with con-

Mo. 452, 11 S. W. 993; Hancock v. Lopez, 53 Cal. 362; Morenhout v. Higuera, 32 Cal. 295; Linehan v. Hathaway, 54 Cal. 251. And see Weeks v. Edwards, 176 Mass. 453, 57 N. E. 701; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387; Christy v. Spring Valley Waterworks, 97 Cal. 21, 31 Pac. 1110.

[975] Jordan v. Van Epps, 85 N. Y. 427.

[976] Doolittle v. Don Maus, 34 Ill. 457.

[977] Bobb v. Graham, 89 Mo. 200, 1 S. W. 90; Choppin v. Union Nat. Bank, 47 La. Ann. 660, 17 South. 201; Beaver v. Irwin, 6 Ind. App. 285, 33 N. E. 462; Pearce v. Jackson, 84 Tex. 515, 19 S. W. 690; Moy v. Moy, 111 Iowa, 161, 82 N. W. 481; Phillips v. Winter (Cal.) 37 Pac. 154.

[978] Edson v. Munsell, 12 Allen (Mass.) 600.

[979] Christy v. Spring Valley Waterworks, 68 Cal. 73, 8 Pac. 849; Fleenor v. Driskill, 97 Ind. 27.

[980] Kenney v. Phillipy, 91 Ind. 511.

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siderable 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."[981] 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.[982] 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.[983]

§ 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 conveyances upon sale under the judgment are a bar in law and equity as against all such parties or their representatives.[984] 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.[985] And where such proceed-

[981] Ross v. Pleasants, 19 Pa. 168.

[982] Mayo v. Tudor's Heirs, 74 Tex. 471, 12 S. W. 117.

[983] Colton v. Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

[984] Jenkins v. Fahey, 73 N. Y. 355. But a decree of partition is not res judicata on the question of title as against claimants or other persons who were strangers to the partition suit. Pacific Bank v. Hannah, 32 C. C. A. 522, 90 Fed. 72; Gunn v. Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

[985] 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.

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ings 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.[986] 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.[987] 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.[988]

§ 661a. Landlord's Action for Recovery of Possession.

In several of the states, statutes authorize summary proceedings by a landlord to evict a tenant for non-payment of rent and to recover possession of the leased premises, of which the so-called "dispossess proceedings" familiar in practice in the state of New York may serve as a type. Judgment rendered in such an action is conclusive, as between the parties, in all subsequent proceedings, of the relation of landlord and tenant, including questions as to the existence and validity of the lease, its alleged cancellation or renewal, the amount of rent in arrear, and the landlord's right to regain possession.[989] Thus, the tenant cannot afterwards set up an oral agree-

417; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Reese v. Holmes, 5 Rich. Eq. (S. C.) 540; Blakeley v. Calder, 15 N. Y. 617; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Croghan v. Livingston, 17 N. Y. 218.

[986] Cook v. Allen, 2 Mass. 461.

[987] Wills v. Slade, 6 Ves. 498; Gaskell v. Gaskell, 6 Sim. 643. See Goodess v. Williams, 2 Younge & C. 595.

[988] Monarque v. Monarque, 80 N. Y. 320. See, also, Nodine v. Greenfield, 7 Paige, 544; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Cheeseman v. Thorne, 1 Edw. Ch. 629; Tyler v. Cartwright, 40 Mo. App. 378.

[989] Reich v. Cochran, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607; Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497; McCotter v. Flynn, 30 Misc. Rep. 119, 61 N. Y. Supp. 786; Grafton v. Brigham, 70 Hun, 131, 24 N. Y. Supp. 54; Racke v. Anheuser-Busch Brewing Ass'n, 17 Tex.

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ment under which he would have been entitled to retain possession, and especially when such oral agreement is inconsistent with the terms of the written lease.[990] But summary proceedings for the possession of demised property being against the person in possession or claiming possession, a landlord is not necessarily precluded by such proceeding from showing a different person to have been in fact his lessee, or liable to him under an agreement creating a tenancy.[991] And it is said that, in an action on notes given for rent, a finding that previous summary proceedings brought by the lessor against the lessee, and the judgment therein, were for the recovery of possession of the property and damages for the detention thereof, will not support a conclusion that the notes were merged in such judgment.[992]

§ 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 agreement to pay a specified sum.[993] 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.[994]

§ 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, or of trespass, or a suit to quiet title, or to enforce a foreclosure, for the reason that the questions involved in the two proceedings are different. "The ob-

Civ. App. 167, 42 S. W. 774; Hammer v. Woods, 6 Tex. Civ. App. 179, 24 S. W. 942; Monteith v. Gehrig, 43 Ill. App. 465; McClelland v. Patterson (Pa.) 10 Atl. 475. Compare Chamberlain v. Hopper, 34 N. J. Law, 220.

[990] Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497.

[991] La Farge v. Park, 1 Edm. Sel. Cas. (N. Y.) 223.

[992] Campbell v. Nixon, 2 Ind. App. 463, 28 N. E. 107.

[993] Hurley v. Lamoreaux, 29 Minn. 138, 12 N. W. 447.

[994] Cobb v. Arnold, 12 Metc. (Mass.) 39; Jones v. Reynolds, 7 Car. & P. 355.

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ject 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."[995] "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."[996] Nor does the judgment furnish any evidence of a right in the plaintiff to recover in an action for mesne profits.[997] 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.[998] 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.[999] A verdict 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

[995] Riverside Co. v. Townsend, 120 Ill. 9, 9 N. E. 65; Vahle v. Brackensieck, 145 Ill. 231, 34 N. E. 524; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; People's Pure-Ice Co. v. Trumbull, 17 C. C. A. 43, 70 Fed. 166; Mattox v. Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Williams v. Newcomb, 16 Mo. App. 185; Harvie v. Turner, 46 Mo. 444; Carter v. Scaggs, 38 Mo. 302; Wanborg v. Karst, 4 Mo. App. 563; Walls v. Endel, 20 Fla. 86; Fain v. Miles (Ky.) 60 S. W. 939; Fishburne v. Engledove, 91 Va. 548, 22 S. E. 354; Robinson v. Allison, 97 Ala. 596, 12 South. 382; Richardson v. Callihan, 73 Miss. 4, 19 South. 95; Westmoreland v. Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167; House v. Reavis, 89 Tex. 626, 35 S. W. 1063; Deisher v. Gehre, 45 Kan. 583, 26 Pac. 3; Redden v. Tefft, 48 Kan. 302, 29 Pac. 157; Soden v. Roth, 9 Kan. App. 826, 61 Pac. 500; Gladwell v. Hume, 18 Ohio Cir. Ct. R. 845; Bishop v. Perrin (Ariz.) 35 Pac. 1059; Dale v. Doddridge, 9 Neb. 138, 1 N. W. 999.

[996] Mattox v. Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64.

[997] Casey v. McFalls, 3 Sneed (Tenn.) 115.

[998] Mitchell v. Davis, 23 Cal. 381; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544.

[999] Norwood v. Kirby's Adm'r, 70 Ala. 397. But see Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175.

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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.[1000] 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.[1001]

§ 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.[1002] 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

[1000] Bradley v. West, 68 Mo. 69. But a judgment for the possession of land, rendered in a suit for forcible detainer, is not conclusive as to the ownership of a crop planted on the land before the action was commenced, and grown during the pendency thereof. McKean v. Smoyer, 37 Neb. 694, 56 N. W. 492.

[1001] Merrin v. Lewis, 90 Ill. 505.

[1002] City and County of San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096; Starr v. Stark, 1 Sawy. 275, Fed. Cas. No. 13,316; Indiana, B. & W. R. Co. v. Allen, 113 Ind. 308, 15 N. E. 451; Davis v. Lennen, 125 Ind. 85, 24 N. E. 885; Morarity v. Calloway, 134 Ind. 503, 34 N. E. 226; Hall v. Craig, 125 Ind. 523, 25 N. E. 538; Utley v. Fee, 33 Kan. 683, 7 Pac. 555; Reed v. Douglas, 74 Iowa, 244, 37 N. W. 181, 7 Am. St. Rep. 476; Bryan v. Alexander, 111 N. C. 142, 15 S. E. 1031; Hanchett v. Auditor General, 124 Mich. 424, 83 N. W. 103; Smith v. Chicago, M. & St. P. Ry. Co., 83 Wis. 271, 53 N. W. 550; Doyle v. Hallam, 21 Minn. 515. See Muffley v. Turner, 141 Ind. 580, 40 N. E. 913. A decree in a proceeding under the "burnt records act," finding the title to land in petitioner as against defendant, has the effect of settling the title as between the parties as effectually as though rendered on a bill to quiet title, or to remove a cloud from title, and cuts off every defense the defendant might have interposed. Harms v. Coryell, 177 Ill. 496, 53 N. E. 87.

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of the finding and judgment.[1003] 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.[1004]

§ 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 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.[1005]

§ 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.[1006] In any case, the judgment is final and conclusive as to the validity of the mortgage,[1007] the power of the mortgagor to execute it,[1008] the fact that the debt secured remains unpaid,[1009] and that the mortgagor's equity of redemption is barred.[1010] So, in a

[1003] Marion County Com'rs v. Welch, 40 Kan. 767, 20 Pac. 483; Burton v. Huma (C. C.) 37 Fed. 738.

[1004] Mueller v. Henning, 102 Ill. 646.

[1005] Sigmon v. Hawn, 86 N. C. 310; Gay v. Stancell, 76 N. C. 369.

[1006] Bundy v. Cunningham, 107 Ind. 360, 8 N. E. 174; Ulrich v. Drischell, 88 Ind. 354; Graydon v. Hurd, 5 C. C. A. 258, 55 Fed. 724. See Walraven v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 53 S. W. 1028.

[1007] Black v. Caldwell (C. C.) 83 Fed. 880; Finley v. Houser, 22 Or. 562, 30 Pac. 494; Northern Trust Co. v. Crystal Lake Cemetery Ass'n, 67 Minn. 131, 69 N. W. 708.

[1008] Craighead v. Dalton, 105 Ind. 72, 4 N. E. 425.

[1009] Sibley v. Alba, 95 Ala. 191, 10 South. 831.

[1010] Allen v. Allen, 106 Cal. 137, 39 Pac. 436.

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proceeding to foreclose a contract for the sale of real estate as a mortgage, the identity of the land described therein, the breach of the same, and the amount remaining due thereon, are material issues determined by the decree.[1011] If a personal judgment for a deficiency is given against the mortgagor, the decree is also conclusive upon the question of his liability therefor,[1012] except in the case where the mortgagor is a nonresident and is not personally served with process within the state, and does not appear in the action; in this event, the judgment will not preclude him from contesting his liability for a deficiency, but it will be conclusive as to the ownership of the mortgage and as to the right of the mortgagee to have the lands sold and applied on the debt secured by the mortgage.[1013] In actions of this kind, as in others, the doctrine of virtual representation may apply. Thus, where, in a suit to foreclose a mortgage, all the persons having vested estates, and some of those having contingent estates in remainder, are made parties defendant, a decree of foreclosure rendered therein is binding upon a person born pending suit whose only interest is a contingent remainder of the same class as that of those who are parties to the suit, since he is before the court by representation.[1014] But it seems that the judgment is not binding on the wife, heir, or administrator of the deceased mortgagor, if they are not made parties to the action.[1015] A similar rule applies to other lien claimants, such as mortgagees senior or junior to the plaintiff. If joined as defendants in the action, their interests will be concluded by the decree; but otherwise not.[1016] General creditors cannot question the construction placed on a mortgage of their debtor's property, in a suit to foreclose, to which all persons having an interest in the mortgaged property are

1011 Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955.

1012 Ward v. Obenauer, 119 Mich. 17, 77 N. W. 305.

1013 In re James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774.

1014 McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672.

1015 Beer v. Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

1016 Mann v. Peck, 45 W. Va. 18, 30 S. E. 206; Case v. Bartholow, 21 Kan. 300; Jacobie v. Mickle, 70 Hun, 599, 24 N. Y. Supp. 87; Stanbrough v. Cook, 83 Iowa, 705, 49 N. W. 1010. See Scribner v. York, 89 Iowa, 737, 55 N. W. 10; Banning v. Sabin, 45 Minn. 431, 48 N. W. 8; English v. Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Brill v. Shively, 93 Cal. 674, 29 Pac. 324.

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made parties.[1017] But on the other hand, a judgment foreclosing a mortgage in a suit in which the question whether or not the mortgage was executed to defraud the mortgagor's creditors is not in issue does not preclude a creditor of the mortgagor, who was not a party to the foreclosure suit, from attacking the mortgage on that ground.[1018]

§ 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.[1019] 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 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

[1017] Omaha & St. L. Ry. Co. v. O'Neill, 81 Iowa, 463, 46 N. W. 1100.

[1018] Brookes v. Munoz, 125 N. Y. 256, 26 N. E. 258. And see Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572; Clements v. Davis, 155 Ind. 624, 57 N. E. 905.

[1019] Shelton v. Alcox, 11 Conn. 240; Carey v. Wilcox, 6 N. H. 177; Porter's Lessee v. Matthews, 2 Har. (Del.) 30; Sellick v. Addams, 15 Johns. (N. Y.) 197; Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Murray v. Blackledge, 71 N. C. 492; Loring v. Whittemore, 13 Gray (Mass.) 228; Girdler v. Carter, 47 N. H. 305.

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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." [1020]

§ 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.[1021]

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 subseqent conversion to recover the value.[1022] 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.[1023] 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.[1024] In general, the judgment in this species of action will not be conclusive upon the question of ownership, 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

[1020] Davis v. Havard, 15 Serg. & R. 165, 16 Am. Dec. 537.

[1021] Smith v. Walker, 77 Ga. 289, 3 S. E. 256.

[1022] Stewart v. Martin, 16 Vt. 397.

[1023] Rice v. King, 7 Johns. (N. Y.) 20; Johnson v. Smith, 8 Johns. (N. Y.) 383.

[1024] Harris v. Miner, 28 Ill. 135.

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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.[1025]

§ 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.[1026]

§ 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.[1027] 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." [1028] 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 case.[1029] In order that the judgment may be conclusive upon

[1025] Greaves v. Middlebrooks, 59 Ga. 240.

[1026] Atkinson v. White, 60 Me. 396.

[1027] Allen v. Butman, 138 Mass. 586; Schwenk v. Widemeyer, 60 Hun, 579, 14 N. Y. Supp. 456. See Hannon v. O'Dell, 71 Conn. 698, 43 Atl. 147.

[1028] Missouri Pac. R. Co. v. Levy, 17 Mo. App. 501. But a judgment for plaintiff in replevin will not debar the defendant from asserting against the plaintiff personally a claim for compensation for the care of the property replevied, which was not set up in the replevin suit. Wright v. Broome, 67 Mo. App. 32.

[1029] McFadden v. Ross, 108 Ind. 512, 8 N. E. 161; Huffman v. Knight, 36 Or. 581, 60 Pac. 207. But it is said that, where the record in replevin fails to disclose what issues were litigated, a finding by the court against plaintiff, and judgment that he take nothing by his complaint, are conclusive of

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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.[1030] 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.[1031] It is well settled that issues tried and determined in a replevin suit cannot be again presented in an action on the replevin bond.[1032] 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.[1033] 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.[1034] 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.[1035] 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.

all issuable matters; and, in a subsequent action by defendants to recover the value of the property, plaintiff having failed to return it, the latter cannot show by extraneous evidence that the prior action did not determine the right of ownership. Fromlet v. Poor, 3 Ind. App. 425, 29 N. E. 1081.

1030 Emmons v. Dowe, 2 Wis. 322.

1031 Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311.

1032 Denny v. Reynolds, 24 Ind. 248; Cox v. Hartranft, 154 Pa. 457, 26 Atl. 304; Christiansen v. Mendham, 26 Misc. Rep. 662, 56 N. Y. Supp. 655.

1033 McFadden v. Fritz, 110 Ind. 1, 10 N. E. 120; Brady v. Beadleston, 62 Hun, 548, 17 N. Y. Supp. 42; Sconce v. Long Bell Lumber Co., 54 Mo. App. 509. Where title to land is put in issue in replevin for logs cut therefrom, the judgment determining the title to the logs conclusively fixes the title to the land as between the parties and their privies. Wolf River Lumber Co. v. Brown, 88 Wis. 638, 60 N. W. 996.

1034 Hawley v. Warner, 12 Iowa, 42; Buck v. Rhodes, 11 Iowa, 348.

1035 Henry v. Ferguson, 55 Mich. 399, 21 N. W. 381.

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Such adjudication is equally binding on an intervening claimant as on either of the primary parties.[1036] 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 no-wise participated therein, from setting up his claim to the goods.[1037] If goods have been taken 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.[1038] 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.[1039] 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.[1040] 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.[1041] So, also, a judgment for the lienholder in replevin, brought to recover possession of goods held as a lien for board, is not a bar to an action by the lienholder on the board bill.[1042] Judgment for plaintiff in replevin for the recovery of certain hotel furniture claimed by him as head of a family, is not a bar

[1036] Witter v. Fisher, 27 Iowa, 9.

[1037] Frank v. Jenkins, 22 Ohio St. 597.

[1038] Carlton v. Davis, 8 Allen (Mass.) 94. And see McDowell v. Gibson, 58 Kan. 607, 50 Pac. 870.

[1039] Daggett v. Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752.

[1040] Ewald v. Waterhout, 37 Mo. 602.

[1041] Briggs v. Milburn, 40 Mich. 512. See Robinson v. Kruse, 29 Ark. 575.

[1042] Rosenow v. Gardner, 99 Wis. 358, 74 N. W. 982.

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to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived plaintiff of the use.[1043] And recovery in replevin of part of a fraudulent purchase of goods is not a bar to trover for the remainder, those recovered being all that were in defendant's possession when the writ issued.[1044] On the same principle, judgment in a replevin suit brought to recover chattels wrongfully taken from the owner's possession, is not a bar to a subsequent proceeding by him against the same defendant to recover damages for the conversion of money or other irrepleviable property, taken at the same time.[1045] And where, in replevin, the owner obtains judgment merely for the value of the property, and not for its return, such judgment, while unsatisfied, is no bar to another action to recover the same property from one who has purchased it from the judgment debtor, with or without notice.[1046] But defendant in replevin, who has recovered damages for wrongful detention, is barred thereby from suing for damages on account of depreciation in the property.[1047]

§ 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.[1048]

1043 Mathews v. Herron, 102 Iowa, 45, 67 N. W. 226.

1044 Reid, Murdoch & Co. v. Ferris, 112 Mich. 695, 71 N. W. 484, 67 Am. St. Rep. 437.

1045 Lovell v. Hammond Co., 66 Conn. 500, 34 Atl. 511.

1046 Ledbetter v. Embree, 12 Ind. App. 617, 40 N. E. 928.

1047 Teel v. Miles, 51 Neb. 542, 71 N. W. 296. And see Shepherd v. Moodhe, 8 Misc. Rep. 607, 29 N. Y. Supp. 392.

1048 Hughes v. Jones, 2 Md. Ch. 178; Wittick v. Traun, 25 Ala. 317.

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CHAPTER XIX.

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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

[1] Supra, § 506; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.
[2] Supra, § 504, and cases cited.

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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 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-

[3] 5 Coke, 61.

[4] Slocomb v. Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740. In California, the Code of Civil Procedure, § 1908, declares that a judgment is a bar to a subsequent action only "when the same thing under the same title" is litigated. See South San Bernardino Land & Imp. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699.

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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.

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

[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 Metc. (Mass.) 247.

[6] Ries v. Rowland (C. C.) 11 Fed. 657; Cooksey v. Kansas City, St. J. & C. B. R. Co., 74 Mo. 477.

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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 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]

[7] Grant v. Burgwyn, 88 N. C. 95, citing Higgens' Case, 6 Coke, 45; King v. Hoare, 13 Mees. & W. 494.

[8] Schuler v. Israel (C. C.) 27 Fed. 851; Connecticut Mut. Life Ins. Co. v. Jones (C. C.) 8 Fed. 303. Where a payee takes judgment on a note given as security for other notes of the same maker, the latter notes become merged in the judgment. Peoria Savings, L. & T. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083. After judgment has been recovered before a justice of the peace on a judgment note, the warrant of attorney therein is functus officio, and no judgment can be entered thereon in the court of common pleas, the debt being merged in the higher security. Dixon v. Miller, 20 Pa. Co. Ct. R. 335. But where, in an action against the maker and indorser of a note, judgment is obtained against the indorser alone, the note is not merged in the judgment so as to prevent an action thereon by the indorser. Still v. Lombardi, 8 Tex. Civ. App. 315, 27 S. W. 845. And see McLennan v. McMonies, 23 U. C. Q. B. 114; Tarleton v. Allhusen, 2 Adol. & El. 32.

[9] Caylus v. New York, K. & S. R. Co., 76 N. Y. 609.

[10] Toby v. Brown, 11 Ark. 308. And see Tabor v. The Cerro Gordo (D. C.) 54 Fed. 391.

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§ 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 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

[11] Mutual Life Ins. Co. v. Newton, 50 N. J. Law, 571, 14 Atl. 756. And see Laur v. People, 17 Ill. App. 448; Meyer v. Meyer, 40 Ill. App. 94; Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

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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 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 high-

[12] See infra, § 847.

[13] See infra, § 864. And see Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Stearns v. Wiborg, 123 Mich. 584, 82 N. W. 283.

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est 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 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

[14] Garrison v. New York City, 21 Wall. 196, 22 L. Ed. 612; Louisiana v. City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Black. Const. Prohib. § 131. See supra, vol. 1, §§ 9–11.

[15] Taylor v. Root, *43 N. Y. 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 Kan. 454, 15 Pac. 584.

[16] Thatcher v. Gammon, 12 Mass. 268.

[17] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

[18] Biddle v. Wilkins, 1 Pet. 586, 7 L. Ed. 315; Talmage v. Chapel, 16 Mass. 71; Slauter v. Chenowith, 7 Ind. 211; Young v. O'Neal, 3 Sneed (Tenn.) 55; Hall v. Harrison, 21 Mo. 227, 64 Am. Dec. 225; Allen v. Lyman, 27 Vt. 20; Trecothick v. Austin, 4 Mason, 16, Fed. Cas. No. 14,164.

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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 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] Also, as will be shown more fully in a later section,[25] a party cannot escape the estoppel of a judgment merely by varying the form of his action. But in a suit for the amount of a forged note sold

[19] Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593.

[20] Curtis v. Gooding, 99 Ind. 45; Pence v. Armstrong, 95 Ind. 191; Manns v. Brookville Nat. 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. 116.

[23] Carit v. Williams, 74 Cal. 183, 15 Pac. 751; Murphy v. Manning, 134 Mass. 488.

[24] Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655. For similar rulings, see supra, § 632.

[25] Infra, § 729.

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to plaintiff by defendant, based, in one count, on the implied warranty that the note was genuine, and, in another, on the want of consideration for the purchase price thereof, where plaintiff was required to elect between the two counts, and proceeded on the former one, it was held that a judgment against him thereon would be no bar to the reinstatement of the other count and a trial thereon.[26]

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.[27]

§ 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, and a valid and subsisting judgment.[28] 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

[26] Ware v. McCormack, 96 Ky. 139, 28 S. W. 157.

[27] See supra, vol. 1, § 173, and vol. 2, § 516.

[28] Cackley v. Smith, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311; Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109. Where there have been two adjudications of the same matter between the same parties, with opposite results, the estoppel of one judgment will neutralize that of the other, and both parties may assert their claims anew. Shaw v. Broadbent, 129 N. Y. 114, 29 N. E. 238. The mere setting aside of a verdict for plaintiff, with the remark by the court that a nonsuit should have been entered, without showing why, is not such a judgment for defendant as may be availed of in bar of the same claim against his estate in the orphans' court. In re Dunlevy's Estate, 10 Pa. Co. Ct. R. 454.

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from investigating the conduct of the guardian in making the sale.[29] 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.[30] 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.[31] 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.[32] 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.[33] 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.[34] So a judgment which is ineffectual, by reason of a mistake

[29] Holbrook v. Brooks, 33 Conn. 347.

[30] Ferguson v. Town of Sheffield, 52 Vt. 77.

[31] Hancock v. Flynn, 54 Hun, 638, 8 N. Y. Supp. 133; Plummer v. Hatton, 51 Minn. 181, 53 N. W. 460; Springer v. Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; Kansas City, P. & G. R. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Reading v. Price, 3 J. J. Marsh. (Ky.) 61, 19 Am. Dec. 162; Clark's Adm'r v. Stroud, 1 Swan (Tenn.) 274; Semple v. Bank of British Columbia, 5 Sawy. 394, Fed. Cas. No. 12,660; Yon v. Baldwin, 76 Ga. 769.

[32] Kintz v. McNeal, 1 Denio (N. Y.) 436; Wamsley v. Robinson, 28 La. Ann. 793; Basom v. Taylor, 39 Mich. 682; Blin v. Campbell, 14 Johns. (N. Y.) 432; Johnson v. Logan, 68 Ill. 313; McCarty v. Kinsey, 154 Ind. 447, 57 N. E. 108.

[33] Rhoades v. Delaney, 50 Ind. 468.

[34] Briscoe v. Stephens, 2 Bing. 213; Blakeslee v. Murphy, 44 Conn. 188; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Zalesky v. Iowa State Ins. Co., 102 Iowa, 512, 70 N. W. 187; McCadden v. Slausen, 96 Tenn. 586, 36 S. W. 378. Nor is it necessary that the former judgment should first be reversed; it is a mere nullity. Green v. Clawson, 5 Houst. 159. Compare Levey v. Norton, 10 Pa. Co. Ct. R. 278.

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in the name of one of the plaintiffs, will not preclude them from bringing a new suit to recover upon the original demand.[35] 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.[36]

§ 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.[37] 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.[38] 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.[39] On the same rule, where a prisoner

[35] Wixom v. Stephens, 17 Mich. 518, 97 Am. Dec. 205.

[36] Pond v. Makepeace, 2 Metc. (Mass.) 114.

[37] Phillips v. Lewis, 109 Ind. 62, 9 N. E. 395; Kelley v. Mize, 3 Sneed (Tenn.) 59; Davis v. Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; Osborn v. United States, 9 Ct. Cl. 153; Tankersly v. Pettis, 71 Ala. 179; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Thornton v. Eppes, 6 Fla. 546; Parker v. Wright, 62 Ind. 398; Town v. Smith, 14 Mich. 348; Colburn v. Woodworth, 31 Barb. (N. Y.) 381; Griffin v. Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Bolton v. Hey, 168 Pa. 418, 31 Atl. 1097; Gale v. Best, 20 Wis. 44; Fluker v. Herbert, 27 La. Ann. 284; Smith v. Borden, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585, 33 Am. St. Rep. 867. See Hecht v. Mothner, 4 Misc. Rep. 536, 24 N. Y. Supp. 826. Where a plaintiff was entitled to relief only in equity, but his bill was erroneously dismissed on the ground that he had an adequate remedy at law, and he did not appeal from such decree, the decision in equity was conclusive against him, preventing his maintaining an action at law. Barnett v. Smart, 158 Mo. 167, 59 S. W. 235.

[38] McCrillis v. Harrison Co., 63 Iowa, 592, 19 N. W. 679.

[39] McLean v. Hugarin, 13 Johns. (N. Y.) 184.

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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.[40]

§ 681a. Judgment Procured by Fraud.

Numerous decisions hold that a judgment duly rendered by a court of competent jurisdiction is none the less conclusive, or not the less a complete bar to the further litigation of the same cause of action between the same parties, because it may have been procured by the fraud of the successful party.[41] On the other hand, there are authorities to the effect that, when a former judgment between the parties is pleaded in bar of the present action, it may be shown by way of replication that the judgment pleaded was fraudulently obtained, and thereby its effect as an estoppel will be avoided.[42] If the suit in which the judgment was entered was merely collusive,—that is, a fraudulent arrangement between the parties of record to trick the real party in interest out of his rights,—there is good ground for holding that the latter should not be prejudiced by it as an estoppel or a bar to his proper claims.[43] But the manufacture and use of perjured testimony is not fraud of the kind which will justify courts in disregarding the estoppel of a judgment apparently regular and fair on its face.[44]

§ 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.[45] It has been thought, however,

[40] Ex parte Jilz, 64 Mo. 205, 27 Am. Rep. 218.

[41] Peninsular Iron Co. v. Eells, 32 U. S. App. 348, 15 C. C. A. 189, 68 Fed. 24; Whitaker v. Merrill, 28 Barb (N. Y.) 526.

[42] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

[43] Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 South. 98; Kerr v. Blodgett, 25 How. Prac. 303.

[44] Gusman v. Hearsey, 28 La. Ann. 709, 26 Am. Rep. 104; Ross v. Wood, 70 N. Y. 8; Verplanck v. Van Buren, 11 Hun, 328.

[45] Needham v. Bremner, L. R. 1 C. P. 583; Reed v. Proprietors of Locks

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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 of a conclusive operation to the mere verdict.[46] 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.[47] 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.[48] 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

& Canals on Merrimac River, 8 How. 274, 12 L. Ed. 1077; Smith v. McCool, 16 Wall. 560, 21 L. Ed. 324; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Saylor v. Hicks, 36 Pa. 392; Ferguson v. Staver, 40 Pa. 213; Chester City Presbyterian Church v. Conlin, 11 Pa. Super. Ct. 413; Lorillard v. Clyde, 99 N. Y. 196, 1 N. E. 614; De Forest v. Andrews, 27 Misc. Rep. 145, 58 N. Y. Supp. 358; Humphreys v. Browne, 19 La. Ann. 158; Attica State Bank v. Benson, 8 Kan. App. 566, 54 Pac. 1037; 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 Neb. 124, 93 Am. Dec. 333; Gapen v. Bretternitz, 31 Neb. 302, 47 N. W. 918; Pearson v. Post, 2 Dak. 220, 9 N. W. 684; In re Holbert's Estate, 57 Cal. 257. Compare Kane v. Dulex, 3 E. D. Smith, 127; Perry v. King, 117 Ala. 533, 23 South. 783; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[46] See Hume v. Schintz, 90 Tex. 72, 36 S. W. 429; Id., 91 Tex. 204, 42 S. W. 543; Ball v. Trenholm (D. C.) 45 Fed. 588. In Massachusetts, it is said that a verdict in favor of the plaintiff conclusively establishes his right to the property in suit, where there is no showing that a judgment will not follow in due course, although a continuance was granted after the verdict was rendered. Downer v. Cripps, 170 Mass. 345, 49 N. E. 644.

[47] Felter v. Mulliner, 2 Johns. (N. Y.) 181.

[48] See Webster v. Dundee Mortg. & Trust Co., 93 Ga. 278, 20 S. E. 310. In Georgia, it is said that, while a declaration and a verdict thereon in the plaintiff's favor, upon which no judgment was ever entered, are not admissible to show an adjudication of the matters set forth in such declaration, or as a conclusive estoppel against the defendant therein as to such matters, they are competent for the purpose of showing, as between the parties and

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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.[49] 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.[50] 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."[51] 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.[52]

§ 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 merger of the cause of action, and it does not bar a second action on the same demand.[53] Thus, where a judgment by confession is re-

their privies in estate, the independent fact that such a verdict was rendered in the case in which that declaration was filed, and are admissible, if otherwise relevant, to show that the parties were at that time at issue upon the particular facts therein pleaded, and as a circumstance, in connection with other and independent evidence, tending to show acquiescence in the verdict and its consequences, to be weighed by the jury in determining whether such acquiescence was attributable to the verdict itself, or to other and distinct causes. Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904.

[49] Estep v. Hutchman, 14 Serg. & R. (Pa.) 435.

[50] Pollitz v. Schell (C. C.) 30 Fed. 421.

[51] Nash v. Hunt, 116 Mass. 249.

[52] Hawks v. Truesdell, 99 Mass. 557. And see Whitney v. Bayer, 101 Mich. 151, 59 N. W. 414.

[53] City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42; French v. Edwards, 4 Sawy. 125, Fed. Cas. No. 5,097; Goodrich v. Bodurtha, 6 Gray (Mass.) 323; Fries v. Pennsylvania R. Co., 98 Pa. 142; Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Borden Manuf'g Co. v. Barry, 17 Md. 419; Flemings v. Riddick's Ex'r, 5 Grat. (Va.) 272, 50 Am.

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versed 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.[54] 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.[55] 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.[56] 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.[57] But a secondary or dependent judgment may

Dec. 119; Taylor v. Smith, 4 Ga. 133; Board of Education of City and County of San Francisco v. Fowler, 19 Cal. 11; Poole v. Seney, 70 Iowa, 275, 24 N. W. 520; Chicago Forge & Bolt Co. v. Rose, 69 Ill. App. 123; Porter v. Leache, 56 Mich. 40, 22 N. W. 104; Jenkinson v. Hilands, 146 Pa. 380, 23 Atl. 394; Roll v. Davison, 165 Pa. 392, 30 Atl. 987; McElroy v. Mumford, 62 Hun, 619, 16 N. Y. Supp. 691; Surget v. Newman, 43 La. Ann. 873, 9 South. 561; King v. Mollohan, 61 Kan. 683, 60 Pac. 731; Stanbrough v. Cook, 86 Iowa, 740, 53 N. W. 131; Chicago, R. I. & P. Ry. Co. v. Berg, 57 Ill. App. 521; Clodfelter v. Hulett, 92 Ind. 426; Edgar v. Greer, 10 Iowa, 279; Atkison v. Dixon, 96 Mo. 582, 10 S. W. 163.

[54] Edgar v. Greer, 10 Iowa, 279.

[55] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

[56] Pittsburgh, Ft. W. & C. R. Co. v. Reno, 123 Ill. 273, 14 N. E. 195.

[57] Turley v. Turley, 85 Tenn. 251, 1 S. W. 891.

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in some cases stand, although the original or principal judgment falls. Thus, a decree confirming the title of a purchaser of land at 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.[58] 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.[59] And the verdict of a former jury in the same cause, which has been set aside by the court, is not evidence.[60]

§ 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.[61] 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 can-

[58] Gould v. Sternburg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138.

[59] Small's Appeal (Pa.) 15 Atl. 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. 551. A judgment, in an action against a county on a contract, adjudging the contract invalid for want of authority in the county to make it, is not a bar to a subsequent suit on the same contract after it has been legalized by a curative act of the legislature. Steele County v. Erskine, 39 C. C. A. 173, 98 Fed. 215.

[60] Ridgely v. Spenser, 2 Bin. (Pa.) 70.

[61] Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Young v. Brehl, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892; Chase v. Jefferson, 1 Houst. (Del.) 257; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. But compare People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Fresno Milling Co. v. Fresno Canal & Irrigation Co. (Cal.) 36 Pac. 412; Taylor v. Smith, 4 Ga. 133; Brown v. Cody, 115 Ind. 484, 18 N. E. 9.

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not be pleaded or given in evidence for any purpose in any subsequent suit.[62] 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.[63]

§ 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.[64] Reasonable as this view appears, it must be admitted that it is opposed by a settled line of decisions in numerous other states.[65] But at any rate, though an application for an appeal may be filed, if it is never allowed or perfected, and no

[62] Sheldon v. Van Vleck, 106 Ill. 45; Preachers' Aid Soc. v. England, Id. 125. Compare Ferris v. Udell, 139 Ind. 579, 38 N. E. 180.

[63] Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

[64] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Creighton v. Keith, 50 Neb. 810, 70 N. W. 406; Cloud v. Wiley, 29 Ark. 80; Moore v. Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; People v. Rickert, 159 Ill. 496, 42 N. E. 884; Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun, 78, 25 N. Y. Supp. 1068; Thompson v. Giffin, 69 Tex. 139, 6 S. W. 410; Smith v. Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869; Buchanan v. Logansport, C. & S. W. Ry. Co., 71 Ind. 265; Willard v. Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; Curtis v. Donnell, 3 Mont. 211; Souter v. Baymore, 7 Pa. 415, 47 Am. Dec. 518.

[65] Southern Ry. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762; Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; In re Blythe's Estate, 99 Cal. 472, 34 Pac. 108; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; Story v. Story & Isham Commercial Co., 100 Cal. 41, 34 Pac. 675; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Byrne v. Prather, 14 La. Ann. 653 (compare Succession of Gaines, 45 La. Ann. 1237, 14 South. 233); Ketchum v. Thatcher, 12 Mo. App. 185; Sherman v. Dilley, 3 Nev. 21; Haynes v. Ordway, 52 N. H. 284; De Camp v. Miller, 44 N. J. Law, 617; Texas Trunk R. Co. v. Jackson, 85 Tex. 605, 22 S. W. 1030; Cunningham v. Holt, 12 Tex. Civ. App. 150, 33 S. W. 981. And see, supra, § 510, and cases there cited.

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transcript is filed in the appellate court, this will not vacate the judgment so as to affect its operation as a plea in bar.[66]

§ 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.[67] 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.[68] 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, 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.[69] And the fact

[66] Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136.

[67] Loeb v. Willis, 100 N. Y. 231, 3 N. E. 177.

[68] Phillips v. Israel, 10 Serg. & R. 391; Rose v. Roseburg & M. Turnpike Co., 3 Watts, 46.

[69] Bassett v. United States, 9 Wall. 38, 19 L. Ed. 548; Dauchy v. Goodrich,

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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.[70] 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."[71] 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.[72]

§ 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 character of finality will attach. But otherwise it is conclusive whether performed or not.[73]

§ 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 hold-

20 Vt. 127; Bissell v. Kellogg, 60 Barb. (N. Y.) 617; Kibbee v. Howard, 7 Wis. 150. But the findings of the court do not constitute a bar in a subsequent action between the same parties, unless followed by a judgment based thereon. Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515.

[70] Beall v. Pearre, 12 Md. 550.

[71] Mitchell v. Insley, 33 Kan. 654, 7 Pac. 201; Auld v. Smith, 23 Kan. 65.

[72] Creager v. Walker, 7 Bush (Ky.) 1.

[73] Brazill v. Isham, 12 N. Y. 9; supra, § 526.

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ing which he might have had.[74] 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.[75]

§ 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.[76] "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 held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered."[77] 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

[74] Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497.

[75] Hawk v. Evans, 76 Iowa, 593, 41 N. W. 368, 14 Am. St. Rep. 247. Compare Dexter, Horton & Co. v. Sayward (C. C.) 84 Fed. 296.

[76] Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Wilcox v. Kassick, 2 Mich. 165. See Roberts v. Northern Pac. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

[77] Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; Estes v. Chicago, I. & D. Ry. Co., 72 Iowa, 235, 33 N. W. 647; Andrews v. Varrell, 46 N. H. 17; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Pryar v. Bryar (C. C.) 78 Fed. 657; Bourgeois v. Jacobs, 45 La. Ann. 1310, 14 South. 68.

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action and gives to the plaintiff in lieu thereof one of a higher nature.[78]

§ 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.[79] 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.[80] 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.[81] 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.[82] 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 parties, unless reversed or modified by an appellate tribunal.[83] Follow-

[78] Bank of United States v. Merchants'. Bank, 7 Gill (Md.) 415; North British & M. Ins. Co. v. Cohn, 17 Ohio Cir. Ct. R. 185. Compare Bateman v. Grand Rapids & I. R. Co., 96 Mich. 441, 56 N. W. 28.

[79] Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419, 23 N. W. 854; Simson v. Hart, 14 Johns. (N. Y.) 75; Dickenson v. Gilliland, 1 Cow. (N. Y.) 495; Acker v. Ledyard, 8 Barb. (N. Y.) 514; Dryden v. St. Joseph & D. C. R. Co., 23 Kan. 525; Easton v. Pickersgill, 75 N. Y. 599; Johnston v. Brown, 115 Cal. 694, 47 Pac. 686; Wing v. De La Rionda, 125 N. Y. 678, 25 N. E. 1064; Hahl v. Sugo, 57 N. Y. Supp. 920, 27 Misc. Rep. 1.

[80] Wills v. Chandler, 2 Fed. 273.

[81] Wistar v. McManes, 54 Pa. 318, 93 Am. Dec. 700; Ashton's Appeal, 73 Pa. 153. Compare Heilman v. Krob, 155 Pa. 1, 25 Atl. 751.

[82] Wilson County Com'rs v. McIntosh, 30 Kan. 234, 1 Pac. 572.

[83] Spitley v. Frost (C. C.) 15 Fed. 299; Buckles v. Chicago, M. & St. P. R. Co. (C. C.) 53 Fed. 566; McDonald v. Seligman (C. C.) 81 Fed. 753; Straw v. Murphy, 179 Pa. 376, 36 Atl. 162; Burner v. Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948; Kaufman v. Schneider, 35 Ill. App. 256; Parrott v. Hodgson, 46 Ill. App. 232; Second Nat. Bank v. Haerling, 106 Iowa, 505, 76 N. W. 826.

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ing 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.[84] 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.[85] The denial of a motion to open a default, or to vacate or set aside a judgment, if not appealed from, is generally considered final and conclusive, and a bar to any further proceeding for the same purpose.[86] But on the other hand, the decision on a motion to vacate or discharge an attachment, being merely incidental or collateral to the main controversy, is not such an adjudication as will prevent the parties in interest from renewing the same contentions in another form of action or proceeding.[87] In regard to a motion to restrain the issuance of an execution, or to quash the writ, or set aside a sale made thereunder, a majority of the cases hold that the ruling thereon is a bar to any further litigation of the same issues.[88]

[84] Page v. Esty, 54 Me. 319; Grier v. Jones, 54 Ga. 154.

[85] Reeves v. Plough, 46 Ind. 350.

[86] Haneman v. Pile, 161 Pa. 599, 29 Atl. 113; Bush v. O'Brien, 47 App. Div. 581, 62 N. Y. Supp. 685; Moore v. Horner, 146 Ind. 287, 45 N. E. 341; Carlson v. Carlson, 49 Minn. 555, 52 N. W. 214; Dick v. Williams, 87 Wis. 651, 58 N. W. 1029; Chezum v. Claypool, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955; Thompson v. Connell, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818. Compare Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Dutton v. Smith, 10 App. Div. 566, 42 N. Y. Supp. 80; Monroe v. Monroe, 66 Hun, 635, 21 N. Y. Supp. 655; Royer v. Wolf, 8 Pa. Co. Ct. R. 641; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; Wolff & Co. v. Canadian Pac. Ry. Co., 89 Cal. 332, 26 Pac. 825.

[87] Frazer v. Parry, 4 Kan. App. 33, 45 Pac. 724; Miami Co. Nat. Bank v. Barkalow, 53 Kan. 68, 35 Pac. 796; State v. Bierwirth, 47 Mo. App. 551; Cox v. Allen, 91 Iowa, 462, 59 N. W. 335; Quigley v. McEvony, 41 Neb. 73, 59 N. W. 767.

[88] Sherman v. Grinnell, 179 N. Y. 50, 53 N. E. 674; Reed v. Whitlow (Ky.) 43 S. W. 686; Parker v. Obenchain, 140 Ind. 211, 39 N. E. 869; Trescott v. Lewis, 12 La. Ann. 197. Compare Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33.

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§ 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.[89] 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.[90] 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 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.[91]

[89] Ford v. Doyle, 44 Cal. 635; Chichester v. Cande, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238. And see Easton v. Pickersgill, 75 N. Y. 599; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; German Exchange Bank v. Kroder, 14 Misc. Rep. 179, 35 N. Y. Supp. 380; Johnson v. Stockham, 89 Md. 368, 43 Atl. 943; Wingo v. Hooper, 98 N. C. 482, 4 S. E. 463; Roulhac v. Brown, 87 N. C. 1; Turner v. Nachtsheim, 71 Wis. 16, 36 N. W. 637; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; Rockwell v. District Court of Lake County, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265.

[90] National Bank of Port Jervis v. Hansee, 15 Abb. N. C. (N. Y.) 488.

[91] Claggett v. Simes, 25 N. H. 402. And see Bangs v. Strong, 4 N. Y. 315.

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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.[92] 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.[93] "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."[94] Hence a plea of former recovery which discloses the fact that the former judgment was not on the merits, is bad on demurrer.[95] 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 con-

[92] Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Billing v. Gilmer, 10 C. C. A. 579, 62 Fed. 661; Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125; Sayles v. Tibbitts, 5 R. I. 79; People v. Barrett, 1 Johns. (N. Y.) 66; Vaughan v. O'Brien, 39 How. Prac. (N. Y.) 515; Stowell v. Chamberlain, 60 N. Y. 272; Heikes v. Com., 26 Pa. 513; Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449; Agnew v. McElroy, 10 Smedes & M. (Miss.) 552, 48 Am. Dec. 772; Wethered v. Mays, 4 Tex. 387; Houston v. Musgrove, 35 Tex. 594; Birch v. Funk, 2 Metc. (Ky.) 544; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Thomas v. Hite, 5 B. Mon. (Ky.) 590; Cannon v. State, 17 Ark. 365; Vanlandingham v. Ryan, 17 Ill. 25; Carson v. Clark, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; Delaney v. Reade, 4 Iowa, 292; Mahaffey v. Rogers, 2 Ohio Dec. 188; Winham v. Kline, 77 Mo. App. 36; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Verhein v. Schultz, 57 Mo. 326; Wells v. Moore, 49 Mo. 230; Tucker v. Rohrback, 13 Mich. 73; Gray v. Dougherty, 25 Cal. 266.

[93] Johnson v. White, 21 Miss. 584.

[94] Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303.

[95] Perkins v. Moore, 16 Ala. 9.

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troversy 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." [96] 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.[97]

§ 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.[98] And a learned writer is of opinion that "judgment proceeds upon the merits when the very cause of action is decided upon." [99] Now in the first place, it is clearly not intended that the judgment must be meritorious in the ethical sense.[100] It is not required that the decision be righteous. Courts are to administer justice, and yet a judgment may be "on the

[96] Carmony v. Hoober, 5 Pa. 305, Bell, J.
[97] Bore's Ex'r v. Querry's Ex'r, 4 Mart. O. S. (La.) 545, 6 Am. Dec. 713.
[98] Holthouse, Brown, Anderson, sub voce.
[99] Bigelow, Estop. p. 30.
[100] Parkes v. Clift, 9 Lea (Tenn.) 524, 531.

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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.[101] 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 meantime, 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 complaint 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.[102] A decision that the subject-matter of the suit has already been determined by a valid and subsisting judgment

[101] See Besecher v. Flory, 176 Pa. 23, 34 Atl. 926; Davie v. Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71.

[102] Hamilton Building Ass'n v. Reynolds, 5 Duer (N. Y.) 671.

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between the parties, is a decision upon the "merits" of the case.[103] 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.[104] 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.[105]

§ 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 question at issue. An interlocutory order is not such a judgment. It is not a judgment at all."[106] 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.[107]

[103] Buck v. Spofford, 35 Me. 526.

[104] Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441.

[105] Dixon v. Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

[106] Webb v. Buckelew, 82 N. Y. 555; Whitaker v. Bramson, 2 Paine, 209. Fed. Cas. No. 17,526; Hurst v. Everett (C. C.) 21 Fed. 218; Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Hibler v. Shipp, 78 Ky. 64; Kellam v. Rippey, 3 La. Ann. 202; McLane v. Spence, 11 Ala. 172; Stedman v. Poterie, 139 Pa. 100, 21 Atl. 219; Shober v. Wheeler, 120 N. C. 353, 27 S. E. 29; Hart v. Bank of Commerce, 51 Neb. 486, 71 N. W. 40. See Gallaher v. City of Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942; Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154.

[107] Proctor v. Cole, 104 Ind. 373, 3 N. E. 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.[108] 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.[109] In Iowa, the Code (section 2851) requires the judgment in an action, in case matter in abatement and matter in bar are both pleaded, and it is based on the matter in abatement, to state the fact. But if the judgment fails to state on which plea it was based, it will be presumed that it was based on the matter in bar.[110] But an entry of judgment which recites that the court found that the suit was prematurely brought, and directed a verdict for defendant, sufficiently shows that judgment was rendered on a plea in abatement, and hence is no bar to another action for the same cause.[111]

[108] Jordan v. Siefert, 126 Mass. 25; Atkins v. Anderson, 63 Iowa, 739, 19 N. W. 323; Garrett v. Greenwell, 92 Mo. 120, 4 S. W. 441; Caruthers v. Williams, 53 Mo. App. 181; Clark v. Young, 1 Cranch, 181, 2 L. Ed. 74; Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396; Birch v. Funk, 2 Metc. (Ky.) 544; Dunklee v. Goodenough, 65 Vt. 257, 26 Atl. 988.

[109] The 420 Mining Co. v. Bullion Mining Co., 3 Sawy. 634, Fed. Cas. No. 4,989; Sheldon v. Edwards, 35 N. Y. 279; Gundlin v. Hamburg-American Packet Co., 31 Abb. N. C. 437, 28 N. Y. Supp. 572.

[110] Garretson v. Ferrall, 92 Iowa, 728, 61 N. W. 251.

[111] Harrison v. Hartford Fire Ins. Co., 102 Iowa, 112, 71 N. W. 220, 47 L. R. A. 709.

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§ 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. It is just as conclusive between the parties, as to all matters necessary to support the judgment, as one rendered after answer and contest; and further, such judgment is a "judgment upon the merits," having the effect of barring any further suit between the same parties on the same cause of action.[112] "The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint."[113] 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.[114] In regard to the conclusiveness of a default judgment upon defenses which might have

[112] Leonard v. Simpson, 2 Bing. N. C. 176; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Garner v. Second Nat. Bank (C. C.) 89 Fed. 636; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817; White v. Savage, 94 Me. 145, 47 Atl. 138; Gaskill v. Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Briggs v. Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Thatcher v. Gammon, 12 Mass. 268; Newton v. Hook, 48 N. Y. 676; Jarvis v. Driggs, 69 N. Y. 143; Brown v. Mayor, etc., of City of New York, 66 N. Y. 385; Barker v. Miller, 32 App. Div. 364, 53 N. Y. Supp. 283; Henriques v. Yale University, 28 App. Div. 354, 51 N. Y. Supp. 284; 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. (Ky.) 283; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Fletcher v. Holmes, 25 Ind. 458; City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54; Doyle v. Hallam, 21 Minn. 515; Northern Trust Co. v. Crystal Lake Cemetery Ass'n, 67 Minn. 131, 69 N. W. 708; Van Valkenburgh v. City of Milwaukee, 43 Wis. 574; Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955; Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803; Kittridge v. Stevens, 16 Cal. 381; Seattle Nat. Bank v. School Dist. No. 40, 20 Wash. 368, 55 Pac. 317; supra, vol. 1, § 87.

[113] Barton v. Anderson, 104 Ind. 578, 4 N. E. 420.

[114] Argall v. Pitts, 78 N. Y. 239.

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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.[115] 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.[116] 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.[117] 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.[118] 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.[119]

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

[115] Howlett v. Tarte, 10 C. B. (N. S.) 813. And see State v. Cooley, 58 Minn. 514, 60 N. W. 338; s. c. 65 Minn. 406, 68 N. W. 66.

[116] McCalley v. Wilburn, 77 Ala. 549.

[117] Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14; Smith v. Weeks, 26 Barb. (N. Y.) 463.

[118] Fuller v. Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Binck v. Wood, 43 Barb. (N. Y.) 315; Kent v. Riley (Ky.) 47 S. W. 1082. And see infra, § 758.

[119] Hanham v. Sherman, 114 Mass. 19. And see Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.

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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.[120] 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.[121] 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.[122]

§ 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.[123] 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.[124] So a judgment

120 Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526.

121 Garrard v. Dollar, 49 N. C. 175, 67 Am. Dec. 271. See supra, vol. 1, § 91.

122 Attorney-General v. Carver, 34 N. C. 231.

123 Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Barney v. Goff, 1 D. Chip. (Vt.) 304; Sheldon v. Stryker, 34 Barb. (N. Y.) 116; Neusbaum v. Kelm, 24 N. Y. 325; Kirby v. Fitzgerald, 31 N. Y. 417; Braddee v. Brownfield, 4 Watts (Pa.) 474; Secrist v. Zimmerman, 55 Pa. 446; Weikel v. Long, Id. 238; Dean v. Thatcher, 32 N. J. Law, 470; State v. Mangum, 28 N. C. 369; Goff v. Dabbs, 4 Baxt. (Tenn.) 300; Jeffries v. Morgan, 1 Ark. 169; Kingman v. Paulsen, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611; Lagerquist v. Williams, 74 Ill. App. 17; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Sherman v. Christy, 17 Iowa, 322; Twogood v. Pence, 22 Iowa, 543.

124 Dodds v. Blackstock, 1 Pittsb. R. 46.

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by confession 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.[125] 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.[126]

§ 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.[127] 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

[125] Orr v. Mercer County Mut. Fire Ins. Co., 114 Pa. 387, 6 Atl. 696.

[126] Goucher v. Clayton, 11 Jur. (N. S.) 107.

[127] Homer v. Brown, 16 How. 354, 14 L. Ed. 970; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433; Hammergen v. Schurmeier (C. C.) 3 Fed. 77; Evans v. White, 1 Hempst. 296, Fed. Cas. No. 4,572a; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817; Greely v. Smith, 1 Woodb. & M. 181, Fed. Cas. No. 5,749; Book v. United States, 31 Ct. Cl. 272; Inhabitants of Knox v. Inhabitants of Waldoborough, 5 Me. 185; Brett v. Marston, 45 Me. 401; Haynes v. Jackson, 66 Me. 93; Inhabitants of Jay v. Inhabitants of 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 (Mass.) 223; Marsh v. Hammond, 11 Allen (Mass.) 483; Clapp v. Thomas, 5 Allen (Mass.) 158; Bridge v. Sumner, 1 Pick. (Mass.) 370; Beckett v. Stone, 60 N. J. Law, 23, 36 Atl. 880; Merrick v. Hill, 77 Hun, 30, 28 N. Y. Supp. 237; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Wheeler v. Ruckman, 51 N. Y. 391; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Bate v. Fellowes, 4 Bosw. (N. Y.) 638; Reynolds v. Garner, 66 Barb. (N. Y.) 310; Blair v. McLean, 25 Pa. 77; Haws v. Tiernan, 53 Pa. 192; Vought v. Sober, 73 Pa. 49; Fisher v. Longnecker, 8 Pa. 410; Wortham v. Com., 5 Rand. (Va.) 669; Smith v. Floyd County, 85 Ga. 420, 11 S. E. 850; Hendrick v. Clonts, 91 Ga. 196, 17 S. E. 119; Ryan v. Fulghum, 96 Ga. 234, 22 S. E. 940; Long v. Behan, 19 Tex. Civ. App. 325, 48 S. W. 555; Johnson v. City of New Orleans, 50 La. Ann. 920, 24 South. 635; Beadle v. Graham's Adm'r, 66 Ala. 99; Allinet v. His Creditors, 15 La. Ann. 130; Baudin v. Roliff, 1 Mart. (N.

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was sham and irrelevant.[128] So a nonsuit in an action against a deputy sheriff for the wrongful attachment of property is no bar to an action against the sheriff for the same cause.[129] 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.[130] 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.[131] 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.[132] 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.[133]

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.[134] As observed by the supreme court of Maine, "in ordering a nonsuit on account of the insufficiency of the

S.; La.) 165, 14 Am. Dec. 181; Dana v. Gill, 5 J. J. Marsh. (Ky.) 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, 35 Ill. 396; Ellington v. Crockett, 13 Mo. 72; Cheny v. Cooper, 14 Neb. 415, 16 N. W. 471; Wood v. Ramond, 42 Cal. 643; Gates v. McLean (Cal.) 9 Pac. 938; Hallum v. Dickinson, 47 Ark. 126, 14 S. W. 477; Wiethaupt v. City of St. Louis, 158 Mo. 655, 59 S. W. 960; Jacob v. Day, 111 Cal. 571, 44 Pac. 243.

[128] Fleming v. Hawley, 65 Cal. 492, 4 Pac. 494.

[129] Clapp v. Thomas, 5 Allen (Mass.) 158.

[130] Savage v. Gunter, 32 Ala. 467.

[131] Van Vliet v. Olin, 1 Nev. 495.

[132] Crawford v. Summers, 3 J. J. Marsh. (Ky.) 300.

[133] Holland v. Hatch, 15 Ohio St. 464; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Union Bank v. Commissioners of Oxford (C. C.) 90 Fed. 7.

[134] Howes v. Austin, 35 Ill. 396; Wood v. Ramond, 42 Cal. 644; Bournonville v. Goodall, 10 Pa. 133; National Water Works Co. v. School Dist. of Kansas City, 23 Mo. App. 227; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253; Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; Gummer v. Trustees of Village of Omro, 50 Wis. 247, 6 N. W. 885. In the case last cited, Orton,

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plaintiff's evidence, the court simply declares the law applicable 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." [135] 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.[136] 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-appear-

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."

[135] Pendergrass v. York Manuf'g Co., 76 Me. 509, citing Morgan v. Bliss, 2 Mass. 111. But compare Ordway v. Boston & M. R. R., 69 N. H. 429, 45 Atl. 243.

[136] Gould v. Crawford, 2 Pa. 89; Lawver v. Walls, 17 Pa. 75; Gillilan v. Spratt, 8 Abb. Prac. (N. S.; N. Y.) 13. See, also, Moreland Tp. v. Gordner, 109 Pa. 116.

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ance, 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 a 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." [137]

Wherever we find the essential characteristics of a judgment of 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.[138] 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.[139] 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." [140] So in suits in equity where the plaintiff has a right

[137] Homer v. Brown, 16 How. 354, 14 L. Ed. 970. To the same effect, Inhabitants of Knox v. Inhabitants of Waldoborough, 5 Me. 185; Derby v. Jacques, 1 Cliff. 432, Fed. Cas. No. 3,817.

[138] Marsh v. Hammond, 11 Allen (Mass.) 483.

[139] Haws v. Tiernan, 53 Pa. 192.

[140] Bourg v. Gerding, 33 La. Ann. 1369. So, also, an order, made on motion of relator's attorney, dismissing an information in the nature of a quo warranto, without prejudice to further action in another proceeding, and giving leave to withdraw the information, is in effect an order of nonsuit on motion of relator's attorney, and not a final judgment on the merits of the cause, and does not bar a subsequent action on the same claim in another court. State v. Anderson, 26 Fla. 240, 8 South. 1.

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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.[141] 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.[142]

§ 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."[143] "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 court, and by this he forever loses his action."[144] 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.[145] 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.[146] 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.[147] A judgment entered

[141] Kempton v. Burgess, 136 Mass. 192.

[142] Vaughan v. O'Brien, 57 Barb. (N. Y.) 491.

[143] Cunningham v. Schley, 68 Ga. 105.

[144] 3 Bl. Comm. 296.

[145] Beecher v. Shirley, Cro. Jac. 211; Cunningham v. Schley, 68 Ga. 105; Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159; Harris v. Preston, 10 Ark. 291; Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; Evans v. McMahan, 1 Ala. 45; Coffman v. Brown, 7 Smedes & M. (Miss.) 125, 45 Am. Dec. 299; Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501; Exchange Bank v. Gilman, 17 Can. Sup. Ct. 108.

[146] Coffman v. Brown, 7 Smedes & M. (Miss.) 125, 45 Am. Dec. 299.

[147] Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501.

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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.[148] 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.[149] 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.[150] 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.[151]

§ 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."[152] But in modern practice this is not the sole application of the term. "The word is also frequently used to indi-

[148] United States v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. But it has been held that a judgment in the nature of a retraxit must be entered by the plaintiff personally, and cannot be effected by stipulation of counsel, so as to bar plaintiff's subsequent action on the same claim. Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

[149] Gibson v. Chouteau, 7 Mo. App. 1.

[150] Crawford's Adm'r v. Glass' Ex'rs, 33 N. C. 118.

[151] Welch v. Mandeville, 1 Wheat. 233, 4 L. Ed. 79. See Tate v. Bank of State of New York, 96 Va. 765, 32 S. E. 476.

[152] 3 Bl. Comm. 296.

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cate 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." [153]

§ 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,[154] 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 2 Archb. Pr. 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 recovery 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.[155]

[153] Muse v. Farmers' Bank of Virginia, 27 Grat. (Va.) 252; Reynolds v. Hennessy, 17 R. I. 169, 23 Atl. 639; Dunham v. Carson, 37 S. C. 269, 15 S. E. 960; Weingartner v. Missouri Lumber & Mining Co. (Ky.) 44 S. W. 355; Shank v. Woodworth, 111 Mich. 642, 70 N. W. 140; Oliver v. Lansing, 48 Neb. 338, 67 N. W. 195. See, also, Gibson v. Gibson, 20 Pa. 9.

[154] 35 Ill. 396, 412.

[155] Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149. And see Book v. United States, 31 Ct. Cl. 272; Gabrielson v. Waydell (C. C.) 67 Fed. 342. But in Maryland a verdict for nominal damages, followed by a judgment of non pros., is a conclusive adjudication of the amount of the debt. Berkley v. Wilson, 87 Md. 219, 39 Atl. 502.

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§ 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.[156] 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.[157] 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.[158] 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

[156] Mechanics' Banking Ass'n v. Mariposa Co., 7 Rob. (N. Y.) 225; Dexter v. Clark, 35 Barb. (N. Y.) 271; Colt v. Beard, 33 Barb. (N. Y.) 357; Wheeler v. Ruckman, 51 N. Y. 391; Smith v. Ferris, 1 Daly (N. Y.) 18; Bond v. McNider, 25 N. C. 440; Hukill v. Maysville & B. S. R. Co. (C. C.) 72 Fed. 745; Hauselt v. Patterson, 124 N. Y. 349, 26 N. E. 937; Gould v. Chicago, B. & Q. R. Co., 61 Hun, 625, 15 N. Y. Supp. 895; Campbell v. Potts, 119 N. C. 530, 26 S. E. 50; Rudolph v. Underwood, 88 Ga. 664, 16 S. E. 55; Kopf v. Huckins, 11 Tex. Civ. App. 86, 32 S. W. 41; Gerber v. Gerber, 155 Ill. 219, 40 N. E. 581; Jones v. Hunter, 32 Ill. App. 445; McWhorter v. Norris, 9 Ind. App. 490, 34 N. E. 854; Bank of Maywood v. McAllister's Estate, 56 Neb. 188, 76 N. W. 552; Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916; Fisk v. Parker, 14 La. Ann. 491; Crews v. Cleghorn, 13 Ind. 438. But see Bostwick v. Abbott, 40 Barb. (N. Y.) 331; People v. Smith, 51 Barb. (N. Y.) 360.

[157] Miller v. McGuckin, 15 Abb. N. C. (N. Y.) 204; Hibler v. Shipp, 78 Ky. 64.

[158] Hughes v. Walker, 14 Or. 481, 13 Pac. 450.

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will be no bar to another suit for the same cause of action.[159] 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.[160] 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.[161] 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,[162] yet such a judgment, after a hearing on the merits, is conclusive on the plaintiff as to all facts involved in the issue.[163] In Louisiana, a judgment dismissing the plaintiff's demand

[159] Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595. But compare McFadden v. Schroeder, 4 Ind. App. 305, 30 N. E. 711.

[160] Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Andrews v. School District, 35 Minn. 70, 27 N. W. 303; Woods v. Lindvall, 4 U. S. App. 49, 1 C. C. A. 37, 48 Fed. 62.

[161] Wheeler v. Ruckman, 51 N. Y. 391. And see Louisville, N. A. & C. Ry. Co. v. Wylie, 1 Ind. App. 136, 27 N. E. 122; Phipps v. Alford, 95 Ga. 215, 22 S. E. 152. But in New York, a statute (Code Civ. Proc. § 1209) provides that a judgment of dismissal after trial shall bar a new suit for the same cause of action only where it expressly appears that the dismissal was on the merits. As to the effect of this statute, see Nicoll v. Karrick, 28 Misc. Rep. 199, 58 N. Y. Supp. 1018; Stokes v. Stokes, 49 App. Div. 302, 63 N. Y. Supp. 887; Vowell v. Twenty-Third St. Ry. Co., 14 Misc. Rep. 538, 35 N. Y. Supp. 1082.

[162] Philpott v. Brown, 16 Neb. 387, 20 N. W. 288; Burgess v. American Mortgage Co., 119 Ala. 669, 24 South. 727.

[163] Amory v. Amory, 26 Wis. 152; Brothers v. Higgins, 5 J. J. Marsh. (Ky.) 658; Best v. Hoppie, 3 Colo. 137; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Flanders v. Hall, 159 Mass. 95, 34 N. E. 178; Goodman v. Malcolm, 5 Kan. App. 285, 48 Pac. 439. See Cameron v. Chicago, M. & St. P. R. Co., 51 Minn. 153, 53 N. W. 199.

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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.[164]

§ 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.[165]

§ 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.[166] Thus, in New Jersey, it is said to be immaterial "whether

[164] Granger v. Singleton, 32 La. Ann. 898.

[165] Brown v. Sprague, 5 Denio (N. Y.) 545. Compare Gray v. Daniels, 18 App. Div. 465, 45 N. Y. Supp. 1106. See Bank of Commerce v. City of Louisville (C. C.) 88 Fed. 398. And see § 545, supra.

[166] Nashville, C. & St. L. Ry. Co. v. United States, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Chamberlain v. Preble, 11 Allen (Mass.) 370; Brown v. Sprague, 5 Denio (N. Y.) 545; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; Richmond & P. R. Co. v. Shippen, 2 Pat. & H. (Va.) 327; Hoover v. Mitchell, 25 Grat. (Va.) 387; Kidd v. Huff, 105 Ga. 209, 31 S. E. 430; Donnelly v. Wilcox, 113 N. C. 408, 18 S. E. 339; Adler v. Van Kirk Land & C. Co., 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Wynne v. Spiers, 7 Humph. (Tenn.) 394; Dunn v. Pipes, 20 La. Ann. 276; Greenwood v. City of New Orleans, 12 La. Ann. 426; Fletcher v. Holmes, 25 Ind. 458.

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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." [167] So in Massachusetts, an agreed statement may be the proper foundation of such a judgment as will constitute a bar to a new suit between the same parties for the same cause of action.[168] 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.[169] 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.[170] A contrary rule, however, prevails in England, and has been maintained in a few cases in this country.[171] 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

[167] Gifford v. Thorn, 9 N. J. Eq. 702, 722.

[168] Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817.

[169] McCreery v. Fuller, 63 Cal. 30.

[170] Fletcher v. Holmes, 25 Ind. 458.

[171] Jenkins v. Robertson, L. R. 1 H. L. Sc. 117 (but compare In re South American & Mexican Co. [1895] 1 Ch. 37); Wadhams v. Gay, 73 Ill. 415; Lamb v. Gatlin, 22 N. C. 37; Edgerton v. Muse, 2 Hill, Eq. (S. C.) 51; Luckett v. Canadian & American Mortg. & Trust Co., 47 La. Ann. 1259, 17 South. 836.

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for the same cause.[172] 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 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."[173] 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

[172] Bank of the Commonwealth v. Hopkins, 2 Dana (Ky.) 395; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Merritt v. Campbell, 47 Cal. 542; Phillpotts v. Blasdell, 10 Nev. 19; Hoover v. Mitchell, 25 Grat. (Va.) 387; Wohlford v. Compton, 79 Va. 333; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322. See, per contra, Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075. And compare Allison v. Hess, 28 Iowa, 388.

[173] Hoover v. Mitchell, 25 Grat. 387.

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action." [174] 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.[175]

§ 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.[176] 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.[177] 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

[174] Merritt v. Campbell, 47 Cal. 542. But a judgment of dismissal by consent, which shows on its face that it is not the result of an adjustment of the controversy, is not a bar to a subsequent suit. Marshall v. Otto (C. C.) 59 Fed. 249.

[175] Crossman v. Davis, 79 Cal. 603, 21 Pac. 963.

[176] Van Horn v. Van Horn (N. J.) 21 Atl. 1069; Jordan v. Faircloth, 34 Ga. 47; Johnson v. Pate, 90 N. C. 334; Cameron v. Hinton (Tex. Civ. App.) 48 S. W. 24; McDowell v. Chesapeake, O. & S. W. R. Co., 90 Ky. 346, 14 S. W. 338; Hyatt v. Challiss, 59 Kan. 422, 53 Pac. 467; Luttrell v. Reynolds, 63 Ark. 254, 37 S. W. 1051; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Nispel v. Laparle, 74 Ill. 306; McKean v. Jones, 19 Can. S. C. R. 489.

[177] Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Aurora City v. West, 7 Wall. 90, 19 L. Ed. 42; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; Chapin v. Curtis, 23 Conn. 388; Com. v. Goddard, 13 Mass. 456; Foster v. Com., 8 Watts & S. (Pa.) 77; Papworth v. City of Fitzgerald, 111 Ga. 54, 36 S. E. 311; Crumpton v. State, 43 Ala. 31; Alabama & V. Ry. Co. v. McCerren, 75 Miss. 687, 23 South. 423; Nickelson v. Ingram, 24 Tex. 630; Birch v. Funk, 2 Metc. (Ky.) 544; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955; Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396.

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it turned merely upon the question of special pleading and was not on the merits.[178] 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.[179] 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.[180] The United States supreme 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

[178] Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

[179] Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 South. 512.

[180] Gould v. Evansville & C. R. Co., 91 U. S. 533, 23 L. Ed. 416; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. 495, 31 L. Ed. 411; Bowdoin College v. Merritt (C. C.) 63 Fed. 213; St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt. 294, 7 Atl. 277; Bouchaud v. Dias, 3 Denio (N. Y.) 238; Gray v. Gray, 34 Ga. 499; Carey v. Giles, 10 Ga. 9; Fain v. Hughes, 108 Ga. 537, 33 S. E. 1012; Straw v. Illinois Cent. R. Co., 73 Miss. 446, 18 South. 847; Perkins v. Moore, 16 Ala. 17; City Bank of New Orleans v. Walden, 1 La. Ann. 46; Parker v. Spencer, 61 Tex. 155; Cameron v. Hinton (Tex. Civ. App.) 48 S. W. 616; McLaughlin v. Doane, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210; 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 G. Greene (Iowa) 582, 52 Am. Dec. 537; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Coleman v. Dalton, 71 Mo. App. 14; Wilson v. Lowry (Ariz.) 52 Pac. 777; Robinson v. Howard, 5 Cal. 428; Terry v. Hammonds, 47 Cal. 32; State v. Moss, 13 Wash. 42, 43 Pac. 373.

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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." [181] 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.[182] 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.[183] 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 complete bar to a second suit for the same cause of action.[184] 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.[185] It matters not to which of the

[181] Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416.

[182] Robinson v. Howard, 5 Cal. 428.

[183] Parkes v. Clift, 9 Lea (Tenn.) 524.

[184] Kimbro v. Virginia & T. A. L. R. Co., 56 Ga. 185.

[185] Spicer v. United States, 5 Ct. Cl. 34; Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774; Whaley v. Lawton, 57 S. C. 198, 35 S. E. 741; Alabama & V. Ry. Co. v. McCerrin, 75 Miss. 687, 23 South. 876; Connor v. Corson, 13 S. D. 550, 83 N. W. 588.

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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.[186] 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.[187] 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.[188] 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.[189]

[186] Wilson v. Ray, 24 Ind. 156; Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411.

[187] State v. Saylor, 70 Md. 472, 17 Atl. 392; Scherff v. Missouri Pac. Ry. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828; Harrison v. Hartford Fire Ins. Co. (Iowa) 80 N. W. 309; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571. So, where a petition is heard on demurrer, an order by the judge that it would be dismissed unless amended within a given time is not final on the merits, but the whole petition is open for amendment within the time limited; and a demurrer to the petition as amended opens the merits of the pleadings for a fresh adjudication. Folsom v. Howell, 94 Ga. 112, 21 S. E. 136. But under a statute (Code Iowa 1873, § 2654) providing that, on the decision of a demurrer, if the unsuccessful party fails to amend or plead over, the same consequences shall ensue as though a verdict had passed against plaintiff, or defendant had made default, it was held that, where the plaintiff failed to amend his petition, to which a demurrer had been sustained, but appealed to the supreme court, where the judgment was affirmed, such judgment constituted a final adjudication, which would bar another action for the same cause. Gregory v. Woodworth, 107 Iowa, 151, 77 N. W. 837.

[188] City Bank of New Orleans v. Walden, 1 La. Ann. 46.

[189] Detrick v. Sharrar, 95 Pa. 521.

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§ 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 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." [190] 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.[191]

§ 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

[190] Bomar v. Parker, 68 Tex. 435, 4 S. W. 599; Perkins v. Moore, 16 Ala. 17; Brown v. Kirkbride, 19 Kan. 588; Carlin v. Brackett, 38 Minn. 307, 37 N. W. 342; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 27 Fed. 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."

[191] City of Los Angeles v. Mellus, 59 Cal. 444; Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Wilbur v. Gilmore, 21 Pick. (Mass.) 250; State v. Roth, 47 Ark. 222, 1 S. W. 98.

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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 which can be pleaded in bar to any other suit for the same cause of action." [192] 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.[193] 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

[192] Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491. See, to the same effect, Messinger v. New England Mut. Life Ins. Co. (C. C.) 59 Fed. 416; Lindsley v. Union Silver Star Min. Co. (C. C.) 106 Fed. 468; Brennan v. Berlin Iron-Bridge Co., 71 Conn. 479, 42 Atl. 625; Baker v. Frellsen, 32 La. Ann. 822; Porter v. Fraleigh, 19 Ind. App. 562, 49 N. E. 863; Lamb v. McConkey, 76 Iowa, 47, 40 N. W. 77; City of Los Angeles v. Mellus, 58 Cal. 16; Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107.

[193] Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Gilmer v. Morris (C. C.) 46 Fed. 333; City of North Muskegon v. Clark, 22 U. S. App. 522, 10 C. C. A. 591, 62 Fed. 694; Stowell v. Chamberlain, 3 Thomp. & C. (N. Y.) 374; Grotenkemper v. Carver, 4 Lea (Tenn.) 375; McClung v. Hohl (Kan. App.) 61 Pac. 507; Moore v. Dunn, 41 Ohio St. 62; Gerrish v. Pratt, 6 Minn. 53 (Gil. 14); Wells v. Moore, 49 Mo. 229; Swanson v. Great Northern Ry. Co., 73 Minn. 103, 75 N. W. 1033; Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829; Gallup v. Lichter, 4 Colo. App. 296, 35 Pac. 985; Wilson v. Lowry (Ariz.) 52 Pac. 777.

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for that reason must operate as a bar to any relief." [194] 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.[195] Where a demurrer to a complaint, interposed on the ground that it does not state facts sufficient to constitute a cause of action, is overruled with leave to answer, the plaintiff's right to maintain the action is not res judicata, but defendant, by answering, withdraws the demurrer, and may raise any objections to the maintenance of the action which he did not waive by answering.[196]

§ 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 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.[197]

[194] Birch v. Funk, 2 Metc. 544.

[195] In the case of Haug v. Great Northern Ry. Co., 42 C. C. A. 167, 102 Fed. 74, it is said that, where an action is dismissed on motion of defendant because the complaint fails to state facts sufficient to constitute a cause of action, plaintiff cannot afterwards maintain an action to enforce the same right, where the legal effect of the complaint in the two cases is identical, and all evidence going to the merits of the action which would have been competent under the one would likewise be competent under the other.

[196] McCullough v. Pence, 85 Hun, 271, 32 N. Y. Supp. 986.

[197] Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. 495, 31 L. Ed. 411. See Merrill v. Board of Com'rs of Ness County, 7 Kan. App. 717, 52 Pac. 109. Compare People v. Stephens, 51 How. Prac. (N. Y.) 235.

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§ 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." [198]

§ 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." [199]

§ 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, this is of course no adjudication of the merits and no bar to another action for the same cause.[200] Thus the dismissal of an action by a

[198] Kilpatrick v. Strozier, 67 Ga. 247. See infra, § 720.

[199] Hunt v. Terril's Heirs, 7 J. J Marsh. (Ky.) 67, per Robertson, C. J. See, also, Seckler v. Delfs, 25 Kan. 159.

[200] Walden v. Bodley, 14 Pet. 156, 10 L. Ed. 398; Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., 47 C. C. A. 200, 109 Fed. 504; United States v. Rand, 5 U. S. App. 230, 3 C. C. A. 556, 53 Fed. 348; Gilmer v. City of Grand Rapids (C. C.) 16 Fed. 708; Weigley v. Coffman, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep.

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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.[201] So, the disallowance, by a district court or the court of claims, of a claim against the United States, for supposed want of jurisdiction to pass upon the merits, is no bar to a subsequent petition for the allowance of the claim, after a determination that the court has jurisdiction.[202] 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.[203] 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.[204] Although a court of law declines to determine a question of set-off,

667; Champlin v. Smith, 164 Pa. 481, 30 Atl. 447; Town of Jericho v. Town of Underhill, 67 Vt. 85, 30 Atl. 690; Seitz v. McKenzie, 4 Tex. Civ. App. 81, 22 S. W. 104; Bitzer v. O'Bryan (Ky.) 54 S. W. 951; Gist v. Davis, 2 Hill, Eq. (S. C.) 335, 29 Am. Dec. 89; Smith v. Adams, 24 Wend. (N. Y.) 585; Lamaster v. Lair, 1 Dana (Ky.) 109; Waddle v. Ishe, 12 Ala. 308; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Schindel v. Suman, 13 Md. 310; Cauhape v. Parke, 46 Hun (N. Y.) 306; Roberts v. Hamilton, 56 Iowa, 683, 10 N. W. 236.

[201] Weyand v. Atchison, T. & S. F. R. Co., 75 Iowa, 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504.

[202] United States v. Rand, 5 U. S. App. 230, 3 C. C. A. 556, 53 Fed. 348; Green v. United States, 18 Ct. Cl. 93.

[203] Arnold v. Grimes, 2 Iowa, 1. See, also, Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. 449.

[204] Goenen v. Schroeder, 18 Minn. 68 (Gil. 51).

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yet this is not res judicata so as to preclude an inquiry in a court of equity having concurrent jurisdiction of the matter.[205]

§ 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 having yet accrued, is universally held to be no bar to another action on the same demand after time has removed the objection.[206] It is no adjudication of the merits; the most it decides is that the claim or demand was not then due or matured.[207] 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.[208] 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.[209] A judgment rendered for the defendant in a suit on a

[205] Hackett v. Connett, 2 Edw. Ch. (N. Y.) 73.

[206] Clark v. Young, 1 Cranch, 181, 2 L. Ed. 74; New England Bank v. Lewis, 8 Pick. (Mass.) 113; Jepson v. International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15; Slocum v. Wilbour (R. I.) 49 Atl. 489; Moloney v. Nelson, 158 N. Y. 351, 53 N. E. 31; Wilcox v. Lee, 1 Rob. (N. Y.) 355; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Ezzell v. Maltbie, 6 Ga. 495; Hurst v. Means, 2 Sneed (Tenn.) 546; McCelvy v. Noble, 13 Rich. Law (S. C.) 330; Estill v. Taul, 2 Yerg. (Tenn.) 466, 24 Am. Dec. 498; Pasley v. McConnell, 40 La. Ann. 609, 4 South. 501; Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22; Chicago & E. I. R. Co. v. State, 153 Ind. 134, 51 N. E. 924; Kirkpatrick v. Stingley, 2 Ind. 269; Brackett v. People, 115 Ill. 29, 3 N. E. 723; Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123; Rivers v. Rivers, 65 Iowa, 568, 22 N. W. 679; Dillinger v. Kelley, 84 Mo. 561; Shanklin v. Francis, 67 Mo. App. 457; McNees v. Southern Ins. Co., 69 Mo. App. 232; Gassert v. Black, 18 Mont. 35, 44 Pac. 401; Hart v. Bank of Commerce, 51 Neb. 486, 71 N. W. 40; McFarlane v. Cushman, 21 Wis. 401; Gray v. Dougherty, 25 Cal. 266.

[207] But such a judgment finally and conclusively settles the point that the action was prematurely brought; this question cannot be relitigated in a new action. Wilhelmi v. Des Moines Ins. Co. (Iowa) 68 N. W. 782.

[208] New England Bank v. Lewis, 8 Pick. (Mass.) 113; Kirkpatrick v. Stingley, 2 Ind. 273.

[209] Hurst v. Means, 2 Sneed (Tenn.) 546. And see Rose v. City of Yonkers, 133 N. Y. 315, 31 N. E. 236.

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promissory note, because the action was brought before the note was due, is not a bar to an action on the note after its maturity.[210] And so, where a bill in equity, brought by a general creditor of an insolvent debtor, is dismissed on the ground that it cannot be maintained until he has obtained a judgment at law on his debt, the decree dismissing the bill is no bar to an action at law on the debt.[211] 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.[212] 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.[213] 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.[214] And although there 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.[215] The same prin-

[210] Farber v. National Forge & Iron Co., 50 Ill. App. 503; Hewett v. Williams, 48 La. Ann. 686, 19 South. 604; Hardin v. Dickey, 123 Cal. 513, 56 Pac. 258. Judgment for defendant in an action on a note, on the ground of a failure to make a deed as agreed, is not a bar to an action on the note, after such consideration is supplied. Whitlock v. Appleby, 49 Mo. App. 295. The dismissal of an action to recover for usury charged plaintiff by defendant, on the ground that the action could not be maintained until the usurious interest had been paid, is no bar to an action brought after payment has been made. Anderson v. Trimble (Ky.) 37 S. W. 71.

[211] Maxwell v. Clarke, 139 Mass. 112, 29 N. E. 224.

[212] Boyer v. Austin, 54 Iowa, 402, 6 N. W. 585; McCelvy v. Noble, 13 Rich. Law (S. C.) 330.

[213] New England Bank v. Lewis, 8 Pick. (Mass.) 113. See, also, Tracy v. Merrill, 103 Mass. 280.

[214] Oleson v. Merrihew, 45 Wis. 397.

[215] Kane v. Fisher, 2 Watts (Pa.) 246.

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ciples 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.[216]

§ 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.[217] "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."[218] 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.[219] 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 such a case and provided a remedy by

[216] Krapp v. Eldridge, 33 Kan. 106, 5 Pac. 372; Crabtree v. Welles, 19 Ill. 55.

[217] Ferrers v. Arden, 2 Cro. Eliz. 668; Hitchin v. Campbell, 2 Wm. Bl. 779; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188; Meredith Mechanic Ass'n v. American Twist-Drill Co., 67 N. H. 450, 39 Atl. 330; Steinson v. Board of Education of City of New York, 49 App. Div. 143, 63 N. Y. Supp. 128; Massey v. McCoy, 79 Mo. App. 169; Wyman v. Dorr, 3 Me. 185; Walker v. Davis, 1 Gray (Mass.) 506; Livermore v. Herschell, 3 Pick. (Mass.) 33; Sager v. Blain, 44 N. Y. 445; Foster v. Wells, 4 Tex. 101; City of Oakland v. Oakland Water-Front Co., 118 Cal. 160, 50 Pac. 277; 5 Bac. Abr. 440, "Pleas," 1, 13; 1 Smith, Lead. Cas. 673.

[218] Ferrers v. Arden, 2 Cro. Eliz. 668.

[219] Kittredge v. Holt, 58 N. H. 191.

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"claimant's issue," does not preclude them from thereafter maintaining a bill to foreclose.[220] 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.[221] 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.[222]

§ 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.[223] 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.[224] So the dismissal of an action of replevin for informality in the replevin bond,[225] or because the plaintiff failed to make and prove a lawful demand,[226] or on account of a defect in the affidavit,[227] 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.[228]

[220] Conn v. Bernheimer, 67 Miss. 498, 7 South. 345.

[221] Bigley v. Jones, 114 Pa. 510, 7 Atl. 54.

[222] Bertrand v. Bingham's Adm'x, 13 Tex. 266. See, also, Watson v. Cowdrey, 23 Hun (N. Y.) 169.

[223] See Ryan v. Seaboard & R. R. Co. (C. C.) 89 Fed. 397; Rose v. Hawley, 141 N. Y. 366, 36 N. E. 335; Kern v. Wilson, 82 Iowa, 407, 48 N. W. 919.

[224] Witcher v. Oldham, 4 Sneed (Tenn.) 220. See Crosby v. Baker, 6 Allen (Mass.) 295.

[225] Morton v. Sweetser, 12 Allen (Mass.) 134; Walbridge v. Shaw, 7 Cush. (Mass.) 560.

[226] Roberts v. Norris, 67 Ind. 386.

[227] Stockwell v. Byrne, 22 Ind. 6.

[228] Dean v. Ridgway (Miss.) 6 South. 236; Rosenthal v. McMann, 93 Cal 505, 29 Pac. 121.

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And so if a suit is dismissed on account of a failure of the plaintiff to submit himself to examination.[229]

§ 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.[230] 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.[231] 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.[232]

§ 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.[233] Or, as stated in an

[229] Cheney v. Stone (C. C.) 29 Fed. 885.

[230] Brackett v. Hoitt, 20 N. H. 257; Converse v. Sickles, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; In re Townshend, 64 Hun, 636, 18 N. Y. Supp. 905.

[231] Whaley v. Stevens, 24 S. C. 479; Alabama G. S. Ry. Co. v. Blivens, 92 Ga. 522, 17 S. E. 836; White v. Whiting, 8 Daly (N. Y.) 23. Compare Chiles v. Champenois, 69 Miss. 603, 13 South. 840; Morgan v. Chicago, M. & St. P. Ry. Co., 83 Wis. 348, 53 N. W. 741.

[232] McLaughlin v. McGee, 79 Pa. 217.

[233] Lampen v. Kedgewin, 1 Mod. 207; City of North Muskegon v. Clark, 10 C. C. A. 591, 62 Fed. 694; Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Fuher v. Villwock, 14 Ohio Cir.

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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.[234] 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 formal leave to renew be obtained.[235] And the same rule governs the case of similar 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.[236] 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.[237] 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.[238]

§ 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

Ct. R. 389; Elkhart Car-Works Co. v. Ellis, 135 Ind. 205, 34 N. E. 11; Chicago, M. & St. P. Ry. Co. v. Hoyt, 50 Ill. App. 583; Hoyt v. Chicago, M. & St. P. Ry. Co., 177 Ill. 617, 52 N. E. 1127; Smalley v. Edey, 19 Ill. 207; Wells v. Moore, 49 Mo. 229; State v. Cornell, 52 Neb. 25, 71 N. W. 961; Naftzger v. Gregg (Cal.) 31 Pac. 612; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004.

[234] Ingram v. Bray, 2 Lev. 210.

[235] Corwith v. State Bank of Illinois, 15 Wis. 289.

[236] Gilmer v. Morris (C. C.) 30 Fed. 476.

[237] Keller v. Stolzenbach (C. C.) 20 Fed. 47.

[238] Thompson v. Wineland, 11 Mo. 243.

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on the same cause.[239] 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.[240] 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 dismissed 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.[241] 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.[242] 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.[243] The rule first above given applies not only to the case of a misjoinder or nonjoinder of parties, but also where the successful contention of

[239] St. Romes v. Levee Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289; Vaughan v. O'Brien, 57 Barb. (N. Y.) 491; Robbins v. Wells, 1 Rob. (N. Y.) 666; Wheeler v. Ruckman, 7 Rob. (N. Y.) 447; Fleming v. Insurance Co., 12 Pa. 391; Nickelsen v. Ingram, 24 Tex. 630; Miller v. Langworthy, 3 G. Greene (Iowa) 347; McCall v. Jones, 72 Ala. 368; Weinberger v. Merchants' Mut. Ins. Co., 41 La. Ann. 31, 5 South. 728; Union Terminal R. Co. v. Board of Railroad Com'rs, 54 Kan. 352, 38 Pac. 290; Baker v. Lane, 137 Mo. 682, 39 S. W. 450; Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923.

[240] Tierney v. Abbott, 46 Wis. 329, 1 N. W. 94.

[241] Smith v. Auld, 31 Kan. 262, 1 Pac. 626.

[242] Fleming v. Insurance Co., 12 Pa. 391.

[243] Thompson v. Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108.

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the defendant is that the plaintiff has not legal capacity to sue.[244] 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.[245] 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.[246]

On similar principles, it is held that a judgment of a United States court dismissing a bill because brought by a married woman in her own name, and for want of jurisdiction, is not a bar to an action in a state court between the same parties for the same cause of action.[247] And the fact that a highway commissioner, whose duty it was to bring an action to recover the cost of repairing a highway, by mistake brought it in his own name as such officer, does not bar or estop him from thereafter bringing the action in the name of the municipal corporation.[248]

§ 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.[249] In the language of the

[244] Cunningham v. City of Cleveland, 39 C. C. A. 211, 98 Fed. 657; White v. Savery, 50 Iowa, 515; Cook v. Doremus, 10 La. Ann. 679; Rodgers v. Levy, 36 Neb. 601, 54 N. W. 1080.

[245] Mitchell v. Cook, 29 Barb. (N. Y.) 243. See, also, Miller v. Langworthy, 3 G. Greene (Iowa) 347.

[246] Robbins v. Wells, 1 Rob. (N. Y.) 666.

[247] Wills v. Pauly, 116 Cal. 575, 48 Pac. 709.

[248] Town of Clay v. Hart, 25 Misc. Rep. 110, 55 N. Y. Supp. 43.

[249] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154; Doe ex dem. Parrish v. Ferris, 2 Black, 606, 17 L. Ed. 317; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Albright v. Oyster, 140 U. S. 493, 11 Sup. Ct. 916, 35 L. Ed. 534; Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Lewis v. Lewis, 106 Mass. 309; Blackinton v. Blackinton, 113 Mass. 231; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482;

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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."[250] 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 upon the merits and bars a second suit upon the same matters.[251] 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.[252] Decree dis-

Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140; Kelsey v. Murphy, 26 Pa. 78; Evans v. Tatem, 9 Serg. & R. (Pa.) 261, 11 Am. Dec. 717; Holliday v. Coleman, 2 Munf. (Va.) 162; Taylor v. Yarbrough, 13 Grat. (Va.) 183; Watson v. Watson, 45 W. Va. 290, 31 S. E. 939; Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Jenkins v. Johnston, 57 N. C. 149; Black v. Black, 27 Ga. 40; Pugh v. Holt, 27 Miss. 461; Thompson v. Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108; Moss v. Ashbrooks, 12 Ark. 369; Wilcox v. Balger, 6 Ohio, 406; Stults v. Forst, 135 Ind. 297, 34 N. E. 1125; Armstead v. Blickman, 51 Ill. App. 470; Garrick v. Chamberlain, 97 Ill. 620; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528.

[250] Tankersly v. Pettis, 71 Ala. 179. See, also, Strang v. Moog, 72 Ala. 460.

[251] Lyon v. Perin & Gaff Manuf'g Co., 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. Ed. 839.

[252] Jenkins v. Johnston, 57 N. C. 149; Black v. Black, 27 Ga. 40.

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missing 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.[253] 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.[254]

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.[255] And the decree must have been ordered upon a hearing of the parties or on the merits of the cause.[256] 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.[257] And such a decree is none the less a bar because the record shows that it was passed by a divided court.[258] 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.[259] A decree in terms dismissing an amended bill for want of equity, dismisses the original bill as amended, and such decree is therefore conclusive as to the claim made by the plaintiff in the original bill.[260]

Before leaving the subject it is necessary to call the reader's at-

[253] Holliday v. Coleman, 2 Munf. (Va.) 162.

[254] Wilcox v. Balger, 6 Ohio, 406.

[255] Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; Pugh v. Holt, 27 Miss. 461.

[256] Sarchet v. The General Isaac Davis, Crabbe, 185, Fed. Cas. No. 12,357; Clark v. Bernhard Mattress Co. (C. C.) 82 Fed. 339; Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471; Gage v. Ewing, 114 Ill. 15, 28 N. E. 379.

[257] Ogsbury v. La Farge, 2 N. Y. 113.

[258] Durant v. Essex Co., 8 Allen (Mass.) 103. 85 Am. Dec. 685.

[259] Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528.

[260] Bradish v. Grant, 119 Ill. 606, 9 N. E. 332.

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tention 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.[261] 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.[262] 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.[263] The pur-

[261] Walden v. Bodley, 14 Pet. 160, 10 L. Ed. 398; Badger v. Badger, 1 Cliff. 241, Fed. Cas. No. 717.

[262] Beere v. Fleming, 13 Ir. C. L. 506; Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, 36 Ohio St. 471. But compare Carberry v. West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694.

[263] Durant v. Essex Co., 7 Wall. 109, 19 L. Ed. 154; Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. Ed. 706; Northern Pac. R. Co. v. St. Paul, M. & M. R. Co. (C. C.) 47 Fed. 536; Thurston v. Thurston, 99 Mass. 39; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; Reynolds v. Hennessy, 17 R. I. 169, 23 Atl. 639; English v. English, 27 N. J. Eq. 579; Ballentine v. Ballentine (Pa.) 15 Atl. 859; O'Keefe v. Irvington Real-Estate Co., 87 Md. 196, 39 Atl. 428; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609; Tucker v. Wilson, 68 Miss. 693, 9 South. 898; Epstein v. Ferst, 35 Fla. 498, 17 South. 414; Fisk v. Parker, 14 La. Ann. 491; Magill v. Mercantile Trust Co., 81 Ky. 129; Condon v. Knoxville, C. G. & L. R. Co. (Tenn. Ch. App.) 35 S. W. 781; Missouri, K. & T. Ry. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Wanzer v. Self, 30 Ohio St. 378; Crews v. Cleghorn, 13 Ind. 438; Long v. Long, 141 Mo. 352, 44 S. W. 341; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Moore v. Russell, 133 Cal. 297, 65 Pac. 624; Prondzinski v. Garbut (N. D.) 86 N. W. 969.

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port 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 statute of limitations the time of the pendency of that suit.[264] 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.[265] 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.[266] Conversely, if the reservation is omitted, where it ought to have been inserted, the error will be corrected in the court above.[267]

§ 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.[268] Where,

[264] Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609.

[265] Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533.

[266] Wanzer v. Self, 30 Ohio St. 378.

[267] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154.

[268] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Equitable Trust Co. v. Smith, 23 C. C. A. 394, 77 Fed. 677; Gove v. Lyford, 44 N. H. 525; Foote v. Gibbs, 1 Gray (Mass.) 412; Thurston v. Thurston, 99 Mass. 39; Bigelow v. Winsor, 1 Gray (Mass.) 301; Borrowscale v. Tuttle, 5 Allen (Mass.) 377; Cochran v. Couper, 2 Del. Ch. (Del.) 27; Kelsey v. Murphy, 26 Pa. 78; Taylor v. Yarbrough, 13 Grat. (Va.) 183; Martin v. Evans, 85 Md. 8, 36 Atl. 258, 36 L. R. A. 218, 60 Am. St. Rep. 292; Carlisle v. Howes (Ky.) 43 S. W. 191; Curts v. Trustees of Bardstown, 6 J. J. Marsh. (Ky.) 536; Wilcox v. Balger,

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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.[269] There are a few cases, however, which have refused to recognize this rule, or have even applied an opposite rule. Thus in Chase's Case,[270] 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.[271] 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.[272]

§ 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 dis-

6 Ohio, 406; Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528; Adams v. Cameron, 40 Mich. 506; Edgar v. Buck, 65 Mich. 356, 32 N. W. 644.

269 Williams v. Hollingsworth, 5 Lea (Tenn.) 358.

270 1 Bland, Ch. (Md.) 206, 17 Am. Dec. 277.

271 Loudenback v. Collins, 4 Ohio St. 251.

272 Lore's Lessee v. Truman, 10 Ohio St. 45.

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missal 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.[273] 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 question, in any other suit in equity, the validity of the proceedings which the bill was brought to annul.[274]

§ 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.[275] But if nothing can be discovered from the record, it will be presumed (although not conclusively) that the judgment was rendered on the merits.[276] Hence, when a party to an action seeks to avoid the estoppel of a

[273] Keller v. Stolzenbach (C. C.) 20 Fed. 47; Whitaker v. Davis (C. C.) 91 Fed. 720; Rosse v. Rust, 4 Johns. Ch. (N. Y.) 300; Porges v. Cohen, 23 Misc. Rep. 703, 52 N. Y. Supp. 71; Porter v. Vaughn, 26 Vt. 624; Cornell v. Hartley, 41 W. Va. 493, 23 S. E. 789; Worst v. Sgitcovich (Tex. Civ. App.) 46 S. W. 72; Nickell v. Fallen (Ky.) 23 S. W. 366; Renshaw v. First Nat. Bank (Tenn. Ch. App.) 63 S. W. 194; Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33; Loudenback v. Collins, 4 Ohio St. 251; Laird v. Morris, 23 Nev. 34, 42 Pac. 11; Spear v. Door County, 65 Wis. 298, 27 N. W. 60; Philpott v. Brown, 16 Neb. 387, 20 N. W. 288; Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

[274] Chamberlain v. Sutherland, 4 Ill. App. 494.

[275] Gibson v. Milln, 1 Nev. 526.

[276] National Bank of Monticello v. Bryant, 13 Bush (Ky.) 419. Compare Estep v. Larsh, 21 Ind. 190.

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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.[277] 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."[278] The testimony of the justice of the peace by whom the judgment was rendered may be admitted to show that the cause was dismissed, and not tried on its merits, because the claim was not due at the time the suit was brought.[279]

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.[280] 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.[281] An exception to this rule, or rather,

[277] Dear v. Reed, 37 Hun (N. Y.) 594; Inhabitants of Embden v. Lisherness, 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442; Davie v. Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71; Haseltine v. Thrasher, 65 Mo. App. 334; Munro v. Meech, 94 Mich. 596, 54 N. W. 290.

[278] Baxter v. Aubrey, 41 Mich. 13, 1 N. W. 897.

[279] Wood v. Faut, 55 Mich. 185, 20 N. W. 897.

[280] Supra, §§ 504, 506.

[281] Parr v. Village of Greenbush, 42 Hun (N. Y.) 232; McGee v. Overby, 12 Ark. 164; Wooster v. Cooper, 59 N. J. Eq. 204, 45 Atl. 381; Tracy v. Kerr, 47 Kan. 656, 28 Pac. 707; Weis v. Meyer, 55 Ark. 18, 17 S. W. 339; Hoosier

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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. 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." [282] 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.[283] For

Stone Co. v. Louisville, N. A. & C. Ry. Co., 131 Ind. 575, 31 N. E. 365; Chicago & S. E. Ry. Co. v. Yawger, 24 Ind. App. 460, 56 N. E. 50; Folz v. Nelke, 33 Ill. App. 370; Marshall v. John Grosse Clothing Co., 83 Ill. App. 338; Winham v. Kline, 77 Mo. App. 36.

[282] Girardin v. Dean, 49 Tex. 243.

[283] See Fisk v. City of Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147.

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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.[284] So, a judgment of foreclosure is not a bar to an action by the mortgagee against the assignee of a policy of insurance held by the mortgagor for the benefit of the mortgagee.[285] And a judgment that a certain sale of mortgaged property under a power in the mortgage, and a sheriff's certificate based on the sale, are void, and that the party claiming under such certificate has no interest in the property by virtue of such sale or certificate, is no bar to an action subsequently brought to foreclose the mortgage.[286] 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.[287] So, a judgment dismissing a suit for specific performance of a promise to sign a lease is not a bar to a subsequent action on a verbal lease.[288] 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 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

284 Bilsland v. McManomy, 82 Ind. 139.
285 Heins v. Wicke, 102 Iowa, 396, 71 N. W. 345.
286 Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034.
287 Gilmer v. Morris (C. C.) 35 Fed. 682.
288 Laroussini v. Werlein, 50 La. Ann. 637, 23 South. 467.

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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." [289] 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.[290]

§ 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.[291] "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." [292] But it must also be observed that "if the testimony offered in the second suit is sufficient

[289] Nickerson v. California Stage Co., 10 Cal. 520. See, also, Vinal v. Continental Const. & Imp. Co., 53 Hun, 547, 6 N. Y. Supp. 595.

[290] O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236.

[291] Stone v. United States, 12 C. C. A. 451, 64 Fed. 667; Jones v. Hillis (C. C.) 100 Fed. 355; Lawrence v. Vernon, 3 Sumn. 20, Fed. Cas. No. 8,146; Gates v. Goreham, 5 Vt. 317, 26 Am. Dec. 303; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Smith v. Whiting, 11 Mass. 445; Percy v. Foote, 36 Conn. 102; Miller v. Manice, 6 Hill (N. Y.) 114; Stowell v. Chamberlain, 60 N. Y. 272; Marsh v. Masterson, 50 N. Y. Super. Ct. 187; Crockett v. Routon, Dud. (Ga.) 254; Dawley v. Brown, 79 N. Y. 390; Marsh v. Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; Motley v. Harris, 1 Lea (Tenn.) 577; People v. Rickert, 159 Ill. 496, 42 N. E. 884; Gayer v. Parker, 24 Neb. 643, 39 N. W. 845, 8 Am. St. Rep. 227; Pratt v. Ratliff, 10 Okl. 168, 61 Pac. 523; Taylor v. Castle, 42 Cal. 367; Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Martin v. Kennedy, 2 Bos. & P. 69.

[292] Taylor v. Castle, 42 Cal. 367.

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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." [293] 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.[294] "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." [295] 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.[296]

§ 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 when

[293] Stringer v. Adams, 98 Ind. 539, citing Kirkpatrick v. Stingley, 2 Ind. 269; Indianapolis & C. R. Co. v. Clark, 21 Ind. 150; Hargus v. Goodman, 12 Ind. 629.

[294] Wharton, Cr. Law (7th Ed.) § 551.

[295] Heikes v. Com., 26 Pa. 513. And see In re Campbell's Registration, 197 Pa. 581, 47 Atl. 860.

[296] Gordon v. State, 71 Ala. 315.

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pleaded, and nothing conclusive in it when offered in evidence." [297] Thus, in an action for specific performance of a contract to sell lands, where the issue is whether defendant ratified the unauthorized act of his agent in making the contract, a judgment for the defendant in a former action between the same parties for damages caused by recording such contract, and thus placing a cloud on the title is not conclusive where, under the instructions in that action, the jury might have found for defendant either on the ground that plaintiff had ratified the contract, or that no damage had been sustained by placing it on the record, and the verdict does not specify on which ground the jury based their verdict.[298] So, the record of a judgment in a suit on several distinct claims is not a bar to a subsequent suit by the same plaintiff on one of the same claims, where the record does not show that the claim was adjudicated in such suit, but merely that the other demands were determined in favor of the plaintiff.[299] So, 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 suing the same defendant again for infringing the same patent.[300]

§ 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.[301] His-

[297] Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108; Griffith v. Fields, 105 Iowa, 362, 75 N. W. 325.

[298] De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956.

[299] Nashua & L. R. Corp. v. Boston & L. R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454.

[300] Steam-Gauge & Lantern Co. v. Meyrose (C. C.) 27 Fed. 213.

[301] 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, 2 L. Ed. 126; Lawrence v. Vernon, 3 Sumn. 20, Fed. Cas. No. 8,146; Case v. New Orleans & C. R. Co., 2 Woods, 236, Fed. Cas. No. 2,493; 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.

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torically, this important rule is as old as the time of the Roman jurists,[302] and rests upon broad foundations of justice and expediency. That it has prevailed from very early times in the English law will appear from Slade's Case,[303] 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

Dearth, 43 Vt. 98; Lindsey v. Danville, 46 Vt. 144; **Livermore v. Herschell**, 3 Pick. (Mass.) 33; Merriam v. Woodcock, 104 Mass. **326**; **Blackinton** v. Blackinton, 113 Mass. 231; Norton v. Doherty, 3 Gray (**Mass.**) **372**, 63 Am. Dec. 758; Smith v. Way, 9 Allen (Mass.) 472; Goodrich v. **Yale**, 97 **Mass.** 15; Harlow v. Bartlett, 170 Mass. 584, 49 N. E. 1014; Betts v. **Starr**, 5 Conn. 550, 13 Am. Dec. 94; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, **15 Am. Dec. 256**; Taylor v. Taylor, 63 Hun. 303, 17 N. Y. Supp. 161; **Boyd v. Boyd**, 53 App. Div. 152, 65 N. Y. Supp. 859; Collins v. Bennett, 46 N. **Y. 490**; **Brown** v. Mayor, etc., of City of New York, 66 N. Y. 385; Baker **v. Rand**, 13 Barb. (N. Y.) 152; Rice v. King, 7 Johns. (N. Y.) 20; **Cist v. Zeigler**, 16 **Serg. & R.** (Pa.) 282, 16 Am. Dec. 573; Marsh v. Pier, 4 Rawle (Pa.) **273**, 26 **Am. Dec.** 131; Ahl v. Goodhart, 161 Pa. 455, 29 Atl. 82; **Harryman v. Roberts**, 52 Md. 64; Hite v. Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719; **Ferguson** v. Carter, 8 Ga. 524; Perry v. Lewis, 49 Miss. 443; Agnew v. **McElroy**, 18 **Miss.** 552, 48 Am. Dec. 772; Stuart v. Tenison Bros. Saddlery Co., **21 Tex. Civ. App.** 530, 53 S. W. 83; Owens v. Rawleigh, 6 Bush (Ky.) 656; **State Bank v. Rude**, 23 Kan. 143; Walker v. Fuller, 29 Ark. 448; Covington & **C. 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; Union R. & Transp. Co. v. Traube, 59 Mo. 355; Barker v. **Cleveland**, 19 **Mich.** 230; In re Skoll, 72 Minn. 319, 75 N. W. 231; Spear v. Tidball, **40 Neb. 107**, 58 N. W. 708; Taylor v. Castle, 42 Cal. 367.

[302] Dig. 44, 2, 5. See Pothier on Obl. pt. 4, c. 3, § 3, **art. 4, § 4.**

[303] 4 Coke, 94b. See, also, Y. B. 12 Edw. IV, 13a.

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a different remedy upon the same facts or cause of action." [304] 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.[305] 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 plaintiff. 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.[306] 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.[307] 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." [308] For instance, plaintiff sued defendant in covenant for breach of a sealed agreement in

[304] Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773. And see Miller v. Manice, 6 Hill (N. Y.) 114, 122.

[305] Eastmure v. Laws, 5 Bing. N. C. 444.

[306] Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393.

[307] Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

[308] Norton v. Doherty, 3 Gray (Mass.) 372, 63 Am. Dec. 758; Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565.

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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.[309] 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.[310] 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.[311] 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 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.[312]

§ 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.[313] So, in

309 Cutler v. Cox, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152. See, also, Newby v. Caldwell, 54 Iowa, 102, 6 N. W. 154.

310 Duncan v. Stokes, 47 Ga. 593.

311 Walker v. Fuller, 29 Ark. 448.

312 Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766.

313 Supra, § 715. And see Johnson v. East Tennessee, V. & G. Ry. Co., 90 Ga. 810, 17 S. E. 121.

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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.[314] 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.[315] 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 was of that extent.[316] 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.[317] 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.[318]

[314] Elgin Nat. Watch Co. v. Meyer (C. C.) 29 Fed. 225.

[315] Woodland v. Newhall's Adm'r (C. C.) 31 Fed. 434.

[316] Schriver v. Eckenrode, 87 Pa. 213.

[317] Putt v. Rawstern, 3 Mod. 1.

[318] Elliot v. Porter, 5 Dana (Ky.) 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.

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§ 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. The general rule may be thus stated: A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.[319] This rule means, in the first place, that the parties must bring forward, in one trial, all the evidence and all the reasons which 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.[320] Thus, a judgment on the merits in an action for personal injuries, on the ground of

[319] Henderson v. Henderson, 3 Hare, 100; Nelson v. Couch, 15 C. B. (N. S.) 99; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690; David Bradley Manuf'g Co. v. Eagle Manuf'g Co., 6 C. C. A. 661, 57 Fed. 980; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Fayerweather v. Ritch, 34 C. C. A. 61, 91 Fed. 721; Landon v. Bulkley, 37 C. C. A. 96, 95 Fed. 344; Chavent v. Schefer (C. C.) 59 Fed. 231; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Pennock v. Kennedy, 153 Pa. 579, 26 Atl. 217; Northwestern Bank v. Hays, 37 W. Va. 475, 16 S. E. 561; Lindsley v. Thompson, 1 Tenn. Ch. 272; Chicago, K. & W. R. Co. v. Black, 47 Kan. 766, 29 Pac. 96; Desnoyers v. Dennison, 19 Ohio Cir. Ct. R. 320; Bates v. Spooner, 45 Ind. 489; Bailey v. Bailey, 115 Ill. 551, 4 N. E. 394; Terre Haute & I. R. Co. v. Peoria & P. U. Ry. Co., 81 Ill. App. 435; Pugh v. Williamson, 1 Mo. App. Rep'r, 361, 61 Mo. App. 165; Territory v. Santa Fé Pac. R. Co. (N. M.) 62 Pac. 985.

[320] Rogers v. Higgins, 57 Ill. 244; Macdougall v. Knight, 25 Q. B. Div. 1; Newell v. Neal, 50 S. C. 68, 27 S. E. 560.

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defendant's negligence, is a bar to a second action between the same parties for the same injury, though additional acts of negligence are charged.[321] So where a plaintiff has unsuccessfully prosecuted to final judgment an action for the trial of title to land, he is concluded by the result, whether or not he then asserted all the claims which he had to the land.[322] And where an action to recover a debt is litigated on the theory that defendant is liable individually, the judgment is a bar to a subsequent action to charge him as a surviving partner, since his liability as surviving partner could have been tried in the former action.[323] For another 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.[324] 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.[325] 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.[326] 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

[321] Columb v. Webster Manuf'g Co., 28 C. C. A. 225, 84 Fed. 592, 43 L. R. A. 195; McCain v. Louisville & N. R. Co. (Ky.) 22 S. W. 325.

[322] Des Moines & Ft. D. R. Co. v. Bullard, 89 Iowa, 749, 56 N. W. 498.

[323] Wilcox v. Gilchrist, 85 Hun, 1, 32 N. Y. Supp. 608.

[324] Martin v. Roney, 41 Ohio St. 141.

[325] Price v. Dewey (C. C.) 11 Fed. 104.

[326] See Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506; McGillis v. Willis, 39 Ill. App. 311; Achey v. Creech, 21 Wash. 319, 58 Pac. 208.

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proceeding is a bar to the latter.[327] Finally, a party must present his whole case. He must extend his claim so as to embrace everything which properly constitutes a part of his cause of action.[328] 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.[329]

§ 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." [330] 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.[331] 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.[332] 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

327 Vail v. Rinehart, 105 Ind. 6, 4 N. E. 218. And see Kirk v. Goodwin, 53 Kan. 610, 36 Pac. 1057.

328 Fleitas v. Meraux, 47 La. Ann. 232, 16 South. 848; Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461; Hyde v. Leisenring, 107 Mich. 490, 65 N. W. 536.

329 Stewart v. Stebbins, 30 Miss. 66; Burford v. Kersey, 48 Miss. 643.

330 Williams v. Clouse, 91 N. C. 322.

331 Malony v. Horan, 12 Abb. Prac. (N. S.; N. Y.) 289.

332 Fairchild v. Lynch, 99 N. Y. 359, 2 N. E. 20.

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they were of such a character that the law would permit their union." [333]

§ 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 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.[334] 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

[333] Eastman v. Porter, 14 Wis. 39. See also Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454; Gentles v. Finck, 23 Misc. Rep. 153, 50 N. Y. Supp. 726; Schuster v. White's Adm'r (Ky.) 50 S. W. 242; Mussey v. Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516; Jones v. Beaman, 119 N. C. 300, 25 S. E. 970; Collier v. Cunningham, 2 Ind. App. 254, 28 N. E. 341.

[334] People v. Dalton, 52 App. Div. 371, 65 N. Y. Supp. 342; Dowdall v. Cannedy, 32 Ill. App. 207; Taylor v. Indiana Paper Co., 64 Ill. App. 339; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

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former judgment.[335] 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.[336] 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 back the same money on the ground of fraud on the part of the defendant.[337] 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.[338] 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.[339] On similar principles, it is held that a judgment denying to the plaintiff a specific lien on property (as, in the case of an unsuccessful attempt to establish a mechanic's lien) will not be a bar to an action by him for the value of the services, advances, or material furnished to the defendant.[340] And where a plaintiff alleges an express contract to pay a stipulated sum for services rendered, but fails to re-

[335] Rider v. Union India Rubber Co., 28 N. Y. 379.

[336] Marsh v. Masterson, 101 N. Y. 401, 5 N. E. 59.

[337] Belden v. State, 103 N. Y. 1, 8 N. E. 363.

[338] Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436.

[339] Keater v. Hock, 16 Iowa, 23.

[340] Geary v. Bangs, 138 Ill. 77, 27 N. E. 462; Texas, S. F. & N. Ry. Co. v. Saxton, 7 N. M. 302, 34 Pac. 532; Sease v. Dobson, 34 S. C. 345, 13 S. E. 530; Brown v. Squires' Adm'r, 42 W. Va. 367, 26 S. E. 177.

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cover, he will not be precluded from bringing another action for the reasonable value of the services, as upon a quantum meruit.[341] Again, where a town borrowed money to pay the expenses of certain litigation, giving notes therefor, and, in an action at law upon these notes, the town was held not liable, as not having authority to borrow for such a purpose, it was held that the judgment was not a bar to a subsequent action in equity by the person who made the loan, claiming as the equitable assignee of the bills to pay which the money was borrowed.[342]

But it is not enough to bring a case within the foregoing rule that the party sets up new or additional reasons why his contention should prevail. In other words, a judgment will be allowed its full conclusive effect where the parties and the cause of action are the same, and the theory on which the case is based is not essentially different from that formerly litigated, although the plaintiff now brings forward new grounds of recovery, or the defendant now sets up new grounds of defense.[343] For instance, where a debtor assigned a note to his creditor, an attorney, as collateral security, and the latter took judgment on the note in his own name, but failed to collect it, and the debtor then sued the creditor for negligence as an attorney in not collecting the judgment, and a demurrer to the complaint was sustained, whereupon the debtor brought another suit, alleging the same facts, but counting on the creditor's negligence as an assignee, it was held that the former judgment was a bar to the second suit.[344]

§ 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

[341] Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; Rossman v. Tilleny, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247; Henrietta Nat. Bank v. Barrett (Tex. Civ. App.) 25 S. W. 456.

[342] Wells v. Town of Salina, 25 N. Y. Supp. 134, 71 Hun, 559.

[343] Ross v. City of Portland (C. C.) 105 Fed. 682; Greene v. Central of Georgia Ry. Co., 112 Ga. 859, 38 S. E. 360; Werlein v. City of New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

[344] Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478.

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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.[345] "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." [346] "The principle which prevents the splitting up of causes of action, and forbids double vexation for the same

[345] Fetter v. Beale, 1 Salk. 11; Bawell v. Kensey, 3 Lev. 179; Bagot v. Williams, 3 Barn. & C. 235; Baird v. United States, 96 U. S. 430, 24 L. Ed. 703; Bucki & Son Lumber Co. v. Atlantic Lumber Co., 48 C. C. A. 455, 109 Fed. 411; Claflin & Kimball v. Mather Electric Co. (C. C.) 87 Fed. 795; Horton v. New York Cent. & H. R. R. Co. (C. C.) 63 Fed. 897; Bartels v. Schell (C. C.) 16 Fed. 341; Hayward v. Clark, 50 Vt. 612; Avery v. Fitch, 4 Conn. 362; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Goodrich v. Yale, 97 Mass. 15; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Willard v. Sperry, 16 Johns. (N. Y.) 121; Farrington v. Payne, 15 Johns. (N. Y.) 432; Miller v. Covert, 1 Wend. (N. Y.) 487; Clark v. Jones, 1 Denio (N. Y.) 519, 43 Am. Dec. 706; Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Stevens v. Lockwood, 13 Wend. (N. Y.) 644, 28 Am. Dec. 492; Staples v. Goodrich, 21 Barb. (N. Y.) 317; Montrose v. Wanamaker, 134 N. Y. 590, 31 N. E. 252; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78; Logan v. Caffrey, 30 Pa. 196; Alcott v. Hugus, 105 Pa. 350; Sykes v. Gerber, 98 Pa. 179; Carvill v. Garrigues, 5 Pa. 152; Eisenhower v. School Dist. of Borough of Centralia, 13 Pa. Super. Ct. 51; Fell v. Bennett, 110 Pa. 181, 5 Atl. 17; In re Strike, 1 Bland (Md.) 57; Hite v. Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719; Bates v. Quattlebom, 2 Nott & McC. (S. C.) 205; Atlanta Elevator Co. v. Fulton Bag & Cotton Mills, 106 Ga. 427, 32 S. E. 541; Oliver v. Holt, 11 Ala. 578, 46 Am. Dec. 228; O'Neal v. Brown, 21 Ala. 485; South & N. A. R. Co. v. Henlein, 56 Ala. 368; Gatewood v. Long (Ky.) 51 S. W. 569; Wells v. Hickox, 1 Kan. App. 485, 40 Pac. 821; Erwin v. Lynn, 16 Ohio St. 539; Stein v. The Prairie Rose, 17 Ohio St. 475, 93 Am. Dec. 631; Mallock v. Krome, 78 Ill. 110; Taylor v. Heitz, 87 Mo. 660; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Beck v. Devereaux, 9 Neb. 109, 2 N. W. 365; Herriter v. Porter, 23 Cal. 385; Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525.

[346] Sykes v. Gerber, 98 Pa. 179.

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thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious grievances." [347] In point of fact, this rule is not even a product of modern jurisprudence, but was well known in the Roman systems.[348] 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.[349] 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.[350] 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.[351] 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.[352] Where a plaintiff brought suit upon a mechanic'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 the former recovery was a bar to the second action.[353]

But it is said that the rule forbidding the severance of a cause of action is for the benefit of the defendant, and therefore he may waive it. Thus, where, upon a consideration moving from the defendant, the plaintiff enters into an agreement for forbearance as to a portion of his claim, the defendant cannot plead a judgment on the remainder

[347] Dutton v. Shaw, 35 Mich. 431.

[348] Dig. 44, 2, 7.

[349] Smith v. Jones, 15 Johns. (N. Y.) 229.

[350] Willard v. Sperry, 16 Johns. (N. Y.) 121. And see Pilcher v. Ligon, 91 Ky. 228, 15 S. W. 513; Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91; Broxton v. Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97.

[351] Hughes v. Dundee Mortgage & Trust Co. (C. C.) 26 Fed. 831.

[352] Ingraham v. Hall, 11 Serg. & R. (Pa.) 78.

[353] Smedly v. Tucker, 3 Phila. 259.

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of the claim as a bar to a second action brought after the time of forbearance agreed upon has expired.[354] Nor can the rule against splitting causes of action be applied unless the two claims separately sued on were both parts of one and the same cause of action, equally available for purposes of suit at the time the first action was brought, and equally within the scope and purview of that action. For instance, where a state statute provides that if goods specified in a writ of replevin shall not be found, the plaintiff may recover their value in the same suit, a plaintiff who secures only a partial recovery in replevin, because part of the goods were not in the defendant's possession at the issuance of the writ, will not be precluded from bringing another suit to recover the value of the balance of the goods.[355] In another case, the plaintiff corporation, which held claims against the defendant corporation, growing out of a contract, accepted stock of defendant in satisfaction of a specified part of the claims upon certain conditions, to be performed by a time stated. The conditions not having been performed within such time, plaintiff tendered back the stock received. It had previously brought a suit on its unadjusted claims, which was then pending. It was held that the judgment in such suit could not be pleaded by defendant in bar of a subsequent suit upon the portion of the claims covered by the adjustment.[356] An action for breach of covenant of seisin is not a bar to an action for breach of covenant in the same deed against incumbrances; for the actions are not founded on the same cause of action, and therefore the rule prohibiting the splitting of a single cause of action has no application.[357] For similar reasons, this rule does not prevent one whose property is taken by a single trespass from maintaining replevin for so much of the property as is owned absolutely by him, and trover for the remainder, owned by him in common with another.[358]

[354] Claflin & Kimball v. Mather Electric Co., 39 C. C. A. 241, 98 Fed. 699. And see Little v. City of Portland, 26 Or. 235, 37 Pac. 911.

[355] Reid, Murdoch & Co. v. Parks, 122 Mich. 363, 81 N. W. 252; Taub v. McClelland-Colt Commission Co., 10 Colo. App. 190, 51 Pac. 168.

[356] Claflin & Kimball v. Mather Electric Co., 39 C. C. A. 241, 98 Fed. 699. And see Wheelock v. Svensgaard, 63 Minn. 486, 65 N. W. 937.

[357] Moore v. Johnston, 108 Ala. 324, 18 South. 825.

[358] Huffman v. Knight, 36 Or. 581, 60 Pac. 207.

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§ 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.[359] "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." [360] 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.[361] 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.[362] 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.[363] The rule against splitting up causes of action is applied with great strictness in actions upon book-accounts, as will appear from the recent case of Buck v.

[359] O'Beirne v. Lloyd, 43 N. Y. 248; Rosenmueller v. Lampe, 89 Ill. 212, 31 Am. Rep. 74; De Weese v. Smith (C. C.) 97 Fed. 309; City of New York v. Constantine (Super. N. Y.) 18 N. Y. Supp. 788; Samuel v. Fidelity & Casualty Co., 76 Hun, 308, 27 N. Y. Supp. 741.

[360] Joyce v. Moore, 10 Mo. 271. And see Hill v. Joy, 149 Pa. 243, 24 Atl. 293.

[361] Warren v. Comings, 6 Cush. (Mass.) 103.

[362] Orendorff v. Utz, 48 Md. 298; Ahl v. Ahl, 60 Md. 207.

[363] Lucas v. Le Compte, 42 Ill. 303.

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Wilson.[364] 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.[365] 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.[366] 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.[367] 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.[368] 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 be so separated into dis-

[364] 113 Pa. 423, 6 Atl. 97.

[365] Davis v. Milburn, 4 Iowa, 246.

[366] Leggett v. Lippincott, 50 N. J. Law, 462, 14 Atl. 577. And see Osborne v. Atkins, 6 Gray (Mass.) 423.

[367] Stewart v. Dent, 24 Mo. 111.

[368] Pierro v. St. Paul & N. P. R. Co., 37 Minn. 314, 34 N. W. 38.

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tinct and independent parts.[369] 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.[370]

§ 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.[371] This rule, however, has not passed unchallenged, and it is repudiated in an important and able decision of the supreme court of Massachusetts.[372] But the reasoning in that case,

[369] Hopkins v. Stockdale, 117 Pa. 365, 11 Atl. 368.

[370] Pinney v. Barnes, 17 Conn. 420.

[371] Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Bendernagle v. Cocks, 19 Wend. (N. Y.) 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 (Conn.) 255; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Memmer v. Carey, 30 Minn. 458, 15 N. W. 877; Manley v. Tufts, 59 Kan. 660, 54 Pac. 683; Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810.

[372] 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. (N. Y.) 492, 24 Am. Dec. 60, 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

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though forcible, 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.[373] 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.[374]

§ 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.[375] Thus, where one has recovered judgment for the amount of a promissory

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 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.

[373] McLaughlin v. Hill, 6 Vt. 20; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

[374] Avery v. Fitch, 4 Conn. 362.

[375] Stockton v. Ford, 18 How. 418, 15 L. Ed. 395; Folsom v. Clemence, 119 Mass. 473; Platner v. Best, 11 Johns. (N. Y.) 530; Hayes v. Reese, 34 Barb. (N. Y.) 151; In re Ahl's Estate, 169 Pa. 609, 32 Atl. 621; Whiley v. Broadway, 3 N. J. Law, 995; Weber v. Morris & E. R. Co., 36 N. J. Law, 213; Horner v. Dunnagan, 41 N. C. 371; Newport & C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673; Russell v. McIlvoy (Ky.) 41 S. W. 765; Callahan v. Murrell (Ky.) 45 S. W. 67; Ewing v. McNairy, 20 Ohio St. 315; Keokuk Co. v. Alexander, 21 Iowa, 377.

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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.[376] 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.[377] In 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.[378] 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.[379] And the same result follows where the inadequacy of the first judgment was due to an error made by the referee.[380] 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.[381] 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 re-

[376] Wickersham v. Whedon, 33 Mo. 561.

[377] See Stevens v. Damon, 29 Vt. 521; Phillipps v. Bossard (D. C.) 35 Fed. 99; Byrket v. State, 3 Ind. 248; Lake v. Hancock, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159.

[378] Kane v. Morehouse, 46 Conn. 300.

[379] Winslow v. Stokes, 48 N. C. 285, 67 Am. Dec. 242.

[380] Bancroft v. Winspear, 44 Barb. (N. Y.) 209.

[381] Town v. Smith, 14 Mich. 348.

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covery does not bar claims of which the plaintiff was ignorant, although they existed at the time and might have been joined.[382]

§ 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 merits in respect to any part will be available as a bar in other actions arising from the same cause.[383] 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.[384] 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.[385] Nor is

[382] Moran v. Plankinton, 64 Mo. 337; Alexander v. Bridgford, 59 Ark. 195, 27 S. W. 69; Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248; Ruehlmann v. Eleventh Ward Bldg. Ass'n, 7 Ohio N. P. 296.

[383] Ranken v. St. Louis & B. Suburban Ry. Co. (C. C.) 98 Fed. 479; Barnard v. Devine, 34 Misc. Rep. 182, 68 N. Y. Supp. 859; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006; Foster v. Napier, 73 Ala. 595; Saddler v. Apple, 9 Humph. (Tenn.) 342; Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502; Jungnitsch v. Michigan Malleable Iron Co., 121 Mich. 460, 80 N. W. 245; Herriter v. Porter, 23 Cal. 385.

[384] Pierro v. St. Paul & N. P. Ry. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. A railway having been constructed along a street on which the plaintiff owned two lots, he obtained a judgment for damages to one of them arising from the construction and operation of the road. It was held that this was a bar to a suit for damages to the other lot, accruing prior to the first action, from the same cause, although the two lots were separated by an intervening space of several hundred feet. Beronio v. Southern Pac. R. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57. And see Covington & C. Elevated Railroad & Transfer & Bridge Co. v. Kleimeier (Ky.) 49 S. W. 484.

[385] Union R. & Transp. Co. v. Traube, 59 Mo. 355; Farrington v. Payne, 15 Johns. (N. Y.) 432; O'Neal v. Brown, 21 Ala. 482; Thisler v. Miller, 53 Kan.

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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;[386] 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.[387] 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 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.[388] 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.[389] 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

515, 36 Pac. 1060, 42 Am. St. Rep. 302; Skeen v. Springfield Engine & Thresher Co., 42 Mo. App. 158. A cause of action for damages for the negligent killing of two horses, at the same time and place, is entire and indivisible, and a recovery in a separate action for the death of one of them is a bar to a subsequent action for the death of the other. St. Louis S. W. Ry. Co. v. Moss, 9 Tex. Civ. App. 6, 28 S. W. 1038.

[386] McCaffrey v. Carter, 125 Mass. 330.

[387] O'Neal v. Brown, 21 Ala. 482.

[388] Knowlt n v. New York & N. E. R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625. See, also, Trask v. Hartford & N. H. R. Co., 2 Allen (Mass.) 331.

[389] Goodrich v. Yale, 8 Allen (Mass.) 454.

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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.[390] 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."[391] 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 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."[392] 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

[390] Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Hodsoll v. Stallebrasse, 11 Adol. & El. 301; Whitney's Adm'r v. Town of Clarendon, 18 Vt. 252, 46 Am. Dec. 150; Watson v. Van Meter, 43 Iowa, 76.

[391] Fetter v. Beale, 1 Salk. 11.

[392] Ware v. Percival, 61 Me. 393, 14 Am. Rep. 565. See, also, Smith v. Way, 9 Allen (Mass.) 472; Ellis v. Crowl, 46 Kan. 100, 26 Pac. 454; Kapischke v. Koch, 180 Ill. 44, 54 N. E. 179. In the case last cited, it was held that, in an action of trespass for the unauthorized seizure and retention of goods obtained on a writ of replevin, it is proper for the court to direct a peremptory finding for the defendant, where admissions of counsel establish the fact that a judgment had been obtained on the replevin bond and satisfied.

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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.[393]

§ 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." [394]

§ 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 wrong-

[393] Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719. And see Union R. & Transp. Co. v. Traube, 59 Mo. 355.

[394] Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301. See, also, Jarnigan v. Fleming, 43 Miss. 724, 5 Am. Rep. 514; Rockwell v. Brown, 36 N. Y. 207; Townsh. Sland. & L. § 251.

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ful 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.[395] And again, the rights of different persons, or of the same person in different capacities, may be violated by the same tortious act. Thus, a stranger, committing waste on premises leased or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord or reversioner for the injury to the freehold or inheritance; and the right of each is distinct from that of the other, and satisfaction made to one is no bar to an action brought by the other.[396] So, recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, and as a result of the same negligence or fault.[397] And where two brothers are at the same time killed by the collision of a railroad train with the vehicle in which they were riding, a recovery for the negligent killing of one is not a bar to an action for the negligent killing of the other, though the same person brings both actions as administrator.[398] So again, a judgment 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.[399] But on the other hand, the recovery of a judgment by factors for injury to goods in their possession, and on which they have a lien, is a bar to an action for such injury by the owner.[400] But an action against a railroad company or other corporation, for personal injuries to a minor, caused by the fault or negligence of the defendant, brought in behalf of such infant by his father as next friend, is

[395] Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141; Watson v. Texas & P. Ry. Co., 8 Tex. Civ. App. 144, 27 S. W. 924. Compare Reilly v. Sicilian Asphalt Pav. Co., 31 App. Div. 302, 52 N. Y. Supp. 817.

[396] California Dry Dock Co. v. Armstrong (C. C.) 17 Fed. 216.

[397] Texas & P. Ry. Co. v. Nelson, 9 Tex. Civ. App. 156, 29 S. W. 78.

[398] Illinois Cent. R. Co. v. Slater, 139 Ill. 190, 28 N. E. 830.

[399] Taylor v. Manhattan Ry. Co., 53 Hun, 305, 6 N. Y. Supp. 488; Cahnmann v. Metropolitan St. Ry. Co., 35 Misc. Rep. 127, 71 N. Y. Supp. 317.

[400] Porter v. Schendel, 25 Misc. Rep. 779, 55 N. Y. Supp. 602. And see Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259.

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not, either as to the cause of action or as to the parties, actually or substantially the same as a suit by the father in his own right against the same defendant for the loss of the child's services, occasioned by the same injuries; and therefore a judgment recovered in one of such actions is no bar to the prosecution of the other.[401] And a former recovery by the father, for the 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.[402] On the same principle, a wife's right of action for injuries sustained by her is entirely distinct from her husband's right of action for the loss of her services and her society occasioned by the same injuries.[403] And an action by an administrator for the wrongful killing of his intestate, for the benefit of the widow and next of kin, is not a bar to an action to recover, for the benefit of the estate, the medical and funeral expenses, and damages for mental anguish suffered by the deceased after receiving the injury which caused his death.[404] Again, the constitutional rule that no person shall be twice put in jeopardy for the same offense does not inhibit an action for a civil penalty for a tortious act in addition to a criminal prosecution therefor.[405] A decree in favor of a lot-owner, assessing damages for the grading of a street, rendered before the grading was done, and specially confining the assessment to damages resulting from ordinary grading, is not a bar to a subsequent action by the same owner for negligent grading, injuring his premises.[406] But where a statute provides for an action of debt for a

[401] Wilton v. Middlesex R. Co., 125 Mass. 130; Hooper v. Southern Ry. Co., 112 Ga. 96, 37 S. E. 165; Bernard v. Merrill, 91 Me. 358, 40 Atl. 136; Bamka v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618; South & N. A. R. Co. v. Donovan, 84 Ala. 141, 4 South. 142; McNamara v. Logan, 100 Ala. 187, 14 South. 175; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686; Central R. Co. v. Brinson, 64 Ga. 475; Morgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504.

[402] Bradley v. Andrews, 51 Vt. 525; Karr v. Parks, 44 Cal. 46.

[403] Denver Cons. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476.

[404] St. Louis, I. M. & S. Ry. Co. v. Sweet, 63 Ark. 563, 40 S. W. 463. But see Clare v. New York & N. E. R. Co., 172 Mass. 211, 51 N. E. 1083.

[405] State v. Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767; McDonald v. Stark, 176 Ill. 456, 52 N. E. 37.

[406] Jones v. City of Seattle, 23 Wash. 753, 63 Pac. 553. And see Kehoe v. City of Philadelphia, 199 Pa. 45, 48 Atl. 679.

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penalty, to be brought in the name of the state, for the use of any person who is injured by a violation of the provisions of the act in relation to the operation of a railroad or the running of its trains, a person who is so injured, in his person or property, must choose whether he will seek his remedy under such statute or by an action at common law; and if he recovers his damages in an action of trespass, he cannot afterwards sue under the statute for the same injuries.[407]

§ 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 rise to distinct causes of action.[408] 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.[409] 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.[410] 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.[411]

[407] Terre Haute & I. R. Co. v. People, 41 Ill. App. 513; Illinois Cent. R. Co. v. People, 84 Ill. App. 260.

[408] Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Missouri Pac. Ry. Co. v. Scammon, 41 Kan. 521, 21 Pac. 590; Amrhein v. Quaker City Dye Works, 192 Pa. 253, 43 Atl. 1008.

[409] White v. Moseley, 8 Pick. (Mass.) 356.

[410] De La Guerra v. Newhall, 55 Cal. 21.

[411] Adams v. Haffards, 20 Pick. (Mass.) 127.

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§ 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.[412] 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.[413] So, a judgment in a former action against a railroad company or other corporation for damages to real property caused by the construction of its road or other works, sustained up to the time of the commencement of such former action, is not a bar to an action for such damages accruing subsequently.[414] Thus, where the faulty or negligent construction of a railroad causes it to obstruct or dam the waters of a stream, so as to overflow the lands of an adjoining proprietor, a judgment recovered by the latter for the damages occasioned by one such overflow (as, for injury to crops, deposit of debris on his land, undermining of buildings, or the like) will not be a bar to a subsequent suit for damages for subsequent injuries arising from the same cause.[415] So, a judgment for the diversion of water which supplied plaintiff's

[412] Smith v. Elliott, 9 Pa. 345; Brakken v. Minneapolis & St. L. Ry. Co., 32 Minn. 425, 21 N. W. 414; Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668.

[413] Holmes v. Wilson, 10 Adol. & E. 503. Compare Clarke v. Yorke, 47 Law T. (N. S.) 381.

[414] Rumsey v. New York & N. E. R. Co., 63 Hun, 200, 17 N. Y. Supp. 672, affirmed 137 N. Y. 563, 33 N. E. 338; Hoch v. Manhattan Ry. Co., 59 Hun, 541, 13 N. Y. Supp. 633; Hartman v. Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

[415] Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Ohio, I. & W. Ry. Co. v. Dooley, 32 Ill. App. 228; Cleveland, C., C. & St. L. Ry. Co. v. Nuttall, 59 Ill. App. 639; McKee v. St. Louis, K. & N. W. R. Co., 49 Mo. App. 174; Rarey v. Lee, 7 Ind. App. 518, 34 N. E. 749; Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061; Bowers v. Mississippi & R. R. Boom Co., 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395.

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mill, limited by its terms to damages sustained from the time of the diversion to the commencement of the action, does not bar an action for the damages afterwards sustained.[416]

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 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.[417] 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.[418] 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.[419] But where the plaintiff might, without any

[416] Covert v. City of Brooklyn, 13 App. Div. 188, 43 N. Y. Supp. 310.

[417] Smith v. Elliott, 9 Pa. 345; Schoch v. Foreman, 3 Brewst. (Pa.) 157; Long v. Trexler (Pa.) 8 Atl. 620; Hartman v. Pittsburg Incline Plane Co., 2 Pa. Super. Ct. 123; Plate v. New York Cent. R. Co., 37 N. Y. 472.

[418] Richardson v. Boston, 19 How. 263, 15 L. Ed. 639; Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; Shepherd v. Willis, 19 Ohio, 142; Nivin v. Stevens, 5 Har. (Del.) 272.

[419] Hahn v. Miller, 68 Iowa, 745, 28 N. W. 51. See Smith v. Inhabitants of Brunswick, 80 Me. 189, 13 Atl. 890. But the fact that plaintiff recovered only nominal damages, in an action for a continuing tort, is not conclusive against

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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.[420]

§ 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.[421] "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

his right to maintain another action for the same tort several years later. Stafford v. Maddox, 87 Ga. 737, 13 S. E. 559.

[420] Jones v. Lavender, 55 Ga. 228.

[421] Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Chicago & A. R. Co. v. Maher, 91 Ill. 312; Omaha & R. V. R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183; Stodghill v. Chicago, B. & Q. R. Co., 73 Iowa, 341, 5 N. W. 495; Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Fowle v. New Haven & N. Co., 107 Mass. 352; Clark v. Lanier, 104 Ga. 184, 30 S. E. 741; Brown v. Southwestern Telegraph & Telephone Co., 17 Tex. Civ. App. 433, 44 S. W. 59; International & G. N. Ry. Co. v. Gieselman, 12 Tex. Civ. App. 123, 34 S. W. 658; Lake Erie & W. Ry. Co. v. Purcell, 75 Ill. App. 573; Hodge v. Shaw, 85 Iowa, 137, 52 N. W. 8, 39 Am. St. Rep. 290; City of Los Angeles v. Baldwin, 53 Cal. 469.

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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."[422] 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. 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."[423] 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.[424] But recent decisions, as shown in the preceding section, hold 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, will not be a bar to a recovery for other injuries to the land sustained subsequent to the former suit by a continuance of such bridge.[425]

[422] Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

[423] Fowle v. New Haven & N. Co., 107 Mass. 352. See, also, Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341, 5 N. W. 495; Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792. Compare Illinois Cent. R. Co. v. Wilbourn, 74 Miss. 284, 21 South. 1.

[424] Decatur Gaslight & Coke Co. v. Howell, 92 Ill. 19.

[425] Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239; Cleveland, C., C. & St. L. Ry. Co. v. Nuttall, 59 Ill. App. 639; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; and other cases cited in the preceding section.

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§ 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.[426] 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 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." [427] On this principle, the holder of several overdue promissory notes, all against

[426] Stark v. Starr, 94 U. S. 477, 24 L. Ed. 276; Olsen v. Whitney (D. C.) 109 Fed. 80; Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Gentles v. Finck, 23 Misc. Rep. 153, 50 N. Y. Supp. 726; Govin v. De Miranda, 9 Misc. Rep. 684, 30 N. Y. Supp. 550; Milligan v. Browarsky, 147 Pa. 155, 23 Atl. 398; Daniels v. Heidenreich, 8 Kulp (Pa.) 413; Gottlieb v. Fred. W. Wolf Co., 75 Md. 126, 23 Atl. 198; Snow Steam Pump Co. v. Dunn, 119 N. C. 77, 25 S. E. 741; Boyle v. Wallace, 81 Ala. 352, 8 South. 194; New Orleans, M. & T. R. Co. v. Castello, 50 Ala. 12; Schuster v. White's Adm'r (Ky.) 50 S. W. 242; Collier v. Cunningham, 2 Ind. App. 254, 28 N. E. 341; Sherer v. Lankford, 67 Ill. App. 342; Corby v. Taylor, 35 Mo. 447; Eastman v. Porter, 14 Wis. 39; Latta v. Visel, 37 Neb. 612, 56 N. W. 311; Journe v. Hewes, 124 Cal. 244, 56 Pac. 1032.

[427] Secor v. Sturgis, 16 N. Y. 548.

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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.[428] 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.[429] 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.[430] 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.[431] To exhibit the application of the rule under somewhat different circumstances, we may cite a case from Wisconsin,[432] in which it was held that a cause of action for goods 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." Two separate and distinct sales of merchandise, though made on the same day to

428 Nathans v. Hope, 77 N. Y. 420.

429 Mills v. Garrison, 3 Abb. Dec. (N. Y.) 297.

430 Hughes v. Mendocino Co. (Cal.) 4 Pac. 236.

431 Bache v. Purcell, 51 How. Prac. (N. Y.) 270.

432 Kronshage v. Chicago, M. & St. P. Ry. Co., 45 Wis. 500. But see Bassett v. Connecticut River R. Co., 150 Mass. 178, 22 N. E. 890.

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the same purchaser, do not constitute an entire or inseverable cause of action, unless by express or implied contract to that effect, where the bills of sale conclusively show that each was an independent transaction.[433] So the interest coupons attached to a municipal bond constitute distinct causes of action from the bond itself.[434] A judgment in an action against a lessee for a breach of the covenant to pay rent is not a bar to an action for damages for negligence in the care of the premises.[435] So, where one agrees to pay a specified sum of money at once, and at a subsequent time to convey certain real estate, he subjects himself to liability in separate actions, and a judgment in an action to recover the money does not bar an action for damages for breach of the agreement to convey the land.[436] Again, a person having two independent claims against the estate of a decedent is not bound to unite them in one action or proceeding; and judgment for one is no bar to an action for the other, unless the executor can show that the second claim is directly connected with the first and naturally a part of it.[437] For the same reason, where a municipal corporation recovers judgment for taxes assessed on one of several parcels of land belonging to the same person, this will be no bar to an action for the taxes chargeable under the same assessment on the other parcels.[438] A salaried superintendent, who agreed with his employer to board its workmen, buy supplies, and pay certain expenses on its account, and who has left his place and recovered judgment for the salary due him, may bring a second suit for board furnished, supplies bought, and money paid, the latter cause of action being independent of the former.[439] In West Virginia, a statute provides that, when a plaintiff has several demands against the same defendant, founded on contract, he must bring his action for the whole amount due and payable at the time; but yet it is held that, where a party has two separate demands

[433] Alkire Grocery Co. v. Tagart, 1 Mo. App. Rep'r, 159, 60 Mo. App. 389.
[434] Nesbit v. Independent District of Riverside, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562.
[435] Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.
[436] Reynolds v. Franklin, 47 Minn. 145, 49 N. W. 648.
[437] Gedney v. Gedney, 19 App. Div. 407, 46 N. Y. Supp. 590.
[438] Harris v. City of Houston (Tex. Civ. App.) 60 S. W. 440.
[439] Terreri v. Jutte, 159 Pa. 244, 28 Atl. 225.

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against another, which together exceed the amount of which a justice has jurisdiction, a judgment recovered on one before a justice is not a bar to an action on the other.[440] Where the plaintiff has two independent accounts against the same defendant, and the latter makes a payment, which the plaintiff credits on one account and sues on the other, and defendant proves that the credit should have been on the account in suit, and obtains a judgment accordingly, such judgment will not operate as a bar to a recovery by plaintiff on the other account.[441]

§ 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.[442] 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.[443]

Again, it by no means follows that two claims are identical, or inseparably connected, because they grow out of the same instru-

[440] Flat Top Grocery Co. v. McClaugherty, 46 W. Va. 419, 33 S. E. 252.

[441] Scott v. Haines (City Ct. N. Y.) 18 N. Y. Supp. 163.

[442] Morrison v. Beckey, 6 Watts (Pa.) 349. Defendant in a forcible detainer suit, having been defeated, took an appeal, giving the usual bond. The appeal was subsequently dismissed and the possession of the premises surrendered, but in the meanwhile rent had accrued in excess of the penalty of the bond. It was held that a recovery upon the appeal bond against the tenant and his surety was not a bar to an action against the tenant for such excess. Chicago Opera-House Co. v. Paquin, 70 Ill. App. 596.

[443] Supra, §§ 738, 743. See Whitney's Adm'r v. Town of Clarendon, 18 Vt. 252, 46 Am. Dec. 150.

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ment. A recovery in one action of covenant is no bar to another on the same instrument, claiming for another and distinct breach.[444] 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.[445] 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.[446] 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.[447]

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

[444] Merchants' Ins. Co. v. Algeo, 31 Pa. 446; Givens v. Peake, 1 Dana (Ky.) 225. See Robinson v. Crowninshield, 1 N. H. 76; Andrew v. Schmitt, 64 Wis. 664, 26 N. W. 190.

[445] McIntosh v. Lown, 49 Barb. (N. Y.) 550. Where one who has no title to land sells it with covenant of warranty, the recovery and satisfaction of a judgment obtained by the vendee against the vendor for the purchase price paid is no bar to an action by the real owner against the vendor for fruits and revenues. City of New Orleans v. Whitney, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

[446] Coggins v. Bulwinkle, 1 E. D. Smith (N. Y.) 434. But see Ullman v. Herzberg, 91 Ala. 458, 8 South. 408.

[447] Millard v. Missouri, K. & T. R. Co., 20 Hun (N. Y.) 191. See, also, Harding v. Hale, 2 Gray (Mass.) 399.

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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."[448] Again, where A. sued B. for assault and battery 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.[449] 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.[450] 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.[451]

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 re-

[448] Duffy v. Gray, 52 Mo. 528. An action by a wife for damages to her separate estate is not barred by a judgment in a former action brought by her husband in his own right, upon the same cause of action. San Antonio & A. P. Ry. Co. v. Flato, 13 Tex. Civ. App. 214, 35 S. W. 859. And a judgment in favor of an infant for damages for loss of wages in an action by his father as guardian ad litem is not conclusive against the individual right of the father to recover for the loss of the same services. Lieberman v. Third Ave. R. Co., 55 N. Y. Supp. 677, 25 Misc. Rep. 704.

[449] Cade v. McFarland, 48 Vt. 47.

[450] Treasurers of State v. Oswald's Sureties, 2 Bailey (S. C.) 214.

[451] White v. Smith, 33 Pa. 186, 75 Am. Dec. 589; Fischer v. Quigley, 8 Wash. 327, 35 Pac. 1071. And see Walden Nat. Bank v. Birch, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211.

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covery of the property.[452] 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.[453] 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.[454] 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.[455] An action against the vendor upon a warranty in the sale of personal property, in which the plaintiff is defeated on the 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.[456] And where a note is given for the price of a chattel sold with warranty, a recovery for breach of the warranty does not affect the right to recover on the note.[457] So, judgment for the statutory penalty for illegal overcharge of fare on a railroad will not bar a suit for wrongful ejection from defendant's cars.[458]

Principles similar to those explained with reference to civil issues obtain in criminal cases with equal force. Thus, for example, an

[452] Pishaway v. Runnells, 71 Tex. 352, 9 S. W. 260. See, also, Turner v. Brock, 6 Heisk. (Tenn.) 50; Henson v. Taylor, 108 Ga. 567, 33 S. E. 911. A judgment in an action for conversion of goods is not a bar to an action between the same parties for the price of the same goods. Southern Ry. Co. v. Raney, 117 Ala. 270, 23 South. 29. So, a judgment for plaintiff in an action for the conversion of bonds held by defendant as plaintiff's agent is not a bar to a subsequent action by plaintiff to recover interest on the bonds collected by defendant before the conversion, as defendant's liability to account, as agent, for the interest collected formed no part of the claim for damages for the conversion of the bonds. Govin v. De Miranda, 79 Hun, 329, 29 N. Y. Supp. 347.

[453] Lenoir's Adm'r v. Wilson, 36 Ala. 600. See Inhabitants of Greenfield v. Wilson, 13 Gray (Mass.) 384.

[454] Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508.

[455] Wanzer v. De Baun, 1 E. D. Smith (N. Y.) 261; Morgan v. Skidmore, 3 Abb. N. C. (N. Y.) 92; Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203; Whittier v. Collins, 15 R. I. 90, 23 Atl. 47. And see Fidelity Insurance, Trust & Safe Deposit Co. v. Gazzam, 161 Pa. 536, 29 Atl. 264.

[456] Gutchess v. Whiting, 46 Barb. (N. Y.) 139.

[457] Trautwein v. Twin City Iron Works, 55 Minn. 264, 56 N. W. 750.

[458] St. Louis & S. F. Ry. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899.

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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.[459]

§ 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.[460] 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.[461] 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.[462] 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.[463]

§ 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 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

[459] State v. Stewart, 11 Or. 52, 4 Pac. 128. See, also, Methard v. State, 19 Ohio St. 363.

[460] Drake v. Mitchell, 3 East, 251; Fairchild v. Holly, 10 Conn. 475; Chipman v. Martin, 13 Johns. (N. Y.) 240; Bowman v. Humphrey (Ky.) 37 S. W. 150; Hervey v. Rawson, 164 Mass. 501, 41 N. E. 682. Compare Sykes v. Gerber, 98 Pa. 179. See Vanuxem v. Burr, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458.

[461] Howell v. McCracken, 87 N. C. 399; Bunker v. Langs, 76 Hun, 543, 28 N. Y. Supp. 210.

[462] Betterton v. Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633.

[463] McCullough v. Hellman, 8 Or. 191; White v. Smith, 33 Pa. 186, 75 Am. Dec. 589; Fisher v. Fisher, 98 Mass. 303; Brandt, Sur. 340.

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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.[464] 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.[465] 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.[466]

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:[467] "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,[468] 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. Simmons [9 Mo. App. 376] is itself an illustration of

[464] Union R. & Transp. Co. v. Traube, 59 Mo. 355.

[465] McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740.

[466] Crouse v. Holman, 19 Ind. 30; Bliss v. Weil, 14 Wis. 35, 80 Am. Dec. 706.

[467] Priest v. Deaver, 22 Mo. App. 276.

[468] Kerr v. Simmons, 9 Mo. App. 376.

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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." [469]

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.[470] This doctrine 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.[471] So where a promissory note

[469] In the case of Bowe v. Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151, it appeared that defendant corporation agreed to buy all of plaintiff's milk during one year, but shortly afterwards the corporation was dissolved by order of court and ceased to do business. Plaintiff sued for damages for failure to buy the milk during three months ensuing the dissolution, and recovered. He brought a second action for damages for such failure for the next three months, and defendant pleaded former recovery. It was held that, as the contract was entire, and its breach total, a single cause of action accrued to plaintiff, upon defendant's dissolution, to recover his whole damages, present and prospective, so that his first action was a bar to any subsequent one. And see Cooke v. Cook, 110 Ala. 567, 20 South. 64.

[470] Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611. In further illustration of these principles, see Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Perry v. Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98; Hanham v. Sherman, 114 Mass. 19; Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79.

[471] Stifel v. Lynch, 7 Mo. App. 326. Where a railroad company, in consideration of the conveyance of a right of way, agrees to use water from a

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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.[472] Again, where one accepts an order to 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.[473]

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.[474] And by an extension of this

spring on the grantor's land, and pay him therefor by the month, a judgment for damages for failure to pay for such water is no bar to a second suit for failure to make the monthly payments after the rendition of the former judgment. Howe v. Harding, 84 Tex. 74, 19 S. W. 363.

[472] Wehrly v. Morfoot, 103 Ill. 183; Dulaney v. Payne, 101 Ill. 325, 40 Am. Rep. 205; Sparhawk v. Wills, 6 Gray (Mass.) 163. See, also, Andover Sav. Bank v. Adams, 1 Allen (Mass.) 28; Kempner v. Comer, 73 Tex. 196, 11 S. W. 194. Interest coupons attached to negotiable bonds are distinct and independent promises to pay the interest installments, and a recovery on one is no bar to a suit on another, though the latter was past due when the first action was brought. Butterfield v. Town of Ontario (C. C.) 44 Fed. 171. The fact that a creditor, holding two notes of his debtor given in the same transaction, each being a part of the consideration thereof, sues first on the note maturing last, and recovers a judgment thereon, cannot operate as a bar to a recovery on the note maturing first. Williams v. Kitchen, 40 Mo. App. 604. A recovery of damages for breach of the covenant against incumbrances, the incumbrance being an assessment payable in installments, is not a bar to recovery in a subsequent suit for the damages which have accrued since the former action. Gardner v. Letson, 5 Ohio N. P. 112.

[473] Perry v. Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98.

[474] Jones v. City of Petaluma, 36 Cal. 231; McKissick v. McKissick, 6

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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.[475] 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.[476] 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.[477]

§ 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 suit for a subsequent breach of the same covenant.[478] 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

Humph. (Tenn.) 75; State v. Torinus, 28 Minn. 175, 9 N. W. 725; McCleary v. Malcolm Brewing Co., 56 App. Div. 531, 67 N. Y. Supp. 258; Montrose v. Wanamaker, 57 Hun, 590, 11 N. Y. Supp. 106; Cooper v. City of Brooklyn (City Ct. Brook.) 18 N. Y. Supp. 438; Glaude v. Peat, 43 La. Ann. 161, 8 South. 884; Maize v. Bowman (Ky.) 19 S. W. 589; Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946; Henderson v. Harness, 184 Ill. 520, 56 N. E. 786; Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935; University of North Carolina v. Maultsby, 55 N. C. 241; Knott v. Stephens, 5 Or. 235.

475 Cook v. Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

476 Leland v. Marsh, 16 Mass. 389.

477 Dick v. Webster, 6 Wis. 481.

478 Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369.

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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." [479]

§ 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.[480] For instance, where a lease stipulates for the payment of rent in monthly or other instalments, a separate right of action accrues to the landlord as each instalment falls due; and while he is bound to include in his demand all the rent that may be due at the time he brings his suit, yet a judgment in his favor in one such action will be no bar to a subsequent suit for rent accruing after the first action

[479] Fish v. Folley, 6 Hill, 54.

[480] Hamm v. Beaver, 31 Pa. 58; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Ahl v. Ahl, 60 Md. 207; Armfield v. Nash, 31 Miss. 361; Priest v. Deaver, 22 Mo. App. 276; West v. Moser, 49 Mo. App. 201; Near v. Donnelly, 93 Mich. 460, 53 N. W. 616; Raymond v. White, 120 Mich. 165, 78 N. W. 1071; Ramsey County Bldg. Soc. v. Lawton, 49 Minn. 362, 51 N. W. 1163; Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736; Hallack v. Gagnon, 4 Colo. App. 360, 36 Pac. 70; McDougal v. Downey, 45 Cal. 165; Weller v. Henarie, 15 Or. 28, 13 Pac. 614.

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was begun.[481] But, under the 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.[482] 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.[483] 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.[484] 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.[485]

§ 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 liti-

[481] Holthausen v. Kells, 18 App. Div. 80, 45 N. Y. Supp. 471; Underhill v. Collins, 60 Hun, 585, 15 N. Y. Supp. 495; Stiles v. Himmelwright, 16 Pa. Super. Ct. 649; Webb v. Bailey (Ky.) 33 S. W. 935; Barnes v. Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498; Marshall v. John Grosse Clothing Co., 83 Ill. App. 338.

[482] Reformed Protestant Dutch Church of Westfield v. Brown, 54 Barb. (N. Y.) 191; Morrison v. De Donato, 76 Mo. App. 643; Union R. & Transp. Co. v. Traube, 59 Mo. 355; Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79; Jex v. Jacob, 7 Abb. N. C. (N. Y.) 452. Compare Andover Sav. Bank v. Adams, 1 Allen (Mass.) 28.

[483] Corbet v. Evans, 25 Pa. 310.

[484] Kane v. Fisher, 2 Watts (Pa.) 246.

[485] Sterner v. Gower, 3 Watts & S. (Pa.) 136.

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gated and determined by it.[486] As the rule is sometimes stated, a judgment for the plaintiff establishes his right to recover upon a like state of facts in a second action.[487] For example, where suit is brought and a judgment recovered for an instalment of rent due under a lease, all questions concerning the validity or terms of the lease, the amount of the rental, the occupancy of the premises, and the like, which were or might have been raised and contested under the issues, are to be regarded as conclusively settled in a subsequent action for another instalment of rent under the same lease.[488] So, where, in an action to recover salary for a part of an unexpired term of plaintiff's employment, it was claimed that the employment was from month to month, and not for a year, which issue was determined in plaintiff's favor, that question cannot be again raised by defendant in a subsequent action for damages accruing subsequent to the first action.[489] For the same reason, if an action is brought upon one of a series of notes, all based upon the same consideration (as, the purchase price of land), and the defendant sets up a defense going to the whole of the original consideration (as, failure of title, an undisclosed incumbrance, or the like), and it is adjudged against him, the judgment will estop him from setting up the same facts in defense to a subsequent suit on another of the notes.[490]

[486] Love v. Waltz, 7 Cal. 250; Haskin v. Mayor, etc., of New York, 11 Hun (N. Y.) 436; Ward v. Sire, 52 App. Div. 443, 65 N. Y. Supp. 101; Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Hartman v. Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282.

[487] Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250; Everett v. New York Engraving & Printing Co., 19 Misc. Rep. 360, 43 N. Y. Supp. 502.

[488] Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Northwestern Brewing Co. v. Manion, 145 Ill. 182, 34 N. E. 50; Hawkins v. George Ringler & Co., 47 App. Div. 262, 62 N. Y. Supp. 56; Zerega v. Will, 34 App. Div. 488, 54 N. Y. Supp. 361.

[489] Williams v. Luckett, 77 Miss. 394, 26 South. 967.

[490] Trescott v. Barnes, 51 Iowa, 409, 1 N. W. 660; Crompton & Knowles Loom Works v. Brown, 27 Misc. Rep. 319, 57 N. Y. Supp. 823; Gilmore v. Whiteman, 50 Neb. 760, 70 N. W. 364; French v. Howard, 14 Ind. 455; Black River Sav. Bank v. Edwards, 10 Gray (Mass.) 387; Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255; De Wolf v. Crandall, 34 N. Y. Super. Ct. 14. Compare Bernard v. Mayor, etc., of City of Hoboken, 27 N. J. Law, 412.

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But if the judgment in the first action proceeds upon a ground of defense relating merely to the particular installment in suit, it does not follow that it will be an estoppel in a later suit upon another installment or upon the whole principal sum. Thus, a decision adverse to the defendant, in an action involving the validity of coupons on 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.[491] And although a defendant may have been worsted in his attempt to defend against the first action upon one of a group or series of obligations or installments, this will not prevent him, when sued the second time, from setting up an entirely different defense, which was not presented or considered in the former action, nor necessarily determined against him by implication from the former judgment.[492] If, on the other hand, the defense to the subsidiary claim involves the validity of the principal debt or obligation, the defendant will be concluded by the result. Thus, if he is sued for interest due on his note, and defends on the ground of fraudulent alteration, and judgment is rendered against him, such judgment will estop him from setting up the same defense to an action on the note itself.[493] But in no instance will the former judgment be conclusive unless the parties are the same in the second suit. Thus, if several notes are given for the same consideration, in the same transaction, and pass by negotiation into the hands of different parties, and the maker, in a suit on one of the notes brought by its holder, unsuccessfully attempts to defend on a plea of failure of

[491] Nesbit v. Independent School Dist. (C. C.) 25 Fed. 635. A judgment in favor of a bondholder upon certain interest coupons is not conclusive of the validity of other interest coupons on the same bonds, where such judgment is rendered upon no other evidence than the coupons themselves, no defense being made to the suit. Skinner v. Franklin Co., 6 C. C. A. 118, 56 Fed. 783. Judgment against a county on coupons from its bonds is not conclusive as to the validity of the bonds in an action by another plaintiff on the bonds. Shell v. Carter Co. (Tenn. Ch. App.) 42 S. W. 78.

[492] Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Louisville Trust Co. v. Drennon Springs Co. (Ky.) 34 S. W. 1072; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965.

[493] Edgell v. Sigerson, 26 Mo. 583.

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consideration, this will not estop him from setting up a like defense to a similar action by the holder of another of the notes.[494]

It is by no means certain that these principles apply where the former judgment was taken by default. For a default, as we have already seen,[495] admits only the material facts well pleaded in the declaration. It has been held that a judgment by default upon one of a series of 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 the notes, the defense of illegality of consideration.[496] But this view does not find favor in some of the states, particularly New York.[497]

It is also very necessary to distinguish carefully between cases where the two 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, though they may be characterized by a certain similarity or consecutiveness. This principle is illustrated by the rule that a decision in a suit concerning the taxes of one year is not res judicata in regard to the taxes of another year, notwithstanding the same contention is involved.[498] Thus, an injunction against a municipal corporation, prohibiting it from collecting taxes levied for one year, will not necessarily bar a suit to recover taxes levied on the same property for a subsequent year, though the same defense is interposed.[499] "Each year's taxes

[494] Dodd v. Mayfield, 90 Ga. 319, 25 S. E. 698.

[495] Supra, § 697.

[496] Adams v. Adams, 25 Minn. 72; Hughes v. Alexander, 5 Duer, 488.

[497] Newton v. Hook, 48 N. Y. 676; Crompton & Knowles Loom Works v. Brown, 28 Misc. Rep. 513, 59 N. Y. Supp. 556; C. Graham & Sons Co. v. Van Horn (Sup.) 49 N. Y. Supp. 401.

[498] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Mercantile Nat. Bank v. Hubbard (C. C.) 98 Fed. 465; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; State v. Jumel, 30 La. Ann. 861; State v. Citizens' Bank of Louisiana, 52 La. Ann. 1086, 27 South. 709; Shuck v. City of Lebanon (Ky.) 53 S. W. 655; City of Newport v. Com. (Ky.) 50 S. W. 845, 45 L. R. A. 518; Union & Planters' Bank v. City of Memphis, 101 Tenn. 154, 46 S. W. 557.

[499] City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 633; Buchanan v. Springer (Tenn. Ch. App.) 35 S. W. 774; Third Nat. Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035.

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constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no further than the taxes of the year 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." [500] But the doctrine of the United States supreme court appears to be that a judgment in an action for taxes is (like any other) conclusive between the parties upon any fact or contention actually litigated and decided. Thus a judgment enjoining the collection of a tax against a bank for a particular year, on the ground that its charter exempts it from taxation, is conclusive as to the right to the exemption for future years, where it is claimed upon identically the same facts.[501] And in a case in Illinois, where the validity of an assessment of taxes against a part of a railroad bridge was questioned on the ground that the property was not situated within the state, and the court determined that it was so situated, it was held that that question was res judicata on a proceeding between the same parties to determine the validity of a subsequent assessment of the same property.[502]

§ 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

[500] City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 633.

[501] City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202 (compare Third Nat. Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450); Hancock v. Singer Mfg. Co., 62 N. J. Law, 289, 41 Atl. 846, 42 L. R. A. 852; St. Joseph & G. I. R. Co. v. Steele, 11 C. C. A. 470, 63 Fed. 867.

[502] Keokuk & H. Bridge Co. v. People, 185 Ill. 276, 56 N. E. 1049.

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series.[503] "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-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."[504] 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.[505] So where,

[503] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Bouchaud v. Dias, 3 Denio (N. Y.) 238; Burdick v. Cameron, 10 App. Div. 589, 42 N. Y. Supp. 78; Coyle v. Ward, 36 App. Div. 181, 55 N. Y. Supp. 388; Danziger v. Williams, 91 Pa. 234; Rake's Adm'r v. Pope, 7 Ala. 161; Hanrick v. Gurley, 93 Tex. 458, 56 S. W. 330; Furneaux v. First Nat. Bank of Whitewater, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541; Peru Plow & Wheel Co. v. Ward, 6 Kan. App. 289, 51 Pac. 805; Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454; Markley v. People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Goodenow v. Litchfield, 59 Iowa, 226, 13 N. W. 86; Hazen v. Reed, 30 Mich. 331; Rio Grande W. Ry. Co. v. Telluride Power Transmission Co. (Utah) 63 Pac. 995.

[504] Kilander v. Hoover, 111 Ind. 10, 11 N. E. 796. And see Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Hoover v. Kilander, 135 Ind. 600, 34 N. E. 697. In an action to recover an assessment on the stock of a corporation, a decision that the cause of action was barred by the statute of limitations is no bar to a subsequent action between the same parties to recover a subsequent assessment. Priest v. Glenn, 4 U. S. App. 569, 2 C. C. A. 311, 51 Fed. 405.

[505] Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; Edwards v. Bates County (C. C.) 55 Fed. 436.

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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.[506]

§ 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 for which he was hired, and recovers, such recovery will be a bar to any subsequent action on the same contract.[507] "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."[508] Some of the authorities maintain that an employé who is engaged for a stipulated time, for wages or salary payable in installments,

[506] Aultman v. Mount, 62 Iowa, 674, 18 N. W. 306.

[507] Dunn v. Murray, 9 Barn. & C. 780; Alle v. Nadeau, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346; Landsberg v. Lewis, 22 Abb. N. C. 277, 6 N. Y. Supp. 561; Wieland v. Willcox, 40 App. Div. 213, 57 N. Y. Supp. 1038; Waldron v. Hendrickson, 40 App. Div. 7, 57 N. Y. Supp. 561; Eisenhower v. School Dist. of Borough of Centralia, 13 Pa. Super. Ct. 51; Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387; Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Weill v. Fontanel, 31 Ill. App. 615; Monarch Cycle Mfg. Co. v. Mueller, 83 Ill. App. 359; Booge v. Pacific R. R., 33 Mo. 212, 82 Am. Dec. 160; Kahn v. Kahn, 24 Neb. 709, 40 N. W. 135.

[508] Soursin v. Salorgne, 14 Mo. App. 486.

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and who is wrongfully discharged before the expiration of the term, may thereafter bring a separate suit for each installment on the day it would have fallen due had the contract remained in force, and as if such installment had been actually earned; and the recovery in one such suit will not bar the actions for subsequent installments.[509] But this theory is not consistent with the rules above stated and is opposed to the great preponderance of the decisions. The better doctrine is that the employé, in such a case, has but one remedy, namely, an action for damages for the breach of the contract, and his recovery must be limited to one action brought thereon.[510] But a judgment for damages for wrongful dismissal of plaintiff from defendant's employment will not bar a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the dismissal, the two claims constituting separate and independent causes of action.[511]

§ 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.[512] So where plaintiff's goods were attached as the debtor's property, and in the special statutory action which plaintiff brought

[509] Gandell v. Pontigny, 4 Camp. 375 (but compare Goodman v. Pocock, 15 Q. B. 576); Williams v. Luckett, 77 Miss. 394, 26 South. 967; Levin v. Standard Fashion Co., 16 Daly, 404, 11 N. Y. Supp. 706; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[510] See Parry v. American Opera Co., 19 Abb. N. C. (N. Y.) 269; James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

[511] Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

[512] Nolte v. Lowe, 18 Ill. 437. See, also, Peerce v. Athey, 4 W. Va. 22; Bird v. Randall, 1 W. Bl. 373.

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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.[513]

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.[514] "A party cannot re-litigate matters which he might have interposed,

[513] Dawson v. Baum, 3 Wash. T. 464, 19 Pac. 46.

[514] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Warner v. George (C. C.) 58 Fed. 435; Black v. Black (C. C.) 77 Fed. 785; Brooks v. O'Hara (C. C.) 8 Fed. 529; Marshall v. Aiken, 25 Vt. 328; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Tucker v. Carr, 20 R. I. 477, 40 Atl. 1, 78 Am. St. Rep. 893; Barber v. Rutherford, 12 Misc. Rep. 33, 33 N. Y. Supp. 89; White v. Cuthbert, 10 App. Div. 220, 41 N. Y. Supp. 818; State v. Brown, 64 Md. 199, 1 Atl. 54; Bond v. Billups, 53 N. C. 423; Lee v. McKoy, 118 N. C. 518, 24 S. E. 210; Ryan v. Kingsberry, 89 Ga. 228, 15 S. E. 302; Mattair v. Card, 19 Fla. 445; Crawford v. Simonton's Ex'rs, 7 Port. (Ala.) 110; Mervine v. Parker, 18 Ala. 241; Thomas v. Junction City Irr. Co., 80 Tex. 550, 16 S. W. 324; Cook v. Carroll Land & Cattle Co., 6 Tex. Civ. App. 326, 25 S. W. 1034; Hill v. Lancaster (Ky.) 11 S. W. 74; Bell County Coke & Imp. Co. v. Board of Trustees of Pineville Graded School (Ky.) 42 S. W. 92; Daniel v. Gum (Tenn. Ch. App.) 45 S. W. 468; Kelly v. Donlin, 70 Ill. 378; Ruegger v. Indianapolis & St. L. R. Co., 103 Ill. 449; Harvey v. Aurora & G. Ry. Co., 186 Ill. 283, 57 N. E. 857; Dewey v. Peck, 33 Iowa, 242; Lawrence Sav. Bank v. Stevens, 46 Iowa, 429; Fulliam v. Drake, 105 Iowa, 615, 75 N. W. 479; Baxter v. Myers (Iowa) 47 N. W. 879; Swinford v. Teegarden, 159 Mo. 635, 60 S. W. 1089; Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887; Sayers v. Auditor General, 124 Mich. 259, 82 N. W. 1045; Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803; Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; Johnson v. Reed, 125 Cal. 74, 57 Pac. 680; Everill v. Swan, 20 Utah, 56, 57 Pac. 716. Compare Farrell v. City of St. Paul, 62 Minn. 271, 64 N. W. 809, 29 L. R. A. 778, 54 Am. St. Rep. 641; State v. Cooley, 58 Minn. 514, 60 N. W. 338.

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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." [515] 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.[516] 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.[517] So in a suit brought for the amount due under a charter-party, the defense was a breach of the covenant of

[515] Covington & C. Bridge Co. v. Sargent, 27 Ohio St. 233.

[516] Decker v. Decker, 108 N. Y. 128, 15 N. E. 307. But see Jacobson v. Miller, 41 Mich. 90, 1 N. W. 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." And see Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282. At common law, a recovery on a gambling contract establishes the validity of the consideration between the parties to the action, precluding inquiry into the consideration by a court of equity, where no reason is shown why the defense was not made at law. Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45.

[517] Mally v. Mally, 52 Iowa, 654, 3 N. W. 670; Ludeling v. Chaffe, 40 La. Ann. 645, 4 South. 586; Murrell v. Smith, 51 Ala. 301.

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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 the plaintiffs. It was held that this adjudication was binding upon the parties, and the issue could not be again raised.[518] So, a judgment in an action on a marine policy covering the owner's loss of freight is conclusive, in a subsequent action between the same parties on a policy covering the loss of the vessel, as to every defense open and available to the insurer in the first action, whether actually litigated or not.[519] A judgment for the plaintiff in an action on a contract which, by its terms, was not to be performed in a year, is conclusive between the parties as to the validity of the contract, though the statute of frauds was not pleaded.[520] In proceedings to compel a county official to issue warrants in payment of a judgment against the county, defendant is estopped to plead that the indebtedness on which the judgment was based was in excess of the constitutional debt limit of the county.[521] So where a plaintiff who has contracted to do work for a city sues for the balance due him, it is a proper ground of defense for the city that claims for labor and material, against which he had undertaken to secure the city by giving a bond, remain unpaid; and if he recovers a judgment, the city cannot afterwards maintain an action on such bond.[522] Again, an order authorizing a railway company to take possession of land under proceedings in eminent domain is conclusive of all matters relied on by the owner for a recovery of the land at the time such order was issued.[523] In a case in Ohio, it is said that where an assessment is imposed on a city lot to pay the cost of improving a street upon which it abuts, and the owner thereof, having two distinct grounds for contesting the validity of such assessment, one of which is common to him and the owners of all the other abutting lots, and the other pertaining to his lot only, elects to bring an action for the benefit of himself and the other abutting owners to enjoin its col-

518 Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334.
519 McLaughlin v. Great Western Ins. Co. (Com. Pl.) 20 N. Y. Supp. 536.
520 Foulke v. Thalmessinger, 158 N. Y. 725, 53 N. E. 1125.
521 State v. Gloyd, 14 Wash. 5, 44 Pac. 103.
522 City of Lancaster v. Frescoln, 192 Pa. 452, 43 Atl. 961.
523 Muhle v. New York, T. & M. Ry. Co., 86 Tex. 459, 25 S. W. 607.

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lection, the judgment rendered therein is a bar to a second action brought by him alone, in which the assessment is attacked on the grounds which pertained to his lot only; and this is so, although the grounds on which the first action was founded would, if maintained, have totally defeated the assessment, while the grounds set forth in the second action would simply have reduced the amount that had been assessed against the plaintiff's lot.[524]

A very strong illustration of the application of the general rule on this subject is afforded by the case of Homer v. Fish.[525] 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.[526] 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.[527]

[524] City of Cincinnati v. Emerson, 57 Ohio St. 132, 48 N. E. 667.
[525] 1 Pick. (Mass.) 435, 11 Am. Dec. 218.
[526] Bierer v. Fretz, 37 Kan. 27, 14 Pac. 558.
[527] Collins v. Bennett, 46 N. Y. 490.

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§ 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 may be pleaded as res judicata against any title which the defendant was possessed of at the time but omitted to plead.[528] Thus, a recovery by the plaintiff in an action to quiet title, or in partition, or in trespass to try title, is conclusive as against every title to the disputed property which the defendant had at the time of the trial.[529] 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.[530] For similar reasons, a judgment foreclosing a mortgage cannot be collaterally attacked by showing that the land, at the time of the execution of the mortgage, and at the foreclosure thereof, was the homestead of the mortgagor.[531] And in a suit against a judgment debtor and his two grantees to subject lands alleged to have been fraudulently conveyed, the grantees are bound to set up all the defenses they have; and after a decree for complainant, one of them cannot, by a subsequent suit, assert title to a part of the lands as a bona fide purchaser from the other, under a deed which he had received before the first suit was begun and which he failed to bring forward therein.[532]

[528] Shaffer v. Scuddy, 14 La. Ann. 575.

[529] Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; Simpson v. Dugger, 88 Va. 963, 14 S. E. 760; Caston v. Perry, 1 Bailey (S. C.) 533, 21 Am. Dec. 482; McCray v. Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387; Flynn v. Hite, 107 Cal. 455, 40 Pac. 749.

[530] Nichols v. Dibrell, 61 Tex. 539. And see Dodd v. Scott, 81 Iowa, 319, 46 N. W. 1057, 10 L. R. A. 360, 25 Am. St. Rep. 492.

[531] Beer v. Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010. Compare Provident Loan Trust Co. v. Marks, 6 Kan. App. 34, 49 Pac. 625.

[532] Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

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§ 756. Same; Fraud.

Fraud, tainting the plaintiff's cause of action, is a defense which the defendant is bound to set up when he has an opportunity to do so; and if he neglects to avail himself of this means of defeating the claim made against him, he will be precluded by the judgment from afterwards alleging such fraud.[533] Thus, a judgment at law rendered upon an account stated is conclusive of the fairness of the account, since fraud in obtaining it could have been set up as a defense.[534] So, 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." [535] 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.[536]

§ 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,

[533] Rauwolf v. Glass, 184 Pa. 237, 39 Atl. 79; Royston v. Horner, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510; McMullen v. Ritchie (C. C.) 64 Fed. 253; Pettus v. Smith, 4 Rich. Eq. (S. C.) 197. Compare Arnold v. Norfolk & N. B. Hosiery Co., 63 Hun, 176, 17 N. Y. Supp. 646.

[534] Edmanson v. Best, 6 C. C. A. 471, 57 Fed. 531.

[535] Ruff v. Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709. See, also, Flint v. Bodge, 10 Allen (Mass.) 128.

[536] Lewis v. Nenzel, 38 Pa. 222.

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could not operate as a payment or satisfaction pro tanto of the debt.[537] 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.[538]

§ 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.[539] But these decisions have been overruled.[540] 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.[541] Thus a judgment by

[537] Hunt v. Brown, 146 Mass. 253, 15 N. E. 587.

[538] Smith v. Chilton, 84 Va. 840, 6 S. E. 142. And see Henderson v. Moss, 82 Tex. 69, 18 S. W. 555.

[539] Smith v. Weeks, 26 Barb. (N. Y.) 463; Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14.

[540] Binck v. Wood, 43 Barb. (N. Y.) 315; Fuller v. Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Sacket v. Loomis, 4 Gray (Mass.) 148.

[541] Cadaval v. Collins, 4 Adol. & E. 858, 867; Fuller v. Eastman, 81 Me. 284, 17 Atl. 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. (N. Y.) 244; Binck v. Wood, 43 Barb. (N. Y.) 315; Walker v. Ames, 2 Cow. (N. Y.) 428; Weiser v. Weiser (Sup.) 53 N. Y. Supp. 578; In re Lawrence's Estate, 169 Pa. 185, 32 Atl. 406; Davis v. Murphy, 2 Rich. Law (S. C.) 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 Smedes & M. (Miss.) 108; Kirklan v. Brown's Adm'rs, 4 Humph. (Tenn.) 174, 40 Am. Dec. 635; Wright v. Leclaire, 3 Iowa, 221; Doyle v. Reilly, 18

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default in a summary proceeding against a tax-collector and the sureties on his official bond, is 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.[542] 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.[543] We must here call attention to a case decided in Wisconsin,[544] 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.

Iowa, 108, 85 Am. Dec. 582; Greenabaum v. Elliott, 60 Mo. 25; 1 Whart. Ev. § 789.

[542] State v. McBride, 76 Ala. 51.

[543] Footman v. Stetson, 32 Me. 17, 52 Am. Dec. 634.

[544] Woodward v. Hill, 6 Wis. 143.

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§ 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, 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.[545] 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.[546]

§ 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.[547] 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." [548]

[545] Heath v. Frackleton, 20 Wis. 320, 91 Am. Dec. 405; Davidson v. Weed, 20 Misc. Rep. 147, 45 N. Y. Supp. 718; Henry v. Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69.

[546] Montague v. McDowell, 99 Pa. 265; Lagerquist v. Williams, 74 Ill. App. 17.

[547] In re Burton (D. C.) 29 Fed. 637; Fowle v. Park (C. C.) 48 Fed. 789; Marsh v. Mandeville, 28 Miss. 122; Ackerman's Ex'rs v. Van Houten, 10 N. J. Law, 332; Jenks v. Opp, 43 Ind. 108.

[548] Rahm v. Minis, 40 Cal. 421.

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§ 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 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.[549] 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.[550] 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

[549] Davis v. Hedges, L. R. 6 Q. B. 687; Robinson v. Wiley, Hemp. 38, Fed. Cas. No. 11,968a; Davenport v. Hubbard, 46 Vt. 200, 14 Am. Rep. 620; Dewsnap v. Davidson, 18 R. I. 98, 26 Atl. 902; Robbins v. Harrison, 31 Ala. 160; Kennedy v. Davisson, 46 W. Va. 433, 33 S. E. 291; Axtel v. Chase, 83 Ind. 546; Indiana Farmers' Live Stock Ins. Co. v. Stratton, 4 Ind. App. 566, 31 N. E. 380; Gates v. Newman, 18 Ind. App. 392, 46 N. E. 654; Smith v. Rountree, 185 Ill. 219, 56 N. E. 1130; Sheetz v. Baker, 38 Ill. App. 349; Fairfield v. McNany, 37 Iowa, 75; Savery v. Sypher, 39 Iowa, 675; Seventh Day Adventist Pub. Ass'n v. Fisher, 95 Mich. 274, 54 N. W. 759; Uppfalt v. Woremann, 30 Neb. 189, 46 N. W. 419; Hobbs v. Duff, 23 Cal. 596. Compare Morarity v. Calloway, 134 Ind. 503, 34 N. E. 226. A fortiori, where the nature of the plaintiff's claim is such that the defendant's affirmative matter could not properly be pleaded by way of set-off or counterclaim, the latter will not be precluded from bringing a separate action upon it. Parker v. Albee, 86 Iowa, 46, 52 N. W. 533; Gay v. Riehmann Mantel Co., 53 App. Div. 507, 65 N. Y. Supp. 964.

[550] Doak v. Wiswell, 33 Me. 355; Gaines v. Kennedy, 53 Miss. 103.

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of the action, the defendant must present it as a set-off, or forfeit his right to claim relief upon it.[551] 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.[552] 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, were included in the judgment, though such presumption may be removed by proof to the contrary.[553] 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.[554] 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

[551] See Code Civ. Proc. Cal. §§ 438, 439; Code Civ. Proc. N. Y. § 2947; Davis v. Aikin, 85 Hun, 554, 33 N. Y. Supp. 103; Weiser v. Kling, 38 App. Div. 266, 57 N. Y. Supp. 48; Rev. St. Tex. arts. 649, 650; Fitzhugh v. McKinney (C. C.) 43 Fed. 461.

[552] Herring v. Adams, 5 Watts & S. 459; Code Civ. Proc. Cal. §§ 855, 856.

[553] Carter v. Hanna, 2 Ind. 45.

[554] Campbell v. Mayhugh, 15 B. Mon. (Ky.) 142; Litch v. Clinch, 136 Ill. 410, 26 N. E. 579.

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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.[555] 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 withdrawn. "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." [556]

§ 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

[555] Osborne v. Williams, 39 Minn. 353, 40 N. W. 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 (Mass.) 231.

[556] Smith v. Berry, 37 Me. 298.

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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 R. 147 note] or the case cited from the civil law,[557] 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." [558] But as already shown,[559] 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 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.[560] 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.[561] 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 miti-

[557] A response of Scaevola, reported in Dig. 4, 8, 43.

[558] Smith v. Johnson, 15 East, 213.

[559] Supra, §§ 526, 688.

[560] Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; Inslee v. Hampton, 11 Hun, 156; Simes v. Zane, 24 Pa. 242; Boland v. Spitz, 153 Pa. 590, 26 Atl. 22; Lewis v. Smith (Tex. Civ. App.) 43 S. W. 294; Nave v. Wilson, 33 Ind. 294; Thompson v. Schuster, 4 Dak. 163, 28 N. W. 858; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614. Compare Wright v. Anderson, 117 Ind. 349, 20 N. E. 247.

[561] Burnett v. Smith, 4 Gray (Mass.) 50. See, also, Sargent v. Fitzpatrick, Id. 511.

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gation of damages in this suit." [562] 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." [563] 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.[564]

§ 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.[565] Hence the rejection of a demand offered as a 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.[566] And so a debt which, when not due, the debtor has unsuccessfully endeavored to use as a set-off, may, when it becomes

[562] Stevens v. Miller, 13 Gray (Mass.) 283.

[563] O'Connor v. Varney, 10 Gray (Mass.) 231.

[564] Eastmure v. Laws, 5 Bing. (N. C.) 444; Tillison v. Tillison, 63 Vt. 411, 22 Atl. 531; Glaude v. Peat, 43 La. Ann. 161, 8 South. 884; Dougherty v. Cummings, 9 Ohio Cir. Ct. R. 718; Latta v. Visel, 37 Neb. 612, 56 N. W. 311; Reed v. Cross, 116 Cal. 473, 48 Pac. 491.

[565] Hobbs v. Duff, 23 Cal. 596; Garrott v. Johnson, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272; Niday v. Harvey, 9 Grat. (Va.) 454. But if, on the trial of an action, the defendant offered evidence in support of an account filed by him in set-off, and 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. 363.

[566] Beebe v. Bull, 12 Wend. (N. Y.) 504, 27 Am. Dec. 150; De Graaf v. Wycoff, 118 N. Y. 1, 22 N. E. 1118; Haas v. Taylor, 80 Ala. 479, 2 South. 633. Where defendant pleads a counterclaim, but fails to appear on the trial, and judgment is rendered for the full amount of plaintiff's claim, such judgment cannot be set up as a bar to another action on the counterclaim. Anderson v. Rogge (Tex. Civ. App.) 28 S. W. 106; Litch v. Clinch, 35 Ill. App. 654.

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due, be recovered by the creditor.[567] 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.[568]

§ 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 · · defendant against plaintiff for the same goods, if they were not credited at their full value in the first suit.[569] 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 to show that the credit in the first suit did not cover all his claim.[570] 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.[571] 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

[567] Crabtree v. Welles, 19 Ill. 55.

[568] Lancaster Mfg. Co. v. Colgate, 12 Ohio St. 344.

[569] Minor v. Walter, 17 Mass. 237; McEwen v. Bigelow, 40 Mich. 215. A judgment recovered on an account, in which the judgment debtor is credited with a certain amount as being due from him to a third person, is a bar to a subsequent action by the judgment creditor against the debtor to recover that amount, on the claim that it has not in fact been paid by the debtor. Hermann v. Schwartz Bros. Commission Co., 59 Mo. App. 649.

[570] Kauff v. Messner, 4 Brewst. (Pa.) 98.

[571] Briggs v. Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Hudelmeyer v. Hughes, 13 Mo. 87.

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will be barred of another action to recover the amount of that item for which credit was given.[572]

§ 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.[573] 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.[574] 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 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-

[572] Abbott v. Stevens, 117 Mass. 340.

[573] Hawkins v. Wills, 1 C. C. A. 339, 4 U. S. App. 274, 49 Fed. 506; Tompkins v. Drennen, 6 C. C. A. 83, 56 Fed. 694; Waters v. Perkins, 65 Ga. 32; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Nims v. Vaughn, 40 Mich. 356; Bush v. Merriman, 87 Mich. 260, 49 N. W. 567; Petrie v. Badenoch, 102 Mich. 45, 60 N. W. 449, 47 Am. St. Rep. 503; Cassill v. Morrow, 13 S. D. 109, 82 N. W. 418.

[574] Tuttle v. Harrill, 85 N. C. 456; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Foot v. Sprague, 12 How. Prac. (N. Y.) 355; Fowler v. Atkinson, 6 Minn. 503 (Gil. 350).

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existing remedies by implication." [575] 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.[576]

§ 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 judgment 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.[577] For example, a judgment in favor of a carrier, in an

[575] Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 309; Hills v. Sherwood, 48 Cal. 386.

[576] McCreary v. Casey, 45 Cal. 128.

[577] See Thayer v. Kansas Loan & Trust Co., 41 C. C. A. 106, 100 Fed. 901;

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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.[578] 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.[579] 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.[580]

§ 768. Action for Price of Goods and Cross-Action for Breach of Warranty.

In an important English case,[581] the rule was laid down that in all actions for goods sold and delivered with a warranty, or for work and 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

Riley v. Hale, 158 Mass. 240, 33 N. E. 491; Schwan v. Kelly, 173 Pa. 65, 33 Atl. 1107; Lyman v. Milwaukee Harvester Co., 68 Mo. App. 637.

[578] Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570.

[579] Davenport v. Hubbard, 46 Vt. 200, 14 Am. Rep. 620. See, also, Foster v. Milliner, 50 Barb. (N. Y.) 385.

[580] Whitcomb v. Williams, 4 Pick. (Mass.) 228.

[581] Mondel v. Steel, 8 Mees. & W. 858.

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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.[582] To a certain 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

[582] 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 contracting party in the wrong had or had not issued a writ for the price."

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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.[583] 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." [584] 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.[585] 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.[586] And if he elects to recoup his damages, for the breach of warranty, when sued for the

[583] Citing Mondel v. Steel, 8 Mees. & W. 858, and Rigg v. Banbridge, 15 Mees. & W. 598.

[584] Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156, citing Davis v. Hedges, L. R. 6 Q. B. 687; Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976; Bodurtha v. Phelon, 13 Gray (Mass.) 413; McKnight v. Devlin, 52 N. Y. 399, 11 Am. Rep. 715; Barker v. Cleveland, 19 Mich. 230; Benj. Sales (3d Ed.) 894-899.

[585] Parker v. Roberts, 63 N. H. 431; Bascom v. Manning, 52 N. H. 132; Bodurtha v. Phelon, 13 Gray (Mass.) 413.

[586] Barth v. Burt, 43 Barb. (N. Y.) 628; Cook v. Moseley, 13 Wend. (N. Y.) 277; Earl v. Bull, 15 Cal. 421.

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price, a decision against him in that form will be a bar to another action brought upon the warranty.[587] 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.[588] 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.[589]

§ 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 was involved in the issue and concluded by the judgment, so that the patient could not thereafter sue upon that cause

[587] Timmons v. Dunn, 4 Ohio St. 680.

[588] Davis v. Tallcot, 12 N. Y. 184; American Grocery Co. v. Pirkl, 25 Misc. Rep. 727, 55 N. Y. Supp. 606; Gilson v. Bingham, 43 Vt. 410, 5 Am. Rep. 289.

[589] Barker v. Cleveland, 19 Mich. 230.

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of action.[590] 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.[591] 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,[592] 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.[593] In order, however, to complete the discussion of this topic,

[590] Bellinger v. Craigue, 31 Barb. (N. Y.) 534; Edwards v. Stewart, 15 Barb. (N. Y.) 67; Gates v. Preston, 41 N. Y. 113; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455. See, also, White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527.

[591] Merriam v. Woodcock, 104 Mass. 326.

[592] 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

[593] 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 Cin. R. (Ohio) 464; Mimnaugh v. Partlin, 67 Mich. 391, 34 N. W. 717; Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17; Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 45 L. R. A. 541, 71 Am. St. Rep. 469.

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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 damages 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.[594] 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.[595] 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.[596]

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.[597] 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.[598] The opinion that such a judgment does not merge the cause of action against the other obligor appears to be still ad-

[594] South & N. A. R. Co. v. Henlein, 56 Ala. 368; Howell v. Goodrich, 69 Ill. 556; McNicholas v. Lake, 13 Colo. App. 164, 56 Pac. 987.

[595] Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308.

[596] Haynes v. Ordway, 58 N. H. 167.

[597] Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215.

[598] Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; United States v. Ames, 99 U. S. 35, 25 L. Ed. 295. In Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293, the opinion is expressed that the decision in Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215, was calculated to do perfect justice between the parties concerned in it, but was entirely erroneous in principle and has been repeatedly disapproved.

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hered to in one of our states.[599] But this stands as an exception 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.[600] "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."[601] According to another learned court, "a separate judgment taken

[599] Collins v. Lemasters, 1 Bailey (S. C.) 348, 21 Am. Dec. 469; Treasurers of State v. Bates, 2 Bailey (S. C.) 362; Union Bank of Georgia v. Hodges, 11 Rich. Law (S. C.) 480.

[600] King v. Hoare, 13 Mees. & W. 494; Ex parte Higgins, 3 De Gex & J. 33; Kendall v. Hamilton, L. R. 4 App. Cas. 504; Hoare v. Niblett [1891] 1 Q. B. 781; McLeod v. Power, 67 Law J. Ch. 551; Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; United States v. Ames, 99 U. S. 35, 25 L. Ed. 295; Willings v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17,767; Trafton v. United States, 3 Story, 646, Fed. Cas. No. 14,135; Ward v. Johnson, 13 Mass. 148; Gibbs v. Bryant, 1 Pick. (Mass.) 118; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Penny v. Martin, 4 Johns. Ch. (N. Y.) 567; Olmstead v. Webster, 8 N. Y. 413; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Brown's Adm'r v. Johnson, 13 Grat. (Va.) 644; Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; Pfau v. Lorain, 1 Cin. R. 73; Clinton Bank v. Hart, 5 Ohio St. 33; Taylor v. Claypool, 5 Blackf. (Ind.) 557; Barnett v. Juday, 38 Ind. 86; Root v. Dill, Id. 169; Crosby v. Jeroloman, 37 Ind. 264; Robinson v. Snyder, 74 Ind. 110; Wilson v. Buell, 117 Ind. 315, 20 N. E. 231; Wann v. McNulty, 2 Gilman (Ill.) 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; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015.

[601] Lauer v. Bandow, 48 Wis. 638, 4 N. W. 774; Bowen v. Hastings, 47 Wis. 232, 2 N. W. 301.

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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."[602] 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 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."[603]

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.[604] 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.[605] 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.[606] 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

[602] Kennard v. Carter, 64 Ind. 31.

[603] King v. Hoare, 13 Mees. & W. 494.

[604] Reynolds v. Pittsburgh, C. & St. L. R. Co., 29 Ohio St. 602; Ex parte Higgins, 3 De Gex & J. 33.

[605] Robinson v. Snyder, 97 Ind. 56.

[606] Brady v. Reynolds, 13 Cal. 31.

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been really interested, as a partner, with the two debtors in the business for the purposes of which the money was borrowed.[607]

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.[608] This decision may perhaps 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.[609] 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.[610] 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

[607] Kendall v. Hamilton, 4 App. Cas. 504.

[608] Devol v. Halstead, 16 Ind. 287. See, also, Weyer v. Thornburgh, 15 Ind. 124.

[609] Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293.

[610] Drake v. Mitchell, 3 East, 251.

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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.[611]

It must be added that in several of the states the common law rule concerning the effect of a judgment against one or more of several joint obligors has been reversed by statutory provisions. These statutes provide that a judgment rendered against one or more persons jointly liable on any contract or agreement, less than the whole number of persons so bound, shall not work an extinguishment or merger of the cause of action as to the persons not bound by such judgment.[612] Again, in applying these rules, we are to distinguish between a judgment on the joint contract itself and a judgment on any undertaking or agreement collateral to it or in the nature of a guaranty. Thus, a judgment on a note given by one of the makers of a joint note as collateral to the joint note does not affect the right of action on the original note so long as the judgment remains unsatisfied.[613] And further, the rule applies only where the plaintiff has recovered a judgment as at common law. For example, where one of two obligors makes an assignment for the benefit of creditors, and the obligee files his claim on the bond with the assignee, and obtains an adjudication thereof in his favor in the court having control of the assigned estate, this is not such a judgment as will merge the cause of action on the bond so as to release the other obligor.[614] Finally, it has been held that, where

[611] Dunham v. New England Mut. Ins. Co., 1 Low. 253, Fed. Cas. No. 4,152.

[612] See Code Md. art. 50, § 10; Thomas v. Mohler, 25 Md. 36; Westheimer v. Craig, 76 Md. 399, 25 Atl. 419; Code D. C. 1901, § 1207; Harris v. Leonhardt, 2 App. D. C. 318; Code Va. 1887, §§ 3212, 3395, 3396; Cahoon v. McCullock, 92 Va. 177, 23 S. E. 225; Rev. St. Tex. 1895, art. 1203; Bute v. Brainerd, 93 Tex. 137, 53 S. W. 1017.

[613] First Nat. Bank of Milwaukee v. Finck, 100 Wis. 446, 76 N. W. 363. And see Wegg-Prosser v. Evans, 9 Reports, 830; Id. [1895] 1 Q. B. 108.

[614] Schott v. Youree, 142 Ill. 233, 31 N. E. 591.

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an action is brought against both of the persons who are jointly liable on a bond or contract, and judgment is entered against both of them by default, but the default is afterwards vacated as to one of the defendants, with leave given to him to plead, he cannot contend that the judgment against his co-defendant will operate as an extinguishment of the cause of action, or as a bar to a judgment against himself; for, in these circumstances, there is no election on the part of the plaintiff to pursue his remedy against the one defendant only.[615]

§ 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.[616] 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,

[615] Heckemann v. Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31.

[616] Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co., 22 C. C. A. 11, 76 Fed. 10; 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 (Mass.) 114; Brown v. Birdsall, 29 Barb. (N. Y.) 549; Campbell v. Steele, 11 Pa. 394; Yoho v. McGovern, 42 Ohio St. 11; Whittaker v. Stone, 16 Ohio Cir. Ct. R. 635; Merriman v. Barker, 121 Ind. 74, 22 N. E. 992; Hitchcock v. Frackelton, 116 Mich. 487, 74 N. W. 720.

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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.[617]

§ 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 statutes 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.[618] 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

[617] Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

[618] Oakley v. Aspinwall, 4 N. Y. 515; Rufty v. Claywell, 93 N. C. 306; Ells v. Bone, 71 Ga. 466; Wooters v. Smith, 56 Tex. 198; Smith v. Coopers, 9 Iowa, 376. And see Kramer v. Schatzkin, 27 Misc. Rep. 206, 57 N. Y. Supp. 803; Capital City Dairy Co. v. Plummer, 20 Ind. App. 408, 49 N. E. 963; Finch v. Galigher, 181 Ill. 625, 54 N. E. 611; Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579.

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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 original debt. In short, the joint debtors of the statute are those who are jointly and not severally liable for the same debt." [619]

§ 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." [620] At common law, a verdict and judgment against

[619] Dill v. White, 52 Wis. 456, 9 N. W. 404. See, also, Yoho v. McGovern, 42 Ohio St. 11; Erwin v. Scotten, 40 Ind. 389.

[620] Brown's Adm'r v. Johnson, 13 Grat. (Va.) 644; Phillips v. Ward, 2 Hurl. & C. 717; Nevill v. Hancock, 15 Ark. 511; Hill v. Morse, 61 Me. 541; Hunt v. Terril's Heirs, 7 J. J. Marsh. (Ky.) 67; Mann v. Edwards, 34 Ill. App. 473. But a judgment in favor of one or more joint contractors is no

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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 defendant 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." [621]

§ 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.[622] As was remarked

bar to an action against another of the joint contractors, who was not served with process in the first action, being beyond the jurisdiction of the court, and did not voluntarily appear. Larison v. Hager (C. C.) 44 Fed. 49.

[621] Roby v. Rainsberger, 27 Ohio St. 674.

[622] King v. Hoare, 13 Mees. & W. 494; United States v. Price, 9 How. 83, 13 L. Ed. 56; Townsend v. Riddle, 2 N. H. 448; Sawyer v. White, 19 Vt. 40; Hawkes v. Phillips, 7 Gray (Mass.) 284; Benson v. Paine, 2 Hilt. (N. Y.) 552; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; City of Philadelphia v. Stewart, 23 Pa. Co. Ct. R. 552; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161; Day v. Hill, 2 Speers (S. C.) 628, 42 Am. Dec. 390; Hix v. Davis, 68 N. C. 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 G. Greene (Iowa) 212; Armstrong v. Prewitt, 5 Mo. 476, 32 Am.

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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 promisors 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." [623] 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, 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.[624] 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.[625] But it must be remarked that full payment and satisfaction of a judgment for the whole debt against one of several

Dec. 338; McLaurine v. Monroe's Adm'rs, 30 Mo. 462; McReady v. Rogers 1 Neb. 124, 93 Am. Dec. 333; Handley v. Jackson (Or.) 51 Pac. 1098.

[623] Morgan v. Chester, 4 Conn. 387.

[624] Brooklyn City & N. R. Co. v. National Bank of the Republic of New York, 102 U. S. 14, 26 L. Ed. 61; Allen v. Union Bank of Louisiana, 5 Whart. (Pa.) 420; Russell & Erwin Manuf'g Co. v. Carpenter, 5 Hun (N. Y.) 162, Gilman v. Foote, 22 Iowa, 560; Hitchcock v. Frackelton, 116 Mich. 487, 74 N. W. 720; Beals v. Clinton Circuit Judge, 91 Mich. 146, 51 N. W. 885.

[625] Claxton v. Swift, 2 Show. 441.

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persons jointly and severally liable for such debt operates as a discharge of all.[626]

§ 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."[627] 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."[628] 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 in that suit recover against the whole number of them, he cannot afterwards maintain separate actions against those not included in the first judgment.[629] 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.[630] The rule that the recovery of a joint judg-

[626] Jameson v. Barber, 56 Wis. 630, 14 N. W. 859.

[627] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596.

[628] United States v. Price, 9 How. 83, 13 L. Ed. 56. 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. (Pa.) 280.

[629] Beltzhoover v. Commonwealth, 1 Watts, 126.

[630] Clinton Bank v. Hart, 5 Ohio St. 33.

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ment 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." [631] 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." [632]

§ 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.[633] And

[631] People v. Harrison, 82 Ill. 84, citing Wann v. McNulty, 2 Gilman, 355, 43 Am. Dec. 58; 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, 77 Am. Dec. 148. The case of United States v. Cushman, 2 Sumn. 426, Fed. Cas. No. 14,908, which favored this view, was overruled in United States v. Price, 9 How. 83, 13 L. Ed. 56.

[632] Kirkpatrick v. Stingley, 2 Ind. 269.

[633] Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Sloo v. Lea, 18 Ohio, 279; Candee v. Clark, 2 Mich. 255; Nichols v. Burton, 5 Bush (Ky.) 320; Ex parte Higgins, 3 De Gex & J. 33; National Broadway Bank v. Hitch, 66 Hun, 401, 21 N. Y. Supp. 395; Keith Bros. & Co. v. Stiles, 92 Wis. 15, 64 N. W. 860.

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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.[634] 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.[635] 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.[636]

§ 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 against one of two joint tort-feasors, remaining unsatisfied, is no bar to an action against the other for the same tort.[637]

[634] Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416. Per contra, Watson v. Owens, 1 Rich. Law (S. C.) 111.

[635] Exchange Bank v. Ford, 7 Colo. 314, 3 Pac. 449.

[636] Hyman v. Stadler, 63 Miss. 362.

[637] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; American Bell Telephone Co. v. Albright (C. C.) 32 Fed. 287; Cleveland v. City of Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Preston v. Hutchinson, 29 Vt. 144; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Stone v. Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Elliott v. Hayden, 104 Mass. 180; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Atlantic Dock Co. v. Mayor, etc., of City of New York, 53 N. Y. 64; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; United Society of Shakers v. Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Knott v. Cunningham, 2 Sneed (Tenn.) 204; City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748; Turner v. Hitchcock, 20 Iowa, 310; Williams v. Sutton, 43 Cal. 65.

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§ 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.[638] This doctrine appears to have been first advanced in the case of Brown v. Wootton.[639] 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 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.[640] But in the latest case on

[638] King v. Hoare, 13 Mees. & W. 494, 504; Brown v. Wootton, Cro. Jac. 73; Lendall's Case, 1 Leon. 19; Day v. Porter, 2 Moody & R. 151; Buckland v. Johnson, 15 C. B. 145; Brinsmead v. Harrison, L. R. 7 C. P. 547.

[639] Cro. Jac. 73. This case is also reported in Yel. 67, under the name of Broome v. Wooton.

[640] 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, Judgm. 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

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the subject, the court, while professing to entertain "the highest respect for the American jurists" (who, in the meantime, 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.[641]

§ 779. Joint Trespassers; American Rule.

A very few of the American decisions adhere to the rule just stated to be established in England.[642] 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

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."

[641] 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.

[642] Hunt v. Bates, 7 R. I. 217, 82 Am. Dec. 592; Wilkes v. Jackson, 2 Hen. & M. 355; Petticolas v. City of Richmond, 95 Va. 456, 28 S. E. 566, 64 Am. St. Rep. 811.

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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.[643] "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 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,

[643] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Collard v. Delaware, L. & W. R. Co. (C. C.) 6 Fed. 246; Smith v. Rines, 2 Sumn. 338, Fed. Cas. No. 13,100; Jones v. Lowell, 35 Me. 541; Sanderson v. Caldwell, 2 Aiken, 195; Chamberlin v. Murphy, 41 Vt. 110; Sprague v. Waite, 19 Pick. (Mass.) 455; Stone v. Dickinson, 5 Allen (Mass.) 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; Vincent v. McNamara, 70 Conn. 332, 39 Atl. 444; Fowler v. Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; Union Associated Press v. Heath, 49 App. Div. 247, 63 N. Y. Supp. 96; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; Marsh v. Berry, 7 Cow. (N. Y.) 344; Floyd v. Browne, 1 Rawle (Pa.) 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's Adm'r v. English, 1 Bay (S. C.) 14; Hawkins v. Hatton, 1 Nott & McC. (S. C.) 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 of Shakers v. Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; Knott v. Cunningham, 2 Sneed (Tenn.) 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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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." [644] 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.[645]

§ 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." [646]

§ 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.[647] But of course it would be otherwise where one defendant, sued separately, obtained a verdict on a defense purely personal to himself.

[644] Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529.

[645] Maple v. Cincinnati, H. & D. Co., 40 Ohio St. 313, 48 Am. Rep. 685.

[646] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; Smith v. Rines, 2 Sumn. 348, Fed. Cas. No. 13,100; Hutchinson v. Brown, 19 D. C. 136; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31; McCredy v. Thrush, 37 App. Div. 465, 56 N. Y. Supp. 68. Compare Davis v. Caswell, 50 Me. 294.

[647] Williams v. McGrade, 13 Minn. 46 (Gil. 39); Sonnentheil v. Moody (Tex. Civ. App.) 56 S. W. 1001.

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§ 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.[648] 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.[649] 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.[650] 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

[648] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; Stone v. Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Savage v. Stevens, 128 Mass. 254; Luce v. Dexter, 135 Mass. 23; Mathews v. Lawrence, 1 Denio (N. Y.) 212, 43 Am. Dec. 665; Union Associated Press v. Press Pub. Co., 24 Misc. Rep. 610, 54 N. Y. Supp. 183; Pasthoff v. Banendahl, 6 N. Y. St. Rep. 613; Smith v. Singleton, 2 McMul. (S. C.) 184, 39 Am. Dec. 122; Karr v. Barstow, 24 Ill. 580; Stanley v. Leahy, 87 Ill. App. 465; Miller v. Beck, 108 Iowa, 575, 79 N. W. 344; Garner v. Henzig, 15 Mo. App. 591; Bryant v. Reed, 34 Neb. 720, 52 N. W. 694; Grimes v. Williams' Estate, 113 Mich. 450, 71 N. W. 835. Plaintiff, having been arrested in judicial proceedings which were entirely void, brought an action for false imprisonment against the complaining witness, the magistrate, and the constable who arrested him, and recovered a judgment, which was satisfied. It was held that he could not afterwards bring an action for such imprisonment against the sheriff into whose custody he was delivered by the constable; and this, although it was stated in the first action that the imprisonment continued till the time of plaintiff's delivery to the sheriff, while in the second action it was alleged to have commenced at that time; for the plaintiff was entitled to recover all his damages in the first action, and satisfaction of the judgment rendered therein operated as a release of all the joint wrongdoers. Blackman v. Simpson, 120 Mich. 377, 79 N. W. 573.

[649] Savage v. Stevens, 128 Mass. 254; Mitchell v. Libbey, 33 Me. 74.

[650] Putney v. O'Brien, 53 Iowa, 117, 4 N. W. 891.

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results in satisfaction or not, will release the others.[651] 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.[652] 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 payment in satisfaction of his recovery, is bad on demurrer.[653] 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.[654] 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.[655] 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.[656]

[651] White v. Philbrick, 5 Me. 147, 17 Am. Dec. 214; Boardman v. Acer, 13 Mich. 77, 87 Am. Dec. 736; Kenyon v. Woodruff, 33 Mich. 310; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Allen v. Wheatley, 3 Blackf. (Ind.) 332; Smith v. Singleton, 2 McMul. (S. C.) 184, 39 Am. Dec. 122.

[652] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Norfolk Lumber Co. v. Simmons, 2 Marv. (Del.) 317, 43 Atl. 163; Page v. Freeman, 19 Mo. 421; Knott v. Cunningham, 2 Sneed (Tenn.) 204.

[653] Blann v. Cocheron, 20 Ala. 320.

[654] Karr v. Barstow, 24 Ill. 580.

[655] McVey v. Manatt, 80 Iowa, 132, 45 N. W. 548.

[656] Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154. And see Spurr v. North Hudson County R. Co., 56 N. J. Law, 346, 28 Atl. 582.

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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." [657] 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 matter 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,[658] and in Canada.[659] 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.[660] In one state it is said that if the cir-

[657] Duchess of Kingston's Case, 20 How. St. Tr. 478.

[658] Vooght v. Winch, 2 Barn. & Ald. 662; Hannaford v. Hunn, 2 Car. & P. 148; Dimes v. Company of Proprietors of 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 Comp. M. & R. 316.

[659] Hughes v. Rees, 9 Ont. 198.

[660] Fowler v. Hait, 10 Johns. (N. Y.) 111; Derby v. Yale, 13 Hun (N. Y.) 273; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Bryson v. St. Helen, 79 Hun, 167, 29 N. Y. Supp. 524; Reich v. Cochran, 74 Hun, 551, 26 N. Y. Supp. 443; Smith v. Elliott, 9 Pa. 345; Water Commissioners of City of New Brunswick v. Cramer, 61 N. J. Law, 270, 39 Atl. 671, 68 Am. St. Rep. 705; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Beall v. Walker, 26 W. Va. 741; Brown v. Tillman, 121 Ala. 626, 25 South. 836; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; Norton v. Norton (Ky.) 25 S. W. 750; Royalty v. Shirley (Ky.) 53 S. W. 1044; Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Reilly v. Bader, 50 Minn. 199, 52 N. W. 522; Gregory v. Kenyon, 34 Neb. 640, 52 N.

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cumstances 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.[661] 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."[662] 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."[663] 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.[664] 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.

§ 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.[665] "Conceding

W. 685; Kilpatrick v. Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Josephi v. Mady Clothing Co., 13 Mont. 195, 33 Pac. 1; State v. Board of Com'rs of Washoe Co., 12 Nev. 17; Boston & C. Smelting Co. v. Reed, 23 Colo. 523, 48 Pac. 515; Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

661 Murray v. Murray, 6 Or. 26; Bays v. Trulson, 25 Or. 109, 35 Pac. 26.

662 Brady v. Murphy, 19 Ind. 258. See First Nat. Bank of Huntington v. Williams, 126 Ind. 423, 26 N. E. 75.

663 State v. Spikes, 33 Ark. 801.

664 Lyon v. Tallmadge, 14 Johns. (N. Y.) 501; Turley v. Turley, 85 Tenn. 251, 1 S. W. 891.

665 Regina v. Haughton, 1 El. & Bl. 501; Chase v. Walker, 26 Me. 555; Dame v. Wingate, 12 N. H. 291; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345;

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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." [666] 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.[667] 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.[668]

§ 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 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." [669] 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

Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Perkins v. Walker, 19 Vt. 144; Beebe v. Elliott, 4 Barb. (N. Y.) 457; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Dows v. McMichael, 6 Paige (N. Y.) 139; Ward v. Ward, 22 N. J. Law, 699; Sheldon v. Patterson, 55 Ill. 507; Flandreau v. Downey, 23 Cal. 354; Jackson v. Lodge, 36 Cal. 28; McNair v. O'Fallon, 8 Mo. 188; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

[666] Clink v. Thurston, 47 Cal. 21.

[667] Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

[668] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627.

[669] George v. Gillespie, 1 G. Greene (Iowa) 421. See, also, Renkert v. Elliott, 11 Lea (Tenn.) 235, 250; Fowlkes v. State, 14 Lea (Tenn.) 14.

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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.[670] 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."[671] 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.[672] In the 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

[670] Foye v. Patch, 132 Mass. 105; Gen. St. Mass. c. 129.

[671] Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

[672] Stafford v. Clark, 2 Bing. 377; Young v. Black, 7 Cranch, 565, 3 L. Ed. 440; Bartels v. Schell (C. C.) 16 Fed. 341; Miller v. Manice, 6 Hill (N. Y.) 124; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Carvill v. Garrigues, 5 Pa. 152; Finley v. Hanbest, 30 Pa. 190; Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436; Lampton v. Jones, 5 T. B. Mon. (Ky.) 235; Cook v. Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459 (overruling Inman v. Jenkins, 3 Ohio, 271); Wann v. McNulty, 2 Gilman (Ill.) 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. (N. Y.) 111, was to the contrary, but the court suggested that that case was virtually overruled in Wilt v. Ogden, 13 Johns. (N. Y.) 56, and Sill v. Rood, 15 Johns. (N. Y.) 230. In Coles v. Carter, 6 Cow. (N. Y.) 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. C.) 9 S. E. 192.

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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." [673] 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." [674] 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.[675] It is also held that a former recovery may be given in evidence under the plea of nil debet in an action of debt.[676] 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." [677] But it is otherwise in the action of trespass.[678]

§ 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.[679]

[673] Young v. Black, 7 Cranch, 565, 3 L. Ed. 440.

[674] Bird v. Randall, 3 Burrows, 1353; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Jones v. Weathersbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653.

[675] Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603.

[676] Welsh v. Lindo, 1 Cranch, C. C. 508, Fed. Cas. No. 17,409.

[677] Mussey v. White, 58 Vt. 45, 3 Atl. 319.

[678] Coles v. Carter, 6 Cow. (N. Y.) 691; Jones v. Lavender, 55 Ga. 228; Briggs v. Milburn, 40 Mich. 512. Compare Stancill v. James, 126 N. C. 190, 35 S. E. 245.

[679] See Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926; Mack v. Levy (C. C.) 60 Fed. 751; House v. Lockwood, 63 Hun, 630, 17 N. Y.

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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.[680]

§ 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 matter.[681] But on the other hand, both the preponderance of au-

Supp. 817; Crumlish's Adm'r v. Shenandoah Val. R. Co., 45 W. Va. 567, 32 S. E. 234; Cherry v. York (Tenn. Ch. App.) 47 S. W. 184.

[680] Kilheffer v. Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658.

[681] Vooght v. Winch, 2 Barn. & 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. (Va.) 86; Blandy v. Griffith, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1,529; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Jackson v. Wood, 3 Wend. (N. Y.) 27; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; 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. 345. In the case of Miller v. Manice, 6 Hill (N. Y.) 114, 124, Chancellor Walworth said: "It

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thority, 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.[682] Certain other cases, without

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, 3 L. Ed. 440; Kilheffer v. Herr, 17 Serg. & R. (Pa.) 322, 17 Am. Dec. 658; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603. 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. [N. Y.] 35, 22 Am. Dec. 603), 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. (N. Y.) 284, 21 Am. Dec. 323; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402. 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. (Pa.) 319, 17 Am. Dec. 658."

[682] Duchess of Kingston's Case, 20 How. St. Tr. 538; Bird v. Randall, 3 Burrows, 1353; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; David Bradley Mfg. Co. v. Eagle Mfg. Co., 7 C. C. A. 442, 58 Fed. 721; Adams v. Barnes, 17 Mass. 365; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Bradford v. Burgess, 20 R. I. 290, 38 Atl. 975; Beebe v. Elliott, 4 Barb. (N. Y.) 457; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 328; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Niles v. Totman, 3 Barb. (N. Y.) 594; White v. Coatsworth, 6 N. Y. 137; Fritz v. Tompkins, 18 Misc. Rep. 514, 41 N. Y. Supp. 985; Drake v. New York Suburban Water Co., 26 App. Div. 499, 50 N. Y. Supp. 826; Foulke v. Thalmessinger, 1 App. Div. 598, 37 N. Y. Supp. 563; Marsh v. Pier, 4 Rawle (Pa.) 288, 26 Am. Dec. 131; Westcott v. Edmunds, 68 Pa. 34; Beall v. Pearre, 12 Md. 550; Jones

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going to the same lengths with the authorities last cited, have favored the rule that, aside from the question whether a former judgment is conclusive as a bar, if not pleaded, it is certainly admissible as evidence of the same facts arising in another suit. That is, when the former judgment was rendered between the same parties, but upon a different cause of action, so that it would not constitute a bar to the prosecution of the present suit, but is relied on as a conclusive determination of certain facts, issues, or controversies common to the two suits, it is not necessary to plead it specially, but it may be introduced in evidence, with conclusive effect.[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

v. Weathersbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653; Little v. Barlow, 37 Fla. 232, 20 South. 240, 53 Am. St. Rep. 249; Cannon v. Brame, 45 Ala. 262; Warwick v. Underwood, 3 Head (Tenn.) 238, 75 Am. Dec. 767; Gavin v. Graydon, 41 Ind. 559; Gray v. Gilliian, 15 Ill. 453, 60 Am. Dec. 761; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 57 Ill. App. 430; 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, 73 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; Foulke v. Thalmessinger, 158 N. Y. 725, 53 N. E. 1125; Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515; Swank v. St. Paul City Ry. Co., 61 Minn. 423, 63 N. W. 1088; Bell v. Raymond, 18 Conn. 91; Walker v. Chase, 53 Me. 258.

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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 claiming 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

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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." [684] 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 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." [685]

§ 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." [686] And the rule is the same in California.[687] In Indiana, where the statute provides that "under a

[684] Marsh v. Pier, 4 Rawle, 273, 288, 26 Am. Dec. 131.

[685] 1 Greenl. Ev. § 531. See, also, Chamberlain v. Carlisle, 26 N. H. 540.

[686] Hendricks v. Decker, 35 Barb. 298; Brazill v. Isham, 12 N. Y. 9. And see, as to Louisiana and Missouri, In re Scarborough, 44 La. Ann. 288, 10 South. 858; Preferred Acc. Ins. Co. v. Barker, 35 C. C. A. 250, 93 Fed. 158; Glenn v. Priest (C. C.) 48 Fed. 19.

[687] Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

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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.[688] 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.[689] In Ohio, when an 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.[690] But in California, upon this particular point, the rule is otherwise, there being there no replication to the answer.[691]

§ 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." [692]

[688] Norris v. Amos, 15 Ind. 365.
[689] Greaves v. Middlebrooks, 59 Ga. 240.
[690] Fanning v. Hibernia Ins. Co., 37 Ohio St. 344, 41 Am. Rep. 517.
[691] Wixson v. Devine, 67 Cal. 341, 7 Pac. 776.
[692] City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42. A judgment is suf-

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It has been held that a plea of former recovery which contains neither a recital of the term of court at which the judgment relied on as a bar was recovered, nor the date of its rendition, is bad on demurrer.[693] But the later cases favor the view that the plea is sufficient in this respect if it distinctly shows that the judgment relied on was rendered before the institution of the suit at bar; or that, although the failure to allege a date may be ground for a motion to make more certain, it will not render the plea vulnerable to a demurrer.[694]

It is especially necessary that the plea should show the identity of the causes of action or matters in litigation in the two actions, or that the issues upon which the former judgment is alleged to be conclusive are identically the same with those set up and determined in the former suit, or were within the scope of the controversy there involved and might have been litigated and determined therein.[695] It is said that the plea is sufficient in this respect 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 complaint in the action first brought, and none others."[696] But in an action on a contract, a plea of former recovery "for an alleged vio-

ficiently pleaded in estoppel by alleging the fact of its rendition, without alleging legal conclusions following therefrom. Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506. Where a plea gives the parties to a former suit in the same court, refers to all the documents, pleadings, and judgment, and makes them a part of the plea, "as though fully and in detail set out herein," this is sufficient in a plea of res judicata, as the court takes judicial notice of its own records. Pittel v. Fidelity Mut. Life Ass'n, 30 C. C. A. 21, 86 Fed. 255.

[693] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401. And see Wortham v. Com., 5 Rand. (Va.) 669.

[694] Thomas v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. St. Rep. 483; Ludlow v. Marion Tp. Gravel Road Co., 101 Ind. 176; Kenney v. Howard, 67 Vt. 375, 31 Atl. 850.

[695] Taylor v. Hutchinson, 61 N. J. Law, 440, 39 Atl. 664; Glaser v. Meyrovitz, 119 Ala. 152, 24 South. 514; Dunn v. Barton, 2 Ind. App. 444, 28 N. E. 717; Brooke v. Gregg, 89 Md. 234, 43 Atl. 38.

[696] Wilson v. Buell, 117 Ind. 315, 20 N. E. 231; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263. And see Wythe v. Salem, 4 Sawy. 88, Fed. Cas. No. 18,121; Rynearson v. Parkhurst, 88 Ind. 264. Compare Crum v. Rea, 14 Ind. App. 379, 42 N. E. 1033.

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lation of the contract," there being no averment that the former recovery was for the same violation, or that the causes of action are identical, is bad.[697] 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.[698]

Again, in pleading a former judgment in bar, it must be distinctly shown that such former judgment was on the merits, and definite facts should be pleaded showing the determination of the merits against the adverse party.[699] This is sufficiently shown by a plea averring that the case was tried before a court and jury, "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." [700] But where a bill for relief in regard to infringement of a patent was dismissed on demurrer, and, in a subsequent suit, a plea averred that the parties, the letters patent relied on, and the acts of infringement complained of were the same as in the former suit, it was held that it did not show that the matters in suit were res judicata.[701]

Since only a final judgment can have the effect of barring a subsequent suit between the same parties, a plea setting up a former recovery as a bar must distinctly allege that the judgment so pleaded was final.[702] But it is considered that it is not necessary for the

[697] Montrose v. Wanamaker, 57 Hun, 590, 11 N. Y. Supp. 106.

[698] Gilbreath v. Jones, 66 Ala. 129. And see Crandall v. Gallup, 12 Conn. 365.

[699] Philipowski v. Spencer, 63 Tex. 604; Fowlkes v. State, 14 Lea (Tenn.) 14; Perkins v. Moore, 16 Ala. 9; Wade v. Howard, 8 Pick. (Mass.) 353; Taylor v. Barron, 35 N. H. 484; Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Dunklee v. Goodenough, 63 Vt. 459, 21 Atl. 494; s. c. 65 Vt. 257, 26 Atl. 988.

[700] Ellis v. Staples, 9 Humph. (Tenn.) 238.

[701] Whitaker v. Davis (C. C.) 91 Fed. 720.

[702] Southern Ry. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762; Thomas

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pleader to allege, in addition to the statement of the rendition of the judgment and its finality, that it still remains in full force, or that it has not been reversed or vacated or otherwise annulled; for, when rendered, it is presumed to remain in force until the contrary appears, and presumptions of law need not be stated.[703]

Further, it is necessary for a plea of res judicata to aver that the parties are the same in the two suits, or to allege facts which show that the relation of the pleader to the former action was such as to make the judgment conclusive in his favor, or that the party against whom the estoppel is alleged, if not directly a party to the former suit, was so connected with it in interest as to be bound by the result.[704] Thus, in an action against an indorser of a note, an answer alleging that a judgment had previously been rendered on the note, but without stating against whom such judgment was given, is not sufficient.[705] But a plea setting up a former judgment between plaintiff and a third party as binding on defendant need not allege in terms that defendant had such control of the former action as to be bound by the judgment, but is sufficient if the facts pleaded warrant such a conclusion by the court.[706]

In pleading a former judgment as a bar, it is also necessary to allege that it was rendered by a court of competent jurisdiction. But if the court was one possessing general jurisdiction, it will not be necessary for the plea to set out all the facts and circumstances bringing the particular case within its cognizance, or to describe the issuance and service of process or appearance of the parties; it will be presumed that the court had jurisdiction of the subject-matter and the parties.[707] In the case of a court of special or inferior juris-

v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. St. Rep. 483. Compare Theller v. Hershey (C. C.) 89 Fed. 575.

[703] Campbell v. Cross, 39 Ind. 155; Mull v. McKnight, 67 Ind. 525; Kenney v. Howard, 67 Vt. 375, 31 Atl. 850.

[704] Spargur v. Romine, 38 Neb. 736, 57 N. W. 523; Cheney v. Patton, 134 Ill. 422, 25 N. E. 792; Goddard v. Benson, 15 Abb. Prac. (N. Y.) 191.

[705] Gibson v. Parlin, 13 Neb. 292, 13 N. W. 405.

[706] Theller v. Hershey (C. C.) 89 Fed. 575.

[707] Lynde v. Columbus, C. & I. C. R. Co. (C. C.) 57 Fed. 993; Spaulding v. Baldwin, 31 Ind. 376; Wickersham v. Johnson, 51 Mo. 313; Puckett v. Waco Abstract & Investment Co., 16 Tex. Civ. App. 329, 40 S. W. 812; Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; Fisher v. Kelly, 30 Or. 1, 46 Pac. 146.

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diction, it would be necessary, at common law, to set forth all the facts conferring jurisdiction; but in many of the states, this rule has been changed by statute, the provision being that, in pleading a judgment of such a court, it shall be sufficient to allege that the judgment was "duly given or made." [708] And 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.[709] In an action for an injunction, a plea of former adjudication, which sets up a public record of the same court in which the action is pending, need not be verified.[710]

§ 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.[711] Hence it even follows that a prior judgment 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.[712] 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." [713]

[708] See Rev. St. Mo. 1899, § 2079; Rev. St. Wis. § 2673; Civ. Code Ky. § 122; Code Civ. Proc. N. Y. § 532; State v. Johnson, 78 Mo. App. 569; Garner v. Wills, 92 Ky. 386, 17 S. W. 1023; Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; Schnitzer v. Fox, 31 Misc. Rep. 28, 62 N. Y. Supp. 1127.

[709] Edgell v. Sigerson, 20 Mo. 494.

[710] Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471.

[711] Jones v. Ellison, 10 Wkly. Notes Cas. (Pa.) 205; Finley v. Hanbest, 30 Pa. 190; Marble v. Keyes, 9 Gray (Mass.) 221; Stevens v. Briggs, 14 Vt. 44, 39 Am. Dec. 209; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Mandeville v. Avery, 63 Hun, 624, 17 N. Y. Supp. 429; David Bradley Mfg. Co. v. Eagle Mfg. Co., 6 C. C. A. 661, 57 Fed. 980; Eckert v. Binkley, 134 Ind. 614, 34 N. E. 441.

[712] Duffy v. Lytle, 5 Watts (Pa.) 120.

[713] 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 pages), we shall be content to quote some of the best definitions in the books, indicating the various criticisms to which they are open.

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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 declaration proceeding from an accredited quarter concerning the status of the thing adjudicated upon, which very declaration operates accordingly upon the status

[1] Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030.
[2] Woodruff v. Taylor, 20 Vt. 65.

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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 subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant

[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 Phil. Ev. p. 5; 1 Whart. Ev. § 815; Bigelow, Estop. p. 10 et seq.; Freem. Judgm. § 606; 1 Greenl. Ev. §§ 525, 541; Cross v. Armstrong, 44 Ohio St. 623, 10 N. E. 160; The Sabine, 101 U. S. 388, 25 L. Ed. 982; Pennoyer v. Neff, 95 U. S. 734, 24 L. Ed. 565; Windsor v. McVeigh, 93 U. S. 279, 23 L. Ed. 914; Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372; The J. W. French (D. C.) 13 Fed. 916; Lord v. Chadbourne, 42 Me. 429, 443, 66 Am. Dec. 290; People v. Rodgers, 118 Cal. 393, 46 Pac. 740.

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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 nonresidents 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 proceeding 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, or proceedings to quiet title, or to remove clouds from title, 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

[4] Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372. A decree in a suit by creditors against the debtor and a corporation that certain goods were the property of the debtor, and subject to his debts, is a judgment in rem, binding on the creditors of the corporation. Ex parte Kenmore Shoe Co., 50 S. C. 140, 27 S. E. 682.

[5] Pillsbury's Lessee v. Dugan's Adm'r, 9 Ohio, 117, 34 Am. Dec. 427. Compare Childs v. Hayman, 72 Ga. 791. "Proceedings in partition or to quiet title are not strictly proceedings in rem, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings in rem sub modo, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted." Meyer v. Kuhn, 25 U. S. App. 174, 13 C. C. A. 298, 65 Fed. 705, citing Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918. And see Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652. But a suit to determine the title of land lying in another state from that in which the suit is brought is purely in personam, and the decree therein rendered does not operate directly on the property or affect the title, but is made effectual only by coercion of the parties, and binds only them and their privies. Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733.

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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]

§ 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 pos-

[6] In re Brooklyn, W. & N. R. Co., 19 Hun (N. Y.) 314.

[7] Eppright v. Kauffman, 90 Mo. 25, 1 S. W. 736.

[8] Consolidated Roller-Mill Co. v. George I. Smith Middlings Purifier Co. (C. C.) 40 Fed. 305, citing Ingersoll v. Jewett, 16 Blatchf. 378, Fed. Cas. No. 7,039. But the construction of a patent in an action is conclusive in another action by the patentee against a third person, where no new defenses are interposed. National Folding Box & Paper Co. v. American Paper Pail & Box Co. (C. C.) 48 Fed. 913.

[9] The Globe, 2 Blatchf. 427, Fed. Cas. No. 5,483. And see Fowler v. Brown, 51 Neb. 414, 71 N. W. 54.

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session 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, but also upon strangers,—upon all persons interested.[12] 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

[10] Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

[11] Martin v. Darling, 78 Me. 78, 3 Atl. 118.

[12] Cammell v. Sewell, 3 Hurl. & N. 646; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; State v. Central Pac. R. Co., 10 Nev. 80; Street v. Augusta Ins. & B. Co., 12 Rich. Law (S. C.) 13, 75 Am. Dec. 714; 2 Smith. Lead. Cas. 661; Bailey v. Sundberg (D. C.) 43 Fed. 81; Ballantyne v. Mackinnon [1896] 2 Q. B. 455.

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action.[13] 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.[14]

§ 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.[15] But, as in all other 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]

[13] Durant v. Abendroth, 97 N. Y. 132.

[14] Toby v. Brown, 11 Ark. 308; supra, § 674.

[15] Averill v. Smith, 17 Wall. 95, 21 L. Ed. 613; The Propeller Commerce, 1 Black, 580, 17 L. Ed. 107; The Mary Anne, 1 Ware, 104, Fed. Cas. No. 9,195; Ballantyne v. Mackinnon [1896] 2 Q. B. 455. See China Mut. Ins. Co. v. Force, 66 Hun, 626, 20 N. Y. Supp. 796.

[16] Van Vechten v. Griffiths, 4 Abb. Dec. (N. Y.) 487. See, also, Andrews v. Brown, 3 Cush. (Mass.) 130. A decree dismissing a libel in rem against a vessel to recover for repairs does not constitute an adjudication of the nonliability of the owners, who, under admiralty rule 12, could not be joined as defendants in such suit, and who did not intervene therein, unless it clearly appears from the record that such issue was not only raised but decided, since its determination was not necessarily involved. Morris v. Bartlett, 47 C. C. A. 578, 108 Fed. 675.

[17] The Odorilla v. Baizley, 128 Pa. 283, 18 Atl. 511. See, also, Providence Washington Ins. Co. v. Morse (D. C.) 35 Fed. 363.

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§ 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 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] But where the owner of a vessel which was sunk by collision with a steamer brought a libel in rem, and the steamer was attached, but no notice was given or publication made as required by admiralty rule 9, and subsequently the steamer was released on

[18] Penhallow v. Doane, 3 Dall. 54, 86, 1 L. Ed. 507. And see Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Hughes v. Cornelius, 2 Show. 232.

[19] See, infra, §§ 813–817.

[20] Street v. Augusta Ins. & Banking Co., 12 Rich. Law (S. C.) 13, 75 Am. Dec. 714.

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her owner's giving a bond to the libelant for less than her value, it was held that a decree dismissing the libel was binding on the libelant only, and would not prevent a new libel by the owner of the cargo.[21] So, a default decree against a tug for damages caused to her tow by stranding is not conclusive of negligence on the part of the pilot in charge of the tug, so as to preclude him, after obtaining a decree against the tug for his wages, from denying such negligence in a contest between himself and the owner of the tow as to whose decree should be first paid out of the proceeds of the tug.[22]

§ 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.[23] 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.[24] 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.[25] According to the federal supreme court, "the jurisdiction acquired by the seizure

[21] Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583.

[22] Flannery v. The Alexander Barkley (D. C.) 83 Fed. 846.

[23] Scott v. Shearman, 2 Wm. Bl. 977; Whitney v. Walsh, 1 Cush. (Mass.) 29, 48 Am. Dec. 590; Buchannan v. Biggs, 2 Yeates (Pa.) 232; Gelston v. Hoyt, 13 Johns. (N. Y.) 561; Kriess v. Faron, 118 Cal. 142, 50 Pac. 388.

[24] Hart v. McNamara, 4 Price, 154, note.

[25] Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421. See, also, Dean v. Chapin, 22 Mich. 275.

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[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 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." [26]

§ 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.[27] "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,

[26] Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914.

[27] 13 Johns. (N. Y.) 561. See, also, Cooke v. Sholl, 5 Term R. 255.

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ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every 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.[28]

§ 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.[29] "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."[30] 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

[28] Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381.

[29] Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 931; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564; Megee v. Beirne, 39 Pa. 50; Breading v. Siegworth, 29 Pa. 396; Childs v. Digby, 24 Pa. 23; Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030; Woodruff v. Taylor, 20 Vt. 65. See Peterson v. Willard, 17 La. Ann. 93; National Bank of St. Joseph v. Peters, 51 Kan. 62, 32 Pac. 637; Johnson v. Stockham, 89 Md. 368, 43 Atl. 943. Where a creditor in attachment against the debtor obtains a judgment and a sale of the property attached, the judgment is not binding upon another creditor who has a prior and valid chattel mortgage, and who was not a party to the attachment suit. Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698.

[30] 2 Smith, Lead. Cas. 690.

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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." [31]

But it must be remembered that a suit by attachment against a nonresident or absconding debtor, being a proceeding in rem, operates only upon the property attached, and a judgment recovered therein imposes no sort of personal liability upon the defendant and does not affect him except in respect to his interest in the property attached.[32] Consequently, the judgment cannot operate as a bar to a subsequent suit for the collection of any balance remaining unpaid after exhausting the attached property,[33] nor can it be pleaded in bar of a subsequent suit by the debtor against the plaintiff on an existing claim not set off in the attachment suit.[34]

§ 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.[35] Thus a finding that, at the time of the execution of a deed, the

[31] Sale v. French, 61 Miss. 170.

[32] Soulard v. Vacuum Oil Co., 109 Ala. 387, 19 South. 414. See, supra, § 229; infra, § 904.

[33] Oil Well Supply Co. v. Koen, 64 Ohio St. 422, 60 N. E. 603.

[34] Baldwin v. Woodbridge & Turner Engineering Co., 59 N. J. Law, 317, 36 Atl. 683.

[35] Rogers v. Walker, 6 Pa. 373, 47 Am. Dec. 470; Den ex dem. Aber v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417 (citing Sergeson v. Sealey, 2 Atk. 412; Ex parte Barnesley, 3 Atk. 184; Hall v. Warren, 9 Ves. 603; Faulder v. Silk, 3 Camp. 126); Thomasson v. Kercheval, 10 Humph. (Tenn.) 322; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386.

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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.[36]

§ 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.[37] 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 properly belongs to a later portion of our work.[38] 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

[36] Van Deusen v. Sweet, 51 N. Y. 378. An adjudication of mental unsoundness, per se, is evidence only of the mental condition of the subject at the time of such adjudication and thereafter; it cannot relate back presumptively to a prior date, as evidence of his mental condition at such date. But where it is shown that the same condition of mind has existed in a person for a considerable period of time prior to the adjudication of insanity, such adjudication is competent evidence, where the act claimed to have been affected by such condition occurred within such prior time. Small v. Champeny, 102 Wis. 61, 78 N. W. 407.

[37] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 3 Gray (Mass.) 387; Smith v. Smith, 13 Gray (Mass.) 209; 2 Bish. Mar. & Div. § 755.

[38] See, infra, §§ 822, 924–933.

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that species of judgments.[39] 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.[40] 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.[41] In Vermont, such an order is conclusive not only of the facts directly in issue and decided but also of all facts 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

[39] See Roe v. Roe, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367; Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529; Gray v. Thomas, 83 Tex. 246, 18 S. W. 721; Corry v. Lackey, 105 Mich. 363, 63 N. W. 418.

[40] McCarthy v. Marsh, 5 N. Y. 263; State v. Hoeflinger, 35 Wis. 393; State v. Penney, 10 Ark. 621.

[41] Reg. v. Inhabitants of Township of Hartington, Middle Quarter, 4 El. & Bl. 780; Rex v. Inhabitants of Cirencester, Burrows, Sett. Cas. 18; Rex v. Inhabitants of Bentley, Id. 426; Town of Cabot v. Town of Washington, 41 Vt. 168; West Buffalo v. Walker Tp., 8 Pa. 177.

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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.[42] 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.[43] 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.[44]

§ 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.[45] Similarly, a question of identity of the defendant, contested in a former suit and found against him, cannot be re-examined.[46] 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.[47] 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, but bound only parties and privies.[48] 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

[42] Pittsford v. Chittenden, 58 Vt. 49, 3 Atl. 323.

[43] West Buffalo v. Walker Tp., 8 Pa. 177.

[44] Town of Bethlehem v. Town of Watertown, 47 Conn. 237.

[45] Ennis v. Smith, 14 How. 400, 14 L. Ed. 472.

[46] Verneuil v. Harper, 28 La. Ann. 893.

[47] Kearney v. Denn, 15 Wall. 51, 21 L. Ed. 41. See Ferrell v. Broadway, 127 N. C. 404, 37 S. E. 504.

[48] Davis v. Wood, 1 Wheat. 6, 4 L. Ed. 22.

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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.[49] 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.[50] 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.[51] But while an adjudication of bankruptcy is conclusive upon all persons as to the bankruptcy of the debtor, and as to all facts necessary to warrant the adjudication, it is not final evidence upon matters which came in question only collaterally or by way of evidence. Thus, in one of the cases arising under the bankruptcy act of 1898, the respondent in a petition in involuntary bankruptcy denied his alleged indebtedness to the petitioning creditor, and took issue on the validity and consideration of the note set forth in the petition and on which the creditor claimed. Evidence on this point was presented on both sides, and the court found the allegations of the

[49] Alexander v. Stekely, 7 Serg. & R. (Pa.) 299.

[50] Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; In re Wallace, Deady, 433, Fed. Cas. No. 17,094; Morse v. Godfrey, 3 Story, 391, Fed. Cas. No. 9,856; In re Banks, 1 N. Y. Leg. Obs. 274, Fed. Cas. No. 958; In re Fallon, 2 N. B. R. 277, Fed. Cas. No. 4,628; In re Ordway, 19 N. B. R. 171, Fed. Cas. No. 10,552; Lewis v. Sloan, 68 N. C. 557; Benedict v. Smith, 48 Mich. 593, 12 N. W. 866; Rayl v. Lapham, 27 Ohio St. 452; Thornton v. Hogan, 63 Mo. 143; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726.

[51] Brown v. Smart, 69 Md. 320, 14 Atl. 468; Merriam v. Sewall, 8 Gray (Mass.) 316. See Diamond State Iron Co. v. Alex. K. Rarig Co., 93 Va. 595, 25 S. E. 894.

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petition to be true and made the adjudication of bankruptcy as prayed. It was held that such adjudication was conclusive evidence of the petitioner's claim, so that the note could not be disputed when it was presented for allowance as a claim against the bankrupt's estate, either by the bankrupt or by any creditor who joined in the proceedings and opposed the adjudication. But the bankrupt had also taken issue on the question of his insolvency, and the petitioning creditor, for the purpose of proving insolvency, offered in evidence certain promissory notes made by the debtor to third parties, and the debtor contested their validity and consideration. And though the court found the debtor insolvent and adjudged him bankrupt, yet it was held that the adjudication was not conclusive as to the validity of those notes, so as to preclude the bankrupt from opposing their allowance as claims against his estate, for they were not directly in issue, but only collaterally brought in question, and the holders were not parties to the proceeding.[52]

For similar reasons, it is held that a decree granting a discharge to a bankrupt, or to an insolvent debtor, is conclusive evidence of his having complied with all things required by law to entitle him to a discharge, and of his release from all debts and obligations not excepted by law from the operation of such a discharge. It is binding upon all creditors, whether or not they were notified of the application or took part in the proceedings; and it cannot be impeached in any collateral proceeding, but only directly and in the manner prescribed by the statute itself.[53] In a later chapter we shall be called upon to consider the important subject of the extraterritorial effect of decrees in bankruptcy and the question of the conclusiveness of foreign adjudications upon domestic creditors.[54]

[52] In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409. And see Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.

[53] Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Thurmond v. Andrews, 10 Bush. (Ky.) 400; Blake v. Bigelow, 5 Ga. 437; Boas v. Hetzel, 3 Pa. 298; Sheets v. Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486. See Bankr. Act 1898, § 21f.

[54] Infra, § 824.

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§ 808. Probate Adjudications.

The judgments and decrees of courts of probate, acting within the scope of their peculiar jurisdiction, are quasi in rem, and are binding and conclusive upon all parties in interest, without notice other than such general notice as may be given by publication to all persons interested in the estate.[55] Thus, a judgment of a probate court that one of the heirs of an estate had received advancements during the intestate's lifetime to the full amount of his share of the estate, and that he was not entitled to any further share therein, is binding on the creditors of the heir, though they had no personal notice of the proceeding.[56] So a suit to test the validity of a will is a proceeding in rem, and the decree is binding upon all parties in interest whether parties to the issue or not.[57] But it has been held that a suit for the construction of a testamentary writing is not in the nature of a proceeding in rem.[58]

§ 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.[59] Thus, where land of a nonresident has been sold for taxes, and the title quieted in the purchaser on service by publication, the decree quieting the title divests the nonresident owner of all interest in the land.[60] But more commonly the judgment in a tax case is considered to be binding only upon parties brought in by actual notice and those in privity with them, and in

[55] Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Miller v. Foster, 76 Tex. 479, 13 S. W. 529; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; supra, §§ 635, 638, and cases there cited.

[56] Liginger v. Field, 78 Wis. 367, 47 N. W. 613.

[57] Fry v. Taylor, 1 Head. (Tenn.) 594; Patton v. Allison, 7 Humph. (Tenn.) 320.

[58] Brown v. Brown, 86 Tenn. 277, 7 S. W. 640.

[59] Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595. And see Black, Tax Titles, § 167 et seq.

[60] Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863.

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some cases, not even upon the owner unless he appeared and contested the application for judgment.[61] Thus, in Indiana, where land is erroneously taxed to another than the true owner, a judgment foreclosing the tax lien against the person to whom the land was taxed, in an action to which the owner was not a party, and of which he had no knowledge, is not binding upon him.[62] 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.[63] 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.[64]

§ 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.[65] 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.[66]

[61] 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 Gilman (Ill.) 376; Mayo v. Foley, 40 Cal. 281; Jamison v. City of New Orleans, 12 La. Ann. 346; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449.

[62] Grigsby v. Akin, 128 Ind. 591, 28 N. E. 180.

[63] Rork v. Smith, 55 Wis. 67, 12 N. W. 408.

[64] Waters v. Spofford, 58 Tex. 115.

[65] Oswald v. Kampmann (C. C.) 28 Fed. 36. See Lehman v. Hinton, 44 W. Va. 1, 29 S. E. 984; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; McCollum v. Wood (Tex. Civ. App.) 33 S. W. 1087.

[66] Russell v. Brown, 41 Ill. 184; Williams v. Ives, 49 Ill. 512; White's Adm'rs v. Williams, 3 N. J. Eq. 376. See Smith v. Kreager, 6 Kan. App. 271, 51 Pac. 813.

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§ 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." [67] 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 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.[68]

§ 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.[69] 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.[70]

[67] Jeter v. Hewitt, 22 How. 352, 16 L. Ed. 345; Montgomery v. Samory, 99 U. S. 482, 25 L. Ed. 375.

[68] Latham v. Wiswall, 37 N. C. 294.

[69] Millcreek Tp. v. Reed, 29 Pa. 195. See Bradbury v. Walton (Ky.) 21 S. W. 869.

[70] Pitman v. Town of Albany, 34 N. H. 577.

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CHAPTER XXI.

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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 binding and conclusive on all the world, and not re-examinable on

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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 Doug. 574; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Wellborn v. Carr, 1 Tex. 463; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126.

[2] Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126, 183.

[3] Story, Confl. Laws, § 591; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126, 179. See, also, Cammell v. Sewell, 5 Hurl. & 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

[4] Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, 2 Doug. 574; Stringer v. Ins. Co., L. R. 4 Q. B. 676; Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Ocean Ins. Co. v. Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Lumly v. Quarry, 7 Mod. 9; Williams v. Armroyd, 7 Cranch, 423, 3 L. Ed. 392; Brown v. Union Ins. Co. at London, 4 Day (Conn.) 179, 4 Am. Dec. 204; Walton v. Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; Cucullu v. La. Ins. Co., 5 Mart. (N. S.; La.) 464, 16 Am. Dec. 199.

[5] 4 C. Rob. Adm. 3 (1801).

[6] 2 Wash. C. C. 508, Fed. Cas. No. 538.

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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 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

[7] Williams v. Armroyd, 7 Cranch, 423, 3 L. Ed. 392.

[8] Magoun v. New England Marine Ins. Co., 1 Story, 157, Fed. Cas. No. 8,961; The Bennet, 1 Dod. 175.

[9] This principle was clearly and convincingly stated in the case of Brown v. Union Ins. Co., 4 Day (Conn.) 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

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partly on 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 adjudi-

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 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, 2 L. Ed. 670.

[11] Castrique v. Imrie, L. R. 4 H. L. 414. And see Minna Craig S. S. Co. v. Chartered Mercantile Bank [1897] 1 Q. B. 460.

[12] The East, 9 Ben. 76, Fed. Cas. No. 4,251; Harmer v. Bell, 7 Moore, P. C. 267.

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cations 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 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

[13] Grant v. McLachlin, 4 Johns. (N. Y.) 34.

[14] Calhoun v. Insurance Co. of Pennsylvania, 1 Bin. (Pa.) 293.

[15] Walton v. Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; Brown v. Union Ins. Co., 4 Day (Conn.) 179, 4 Am. Dec. 204; Cucullu v. La. Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Blanque v. Peytavin, 4 Mart. O. S. (La.) 458, 6 Am. Dec. 705.

[16] Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Peters v. Warren Ins. Co., 3 Sumn. 389, Fed. Cas. No. 11,035; Baxter v. N. E. Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Dempsey v. Ins. Co. of Pennsylvania, 1 Bin. (Pa.) 299, note; Stewart v. Warner, 1 Day (Conn.) 143, 2 Am. Dec. 61; Groning v. Union Ins. Co., 1 Nott & McC. (S. C.) 537.

[17] 3 Bos. & P. 499.

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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 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

[18] Bolton v. Gladstone, 5 East, 155. See, also, Baring v. Clagett, 3 Bos & P. 201; Fernandez v. Da Costa, Park, Ins. 170.

[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 Firemen 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. (S. C.) 151, 2 Am. Dec. 654.

[21] Marsh. Ins. 394; Bernardi v. Motteux, 2 Doug. 575.

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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, evidence 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

[22] Dalgleish v. Hodgson, 7 Bing. 495; Fisher v. Ogle, 1 Camp. N. P. 417; Calvert v. Bovill, 7 Term R. 523; Hobbs v. Heming, 17 C. B. (N. S.) 791.

[23] Vasse v. Ball, 2 Dall. 270, 1 L. Ed. 377. See, also, Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. Ed. 591.

[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 (S. C.) 237.

[27] Christie v. Secretan, 8 Term R. 192; Bernardi v. Motteux, 2 Doug. 574; Calvert v. Bovill, 7 Term R. 523; Russel v. Union Ins. Co., 4 Dall. 421, Fed. Cas. No. 12,146, 1 L. Ed. 892; Maley v. Shattuck, 3 Cranch, 458, 2 L. Ed. 498; Lambert v. Smith, 1 Cranch (C. C.) 361, Fed. Cas. No. 8,028; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. Ed. 591.

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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 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

[28] 1 Marsh. Ins. 411.

[29] Fisher v. Ogle, 1 Camp. 418.

[30] Maley v. Shattuck, 3 Cranch, 458, 2 L. Ed. 498.

[31] Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608; Cheriot v. Foussat, 3 Bin. (Pa.) 220; Story, Confl. Laws, § 586.

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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

[32] Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345. See, also, The Flad Oyen, 8 Term. R. 270.

[33] Story, Confl. Laws, § 592; Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 180; Magoun v. N. E. Marine Ins. Co., 1 Story, 157, Fed. Cas. No. 8,961; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793. 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,

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early 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, 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]

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."

[34] Sawyer v. Maine Fire & Marine 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, 3 L. Ed. 392.

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§ 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 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

[36] Stewart v. Warner, 1 Day, 142, 2 Am. Dec. 61.

[37] Shand v. Du Boisson, L. R. 18 Eq. 283; Messina v. Petrocochino, 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. Laws, §§ 592, 597; 1 Whart. Ev. § 814; Bigelow, Estop. (3d Ed.) 195; Freem. Judgm. § 591.

[39] See infra, § 844.

[40] Cucullu v. La. Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Snell v. Faussatt, 1 Wash. C. C. 271, Fed. Cas. No. 13,138; The Griefswald, Swab. 430; The Flad Oyen, 1 C. Rob. Adm. 135.

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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]

§ 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]

[41] 1 Marsh. Ins. 388.

[42] Snell v. Faussatt, 1 Wash. C. C. 271, Fed. Cas. No. 13,138.

[43] Bank of North America v. McCall, 4 Bin. (Pa.) 371.

[44] Roach v. Garvan, 1 Ves. Sr. 157.

[45] Rex v. Lolley, 2 Russ. & R. 237; Sinclair v. Sinclair, 1 Hagg. Consist. 294; Scrimshire v. Scrimshire, 2 Hagg. Consist. 395; Connelly v. Connelly, 2 Eng. Law & Eq. 570; Shaw v. Attorney-General, L. R. 2 Prob. Div. 161; Deck v. Deck, 2 Swab. & T. 90. See Story, Confl. Laws, §§ 215–230, 579, where the whole subject is learnedly discussed.

[46] Dolphin v. Robins, 7 H. L. Cas. 390; Warrender v. Warrender, 2 Clark & F. 541; Harvey v. Farnie, 8 App. Cas. 43.

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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 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

[47] L. R. 3 H. L. 55.

[48] Le Suer v. Le Suer, L. R. 1 Prob. Div. 139.

[49] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743; Burlen v. Shannon, 115 Mass. 438; Hood v. Hood, 110 Mass. 463; Wright v. Wright, 24 Mich. 180; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Rush v. Rush, 46 Iowa, 648, 26 Am. Rep. 179; James v. James, 81 Tex. 373, 16 S. W. 1087; McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20; 2 Bish. Mar. & Div. §§ 155-164. See infra, §§ 924-933.

[50] Williams v. Saunders, 5 Cold. (Tenn.) 60; Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091.

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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 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 extraterritorial 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

[51] Doglioni v. Crispin, L. R. 1 H. L. 301.

[52] Potter v. Brown, 5 East, 124; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Smith v. Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Ory v. Winter, 4 Mart. (N. S.; La.) 277; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Peck v. Hibbard, 26 Vt. 702, 62 Am. Dec. 605; Marsh v. Putnam, 3 Gray (Mass.) 551; Story, Confl. Laws, § 340.

[53] Kuehling v. Leberman, 2 Wkly. Notes Cas. 616.

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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? 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. Fraser, 20 How. St. Trials,

[54] Ohlemacher v. Brown, 44 U. C. Q. B. 366.

[55] Kennedy v. Cassillis, 2 Swanst. 326, note.

[56] Boucher v. Lawson, Cas. t. Hardw. 89.

[57] Hamilton v. Dutch East India Co., 8 Brown, Parl. Cas. 264.

[58] Walker v. Witter, 1 Doug. 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 Doug. 6, note 3; Sinclair

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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 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 ir-

v. Fraser, 20 How. St. Trials, 469; Houlditch v. Donegal, 8 Bligh (N. R.) 301; Don v. Lippmann, 5 Clark & F. 1.

[59] Arnott v. Redfern, 3 Bing. 353.

[60] Phillips v. Hunter, 2 H. Bl. 402, 410.

[61] Burrows v. Jemino, 2 Strange, 733; Boucher v. Lawson, Cas. t. Hardw. 85; Tarleton v. Tarleton, 4 Maule & S. 20; Woodburne v. Plummer, 1 Barn. & C. 625; Reimers v. Druce, 23 Beav. 145. And see Story, Confl. Laws, § 598; 2 Kent, Comm. 119, 120.

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regularity 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 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.

[62] Taylor v. Phelps, 1 Har. & G. (Md.) 492 (1827); Griswold v. Pitcairn, 2 Conn. 85 (1816); Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105. On the subject of foreign judgments as a cause of action, see Lilienthal v. Drucklieb (C. C.) 80 Fed. 562; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158.

[63] Ersk. Inst. bk. 4, tit. 3, § 4.

[64] Reimers v. Druce, 23 Beav. 145.

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§ 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 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 de-

[65] Bank of Australasia v. Nias, 16 Q. B. 717; Bank of Australasia v. Harding, 9 C. B. 661; Ferguson v. Mahon, 11 Adol. & E. 179; Guinness v Carroll, 1 Barn. & Adol. 459; Patrick v. Shedden, 2 El. & Bl. 14; Scott v. Pilkington, 2 Best & S. 11; Paul v. Roy, 15 Beav. 433; Arnott v. Redfern, 3 Bing. 353; Dogliont v. Crispin, L. R. 1 H. L. 301; Godard v. Gray, L. R. 6 Q. B. 139; Ricardo v. Garcias, 12 Clark & F. 368; Castrique v. Imrie, L. R. 4 H. L. 414; General Steam Nav. Co. v. Gouillou, 11 Mees & W. 877; Simpson v. Fogo, 1 Johns. & H. 18; De Cosse Brissac v. Rathbone, 6 Hurl. & N. 301; Tarleton v. Tarleton, 4 Mees. & S. 20; Martin v. Nicolls, 3 Sim. 458; Vanquelin v. Bouard, 15 C. B. (N. S.) 341; Messina v. Petrococchino, L. R. 4 P. C. 144; Pemberton v. Hughes [1899] 1 Ch. 781, 68 Law J. Ch. 281.

[66] Bank of Australasia v. Nias, 16 Q. B. 717.

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fendant'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 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

[67] Ricardo v. Garcias, 12 Clark & F. 368.

[68] Green v. Sarmiento, Pet. C. C. 74, Fed. Cas. No. 5,760; Burnham v. Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; Boston India Rubber Factory v. Holt, 14 Vt. 92; Bartlet v. Knight, 1 Mass. 401, 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. Willson, 13 Johns. (N. Y.) 192; Hitchcock v. Aicken, 1 Caines (N. Y.) 460; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Pritchett v. Clark, 3 Har. (Del.) 517; Taylor v. Phelps, 1 Har. & G. (Md.) 492; Barney v. Patterson's Lessee, 6 Har. & J. (Md.) 182; Garland v. Tucker, 1 Bibb (Ky.) 361; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430.

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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 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

[69] Burnham v. Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179.

[70] Story, Confl. Laws, § 603.

[71] Taylor v. Phelps, 1 Har. & G. (Md.) 492; Barney v. Patterson's Lessee, 6 Har. & J (Md.) 182.

[72] Cummings v. Banks, 2 Barb. (N. Y.) 602.

[73] President, etc., of Middlesex Bank v. Butman, 29 Me. 19; Taylor v. Barron, 30 N. H. 79, 64 Am. Dec. 281; Burnham v Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718.

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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 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

[74] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Cincinnati, U. & Ft. W. R. Co. v. Wynne, 14 Ind. 385; Cummings v. Banks, 2 Barb. (N. Y.) 602; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Baker v. Palmer, 83 Ill. 568; Hilton v. Guyott (C. C.) 42 Fed 249; Christian & Craft Grocery Co. v Coleman, 125 Ala. 158, 27 South. 786. But compare Tourigny v. Houle, 88 Me. 406, 34 Atl. 158.

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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. Lourie[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 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]

[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 Adol. & E. 179; Ricardo v. Garcias, 12 Clark & F. 368; Bank of Australasia v. Nias, 16 Q. B. 717; and also Taylor v. Bryden, 8 Johns. (N. Y.) 173; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Story, Confl. Laws, § 607; and disapproved King v. Van Gilder, 1 D. Chip. (Vt.) 59.

[78] 49 How. Prac. 124 (N. Y. Super. Ct.; 1875).

[79] To the same effect, Shepard v. Wright, 59 How. Prac. (N. Y.) 512.

[80] Konitzky v. Meyer, 49 N. Y. 571. And see Dunstan v. Higgins, 138 N.

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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]

The supreme court of the United States, in recent decisions, has laid down the following principles as applicable to actions on foreign judgments: Where an action is brought in an American court by an alien against a citizen, on a judgment recovered by the former against the latter in a foreign country, and it appears that the foreign court had jurisdiction of the cause and of the parties, the judgment is at least prima facie evidence of the truth of the matter adjudged, and it should be held conclusive on the merits, unless some special ground is shown for impeaching it. If there was opportunity for a fair trial before the foreign court, having

Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431, affirming s. c., 63 Hun, 631, 28 Abb. N. C. 33, 17 N. Y. Supp. 887. Compare In re Gaines' Will, 84 Hun, 520, 32 N. Y. Supp. 398.

[81] Jones v. Jamison, 15 La. Ann. 35.

[82] Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257.

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jurisdiction as aforesaid, and the proceeding was conducted under a system of jurisprudence likely to secure an impartial administration of justice as between natives and foreigners, and if there is no special reason why the comity of the United States should not allow full effect to the judgment, the merits of the case should not be opened and tried afresh, in an action brought in this country on the foreign judgment, on the mere assertion that the judgment was erroneous in law or in fact. Nor can the foreign judgment be disregarded merely because the rules of evidence or of procedure in the country where it was rendered are more lax than ours, or do not accord with those principles which the American system of jurisprudence regards as essential to secure a just and impartial administration of justice. Thus, such a judgment cannot be impeached because the plaintiff was permitted to testify without being sworn, and was not subjected to cross-examination, nor because documents were admitted in evidence with which the defendant had no connection, and which would not be admissible in the United States, provided that the practice followed and the method of examining witnesses were according to the law of the forum. But it was also held in the case in which these rulings were made (although by a bare majority of the court), that judgments rendered in any foreign country (as, in this case, France) by the laws of which judgments rendered in the United States are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in the United States, but are only prima facie evidence of the justice of the plaintiff's claim.[88]

Even before these decisions by the supreme court of the United States, the inferior federal courts had often been called upon to deal with the question of the effect to be given to foreign judgments, and had invariably, in more recent times, decided for the rule which holds such 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

[88] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. And see Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

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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.[84] 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 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.[85]

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 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, hardly any decisions have been made 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

[84] McMullen v. Richie, 41 Fed. 502, 8 L. R. A. 268. See, also, New York, L. E. & W. R. Co. v. McHenry (S. D. N. Y.) 17 Fed. 414.

[85] Hilton v. Guyott, 42 Fed. 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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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 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

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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." [86]

§ 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.[87] 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 exclude the application of foreign laws at its pleasure." [88] 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

[86] Story, Confl. Laws, § 607.
[87] Vatt. Law Nat. bk. 2, c. 7, §§ 84, 85; Story, Confl. Laws, § 585.
[88] Par. Priv. Int. Law, § 125.

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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." [89] 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." [90]

§ 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 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

[89] Hilton v. Guyott (C. C.) 42 Fed. 257.
[90] Williams v. Jones, 13 Mees. & W. 633.

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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." [91] This distinction is closely analogous to that attempted to be made by Lord Chief Justice Eyre,[92] 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, 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.[93] 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

[91] 2 Kames, Eq. (3d Ed., 1778) p. 365.

[92] Phillips v. Hunter, 2 H. Bl. 410. See supra, § 826.

[93] Civ. Code, 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, Code de Procedure Civile, art. 546.

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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." [94] 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 territories to the judgments of foreign states which show the same comity to theirs." [95]

§ 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.[96] So also it is said that a plea, by which it is alleged that a suit has already

[94] Toullier, Droit Civ. Franc., c. 6, § 3, 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, Comm. 121, note. See, also, Story, Confl. Laws, §§ 615–617.

[95] Henry, Personal & Real St. p. 76.

[96] Warrener v. Kingsmill, 8 U. C. Q. B. 407; Law v. Hansen, 25 Can. Sup. Ct. Rep. 69. Compare Rice v. Holmes, 16 Rap. Jud. Que. C. S. 492.

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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.[97]

§ 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.[98] 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."[99] As it was said in another American 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."[100] "A foreign judgment," says another learned court, "rendered without jurisdiction may be assailed in either a direct

[97] Vaughan v. Campbell, 5 L. C. R. 431.

[98] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Novelli v. Rossi, 2 Barn. & Adol. 757; Don v. Lippmann, 5 Clark & F. 1; Ferguson v. Mahon, 11 Adol. & El. 179; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Andrews v. Herriot, 4 Cow. (N. Y.) 524, note; Kerr v. Kerr, 41 N. Y. 272; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608; Long v. Hammond, 40 Me. 204; Wood v. Wood, 78 Ky. 624; Robertson v. Struth, 5 Q. B. 941.

[99] Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Horton v. Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Robertson v. Struth, 5 Q. B. 941.

[100] Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152. And see Christian &

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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." [101]

§ 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.[102] 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 judgment was obtained; for there existed nothing imposing on the defendant any duty to obey the judgment.[103] 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,

Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 South. 786; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

[101] Thorn v. Salmonson, 37 Kan. 441, 15 Pac. 588.

[102] Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Battle v. Jones, 41 N. C. 567; Moore v. Phillips, 10 Pa. Co. Ct. R. 552.

[103] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Voinet v. Barrett, 55 Q. B. Div. 39.

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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 [104] and to Copin v. Adamson,[105] 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 [106] 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." [107]

Our own courts have answered these questions in substantially the same way. Thus, it is held that a judgment by default between parties who are both citizens of a foreign country, rendered by a court of that country having jurisdiction, is valid and enforceable here, although the defendant, being out of that country at the time, was not personally served.[108] Again, it is no defense to an action on a foreign judgment that the defendant was served with process, in the action wherein such judgment was rendered, while transiently sojourning in that country, and that such service was so made and timed for the purpose of embarrassing the defendant, and obtaining an unjust advantage, by preventing his having a fair opportunity to make his defense except at the cost of prolonging indefinitely his stay abroad.[109] In another case, where suit was brought on a judg-

[104] Schibsby v. Westenholz, L. R. 6 Q. B. 155.

[105] L. R. 9 Exch. 345.

[106] 2 Parn. & Adol. 951.

[107] Rousillon v. Rousillon, 14 Ch. Div. 351, 371. See, also, General Steam Nav. Co. v. Gouillou, 11 Mees. & W. 877.

[108] Ouseley v. Lehigh Val. Trust & Safe Deposit Co. (C. C.) 84 Fed. 602.

[109] Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.

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ment recovered in France, it appeared that the defendants were citizens and residents of the state of New York and had their principal place of business in New York city, but had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there. It was shown that their sole object in appearing and carrying on the litigation in the French court was to prevent property in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of the French court, from being taken in satisfaction of the judgment which might be recovered against them. But it was held that this did not show that the French court did not acquire competent jurisdiction of their persons.[110] On the other hand, in an action by an English corporation against a stockholder, a resident of New York, to recover money alleged to be due by way of calls on the stock, pursuant to a scheme of corporate reorganization, an order of an English court approving such scheme and declaring it to be binding on all persons interested, does not impose on the defendant, who was no party to the proceedings, any personal liability other than that resulting from his contract.[111]

Something must be added as to the summoning of nonresident 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-residents 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."[112] 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 courthouse door."[113] But in another case it was considered that suit

[110] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

[111] Bank of China, Japan & The Straits v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268.

[112] Story, Confl. Laws, § 546.

[113] Buchanan v. Rucker, 9 East, 192.

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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." [114] 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." [115]

§ 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

[114] Douglas v. Forrest, 4 Bing. 686.

[115] Story, Confl. Laws, § 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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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." [116]

§ 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.[117] 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 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 lat-

[116] Shepard v. Wright, 59 How. Prac. (N. Y.) 512; Id., 35 Hun (N. Y.) 444, affirmed 113 N. Y. 582, 21 N. E. 724; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Smith v. Grady, 68 Wis. 215, 31 N. W. 477; Turnbull v. Walker, 5 Rep. 132, 67 Law T. (N. S.) 767.

[117] Cowan v. Braidwood, 1 Man. & G. 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 Ont. 699; Addams v. Worden, 6 L. C. R. 237; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

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ter point might mean merely that he had no such notice as he ought in strictness to have had.[118] 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.[119]

§ 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.[120] 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, 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 sum-

[118] Cowan v. Braidwood, 1 Man. & G. 882.

[119] Bacon v. McBean, 3 U. C. Q. B. 305.

[120] 33 Hun (N. Y.) 435. And see Bank of China, Japan & The Straits v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268.

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mary, 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.[121] And although the method of conducting 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

[121] Crawley v. Isaacs, 16 Law T. (N. S.) 529. See, also, Liverpool Marine Credit Co. v. Hunter, 3 Ch. App. 479.

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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?" [122]

§ 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 consequently it follows that no foreign power can be expected to give recognition or effect to decrees or sentences founded on such laws or regulations.[123] 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.[124] This principle also furnished the ground of the decision in the peculiar case of De Brimont v. Penniman.[125] It there appeared that the plaintiff, who was a citizen of

[122] Hilton v. Guyott (C. C.) 42 Fed. 253. And see same case on appeal, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

[123] Ogden v. Folliott, 3 Term R. 733; The Antelope, 10 Wheat. 66, 123, 6 L. Ed. 268; Hohner v. Gratz (C. C.) 50 Fed. 369; Story, Confl. Laws, §§ 620, 621.

[124] Addams v. Worden, 6 L. C. R. 237.

[125] 10 Blatchf. 436, Fed. Cas. No. 3,715.

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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 installments. 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 erroneous 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.[126] 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

[126] Scott v. Pilkington, 2 Best & S. 11.

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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.[127]

§ 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.[128] But a case has recently been decided in England, 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.[129] 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

[127] Allvon v. Furnival, 1 Cromp., M. & R. 277; Becquet v. MacCarthy, 2 Barn. & Adol. 951.

[128] Lang v. Holbrook, Crabbe, 179.

[129] L. R. 6 Q. B. 139.

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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,[130] which does not 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

[130] 2 Barn. & Adol. 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 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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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 supported, 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 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

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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 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

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enforce it.[131] 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.[132] 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.[133] 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.[134] In a recent English case, where the action was upon a judgment recovered by the plaintiff against the defendant in a Russian court, the 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.[135] 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.[136] In this country, it remains to be seen

[131] Henderson v. Henderson, 6 Q. B. 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, 8 Ch. App. 695; Cammell v. Sewell, 3 Hurl. & N. 617; Bowles v. Orr, 1 Younge & C. 464; Abouloff v. Oppenheimer, 10 Q. B. Div. 295; Story, Confl. Laws, § 608.

[132] Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; Ward v. Quinlivin, 57 Mo. 425. See Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. Per contra, see Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

[133] Price v. Dewhurst, 8 Sim. 279.

[134] Ochsenbein v. Papelier, 8 Ch. App. 695.

[135] Abouloff v. Oppenheimer, 10 Q. B. Div. 295.

[136] Hilton v. Guyott (C. C.) 42 Fed. 252.

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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.[187] 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.[188]

§ 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 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." [189] 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

[187] Plummer v. Woodburne, 4 Barn. & 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; Nouvion v. Freeman, L. R. 15 App. Cas. 1.

[188] Munn v. Cook, 55 Hun, 608, 8 N. Y. Supp. 698.

[189] West. Pr. Int. Law, § 295; Scott v. Pilkington, 2 Best & S. 11. Where the judgment of a Mexican court had been appealed from, and it could not be shown that the appeal had been disposed of before Mexico ceased to control the territory where the land lay, it was held, in an action on such judgment in a court of Texas, that it was not final so as to sustain the action. Trevino v. Fernandez, 13 Tex. 630.

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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." [140]

§ 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.[141] 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.[142] "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 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 orig-

[140] Vanquelin v. Bouard, 15 C. B. (N. S.) 341, 367.

[141] 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.

[142] Hays v. Cage, 2 Tex. 501; Wilson v. Tunstall, 6 Tex. 221; Frazier v. Moore's Adm'r, 11 Tex. 755; Turner v. Lambeth, 2 Tex. 365; Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; Lyman v. Browne, 2 Curt. 559, Fed. Cas. No. 8,627; New York, L. E. & W. R. Co. v. McHenry (C. C.) 17 Fed. 414.

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inal cause of action." [143] 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.[144] 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.[145] 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.[146] This last rule is also established in the French law and in the jurisprudence of Canada.[147]

§ 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.[148] In Canada, however, the courts hold that assumpsit only, and not debt, is the proper form for an action on a judgment recovered abroad.[149]

§ 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

[143] Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665.

[144] Jones v. Jamison, 15 La. Ann. 35.

[145] Barber v. Lamb, 8 C. B. (N. S.) 95.

[146] Cox v. Mitchell, 7 C. B. (N. S.) 55; Scott v. Seymour, 1 Hurl. & C. 219; Bayley v. Edwards, 3 Swanst. 703.

[147] Russel v. Field, Stu. K. B. 558.

[148] Grant v. Easton, 13 Q. B. Div. 302; Mellin v. Horlick (C. C.) 31 Fed. 865.

[149] McFarlane v. Derbishire, 8 U. C. Q. B. 12.

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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.[150] 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.[151] If the seal is used, there is no need of proof that the exemplification was compared with the original papers filed or the roll.[152] 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.[153] 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.[154] But on the other hand, a copy of a judgment rendered in a Cuban court was received in evidence in 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.[155] 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

[150] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Capling v. Herman, 17 Mich. 524; 1 Greenl. Ev. §§ 514, 515. See Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

[151] Cavan v. Stewart, 1 Starkie, 525.

[152] Warrener v. Kingsmill, 7 U. C. Q. B. 409.

[153] Junkin v. Davis, 22 U. C. Q. B. 369.

[154] Church v. Hubbart, 2 Cranch, 187, 2 L. Ed. 249.

[155] Packard v. Hill, 7 Cow. (N. Y.) 434.

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correct; if incorrect, the onus probandi lies on the opposite party." [156] 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." [157] 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.[158] It has been held a sufficient allegation of the competency of the foreign court which rendered the judgment to set forth that it was "a lawfully constituted court of record, having jurisdiction of all civil matters" within a certain defined territory.[159] And in Connecticut, it is said that, as the proper averment in a complaint on a judgment rendered by a foreign court is that such court, "in an action therein pending between plaintiff and defendant, duly adjudged that defendant should pay to plaintiff" a certain sum, it is not necessary to allege that said court had jurisdiction of the subject-matter, nor that defendant was summoned to appear, nor that a trial was had.[160] The construction and effect of the record of a judgment rendered in a foreign country against the defendant, and on which the plaintiff sues, is a matter of law for the court.[161]

§ 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.[162] This follows necessarily from the doctrine that such judgments are not records. For if they possess no higher character than

[156] Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.

[157] Philpott v. Adams, 7 Hurl. & N. 888.

[158] Schulenburg v. Merchants' Bank of Canada, 48 Mich. 102, 11 N. W. 826.

[159] Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

[160] Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.

[161] Christian & Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 South. 786.

[162] Don v. Lippmann, 5 Clark & F. 1; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; North v. Fisher, 6 Ont. 206; Dupleix v. De Roven, 2 Vern. 540; Ang. Lim. § 83.

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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,[163] 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." And in a case in Illinois, it was held that the record of a judgment of a foreign court, not of record, and of inferior territorial jurisdiction, was not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction.[164]

§ 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.[165]

[163] 13 Cal. 242.

[164] Kopperl v. Nagy, 37 Ill. App. 23.

[165] Gould v. Webb, 4 El. & Bl. 933; Le Chevelier v. Lynch, 1 Doug. 170; Messier v. Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; Barrow v. West, 23 Pick. (Mass.) 270; Holmes v. Remsen, 20 Johns. (N. Y.) 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

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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 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

[1] Buckner v. Finley, 2 Pet. 586, 7 L. Ed. 528; 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. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 426; Dorsey v. Maury, 10 Smedes & M. (Miss.) 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'g Co. v. Ætna Ins. Co., 2 Paine, 501, 507, Fed. Cas. No. 17,206, per Thompson, J.

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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 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 sub-

[3] McElmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177, per Wayne, J.
[4] Jenkins v. Putnam, 1 Bay, 8, 1 Am. Dec. 594.
[5] Const. U. S. art. 4, § 1.
[6] Act May 26, 1790 (1 Stat. 122); U. S. Rev. St. § 905.

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sequent 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 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 tend-

[7] Act March 27, 1804 (2 Stat. 298).

[8] In Gleason v. Dodd, 4 Metc. (Mass.) 333.

[9] Citing Noble v. Gold, 1 Mass. 410, note. See, also, Armstrong v. Carson, 2 Dall. 302, Fed. Cas. No. 543; Rogers v. Coleman, Hardin (Ky.) 418, 3 Am. Dec. 733.

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ing to outweigh the evidence arising from such judgment." One of the earliest cases holding the latter view was that of Bartlet 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 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

[10] 1 Mass. 401, 2 Am. Dec. 36.

[11] Hitchcock v. Aicken, 1 Caines, 460. In Taylor v. Bryden, 8 Johns. 173, Kent, C. J., while holding to the doctrine of 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 (1802) 1 Brev. 110.

[14] 7 Cranch, 481, 3 L. Ed. 411.

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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 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

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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 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

[15] The doctrine of this case was soon afterwards re-affirmed in Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378.

[16] Pawling v. Willson, 13 Johns. 192.

[17] Commonwealth v. Green, 17 Mass. 515, 546.

[18] Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151.

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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 merits cannot be inquired into.[19] Whatever might have been the dis-

[19] Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 960; Logansport Gaslight & Coke Co. v. Knowles, 2 Dill. 421, Fed. Cas. No. 8,467. 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; Com. 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; Appeal of Freeman, 71 Conn. 708, 43 Atl. 185. 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. Sur. 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; Smith v. Central Trust Co. of New York, 154 N. Y. 333, 48 N. E. 553; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. PENNSYLVANIA. Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. 240; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Rogers v. Burns, 27 Pa. 525; Wetherill v. Stillman, 65 Pa. 105. NEW JERSEY. Chew v. Brumagim, 21 N. J. Eq. 520; Robert v. Hodges, 16 N. J. Eq. 299; First Nat. Bank of City of Brooklyn v. Wallis, 59 N. J. Law, 46, 34 Atl. 983. DELAWARE. Pritchett v. Clark, 5 Har. 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's Adm'r, 2 Pat. & H. 663. WEST VIRGINIA. Stewart v. Stewart, 27 W. Va. 167; Sayre's Adm'r v. Harpold, 33 W. Va. 553, 11 S. E. 16. NORTH CAROLINA. Walton v. Sugg, 61 N. C.

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position of the state courts, if left to settle this question for themselves, they have uniformly considered that they were bound to adopt the 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 govern-

98, 93 Am. Dec. 580; McLure v. Benceni, 37 N. C. 513, 40 Am. Dec. 437; Edwards v. Jones, 113 N. C. 453, 18 S. E. 500. SOUTH CAROLINA. Napier v. Gidiere, 1 Speers, 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; Sammis v. Wightman, 31 Fla. 10, 12 South. 526. ALABAMA. Green v. Foley, 2 Stew. & P. 441; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Crawford v. Simonton's Ex'rs, 7 Port. 110; Bogan v. Hamilton, 90 Ala. 454, 8 South. 186. MISSISSIPPI. Dorsey v. Maury, 10 Smedes & M. 298. LOUISIANA. West Feliciana R. Co. v. Thornton, 12 La. Ann. 736, 68 Am. Dec. 778. TEXAS. Cook v. Thornhill, 13 Tex. 293, 65 Am. Dec. 63. KENTUCKY. Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Delano v. Jopling, 1 Litt. 417; Williams v. Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143; Rankin v. Barnes, 5 Bush, 20. TENNESSEE. Topp v. Branch Bank of Alabama, 2 Swan, 184; Taylor v. Smith (Tenn. Ch. App.) 36 S. W. 970. KANSAS. French v. Pease, 10 Kan. 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, 42 Am. Dec. 197; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621. INDIANA. Anderson v. Fry, 6 Ind. 76; Union Sav. Bank & Trust Co. v. Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846. ILLINOIS. Welch v. Sykes, 3 Gilman, 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; Hays v. Merkle, 70 Mo. App. 509; Winham v. Kline, 77 Mo. App. 36. 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. 422; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423. OREGON. Swift v. Stark, 2 Or. 97, 88 Am. Dec. 463. NEVADA. Phelps v. Duffy, 11 Nev. 80. NEBRASKA. Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138; Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Commonwealth Mut. Fire Ins. Co. v. Hayden, 61 Neb. 554, 85 N. W. 443.

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ment." [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 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

[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, 16 L. Ed. 628; Hunt v. Lyle, 8 Yerg. (Tenn.) 142; Slack v. Perrine, 9 App. D. C. 128.

[23] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152.

[24] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Haggerty v. Amory, 7 Allen (Mass.) 458.

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that is accorded to it at home.[25] 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.[26] 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.[27] 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.[28] 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

[25] Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 531, 29 S. E. 1006; Calloway v. Glenn (Ky.) 49 S. W. 440; Chicago, R. I. & P. Ry. Co. v. Campbell, 5 Kan. App. 423, 49 Pac. 321; Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Smith v. Kander, 58 Mo. App. 61; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

[26] Wilbur v. Abbot, 60 N. H. 40.

[27] Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629.

[28] Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576. But in the same state it is said that it is no bar to an action to recover wages of labor, such wages being exempt by the law of the state, that judgment for such wages had been rendered against defendant, as garnishee of plaintiff, in an action brought in another state, where wages are not exempt. Chicago, R. I. & P. Ry. Co. v. Sturm, 5 Kan. App. 427, 49 Pac. 337. A similar rule is established by statute in Nebraska; and the courts of that state hold that it is not in conflict with the "full faith and credit" clause of the federal constitution. Singer Manuf'g Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. Rep. 613.

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action was such as could not be sued on in the courts of the state where the judgment is in suit.[29] 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 judgment, this court will give it the same force and effect, although it is insufficient to constitute a judgment under our laws and practice."[30] 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.[31] 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.[32] 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.[33] 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.[34] 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

[29] Phillips v. Godfrey, 7 Bosw. (N. Y.) 150.
[30] Clemmer v. Cooper, 24 Iowa, 185, 95 Am. Dec. 720.
[31] Walton v. Sugg, 61 N. C. 98, 93 Am. Dec. 580.
[32] Fletcher v. Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143.
[33] Stanton v. Embry, 46 Conn. 65.
[34] Haywood v. Daves, 81 N. C. 8.

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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." [35]

§ 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.[36] But according to another line of authorities, in a case arising under this clause of the constitution, the domestic tribunal should take judicial notice of the local laws of the state from which the record comes; the reason alleged being that their proceedings, in such a case, are subject to review in the supreme court of the United States, and in that court the states are not regarded as foreign, and their individual laws are officially noticed, so that 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

[35] Wiggins Ferry Co. v. Chicago & A. R. Co. (C. C.) 11 Fed. 381, per McCrary, C. J.

[36] Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Davis v. Headley, 22 N. J. Eq. 115; Thomas v. Pendleton, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Bank of Commerce v. Mayer, 42 La. Ann. 1031, 8 South. 260; People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013. See Field v. Cain, 9 N. M. 283, 50 Pac. 827.

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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 judgment." [37] But it seems that these courts, in so holding, misunderstood the doctrine of the federal supreme court. In the case of Hanley v. Donoghue,[38] it was said by the latter court: "Upon principle, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the laws of that state must be proved like any other matter of fact. The opposing decisions in State of Ohio v. Hinchman, 27 Pa. 479, and Paine v. Schenectady Ins. Co., 11 R. I. 411, are based on the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state, and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. But on a writ of error to the highest court of a state, in which the revisory power of this

[37] State of Ohio v. Hinchman, 27 Pa. 479; Paine v. Schenectady Ins. Co., 11 R. I. 411; Rae v. Hulburt, 17 Ill. 572; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Carpenter v. Dexter, 8 Wall. 513, 19 L. Ed. 426.

[38] 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535. And see Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519.

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court is limited to determining whether a question of law depending upon the constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it, while the law of that state, being known to its courts as law, is of course within the judicial knowledge of this court at the hearing on error, yet as, in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up." Since this decision of the United States supreme court, some of the state courts, finding the reason for the earlier rule abolished, have adopted the principle that they cannot take judicial notice of the laws of a sister state, even in an action upon a judgment rendered in such other state.[39] But the question of taking such judicial notice (as distinguished from the question of giving to the judgment all the faith and credit it is entitled to) is not a federal question, but entirely one of local law; and hence it is not surprising to find that the courts of some of the states still adhere to the rule that they may, in such circumstances, take official cognizance of the laws of the state from which the judgment comes, notwithstanding the ruling of the federal supreme court.[40]

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.[41] 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.[42]

[39] See Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

[40] See Kopperl v. Nagy, 37 Ill. App. 23; Hull v. Webb, 78 Ill. App. 617; Jones v. Quaker City Mut. Fire Ins. Co., 9 Pa. Dist. R. 213; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806.

[41] Hinson v. Wall, 20 Ala. 298.

[42] Davidson v. Sharpe, 28 N. C. 14.

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§ 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.[43] 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.[44] 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 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." [45] So, where a judgment of another state consists of an entry to the effect that, the cause having been settled, it is discontinued by consent, without costs to either party, evidence may be admitted that the discontinuance was not in-

[43] Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576.

[44] First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Bowersox v. Gitt, 12 Pa. Co. Ct. R. 81; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; McLaren v. Kehler, 23 La. Ann. 80, 8 Am. Rep. 592; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175; Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728; Newman v. Greeley State Bank, 92 Ill. App. 638; Brown v. Parker, 28 Wis. 21.

[45] Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562. And see Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254.

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tended as a satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with; and this is not denying "full faith and credit" to the judgment.[46] Again, under the laws of Kansas, a judgment against a corporation is not conclusive against a stockholder who was not a party to the action if it was obtained through fraud or collusion, although it can be impeached only for such cause or for want of jurisdiction; hence such a judgment, rendered by a court of Kansas is required to be given the same effect but no greater, in an action against a stockholder in a court of another state.[47]

§ 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.[48] 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.[49] 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.[50] 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,

[46] Jacobs v. Marks, 182 U. S. 583, 21 Sup. Ct. 865, 45 L. Ed. 1241.

[47] Ball v. Warrington, 47 C. C. A. 447, 108 Fed. 472.

[48] Claflin v. McDermott (C. C.) 12 Fed. 375; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Joice v. Scales, 18 Ga. 725.

[49] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Walser v. Seligman (C. C.) 13 Fed. 415; Cunningham v. Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; Chew v. Brumagim, 21 N. J. Eq. 520; Bennett v. Bennett (N. J. Err. & App.) 49 Atl. 501; Zimmerman v. Helser, 32 Md. 274; Brigot's Heirs v. Brigot, 49 La. Ann. 1428, 22 South. 641; Dunham v. Dunham, 57 Ill. App. 475; Barney v. White, 46 Mo. 137; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478.

[50] Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130.

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and as such will be enforced and executed there.[51] A judgment obtained in one state cannot be the foundation for a creditors' bill in another state.[52] 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 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.[53] 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." [54] But a foreign 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.[55]

[51] Claflin v. McDermott (C. C.) 12 Fed. 375; First Nat. Bank v. Duel County (C. C.) 74 Fed. 373; Wilmer v. Lewis, 24 Pa. Co. Ct. R. 613; Lamberton v. Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Turley v. Dreyfus, 35 La. Ann. 510; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478; Carter v. Bennett, 6 Fla. 214.

[52] Claflin v. McDermott (C. C.) 12 Fed. 375.

[53] Walser v Seligman, 13 Fed. 415.

[54] Arnold v. Roraback, 8 Allen (Mass.) 429.

[55] Watkins v. Wortman, 19 W. Va. 78.

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§ 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." [56] 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.[57]

§ 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.[58] And

[56] Story, Confl. Laws, § 609, citing McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177.

[57] Harness v. Green's Adm'r, 20 Mo. 316; Brengle v. McClellan, 7 Gill & J. (Md.) 434. See, also, Cameron v. Wurtz's Adm'r, 4 McCord (S. C.) 278.

[58] Cleaves v. Lord, 43 Me. 290; President, etc., of North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Child v. Eureka Powder Works, 45 N. H. 547; McGilvray v. Avery, 30 Vt. 538; Green v. Starr, 52 Vt. 426; Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Merritt v. Fowler, 76 Hun, 424, 27 N. Y. Supp. 1047; Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Hogg v Charlton, 25 Pa. 200; President, etc., of Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; Barnes v. Gibbs, 31 N. J. Law, 317, 86 Am. Dec. 210. Compare Beall's Adm'r v. Taylor's Adm'r, 2 Grat. (Va.) 532, 44 Am. Dec. 398; Davis v. Morris' Ex'rs, 76 Va. 21. Under the statute in New York which provides that a recovery of judgment in a foreign state for the price or value of property obtained by fraud or deceit does not affect plaintiff's right to arrest defendant, an action may be maintained in New York on the original cause of action, though a judgment has been recovered thereon in another state. Pitt v. Freed, 78 Hun, 614, 28 N. Y. Supp. 863.

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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.[59] 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.[60] 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.[61] 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.[62] A report of a commissioner of insolvency in one state, in favor of an administrator 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.[63] 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

[59] President, etc., of North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Whiting v. Burger, 78 Me. 287, 4 Atl. 694; Child v. Eureka Powder Works, 45 N. H. 547; Rogers v. Odell, 39 N. H. 452; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Graef v. Bernard, 162 Mass. 300, 38 N. E. 503; Paine v. Schenectady Ins. Co., 11 R. I. 411; Union Pac. Ry. Co. v. Baker, 5 Kan. App. 253, 47 Pac. 563.

[60] Whittier v. Wendell, 7 N. H. 257; Fitzsimmons v. Marks, 66 Barb. (N. Y.) 333.

[61] Rangely v. Webster, 11 N. H. 299.

[62] Brown v. Birdsall, 29 Barb. (N. Y.) 549.

[63] Lomas v. Hilliard, 60 N. H. 148.

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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.[64] 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.[65] But this view has been denied.[66] And indeed, as pointed out by Mr. Bigelow,[67] "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 action; nothing but a definitive judgment on the merits, merging the demand, can produce that result.[68] "The pendency of

[64] Harryman v. Roberts, 52 Md. 64.

[65] Gould v. Hayden, 63 Ind. 443.

[66] Weeks v. Pearson, 5 N. H. 324; Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809.

[67] Note to Story, Confl. Laws (8th Ed.) § 599a.

[68] White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561; McGilvray v. Avery, 30 Vt. 538; Goodall v. Marshall, 11 N. H. 99, 35 Am. Dec. 472; Newell v. Newton, 10 Pick. (Mass.) 470; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Cook v. Litchfield, 5 Sandf. (N. Y.) 342; Bowne v. Joy, 9 Johns. (N. Y.) 221; Walsh v. Durkin, 12 Johns. (N. Y.) 99; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 434; Cole v. Flitcraft, 47 Md. 312; Drake v. Brander, 8 Tex. 352; Caledonia Ins. Co. v. Wenar (Tex. Civ. App.) 34 S. W. 385; Salmon v. Wootton, 9 Dana (Ky.) 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, Fed. Cas. No. 4,243.

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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." [69] 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." [70] 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." [71]

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.[72] 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.[73] But on the other hand, it seems that such a plea is good if the federal court, having jurisdiction of the case, is in a district within the limits of the state where the second action is commenced.[74]

§ 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

[69] Lowry v. Hall, 2 Watts & S. (Pa.) 129, 38 Am. Dec. 495.

[70] Benner v. Marshall, 1 Wheat. 215, 4 L. Ed. 74.

[71] Lynch v. Hartford Fire Ins. Co. (C. C.) 17 Fed. 627.

[72] Hurst v. Everett (C. C.) 21 Fed. 218. And, see infra, § 939a.

[73] Walsh v. Durkin, 12 Johns. (N. Y.) 99; Cook v. Litchfield, 5 Sandf. (N. Y.) 330. And see White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561.

[74] Smith v. Atlantic Mut. Fire Ins. Co., 22 N. H. 21.

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of action against the same defendant in any other state.[75] 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.[76] 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.[77] 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.[78] 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.[79]

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.[80] It must be capable of enforcement, and fit to serve

[75] Sweet v. Brackley, 53 Me. 346. And see Green v. Sanborn, 150 Mass. 454, 23 N. E. 224.

[76] Baker v. Rand, 13 Barb. (N. Y.) 152.

[77] Low v. Mussey, 41 Vt. 393; Brown v. Lexington & D. R. Co., 13 N. J. Eq. 191.

[78] Fulton Iron Works v. Riggin, 14 Mo. App. 321.

[79] Wernse v. McPike, 100 Mo. 476, 13 S. W. 809.

[80] Burnside v. Burnside, 2 Dauph. Co. Rep. (Pa.) 261. A judgment recovered in another state cannot be made the basis of an action when it has been

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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.[81] 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.[82] 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.[83] Further, the judgment is conclusive upon the parties only when it is a

declared void by a court of the same state where it was rendered. McCadden v. Slauson, 96 Tenn. 586, 36 S. W. 378. Nor where, under the laws of that state, it is conclusively presumed to have been paid. Baker v. Stonebraker, 36 Mo. 338. Nor where its operation is suspended, in the state of its rendition, by a stay of execution. Nazro v. McCalmont Oil Co., 36 Hun (N. Y.) 296. And of course a foreign judgment cannot be sued on where it has been reversed, vacated, or set aside in the state where it was rendered; but the mere pendency of an application for a new trial, or for an order setting aside the judgment, will not prevent a suit upon it in another state. Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247; Lawrence v. Jarvis, 32 Ill. 304. A judgment of one state may be sued on in another state, though none of the parties is a resident of the latter state, if jurisdiction of the person can be obtained. Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884. A judgment for a sum of money, as for alimony, in gross, rendered by a court of Missouri, is a final judgment, though the statute of that state provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper, and hence such judgment may be sued on in another state. Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806. In Georgia, it is said that if a deficiency decree for the unpaid balance of the price of land, rendered after sale in foreclosure proceedings, in favor of the vendor against the vendee, is valid under the laws of the state where it was rendered, an action on it may be maintained in the courts of Georgia. Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247. But compare Smith v. Moore, 53 Mo. App. 525.

[81] Palmer v. Palmer, 2 Miles (Pa.) 373; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[82] David v. Porter, 51 Iowa, 254, 1 N. W. 528. But compare Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; St. Louis Type Foundry v. Jackson, 128 Mo. 119, 30 S. W. 521. See Beer v. Simpson, 65 Hun, 17, 19 N. Y. Supp. 578.

[83] Blake v. Burley, 9 Iowa, 592.

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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.[84] 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.[85] Again, it seems that if the judgment is in the 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.[86] 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 extraterritorial validity so as to authorize a recovery in another state.[87] 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.[88]

§ 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 in-

[84] Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460.

[85] Rankin v. Barnes, 5 Bush (Ky.) 20.

[86] Thorner v. Batory, 41 Md. 593, 20 Am. Rep. 74.

[87] Sevier v. Roddie, 51 Mo. 580.

[88] McLaren v. Kehler, 23 La. Ann. 80, 8 Am. Rep. 592. See Griggs v. Becker, 87 Wis. 313, 58 N. W. 396. Compare Cougill v. Farmers' & Merchants' Ins. Co., 25 Or. 360, 35 Pac. 975.

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stance, 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.[89] 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.

§ 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.[90] 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.[91] 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.[92] This doctrine, in its application to judgments and decrees rendered in another state, does not appear to be questioned.

[89] Richards v. Barlow, 140 Mass. 218, 6 N. E. 68; Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; Trebilcox v. McAlpine, 62 Hun, 317, 17 N. Y. Supp. 221; Teel v. Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; Coleman v. Waters, 13 W. Va. 278; Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576; Sipes v. Whitney, 30 Ohio St. 69; Kingman v. Paulson, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611; Nicholas v. Farwell, 24 Neb. 180, 38 N. W. 820; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306.

[90] See infra, § 962.

[91] Sadler v. Robbins, 1 Camp. 253.

[92] Moore v. Adie's Adm'r, 18 Ohio, 430; Post v. Neafie, 3 Caines (N. Y.) 22; Dubois v. Dubois, 6 Cow. (N. Y.) 494; Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717; Howard v. Howard, 15 Mass. 196; McKim v. Odom, 12 Me. 94; Warren v. McCarthy, 25 Ill. 95; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179.

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§ 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. The essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude the courts of another state, when the judgment is sought to be enforced therein, from ascertaining whether the claim is really of such a nature as those courts are authorized to enforce.[93] Hence, in an action on a foreign judgment, it is proper for the court to go behind the judgment so far as to see whether it is founded on a penal action, or an action relating to the revenue of a foreign jurisdiction; such judgments not being entitled to "faith and credit."[94] Thus, 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.[95] But 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 officers, this is not a penal statute, in the sense of international law, so that a judgment recovered thereunder cannot be enforced in another state; and a decision of a court of another state that the judgment is not enforceable therein fails to accord to such judgment the "full faith and credit" required by the constitution of the United States.[96]

[93] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.
[94] State of Arkansas v. Bowen, 20 D. C. 291.
[95] Sims v. Sims, 75 N. Y. 466.
[96] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, re-

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§ 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.[97] 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.[98]

§ 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 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.[99] And it

versing Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344.

[97] State of Indiana v. Helmer, 21 Iowa, 370. And see Healy v. Root, 11 Pick. (Mass.) 390.

[98] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615. But compare State of Arkansas v. Bowen, 3 App. D. C. 537.

[99] Price v. Johnston, 1 Ohio St. 390.

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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.[100] Nor can the decree of a foreign court avail to determine the validity, or order the foreclosure, of a mortgage on realty situated outside its jurisdiction,[101] or to declare the existence of a lien upon it.[102] 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.[103] 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.[104] 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

100 Davis v. Headley, 22 N. J. Eq. 115. Thus, the judgment of a court in New York, declaring that a deed of real estate, conveying land in Tennessee, is void and inoperative as against the plaintiff's claim, is not binding on the courts of the latter state. Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640. And see Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843.

101 Pittsburgh & St. L. R. Co.'s Appeal (Pa.) 4 Atl. 385; Lynde v. Columbus, C. & I. C. Ry. Co. (C. C.) 57 Fed. 993. But where judgment is obtained in one state on a note made and payable there, and secured by a mortgage on land in another state, and plaintiff brings suit in the latter state on such judgment, the court in the latter state may thereupon enforce the mortgage lien on the land. Brown v. Todd's Adm'r (Ky.) 29 S. W. 621. And where a mortgage covering lands in two states was given to secure a note, the amount found due on such note in an action brought in the one state to foreclose the mortgage on the property there situate is res judicata in a subsequent suit for foreclosure on the property lying in the other state. Frank v. Snow, 6 Wyo. 42, 42 Pac. 484.

102 Short v. Galway, 83 Ky. 501, 4 Am. St. Rep. 168. And see McGarvey v. Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

103 Fryer v. Meyers (Tex. Sup.) 13 S. W. 1025.

104 City Ins. Co. v. Commercial Bank, 68 Ill. 348.

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not bound by the construction of the will adopted by the courts of Pennsylvania, although the testator was domiciled there.[105]

It is indeed a general principle that a judgment rendered in one state construing a will is not conclusive as to the title to land situated in another state, which title depends upon the construction of the will.[106] Thus, a decision by the courts of the domicile of a testator that his will worked a conversion into personalty of all his real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in the latter state.[107] So, the proceedings of a probate court in Louisiana, adjudicating as to a succession embracing real and personal property of the deceased in that state, and mentioning, but not appraising, claims to real estate in Texas, are not in rem as to the Texas lands, and a finding in such proceedings as to heirship is not res judicata as to such lands.[108]

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 litigants, 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 master 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

[105] McCartney v. Osburn, 118 Ill. 408, 9 N. E. 210.

[106] Cooper v. Hayes, 96 Ind. 386.

[107] Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028, affirming Appeal of Clarke, 70 Conn. 195, 39 Atl. 155.

[108] Branch v. Texas Lumber Manuf'g Co., 6 C. C. A. 92, 56 Fed. 707; Clapp's Ex'rs v. Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

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effect of record evidence of the equities therein determined, unless it be impeached for fraud.[109] 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.[110] 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 in equity, as the nature of the accounts or the character of the relief may require.[111]

§ 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.[112] A

[109] Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. In another state, it is said that, while a chancery court, after acquiring personal jurisdiction of a party in a proper case, may decree performance of contracts relating to lands lying in another state, yet, if the party fails to convey in obedience to the decree, the decree does not affect the legal title to the lands. Winn v. Strickland, 34 Fla. 610, 16 South. 606. And see Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528. In Iowa, it was held that a judgment in an action brought in a foreign state to set aside a deed to lands in Iowa did not settle the title to said lands as to defendants living in Iowa who did not appear in said action, where such judgment did not purport to act upon the land, though it ordered a defendant who did appear to execute a deed of such lands to the plaintiff in that action, and enjoined the other defendants from prosecuting an action in Iowa affecting the title to said land, and it appeared that, prior to said action, plaintiff therein had conveyed the lands to his wife. Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843. And see Norton v. House of Mercy, 41 C. C. A. 396, 101 Fed. 382.

[110] Remer v. Mackay (C. C.) 35 Fed. 86.

[111] Rose v. Gibson, 71 Ala. 35.

[112] Boston India Rubber Factory v. Holt, 14 Vt. 92; Morehead v. Grisham, 13 Ark. 431; Tompkins v. Craig (C. C.) 102 Fed. 69; McKim v. Odom, 12 Me. 94; Smith v. Kander, 58 Mo. App. 61; Belford v. Woodward, 55 Ill. App. 307.

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certain early case advanced the opinion that the action might be either debt or assumpsit, but could not be case.[113] 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.[114] 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.[115] 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 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

[113] Garland v. Tucker, 1 Bibb (Ky.) 361.

[114] Andrews v. Flack, 88 Ala. 290, 6 South. 907; Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458; Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; Thurmond v. Bank of State of Georgia (Tex. Civ. App.) 27 S. W. 317; Whitley v. General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 959. In a suit on a judgment of a sister state, it is sufficient to aver that the judgment was duly rendered; it will be presumed that the judgment was valid, until the contrary is shown. Stephens v. Roby, 27 Miss. 744. In an action on a foreign judgment on a note, the note need not be incorporated in the declaration or statement of claim. Hogg v. Charlton, 25 Pa. 200; First Nat. Bank v. Crosby, 179 Pa. 63, 36 Atl. 155.

[115] Pringle v. Woolworth, 90 N. Y. 502.

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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." [116]

§ 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.[117] 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. 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

[116] Johnson v. Butler, 2 Iowa, 535, 548. And see Hall v. Mackay, 78 Tex. 248, 14 S. W. 615.

[117] Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Williams v. Preston, 3 J. J. Marsh. (Ky.) 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. 280, 16 Atl. 805; Mills v. Stewart, 12 Ala. 90; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Scott v. Coleman, 5 Litt. (Ky.) 350, 15 Am. Dec. 71; Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; Phelps v. Duffy, 11 Nev. 80; Crane v. Crane, 19 N. Y. Supp. 691; Halstead v. Black, 17 Abb. Prac. (N. Y.) 227; Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Gates v. Newman, 18 Ind. App. 392, 46 N. E. 654; Kunze v. Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857; Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152. In a few states, a contrary rule prevails, and it is held to be necessary to set forth the facts showing jurisdiction. See Dodd v. Groll, 8 Ohio Cir. Dec. 334; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Gebhard v. Garnier, 12 Bush (Ky.) 321, 23 Am. Rep. 721. In Minnesota, the early case of Karns v. Kunkle, 2 Minn. 313 (Gil. 268), appears to have been overruled by the decision in Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

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want of jurisdiction if he can.[118] 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.[119] 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.[120] 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.[121] 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.[122] For even in the case of domestic judgments,

[118] Tenney v. Townsend, 9 Blatchf. 274, Fed. Cas. No. 13,832.

[119] Meredith v. Santa Clara Mining Ass'n, 56 Cal. 178.

[120] Specklemeyer v. Dailey, 23 Neb. 101, 36 N. W. 356, 8 Am. St. Rep. 119.

[121] Wilbur v. Abbot (C. C.) 6 Fed. 814; Gude v. Dakota Fire & M. Ins. Co., 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860.

[122] Gay v. Lloyd, 1 G. 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; Grant v. Bledsoe, 20 Tex. 456; Ellis v. White, 25 Ala. 540; Sheldon v. Hopkins, 7 Wend. (N. Y.) 435. And see Snyder v. Snyder, 25 Ind. 399; Etz v. Wheeler, 23 Mo. App. 449; McLaughlin v. Nichols, 13 Abb. Prac. (N. Y.) 244; Archer v. Romaine, 14 Wis. 375.

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as we have already seen, there can be no presumption in favor of the jurisdiction of such courts, unless all the facts necessary thereto appear on the face of the proceedings.[123]

§ 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." [124] 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.[125] 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.[126] 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.[127] Where an action is brought on

[123] See supra, vol. 1, § 282.

[124] Act May 26, 1790 (1 Stat. 122; Rev. St. § 905).

[125] U. S. v. Biebusch (C. C.) 1 Fed. 213.

[126] Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

[127] Kingman v. Cowles, 103 Mass. 283; Parke v. Williams, 7 Cal. 247; McMillen v. Lovejoy, 115 Ill. 498, 4 N. E. 772. A transcript of a judgment from another state, duly authenticated by the proper officers, is admissible, and is sufficient evidence of the validity of the judgment, though it does not

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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 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." [128] 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.[129]

§ 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.[130] 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.[131] 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.[132] Where the plaintiff sets

appear that the judgment or the minutes of the court were signed by the judge. Dean v. Stone, 2 Okl. 1, 35 Pac. 578; McFarland v. Fricks, 99 Ga. 104, 24 S. E. 868.

[128] White v. Treon, 25 Kan. 484.

[129] Steere v. Tenney, 50 N. H. 461.

[130] Pepin v. Lachenmeyer, 45 N. Y. 27. And see Missouri Glass Co. v. Gregg (Tex. App.) 16 S. W. 174; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Bowman v. Hekla Fire Ins. Co., 58 Minn. 173, 59 N. W. 943; Williams v. Williams, 53 Mo. App. 617.

[131] Reber v. Wright, 68 Pa. 471; Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386. See, also, Blair v. Caldwell, 3 Mo. 353.

[132] Bailey v. Martin, 119 Ind. 103, 21 N. E. 346.

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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.[133]

If the record of a foreign judgment does not show service of process, or an appearance by the defendant against whom suit is brought on such judgment in another state, the record is not admissible.[134] But a record which did not originally show service on the defendant will be admissible in evidence in an action thereon after having been amended on due notice, so as to show that fact affirmatively.[135] Where the action is brought by an assignee of the judgment, a certified copy of the assignment recorded in the court where the judgment was rendered, and made a part of the record of the judgment, is competent evidence of the assignment.[136] And in an action on a judgment of another state, it is error to exclude as evidence a transcript of the judgment simply because it is without a caption.[137] And so, if sufficient appears in the transcript to identify the actual record with the record sued on, it is immaterial that there is a variance in the titles as given in the transcript and in the petition.[138] So also, in an action on a judgment of a sister state, a clerical misprision, apparent on the face of the judgment, in the computation of the amount, may and should be corrected.[139]

§ 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

[133] Phipps v. Nye, 34 Miss. 330.
[134] Cunningham v. Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.
[135] Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.
[136] Caughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005.
[137] Taylor v. Smith (Tenn. Ch. App.) 36 S. W. 970.
[138] Brady v. Palmer, 19 Ohio Cir. Ct. R. 687.
[139] Reynolds v. Powers, 96 Ky. 481, 29 S. W. 209.

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is conclusive.[140] 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.[141] 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.[142] 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.[143] 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

[140] Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386; Andrews v. Flack, 88 Ala. 294, 6 South. 907; Grover v. Grover, 30 Mo. 400. Where the judge is ex officio clerk of his own court, both certificates of authentication specified as necessary for the attestation of the records of a court of another state are not required, his certificate as judge being sufficient. Wilson v. Phoenix Powder Manuf'g Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

[141] Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311. In Pennsylvania and Missouri, also, it is held that the certificate is defective and insufficient if made by a deputy instead of the clerk himself. Ensign v. Kindred, 163 Pa. 638, 30 Atl. 274; Williams v. Williams, 53 Mo. App. 617. But in Illinois, the doctrine appears to be that inquiry should be made into the statutes of the state from which the record comes, and if they are found to authorize the authentication of records by a deputy clerk, his certificate will be sufficient. Hull v. Webb, 78 Ill. App. 617.

[142] Folsom v. Blood, 58 N. H. 11; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52. In a case where the certificate to the record of a judgment from another state 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 former plea was a nullity, and the latter admitted the cause of action, the plaintiff was entitled to recover, notwithstanding the irregularity of the certificate. Curtis v. Hubbell, 8 Wkly. Notes Cas. (Pa.) 367.

[143] Goodrich v. Stevens, 116 Mass. 170.

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was affixed by the proper officer having the custody of it.[144] The statute is broad enough to cover the authentication of a record from 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.[145] 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.[146]

§ 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.[147] This certificate is held to be indispensable.[148] And it must be annexed to the exemplification of the record, and cannot be on a separate piece of paper.[149] 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.[150] 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.[151] 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

144 Ducommun v. Hysinger, 14 Ill. 249; Hull v. Webb, 78 Ill. App. 617.

145 Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3,328; Kirkland v. Smith, 2 Mart. (N. S.; La.) 497.

146 Flourenoy v. Durke, 2 Brev. (Conn.) 256.

147 Dworak v. More, 25 Neb. 735, 41 N. W. 777.

148 Hutchins v. Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

149 Norwood v. Cobb, 20 Tex. 588.

150 Bissell v. Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Catlin v. Underhill, 4 McLean, 199, Fed. Cas. No. 2,523. But compare Wilson v. Phœnix Powder Manuf'g Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

151 Kinsley v. Rumbough, 96 N. C. 193, 2 S. E. 174; McAllister v. Singer Manuf'g Co., 64 Ga. 622.

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were other judges of such circuit.[152] 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 for use in another state, but only to the one who, at the time, is acting as chief judge.[153] 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.[154]

§ 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.[155] 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.[156] And where a judgment in one state bears interest on the amount by its terms, such interest may be recovered in another

[152] Keyes v. Mooney, 13 Or. 179, 9 Pac. 400.

[153] Shaw v. Hurd, 3 Bibb (Ky.) 371.

[154] Arnold v. Frazier, 5 Strob. (S. C.) 33.

[155] 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. President, etc., of American Bank, 4 Metc. (Mass.) 317; Barringer v. King, 5 Gray (Mass.) 9; Mahurin v. Bickford, 6 N. H. 567; Warren v. McCarthy, 25 Ill. 95; Reynolds v. Powers (Ky.) 29 S. W. 299.

[156] Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

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state without showing that judgments ordinarily carry interest by the laws of the state where the particular judgment was rendered.[157]

PART III. DEFENSES TO ACTION ON SISTER STATE JUDGMENTS.

§ 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.[158] 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;[159] or that it was rendered upon a summary proceeding, in derogation of the common law, and not enforceable beyond the local jurisdiction;[160] or that it was given for a penalty or forfeiture, or upon a violation of the local police regulations of the state where ren-

[157] Hudson v. Daily, 13 Ala. 722.

[158] Kinsey v. Ford, 38 Barb. (N. Y.) 195.

[159] Supra, § 867.

[160] Supra, § 867. But a judgment entered by the clerk of the court, in a default case, on the filing of the summons and complaint and proof of service of summons, and that no answer or demurrer had been filed, if authorized by the law of the state where such judgment is entered, is a judicial act or proceeding, within the meaning of the constitution, and is entitled to due recognition in the courts of other states. Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529. On the question whether a decree made in a proceeding on habeas corpus can have any operative effect or binding force in another state, see People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013; Slack v. Perrine, 9 App. D. C. 128.

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dered;[161] or that it purports to affect the title or right to real property situate beyond the territorial jurisdiction of the court.[162] These, and similar defenses, do not involve any impeachment of the judgment on its merits, which is really all that the constitution forbids.[163] 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.[164]

§ 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.[165] 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.[166] 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.[167]

161 Supra, §§ 870, 871.

162 Supra, § 872.

163 Supra, §§ 856, 857.

164 Giddings v. Whittlesey, 2 Mich. N. P. 240.

165 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. (C. C.) 29 Fed. 609; Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Rogers v. Hatch, 8 Nev. 35; Woodbridge & Turner Engineering Co. v. Ritter (C. C.) 70 Fed. 677; Succession of Gaines, 45 La. Ann. 1237, 14 South. 233; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Lonergan v. Lonergan, 55 Neb. 641, 76 N. W. 16; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Falkner v. Franklin Ins. Co., 1 Phila. (Pa.) 183.

166 Paine v. Schenectady Ins. Co., 11 R. I. 411.

167 Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Paine v. Schenectady Ins. Co., 11 R. I. 411; Magnolia Metal Co. v. Sterlingworth Ry. Supply Co., 6 North. Co. R. (Pa.) 358.

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§ 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.[168] Pleas, for example, that the defendant was an infant, that he was not a partner as alleged, that he did not make the note on which the judgment was rendered, that he had no interest in such note,—are all bad.[169]

§ 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.[170] Although this doctrine is fully established by the decisions of the federal courts, and recognized

[168] Snow v. Mitchell, 37 Kan. 636, 15 Pac. 224; Weir v. Vail, 65 Cal. 466, 4 Pac. 422; Powell v. Davis, 60 Ga. 70; Sharman v. Morton, 31 Ga. 34; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

[169] Sharman v. Morton, 31 Ga. 34.

[170] Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564; Jacquette v. Hugunon, 2 McLean, 129, Fed. Cas. No. 7,169; Westerwelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Hall v. Williams, 6 Pick. (Mass.) 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. (N. Y.) 292, 15 Am. Dec. 374; Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Jones v. Quaker City Mut. F. Ins. Co., 23 Pa. Co. Ct. R. 529; Marx v. Logue, 71 Miss. 905, 15 South. 890; Kemp v. Mundell, 9 Leigh (Va.) 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.

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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.[171] 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 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.[172]

§ 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.[173]

[171] Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins v. Union Mut. Fire Ins. Co., 37 N. H. 470; Beale v. Berryman, 30 N. J. Law, 216.

[172] Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717.

[173] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484.

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§ 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.[174] The whole subject of jurisdictional inquiries will be fully considered in the next division of this chapter.

§ 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.[175] 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

[174] Hindman v. Mackall, 3 G. Greene (Iowa) 170.

[175] On the validity of such judgments, see supra, vol. 1, §§ 188, 193, 205.

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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 atttorney. 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 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." [176]

§ 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.[177] 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,

[176] Milne v. Van Buskirk, 9 Iowa, 558. See, also, Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[177] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; Hearfield v. Bridges, 21 C. C. A. 212, 75 Fed. 47; Slack v. Perrine, 9 App. D. C. 128; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Rocco v. Hackett, 2 Bosw. (N. Y.) 579; First Nat. Bank v. Wallis, 59 N. J. Law, 46, 34 Atl. 983; Crawford v. Simonton's Ex'rs, 7 Port. (Ala.) 110; Hassell v. Hamilton, 33 Ala. 280; Conway v. Ellison, 14 Ark. 330; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100; Olds v. Glaze, 7 Iowa, 86; Struble v. Malone, 3 Iowa, 586.

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that such a judgment was authorized by the laws of that state.[178] 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.[179] In an action on a foreign judgment, the court will not inquire whether the original action was by or against all the proper parties.[180] And if it appears from the record that the court had jurisdiction, the defendant cannot show that he and his attorney made mistakes, and that the judgment was consequently for more than was due.[181] And so, a plea that the note on which a judgment of a court of a sister state was recovered was not produced or filed in the cause in which the judgment was obtained, is bad on demurrer.[182]

§ 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 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.[183]

§ 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

[178] Dodge v. Coffin, 15 Kan. 277; McLendon v. Dodge, 32 Ala. 491.
[179] French v. Pease, 10 Kan. 51.
[180] Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Hearfield v. Bridges, 21 C. C. A. 212, 75 Fed. 47.
[181] Edwards v. Jones, 113 N. C. 453, 18 S. E. 500.
[182] Sammis v. Wightman, 31 Fla. 10, 12 South. 526.
[183] Field v. Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

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that state may be different.[184] 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.[185]

§ 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.[186] And such an action will be 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.[187]

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.[188] "Remedies are to be regulated and

[184] Haggerty v. Amory, 7 Allen (Mass.) 458. See, further, Bradford v. Rice, 102 Mass. 472, 3 Am. Rep. 483; Revere Copper Co. v. Dimock, 90 N. Y. 33; Anderson v. Anderson, 65 Ga. 518, 38 Am. Rep. 797.

[185] Anderson v. Clark, 70 Ga. 362.

[186] McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Napier v. Gidiere, 1 Speers, Eq. (S. C.) 215, 40 Am. Dec. 613; Reid v. Boyd, 13 Tex. 241, 65 Am. Dec. 61; Summerside Bank v. Ramsey, 55 N. J Law, 383, 26 Atl. 837; Robb v. Anderson, 43 Ill. App. 575; Pierce v. Davidson, 58 Mo. App. 106.

[187] Kay v. Walter, 28 Kan. 111. And see Owens v. McCloskey, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Rice v. Moore, 48 Kan. 590, 30 Pac. 10, 16 L. R. A. 198, 30 Am. St. Rep. 318; Hepler v. Davis, 32 Neb. 556, 49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457.

[188] Beer v. Simpson, 65 Hun, 17, 19 N. Y. Supp. 578; Mowry v. Cheesman.

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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.[189] 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.[190] 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.[191]

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 embarrassment. 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."[192] But the more approved rule is that such judgments do not come within the usual

6 Gray (Mass.) 515; Egberts v. Dibble, 3 McLean, 86, Fed. Cas. No. 4,307; Hendricks v. Comstock, 12 Ind. 238, 74 Am. Dec. 205; Succession of Lucas, 11 La. Ann. 296; Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051. Compare Bemis v. Stanley, 93 Ill. 230.

[189] Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711.

[190] Miller v. Brenham, 68 N. Y. 83. And see Stewart v. Spaulding, 72 Cal. 264, 13 Pac. 661; Waddill v. Cabell, 21 D. C. 597.

[191] Code W. Va. 1868, c. 104, § 13; Watkins v. Wortman, 19 W. Va. 78.

[192] Hubbell v. Coudrey, 5 Johns. 132, following Dupleix v. De Roven, 2 Vern. 540.

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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.[193] 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.[194]

The statute is unconstitutional if its effect is to prevent entirely the enforcement of a judgment recovered in another state. This principle was clearly brought out in a case decided in California.[195] 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

[193] Patten v. Ray, 4 Cal. 287; Evans v. Cleary, 125 Pa. 204, 17 Atl. 440, 11 Am. St. Rep. 886; Todd v. Crumb, 5 McLean, 172, Fed. Cas. No. 14,073; Dore v. Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100; Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. An action of debt on a foreign judgment is not within the Pennsylvania statute of six years limitation, for the action is not grounded on a "lending" or "contract," as those words are used in the statute, though the judgment sued on may have been based on such a lending or contract. Weiseberger v. Nevil, 11 Pa. Co. Ct. R. 40. In Illinois, a suit on a foreign judgment is not governed by that clause of the statute which relates to "actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing," but by that provision which bars in five years "all civil actions not otherwise provided for." Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

[194] Clay v. Clay, 13 Tex. 195; Spann v. Crummerford, 20 Tex. 216.

[195] Scarborough v. Dugan, 10 Cal. 305.

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the sense of the prohibition against laws impairing the obligation of contracts.[196] 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,[197] 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.[198] 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 constitu-

[196] 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 shall be given to the judgments of other states. This requirement does not prevent the states from enacting and applying reasonable statutes of limitation to actions upon such judgments, although it would be violated by a law which should deny any right of action on judgments from a sister state, or operate retrospectively to cut off the remedy altogether. See Bacon v. Howard, 20 How. 22, 15 L. Ed. 811; Randolph v. King, 2 Bond, 104, Fed. Cas. No. 11,560; Meek v. Meek, 45 Iowa, 294; Fields v. Mundy's Estate, 106 Wis. 383, 82 N. W. 343; Little v. McVey (N. J.) 47 Atl. 61.

[197] Chapman v. Douglas County, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; Price v. Hopkin, 13 Mich. 318; Osborn v. Jaines, 17 Wis. 573; Auld v. Butcher, 2 Kan. 135; Black, Const. Prohib. § 152.

[198] Carter v. Adamson, 21 Ark. 287; Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345; Reed v. Chilson, 61 Hun, 623, 16 N. Y. Supp. 744; Roberts v. Hinkle (Ky.) 43 S. W. 233.

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tion.[199] 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 Illinois court; and therefore the courts of Wisconsin may relieve against such judgment.[200] 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.[201]

§ 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.[202]

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.[203] "The judgment or decree of a sister state is, as a general rule, conclusive as to the rights of the

[199] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Dodge v. Coffin, 15 Kan. 277.

[200] Brown v. Parker, 28 Wis. 21.

[201] Sweet v. Brackley, 53 Me. 346; Weeks v. Harriman, 65 N. H. 91, 18 Atl. 87, 4 L. R. A. 744, 23 Am. St. Rep. 21.

[202] McCleary v. Faber, 6 Pa. 476; Motter v. Welty, 12 Pa. Co. Ct. R. 82.

[203] Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743; Overstreet v. Shannon, 1 Mo. 529; Morris v. Bailey, 15 La. Ann. 2; Commonwealth v. Kirkbride, 2 Brewst. (Pa.) 419; Kerr v. Kerr, 41 N. Y. 272; Ward v. Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Looney v. Reeves, 5 Kan. App. 279, 48 Pac. 606.

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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." [204] 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 against the property of such a defendant located in the state of his residence.[205] 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." [206]

§ 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.[207] "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

[204] Rogers v. Rogers, 15 B. Mon. (Ky.) 364, 378.

[205] Grover & Baker S. M. Co. v. Radcliffe, 66 Md. 511, 8 Atl. 265.

[206] Phelps v. Holker, 1 Dall. 261, 1 L. Ed. 128 (1788).

[207] President, etc., of Middlesex Bank v. Butman, 29 Me. 19; Tessier v. Lockwood, 18 Neb. 167, 24 N. W. 734.

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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."[208] 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.[209]

§ 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.[210] "It would seem to be clear,"

[208] Shumway v. Stillman, 6 Wend. 447.

[209] Bissell v. Wheelock, 11 Cush. (Mass.) 277.

[210] Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Buffum v. Stimpson, 5 Allen (Mass.) 591, 81 Am. Dec. 767; Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; McMahon v. Eagle Life Ass'n, 169 Mass. 539, 48 N. E. 339, 61 Am. St. Rep. 306; Pacific Pneumatic Gas Co. v. Wheelock, 80 N. Y. 278; Pringle v. Woolworth, 90 N. Y. 502; Leach v. Linde, 70 Hun, 145, 24 N. Y. Supp. 176; Velte v. McFadden, 3 Wkly. Notes Cas. (Pa.) 63; Reber v. Wright, 68 Pa. 471; Stewart v. Stewart, 27 W. Va. 167; Coskery v. Wood, 52 S. C. 576, 30 S. E. 475; Mills v. Stewart, 12 Ala. 90; Bogan v. Hamilton, 90 Ala. 454, 8 South. 186; Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Dodge v. Coffin, 15 Kan. 277; Westervelt v. Jones, 5 Kan. App. 35, 47 Pac. 322; Lockhart v. Locke, 42 Ark. 17; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Bailey v. Martin, 119 Ind. 103, 21 N. E. 346; Glos v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Caughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005; Seymour v. Newman, 77 Mo. App. 578; Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Cummings v. O'Brien, 122 Cal. 204, 54 Pac. 742. A certificate of the record of a foreign judgment, showing that it was

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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." [211] 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.[212] 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 due and legal service of process, or a sufficient waiver of notice under their laws, it will be so held in the court where the judgment is put in suit.[213] Where the record shows the return "executed in full" on the summons, this will be considered prima facie evidence of service.[214] Where the transcript showed that the action had been instituted in one common law court, and by agreement of the attorneys of the

rendered by a court of record which has a seal and a clerk, sufficiently shows, until the contrary appears, that it is the judgment of a court having jurisdiction of the parties. Coughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005.

[211] Davis v. Connelly's Ex'r, 4 B. Mon. 136.

[212] Barringer v. King, 5 Gray (Mass.) 9.

[213] Nunn v. Sturges, 22 Ark. 389; Hull v. Webb, 78 Ill. App. 617; Hall v. McKay, 78 Tex. 248, 14 S. W. 615; Semple v. Glenn, 91 Ala. 245, 9 South. 265, 24 Am. St. Rep. 894. Where the supreme court of a state has decided on appeal that the trial court had jurisdiction of the subject-matter of the suit in which the appeal is taken, and of the parties thereto, and affirms the decree appealed from, such decree is not subject to collateral attack in another state, unless it be on the ground of fraud. Glos v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196.

[214] Blackburn v. Jackson, 26 Mo. 308. Where the record of a proceeding in a court of general jurisdiction does not show that every step essential to jurisdiction was duly taken, it must be presumed that the court proceeded to judgment only after acquiring jurisdiction by the service of all notices actually necessary. Smith v. Central Trust Co. of New York, 154 N. Y. 333, 48 N. E. 553.

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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.[215]

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." [216] 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.[217] Furthermore, the presumption of jurisdiction does not extend to judgments rendered by justices of the peace and other inferior courts or magistrates of other states.[218] And it is held that, where it appears, in an action on a judgment from another state, that the jurisdiction of the court rendering it over the subject-matter of the suit was wholly dependent upon statute, the jurisdiction will not be presumed, but, with the statute conferring it, must be pleaded.[219]

[215] Harper v. Nichol, 13 Tex. 151.

[216] Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635.

[217] Downer v. Shaw, 22 N. H. 277.

[218] Infra, § 936.

[219] Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Kohn v. Haas, 95 Ala. 478, 12 South. 577; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389.

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§ 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.[220] On the other hand, any judgment coming from a foreign country may be impeached on this ground.[221] What, then, is the status, in this 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,[222] 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.[223] To this view the supreme court has always steadfastly

220 Supra, vol. 1, §§ 271–275.
221 Supra, § 835.
222 7 Cranch, 481, 3 L. Ed. 411.
223 D'Arcy v. Ketchum, 11 How. 165, 176, 13 L. Ed. 648. In this case

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adhered. And the same has been accepted, on that authority, or 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.[224] "The rule

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."

[224] D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Endicott v. Morgan, 66 Me. 456; Wood v. Augustins, 70 Vt. 637, 41 Atl. 583; Hall v. Williams, 6 Pick. (Mass.) 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 (Mass.) 591, 74 Am. Dec. 652; Wright v. Andrews, 130 Mass. 149; Bissell v. Wheelock, 11 Cush. (Mass.) 277; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; McDermott v. Clary, 107 Mass. 501; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Rathbone v. Terry, 1 R. I. 73; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Kerr v. Kerr, 41 N. Y. 272; Bell v. Bell, 157 N. Y. 719, 53 N. E. 1123; Hammond v. National Life Ass'n, 31 Misc. Rep. 182, 65 N. Y. Supp. 407; In re Norton's Estate, 32 Misc. Rep. 224, 66 N. Y. Supp. 317; Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Guthrie v. Lowry, 84 Pa. 533; Mitchell v. Garrett, 5 Houst. (Del.) 34; Wernwag v. Pawling, 5 Gill & J. (Md.) 500, 25 Am. Dec. 317; Stewart v. Stewart, 27 W. Va. 167; Crumlish's Adm'r v. Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; Davis v. Smith, 5 Ga. 274, 47 Am.

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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." [225] 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.[226] The judgment of a state court may be collaterally questioned 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.[227] 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.[228]

But there are sometimes cases in which the inquiry into the ques-

Dec. 279; Braswell v. Downs, 11 Fla. 62; Sammis v. Wightman, 31 Fla. 10, 12 South. 526; Miller v. Ewing, 8 Smedes & M. (Miss.) 421; Norwood v. Cobb, 15 Tex. 500; Redus v. Burnett, 59 Tex. 576; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Barrett v. Oppenheimer, 12 Heisk. (Tenn.) 298; Chicago, R. I. & P. Ry. Co. v. Campbell, 5 Kan. App. 881, 49 Pac. 321; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Spier v. Corll, 33 Ohio St. 236; Westcott v. Brown, 13 Ind. 83; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Zepp v. Hager, 70 Ill. 223; State v. Fleak, 54 Iowa, 429, 6 N. W. 689; Barlow v. Steel, 65 Mo. 611; Bradley v. Welch, 100 Mo. 258, 12 S. W. 911; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Marr v. Wetzel, 3 Colo. 2; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[225] Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365. See, also, Wilcox v. Kassick, 2 Mich. 165.

[226] Gordon v. Mackay, 34 N. J. Law, 286.

[227] Swift v. Meyers (C. C.) 37 Fed. 37. And see Southern Ins. Co. of New Orleans v. Wolverton Hardware Co. (Tex. Sup.) 19 S. W. 615.

[228] Gerault v. Anderson, Walk. 30, 12 Am. Dec. 521.

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tion 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.[229] 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.[230] Thus, allegations in a plea that a defendant, sued in one state on a judgment recovered against him in a court of another state, did not have his day in the latter court, or that the latter court did not have jurisdiction over him, are mere conclusions of law and bad in substance, even though they have the basis of an accompanying allegation that there was no service of summons in the action in which the judgment was rendered.[231] And so, an affidavit of defense in an action

[229] 2 Bosw. (N. Y.) 579.

[230] Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Struble v. Malone, 3 Iowa, 586; Puckett v. Pope, 3 Ala. 552; Smith v. Rhoades, 1 Day (Conn.) 168; Barkman v. Hopkins, 11 Ark. 157; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; L'Engle v. Gates (C. C.) 74 Fed. 513; Sammis v. Wightman, 31 Fla. 10, 12 South. 526; Foshier v. Narver, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380.

[231] Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

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on a foreign judgment, which sets up that the defendant did not appear in the action, nor authorize an appearance for him by the attorney who filed his answer in the cause, is not sufficient.[232] So again, it is 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.[233] 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.[234] 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."[235] 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

[232] Polk County Bank v. Fleming, 33 Wkly. Notes Cas. (Pa.) 75.

[233] Struble v. Malone, 3 Iowa, 586; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Sammis v. Wightman, 31 Fla. 10, 12 South. 526. But where the plaintiff alleges that the judgment was rendered upon summons and complaint duly and personally served on defendant, an answer denying that any valid judgment was rendered, or that defendant appeared or authorized an appearance, has been thought sufficient as a plea of want of jurisdiction. Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046.

[234] Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. Law, 222.

[235] Barkman v. Hopkins, 11 Ark. 157. In an action on a foreign judgment, it is said that the answer sufficiently negatives jurisdiction of the court rendering the judgment by alleging that it was "without jurisdiction over the person of defendant, because he was not personally served with notice in said cause, nor did he enter an appearance personally or by attorney or otherwise." Minter v. Green (Ind. Ter.) 49 S. W. 48.

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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."[236] 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.[237]

§ 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.[238] 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.[239] 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.[240]

[236] Ward v. Price, 25 N. J. Law, 225. And see Wissler v. Herr, 162 Pa. 552, 29 Atl. 862.

[237] Williams v. Renwick, 52 Ark. 160, 12 S. W. 331, 20 Am. St. Rep. 158.

[238] Kimball v. Merrick, 20 Ark. 12; Noyes v. Butler, 6 Barb. (N. Y.) 613. See, also, Zepp v. Hager, 70 Ill. 223.

[239] Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Sears v. Dacey, 122 Mass. 388; McDermott v. Clary, 107 Mass. 501; Stockwell v. McCracken, 109 Mass. 86; American Tube & Iron Co. v. Crafts, 156 Mass. 257, 30 N. E. 1024; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Russell v. Butler (Tex. Civ. App.) 47 S. W. 406.

[240] Mowry v. Chase, 100 Mass. 79.

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§ 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 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.[241] The applications of this doctrine to the various cases

[241] Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Dilworth v. Johnson (D. C.) 6 Fed. 459; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; 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. (Mass.) 232, 17 Am. Dec. 356; Wetherill v. Stillman, 65 Pa. 105; Lance v. Dugan (Pa.) 13 Atl. 942; Miller v. Dungan, 35 N. J. Law, 389; Pritchett v. Clark, 4 Har. (Del.) 280; Westcott v. Brown, 13 Ind. 83; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Zepp v. Hager, 70 Ill. 223; Caughran v. Gilman, 72 Iowa, 570, 34 N. W. 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. (Mass.) 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

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arising in practice were stated in one of the Illinois decisions in the following terms: First, 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.[242] 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.[243]

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."

[242] 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.

[243] Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430. In support of the third position taken in this case, see, also, Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355.

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§ 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 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.[244] Still this

[244] Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Rep. 652; Bodurtha v. Goodrich, 3 Gray (Mass.) 508; Wright v. Andrews, 130 Mass. 149; McDer-

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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 judgment, 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

mott v. Clary, 107 Mass. 501; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Gleason v. Dodd, 4 Metc. (Mass.) 333; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Dennison v. Hyde, 6 Conn. 508; Colt v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Frothingham v. Barnes, 9 R. I. 474; Black v. Black, 4 Bradf. Sur. (N. Y.) 174; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Kerr v. Kerr, 41 N. Y. 272; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Latham v. Delany, 59 N. Y. Super. Ct. 37, 12 N. Y. Supp. 463; Price v. Schaeffer, 161 Pa. 530, 29 Atl. 279, 25 L. R. A. 699; Commonwealth v. Bolich, 18 Pa. Co. Ct. R. 401; Mitchell v. Garrett, 5 Houst. (Del.) 34; Kingsbury v. Yniestra, 59 Ala. 320; Norwood v. Cobb, 24 Tex. 551; League v. Scott (Tex. Civ. App.) 61 S. W. 521; Wood v. Wood, 78 Ky. 624; Chaney v. Bryan, 15 Lea (Tenn.) 589; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Pond v. Simons, 17 Ind. App. 84, 45 N. E. 48; 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; Banister v. Weber Gas & Gasoline Engine Co., 82 Mo. App. 528; Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046; 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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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."[245] 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.[246] And the rule has been recognized and extended in later decisions of the court,[247] 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 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.[248] 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.

[245] Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897.

[246] Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70.

[247] Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. And see Graham v. Spencer (C. C.) 14 Fed. 603.

[248] Gleason v. Dodd, 4 Metc. (Mass.) 333.

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§ 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 a general denial or 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.[249] "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." [250]

§ 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 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.[251] But this view was never universally accepted, and the best modern cases have entirely repudiated it. So

[249] Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Bennett v. Morley, 10 Ohio, 100; Ferry v. Miltimore Elastic Steel Car-Wheel Co., 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787; Hoffheimer v. Stiefel, 17 Misc. Rep. 236, 39 N. Y. Supp. 714; Rice v. Coutant, 38 App. Div. 543, 56 N. Y. Supp. 351.

[250] Fritz v. Fisher, 5 Clarke (Pa.) 350.

[251] Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Roberts v. Caldwell, 5 Dana (Ky.) 512; Edmonds v. Montgomery, 1 Iowa, 143. This was also the doctrine in Missouri (see Warren v. Lusk, 16 Mo. 102; Baker v. Stonebraker, 34 Mo. 172), until the decision in the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, after which the courts felt obliged to conform to the principles therein established. See Eager v. Stover, 59 Mo. 87.

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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.[252] A recent case in New York carries this rule to a point which seems to

[252] Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Ward v. Price, 25 N. J. Law, 225; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Boylan v. Whitney, 3 Ind. 140; Welch v. Sykes, 3 Gilman (Ill.) 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; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Kahn v. Lesser, 16 N. Y. Supp. 154; Home Friendly Soc. v. Tyler, 12 Pa. Co. Ct. R. 623; Hays v. Merkle, 67 Mo. App. 55; 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 (Mass.) 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. . . . 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."

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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 question of jurisdiction when sued in the courts of another state upon such judgment, nor from proving such facts as would support his contention.[253] 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.[254] 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.[255] 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.[256]

§ 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,

[253] Howard v. Smith, 35 N. Y. Super. Ct. 131.
[254] Graham v. Spencer (C. C.) 14 Fed. 603.
[255] Watson v. New England Bank, 4 Metc. (Mass.) 343.
[256] Wilson v. Hilliard (Pa.) 5 Atl. 258.

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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.[257] 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 whatever. And to this proposition the authorities unanimously agree.[258] It follows from this that a judg-

[257] Story, Confl. Laws, §§ 549-551.

[258] Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Pennoyer v. Neff, 95 U. S. 725, 24 L. Ed. 565; Thompson v. Emmert, 4 McLean, 96, Fed. Cas. No. 13,953; 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. (N. Y.) 37, 4 Am. Dec. 321; Fenton v. Garlick, 8 Johns. (N. Y.)

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ment 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

194; Bates v. Delavan, 5 Paige (N. Y.) 299; Robinson v. Ward's Ex'rs, 8 Johns. (N. Y.) 86, 5 Am. Dec. 327; Pawling v. Willson, 13 Johns. (N. Y.) 192; Bartlett v. Spicer, 75 N. Y. 528; Phelps v. Holker, 1 Dall. (Pa.) 261, 1 L. Ed. 128; Steel v. Smith, 7 Watts & S. (Pa.) 447; Miller v. Dungan, 36 N. J. Law, 21; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Rogers v. Coleman, Hardin (Ky.) 418, 3 Am. Dec. 733; Williams v. Preston, 3 J. J. Marsh. (Ky.) 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. 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 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

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by action, so far as concerns any personal liability of the defendant, although it would bind his person in the courts and by the laws of the state in which it was rendered.[259] 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.[260] 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.[261] 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.[262] 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.[263] But in such a case, it is apprehended, a personal

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."

[259] Steel v. Smith, 7 Watts & S. (Pa.) 447; Miller v. Dungan, 36 N. J. Law, 21, and other cases cited in preceding note.

[260] National Bank v. Peabody, 55 Vt. 492, 45 Am. Rep. 632.

[261] Iles v. Elledge, 18 Kan. 296.

[262] Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372.

[263] Swift v. Meyers (C. C.) 37 Fed. 37.

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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.[264] 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.[265]

§ 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.[266] But of course if

[264] Campbell v. Home Ins. Co., 1 S. C. 158.

[265] Payne v. O'Shea, 84 Mo. 129.

[266] Parrot v. Alabama Gold Life Ins. Co., 4 Woods, 353, 5 Fed. 391; Ewer v. Coffin, 1 Cush. (Mass.) 23, 48 Am. Dec. 587; Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 160; Reber v. Wright, 68 Pa. 471; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am.

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the defendant, after being so served, files an answer in the suit and sets up a defense on the merits, the judgment rendered will be valid and conclusive.[267]

§ 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.[268] As remarked by

Dec. 747; Howard v. Coon, 93 Mich. 442, 53 N. W. 513; Garner v. Garner, 56 Md. 127; Franz Falk Brewing Co. v. Hirsch, 78 Tex. 192, 14 S. W. 450.

[267] Jones v. Jones, 36 Hun (N. Y.) 414.

[268] D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Empire Tp. v. Darlington, 101 U. S. 87, 25 L. Ed. 878; Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; Thompson v. Emmert, 4 McLean, 96, Fed. Cas. No. 13,593; McVicker v. Beedy, 31 Me. 314, 1 Am. Rep. 666; Whittier v. Wendell, 7 N. H. 257; Rangeley v. Webster, 11 N. H. 299; Rider v. Alexander, 1 D. Chip. (Vt.) 275; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Price v. Hickok, 39 Vt. 292; Woodward v. Tremere, 6 Pick. (Mass.) 354; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Rand v. Hanson, 154 Mass. 87, 28 N. E. 6, 12 L. R. A. 574, 26 Am. St. Rep. 210; 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; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Reber v. Wright, 68 Pa. 471; Scott v. Noble, 72 Pa. 115, 13 Am. Rep. 663; Mitchell v. Garrett, 5 Houst. (Del.) 34; Expressman's Mut. Ben. Ass'n v. Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; Stewart v. Northern Assur. Co., 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; Davidson v. Sharpe, 28 N. C. 14; Miller's Ex'rs v. Miller, 1 Bailey (S. C.) 242; Howell v. Gordon, 40 Ga. 302; Dearing v. Bank of Charleston, 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. Marsh. (Ky.) 600, 20 Am. Dec. 179; Carlin v. Taylor, 7 Lea (Tenn.) 666; Barkman v. Hopkins, 11 Ark. 157; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Arndt v. Arndt, 15 Ohio,

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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 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." [269] 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." [270] 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.[271] 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

33; Welch v. Sykes, 3 Gilman (Ill.) 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. Compare Clinch Valley Coal Co. v. Tonkin, 9 Kulp (Pa.) 494; Williams v. Williams, 53 Mo. App. 617.

[269] Whiting v. Johnson, 5 Dana (Ky.) 390.

[270] Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101.

[271] Eaton v. Badger, 33 N. H. 228; Carleton v. Washington Ins. Co., 35 N. H. 162.

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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.[272]

§ 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." [273] 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.[274] 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

[272] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[273] Harryman v. Roberts, 52 Md. 64, 75. And see also Henderson v. Stanford, 105 Mass. 504, 7 Am. Rep. 551; Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743; Stewart v. Schaeffer, 33 Wkly. Notes Cas. (Pa.) 365; Firemen's Ins. Co. v. Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335; Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635; Hamill v. Talbott, 72 Mo. App. 22.

[274] Cassidy v. Leitch, 2 Abb. N. C. 315; Huntley v. Baker, 33 Hun (N. Y.) 578; Biesenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629.

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laws.[275] 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.[276]

§ 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 where rendered, in the domicile of the defendant, and in all other courts.[277] 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.[278] 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.[279]

§ 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

[275] Cassidy v. Leitch, 2 Abb. N. C. (N. Y.) 315.

[276] Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673. And see Amsbaugh v. Exchange Bank, 33 Kan. 100, 5 Pac. 384.

[277] Bellows v. Ingham, 2 Vt. 575; Harbin v. Chiles, 20 Mo. 314. See, also, Randolph v. Keller, 21 Mo. 557; Hubbard v. American Inv. Co. (C. C.) 70 Fed. 808; Mutual Nat. Bank of New Orleans v. Moore, 50 La. Ann. 1332, 24 South. 304.

[278] Roach v. Privett, 90 Ala. 391, 7 South. 808, 24 Am. St. Rep. 819; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

[279] Cleaves v. Lord, 43 Me. 290.

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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."[280] But some of the decisions rendered elsewhere on similar facts incline to 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.[281] Other cases hold that his remedy is to bring suit against the persons conspiring to lure him into the foreign jurisdiction.[282] 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.[283]

§ 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.[284] A

[280] Dunlap v. Cody, 31 Iowa, 260, 7 Am. Rep. 129; Duringer v. Moschino, 93 Ind. 495; Pilcher v. Graham, 18 Ohio Cir. Ct. R. 5. 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. 123.

[281] Steele v. Bates, 2 Aikens (Vt.) 338, 16 Am. Dec. 720; Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27.

[282] Cook v. Brown, 125 Mass. 503, 28 Am. Rep. 259.

[283] Duringer v. Moschino, 93 Ind. 495.

[284] St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Ward

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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.[285] But it 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.[286] 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.[287]

v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207.

[285] Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451.

[286] Henning v. Planters' Ins. Co. (C. C.) 28 Fed. 440; Hazeltine v. Mississippi Val. Fire Ins. Co. (C. C.) 55 Fed. 743. And see Cunningham v. Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.

[287] In re Norwood, 32 Hun (N. Y.) 196; Rodgers v. Adriatic Fire Ins. Co. 148 N. Y. 34, 42 N. E. 515.

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§ 910a. Non-Resident Stockholders of Domestic Corporations.

Where a judgment against a corporation is sought to be enforced against a stockholder resident in another state than that in which the judgment was recovered, the conclusive effect of the judgment will depend upon the law of the state wherein the judgment was rendered. If, by that law, a judgment against a corporation is binding on its stockholders, then the same conclusive effect must be given to it in every other state where an action is brought against a stockholder; and the only defenses which a stockholder can make against the judgment, when sued in the state of his own residence, are such as he could make in the courts of the state where the judgment was recovered.[288] So when a court having jurisdiction over an insolvent corporation makes a decree ascertaining its assets and liabilities and ordering an assessment against the members or stockholders, to raise the sum necessary to discharge the liabilities, if the decree, in that state, is conclusive against the members though they were not parties to the action, then it is equally conclusive against a member who is sued in another state to recover his share of the assessment.[289] But, according to the doctrine of the United States supreme court, an order of a court making a call or assessment upon all stockholders of a corporation who have not paid their shares in full, is merely such a call as the directors might have made before the matter was brought within the court's jurisdiction, and is not a judgment against any particular stockholder, so as to be entitled to "full faith and credit" in the courts of another state, where an action is brought against a stockholder to recover the amount of

[288] Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, reversing s. c., 20 R. I. 466, 40 Atl. 341. As to the general rule concerning the binding effect of a judgment against a corporation as evidence against its stockholders, see supra, § 583.

[289] Mutual Fire Ins. Co. v. Phœnix Furniture Co., 108 Mich. 170, 66 N. W. 1095, 34 L. R. A. 694, 62 Am. St. Rep. 693; Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111. The rule is the same in regard to a decree or order levying an assessment upon the premium notes of the members of a mutual insurance company. Stevens v. Hein, 37 App. Div. 542, 55 N. Y. Supp. 491; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881. But compare Parker v. Lamb & Sons, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704.

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the assessment on his shares; and in such action the defendant is entitled to rely on any defenses which he might have to an action upon the contract of subscription.[290]

§ 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.[291]

§ 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 was necessary, or that, if necessary, it was in fact given.[292] 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.[293] So in cases where a scire

[290] Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

[291] Jardine v. Reichert, 39 N. J. Law, 165; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; supra, vol. 1, §§ 223, 224.

[292] Sanford v. Sanford, 28 Conn. 6.

[293] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628; Cone v. Hooper, 18 Minn. 531 (Gil. 476.) Compare Meyer v. Hartman, 14 Mo. App. 130.

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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.[294] 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.[295]

[294] Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266. See, also, Delano v. Jopling, 1 Litt. (Ky.) 117; Poorman v. Crane's Adm'r, Wright (Ohio) 347. But compare Robinson v. Ward's Ex'rs, 8 Johns. (N. Y.) 86, 5 Am. Dec. 327; Holt v. Alloway, 2 Blackf. (Ind.) 108.

[295] Elsasser v. Haines, 52 N. J. Law, 10, 18 Atl. 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, 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 sub-

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§ 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 personally served with process within the state, a judgment rendered against all cannot be enforced outside of the state in which it was recovered.[296] 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.[297] 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.[298] 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.[299] 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 can only be removed by proof of the law of the other state authorizing the rendition of the judgment and making

mitted himself, and has thereby impliedly assented to it from its inception to its obvious conclusion."

[296] Frothingham v. Barnes, 9 R. I. 474; Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673; Rogers v. Burns, 27 Pa. 525; Duryee v. Hale, 31 Conn. 217; Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

[297] Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Scott v. Bogart, 14 La. Ann. 261; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Hoffman v. Newell, 2 Misc. Rep. 570, 21 N. Y. Supp. 912.

[298] Conley v. Chapman, 74 Ga. 709; Holt v. Johnson, 50 Mo. App. 373. Compare Watson v. Steinau, 19 R. I. 218, 33 Atl. 4, 61 Am. St. Rep. 768.

[299] On this doctrine see supra, vol. 1, § 234.

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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." [300] 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.[301]

§ 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.[302] 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

[300] Wright v. Andrews, 130 Mass. 149. See, also, Scott v. Noble, 72 Pa. 115, 13 Am. Rep. 663.

[301] Knapp v. Abell, 10 Allen, 485.

[302] Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629; Swift v. Stark, 2 Or. 97, 88 Am. Dec. 463.

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of action.[303] 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.[304] 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.[305]

§ 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.[306] 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 assum-

[303] Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Shirley v. Shattuck, 13 Metc. (Mass.) 256.

[304] Duryee v. Hale, 31 Conn. 217.

[305] Oakley v. Aspinwall, 4 N. Y. 513.

[306] Hensley v. Force, 12 Ark. 756.

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ing to dispose of or affect the title to lands situate outside the state is of no ex-territorial validity.[307] 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.[308] 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.[309] 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.[310]

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.[311]

307 Supra, § 872.

308 Supra, vol. 1, §§ 240, 242.

309 Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, affirmed 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

310 Stark v. Ratcliff, 111 Ill. 75.

311 Pearce v. Olney, 20 Conn. 544; Brainard v. Fowler, 119 Mass. 262; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; White v. Reid, 70 Hun, 197, 24 N. Y. Supp. 290; Buford v. Buford, 4 Munf. (Va.) 241, 6 Am. Dec. 511; Miller v. Leach, 95 N. C. 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 Smedes & M. Ch. (Miss.) 374; White v. Trotter, 14 Smedes & M. (Miss.) 30, 53 Am. Dec. 112; Norwood v. Cobb, 20 Tex. 588; Clark v. Ogilvie, 23 Ky. Law Rep. 552, 63 S. W. 429; Coffee v. Neely, 2 Heisk. (Tenn.) 304; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Holt v. Alloway, 2 Blackf. (Ind.) 108; Rogers v. Gwin, 21 Iowa, 58; Marx v. Fore, 51 Mo. 77, 11 Am. Rep. 432; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306.

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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 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.[312] 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.[313] 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.[314]

§ 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.[315] And this must now be regarded

[312] Waddams v. Burnham, 1 Tyler, 233.

[313] Conway v. Ellison, 14 Ark. 360.

[314] Turley v. Taylor, 6 Baxt. (Tenn.) 376.

[315] Barras v. Bidwell, 3 Woods, 5, Fed. Cas. No. 1,039; Granger v. Clark, 22 Me. 128; McDonald v. Drew, 64 N. H. 547, 15 Atl. 148; McRae v. Mattoon, 13 Pick. (Mass.) 53; Engstrom v. Sherburne, 137 Mass. 153; Mooney v. Hinds,

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as settled law, especially in view of certain recent rulings of the United States supreme court in the same direction,[816] 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." [817] 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." [818] And there seems to be logically no escape from this position, except in cases where the court

160 Mass. 469, 36 N. E. 484; Sanford v. Sanford, 28 Conn. 6; Bicknell v. Field, 8 Paige (N. Y.) 440; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Johnson v. Dobbins, 5 Wkly. Notes Cas. (Pa.) 537; Supreme Council of Royal Arcanum v. Carley, 52 N. J. Eq. 642, 29 Atl. 813; Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; Richmond & D. R. Co. v. Gorman, 7 App. D. C. 91; Smedes v. Ilsley, 68 Miss. 590, 10 South. 75; Anderson v. Anderson, 8 Ohio, 108; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Cox v. Barnes, 45 Neb. 172, 63 N. W. 394.

[816] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564.

[817] Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535.

[818] Wyoming Manuf'g Co. v. Mohler (Pa.) 17 Atl. 31. See, also, Bicknell v. Field, 8 Paige (N. Y.) 440.

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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.[819] 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 [820] 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 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,[821] 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

[819] See Warrington v. Ball, 33 C. C. A. 609, 90 Fed. 464; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[820] 35 Ark. 331, 37 Am. Rep. 27.

[821] Supra, § 860.

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assailed on this ground at home, is beyond question inadmissible. This is the ground of the decision in the case of Christmas v. Russell.[322]

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.[323]

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, 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.

[322] 5 Wall. 290, 18 L. Ed. 475.
[323] 8 Ohio, 108.

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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 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."[824] 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.[825]

§ 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.[826]

[824] 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, 13 W. Va. 794; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Ward v. Quinlivin, 57 Mo. 425; Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

[825] Pearce v. Olney, 20 Conn. 544.

[826] Metcalf v. Gilmore, 59 N. H. 417, 47 Am. Rep. 217; Riley v. Murray.

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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 the parties, where the defendant appeared in the action and answered, and where the judgment remains in full force.[327]

§ 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

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, 4 Pac. 422.

[327] Engstrom v. Sherburne, 137 Mass. 153. 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. In Rose v. Northwest Fire & M. Ins. Co. (C. C.) 67 Fed. 439, it was held that, in an action on a foreign judgment, defendant may show that it was obtained by collusion between plaintiff and one who represented himself to be an agent of the defendant for the purpose of being served with process. And see Gilpin v. Baltimore & O. R. Co. (Com. Pl.) 17 N. Y. Supp. 520. It also appears that, in a suit brought on a judgment rendered in another state upon the appearance and confession of an attorney under a warrant contained in the note sued on, the defendant may show that the judgment was fraudulent and void by reason of the fact that the warrant of attorney had expired by previous payment of the note. First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510.

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action in another state.[328] 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."[329]

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.[330]

[328] Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Jeter v. Fellowes, 32 Pa. 465; Hockaday v. Skeggs, 18 La. Ann. 681.

[329] Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

[330] Halle v. Hill, 13 Mo. 612; Wells v. Neff, 14 Or. 66, 12 Pac. 88; Thomas v. Morrisett, 76 Ga. 384. Compare Gillett v. Camp, 23 Mo. 375. An adjudication of the fact of the domicile of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicile in a contest in another state, in proceedings for the administration of assets within the latter jurisdiction, where such adjudication was made without any contest inter partes, but in a proceeding in rem on an application under a statute authorizing notice by publication, the publication not being directed against named individuals, and not having for its object the obtaining of specific relief against any one, but being general, and for the purpose of warning all persons who may be concerned of the proposal to determine the question of appointing a legal representative. Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741. In Rhode Island, 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 probate court 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.

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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.[331] 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.[332] 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.[333] 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.[334] 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.[335]

Where a state statute requires all claims against a decedent to be presented to the probate court within a limited time after his death, and prohibits any action against an executor or administrator, the action of a probate court of that state disallowing a claim which was not presented until after the lapse of the statutory time, the decedent having been a resident of that state, has the force and effect of a judgment in favor of his estate against the claimant; and such judgment is conclusive against the claimant in the courts of another state.[336] So, also, the record of the final settlement of an administrator, containing debits and credits in full, and an order to the ad-

[331] Dalrymple v. Gamble, 68 Md. 523, 13 Atl. 156.

[332] Caruthers v. Corbin, 38 Ga. 75. But the constitutional provision does not make probate proceedings in one state with respect to a will devising lands in another state conclusive in the latter, since the courts of one state have no jurisdiction over lands in another state. Pritchard v. Henderson, 2 Pennewill (Del.) 553, 47 Atl. 376; Nelson v. Potter, 50 N. J. Law, 324, 15 Atl. 375.

[333] Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

[334] Turley v. Dreyfus, 33 La. Ann. 885.

[335] Cherry v. Speight, 28 Tex. 503.

[336] Sanborn v. Perry, 86 Wis. 361, 56 N. W. 337.

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ministrator to distribute a balance found in his hands, according to the will and the law, is a "judicial proceeding" within the meaning of the constitution, and conclusive in the courts of another state.[337] On similar principles, where the parties, the issues, and the facts are the same, a court of one state will not revise the decree of a court of another state awarding the custody of a child to one of its parents.[338]

§ 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.[339] "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,

[337] Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.

[338] Com. v. Ebert, 24 Pa. Co. Ct. R. 648; Slack v. Perrine, 9 App. D. C. 128.

[339] Morgan v. Neville, 74 Pa. 52; Moore v. Spackman, 12 Serg. & R. (Pa.) 287; Ocean Ins. Co. v. Portsmouth Marine Ry. Co., 3 Metc. (Mass.) 420; Hull v. Blake, 13 Mass. 153; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755. Compare Renier v. Hurlbut, 81 Wis. 24, 50 N. W. 783, 14 L. R. A. 562, 29 Am. St. Rep. 850; T. & H. Smith & Co. v. Taber, 16 Tex. Civ. App. 154, 40 S. W. 156.

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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." [840] 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.[841] Where a garnishment in another state 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.[842]

§ 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

[840] Meriam v. Rundlett, 13 Pick. 511.

[841] Gray v. Delaware & Hudson Canal Co., 5 Abb. N. C. (N. Y.) 131; Roharge v. Central Vt. R. Co., 18 Abb. N. C. 363. In the case of McCarty v. The City of New Bedford (D. C.) 4 Fed. 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.

[842] O'Rourke v. Chicago, M. & St. P. R. Co., 55 Iowa, 332, 7 N. W. 582.

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pursued."[843] 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 text-books, 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 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.[844] 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

[843] Commonwealth v. Blood, 97 Mass. 538. And see Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389. Compare Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Davis v. Davis, 2 Misc. Rep. 549, 22 N. Y. Supp. 191.

[844] 2 Bish. Mar. & Div. §§ 147, 156, 164.

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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."[845] 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 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.[846] 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.[847] Finally, if both parties are citizens of the state where

[845] Gould v. Crow, 57 Mo. 200.

[846] 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. (N. Y.) 640; Pawling v. Willson, 13 Johns. (N. Y.) 192; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Hamill v. Talbott, 72 Mo. App. 22.

[847] Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Fishli v. Fishli, 2 Litt. (Ky.) 337; Schnaufer v. Schnaufer, 4 La. Ann. 355; Hare v. Hare, 10 Tex. 355; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702. The decisions in New Hampshire and Pennsylvania to the contrary (Clark v. Clark, 8 N. H. 21; Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Batchelder v. Batchelder, 14 N. H. 380; Payson v. Payson, 34 N. H. 518; Dorsey v. Dorsey, 7 Watts [Pa.] 349, 32 Am. Dec. 767; Hollister v. Hollister, 6 Pa. 449) have been strongly

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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 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.[348]

§ 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 the 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."[349] And all the American authorities agree in sustaining this doctrine.[350] In a recent case in Maine it was said: "The state

criticised by Mr. Bishop (2 Mar. & Div. §§ 173–177) and shown to be contrary both to sound reason and the weight of authority.

[348] Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Hood v. Hood, 11 Allen (Mass.) 196, 87 Am. Dec. 709; Shaw v. Shaw, 98 Mass. 158; Guest v. Guest, 3 Ont. 344.

[349] 2 Bish. Mar. & Div. § 144.

[350] Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Blain v. Blain, 45

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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 court 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 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." [851]

§ 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.[852] In this connection it must be observed that the usual rule

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, 23 Am. Rep. 299; Davis v. Commonwealth, 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Armington, 25 Minn. 29; Barber v. Root, 10 Mass. 260; Ditson v. Ditson, 4 R. I. 93; Jackson v. Jackson, 1 Johns. (N. Y.) 424; Maguire v. Maguire, 7 Dana (Ky.) 181; Pomeroy v. Wells, 8 Paige (N. Y.) 406. But see, per contra, Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

[851] Gregory v. Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792.

[852] 2 Bish. Mar. & Div. §§ 155, 156; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. (Ind.) 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;

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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.[353]

§ 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 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."[354] And this opinion is amply justified by the rulings of the courts.[355] Thus, in a recent case in Massachusetts, it was said

Dutcher v. Dutcher, 39 Wis. 657; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

[353] Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Colvin v. Reed, 55 Pa. 379; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Ditson v. Ditson, 4 R. I. 87.

[354] Cooley, Const. Lim. *400.

[355] Lyon v. Lyon, 2 Gray (Mass.) 367; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Neff v. Beauchamp, 74 Iowa, 92, 36 N. W. 905; Gettys v. Gettys, 3 Lea (Tenn.) 260, 31 Am. Rep. 637; Irby v. Wilson, 21 N. C. 568; Magurn v. Magurn,

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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.[356]

§ 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.[357] 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 peti-

3 Ont. 570; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Shannon v. Shannon, 4 Allen (Mass.) 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, 32 Am. Rep. 274; Holmes v. Holmes, 4 Lans. (N. Y.) 388; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017.

[356] Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299. And see Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333.

[357] People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260. See Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Kerr v. Kerr, 41 N. Y. 272; Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645.

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tioner 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 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.[358] 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.[359] As summing up the principles advo-

[358] Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Barber v. Root, 10 Mass. 262; Irby v. Wilson, 21 N. C. 568; Dorsey v. Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Atherton v. Atherton, 82 Hun, 179, 31 N. Y. Supp. 977; Lyon v. Lyon, 2 Gray (Mass.) 367.

[359] Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 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 (N. Y.) 256; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; State v. Schlachter, 61 N. C. 520; Hull v. Hull, 2 Strobh. Eq. (S. C.) 174; Harrison v. Harrison, 19 Ala. 499; Thompson v. State, 28 Ala. 12; Maguire v. Maguire, 7 Dana (Ky.) 181; Mansfield v. McIn-

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cated 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 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." [360]

§ 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 col-

tyre, 10 Ohio, 28; Tolen v. Tolen, 2 Blackf. (Ind.) 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, 3 Wis. 662, 62 Am. Dec. 702; Shafer v. Bushnell, 24 Wis. 372; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; Cooley, Const. Lim. *401 and note; 2 Bish. Mar. & Div. §§ 155–164; 2 Kent, Comm. 110.

[360] Pennoyer v. Neff, 95 U. S. 714, 734, 24 L. Ed. 565.

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lateral 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 decree dissolving the marriage, but in the nature of a decree in personam affecting the rights of parties beyond the jurisdiction of the court."[361] 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.[362] 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

[361] Garner v. Garner, 56 Md. 127.

[362] 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. But if the court granting a divorce had jurisdiction of the subject-matter and of the person of the defendant, an action may be maintained in another state upon its judgment awarding alimony. Bullock v. Bullock, 57 N. J. Law, 508, 31 Atl. 1024; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Knapp v. Knapp (D. C.) 59 Fed. 641. So, also, where a valid decree is rendered in one state granting an absolute divorce and giving the custody of the child to the mother, habeas corpus will not lie in another state, at the suit of the father, to recover possession of the child on the ground that it is illegally detained from him. Hammond v. Hammond, 90 Ga. 527, 16 S. E. 265.

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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.[363]

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.[364] The basis of this doctrine 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." [365] But we shall

[363] Barrett v. Failing (C. C.) 3 Fed. 471.

[364] Warren v. Flagg, 2 Pick. (Mass.) 448; Robinson 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. (Vt.) 59; Graham v. Grigg, 3 Har. (Del.) 408; Clark v. Parsons, Rice (S. C.) 16; Lawrence v. Gaultney, Cheves (S. C.) 7; McElfatrick v. Taft, 10 Bush (Ky.) 160; Wood v. Wood, 78 Ky. 624.

[365] Ror. Int. St. 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

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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, 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.[366] 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

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."

[366] 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. (Pa.) 203; Danforth v. Thompson, 34 Iowa, 243; Bissell v. Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Beal v. Smith, 14 Tex. 305; Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257; J. S. Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92; Anderson v. Chicago Title & Trust Co., 101 Wis. 385, 77 N. W. 710; Howland v. Chicago, R. I. & P. Ry. Co., 134 Mo. 474, 36 S. W. 29. 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. 52, 11 Atl. 435; Bright v. Smitten, 10 Pa. Co. Ct. R. 647.

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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."[367] 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.[368] 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 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

[367] Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288.
[368] 48 Ark. 50, 2 S. W. 257.

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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.[369] 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.[370] 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 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.[371] 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.[372]

§ 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.[373] This doctrine, however, is unsound.

[369] Russell v. Perry, 14 N. H. 152.

[370] Perry v. Northern Ins. Co., 5 Phila. (Pa.) 188; Shufeldt v. Buckley, 45 Ill. 223; Louisville, N. A. & C. Ry. Co. v. Parish, 6 Ind. App. 89, 33 N. E. 122.

[371] Archer v. Romaine, 14 Wis. 375; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

[372] McElfatrick v. Taft, 10 Bush (Ky.) 160.

[373] Mahurin v. Bickford, 6 N. H. 567; Graham v. Grigg, 3 Har. (Del.) 408; McElfatrick v. Taft, 10 Bush (Ky.) 160.

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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 being had 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.[374] 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 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. CONCLUSIVENESS OF JUDGMENTS AS BETWEEN FEDERAL, STATE, AND TERRITORIAL COURTS.

§ 938. Federal Judgments in the State Courts.

The federal tribunals are not regarded as foreign to each other or to the state courts. Hence a judgment or decree duly rendered by a federal court of competent jurisdiction is binding and conclusive upon the parties in all subsequent litigation between them in the courts of the state where the federal tribunal held its session, and equally in the courts of any other state, and is not subject to review

[374] Casé v. Huey, 26 Kan. 553.

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or impeachment in any of such courts.[875] The rule on this subject enunciated by the supreme court of the United States is as follows: The judgments and decrees of the federal courts, sitting in a particular state, are to be accorded in the courts of 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 and 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 federal court is a federal question, within the jurisdiction of the supreme court of the United States on a writ of error to the court of highest authority of the state.[876] "The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the constitution in the government of the United States or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the constitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial

[875] Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. (C. C.) 46 Fed. 584; Durant v. Essex Co., 90 Mass. 103, 85 Am. Dec. 685; Dennison v. Hyde, 6 Conn. 508; Rounds v. Providence & S. S. S. Co., 14 R. I. 344; Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334; In re Williamson, 26 Pa. 9, 67 Am. Dec. 374; Wandling v. Straw, 25 W. Va. 692; Niblett v. Scott, 4 La. Ann. 246; Pasteur v. Lewis, 39 La. Ann. 5, 1 South. 307; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522; New York & T. Land Co. v. Votaw (Tex. Civ. App.) 52 S. W. 125; Ruegger v. Indianapolis & St. L. R. Co., 103 Ill. 449; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Harrison v. Phœnix Mut. Life Ins. Co., 83 Ind. 575; Moore v. Jeffers, 53 Iowa, 202, 4 N. W. 1084; City of Detroit v. Ellis, 103 Mich. 612, 61 N. W. 886; Copenhaver v. Stewart, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; Semple v. Hagar, 27 Cal. 163.

[876] Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; Pittsburgh, C., C. & St. L. Ry. Co. v. Long Island Loan & Trust Co., 172 U. S. 493, 19 Sup. Ct. 238, 43 L. Ed. 528; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619.

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jurisdiction."[877] The federal courts, therefore, are not to be regarded in the light of foreign tribunals by the state courts; and consequently, in an action brought in a state court upon the judgment of a federal court held in the same or any other state, a party cannot set up and relitigate defenses which were pleaded and decided against him in the first action.[878] And since a federal court is neither a foreign court nor a court of inferior jurisdiction, nil debet is not a good plea to an action on a judgment rendered by such a court.[879]

To illustrate these rules,—a judgment in mandamus by a United States circuit court, directing a state county court to issue warrants for county bonds in aid of a railroad payable out of the general revenues of the county, must be taken as an adjudication of the status of said bonds by a court of competent jurisdiction, and is not reviewable in a state court.[880] In another case plaintiff brought an action in a state court, and a judgment was rendered against him. At his request, the judgment was vacated, and the cause set down for another trial. Before the second trial, he dismissed the action, and subsequently brought a like suit against the same parties in the federal court, which court held that the former proceedings barred the plaintiff from maintaining the proceeding in that tribunal. Afterwards, the plaintiff brought a similar action against the same parties in the state court. But it was held that the decision of the federal court was conclusive and precluded the plaintiff from maintaining such action.[881] It makes no difference that a judgment rendered by a federal court is such as could not have been recovered by the plaintiff in a state court. Thus, the fact that a judgment for personal

[877] Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346.

[878] Thomson v. Lee County, 22 Iowa, 206; Niblett v. Scott, 4 La. Ann. 246; Barney v. Patterson's Lessee, 6 Har. & J. (Md.) 182. But judgments of the federal courts are not domestic judgments, in the sense that it cannot be shown on collateral attack that the court failed to acquire jurisdiction over the person of the defendant; and the fact that he was a resident of the state does not change the rule. League v. Scott (Tex. Civ. App.) 61 S. W. 521.

[879] Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246.

[880] State v. Trammel, 106 Mo. 510, 17 S. W. 502; Garland County v. Hot Spring County, 68 Ark. 83, 56 S. W. 636.

[881] Hyatt v. Challis, 59 Kan. 422, 53 Pac. 467.

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injuries was recovered against a lessee in a federal court having jurisdiction, and could not have been recovered had the person injured sued in the state court, cannot defeat the lessee's right to sue the sublessee, whose negligence caused the injury, in a state court, since the latter court must give the same force and effect to judgments of the federal courts as to those of the state courts.[382]

§ 938a. Authentication of Federal Judgments.

Since the act of congress for carrying into effect the "full faith and credit" clause of the constitution (Rev. St. U. S. § 905) does not specifically apply to judgments of the federal courts, in respect to the mode of authentication, the question early arose as to the manner in which they should be proved in the courts of the states. It was held in Mississippi that such judgments must either be construed to be impliedly embraced in the act of congress, or else they must be esteemed as foreign judgments, but in either case the judgment must be properly authenticated; and in a suit in a state court the certificate of a discharge in bankruptcy by a clerk of a United States district court, under the seal of the court, was not admissible in evidence without the authentication of the clerk's certificate by the judge.[383] But, as stated in a later case, it has been the uniform practice, ever since 1790, to follow the requirements of Rev. St. § 905, as to the certificate of the clerk and judge in authenticating the records and judicial proceedings of the United States courts, though that section does not include them in terms; and an authentication which conforms thereto is sufficient.[384]

§ 938b. Judgment of Federal Court as Foundation for Creditor's Bill.

In the state of New York, it is held that a creditor's bill will not lie in the courts of that state upon a judgment recovered in a federal court; the jurisdiction is regarded as so far foreign that the state courts will not recognize the proceedings of the national courts as a

[382] Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685.

[383] Dorsey v. Maury, 10 Smedes & M. 298.

[384] O'Hara v. Mobile & O. R. Co., 22 C. C. A. 512, 76 Fed. 718.

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basis upon which to afford relief.[385] In Illinois, the earlier decisions inclined to the same view,[386] but later rulings of the courts of that state appear to favor the doctrine that a creditor's bill may be based upon a judgment of a federal court as well as upon one rendered by a court of the state itself.[387] And the latter rule is now recognized and accepted by the courts of all the other states.[388]

In regard to the converse question,—the right to maintain a creditor's bill in a federal court on a judgment of a state court,—the decisions of the United States courts reflect the rulings in the courts of the states where they are held. Thus, in New York, the federal courts refuse to take cognizance of a creditor's bill founded on a judgment of another state. They hold that it must be sued over before it can become a judgment for the purpose of any remedy within their jurisdiction, either at law or in equity.[389] But the courts of the United States elsewhere all agree in the view that a creditor's bill will lie in a federal court on a judgment recovered in a state court, the necessary conditions as to jurisdiction and the plaintiff's right to relief being shown to exist.[390] It makes no difference whether the

[385] Tarbell v. Griggs, 3 Paige, 207, 23 Am. Dec. 790; Davis v. Bruns, 23 Hun, 648.

[386] Steere v. Hoagland, 39 Ill. 264; Winslow v. Leland, 128 Ill. 304, 21 N. E. 588.

[387] See Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861. In this case, an attempt is made to distinguish the rulings in the earlier cases cited in the preceding note. It is said that it was held in those cases that proof of a judgment rendered in a federal court (that being a court of another jurisdiction) was not sufficient evidence of a judgment at law or in equity to sustain a creditor's bill brought in a state court. But this, the court thought, was altogether a different matter from holding that the state court would not have jurisdiction of such a bill founded on such a judgment. It might render a decree on insufficient evidence, but that would be a mere error in no way affecting the jurisdiction of the court.

[388] Brown v. Bates, 10 Ala. 432; Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412; Bush v. Arnold, 50 Mo. App. 8; First Nat. Bank v. Sloman, 42 Neb. 350, 60 N. W. 589, 47 Am. St. Rep. 707; Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727.

[389] Claflin v. McDermott (C. C.) 12 Fed. 375; Walser v. Seligman (C. C.) 13 Fed. 415, 21 Blatchf. 130.

[390] Wilkinson v. Yale, 6 McLean, 16, Fed. Cas. No. 17,678; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79; Bidwell v. Huff (C. C.) 103 Fed. 362.

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judgment was recovered in a court of that state wherein the federal court sits or of some other state.[391]

In New York, the return of an execution unsatisfied upon a judgment rendered by a federal court within the state does not authorize the institution of supplementary proceedings thereon; and this, although a statute of the state provides that a transcript of a judgment of a federal court sitting within the state may be filed with the county clerk, who must docket it as if it had been rendered by the supreme court of the state; for this statute does not render the judgment a domestic judgment in such sense that executory process may be issued upon it.[392] But in some other states it appears that a different rule obtains.[393]

§ 938c. State Judgments in Federal Courts.

A judgment rendered by a state court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States. In the latter court, the controversy will not be open to re-examination on the merits, and the judgment of the state court cannot be impeached for any error or irregularity, but must receive the same faith and credit which would be accorded to it in the courts of the state where it was rendered.[394] The act of congress applicable to the subject provides

[391] Merchants' Nat. Bank v. Chattanooga Const. Co. (C. C.) 53 Fed. 314.

[392] Tompkins v. Purcell, 12 Hun, 662.

[393] See Ballin v. Loeb, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742.

[394] Caldwell v. Carrington, 9 Pet. 86, 9 L. Ed. 60; Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 Sup. Ct. 614, 27 L. Ed. 636; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Kaukauna Water-Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Forsyth v. City of Hammond, 166 U. S. 506, 17 Sup. Ct. 965, 41 L. Ed. 1095; Harper v. Harper, 3 U. S. App. 328, 3 C. C. A. 415, 53 Fed. 35; Elder v. Richmond G. & S. Min. Co., 7 C. C. A. 354, 58 Fed. 536; Clay v. Deskins, 8 U. S. App. 661, 11 C. C. A. 229, 63 Fed. 330; Compton v. Jesup, 31 U. S. App. 486, 15 C. C. A. 397, 68 Fed. 263; Loyd v. Waller, 20 C. C. A. 548, 74 Fed. 601; Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429; State Trust Co. v. De LaVergne Refrigerating Mach. Co., 44 C. C. A. 556, 105 Fed. 468; Amory v. Amory, 3 Biss. 266, Fed. Cas. No. 334; Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Montford v. Hunt,

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that "the records and judicial proceedings of any state or territory . . . . shall be proved or admitted in any other court within the United States, by the attestation of the clerk, ... and the said records and judicial proceedings, so authenticated, 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 which they are taken." [395] This act of congress, it has been said, "goes perhaps further than the constitutional requirement, which relates to the faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, inasmuch as it declares the effect of the records and judicial proceedings of the states, when authenticated as provided, 'in every court within the United States,' thus making its provisions applicable to the national courts as well as to the courts of the states." But "the power of congress to prescribe the manner in which the records of the states shall be proved in the national courts, and the effect which shall be given to them, is independent of the constitutional provision." [396] At the same time, while the courts of the United States are not foreign tribunals in their relation to the state courts, they are tribunals of a different sovereignty, and they are bound to give to a judgment of a state court only the same faith and credit to which it is entitled in the courts of another state.[397] In a proceeding to enforce a liability created by a state statute, the federal courts will give to a judgment of a state court the same effect, either as evidence or as a cause of action, which is given to it in like proceedings in the courts of the

3 Wash. C. C. 28, Fed. Cas. No. 9,725; Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243; In re Dunn, 2 Hughes, 169, Fed. Cas. No. 4,172; Owens v. Gotzian, 4 Dill. 436, Fed. Cas. No. 10,634; Howards v. Selden (C. C.) 5 Fed. 465; Bloch v. Price (C. C.) 32 Fed. 447; Russell & Co. v. Lamb (C. C.) 49 Fed. 770; De Chambrun v. Campbell (C. C.) 54 Fed. 231; Pennsylvania R. Co. v. National Docks & N. J. J. C. R. Co. (C. C.) 58 Fed. 929; Lake Erie & W. R. Co. v. Smith (C. C.) 61 Fed. 885; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 62 Fed. 945; Louisville Trust Co. v. City of Cincinnati (C. C.) 73 Fed. 716; Philbrook v. Newman (C. C.) 85 Fed. 139; Montgomery v. McDermott (C. C.) 87 Fed. 374; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79.

[395] Rev. St. U. S. § 905.

[396] Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206.

[397] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

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state whose laws are invoked in the enforcement.[398] But a decree of a state court is not a bar to a suit in a federal court on a question which, although it might possibly have been litigated in the state court if properly pleaded, was in fact neither pleaded nor litigated.[399]

It should be observed that the rule of res judicata as between federal and state courts is entirely separate and distinct from the rule which requires the courts of the United States to adopt and follow the decisions of the state courts on questions involving the construction of state statutes and the like, but exempts them from following such decisions on questions of general commercial law, general equity jurisprudence, and some other subjects. A final decision in a state court bars a subsequent suit in a federal court on the same cause of action as effectually when the issues involve questions of general commercial law, or general equity jurisprudence, as when they involve the interpretation of a state constitution or law, or some local law, usage, or custom. "State-court judgments are as much entitled to respect from federal courts as federal courts from those of the state. A precedent is one thing; a judgment, another. The decision of one case may become a precedent in another case. This depends upon the analogies of the cases, but the cases are and must be different. The question of res judicata is not like a precedent in fact or principle. A precedent may apply to it and control it, but the plea of res judicata belongs to but one cause of action. There may be, and must be, two or more suits in the same forum, or in different forums, but it must, in each suit, be essentially the same cause of action." [400]

§ 939. Jurisdiction May be Questioned.

When a judgment rendered by a state court is sued on in a federal court, or set up in bar of an action, the party supposed to be bound by it may aver and prove, even in contradiction of the record, any fact showing that the court had no jurisdiction over him; as, that he was not a resident within the territorial jurisdiction of the court

[398] Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038.
[399] De Chambrun v. Schermerhorn (C. C.) 59 Fed. 504.
[400] Fuller v. Hamilton County (C. C.) 53 Fed. 411.

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rendering the judgment, that he was not personally served with process within that jurisdiction, or that the attorney who appeared for him had no authority to do so. If he succeeds in establishing a want of jurisdiction, the judgment loses all its force as evidence or as a bar.[401] The courts of the United States do not regard as valid, or as importing verity, a judgment in personam rendered by a state court for the recovery of a debt or demand, unless the defendant either entered a voluntary appearance, or he or some one authorized to receive service of process for him was personally cited, within the jurisdiction of the court, to appear in the action.[402] Thus, a decree of a state court, in an action not in rem, rendered against a citizen of another state, who was cited by publication only, as directed by the local statute, is no bar to an action by him in a federal court concerning the same subject-matter.[403]

State courts also 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 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.[404] In Minnesota, it has been held that a judgment of the United States circuit court for the district of Minnesota stands on

[401] Lytle v. Town of Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed. 78; Hekking v. Pfaff, 33 C. C. A. 328, 91 Fed. 60, 43 L. R. A. 618; Wood v. City of Mobile, 47 C. C. A. 9, 107 Fed. 846; Galpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206; Graham v. Spencer (C. C.) 14 Fed. 603; Swift v. Meyers (C. C.) 13 Sawy. 583, 37 Fed. 37; L'Engle v. Gates (C. C.) 74 Fed. 513.

[402] St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[403] Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; Cooper v. Newell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808.

[404] Slocum v. Wheeler, 1 Conn. 429; Pasteur v. Lewis, 39 La. Ann. 5, 1 South. 307; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Gibson v. Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729; Southern

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the same footing as a domestic judgment of a court of record in the state and cannot be impeached in a collateral proceeding unless a want of jurisdiction appears affirmatively on the record.[405] But the cases do not furnish any sufficient reason for discriminating between federal courts within the state and federal courts without the state, in respect to the validity and conclusiveness of their judgments. It has also been held that a judgment rendered in one federal court cannot be attacked collaterally in another because the jurisdictional averment as to the citizenship of the plaintiff was insufficient.[406] Finally, when the question of jurisdiction is one depending upon some local law or statute, and is raised in the court which rendered the judgment, and there decided, its determination, upholding its own jurisdiction, is just as binding and conclusive as the decision on the merits. Thus, a decision by a state court sustaining personal service of process made while the defendant was attending court as a party is binding on the federal courts, and the judgment founded upon it cannot be collaterally attacked therein on the ground that such service was void.[407]

§ 939a. Lis Pendens and Priority of Decision.

As between courts of the same system, exercising a concurrent jurisdiction, the pendency of a prior suit between the same parties upon the same subject-matter will be pleadable in bar or in abatement; but this rule does not extend to courts of a foreign jurisdiction.[408] State courts and the federal courts are not strictly speaking foreign to each other, but they are tribunals of different sovereignties; and therefore we have the well-settled rule that the mere pendency of a prior suit in a state court, though it be between the same parties and upon the identical cause of action, will not prevent a federal court from taking jurisdiction, nor be effective as a plea

Ins. Co. v. Wolverton Hardware Co. (Tex.) 19 S. W. 615; Hovey v. Elliott, 61 N. Y. Super. Ct. 409, 21 N. Y. Supp. 108.

[405] Sandwich Manuf'g Co. v. Earl, 56 Minn. 390, 57 N. W. 938.

[406] Rice v. Adler-Goldman Commission Co., 18 C. C. A. 15, 71 Fed. 151.

[407] Sipe v. Copwell, 8 C. C. A. 419, 59 Fed. 970.

[408] Latham v. Chafee (C. C.) 7 Fed. 520; Hospes v. O'Brien (C. C.) 24 Fed. 145; supra, §§ 690, 865.

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in bar or in abatement; and vice versa.[409] But while the defendant in a suit brought in a federal court cannot demand, as a matter of course, that the action shall abate upon his showing the pendency of a similar suit in a state court, yet it is always within the competence of the federal court to refuse to entertain a suit between the same parties, when the issues and the interests involved in the two suits are the same.[410] And it has been declared that, in cases of concurrent jurisdiction, it is a fixed rule of the federal courts never to take jurisdiction of a cause which presents the same issues and seeks the same relief as are presented and sought in a cause pending in a state court.[411]

And where suits upon the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, without any regard to the question which suit was first commenced.[412]

[409] Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383; Liggett v. Glenn, 2 C. C. A. 286, 51 Fed. 381; City of North Muskegon v. Clark, 10 C. C. A. 591, 62 Fed. 694; Gilmour v. Ewing (C. C.) 50 Fed. 656; Sharon v. Hill (C. C.) 22 Fed. 28; Walsh v. Durkin, 12 Johns. (N. Y.) 99; Litchfield v. City of Brooklyn, 13 Misc. Rep. 693, 34 N. Y. Supp. 1090; State v. Boyce, 72 Md. 140, 19 Atl. 366, 7 L. R. A. 272, 20 Am. St. Rep. 458; Pomeroy v. Chandler (N. J.) 30 Atl. 1092; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Davis v. Morton, 4 Bush (Ky.) 442, 96 Am. Dec. 309; Allen v. Watt, 69 Ill. 655; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Lockwood v. Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

[410] Martin v. Baldwin (C. C.) 19 Fed. 340.

[411] State Trust Co. v. National Land Imp. & Manuf'g Co. (C. C.) 72 Fed. 575, following Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961.

[412] Nugent v. Philadelphia Traction Co. (C. C.) 87 Fed. 251; United States v. Dewey, 6 Biss. 501, Fed. Cas. No. 14,956; Duden v. Maloy (C. C.) 43 Fed. 407. Where a suit is removed to a federal court after the state supreme court has passed upon a demurrer filed in the suit, the decision on such demurrer is binding on the federal court. Lookout Mountain R. Co. v. Houston (C. C.) 44 Fed. 449. But the fact that a judgment in the state court is res judicata of the questions litigated in an action removed to the federal court does not deprive the latter court of jurisdiction where a federal question is involved. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 62 Fed. 945.

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§ 939b. Judgments of Territorial Courts.

An act of congress of 1804 provides for the manner of attesting or authenticating the records and judicial proceedings of the courts of "any state or territory, or of any country subject to the jurisdiction of the United States;" and provides for their admission as evidence, when so authenticated, "in any other court within the United States," and declares that they 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 which they are taken."[413] Under these provisions, the judgments and judicial records of the courts of the several territories stand on the same footing as those of the courts of a state, and are equally conclusive, and equally entitled to faith and credit, when made the basis of a claim or defense in any court within the United States, whether state or national.[414] But in an action in a state court, on a judgment recovered in one of the territories, the defendant may show, notwithstanding recitals in the record to the contrary, that the court had no jurisdiction of the subject-matter, or of the defendant.[415]

Although the District of Columbia is not technically a "state" nor yet a "territory," it is within the provisions of the act of congress referred to. The supreme court of the District is a court of the United States, and its judgments and decrees, when suit is brought thereon in any state of the Union, or when they are set up as a defense or a bar, are conclusive upon the defendant, under the legislation of congress, except that they may be impeached for want of jurisdiction or for such other cause as would be sufficient to set them aside in the courts of the District.[416]

[413] Rev. St. U. S. § 905.

[414] Hughes v. Davis, 8 Md. 271; Suesenbach v. Wagner, 41 Minn. 108, 42 N. W. 925; Coughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005; Ehrngren v. Gronlund, 19 Utah, 411, 57 Pac. 268.

[415] Gibson v. Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729.

[416] Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; Johnson v. Dobbins, 12 Phila. (Pa.) 518, 5 Wkly. Notes Cas. 537; Hovey v. Elliott, 61 N. Y. Super. Ct. 409, 21 N. Y. Supp. 108.

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§ 939c. Judgments of Indian Courts.

The treaties made by the United States with the Creeks, Cherokees, Choctaws, and other tribes of civilized Indians, have guaranteed to them, among other things, the right to establish and maintain courts of justice. These Indian courts have exclusive jurisdiction, both civil and criminal, where only members of the tribe, by nativity or adoption, are concerned; but jurisdiction of cases in which citizens of the United States are parties is reserved to the appropriate federal courts.[417] The authorities have fully established the rule that the judgments of the courts of the Indian nations in the Indian Territory, when proceeding within their jurisdiction, stand on the same footing with those of the federal territorial courts and are entitled to the same faith and credit.[418] In respect to the question of personal jurisdiction, "it is competent for a white man to waive the treaty and statutory stipulations exempting him from the jurisdiction of the Cherokee courts; and when he enters a general appearance to an action pending in those courts, and pleads to the merits, and there is a trial upon such plea, he thereby waives the exemption, and submits himself to the jurisdiction of the court, and will not afterwards be heard to contest the validity of the proceedings and judgment of the Cherokee court upon the ground that it had no jurisdiction of his person."[419] But just as a judgment rendered by a court of a state may be impeached for want of jurisdiction, when relied on in a court of another state, or in a federal court, so it is competent, in an action in a state or national court, to attack collaterally, on the ground of lack of jurisdiction, a judgment rendered by a court of one of the Indian nations.[420] But in deter-

[417] See 7 Stat. 478; 14 Stat. 799; 25 Stat. 783, § 6; 26 Stat. 81; Ex parte Mayfield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635.

[418] Standley v. Roberts, 19 U. S. App. 407, 8 C. C. A. 305, 59 Fed. 836; Mehlin v. Ice, 12 U. S. App. 305, 5 C. C. A. 403, 56 Fed. 12; Cornells v. Shannon, 11 C. C. A. 465, 63 Fed. 305; Exendine v. Pore, 6 C. C. A. 112, 56 Fed. 777; Mackey v. Coxe, 18 How. 100, 15 L. Ed. 299.

[419] Mehlin v. Ice, 12 U. S. App. 305, 5 C. C. A. 403, 56 Fed. 12; Exendine v. Pore, 6 C. C. A. 112, 56 Fed. 777; Cornells v. Shannon, 11 C. C. A. 465.

[420] Raymond v. Raymond, 1 Ind. Ter. 334, 37 S. W. 202.

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mining the validity of a judgment rendered by one of these Indian courts, on a plea of res judicata, the court will disregard informalities, and enforce the intent of the judgment, gathered broadly from the entire proceeding.[421]

[421] Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584.

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CHAPTER XXIII.

ASSIGNMENT OF JUDGMENTS.

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§ 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

[1] Bloomstock v. Duncan, 2 McCord (S. C.) 318, 13 Am. Dec. 728; Edmonds v. Montgomery, 1 Iowa, 143.

[2] U. S. v. Samperyac, Hempst. 118, Fed. Cas. No. 16,216a.

[3] Moore v. Ireland, 1 Ind. 531; Reid v. Ross, 15 Ind. 265; Forbes v. Tiffany, 4 Ind. 204; Edmonds v. Montgomery, 1 Iowa, 143; Elliott v. Waring, 5

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is 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. Parties to Assignment of 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.[8] And it has been held that this may be done by a national bank.[9]

So also, an ordinary business corporation may take an assignment of a judgment and sue thereon.[10] The purchase of a judgment by

T. B. Mon. (Ky.) 339, 17 Am. Dec. 69; Mayor, etc., of City of Macon v. Trustees of Bibb County Academy, 7 Ga. 204; McKinney v. Mehaffey, 7 Watts & S. (Pa.) 276.

[4] Weir v. Pennington, 11 Ark. 745.

[5] Brice v. Taylor, 51 Ark. 75, 9 S. W. 854.

[6] Mayer v. Blease, 4 S. C. 10; Rice v. Troup, 62 Miss. 186; Clark v. Kingsland, 1 Smedes & M. (Miss.) 256; Head v. Gervais, 1 Walk. (Miss.) 431, 12 Am. Dec. 577; Wilson v. Wadleigh, 36 Me. 496; Maxwell v. Owen, 7 Cold. (Tenn.) 630.

[7] Peacock v. Pembroke, 8 Md. 348.

[8] Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66.

[9] Emory v. Joice, 70 Mo. 537.

[10] Capital Lumbering Co. v. Learned, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

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a constable, in a case where no execution comes to him for collection, is not per se void at common law.[11] It should be remembered that the payment of a judgment by one primarily liable is an absolute satisfaction, though the judgment is assigned to him.[12] But a surety on the debt for which the judgment was recovered may hold the judgment under an assignment, after paying to the clerk of the court the amount necessary to satisfy the judgment, if his intention not to pay the judgment was clear.[13]

§ 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 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.[14] 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.[15]

[11] Spaugh v. Huffer, 14 Ind. 305.

[12] Zimmerman v. Gaumer, 152 Ind. 552, 53 N. E. 829.

[13] Anglo-American Land Mortgage & Agency Co. v. Bush, 84 Iowa, 272, 50 N. W. 1063.

[14] Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Mackey v. Mackey, 43 Barb. (N. Y.) 58; Moore v. Nowell, 94 N. C. 265. See, also, Kessel v. Albetis, 56 Barb. (N. Y.) 362; Risley v. Phœnix Bank, 11 Hun (N. Y.) 484; Bridge v. Johnson, 5 Wend. (N. Y.) 342. A judgment recovered in a breach of promise suit may be assigned. Stewart v. Lee, 70 N. H. 181, 46 Atl. 31.

[15] Wright v. Parks, 10 Iowa, 342; Rufe v. Commercial Bank, 40 C. C. A.

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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.[16] 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 subsequent judgment to the assignee. He has no interest in it, and payment to the judgment-plaintiff will satisfy it.[17]

§ 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.[18] 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

27, 99 Fed. 650; Dignan v. Dignan (N. J.) 22 Atl. 1092; Bechtel v. Lauer Brewing Co., 21 Pa. Co. Ct. R. 449; Weire v. City of Davenport, 11 Iowa, 49, 77 Am. Dec. 132; Robinson v. Weeks, 6 How. Prac. (N. Y.) 161; Hudson v. Morriss, 55 Tex. 595; Dugas v. Mathews, 9 Ga. 510, 54 Am. Dec. 361.

[16] Comegys v. Vasse, 1 Pet. 213, 7 L. Ed. 108; Crouch v. Gridley, 6 Hill (N. Y.) 250; Kellogg v. Schuyler, 2 Denio (N. Y.) 73. But compare Mackey v. Mackey, 43 Barb. (N. Y.) 58; North Chicago St. R. Co. v. Ackley, 58 Ill. App. 572.

[17] Gamble v. Central R. & Banking Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276; Rice v. Stone, 1 Allen (Mass.) 566; Lawrence v. Martin, 22 Cal. 173. Compare Pratt v. Werthelmer, 39 Hun (N. Y.) 463.

[18] Love v. Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Loomis v. Robinson, 76 Mo. 488; Burnett v. Crandall, 63 Mo. 410; Fullmer v. Pine Tp., 17 Pa. Co. Ct. R. 482.

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right to process for its collection. But it was held that the undivided judgment could not be so separated into distinct parts.[19] 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.[20] It should also be observed that a partial assignment of a judgment will be binding on the assignor even though made without the consent of the judgment debtor; that the latter may ratify a partial assignment of a judgment against him, and that he will be held to have done so if he pleads the assignment as a defense to proceedings by the judgment creditor to enforce it.[21] In some states, also, the doctrine prevails that an assignment of a part of a judgment is enforceable in equity,[22] and in Minnesota, such an assignment is valid if placed on the record as provided by the statute.[23] 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 are 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.[24] So, where, in an action against two defendants, separate judgments are rendered against each, an assignment of the judgment against one defendant gives the assignee no power to release the other defendant.[25] 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 sufficient to pay them all, they will take pro rata

[19] Hopkins v. Stockdale, 117 Pa. 365, 11 Atl. 368.

[20] Wood v. Wallace, 24 Ind. 226. And see Godbold v. Kirkpatrick, 26 S. C. 607, 1 S. E. 156.

[21] McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852.

[22] Line v. McCall, 126 Mich. 497, 85 N. W. 1089; Pittsburg, C., C. & St. L. Ry. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924. And see Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757.

[23] Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372.

[24] Hanks v. Harris, 29 Ark. 323.

[25] Whittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708.

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shares in the fund, and not be paid in full in the order of the assignments.[26]

§ 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.[27] 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.[28] But in this case the intent to assign the judgment must be clearly shown.[29] 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.[30] An assignment of a judgment recovered in a United States court is not a "judicial proceeding," within the meaning of a statute giving full faith and credit to the judicial proceedings of the federal courts, when attested by the clerk and certified by the judge, and hence is

[26] Moore's Appeal, 92 Pa. 309.

[27] Briggs v. Dorr, 19 Johns. (N. Y.) 95; Prescott v. Hull, 17 Johns. (N. Y.) 284; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Ford v. Stuart, 19 Johns. (N. Y.) 342; Clark v. Moss, 11 Ark. 736; Weir v. Pennington, Id. 745; Stoddard v. Benton, 6 Colo. 508; Brahan v. Ragland, 3 Stew. (Ala.) 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; Smith v. Peck, 128 Cal. 527, 61 Pac. 77; Bartlett v. Yates, 52 N. C. 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. C. 351. In Texas, a judgment may be transferred by parol, but must be enforced in the name of the original plaintiff. Garvin v. Hall, 83 Tex. 295, 18 S. W. 731. And the statute of that state providing that the sale of a judgment of any court of record shall be evidenced by a written transfer, does not render void the verbal assignment of a judgment, as between the parties. Putnam v. Capps, 6 Tex. Civ. App. 610, 25 S. W. 1024. A judgment on a promissory note extinguishes its negotiability, and is only transferable as other credits are. Newman v. Irwin, 43 La. Ann. 1114, 10 South. 181.

[28] Dunn v. Snell, 15 Mass. 481.

[29] Thomas v. Porter, 3 Bush (Ky.) 177.

[30] Emory v. Joice, 70 Mo. 537.

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not admissible in evidence without proper proof of its execution.[31] It is also held that a written assignment of a judgment is not valid and enforceable as against third persons without a delivery of the assignment to the assignee or to some one authorized by him to accept it.[32] Authority to assign a judgment can be conferred by power of attorney,[33] and the power of attorney need not be recorded.[34] An assignment is not vitiated by mistakes in the description if it can be shown what judgment was meant.[35] But whatever mode of assignment 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.[36]

§ 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.[37] 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

[31] Wonderly v. Lafayette Co., 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474.

[32] Williams v. West Chicago St. R. Co., 85 Ill. App. 305. And see Baker v. Secor, 55 Hun, 605, 7 N. Y. Supp. 803.

[33] Caley v. Morgan, 114 Ind. 350, 16 N. E. 790; Rufe v. Commercial Bank, 40 C. C. A. 27, 99 Fed. 650.

[34] Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.

[35] Griffin v. Camack, 36 Ala. 695, 76 Am. Dec. 344; Aylesworth v. Brown, 10 Barb. (N. Y.) 167; People v. Fleming, 2 N. Y. 484; Klemme v. McLay, 68 Iowa, 158, 26 N. W. 53.

[36] Pike v. Bright, 29 Ala. 332. And see Vanderpool v. Vanderpool, 162 Pa. 394, 29 Atl. 910.

[37] Burgess v. Cave, 52 Mo. 43. See Blackman v. Joiner, 81 Ala. 344, 1 South. 851; Gardner v. Mobile & N. W. R. Co., 102 Ala. 635, 15 South. 271, 48 Am. St. Rep. 84; Knapp, Stout & Co. v. Standley, 45 Mo. App. 264; Wise v. Loring, 54 Mo. App. 258; Chemical Bank v. Bulkley, 68 Mo. App. 327; Snell v. Maddox, 20 Ind. App. 169, 49 N. E. 856.

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title in the assignee as will enable him to use it as a set-off to a judgment held by the defendant against him.[38] 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.[39]

§ 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.[40] 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.[41] 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, 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.[42] 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.[43] In some

[38] Adams v. Lee, 82 Ind. 587.

[39] Baker v. Stonebraker, 34 Mo. 172.

[40] Frybarger v. Andre, 106 Ind. 337, 7 N. E. 5.

[41] Wright v. Parks, 10 Iowa, 342.

[42] Hussey v. Culver, 53 Hun, 637, 6 N. Y. Supp. 466. But compare Teetor v. Abden, 2 Ind. 183.

[43] Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19.

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of the states, a judgment, as property, may be taken in execution and sold.[44] But according to other authorities, the judgment-creditor's interest can be reached only by summoning the judgment-debtor as garnishee.[45]

§ 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.[46] But the cases generally agree that the assignment carries with it the debt or claim on which the judgment was based,[47] and the right to stand in the creditor's place as regards the means of its collection and enforcement,[48] together with any incidental rights or advantages, existing at the time, such as the benefit of an appeal-bond.[49] And the assignee's rights are not affected by the fact that the consideration was less than the face of the judgment;[50] nor even by fraud in the transfer, unless the judgment-debtor can show that he was injured by such fraud.[51]

[44] Ochiltree v. Missouri, I. & N. Ry. Co., 49 Iowa, 150; Safford v. Maxwell, 23 La. Ann. 345; Adams v. Hackett, 7 Cal. 187.

[45] Osborn v. Cloud, 23 Iowa, 104, 92 Am. Dec. 413; McBride v. Fallon, 65 Cal. 301, 4 Pac. 17.

[46] Hossack v. Underwood, 55 Ill. 123; Hanks v. Harris, 29 Ark. 323; Hewett v. Outland, 37 N. C. 438.

[47] Bolen v. Crosby, 49 N. Y. 183; Elsworth v. Caldwell, 18 Abb. Prac. (N. Y.) 20; Pratt v. Wertheimer, 39 Hun (N. Y.) 463; Vila v. Weston, 33 Conn. 50. Even if the judgment was void, the assignment transfers the original debt. Brown v. Scott, 25 Cal. 189.

[48] Burns v. Bangert, 16 Mo. App. 22; Applegate v. Mason, 13 Ind. 75; Thompson v. First State Bank, 102 Ga. 696, 29 S. E. 610; Avery v. Ackart, 20 Misc. Rep. 631, 46 N. Y. Supp. 1085. See infra, § 951.

[49] Ullmann v. Kline, 87 Ill. 268. But probably not a bond in attachment. Forrest v. O'Donnell, 42 Mich. 556, 4 N. W 259. And the mere assignment of a judgment does not carry with it a right of action which has accrued to the judgment creditor against the clerk of the court for his failure properly to index the judgment. so as to give it a lien on the debtor's lands. Redmond v. Staton, 116 N. C. 140, 21 S. E. 186.

[50] Harmon v. Hope, 87 N. Y. 10, Inglehart v. Thousand Island Hotel Co., 32 Hun (N. Y.) 377. Compare Campion v. Friedberg, 55 Ill. App. 450.

[51] Long v. Klein, 35 La. Ann. 384.

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§ 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.[52] 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.[53] 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.[54] 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.[55] Of course the judgment-creditor, after the assignment, cannot receive payment of the judg-

[52] Miller v. Dugan, 36 Iowa, 433; Lile v. Hopkins, 12 Smedes & M. (Miss.) 299. 51 Am. Dec. 115; Furniss v. Ferguson, 15 N. Y. 437; Emerson v. Knapp, 75 Mo. App. 92; Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528. A warranty that the judgment assigned is valid is broken by the transfer of a voidable judgment; and hence, where the judgment is afterwards set aside by the decision of an appellate court, the purchaser may recover the purchase price from the assignor. Emerson v. Knapp, 75 Mo. App. 92.

[53] Furniss v. Ferguson, 15 N. Y. 437.

[54] Miller v. Dugan, 36 Iowa, 433; Scofield v. Moore, 31 Iowa, 241. And see Gore v. Poteet, 101 Tenn. 608, 50 S. W. 754. In Mississippi, it is said that the rule of caveat emptor applies to the purchaser of a judgment as well as to purchasers of other classes of personal property. Cox v. Palmer, 60 Miss. 793.

[55] Robinson's Adm'x v. White, 4 Litt. (Ky.) 235; Reid v. Ross, 15 Ind. 265; Mohler's Appeal, 5 Pa. 418, 47 Am. Dec. 413; Findley v. Smith, 42 W. Va. 299, 26 S. E. 370.

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ment 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 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." [56] 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.[57]

§ 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.[58] 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.[59]

[56] Booth v. Farmers' & Mechanics' Nat. Bank, 50 N. Y. 396.

[57] Baker v. Secor, 55 Hun, 605, 7 N. Y. Supp. 803.

[58] Gaullagher v. Caldwell, 22 Pa. 300, 60 Am. Dec. 85; Lee v. Delehanty, 25 Hun (N. Y.) 197; Noble v. Thompson Oil Co., 79 Pa. 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's Heirs, 6 Mart. N. S. (La.) 296, 17 Am. Dec. 183; Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528; Commonwealth v. Burnett (Ky.) 44 S. W. 966; Cantrell v. Ford (Tenn.) 46 S. W. 581; Clark v. Baltimore & O. R. Co., 3 Ohio N. P. 172; Ihorn v. Wallace, 88 Ill. App. 562. 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. Prac. (N. Y.) 161; Richardson v. Ainsworth, 20 How. Prac. (N. Y.) 530; Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655. But a different rule obtains in other states. Drumm v. Sherman, 20 La. Ann. 96. And see Garey v. Sangston, 64 Md. 31, 20 Atl. 1034. As against an attaching creditor seeking to subject a judgment to the payment of his claims, notice to the judgment defendant of an assignment of it is not necessary to perfect the assignee's right to the proceeds of the judgment. Hutchinson v. Brown, 8 App. D. C. 157.

[59] Stoddard v. Benton, 6 Colo. 508, Ullmann v. Kline, 87 Ill. 268; Hughes

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It is not necessary that direct notice of the assignment be given by the assignee; it is sufficient if the information is given under circumstances and in terms calculated to arrest the attention of the debtor. Or, as the rule is otherwise stated, it is necessary that the debtor should either have actual notice of the assignment or notice of such facts as suffice to put him upon inquiry.[60] Where the judgment debtor hears mere reports or rumors to the effect that the judgment has been assigned to some person not named, and applies to the judgment creditor for information on the point, who declines to tell him, there is no such notice to him as the rule contemplates.[61] Also it is held that the mere entry of the assignment on the record of the judgment 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 records. Not so with the debtor himself. The judgment docket is not for his benefit." [62]

§ 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.[63] The new rule, how-

v. Trahern, 64 Ill. 48; Germania Life Ins. Co. v. Koehler, 59 Ill. App. 592; Laughlin v. Fairbanks, 8 Mo. 367; Pittsburg, C., C. & St. L. Ry. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924.

[60] Guthrie v. Bashline, 25 Pa. 80; Clark v. Baltimore & O. R. Co., 7 Ohio N. P. 647. 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 (Tenn.) 699.

[61] The Lulie D., 4 Biss. 249, Fed. Cas. No. 8,602.

[62] Henry v. Brothers, 48 Pa. 70; Clark v. Baltimore & O. R. Co., 3 Ohio N. P. 172; Steiner v. Scholze, 114 Ala. 88, 21 South. 428; Miller v. Baltimore & O. R. Co., 60 Ohio St. 374, 54 N. E. 369; Chicago City Ry. Co. v. Blanchard, 37 Ill. App. 391.

[63] Edmonds v. Montgomery, 1 Iowa, 143; Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Steele v. Thompson, 62 Ala. 323; Moore v. Nowell,

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ever, 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.[64] 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.[65]

§ 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.[66] The assignee has all the equitable remedies of the plaintiff in the judgment.[67] But the assignment does not pass any interest in the money which the sheriff had previously collected on the judgment.[68] 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.[69]

94 N. C. 265; Clark v. Digges, 5 Gill (Md.) 109; Murphy v. Cochran, 1 Hill (N. Y.) 339; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82; Ware v. Bucksport & B. R. Co., 69 Me. 97; Moore v. Smith, 103 Mich. 387, 61 N. W. 538; Willett v. Clark, 61 N. J. Law, 696, 44 Atl. 515. See Timberlake v. Powell, 99 N. C. 233, 5 S. E. 410.

[64] Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809. See Moorer v. Moorer, 87 Ala. 545, 6 South. 289. Supra, vol. 1, § 11.

[65] Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729. See Act Cong. March 3, 1887 (24 Stat. 552); Dill. Rem. Causes, § 100.

[66] Forwood v. Dehoney, 5 Bush (Ky.) 174; Perry v. Roberts, 30 Ind. 244, 95 Am. Dec. 689; Parmelee v. Dann, 23 Barb. (N. Y.) 461; Bolen v. Crosby, 49 N. Y. 183; Ritch v. Eichelberger, 13 Fla. 169; Richmond Bldg. Ass'n v. Richmond Bldg. Ass'n, 100 Pa. 191; Van Houten v. Reily, 6 Smedes & M. (Miss.) 440; Burson v. Blair, 12 Ind. 371.

[67] Kimble v. Cummins, 3 Metc. (Ky.) 327.

[68] Robinson v. Towns, 30 Ga. 818.

[69] Boyer v. Bolender, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

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§ 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.[70] 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.[71] And in respect to a lien on property for the satisfaction of the judgment, he can occupy no better position than the assignor.[72] 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.[73] The assignee is a

[70] Downer v. South Royalton Bank, 39 Vt. 25; Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564; Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; McCotter v. McCotter, 16 Abb. Prac. (N. Y.) 265; Filbert v. Hawk, 8 Watts (Pa.) 443; Starr v. Haskins, 26 N. J. Eq. 414; Stout v. Van Kirk, 10 N. J. Eq. 78; Lattomus v. Garman, 3 Del. Ch. 232; Rawson v. McJunkins, 27 Ga. 432; Scott v. Harkins, 32 Ga. 302; Mayor, etc., 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; Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058; Hayes v. Carr, 44 Hun (N. Y.) 372; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Yarnell v. Brown, 65 Ill. App. 83; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201; Commonwealth v. Burnett (Ky.) 44 S. W. 966; Boggs v. Douglass, 105 Iowa, 344, 75 N. W. 185; Fleming v. Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504; Minnesota Thresher Manuf'g Co. v. Holz, 10 N. D. 16, 84 N. W. 581; 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 Dist. 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. 82.

[71] 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. (S. C.) 276; Ellis v. Kerr, 11 Tex. Civ. App. 349, 32 S. W. 444; Hibbard v. Randolph, 72 Hun, 626, 25 N. Y. Supp. 854. See Dutton v Mason, 21 Tex. Civ. App. 389, 52 S. W. 651.

[72] Rider v. Kelso, 53 Iowa, 367, 5 N. W. 509.

[73] Borst v. Baldwin, 30 Barb. (N. Y.) 180.

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necessary 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.[74] 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.[75]

§ 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.[76] 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.[77] 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.[78] 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.[79] But a considerable proportion of the authorities take the

[74] Mumford v. Sprague, 11 Paige (N. Y.) 438.

[75] Traphagen v. Lyons, 38 N. J. Eq. 613; Stout v. Van Kirk, 10 N. J. Eq. 78; Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19. Compare Doub v. Mason, 2 Md. 380.

[76] Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Peirce 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; Hendrickson v. Brown, 39 N. J. Law, 239; Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042; Benson v. Haywood, 86 Iowa, 107, 53 N. W. 85, 23 L. R. A. 335; Gregory v. Cuppy (Iowa) 82 N. W. 1016; Hobbs v. Duff, 23 Cal. 596; Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Merrill v. Souther, 6 Dana (Ky.) 305; McBride v. Fallon, 65 Cal. 301, 4 Pac. 17; Yorton v. Milwaukee, L. S. & W. Ry. Co., 62 Wis. 367, 23 N. W. 401; Wells, Fargo & Co. v. Clarkson, 5 Mont. 336, 5 Pac. 894; Orr v. Sp oner, 19 U. C. Q. B. 601.

[77] Hurst v. Sheets, 14 Iowa, 322.

[78] Irvine v. Myers, 6 Minn. 562 (Gil. 398); Skinker v. Smith, 48 Mo. App. 91.

[79] Henderson v. McVey, 32 Ala. 471; Davis v. Milburn, 3 Iowa, 168.

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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 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.[80] 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.[81]

§ 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.[82] 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.[83] Upon the reversal of the judgment, the assignee, if he has purchased property under his own execution, will lose his title thereto.[84] So if he has acquired rights

[80] Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301; Goodwin v. Richardson, 44 N. H. 125; Primm v Ransom, 10 Mo. 444; Ledyard v. Phillips, 58 Mich. 204, 24 N. W. 551; Gallaher v. Pendleton, 55 Iowa, 142, 7 N. W. 512; Bell v. Perry, 43 Iowa, 368; In re Wells, 43 S. C. 477, 21 S. E. 334; Holly v. Cook, 70 Miss. 590, 13 South. 228; Matthews v. Russell, 17 Pa. Co. Ct. R. 590.

[81] Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36; Terney v. Wilson, 45 N. J. Law, 282; Ely v. Cooke, 28 N. Y. 365. Compare Yorton v. Milwaukee, L. S. & W. Ry. Co., 62 Wis. 367, 23 N. W. 401; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Crecelius v. Bierman, 72 Mo. App. 355.

[82] Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201; Northam v. Gordon, 23 Cal. 255. Compare Reynolds v. Reynolds Lumber Co., 175 Pa. 437, 34 Atl. 791.

[83] Ritch v. Eichelberger, 13 Fla. 169; Ellis v. Kerr (Tex. Civ. App.) 23 S. W. 1050.

[84] Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

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under the judgment, and it is subsequently reversed, he must make restitution, the same as if he were an original party.[85]

§ 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 purchasers of other classes of personal property.[86] 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.[87] "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." [88] 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

[85] McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449.

[86] Cox v. Palmer, 60 Miss. 793; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151.

[87] Wright v. Levy, 12 Cal. 257; McCotter v. McCotter, 16 Abb. Prac. (N. Y.) 265; Hale v. First Nat. Bank, 50 Iowa, 642; Starr v. Haskins, 26 N. J. Eq 414; Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 442; Hendrickson's Appeal, 24 Pa. 363; Greene v. Darling, 5 Mason, 214, Fed. Cas. No. 5,765; Garland v. Harrison, 17 Mo. 282; Ives v. Addison, 39 Kan. 172, 17 Pac. 797; Wright v. Snell, 22 Ohio Cir. Ct. R. 86; Le Duc v. Slocomb, 124 N. C. 347, 32 S. E. 726. See Thompson v. Noble, 55 Hun, 268, 8 N. Y. Supp. 373.

[88] Robeson v. Roberts, 20 Ind. 155, 161, 83 Am. Dec. 308.

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judgment of the conveyance, is not affected by the notice to his assignor.[89] 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.[90] Again, the bona fide assignee of a judgment is not affected in his right to enforce the same by an agreement 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.[91] 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.[92] 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.[93]

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.[94] Again, some of the cases hold that he is not entitled to the protection of a bona fide purchaser unless he has actually

[89] Duke v. Clark, 58 Miss. 465, 474.
[90] Ritter v. Cost, 99 Ind. 80
[91] Starr v. Haskins, 26 N. J. Eq. 414.
[92] Winton's Appeal (Pa.) 5 Atl. 433.
[93] Mifflin County Nat. Bank's Appeal, 98 Pa. 150.
[94] Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492. Foltz v. Wert, 103 Ind. 404 2 N. E. 950.

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paid the purchase-money before the adverse equity is asserted.[95] 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.[96] So again, under proper circumstances, an attorney's lien upon a judgment will be held superior to the claim of an assignee.[97] In a case where a debtor, while in failing circumstances, confessed a judgment to his brother, which was then assigned to a 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.[98] 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.[99]

§ 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.[100] 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.[101] If a judgment

[95] Christie v. Bishop, 1 Barb. Ch. (N. Y.) 105.

[96] Beebe v. Bank of New York, 1 Johns. (N. Y.) 528, 3 Am. Dec. 353; Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258.

[97] Gill v. Truelsen, 39 Minn. 373, 40 N. W. 254.

[98] Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. 491.

[99] Downer v. South Royalton Bank, 39 Vt. 25; De La Vergne v. Evertson, 1 Paige (N. Y.) 181, 19 Am. Dec. 411; Wise v. Shepherd, 13 Ill. 41.

[100] Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Clarke v. Hogeman, 13 W. Va. 718; Dinsmore v. Boyd, 6 Lea (Tenn.) 689; Thompson v. Jones, 55 Hun, 268, 8 N. Y. Supp. 373. Compare Stanford v. Connery, 84 Ga. 731, 11 S. E. 507.

[101] Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

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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.[102] The rightful assignee of a judgment may enjoin the collection of the same by one who claims the same judgment by a simulated assignment.[103]

[102] Fore v. Manlove, 18 Cal. 436. Compare Cole v. Brewer, 4 Lea (Tenn.) 318. See Hutchinson v. Brown, 8 App. D. C. 157.

[103] Klein v. Dennis, 36 La. Ann. 284.

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CHAPTER XXIV.

ACTIONS UPON JUDGMENTS.

§ 958. Judgment as a Cause of Action.
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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

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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 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 ac-

[1] Hickman v. Macon Co. (C. C.) 42 Fed. 759; Whittemore v. Carkin, 58 N. H. 576; Morse v. Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; White River Bank v. Downer, 29 Vt. 332; Clark v. Goodwin, 14 Mass. 237; O'Neal v. Kittredge, 3 Allen (Mass.) 470; Linton v. Hurley, 114 Mass. 76; Wilson v. Hatfield, 121 Mass. 551; Denison v. Williams, 4 Conn. 402; Ives v. Finch, 28 Conn. 112; Hale v. Angel, 20 Johns. (N. Y.) 342; Goodrich v. Colvin, 6 Cow. (N. Y.) 397; Church v. Cole, 1 Hill (N. Y.) 645; Smith v. Mumford, 9 Cow. (N. Y.) 26; Harris v. Steiner, 30 Misc. Rep. 624, 62 N. Y. Supp. 752; Stewart v. Peterson's Ex'rs, 63 Pa. 230; Harter v. Harter, 4 Pa. Dist. R. 211; Fullmer v. Pine Tp., 17 Pa. Co. Ct. R. 482; Lawton v. Perry, 40 S. C. 255, 18 S. E. 861; Copeland v. Todd, 30 S. C. 419, 9 S. E. 341; Kingsland v. Forrest, 18 Ala. 519, 52 Am. Dec. 232; Elliott v. Holbrook, 33 Ala. 659; Field v. Sims, 96 Ala. 540, 11 South. 763; Succession of Ducker, 10 La. Ann. 758; Hull v. Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125; Stevens v. Stone, 94 Tex. 415, 60 S. W. 959; Gardner v. Henry, 5 Cold. (Tenn.) 458; Burnes v. Simpson, 9 Kan. 658; Hummer v. Lamphear, 32 Kan. 439, 4 Pac. 845, 49 Am. Rep. 491; Headley v. Roby, 6 Ohio, 521; Davidson v. Nebraker, 21 Ind. 334, 83 Am. Dec. 350; Gould v. Hayden, 63 Ind. 443; Becknell v. Becknell, 110 Ind. 42, 10 N. E. 414; Greathouse v. Smith, 3 Scam. (Ill.) 541; Albin v. People, 46 Ill. 372; Haven v. Baldwin, 5 Iowa, 503; Thomson v. Lee County, 22 Iowa, 206; Simpson v. Cochran, 23 Iowa, 81, 92 Am. Dec. 410; Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Eldredge v. Aultman, Miller & Co., 35 Neb. 884, 53 N. W. 1008, 37 Am. St. Rep. 476; Mandlebaum v. Gregovich, 24 Nev. 154, 50 Pac. 849; Ames v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815. In Michigan, an action of debt will lie upon 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. 570. As to whether an action can be maintained in a federal court on a money judgment recovered in a court of the same state wherein the federal court is sitting, see Barr v. Simpson, Baldw. 543, Fed. Cas. No. 1,038; Davis v. Davis (C. C.) 65 Fed. 380.

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tion.[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 follows also, as a corollary to the proposition above stated, that the vitality of a judgment is not exhausted by one action thereon, but the creditor is entitled to pursue successive actions until satisfaction is obtained.[4]

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, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment." [5] In New York, it is said that, although, as a general rule, a judgment plaintiff may sue on his judgment, yet a court will not allow its process to be perverted; and where several suits have been brought upon successive judgments, in different courts, for the avowed purpose of coercing payment by increasing costs, it is proper for the court in which the last suit is brought to order a stay of execution in all the cases which have been brought in that court except the first.[6] In Kentucky, it is provided by statute that no action shall lie upon a judgment except one to enforce the collection thereof.[7] 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

[2] Moor v. Towle, 38 Me. 133.
[3] Mawhinney v. Doane, 40 Kan. 681, 20 Pac. 488.
[4] Kelly v. Hamblen, 98 Va. 383, 36 S. E. 491.
[5] Pitzer v. Russel, 4 Or. 124. And see Smith v. Belmont & N. Iron Co., 11 Bush (Ky.) 390.
[6] Keeler v. King, 1 Barb. 390.
[7] Cundiff v. Trimble (Ky.) 52 S. W. 940.

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judgment, that is, a year and a day.[8] In Louisiana, it is said that the necessity of bringing a separate action to enforce a judgment exists in two cases; first, where it is a foreign judgment, and second, in case of a domestic judgment, where the debtor is dead and his estate is under administration.[9]

In several of the states, it is provided by law that an action on a domestic judgment cannot be prosecuted without leave of the court first obtained, and generally upon a showing of good cause and after notice to the adverse party.[10] Where a statute of this kind is in force, the application for leave to sue on a judgment should be addressed to the court in which the judgment was rendered.[11] But such a statute does not require leave of court to be obtained in order to maintain a suit on a judgment of a federal court sitting in the same state; it is, quoad hoc, a foreign judgment.[12] And conversely, a state statute of this character must be held as intended only to regulate the course of procedure in the courts of that state; and it does not affect the jurisdiction of the federal courts to entertain an action based on a judgment of a court of such state.[13] For similar reasons, where a judgment on a judgment is recovered without such leave to sue being first obtained, this is no obstacle to the maintenance of a suit on the last judgment in a court of another state.[14] Where, as in New York, the statute forbids the

[8] Lee v. Giles, 1 Bailey, 449, 21 Am. Dec. 476; Ligon v. McNeil, 6 Rich. Law, 377; Vandiver v. Hammet, 4 Rich. Law, 509.

[9] Succession of Beckham, 16 La. Ann. 352. So where the debtor has left the jurisdiction. Wood v. Newberry, 48 Mo. 322.

[10] Rev. St. Wis. § 2916; Cole v. Mitchell, 77 Wis. 131, 45 N. W. 948; Code Civ. Proc. N. Y. § 1913; In re Van Beuren, 33 App. Div. 158, 53 N. Y. Supp. 349; Farish v. Austin, 25 Hun (N. Y.) 430; Carpenter v. Butler, 29 Hun (N. Y.) 251; Code Civ. Proc. S. C. § 91; Brock v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779; Code Iowa 1873, § 2521; Watts v. Everett, 47 Iowa, 269; Matthews v. Davis, 61 Iowa, 225, 16 N. W. 102; Wilson v. Tucker, 105 Iowa, 55, 74 N. W. 908; McDonald v. Dickson, 85 N. C. 248; Kendall v. Briley, 86 N. C. 56; Warren v. Warren, 84 N. C. 614; Comp. Laws S. D. § 4831.

[11] Graham v. Scripture, 26 How. Prac. (N. Y.) 501.

[12] Morton v. Palmer, 60 Hun, 583, 14 N. Y. Supp. 912, citing Goodyear Dental Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 174.

[13] Union Trust Co. v. Rochester & P. R. Co. (C. C.) 29 Fed. 609.

[14] Weber v. Yancy, 7 Wash. 84, 34 Pac. 473.

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maintenance of a suit on a judgment "between the original parties thereto," without leave of court, this does not prevent the assignee of a judgment from suing thereon without obtaining leave.[15] In some states, under laws of this kind, it is thought that the granting of leave to sue on a judgment is a jurisdictional requisite, which must precede the institution of the action, so that, if it is omitted, a motion for leave to sue nunc pro tunc, made after the action is brought, must be denied.[16] But elsewhere, it is held that such leave may be granted retrospectively, after suit brought, if the defendant loses no substantial right thereby, and the order would have been made if regularly applied for.[17]

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.[18] 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.[19] But in some states, 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.[20] 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.[21]

[15] Knapp v. Valentine, 24 Civ. Proc. R. 331, 33 N. Y. Supp. 712; McGrath v. Maxwell, 17 App. Div. 246, 45 N. Y. Supp. 587.

[16] Cook v. Thurston, 18 Misc. Rep. 506, 42 N. Y. Supp. 1084.

[17] Stoddard Manuf'g Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

[18] Merchants' Nat. Bank v. Gaslin, 41 Minn. 552, 43 N. W. 483.

[19] Pratt v. Jones, 22 Vt. 341, 54 Am. Dec. 80; Grosvenor v. Chesley, 48 Me. 369. But 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. And the levy of an execution on chattels, though they are of sufficient value to satisfy the judgment, is not a prima facie satisfaction of the judgment, and therefore no obstacle to the maintenance of an action upon it. Smith v. Condon, 174 Mass. 550, 55 N. E. 324, 75 Am. St. Rep. 372.

[20] Hutchinson v. Inhabitants of Greenbush, 30 Me. 450; Clarkson v. Beardsley, 45 Conn. 1[illegible].

[21] 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.[22] Nor upon a judgment which is void on its face.[23] Nor where it appears from the record of the judgment that its collection has been enjoined, and no disposition of the injunction is shown.[24] But in Kansas an action can be maintained on a dormant domestic judgment, if commenced within one year after the judgment becomes dormant.[25]

§ 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.[26] 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.[27] 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.[28]

[22] Fry v. Malcolm, 4 Taunt. 705; Biddle v. Dowse, 9 Dow. & Ry. 404; Ledyard v. Brown, 39 Tex. 402; MacDougall v. Hoes, 27 Misc. Rep. 590, 58 N. Y. Supp. 209.

[23] Ellis v. Connecticut Mut. Life Ins. Co. (C. C.) 8 Fed. 81; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

[24] Blair v. Caldwell, 3 Mo. 353.

[25] Baker v. Hummer, 31 Kan. 325, 2 Pac. 808.

[26] Dawson v. Daniel, 2 Flip. 301, Fed. Cas. No. 3,668; Gifford v. Whalon, 8 Cush. (Mass.) 428; Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Suydam v. Hoyt's Adm'rs, 25 N. J. Law, 230; Woodward v. Carson, 86 Pa. 176; Sublette v. St. Louis, L. M. & S. Ry. Co., 66 Mo. App. 331.

[27] Curtiss v. Beardsley, 15 Conn. 518.

[28] Benwell v. Black, 3 Term. R. 643.

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§ 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 undeniably a legal obligation, upon which an action may be maintained in any court of competent jurisdiction.[29] In New York it is held that an action will lie upon a surrogate's decree for the payment of money.[30] 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.[31]

§ 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.[32] 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.[33] In the United States, some of the earlier cases manifested a disposition to follow the English rule in this respect.[34] 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.[35] Thus, it is said by

[29] Williams v. Jones, 13 Mees. & W. 628. See Deidrich v. Nachtsheim, 33 Wis. 225; Alexander v. Arters, 11 Pa. Co. Ct. R. 211.

[30] Dubois v. Dubois, 6 Cow. 494.

[31] Black's Exr. v. Black, 34 Pa. 354; Fort v. Blagg, 38 Ark. 471.

[32] Sadler v. Robins, 1 Camp. 253; Henly v. Soper, 8 Barn. & C. 16; Henderson v. Henderson, 6 Ad. & El. N. S. 295.

[33] Carpenter v. Thornton, 3 B. & Ald. 52.

[34] Hugh v. Higgs, 8 Wheat. 697; Van Buskirk v. Mulock, 18 N. J. Law, 184.

[35] 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

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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 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." [36] But an action will not lie on a decree for the performance of any other acts than the payment of money.[37] 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.[38]

§ 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.[39] But

N. Y. 263; Tilford v. Oakley, Hempst. 197; McKim v. Odom, 12 Me. 94; Mutual Life Ins. Co. v. Newton (N. J.) 14 Atl. 756; Warren v. McCarthy, 25 Ill. 95; Blattner v. Frost, 44 Ill. App. 580; Shalnwald v. Lewis, 69 Fed. 487; Moore v. Adie, 18 Ohio, 430; Thrall v. Waller, 13 Vt. 231.

[36] Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

[37] Warren v. McCarthy, 25 Ill. 95. See Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

[38] Burgess v. Souther, 15 R. I. 202, 2 Atl. 441. But see Rowe v. Blake, 19 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

[39] Supra, §§ 940, 951. See Love v. Fairfield, 5 Gilman (Ill.) 303; Smith v.

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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.[40] 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 debt due to him, and the principle which forbids a foreign administrator to sue for a debt due the estate does not apply.[41] 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.[42] And a judgment against an administrator in one state will not support an action against a different administrator in another state.[43] 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.[44] 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.[45]

Belmont & N. Iron Co., 11 Bush (Ky.) 390; Triplett v. Scott, 12 Ill. 137; Clark v. Willet, 59 N. J. Law, 308, 35 Atl. 1052; Sammis v. Wightman, 31 Fla. 45, 12 South. 536; Hall v. Henderson, 126 Ala. 449, 28 South. 531; Chicago & S. E. Ry. Co. v. Higgins, 150 Ind. 329, 50 N. E. 32; Case Threshing Machine Co. v. Pederson, 6 S. Dak. 140, 60 N. W. 747.

[40] Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

[41] Talmage v. Chapel, 16 Mass. 71. See Winham v. Kline, 72 Mo. App. 615.

[42] United States v. Cushman, 2 Sumn. 310, Fed. Cas. No. 14,907.

[43] Creswell v. Slack, 68 Iowa, 110, 26 N. W. 42. But it is otherwise when the successive defendants are executors. Turley v. Dreyfus, 33 La. Ann. 885; Latine v. Clements, 3 Ga. 426.

[44] Blake v. Burley, 9 Iowa, 592. But see Bignold v. Carr, 24 Wash. 413, 64 Pac. 519. Where a judgment obtained against a life-tenant and the owners in fee of land is sought to be enforced out of the land, after the death of the life-tenant, it is not necessary to make his administrator a party defendant. Johnson v. Huber, 34 Ill. App. 527.

[45] Tay v. Hawley, 39 Cal. 93; Lindh v. Crowley, 26 Kan. 47.

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§ 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.[46] 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.[47] 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.[48] 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 has accrued to the plaintiff to have and recover of the defendant the balance due thereon and interest, is sufficient on demurrer.[49]

[46] Central Bank of Georgia v. Veasey, 14 Ark. 671. But in Kansas, under a statute providing that, "in an action on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleadings," it is held that a judgment is such an instrument as must be set out by copy. Oberlin Loan, Trust & Banking Co. v. Kitchen, 8 Kan. App. 445, 57 Pac. 494.

[47] Ewing v. Jennings, 15 Nev. 379. See Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. A petition stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered. Davis v. Davis (C. C.) 65 Fed. 380. Where the complaint in an action on a judgment sufficiently describes the judgment, no description of the contract on which the judgment was rendered is necessary. Sims v. Hertzfeld, 95 Ala. 145, 10 South. 227.

[48] Chaquette v. Ortet, 60 Cal. 594; Carter v. Paige, 80 Cal. 390, 22 Pac. 188; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254. A declaration in debt on a judgment, stating that the judgment remains in full force, and unsatisfied in part, to wit, for a certain sum, sufficiently alleges that the judgment is unsatisfied. Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68. An averment that the judgment sued on is due and wholly unpaid is sufficient to show that the judgment is in full force. City of Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784. And an allegation that the judgment remains valid and in full force is equivalent to an allegation that it is unpaid. Wise v. Loring, 54 Mo. App. 258.

[49] O'Neal v. Kittredge, 3 Allen (Mass.) 470.

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§ 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.[50]

§ 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.[51] 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.[52] And, independently of statutes, a general allegation that the court had

[50] 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, note; Barnes v. Harris, 4 N. Y. 375.

[51] Wilbur v. Abbot, 58 N. H. 272; Hansford v. Van Auken, 79 Ind. 302; Spaulding v. Baldwin, 31 Ind. 376; Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152; Holmes v. Campbell, 12 Minn. 221 (Gil. 141); City of Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784; McCoy v. Van Ness, 98 Cal. 675, 33 Pac. 761; Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854; Burnes v. Simpson, 9 Kan. 658; Blanc v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Springsteene v. Gillett, 30 Hun (N. Y.) 260; Rogers v. Odell, 39 N. H. 452; Judge of Probate v. Fillmore, 1 D. Chip. (Vt.) 423; Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113.

[52] Willey v. Strickland, 8 Ind. 453; Dakin v. Hudson, 6 Cow. (N. Y.) 221; Cleveland v. Rogers, 6 Wend. (N. Y.) 438; Cornell v. Barnes, 7 Hill (N. Y.) 35; Barnes v. Harris, 3 Barb. (N. Y.) 603; Turner v. Roby, 3 N. Y. 193; Bridge v. Ford, 4 Mass. 641; Payne v. Taylor, 34 Ill. App. 491; Willits v. Walter, 32 Or. 411, 52 Pac. 24.

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jurisdiction is not sufficient, but the facts must be detailed.[53] But as 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.[54]

§ 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.[55] 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.[56] Thus an allegation that a judgment was "duly made by and entered in" a certain court is sufficient.[57] But either the words of the statute or words of exactly

[53] Cleveland v. Rogers, 6 Wend. (N. Y.) 438; Sheldon v. Hopkins, 7 Wend. (N. Y.) 435; Barnes v. Harris, 3 Barb. (N. Y.) 603.

[54] Masterson v. Matthews, 60 Ala. 260; Stiles v. Stewart, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

[55] Code Civ. Proc. N. Y. § 532; Sand. & H. Dig. Ark. (1884) c. 119, § 5057; Comp. Laws Ariz. (1877) § 2495; Code Civ. Proc. Cal. § 456; Code Civ. Proc. Dak. § 130; 2 Miller's Rev. Code Iowa, § 2714; Code Civ. Proc. Colo. § 66; Rev. St. Idaho (1887) § 4211; Burns' Rev. St. Ind. 1894, § 372; Code Civ. Proc. Kan. § 121; Carroll's Civ. Code Ky. § 122; 2 How. Ann. Mich. § 6878; Gen. St. Minn. (1878) p. 722, § 108; 2 Wagner's St. Mo. (1870) p. 1020, § 42; Code Civ. Proc. Mont. § 103; Rev. St. Wis. § 2673; Gen. St. Neb. (1885) p. 645, § 127; 1 Comp. Laws Nev. p. 298, c. 52, § 59; Tourgee's Code N. C. p. 109, § 121; 1 Rev. St. Ohio (1890) § 5090; 1 Hill's Laws Or. p. 230, § 86; Rev. St. S. C. (1872) p. 609, § 184; 2 Comp. Laws Utah (1888) p. 250, § 3242.

[56] Keys v. Grannis, 3 Nev. 548; Willey v. Strickland, 8 Ind. 453; Crake v. Crake, 18 Ind. 156; Chicago & S. E. Ry. Co. v. Higgins, 150 Ind. 329, 50 N. E. 32; Garner v. Wills, 92 Ky. 386, 17 S. W. 1023; Hanscom v. Tower, 17 Cal. 518; Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254; Wheeler v. Dakin, 12 How. Prac. (N. Y.) 537; State v. Bowen, 45 Miss. 347. These statutes apply only to the judgments of inferior courts, and do not affect the rule that the jurisdiction of the superior courts is presumed. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

[57] Lee v. Terbell (C. C.) 33 Fed. 850.

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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.[58] In some jurisdictions, it is held that the provisions of these statutes apply to judgments rendered by the inferior courts of a sister state.[59] But it is apparently agreed that they do not include judgments of such courts in foreign countries.[60]

§ 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.[61] 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.[62] The minute book of the court is not evidence of a judgment.[63] 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.[64] Thus, under the plea of nul tiel record,

[58] Hunt v. Dutcher, 13 How. Prac. (N. Y.) 538. An allegation that, in an action before a justice of the peace, plaintiff "recovered a judgment" against defendant, is insufficient. Weaver v. English, 11 Mont. 84, 27 Pac. 396. So, it is not sufficient to allege that the judgment was recovered and duly entered and docketed, since this may all be true, though the judgment was not duly recovered. People v. Bacon, 37 App. Div. 414, 55 N. Y. Supp. 1045. But in some other states, it is thought that the statute is substantially complied with by alleging that the plaintiff "recovered a judgment" and that "such judgment was duly docketed." Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881. And see Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799.

[59] Crake v. Crake, 18 Ind. 156; Toledo, W. & W. Ry. Co. v. McNulty, 34 Ind. 531. But see Karns v. Kunkle, 2 Minn. 313 (Gil. 268).

[60] McLaughlin v. Nichols, 13 Abb. Prac. (N. Y.) 244; Hollister v. Hollister, 10 How. Prac. (N. Y.) 559.

[61] Supra, §§ 876–879, 937.

[62] Wentworth v. Keazer, 30 Me. 336; Smith v. Frost, 5 Hill (N. Y.) 431; Day v. Crosby, 173 Mass. 433, 53 N. E. 890. See Peterson v. Gittings, 107 Iowa, 306, 77 N. W. 1056.

[63] Lehr v. Hall, 5 How. (Miss.) 54.

[64] Lawrence v. Willoughby, 1 Minn. 87 (Gil. 65). Where, in suing on a judgment, plaintiff alleges that it is a corporation, and that it was plaintiff

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a variance as to the amount, between the judgment laid and the judgment produced, is fatal.[65] 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.[66]

§ 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 and procure its restoration by proper proceedings for that purpose.[67] 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.[68]

in the judgment, it is not necessary that the truth of these allegations should appear on the face of the certified copy of the judgment offered in evidence. Missouri Glass Co. v. Gregg (Tex. App.) 16 S. W. 174.

[65] Eichelberger v. Smyser, 8 Watts (Pa.) 181; Butler v. Owen, 7 Ark. 369. In an action on a judgment reciting that it is payable in gold, but based on a contract silent as to the medium of payment, a declaration omitting the clause in regard to payment in gold does not render the judgment record inadmissible on the ground of variance, since such clause may be rejected as surplusage. Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. So where the declaration was on a general judgment, and the judgment introduced was made payable out of certain public funds, the limitation in the manner of payment was surplusage, and there was no variance. City of East St. Louis v. Canty, 65 Ill. App. 325.

[66] Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522.

[67] Foulk v. Colburn, 48 Mo. 230; Walton v. McKesson, 64 N. C. 77.

[68] Mandeville v. Reynolds, 68 N. Y. 528; Jackson v. Crawfords, 12 Wend. (N. Y.) 533; Jackson v. Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158; Inhabitants of Stockbridge v. Inhabitants of West Stockbridge, 12 Mass. 400; Newcomb v. Drummond, 4 Leigh (Va.) 57; Mason v. Bull, 26 Ark. 164; Ames v. Hoy, 12 Cal. 11; Parry v. Walser, 57 Mo. 169.

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§ 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.[69] 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.[70] On no pretext can the merits of the judgment be re-examined. And consequently the plea of nil debet cannot be permitted.[71] 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.[72] 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.[73] But a judgment does not conclude a defense which did not exist at the

[69] Biddle v. Wilkins, 1 Pet. 692, 7 L. Ed. 315; Wittemore v. Malcomson (C. C.) 28 Fed. 605; Noble v. Merrill, 48 Me. 140; Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635; Jones v. Jones, 87 Me. 117, 32 Atl. 779; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; McAllister v. Singer Manuf'g Co., 64 Ga. 622; Sims v. Hertzfeld, 95 Ala. 145, 10 South. 227; Bullock v. Ballew, 9 Tex. 498; Taylor v. Harris, 21 Tex. 438; Snow v. Mitchell, 37 Kan. 636, 15 Pac. 224; Morris v. Curry, 41 Ark. 75; Ellis v. Clarke, 19 Ark. 420, 70 Am. Dec. 603; Brown v. Trulock, 4 Blackf. (Ind.) 429; Burton v. Stewart, 11 Ind. 238; Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60; Guinard v. Heysinger, 15 Ill. 288; Shadbolt v. Findeisen, 88 Ill. App. 432; Jackson v. Fletcher, Morris (Iowa) 230; Poorman v. Mitchell, 48 Mo. 45; Morris v. Boomer, 16 Wis. 547.

[70] Ludwick v. Fair, 29 N. C. 422, 47 Am. Dec. 333.

[71] Tappan v. Heath, 16 N. H. 34.

[72] Allgood v. Whitley, 49 Ala. 215.

[73] Stephens v. Howe, 127 Mass. 164; Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635. So, in an action on a judgment, it is no defense that the original claim was barred by the statute of limitations. Carey v. Roosevelt (C. C.) 83 Fed. 242. But if the action on a judgment is between the original parties thereto, the defendant may plead a counterclaim growing out of a contract between them, even though it might have been set up in the

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time of its rendition, and such defense, becoming available in the interval, may be set up against an action on the judgment.[74]

§ 971. Plea of Nul Tiel Record.

The proper form of the general issue in an action upon a domestic judgment is nul tiel record.[75] 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.[76] 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.[77] 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.[78]

original action. Rose v. Northwest Fire & Marine Ins. Co. (C. C.) 67 Fed. 439; Brower v. Nellis, 6 Ind. App. App. 323, 33 N. E. 672.

[74] Burwell v. Jackson, 9 N. Y. 535.

[75] Westerwelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Crawford v. Simonton's Ex'rs, 7 Port. (Ala.) 110; Wilbur v. Abbott, 59 N. H. 132; Reynolds v. Robertson (Cal.) 4 Pac. 1192. Under the code system of pleading, a general denial is equivalent to pleading the general issue of nul tiel record. First Nat. Bank v. Hamor (C. C.) 47 Fed. 36.

[76] Stevens v. Fisher, 30 Vt. 200; Clemons v. Clemons' Estate, 69 Vt. 545, 38 Atl. 314; City of East St. Louis v. Canty, 65 Ill. App. 325. In an action of debt on a judgment, where the defendant pleads nul tiel record, the only question to be determined is whether such a judgment exists as is alleged, and if there is a material variance, it will be fatal. Lancaster v. Inhabitants of Richmond, 83 Me. 534, 22 Atl. 393. The plea of nul tiel record does not raise the issue whether the judgment in suit has been transferred to the plaintiff. Marx v. Logue, 71 Miss. 905, 15 South. 890. Where the declaration is on a judgment rendered by a domestic court of record, the plea of nul tiel record should conclude with a verification to the court only, not to the country; but otherwise, if the judgment was rendered by a foreign court, or by an inferior court, not a court of record. Thornton v. Lane, 11 Ga. 459; Steele v. Hanna, 8 Blackf. (Ind.) 326; Wittemore v. Malcomson, 9 N. J. Law J. 338.

[77] Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522.

[78] Deem v. Crume, 46 Ill. 69.

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§ 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.[79] But in other states it is not permitted to defend against the judgment on this ground, the doctrine which ascribes "absolute verity" to the record being considered as of controlling authority.[80] The reader will find a detailed discussion of the subject of impeaching judgments for want of jurisdiction in an earlier chapter of this work.[81] 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.[82]

§ 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 ob-

[79] Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Clark v. Little, 41 Iowa, 497; Salladay v. Bainhill, 29 Iowa, 555; Indianapolis & St. L. Ry. Co. v. Harmless, 124 Ind. 25, 24 N. E. 369; Evans v. Instine, 6 Ohio, 117; Greene v. Woodland Ave. & W. S. St. R. Co., 62 Ohio St. 67, 56 N. E. 642; Hill v. City Cab & Transfer Co., 79 Cal. 188, 21 Pac. 728; Baldwin v. Kimmel, 16 Abb. Prac. (N. Y.) 353; Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Deering v. Poston, 78 Minn. 29, 80 N. W. 783; Minter v. Green (Ind. T.) 49 S. W. 48. An answer which alleges want of jurisdiction to render the judgment sued on is not defective because it fails to state a defense to the cause of action on which the judgment was founded. Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Minter v. Green (Ind. T.) 49 S. W. 48.

[80] Miller v. Dungan, 35 N. J. Law, 391; Kittredge v. Martin, 141 Mass. 410, 6 N. E. 95; Maysville & B. S. R. Co. v. Ball (Ky.) 56 S. W. 188; Holt v. Thacher, 52 Vt. 592.

[81] Supra, vol. 1, §§ 270–289.

[82] Supra, §§ 818, 835, 894–915.

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tained.[83] 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.[84] 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.[85]

§ 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 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.[86] 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.[87]

[83] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Carpentier v. City of Oakland, 30 Cal. 439.

[84] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; State of Michigan v. Phœnix Bank, 33 N. Y. 9, 27; Hackley v. Draper, 60 N. Y. 88; Greene v. Hallenbeck, 24 Hun (N. Y.) 116; Gardiner v. Van Alstyne, 163 N. Y. 573, 57 N. E. 1110; Stone v. Lewman, 28 Ind. 97; Miller v. Lovell (Tex. Civ. App.) 40 S. W. 835; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27; Duringer v. Moschino, 93 Ind. 495; Hopkins v. Woodward, 75 Ill. 62.

[85] Cottle v. Cole, 20 Iowa, 481; Demerit v. Lyford, 27 N. H. 541.

[86] Hawes v. Hathaway, 14 Mass. 233; Townsend v. Cox, 45 Mo. 401; Hammond v. Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543; supra, vol. 1, §§ 261–269.

[87] Dick v. Tolhausen, 4 Hurl. & N. 695.

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§ 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." [88] And there can be no question that such plea would now be good in all the courts of this country.[89] 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.[90] 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.[91] It is no defense to an action on a judgment that an execution upon it is in full life and in the officer's hands, if there is no plea or proof of payment.[92] The payment or satisfaction of the judgment must be specially pleaded; it cannot be proved under the plea of nul tiel record.[93] And according to the

[88] Briley v. Sugg, 21 N. C. 366, 30 Am. Dec. 172, citing 1 Archb. Prac. 325; 2 Saund. Prac. Cas. 713; 1 Chit. Pl. 426.

[89] See Conner v. Pennington, 1 Del. Ch. 177; Thom v. Wilson's Ex'r, 27 Ind. 370; Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711; Wolcott v. Ensign, 53 Ind. 70; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033.

[90] Colclough v. Rhodus, 2 Rich. Law (S. C.) 76.

[91] Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635.

[92] White River Bank v. Downer, 29 Vt. 332; Tarbell v. Same, Id. 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. Law (S. C.) 377. And see Gassner v. Sandford, 2 Sandf. (N. Y.) 440.

[93] Tunstall v. Robinson, Hemp. 229, Fed. Cas. No. 14,238a.

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strict theory, the defendant may plead either nul tiel record or payment of the judgment but not both.[94]

§ 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.[95] 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.[96]

§ 977. Discharge in Bankruptcy.

The generally accepted rule is 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.[97] But in some jurisdictions the opinion prevails that if

[94] Riley v. Riley, 20 N. J. Law, 114. But in New Hampshire, under the practice as to double pleading, the defendant in an action of debt on a judgment may plead both nul tiel record and payment, and also a release. Chapman v. Sloan, 2 N. H. 464. And see Crawford's Ex'rs v. Ellison, 1 Brev. (S. C.) 378.

[95] Farmers' Bank v. Groves, 12 How. 51, 13 L. Ed. 889; Savage v. Everman, 70 Pa. 315, 10 Am. Rep. 676; Witherby v. Mann, 11 Johns. (N. Y.) 518; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Brown v. Feeter, 7 Wend. (N. Y.) 301; Evans v. Wells, 22 Wend. (N. Y.) 324; La Farge v. Herter, 11 Barb. (N. Y.) 159; Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68; Harden v. Campbell, 4 Gill (Md.) 29; McCullough v. Franklin Coal Co., 21 Md. 256; Reid v. Hibbard, 6 Wis. 175; Jones v. Ransom, 3 Ind. 327.

[96] Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

[97] Johnson v. Fitzhugh, 3 Barb. Ch. (N. Y.) 360; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; In re McBryde (D. C.) 99 Fed. 686; In re Pinkel, 1 Nat. Bankr. N. 161; In re Brown, 5 Ben. 1, Fed. Cas. No. 1,975; In re Crawford, 3 N. B. R. 698, Fed. Cas. No. 3,363; In re Stansfield, 4 Sawy. 334, Fed. Cas. No. 13,294; In re Vickery, 3 N. B. R. 696, Fed. Cas. No. 16,930; Bankr. Act 1898, § 63a, cl. 5.

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the judgment was obtained after the defendant was adjudicated a bankrupt and before his discharge, 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.[98]

§ 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.[99] 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.[100]

§ 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 de-

[98] Bown v. Morange, 108 Pa. 69; Woodbury v. Perkins, 5 Cush. (Mass.) 86, 51 Am. Dec. 51.

[99] Kinsman v. Page, 22 Vt. 628; Coburn v. Palmer, 10 Cush. (Mass.) 273.

[100] Clark v. Goodwin, 14 Mass. 237.

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fendant in an action at law to avail himself of those which were recognized by 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.[101] In the federal courts, equitable defenses cannot be set up in actions at law.[102] 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.[103]

§ 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.[104] "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

[101] Barton v. Radcliffe, 149 Mass. 275, 21 N. E. 374.

[102] Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Montejo v. Owen, 14 Blatchf. 324, Fed. Cas. No. 9,722; Parsons v. Denis (C. C.) 7 Fed. 317.

[103] Buller v. Sidell (C. C.) 43 Fed. 116.

[104] Battey v. Holbrook, 11 Gray (Mass.) 212.

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judgment by default, to recover interest by way of damages for the detention of the debt." [105]

§ 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.[106] In Louisiana, under the statute, interest cannot be collected on a money judgment which, by its terms, is silent as to interest.[107] But in a majority of the states, by the present statutes, interest is allowed on judgments and may be recovered in actions upon them.[108] 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.[109] 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.[110] The subject of

[105] Smith's Adm'rs v. Vanderhorst, 1 McCord (S. C.) 328, 10 Am. Dec. 678. In an action on a judgment, it is proper for the plaintiff to recover the costs shown by the original judgment as a part thereof. Cranor v. School Dist., 81 Mo. App. 152.

[106] Collais v. McLeod, 30 N. C. 221, 49 Am. Dec. 376; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Hamer v. Kirkwood, 25 Miss. 95; Trenholm v. Bumpfield, 3 Rich. Law (S. C.) 376; Crawford v. Simonton's Heirs, 7 Port. (Ala.) 110; Thomas v. Wilson, 3 McCord (S. C.) 166; Manning v. Norwood's Adm'rs, 2 Nott. & McC. (S. C.) 395; Harrington v. Glenn, 1 Hill (S. C.) 79.

[107] Succession of Anderson, 33 La. Ann. 581. And see Keenan v. Whitehead, 15 La. Ann. 333.

[108] See Attorney General v. Western Union Tel. Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; Cruger v. Sullivan, 11 Tex. Civ. App. 377, 32 S. W. 448; Lombard Inv. Co. v. Burton, 5 Kan. App. 197, 47 Pac. 154; San Joaquin Land & Water Co. v. West, 99 Cal. 345, 33 Pac. 928. Rev. St. U. S. § 966, allows interest on judgments recovered in the federal courts when such interest is allowed by the laws of the state in which the court is held. See Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; Moran v. Hagerman (C. C.) 69 Fed. 427.

[109] Berryhill v. Wells, 5 Bin. (Pa.) 56; Schell v. Stetson, 12 Phila. (Pa.) 187.

[110] A statute allowing interest generally on "judgments" applies to judgments in actions for tort. Woodbury v. District of Columbia, 19 D. C. 157. A judgment for damages rendered as compensation for land taken under the power of eminent domain is entitled to draw interest, unless excepted from the statute. Epling v. Dickson, 170 Ill. 329, 48 N. E. 1001. Where compensa-

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allowing interest on judgments recovered in other states, and the rate at which it is to be computed, has already been discussed.[111] 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.[112] 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.[113] And where a judgment has been recovered for the full penalty of a bond, such judgment will carry interest.[114] But it is otherwise in the case of a judgment rendered for a fine.[115] In 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.[116] 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.[117] And a judgment cannot be rendered to

tion was allowed to an assignee by decree of court for services rendered before the assignment was set aside, to be paid from the property, which was transferred to a receiver, the assignee is entitled to interest thereon from the date of the decree. Mann v. Poole, 48 S. C. 154, 26 S. E. 229. Where a judgment is properly allowed to be set off against another, the decree should include interest thereon at the legal rate from the date of the judgment. National S. S. Co. v. Tugman, 27 C. C. A. 116, 82 Fed. 246.

111 Supra, § 880.

112 Kenney v. Hannibal & St. J. R. Co., 63 Mo. 99; Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320. And see State v. Harrington, 44 Mo. App. 297.

113 Finley v. Carothers, 9 Tex. 517, 60 Am. Dec. 179.

114 Winslow v. Anerum's Assignees, 1 McCord, Eq. (S. C.) 100; Furber v. McCarthy, 59 Hun (N. Y.) 622, 12 N. Y. Supp. 794.

115 State v. Steen, 14 Tex. 396; People v. Sutter St. Ry. Co., 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137. But a judgment for costs will bear interest. Linck v. City of Litchfield, 31 Ill. App. 104.

116 Hodgdon v. Hodgdon, 2 N. H. 169.

117 Johnson v. Tuttle, 17 Abb. Prac. (N. Y.) 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 Sawy. 39, Fed. Cas. No. 4,041; Gibson v. Cincinnati Enquirer, 2 Flip. 88, Fed. Cas. No. 5,391.

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draw interest from a day prior to its rendition.[118] If there is interest due on the demand on which the action is brought, it should be included in the original judgment when entered.[119] 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.[120]

§ 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.[121] 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.[122] Thus, if a contract specifies a 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.[123] Under a statute of this

[118] Simmons v. Garrett, McCahon (Kan.) 82.

[119] Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78.

[120] Whereatt v. Ellis, 68 Wis. 61, 30 N. W. 520.

[121] 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 Branch of State Bank v. Kelley, 14 Ohio St. 367; McCutchen v. Dougherty, 44 Miss. 419; Board County Com'rs Cheyenne County v. Board County Com'rs Bent County, 15 Colo. 320, 25 Pac. 508.

[122] Wilson v. King, 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; City of Burrton v. Harvey County Savings Bank, 28 Kan. 390; State v. Vogel, 14 Mo. App. 187; Neal v. Brockhan, 87 Ga. 130, 13 S. E. 283; Crook v. Tull, 111 Mo. 283, 20 S. W. 8; Catron v. Lafayette County, 125 Mo. 67, 28 S. W. 331. As to construction of such a statute, with reference to contracts for compound interest, see Raun v. Reynolds, 11 Cal. 14.

[123] Daniel v. Gibson, 72 Ga. 367, 53 Am. Rep. 845.

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kind, where a contract bears interest at the rate of 12 per cent., with a stipulation for 10 per cent. attorney's fees, judgment on it is properly entered for the sum of principal, interest, and attorney's fees, the whole to bear 12 per cent. interest from its date.[124] Where the interest agreed upon in the note or other contract is usurious, still a judgment recovered for so much of the claim as is collectible by law will bear interest from its rendition.[125] It remains to be stated that a state statute reducing the rate of interest thereafter to accrue and be payable on judgments is not unconstitutional, although it may apply to judgments recovered before its enactment,[126] but such a law will not be interpreted to apply retroactively to judgments already rendered, unless its plain terms require such a construction.[127]

§ 983. Interest on Decrees in Equity.

Where a judgment does not at law bear interest, equity, following the law, will not give interest.[128] 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.[129] 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

[124] Llano Improvement & Furnace Co. v. Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

[125] Ramsey v. Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259; Shafer v. First Nat. Bank, 53 Kan. 614, 36 Pac. 998.

[126] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925. And see, supra, vol. 1, § 8.

[127] Brauer v. City of Portland, 35 Or. 471, 60 Pac. 378.

[128] McMillen v. Scott, 1 T. B. Mon. (Ky.) 150. And see McAlexander v. Lee, 3 A. K. Marsh. (Ky.) 483; Moore v. Pendergrast's Heirs, 6 J. J. Marsh. (Ky.) 534; Crocker v. Clements' Adm'r, 23 Ala. 296; Lair v. Jelf, 3 Dana (Ky.) 181; Hunt v. Smith, 3 Rich. Eq. (S. C.) 465.

[129] Ryckman v. Parkins, 5 Paige (N. Y.) 543; Stuart v. Hurt, 88 Va. 343, 13 S. E. 438.

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of the debtor, and rendered against the defendant without reference to the sale of particular property and the distribution of the fund arising therefrom.[130] 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." [131]

§ 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, and judgment rendered on the whole amount to bear interest from the date of the last judgment.[132] But there are also authorities which oppose this rule.[133] 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.[134]

§ 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.[135] 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 ex-

[130] National Bank of Augusta v. Heard, 65 Ga. 189.

[131] Wilson v. Marsh, 13 N. J. Eq. 289.

[132] Heidenheimer v. Johnston, 76 Tex. 200, 13 S. W. 46. See, also, Corcoran v. Doll, 32 Cal. 82; The Umbria, 11 U. S. App. 691, 8 C. C. A. 181, 59 Fed. 475.

[133] Pinckney's Adm'r v. Singleton, 2 Hill (S. C.) 343. And in Re Fuller, 1 Sawy. 243, Fed. Cas. No. 5,148, 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.

[134] Quivey v. Hall, 19 Cal. 97.

[135] See Mason v. Cronise, 20 Cal. 211; Kennard v. Alston, 62 Miss. 763; Succession of Rice, 15 La. Ann. 649; Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977.

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cluded.[136] 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.[137] A common provision in statutes of limitation of this class is that no action shall be maintained upon a judgment unless commenced within a certain number of years after the issuance of the last execution upon it, or after a motion or other proceeding to revive it.[138] But it is held that the issuance of a writ of garnishment by the judgment creditor is not equivalent to an execution, so as to prevent the running of the statute against the judgment.[139] Nor is the bringing of an action to enforce payment of the judgment sufficient to toll the statute.[140] And where the law provides that limitations shall not run during the time a party was stayed from bringing his action on the judgment by any injunction or order of court, or by statutory prohibition, the bringing of an action on the judgment is not "stayed," within its meaning, during the time the creditor is required to obtain leave of court in order to bring suit on the judgment.[141] In case of an assignment of a judgment in favor of the state, the statute will begin to run as against the assignee from the date of the assignment.[142] A new statute of limitations may be made retrospectively applicable to existing judgments, without violating the constitutional prohibitions, since it affects the remedy merely.[143] And a state does not withhold from the judgments of the federal courts the credit

[136] Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70; Connecticut Nat. Bank v. Bayles, 17 App. Div. 596, 45 N. Y. Supp. 305. And see Galt v. Todd, 5 App. D. C. 350. See, per contra, Cook v. Moore, 95 N. C. 1.

[137] Carshore v. Huyck, 6 Barb. 583. And see Pease v. Howard, 14 Johns. 479.

[138] See St. Louis Type Foundry v. Jackson, 128 Mo. 119, 30 S. W. 521; McKinnon v. McGown (Tex. Civ. App.) 29 S. W. 696; Rowe's Adm'r v. Hardy's Adm'r, 97 Va. 674, 34 S. E. 625; Thatcher v. Lyons, 70 Vt. 438, 41 Atl. 428, 67 Am. St. Rep. 677.

[139] Shields v. Stark (Tex. Civ. App.) 51 S. W. 540.

[140] Swafford v. Howard (Ky.) 50 S. W. 43.

[141] Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516.

[142] Predohl v. O'Sullivan, 59 Neb. 311, 80 N. W. 903.

[143] Warner v. Bartle, 39 App. Div. 91, 56 N. Y. Supp. 585.

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and efficacy which is due to them, in limiting, by statute, the time within which actions may be brought on the judgments of such courts in its own courts.[144]

§ 985a. Mandamus to Enforce Judgments against Municipal Corporations.

As a general rule, the property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, town halls, etc., or property which has been destined and set apart by statute as a source of permanent revenue for the corporation, cannot be seized or sold on execution against it.[145] Nor can its taxes or public revenues be levied on under an execution in favor of a private creditor.[146] And in several of the states, it is now well settled that the writ of execution cannot be employed at all when the judgment debtor is a municipality.[147] In these circumstances, the legal method of enforcing the payment of a judgment against a municipal corporation is by a writ of mandamus, issuing from a court of competent jurisdiction, and based on proper proceedings, commanding the officers of the corporation to pay the judgment out of public funds in their hands, or to levy and collect taxes sufficient in amount to discharge the obligation. The writ, as thus employed, is in the nature of the statutory writ of execution and is legally equivalent thereto.[148] Accordingly, we find numerous decisions recognizing the power of the courts of a state to issue the writ of mandamus to compel the payment of judgments recovered against the municipal corporations of the state, either in the state's own courts or in the federal courts

[144] Waterman v. Town of Waterloo, 69 Wis. 260, 34 N. W. 137.

[145] New Orleans v. Morris, 3 Woods, 103, Fed. Cas. No. 10,182.

[146] Peterkin v. New Orleans, 2 Woods, 100, Fed. Cas. No. 11,026.

[147] City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Amy v. City of Galena (C. C.) 7 Fed. 163; United States v. Board of Auditors of Town of Ottawa (C. C.) 28 Fed. 407. But in some states, the collection of judgments against municipal corporations of certain classes, by means of the writ of execution, is expressly authorized. See Hart v. City of New Orleans (C. C.) 12 Fed. 292; Allen v. Dubois Borough, 5 Pa. Dist. R. 585. And where this remedy is authorized by statute, it is exclusive, and proceedings by mandamus cannot be sustained. Comm. v. Pease, 1 Dauph. Co. R. (Pa.) 47.

[148] United States v. Township of Oswego (C. C.) 28 Fed. 55.

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sitting within its borders.[149] And where a plaintiff has shown himself entitled to a mandamus to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the machinery necessary to raise and apply the money, including action on the part of all necessary officers.[150] But in regard to the exigence of the writ, the court is vested with a considerable measure of discretion. Thus, where the amount of the tax required is very large in proportion to the resources of the municipality, it is within the discretion of the court issuing the mandamus to decide whether it shall be collected at one time or raised by successive levies.[151] And so, where the municipality has an option to pay the debt either by levying a tax or by issuing bonds, a mandamus recognizing the option, and requiring it to do one or the other, would not be bad for uncertainty; but if the corporation has expressly refused to issue bonds, it is not error, when mandamus issues, to make it require absolutely the levy of a tax.[152]

§ 985b. Same; Power of Federal Courts.

When a judgment has been recovered in a federal court having jurisdiction over the parties and the subject-matter, against a city, county, or other municipal corporation of a state, and the creditor has no other remedy or means of making his judgment effective, he will be entitled to a writ of mandamus, directed to the proper officers of the municipality, requiring them to pay the judgment out of public funds in their hands, or to levy and collect a tax sufficient in amount to satisfy the judgment and costs. The writ, in such a case, is in the nature of an execution, and is ancillary and necessary

[149] State v. Town of Beloit, 20 Wis. 85; State v. City of Madison, 15 Wis. 30; United States v. King (C. C.) 74 Fed. 493; People v. Marsh, 21 App. Div. 88, 47 N. Y. Supp. 395; State v. City of New Orleans, 49 La. Ann. 946, 22 South. 370; White v. City of Decatur, 119 Ala. 476, 23 South. 999; State v. Harris, 17 Ohio St. 608; Supervisors v. Randolph, 89 Va. 614, 16 S. E. 722. Sheridan v. Fleming, 93 Mo. 321, 5 S. W. 813; Dearing v. Shepherd, 78 Ga. 28; Wells v. Town of Mason, 23 W. Va. 456; Stevens v. Miller, 3 Kan. App. 192, 43 Pac. 439; Evans v. Bradley, 4 S. D. 83, 55 N. W. 721.

[150] Marion County v. Coler, 21 C. C. A. 392, 75 Fed. 352.

[151] City of East St. Louis v. United States, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798; United States v. City of Key West, 23 C. C. A. 663, 78 Fed. 88.

[152] United States v. City of Key West, 23 C. C. A. 663, 78 Fed. 88.

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to the jurisdiction of the federal court in the original case.[153] So, where the state law provides specifically for the auditing of charges against a municipality, among which judgments are included, and for the levy of taxes to pay them, auditing a judgment is a mere ministerial act, the performance of which can be coerced by mandamus.[154] Further, if the remedy by mandamus does not at first prove effectual, it may be repeated again and again and as often as the occasion requires.[155] But when the writ of mandamus is thus resorted to for the purpose of compelling a municipal corporation to levy a tax, the federal court will conform as much as possible to the state practice in similar cases.[156]

The rightful power and authority of the federal courts in this particular cannot be abridged or interfered with by the authority of the state, manifested either through its legislature or its courts. Thus, if a statute of the state prohibits the issuance of writs of mandamus against a city, it must be confined in its operation to the courts of the state; it cannot constitutionally have any effect as to the remedies on judgments rendered against a city by the courts of the United States.[157] Again, the state courts have no more right or authority to interfere with the enforcement of the writ of man-

[153] City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; United States v. City Council of Keokuk, 6 Wall. 514, 18 L. Ed. 933; Walkley v. Muscatine, 6 Wall. 481, 18 L. Ed. 930; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; Morgan v. Town Clerk, 7 Wall. 610, 19 L. Ed. 203; Butz v. Muscatine, 8 Wall. 575, 19 L. Ed. 490; Mayor, etc., of City of Davenport v. Lord, 9 Wall. 409, 19 L. Ed. 704; Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72; United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225; Cass County v. Johnston, 95 U. S. 360, 24 L. Ed. 416; Knox County v. Aspinwall, 24 How. 376, 16 L. Ed. 735; Deuel County v. First Nat. Bank of Buchanan Co., 30 C. C. A. 30, 86 Fed. 264; United States v. Board of Auditors (C. C.) 28 Fed. 407; Shelley v. St. Charles County (C. C.) 30 Fed. 603; United States v. Judges of Scotland County (C. C.) 32 Fed. 714; In re Copenhaver (C. C.) 54 Fed. 660; United States v. Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538; Jenkins v. Supervisors, 1 Hughes, 568, Fed. Cas. No. 7,261; Ex parte Parsons, 1 Hughes, 282, Fed. Cas. No. 10,774; United States v. Jefferson County, 5 Dill. 310, Fed. Cas. No. 15,472; Same v. Lincoln County, 5 Dill. 184, Fed. Cas. No. 15,503; Same v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589.

[154] Lower v. United States, 91 U. S. 536, 23 L. Ed. 420.

[155] Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72.

[156] Wisdom v. Memphis, 2 Flip. 285, Fed. Cas. No. 17,903.

[157] Hart v. City of New Orleans (C. C.) 12 Fed. 292.

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damus, thus issued, by injunction or by attempting to replevy property seized by the tax collector, than they have to interfere with the marshal, when he is proceeding under an ordinary writ of execution.[158] Hence, to a writ of mandamus, so issuing from a federal court, it is not an admissible or sufficient answer that the respondents have been enjoined by a state court from doing the act which the mandamus commands.[159] Nor is it a material circumstance that the injunction from the state court was issued before the mandamus from the federal court, prohibiting the same acts which the mandamus commands, and still remains in force. The mandamus, when issued, is to be regarded as a writ necessary to the exercise of the jurisdiction of the federal court which had previously attached, and to enforce its judgment, and hence the state court is not to be regarded as in prior possession of the case.[160]

§ 985c. Same; Prerequisites to Issuance of Writ.

In the federal courts, the writ of mandamus can be used only in aid of a jurisdiction which has already attached; and it is a writ in the nature of an execution to carry into effect a judgment previously rendered. Further, as a general rule, the determination of the validity of a claim against a municipal corporation, and approval of it, is a judicial function, before the recovery of judgment, and therefore cannot be coerced by mandamus; but the allowance or approval of the claim, after judgment upon it, is a mere ministerial act. For these reasons the holder of the claim must sue on

[158] United States v. Treasurer of Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538; Apperson v. Memphis, 2 Flip. 363, Fed. Cas. No. 497; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Mayor, etc., of City of Davenport v. Lord, 9 Wall. 409, 19 L. Ed. 704; Supervisors of Washington County v. Durant, 9 Wall. 415, 19 L. Ed. 732; Amy v. Barkholder, 11 Wall. 136, 20 L. Ed. 101.

[159] United States v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589; Hill v. Scotland County Court (C. C.) 32 Fed. 716; United States v. King (C. C.) 74 Fed. 493; Clews v. Lee County, 2 Woods, 474, Fed. Cas. No. 2,892.

[160] Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. 846, 27 L. Ed. 820; Clews v. Lee County, 2 Woods, 474, Fed. Cas. No. 2,892; Smith v. Tallapoosa County, 2 Woods, 596, Fed. Cas. No. 13,114; Supervisors of Washington County v. Durant, 9 Wall. 415, 19 L. Ed. 732.

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it and recover judgment before the federal courts will aid him to enforce its payment by mandamus; and this, notwithstanding the fact that the claim could be directly enforced, in the state courts, by means of the writ, without first reducing it to judgment.[161]

Where a levy of taxes is desired by a judgment creditor of a municipal corporation for the payment of his claim, and his right is based upon the ordinary status of a judgment creditor and the power of the municipal authorities to make a levy, a demand upon the proper officers for a levy to pay the judgment must be made before relief by mandamus can be had. But it is not necessary that the demand should be to levy a special tax; a definite demand or request to levy a tax to pay the judgment is enough.[162] And in some jurisdictions it is held that a demand for payment is sufficient, being equivalent to a demand for the levy of a tax; since the demand of payment is held to include a demand to do any particular thing necessary to such payment.[163] Also a formal demand for payment may be dispensed with, or rendered unnecessary, by long continued neglect of the municipality to make any provision for the payment of judgments against it. On this point it has been remarked: "While it is generally true that a court will not issue a mandamus to compel the performance of an act which it is merely anticipated that the defendant will not perform, still, if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance." [164]

[161] Greene County v. Daniel, 102 U. S. 187, 26 L. Ed. 99; Davenport v. Dodge County, 105 U. S. 237, 26 L. Ed. 1018; Chickaming v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307; Osborne v. Board of Com'rs of Adams County (C. C.) 7 Fed. 441; United States v. Buchanan County, 5 Dill. 285, Fed. Cas. No. 14,679.

[162] State v. City of Jacksonville, 22 Fla. 21; United States v. Indian Grave Drainage Dist., 29 C. C. A. 578, 85 Fed. 928.

[163] City of Cairo v. Everett, 107 Ill. 75.

[164] United States v. Board of Town Auditors of Town of Brooklyn, 10 Biss. 466, 8 Fed. 473; Board of Supervisors v. Thompson, 10 C. C. A. 154, 61 Fed. 914.

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§ 985d. Same; Defenses; Impeachment of Judgment.

On an application for a writ of mandamus to compel the payment of a judgment against a municipal corporation, the original judgment is conclusive of all matters which were or might have been set up in defense to the action, and it cannot be impeached collaterally.[165] So also, questions which have been decided by courts of last resort, on applications for mandamus to enforce certain judgments against a municipality, are res judicatæ on a subsequent application by the same party to enforce a new judgment, into which unpaid balances on the original judgments have been merged together with other judgments, in so far as concerns the remainder of the original judgments, though not as to the additional judgments merged with them.[166]

The defense of limitations may be interposed on an application for this writ. That is to say, when a judgment has ceased to be operative, by the expiration of the time during which an execution could be issued on it, it can no longer be enforced by mandamus.[167] But the fact that the time during which a judgment attaches as a lien upon real estate may have elapsed is no impediment to the issuance of a mandamus to enforce its payment, provided the right to issue an execution as against personalty still remains.[168] But if a state, with the deliberate purpose of obstructing the creditor, repeals a municipal charter, whereby it results that there is no organization to be sued, and the creditor is disabled from proceeding, the time of such obstruction will be excluded from the limitation of the statute, the legislative intention to suspend it being implied, as in case of war. Moreover, it may be set up as an equitable defense against the statute in proceedings by mandamus.[169] A method is commonly provided by which judgments, on which the right to issue execution is lost, may be revived; and this is, of course, applicable

[165] Supra, § 253a, and cases there cited.

[166] Police Jury of Jefferson v. United States, 8 C. C. A. 607, 60 Fed. 249.

[167] McAleer v. Clay County (C. C.) 42 Fed. 665; United States v. Township of Oswego (C. C.) 28 Fed. 55.

[168] Amy v. City of Galena (C. C.) 7 Fed. 163.

[169] Devereaux v. City of Brownsville (C. C.) 29 Fed. 742.

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to judgments against municipalities, no less than to others. Under a statute providing that judgments may be revived by scire facias, a proceeding to revive a judgment against a city may be joined with an application for a mandamus to enforce its collection.[170] But the right to the aid of a writ of mandamus may be lost or impaired by the laches of the creditor, or his neglect to insist upon the full measure of his rights. Thus, it has been held that a delay of eight years in demanding by suit the payment of a claim against a county is such laches as will cause the courts to refuse a writ of mandamus.[171]

§ 985e. Same; Execution of Writ.

When mandamus issues from a federal court to compel the levy and collection of taxes to pay a judgment against a municipal corporation, the officers to whom the writ is directed must obey it or be liable to punishment for contempt; and this, notwithstanding the courts of the state have forbidden them to proceed and will punish them for contempt if they comply with the requirement of the writ.[172] And if municipal officers thus refusing to obey the mandate of the federal court are imprisoned for their contempt, it is no ground for their release on habeas corpus that their continued detention might seriously interfere with the collection of the county revenues, and thereby endanger the continuance of the state government.[173]

If there are no officers of the municipal corporation authorized to levy and collect the necessary taxes (or if their offices are temporarily vacant), the course which may be pursued is not entirely free from doubt. But it is the generally settled doctrine of the supreme court of the United States that, if the proper officers of the corporation neglect or refuse to obey a writ of mandamus requiring

[170] City of Houston v. Emery, 76 Tex. 282, 13 S. W. 264. And see Wonderly v. Lafayette County (C. C.) 74 Fed. 702.

[171] State v. Appleby, 25 S. C. 100.

[172] United States v. Silverman, 4 Dill. 224, Fed. Cas. No. 16,288; President v. City of Elizabeth (C. C.) 40 Fed. 799; United States v. Buchanan County, 5 Dill. 285, Fed. Cas. No. 14,679; United States v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589.

[173] In re Copenhaver (C. C.) 54 Fed. 660.

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them to levy and collect taxes to pay a judgment, or if there are no officers authorized to perform these duties, it is not within the power of a federal court to appoint its own marshal or other officer to execute the writ, unless such a power may be derived from some law of the particular state and the adoption of such law by the federal courts as authorized by the Revised Statutes. "This power to impose burdens and raise money," it is said, "is the highest attribute of sovereignty, and is executed, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important." [174] If, therefore, the municipal authorities

[174] Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72. And see Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. Ed. 893; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223. While the federal courts will, in proper cases, compel the agents of a state to set in motion machinery existing under state authority for the collection of taxes, those courts will themselves neither create the machinery nor invest any person with power to use the same. O'Brien v. Wheelock (C. C.) 78 Fed. 673. In the case of Welch v. Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372, the court appointed its marshal a special commissioner to assess, levy, and collect the tax; but this action was disapproved in Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72. A similar course was allowed to be valid and correct in Supervisors of Lee County v. Rogers, 7 Wall. 175, 19 L. Ed. 162, but this case arose in Iowa, and the proceeding was taken by the express authority of a statute of that state, which gave to the courts power to appoint a person to levy and collect the tax when the proper officer refused to obey a writ of mandamus requiring him to perform that duty; and this practice, thus prescribed by a law of the state, had been adopted, or could be adopted, by the federal courts sitting within the state, under Rev. St. U. S. § 916. There is also some authority for the position that the federal court may appoint its marshal to collect a tax which has been already duly levied or assessed, this being merely a ministerial duty. See United States v. Treasurer of Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538. And in Post v. Taylor County, 2 Flip. 518, Fed. Cas. No. 11,302, it appeared that certain holders of bonds issued by a county in aid of a railroad had recovered judgments in the federal court for overdue interest. Mandamus was issued to the proper officers of the county requiring them to assess and collect taxes to pay these judgments. An assessment of taxes was duly made and reported to the court, but the officers also reported that they were not able to find any qualified person to accept the office of collector and collect the taxes. The court then appointed a receiver, and gave him authority to collect the tax; but he was soon induced, by threats of violence, to resign his position. There-

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refuse to make the levy, the remedy is to constrain them by attachment, as for contempt, not to appoint new officers; and if there are no municipal officers who can make the levy, the judgment creditor is in fact without a remedy, and can only apply to the legislature for relief.[175] Where officers of a municipality have resigned in order to avoid auditing and paying a judgment against the corporation, it is not a sufficient return to an alternative writ of mandamus that the respondents had resigned. If it does not also appear that their successors have been elected or appointed, and qualified, they will be ordered to audit the judgment.[176] But if the governor of the state refuses to appoint a receiver, authorized by statute to collect the taxes already levied by a municipal corporation whose charter has been repealed, a federal court will not undertake to compel an appointment by mandamus, because the writ will not be issued where it is likely to be nugatory and cannot be enforced.[177]

§ 985f. Same; Effect of Limitation of Taxing Power of Municipality.

When a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise is in express terms prohibited. When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment accompanies it, without any spe-

upon the judgment creditors filed their bill in equity against the county and several of the most prominent tax payers therein, and it was held that the court would take jurisdiction, and would direct the defendants to pay their taxes into the registry of the court, to be applied in satisfaction of the judgments, and execution would be issued against each defendant debtor who did not so pay within 90 days; and if the sums thus collected were not sufficient, a receiver would again be appointed, authorized to collect the taxes from property holders not parties to the cause, and if they would not pay within a reasonable time, the receiver would be instructed to bring them before the court by ancillary petition.

[175] Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. Ed. 893.

[176] United States v. Badger, 6 Biss. 308, Fed. Cas. No. 14,493. And see Gorgas v. Blackburn, 14 Ohio, 252.

[177] Devereaux v. City of Brownsville (C. C.) 29 Fed. 742.

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cial mention that such power is granted.[178] Hence it would seem to follow that unless municipal taxation beyond a certain limit is expressly forbidden, it is no defense to an application for mandamus that taxation up to that limit has already been laid. But the writ of mandamus will not issue to compel the officers of a municipal corporation to levy a greater tax than they are allowed by the law of the state to levy, nor to compel the levy of a special tax, when they have already, in the general levy, exercised the taxing power of the municipality to the limit allowed by its charter or the laws of the state.[179] But although it appears that the estimate of municipal expenses is sufficient to exhaust the revenue which the corporation is allowed to raise by taxation, yet if it appears that such expenses can be reduced by judicious management, and a portion of the revenues applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued.[180] And when the limitation on the taxing power of a municipal corporation renders it impossible to raise sufficient by a single levy to pay off a judgment which is made the basis of an application for mandamus, it is competent for the court to order that additional levies be made from year to year until the entire indebtedness is discharged.[181]

Where a state has authorized a municipal corporation to enter into a contract and to exercise the power of local taxation to an extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied; and the state has no power to impair the obligation of the contract by taking away the taxing power of the corporation, or so reducing it as to leave it inadequate to satisfy the requirements of the contract; and, the con-

[178] United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225. Compare Board Com'rs Grand County v. King, 14 C. C. A. 421, 67 Fed. 202.

[179] Supervisors of Carroll County v. United States, 18 Wall. 71, 21 L. Ed. 771; United States v. Macon County, 99 U. S. 582, 25 L. Ed. 331; United States v. Clark County, 95 U. S. 769, 24 L. Ed. 545; Louisiana v. United States, 103 U. S. 289, 26 L. Ed. 358; Clay County v. McAleer, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482; Stewart v. Jefferson Police Jury, 116 U. S. 135, 6 Sup. Ct. 332, 29 L. Ed. 588; State v. Sheldon, 53 Neb. 365, 73 N. W. 694.

[180] Deuel County v. First Nat. Bank, 30 C. C. A. 30, 86 Fed. 264.

[181] Coy v. Lyons City, 17 Iowa, 1, 85 Am. Dec. 539.

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tract or obligation having been reduced to judgment, a federal court can proceed by mandamus to enforce its payment, as if no such restrictive legislation had ever been attempted.[182]

[182] Von Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403; City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Memphis v. United States, 97 U. S. 293, 24 L. Ed. 920; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; United States v. Port of Mobile, 4 Woods, 536, 12 Fed. 768.

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CHAPTER XXV.

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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,

[1] Lacey v. Waples, 28 La. Ann. 158; Wills v. Chandler (C. C.) 2 Fed. 273; Mervine v. Parker, 18 Ala. 241. Where money is paid into court on a judgment which different persons claim to own, and there are material questions of fact in dispute, the court may award an issue to determine the ownership. Mahon v. Rosenkrantz, 8 Kulp (Pa.) 334.

[2] Erwin v. Rutherford, 1 Yerg. (Tenn.) 169; American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068.

[3] Matter v. Phillips, 52 Iowa, 232, 3 N. W. 49.

[4] Supra, § 950. And see The Lulie D., 4 Biss. 249, Fed. Cas. No. 8,602; Seymour v. Smith, 17 Abb. N. C. (N. Y.) 387. A payment on a judgment to the original judgment creditor, after notice of an assignment to other parties, is no defense to the enforcement of such judgment. Moore v. Red (Miss.) 22 South. 948.

[5] Yoakum v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738; Harper v. Harvey,

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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 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

4 W. Va. 539; Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Wilkinson v. Holloway, 7 Leigh (Va.) 277. See Myers v. Zeek, 151 Pa. 423, 25 Atl. 106; Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212. The appearance of an attorney in a case, and the satisfaction of the judgment by him, are presumed to be by authority of the client; and such a satisfaction will not be stricken off years afterwards, when the attorney is dead, on the ground of his want of authority in the premises. Miller v. Preston, 154 Pa. 63, 25 Atl. 1041. But if nothing appears of record to show any authority on the part of an attorney claiming to represent the judgment creditor, a person paying to him the amount of the judgment must exercise care and prudence in ascertaining the extent of the attorney's authority; if he fails to make proper inquiries, he pays the money at his own peril. Ely v. Lamb, 10 Pa. Co. Ct. R. 209.

[6] See Miller v. Preston, 154 Pa. 63, 25 Atl. 1041; Vermont Loan & Trust Co. v. McGregor (Idaho) 53 Pac. 399. The parol assignment of a judgment constitutes the assignee an agent for the plaintiff, and payment to such agent discharges the judgment. Bartlett v. Yates, 52 N. C. 615. In a case where a party against whom a bank had obtained a judgment subsequently deposited money with a branch of the bank, which was lost by the insolvency of the bank, and the judgment passed by assignment to plaintiff, it was held that the deposits did not extinguish 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. 749. Where a stranger represents by a forged memorandum that he is plaintiff's agent, and thus employs an attorney to satisfy the judgment, who thereupon satisfies it, and the stranger embezzles the money, if the plaintiff is not in any fault, the defendant must bear the loss. Guiles v. Murray, 22 Pa. Co. Ct. R. 99.

[7] Morgan v. Thorne, 7 Mees. & W. 400; Collins v. Brook, 4 Hurl. & N. 270.

[8] Bynum v. Barefoot, 75 N. C. 576; Hawkeye Ins. Co. v. Luckow, 76 Iowa. 21, 39 N. W. 923; Haynes v. Wheat, 9 Ala. 239; Portland Const. Co. v. O'Neil, 24 Or. 59, 32 Pac. 766. But in several of the states it is held that the clerk of the court has no right to receive money from the defendant in satisfaction of a judgment, without special authority. Seymour v. Haines, 104 Ill. 557; Lewis v. Cockrell, 31 Ill. App. 476; Durant v. Gabby, 2 Metc. (Ky.) 91; Baker v. Hunt, 1 Wend. (N. Y.) 103; Wells v. Baird, 3 Pa. 351. And see Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283. Where a decree requires the payment of a certain sum to "complainant" within a certain time under pain of forfeiture, a deposit of such sum with the register of the court is not a compliance therewith. Lewis v. Kean, 102 Mich. 605, 61 N. W. 63.

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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] And generally, if the judgment debtor has been compelled, by garnishment, to pay a debt of his judgment creditor, the amount so paid should be allowed as a credit on the judgment.[15]

§ 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 when he has once accepted any substitute for money, his acceptance becomes irrevocable.[16] Thus a judgment may be satisfied, the cred-

[9] Governor v. Read, 38 Ala. 252.

[10] Beard v. Millikan, 68 Ind. 231.

[11] Lofland v. Jefferson, 4 Har. (Del.) 303; Irwin v. McKee, 25 Ga. 646; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497.

[12] Bailey v. Hester, 101 N. C. 538, 8 S. E. 164.

[13] Drumm v. Sherman, 20 La. Ann. 96. The rule is otherwise in New York. Robinson v. Weeks, 6 How. Prac. 161; Richardson v. Ainsworth, 20 How. Prac. 530.

[14] Lawrence v. Martin, 22 Cal. 173.

[15] Brandenburgh v. Beach (Ky.) 32 S. W. 168.

[16] Lyon v. Northrup, 17 Iowa, 314; Ives v. Phelps, 16 Minn. 451 (Gil. 407);

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itor assenting, by the giving of a note secured by a deed of trust on land,[17] or a check of a third party,[18] or a bond and mortgage on real estate,[19] or drafts for various amounts due at stated different times.[20] 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.[21] 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.[22] 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.[23] 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.[24] 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 cir-

Weston v. Clark, 37 Mo. 572. See President, etc., of Planters' Bank v. Calvit, 3 Smedes & M. (Miss.) 143, 41 Am. Dec. 616. Potter v. Hartnett, 148 Pa. 15, 23 Atl. 1007; Musser v. Gray (Cal.) 31 Pac. 568. But property delivered by the debtor to the creditor subsequent to the rendition of a judgment is not a part payment, unless both the delivery and the receipt were with the intention that it should be such, since a tender cannot be made in goods. Lofland v. McDaniel, 1 Pennewill (Del.) 416, 41 Atl. 882. The acceptance of Confederate money, during the Civil War, in payment of a judgment, constituted a valid settlement. Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283.

[17] Bushong v. Taylor, 82 Mo. 660.

[18] Lyon v. Northrup, 17 Iowa, 314.

[19] La Farge v. Herter, 11 Barb. (N. Y.) 159.

[20] Woolfolk v. Degelos, 24 La. Ann. 199.

[21] Riggs v. Goodrich, 74 Mo. 108; McCoy v. Hazlett, 14 Kan. 430; Schneider v. Meyer, 56 Mo. 475.

[22] Schneider v. Meyer, 56 Mo. 475.

[23] Chambers v. McDowell, 4 Ga. 185.

[24] Portis v. Ennis, 27 Tex. 574. See Kallander v. Neidhold, 112 Mich. 339, 70 N. W. 892.

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culating 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.[25]

§ 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.[26]

§ 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;[27] although the case is otherwise if the agreement is evidenced by a sealed instrument acknowledging satisfaction.[28] But there are numerous other authorities which hold that compromise and part payment of a judgment, on a verbal agree-

[25] Draper v. State, 1 Head (Tenn.) 262; Crutchfield v. Robins, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417; Heald v. Bennett, 1 Doug. (Mich.) 513; Mitchell v. Hockett, 25 Cal. 539, 85 Am. Dec. 151; Alcardi v. Robbins, 41 Ala. 541, 94 Am. Dec. 614; Ellis v. Smith, 42 Ala. 349; Codwise v. Field, 9 Johns. (N. Y.) 263. Compare Trigg v. Harris, 49 Mo. 176.

[26] Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598; Campion v. Friedberg, 55 Ill. App. 450; Rother v. Monahan, 60 Minn. 186, 62 N. W. 263; Thompson v. McMillan, 89 Tenn. 110, 14 S. W. 439; Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

[27] 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. (N. Y.) 179; McArthur v. Dane, 61 Ala. 539. A judgment debtor is not entitled to have the judgment satisfied on payment of the amount of the judgment, where the amount of the costs is not inserted, where he made no motion to require the prevailing party to have the costs taxed. Stakke v. Chapman, 13 S. D. 269, 83 N. W. 261. See Maxton v. Mount, 86 Ill. App. 187. But where the defendant is liable for nominal damages only, the payment by him of the costs may be considered a sufficient payment of the judgment. Boardman v. Marshalltown Grocery Co., 105 Iowa, 445, 75 N. W. 343.

[28] Beers v. Hendrickson, 45 N. Y. 665.

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ment that the same shall discharge it in full, will operate, especially under equitable circumstances, as a discharge of the judgment.[29] 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."[30] And it is certain that payment of part of a judgment, together with an additional consideration, either in the shape of an article of value,[31] or of the doing or procuring some act which is a burden or inconvenience to the defendant and a possible benefit to the plaintiff,[32] 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.[33] 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.[34]

[29] Clay v. Hoysradt, 8 Kan. 74; Walrath v. Walrath, 27 Kan. 395; Harper v. Graham, 20 Ohio, 105; Case v. Hawkins, 53 Miss. 702; Reid v. Hibbard, 6 Wis. 175; Jackson v. Olmstead, 87 Ind. 92; Hendrick v. Thomas, 106 Pa. 327; Pinson v. Puckett, 35 S. C. 178, 14 S. E. 393; Thurmond v. Bank of the State of Georgia (Tex. Civ. App.) 27 S. W. 317.

[30] Clay v. Hoysradt, 8 Kan. 74.

[31] Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784.

[32] Booth v. Campbell, 15 Md. 569. Where a judgment debtor was financially embarrassed, and unable to pay the judgment, his payment of a portion, and giving of additional security for another portion, aggregating less than the whole, were a sufficient consideration for the satisfaction of the judgment. Brown v. Kern, 21 Wash. 211, 57 Pac. 798.

[33] Knight v. Cherry, 64 Mo. 513.

[34] Jones v. Ransom, 3 Ind. 327; Trumbull v. Nicholson, 27 Ill. 149; Garth-

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§ 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.[35] And the return and receipts on the execution are also competent evidence of payment.[36] 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.[37] In a suit to cancel a judgment on the ground that it has been paid, the judgment debtor has the burden of proving payment.[38] And on the hearing of a rule to show cause why satisfaction of a judgment should not be entered, conflicting evidence on the question of payment being offered, it is in the discretion of

waite v. Wentz, 19 La. Ann. 196; Jewett v. Wadleigh, 32 Me. 110; Beers v. Hendrickson, 45 N. Y. 665; Vail v. Conant, 15 Vt. 314; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Abbe v. Rood, 6 McLean, 107, Fed. Cas. No. 6; Maxfield v. Carr, 8 Kulp (Pa.) 214; Wood v. City of New York, 44 App. Div. 299, 60 N. Y. Supp. 759; Lewis v. Blue, 110 N. C. 420, 15 S. E. 196. See Whitesell v. Peck, 165 Pa. 571, 30 Atl. 933. Where the judgment debtor in good faith pays to the attorney of record of the judgment creditor an amount less than was due on the judgment in full satisfaction, the satisfaction will be vacated only on terms that plaintiff release defendant from the judgment to the extent of the payment made to the attorney. Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212. Where a judgment creditor's attorney compromises a judgment, which he partially owns, without receiving payment therefor in cash, the judgment is satisfied to the extent of the attorney's interest. McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852.

[35] Hollenbeck v. Stanberry, 38 Iowa, 325; Vestal v. Wicker, 108 N. C. 21, 12 S. E. 1037. Parol evidence is admissible to prove any matters arising subsequent to a judgment which in law or fact amount to payment. Fowler v. Smith, 153 Pa. 639, 25 Atl. 744; Barrett v. Wilkinson, 87 Va. 442, 12 S. E. 885; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734. Plaintiff in a creditor's suit may testify that his judgment has never been satisfied, since the record is not the only means by which proof of payment of the judgment may be made. Whiteside v. Hoskins, 20 Mont. 361, 51 Pac. 739. Positive testimony that witness paid a certain sum on a judgment to the creditor's attorneys of record is competent. Shaffer v. McCrackin, 90 Iowa, 578, 58 N. W. 910, 48 Am. St. Rep. 465.

[36] Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

[37] Platt v. St. Clair's Heirs, Wright (Ohio) 526.

[38] Lewis v. Lewis, 31 Neb. 528, 48 N. W. 267.

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the court, instead of discharging the rule and entertaining an application to open the judgment, to order the judgment opened and cause the issue of payment to be submitted to a jury.[39]

§ 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 advances.[40] 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."[41] 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.[42] 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.[43] An entry upon the record of payment of the debt and interest, does not

[39] Hottenstein v. Haverly, 185 Pa. 305, 39 Atl. 946.

[40] Averill v. Loucks, 6 Barb. (N. Y.) 19; Truscott v. King, 6 N. Y. 147; Troup v. Wood, 4 Johns. Ch. (N. Y.) 228; Craft v. Merrill, 14 N. Y. 456; Winslow v. Clark, 2 Lans. (N. Y.) 380; Fowler v. Smith, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721; Flagg v. Kirk, 20 D. C. 335; Bank of Warren County v. Kemble, 61 Mo. App. 215.

[41] Fleming v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629; Milligan's Appeal, 104 Pa. 503.

[42] Peirce v. Black, 105 Pa. 342; Wood v. Currey, 49 Cal. 359. But see Thompson v. Sankey, 175 Pa. 594, 34 Atl. 1104.

[43] Howk v. Kimball, 2 Blackf. (Ind.) 309. But in Nebraska, it is said that when payment of a judgment has been made by one who is primarily liable, it operates as an absolute satisfaction, even though an assignment be made to a third person with the intention of keeping the judgment alive. Henry & Coatsworth Co. v. Halter, 58 Neb. 685, 79 N. W. 616; First Nat. Bank v. Gibson, 60 Neb. 767, 84 N. W. 259.

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satisfy the judgment so far as to prevent further proceedings for the collection of costs.[44]

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 meantime as a subsisting debt, or any explanation of its so remaining, will be presumed in law to be paid.[45] But this presumption 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.[46] 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.[47] 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.[48] 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.[49]

[44] Altman v. Klingensmith, 6 Watts (Pa.) 445.

[45] Robinson's Adm'r v. Milby's Adm'r, 2 Houst. (Del.) 387; Bright's Adm'r v. Sexton, 18 Ind. 186; Hendricks v. Wallis, 7 Iowa, 224; Smith's Ex'r v. Miller, 14 Wend. (N. Y.) 188; Beekman v. Hamlin, 19 Or. 383, 24 Pac. 195, 10 L. R. A. 454, 20 Am. St. Rep. 827; Farmers' Bank v. Leonard, 4 Har. (Del.) 536; Burt v. Casey, 10 Ga. 178; Miller v. Smith's Ex'rs, 16 Wend. (N. Y.) 425; Sargent v. Hayne, Riley (S. C.) 293; Pratt v. McLure, 10 Rich. Eq. (S. C.) 301; Thayer v. Mowry, 36 Me. 287; Morrow v. Robinson, 4 Del. Ch. 521; Moore v. Carey, 1 Marv. (Del.) 401, 41 Atl. 75; Maxwell v. Devalinger, 2 Pennewill (Del.) 504, 47 Atl. 281; Tennessee v. Virgin, 36 Ga. 390; Willingham v. Long, 47 Ga. 545; Biddle v. Girard Nat. Bank, 109 Pa. 349; Tobin v. Meyers, 18 S. C. 324.

[46] Clark v. Clement, 33 N. H. 563. See also the cases cited above and those in the next section.

[47] Cope v. Humphreys, 14 Serg. & R. (Pa.) 15.

[48] Brewer v. Thomes, 28 Me. 81. See Code Civ. Proc. N. Y. § 376; Seaman v. Clarke, 60 App. Div. 416, 69 N. Y. Supp. 1002.

[49] McQueen v. Fletcher, 4 Rich. Eq. (S. C.) 152.

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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.[50]

§ 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 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." [51] The presumption will be rebutted by proof that, within the twenty years, payments have been made on the judgment,[52] even where the payment is made by a surety without the knowledge of the principal.[53] 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.[54] The

[50] Van Rensselaer v. Wright, 121 N. Y. 626, 25 N. E. 3.

[51] Woodruff v. Sanders, 15 Ark. 143; In re Walker, 107 N. C. 340, 12 S. E. 136; Day v. Crosby, 173 Mass. 433, 53 N. E. 880.

[52] Bissell v. Jaudon, 16 Ohio St. 498; Rowe's Adm'r v. Hardy's Adm'r, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

[53] Denny v. Eddy, 22 Pick. (Mass.) 533.

[54] Vaughan v. Marshall, 1 Houst. (Del.) 604.

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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.[55] But a mere acknowledgment that the debt has not been paid will not suffice, unless there is also a distinct promise to pay it.[56] If the collection of the judgment has been prevented by an injunction, this fact also will avail to repel the presumption of payment.[57] 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.[58] Evidence of his failure in business is admissible, but this is not sufficient without something to show the continued insolvency of the debtor.[59] 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.[60] Other cases dealing with the weight and sufficiency of evidence available for this purpose are collected in the note.[61]

§ 994. Lapse of Less than Twenty Years.

The fact that any number of years less than twenty have elapsed since the rendition of a judgment will not raise a presumption of law that it has been paid. But the lapse of a shorter period of time, when accompanied by persuasive circumstances, may be submitted to a jury as ground for a presumption of fact.[62] "Before the ex-

[55] Beekman v. Hamlin, 19 Or. 383, 24 Pac. 195, 10 L. R. A. 454, 20 Am. St. Rep. 827.

[56] Stover v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634. Compare McNair v. Ingraham, 21 S. C. 70. See Smith v. Schoenberger, 176 Pa. 95, 34 Atl. 954.

[57] Hutsonpiller's Adm'r v. Stover's Adm'r, 12 Grat. (Va.) 579.

[58] Taylor v. Megargee, 2 Pa. 225; Knight v. Macomber, 55 Me. 132; Robinson's Adm'r v. Milby's Adm'r, 2 Houst. (Del.) 387; Waddell's Adm'r v. Elmendorf's Adm'r, 10 N. Y. 170. See Boyd v. Boyd, 9 Misc. Rep. 161, 29 N. Y. Supp. 7.

[59] Jackson v. Nason, 38 Me. 85.

[60] Johnson v. Tuttle, 9 N. J. Eq. 365.

[61] See Walker v. Robinson, 136 Mass. 280; Van Loon v. Smith, 103 Pa. 238; Boardman v. De Forrest, 5 Conn. 8; Mower v. Kip, 2 Edw. Ch. (N. Y.) 165; Burt v. Casey, 10 Ga. 179; Yarnell v. Moore, 3 Cold. (Tenn.) 173; Willaume v. Gorges, 1 Camp. 217.

[62] Hendricks v. Wallis, 7 Iowa, 224; Thayer v. Mowry, 36 Me. 287; Daby

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piration 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." [63] 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.[64]

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 against his co-defendant, or keep the judgment alive in any manner or for any purpose.[65] But still, in some of the states, it is held

v. Ericsson, 45 N. Y. 786; Boyd v. Boyd, 9 Misc. Rep. 161, 29 N. Y. Supp. 7; Foster v. Hunter, 4 Rich. Eq. (S. C.) 16; Renwick v. Wheeler (C. C.) 48 Fed. 431; James' Ex'r v. Life, 92 Va. 702, 24 S. E. 275; Wherry v. McCammon, 12 Rich. Eq. (S. C.) 337, 91 Am. Dec. 240; Baker v. Stonebraker, 36 Mo. 338; Kinsler v. Holmes, 2 S. C. 483; Rector v. Morehouse, 17 Ark. 131; Murphy v. Philadelphia Trust Co., 103 Pa. 379; Van Loon v. Smith, Id. 238.

[63] Woodruff v. Sanders, 15 Ark. 143.

[64] Blackburn v. Squib, Peck, 64; McDaniel v. Goodall, 2 Cold. 391; Yarnell v. Moore, 3 Cold. 173; Husky v. Maples, 2 Cold. 25, 88 Am. Dec. 588; Leiper v. Erden, 5 Yerg. 97; Anderson v. Settle, 5 Sneed, 202.

[65] Montgomery v. Vickery, 110 Ind. 211, 11 N. E. 38; Morley v. Stevens, 47 How. Prac. (N. Y.) 228; Booth v. Farmers' & Mechanics' Bank, 74 N. Y. 228; Tompkins v. Fifth Nat. Bank, 53 Ill. 57; Porter v. Gile, 44 Vt. 520; Towe v. Felton, 52 N. C. 216; Weston v. Clark, 37 Mo. 568; Bones v. Aiken, 35 Iowa, 534; Preslar v. Stallworth, 37 Ala. 402; Hammatt v. Wyman, 9 Mass. 138; Worden v. Jones, 1 Kan. App. 501, 40 Pac. 1071; Dunn v. Bea-

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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.[66] 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."[67] 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.[68]

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

man, 126 N. C. 764, 36 S. E. 174; National Security Bank v. Hunnewell, 124 Mass. 260; Shields v. Moore, 84 Ind. 440; Hinton v. Odenheimer, 57 N. C. 406; Sager v. Moy, 15 R. I. 528, 9 Atl. 847.

[66] 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; In re Wheeler's Estate, 1 Md. Ch. 80.

[67] Sherwood v. Collier, 14 N. C. 380, 24 Am. Dec. 264.

[68] Molyneaux v. Marsh, 1 Woods, 452, Fed. Cas. No. 9,703. See, also, Penn v. Edwards, 50 Ala. 63; Boykin v. Bule, 109 N. C. 501, 13 S. E. 879.

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extinguishment of the judgment as against the maker, and the indorser, so purchasing the judgment, can wield it against the property of the maker.[69]

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.[70] So also, in actions of tort, where the plaintiff recovers separate judgments against the joint tort-feasors, the satisfaction of any one of the judgments will release the other defendants from liability.[71] But it has been 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.[72]

§ 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

[69] Corey v. White, 3 Barb. (N. Y.) 12; Eno v. Crooke, 10 N. Y. 66. Compare Bank of Salina v. Abbot, 3 Denio (N. Y.) 181; Topp v. Branch of Alabama Bank, 2 Swan (Tenn.) 184.

[70] First Nat. Bank v. Indianapolis Plano Manuf'g Co., 45 Ind. 5; Bank of State v. Mosely, 1 Strob. (S. C.) 414; Sherman v. Brett, 7 Wis. 139; Craft v. Merrill, 14 N. Y. 456.

[71] Shainwald v. Lewis (D. C.) 46 Fed. 839; Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Gross v. Pennsylvania, P. & B. R. Co., 65 Hun, 191, 20 N. Y. Supp. 28; Bryant v. Reed, 34 Neb. 720, 52 N. W. 694; Butler v. Ashworth, 110 Cal. 614, 43 Pac. 4. But in Kansas, it is said that a cause of action against several, founded on a tort, when reduced to judgment, becomes as to all a joint indebtedness, which may be discharged as to one, without releasing the others as to any unpaid balance. Missouri, K. & T. Ry. Co. v. Haber, 56 Kan. 717, 44 Pac. 619.

[72] Bell v. Perry, 43 Iowa, 368.

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to satisfy it, the judgment will not be extinguished by the payment.[73] 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 not therefore entitled to an execution, for use against his co-defendant, unless he himself has been judicially determined to be only a surety.[74] 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.[75] 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

[73] Briley v. Sugg, 21 N. C. 366, 30 Am. Dec. 172; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; Barringer v. Boyden, 52 N. C. 187; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Dempsey v. Bush, 18 Ohio St. 376; Peters v. McWilliams, 36 Ohio St. 155; Cottrell's Appeal, 23 Pa. 294; McClung v. Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739; Fleming v. Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; Fulton v. Harrington, 7 Houst. (Del.) 182, 30 Atl. 856; State v. Hearn, 109 N. C. 150, 13 S. E. 895; Storz v. Boyce, 34 Misc. Rep. 279, 69 N. Y. Supp. 612; Wilmer v. Brice, 91 Md. 71, 46 Atl. 322; Smith v. Lang, 2 Tex. Civ. App. 683, 22 S. W. 197; Frankel v. Stern, 50 Ill. App. 54; Cleiman v. Murphy, 34 Ill. App. 633; Wyatt v. Fromme, 70 Mo. App. 613. Compare Murray v. Meade, 5 Wash. St. 693, 32 Pac. 780. But a deposit of money, made by a guarantor of notes on which judgment has been taken, intended as a security for the ultimate payment of the debt, and which it was stipulated should not operate as a payment of the debt, cannot be regarded as a payment of the judgment. Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725. And where the administrator of a surety became the assignee of a judgment against his intestate and the latter's 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, 3 Strob. Eq. (S. C.) 149.

[74] Laval v. Rowley, 17 Ind. 36.

[75] Caldwell v. Martin, 29 S. C. 22, 6 S. E. 857.

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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.[76]

§ 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.[77]

§ 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.[78] 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.[79] But most of the cases make a distinction

[76] Cox v. Smith, 10 Or. 418.

[77] Hammett v. Morris, 55 Ga. 644.

[78] Bigelow v. Provost, 5 Hill, 566; Jones v. Wilson, 3 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. 238, 38 Am. Dec. 309; Simpson v. Mercer, 144 Mass. 413, 11 N. E. 720; Boren v. McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695.

[79] Heilig v. Lemly, 74 N. C. 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 (Tenn.) 456, 73 Am. Dec. 182.

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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.[80] 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.[81]

§ 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.[82] 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.[83] But where a judgment-debtor furnishes money to a third person to buy up the judgment at a discount, and he does so,

[80] Lintz v. Thompson, 1 Head (Tenn.) 456, 73 Am. Dec. 182; Arnett v. Cloud, 2 Ga. 53; Garth v. Campbell, 10 Mo. 154; Hall v. Taylor, 18 W. Va. 544.

[81] Lintz v. Thompson, 1 Head (Tenn.) 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 (Tenn.) 482.

[82] Harbeck v. Vanderbilt, 20 N. Y. 395; Rollins v. Thompson, 21 Miss. 522; Null v. Moore, 32 N. C. 324; Marshall v. Moore, 36 Ill. 321; Sydam v. Cannon, 1 Houst. (Del.) 431. Compare Riffle's Appeal, 3 Brewst. (Pa.) 94. When a person pays a judgment creditor the amount of his judgment against another, and takes an assignment of it, the judgment creditor is satisfied, but the judgment is not. People v. Weimer, 94 Ill. App. 112. But the payment of part of a judgment by a person other than the debtor is a sufficient consideration for an agreement by the creditor to cancel the judgment. Smith v. Gould, 84 Hun, 325, 32 N. Y. Supp. 373. The owner of a judgment, however, is under no obligation to accept payment from any volunteer. For example, a judgment creditor of an insolvent is not bound to assign his judgment to junior creditors of the insolvent on their offering to pay the judgment debt. James v. Markham, 128 N. C. 380, 38 S. E. 917.

[83] Owensby v. Platt, 3 Ind. 459.

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the creditor not knowing the facts, it amounts only to a part payment.[84] 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.[85] 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.[86] And the supreme court of Pennsylvania 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.[87] 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.[88] In a 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

[84] Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578.

[85] Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Head v. Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577.

[86] Harbeck v. Vanderbilt, 20 N. Y. 395.

[87] Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

[88] Phillips v. Behn, 19 Ga. 298.

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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.[89] 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.[90]

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.[91] This power was one which pertained originally only to the 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.[92] "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."[93] But cases some-

[89] Rogers v. Welte, 61 Mich. 258, 28 N. W. 86.

[90] Harbeck v. Vanderbilt, 20 N. Y. 395.

[91] United States v. Griswold (D. C.) 30 Fed. 604; Sowles v. Witters (C. C.) 40 Fed. 413; Skrine v. Simmons, 36 Ga. 402, 91 Am. Dec. 771; Leavenson v. Lafontane, 3 Kan. 523; Peirce v. Bent, 69 Me. 381; Matthews v. Russell, 17 Pa. Co. Ct. R. 590; Schnitker v. Schnitker, 109 Iowa, 349, 80 N. W. 403; Zinn v. Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772; Brown v. Warren, 43 N. H. 430; Hendrickson v. Brown, 39 N. J. Law, 239; Quick v. Durham, 115 Ind. 302, 16 N. E. 601; Ames v. Bates, 119 Mass. 397; Simson v. Hart, 14 Johns. (N. Y.) 63.

[92] Scott v. Rivers, 1 Stew. & P. (Ala.) 24, 21 Am. Dec. 646; Davidson v. Geoghagan, 3 Bibb (Ky.) 233; Palmateer v. Meredith, 4 J. J. Marsh. (Ky.) 74; Dutton v. Mason (Tex. Civ. App.) 52 S. W. 651.

[93] Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; Temple v. Scott, 3 Minn. 419 (Gil. 306). In several of the states, the set-off of mutual judgments is now authorized by statute. See Code Iowa, § 4040; Rev. St. Mo. 1889, § 8168; Civ. Code Ky. § 377; Rev. Codes N. D. § 5499. But the jurisdiction

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times 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.[94] 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.[95] "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."[96] 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 not a matter of right under the statute law.[97] 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.[98] Where a plaintiff seeks to have a judgment obtained

conferred by statute upon courts of law to set off judgments against judgments does not divest courts of equity of jurisdiction in the same cases. Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042.

[94] Story v. Patten, 3 Wend. (N. Y.) 331.

[95] Simson v. Hart, 14 Johns. (N. Y.) 63; Hendrickson v. Brown, 39 N. J. Law, 239; Tolbert v. Harrison, 1 Bailey (S. C.) 599; Williams v. Evans, 2 McCord (S. C.) 203; Ex parte Wells, 43 S. C. 477, 21 S. E. 334; Conable v. Bucklin, 2 Aikens (Vt.) 221; Baker v. Hoag, 6 How. Prac. (N. Y.) 201; Davidson v. Geoghagan, 3 Bibb (Ky.) 233; Smith v. Lowden, 1 Sandf. (N. Y.) 696; Makepeace v. Coates, 8 Mass. 451; Colquitt v. Bonner, 2 Ga. 155; Meador v. Rhyne, 11 Rich. Law (S. C.) 631; Low v. Duncan, 3 Strob. (S. C.) 195; Temple v. Scott, 3 Minn. 419 (Gil. 306); Herman v. Miller, 17 Kan. 328; Lundberg v. Davidson, 68 Minn. 328, 72 N. W. 71; Schuler v. Collins, 63 Kan. 372, 65 Pac. 662. The right of setting off judgments is permitted only where it will infringe on no other right of equal grade; and a debtor's exemption right is treated as one of equal grade. Hence, where the personal property of one debtor, including the judgment owned by him against his creditor, is less in value than the amount allowed him by the exemption laws, no set-off of the judgments will be allowed. Gieseke v. Schrakamp, 6 Ohio N. P. 299; Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908, 41 L. R. A. 852, 66 Am. St. Rep. 670.

[96] Bartlett v. Pearson, 29 Me. 9.

[97] Chipman v. Fowle, 130 Mass. 352; Burns v. Thornburgh, 3 Watts (Pa.) 78.

[98] Harris v. Palmer, 5 Barb. (N. Y.) 105.

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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.[99]

§ 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." [100] 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.[101] Thus, a judgment of a federal court may be set off against a judgment of a court of the state in which it sits.[102] A justice's judgment may be set off against the judgment of a court of record, if the time for appeal has expired.[103] And a judgment

[99] Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829. See Clark v. Story, 29 Barb. (N. Y.) 295.

[100] Webster v. McDaniel, 2 Del. Ch. 297. See, also, Buckmaster v. Grundy, 3 Gilman (Ill.) 626.

[101] Bloomstock v. Duncan, 2 McCord (S. C.) 318, 13 Am. Dec. 728; People v. New York Common Pleas, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; Simpson v. Hart, 1 Johns. Ch. (N. Y.) 91; Ewen v. Terry, 8 Cow. (N. Y.) 126; Rix v. Nevius, 26 Vt. 384; Wright v. Mooney, 28 N. C. 22; Hendrickson v. Brown, 39 N. J. Law, 239; Best v. Lawson, 1 Miles (Pa.) 11; State Bank at Trenton v. Coxe, 8 N. J. Law, 172, 14 Am. Dec. 417; Howe v. Klein, 89 Me. 376, 36 Atl. 620; Welsher v. Libby, McNeill & Libby, 107 Wis. 47, 82 N. W. 693. It is even immaterial that the judgment sought to be set off was rendered in another state. Phillips v. Mackay, 54 N. J. Law, 319, 23 Atl. 941.

[102] Schautz v. Kearney, 47 N. J. Law, 56.

[103] State Bank at Trenton v. Coxe, 8 N. J. Law, 172, 14 Am. Dec. 417; Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451. But in an action before a justice of the peace, the defendant 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

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recovered before one justice can be ascertained and applied by another in satisfaction of a counterclaim recovered before him by the other party.[104] And in Tennessee it is also held that the supreme court may set off two of its own judgments in a proper case.[105]

§ 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.[106]

§ 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.[107] 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.[108] 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.[109] And so also has one who acquired the

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. (N. Y.) 497.

104 McEwen v. Bigelow, 40 Mich. 215.

105 Sneed v. Sneed, 14 Lea, 13.

106 Russell v. Conway, 11 Cal. 93; Cooke v. Smith, 7 Hill (N. Y.) 186; Hicks v. Ross, 11 Barb. (N. Y.) 481; Wright v. Cobleigh, 23 N. H. 32; Taylor v. Williams, 14 Wis. 155; Weisner v. Libby, McNeill & Libby, 107 Wis. 47, 82 N. W. 693. See Sholle v. Pino, 9 N. M. 393, 54 Pac. 335.

107 Mason v. Knowlson, 1 Hill (N. Y.) 218; Turner v. Satterlee, 7 Cow. (N. Y.) 480; Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 681. A judgment for costs belongs to the attorney of the judgment creditor, and the judgment debtor cannot set off the same with a judgment recovered by him against such judgment creditor in a different action in another court. Jaeger v. Koenig, 33 Misc. Rep. 82, 67 N. Y. Supp. 172.

108 Meador v. Rhyne, 11 Rich. Law (S. C.) 631.

109 Norwood v. Norwood, 4 Har. & J. (Md.) 112.

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judgment by assignment before the bringing of the action in which the judgment against himself was rendered.[110] But a judgment purchased by a party with a view to set it off, and upon condition that if he 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.[111]

§ 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.[112] 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.[113] 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.[114] 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.[115] 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.[116] 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 com-

[110] Sexton v. Gee, 1 Hill (S. C.) 378.

[111] Miller v. Gilman, 7 Cow. (N. Y.) 469. But see, per contra, McBrayer v. Dean, 100 Ky. 398, 38 S. W. 508.

[112] Howe Mach. Co. v. Hickox, 106 Ill. 461; Patterson v. Ward, 8 N. D. 87, 76 N. W. 1046; Richmond v. Bloch, 38 Or. 317, 60 Pac. 388.

[113] Atkins v. Churchill, 19 Conn. 394; Holmes v. Robinson, 4 Ohio, 90.

[114] Colquitt v. Bonner, 2 Ga. 155; Hobbs v. Duff, 23 Cal. 596.

[115] Hutchins v. Riddle, 12 N. H. 464; Simson v. Hart, 14 Johns. (N. Y.) 63; Allen v. Hall, 5 Metc. (Mass.) 263; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512.

[116] Prince v. Fuller, 34 Me. 122; Bennett v. Hanley, 91 Mich. 143, 51 N. W. 885.

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mitted by her as administratrix.[117] 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.[118] But unless the joint plaintiffs or joint defendants in the one judgment stand in some 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.[119] 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.[120]

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.[121] 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.[122]

117 Rutherford v. Crabb, 5 Yerg. (Tenn.) 112.

118 Darrah's Ex'rs v. Bayard, 3 Yeates, 152.

119 Phelps v. Reeder, 39 Ill. 172; Windecker v. Mutual Life Ins. Co., 12 App. Div. 73, 43 N. Y. Supp. 358; Simmons v. Shaw, 172 Mass. 516, 52 N. E. 1087.

120 Francis v. Rand, 7 Conn. 221. But compare Jeffries v. Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

121 Morris v. Hollis, 2 Har. (Del.) 4; Hurst v. Sheets, 14 Iowa, 322; Russell v. Conway, 11 Cal. 93.

122 Supra, § 954. And see Wright v. Cobleigh, 23 N. H. 32; Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Makepeace v. Coates, 8 Mass. 451.

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§ 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.[123] Hence a judgment upon which an appeal is pending cannot be set off against another judgment,[124] nor can one which appears by the record to be satisfied, although it has not in fact been paid.[125] 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.[126] A judgment for costs for a defendant may be set off against the judgment recovered by the plaintiff;[127] but not so as to divest the lien of the attorney

[123] A judgment not in existence when the action was commenced cannot be pleaded as a set-off. Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482. Nor can one judgment be set off against another until both have been entered of record. Rupp v. Swartz, 3 Lack. Jur. (Pa.) 125. A final order allowing a receiver's account, and directing payment of a certain sum to one who rendered services to the receiver, is not a judgment, within the meaning of a statute allowing the set-off of mutual judgments. Patterson v. Ward, 8 N. D. 87, 76 N. W. 1046. In Pennsylvania, it is stated to be the general rule that judgments may be set off against each other whenever executions issued upon them could be legally set off, one against the other, by the officer having them in his hands for service. Matthews v. Russell, 17 Pa. Co. Ct. R. 590.

[124] De Figaniere v. Young, 2 Rob. (N. Y.) 670; De Camp v. Thomson, 22 Misc. Rep. 385, 50 N. Y. Supp. 454; Same v. Thompson, 31 App. Div. 634, 54 N. Y. Supp. 1098; Yarborough v. Fitzpatrick (Ky.) 51 S. W. 172; Gemmell v. Hueben, 71 Mo. App. 291; Zerbe v. Missouri, K. & T. Ry. Co., 80 Mo. App. 414; Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482. But in some states, it is thought that the pendency of an appeal from one of the judgments will not warrant the court in refusing the set-off, though it should retain the motion until the determination of the appeal. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Irvine v. Myers, 6 Minn. 562 (Gil. 398); Gaddis v. Leeson, 55 Ill. 522. Of course a judgment which was annulled on appeal cannot be set off. Magarity v. Succop's Adm'r, 90 Va. 561, 19 S. E. 260. But it is immaterial that the time for appealing from the judgment has not yet expired, if no appeal has actually been taken. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786.

[125] Smith v. Briggs, 9 Barb. (N. Y.) 252.

[126] Simpson v. Huston, 14 Tex. 476.

[127] Hurd v. Fogg, 22 N. H. 98; Zerbe v. Missouri, K. & T. Ry. Co., 80 Mo. App. 414; Welsher v. Libby, McNeil & Libby, 107 Wis. 47, 82 N. W. 693. Compare Gilson v. Fryatt, 2 Sandf. (N. Y.) 638; Howell v. Withers, 11 Pa. Co. Ct. R. 630.

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for costs in the first-mentioned judgment.[128] A judgment may be set off before a jury against a demand not yet ascertained by judgment.[129] 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.[130] 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.[131] It is no objection to the set-off of mutual judgments that one was recovered upon a debt or contract and the other upon a claim in tort.[132] So also, where a claim for usury against a bank has been reduced to judgment, it may be set off against a judgment on the note or other obligation on which the usurious interest was paid.[133] And a judgment for damages for breach of a covenant of warranty in the conveyance of property may be allowed in reduction of the mortgage debt for such conveyance.[134] Again, one judgment may be set off against another, although the latter was entered on a note containing a waiver of homestead.[135]

[128] Nicoll v. Nicoll, 2 Edw. Ch. (N. Y.) 574; Dunkin v. Vandenbergh, 1 Paige (N. Y.) 622; Ainslie v. Boynton, 2 Barb. (N. Y.) 258; Winterson v. Hitchings, 38 N. Y. Supp. 171; Higgins v. Dunkleberger, 23 Pa. Co. Ct. R. 291; Morton v. Urquhart, 79 Minn. 390, 82 N. W. 653. See Ocean Ins. Co. v. Rider, 22 Pick. (Mass.) 210. Compare Smith v. Evans, 110 Ga. 536, 35 S. E. 633. Proceedings for setting off judgments cannot be defeated by subsequent notice by the attorney of one of the judgment creditors of his claim of lien. Sweeney v. Bailey, 7 S. D. 404, 64 N. W. 188.

[129] Metzgar v. Metzgar, 1 Rawle (Pa.) 227; Central Appalachian Co. v. Buchanan, 33 C. C. A. 598, 90 Fed. 454. Compare Irvin v. Wright, 1 Scam. (Ill.) 135; Faulconer v. Stinson, 44 W. Va. 546, 29 S. E. 1011.

[130] New Haven Copper Co. v. Brown, 46 Me. 418.

[131] Quick v. Durham, 115 Ind. 302, 16 N. E. 601.

[132] Langston v. Roby, 68 Ga. 406; Pasek v. Vockroth, 13 Pa. Co. Ct. R. 593. But compare McCormick v. Alexander, 3 Pa. Dist. R. 149.

[133] Lloyd v. First Nat. Bank, 5 Kan. App. 512, 47 Pac. 575; Barbour v. National Exchange Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192.

[134] Harrington v. Bean, 94 Me. 208, 47 Atl. 147.

[135] Riehl v. Vockroth, 10 Pa. Co. Ct. R. 657.

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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.[136] "A levy upon real estate constitutes no satisfaction of an 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."[137] But a return of "land delivered" on an elegit is a legal satisfaction of the judgment.[138] 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.[139] 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.[140]

136 Shepard v. Rowe, 14 Wend. (N. Y.) 260; Taylor v. Ranney, 4 Hill (N. Y.) 621; Patterson v. Swan, 9 Serg. & R. (Pa.) 16; Deloach v. Myrick, 6 Ga. 410; Foster v. Rutherford, 20 Ga. 676; Overby v. Hart, 68 Ga. 493; Fry v. Branch Bank, 16 Ala. 282; Beazley v. Prentiss, 13 Smedes & M. (Miss.) 97; Peale v. Bolton, 24 Miss. 630; White v. Graves, 15 Tex. 183; Boyd v. Mann, 9 Baxt. (Tenn.) 349; Hogshead v. Carruth, 5 Yerg. (Tenn.) 227; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Reynolds v. Rogers' Ex'rs, 5 Ohio, 169; Gregory v. Stark, 3 Scam. (Ill.) 612; Gold v. Johnson, 59 Ill. 62; Spafford v. Beach, 2 Doug. (Mich.) 150; Davidson v. Gaston, 16 Minn. 230 (Gil. 202); Wood v. Conrad, 2 S. D. 405, 50 N. W. 903; Chandler v. Furbish, 8 Me. 408; Tarbell v. Downer, 29 Vt. 339; New Zealand Ins. Co. v. Maaz, 13 Colo. App. 493, 59 Pac. 213. Compare Anthony v. Humphries, 9 Ark. 176.

137 Beazley v. Prentiss, 13 Smedes & M. (Miss.) 97.

138 Hinesly v. Hunn's Adm'r, 5 Har. (Del.) 236.

139 Thomas v. Platts, 43 N. H. 629.

140 Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Hanna v. Savage, 21 Wash. 555, 58 Pac. 1069; Gonce v. McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714.

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§ 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.[141] 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 or his deputy.[142] 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.[143]

§ 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.[144] As stated by the

[141] Clark v. Withers, 1 Salk. 323; Slie v. Finch, 2 Rolle, 57; Speake v. Richards, Hob. 206; Campbell v. Pope, Hempst. 271, Fed. Cas. No. 2,365a; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Shepard v. Rowe, 14 Wend. (N. Y.) 260; Hunt v. Breading, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665; Cathcart's Appeal, 13 Pa. 421; Marshall v. Morris, 13 Ga. 185; Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301; Young v. Read, 3 Yerg. (Tenn.) 296; Cass v. Adams, 3 Ohio, 223; Frank v. Brasket, 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.

[142] Hunt v. Breading, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665.

[143] Mulford v. Estudillo, 23 Cal. 94.

[144] United States v. Dashiel, 3 Wall. 688, 18 L. Ed. 268; Smith v. Condon,

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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 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."[145] 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

174 Mass. 550, 55 N. E. 324, 75 Am. St. Rep. 372; Folsom v. Chesley, 2 N. H. 432; McBride v. Farmers' Bank, 28 Barb. (N. Y.) 476; Denvrey v. Fox, 22 Barb. (N. Y.) 522; People v. Hopson, 1 Denio (N. Y.) 574; Voorhees v. Gros, 3 How. Prac. (N. Y.) 262; Green v. Burke, 23 Wend. (N. Y.) 490; Peck v. Tiffany, 2 N. Y. 451; Lyon v. Hampton, 20 Pa. 46; Carr v. Weld, 19 N. J. Eq. 319; Banta v. McClennan, 14 N. J. Eq. 120; In re King, 13 N. C. 341, 21 Am. Dec. 335; Peay v. Fleming, 2 Hill Eq. (S. C.) 97; Lewis v. Spann, 1 Rich. Law (S. C.) 429; McElwee v. Jeffreys, 7 S. C. 228; Foster v. Rutherford, 20 Ga. 676; Chisolm v. Chittenden, 45 Ga. 213; Overby v. Hart, 68 Ga. 493; Walker v. McDowell, 4 Smedes & M. (Miss.) 118, 43 Am. Dec. 476; McNutt v. Wilcox, Freem. Ch. (Miss.) 116; Wade v. Watt, 41 Miss. 248; Shelton v. Hamilton, 23 Miss. 496, 57 Am. Dec. 149; McGinlss v. Lillard's Ex'r, 4 Bibb (Ky.) 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 G. 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); Murray v. Meade, 5 Wash. St. 693, 32 Pac. 780.

145 Peck v. Tiffany, 2 N. Y. 451, 456.

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discharge the judgment.[146] 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.[147] 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.[148] So again, it may be rebutted by proof that the property was removed from the plaintiff's possession by process of law.[149] 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.[150] Thus where the debtor, on a levy, gives a note with collaterals, and thereupon 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.[151] 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

[146] Waddell v. Elmendorf, 5 Denio (N. Y.) 447.

[147] Newsom v. McLendon, 6 Ga. 392; Caudle v. Dare, 7 Ark. 46; Moody v. Harper, 28 Miss. 615; Bibb v. Jones, 7 How. (Miss.) 397; McNutt v. Wilcox, Freem. Ch. (Miss.) 116; Chandler v. Higgins, 109 Ill. 602.

[148] People v. Hopson, 1 Denio (N. Y.) 574; Hanness v. Bonnell, 23 N. J. Law, 159; Newsom v. McLendon, 6 Ga. 392; Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 621; Peay v. Fleming, 2 Hill Eq. (S. C.) 97; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309.

[149] Bean v. Seyfert, 12 Phila. 224; Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; Alexander v. Polk, 39 Miss. 737; Peoria Savings, L. & T. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083.

[150] United States v. Dashiel, 3 Wall. 688, 18 L. Ed. 268; Churchill v. Warren, 2 N. H. 298, 9 Am. Dec. 73; Ostrander v. Walter, 2 Hill (N. Y.) 329; Peck v. Tiffany, 2 N. Y. 451; Cummin's Appeal, 9 Watts & S. (Pa.) 73; Sasscer v. Walker's Ex'rs, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272; Foster v. Crawford (C. C.) 80 Fed. 991; Lustfield v. Ball, 103 Mich. 17, 61 N. W. 339; Binford v. Alston, 15 N. C. 351; Stone v. Tucker, 2 Bailey (S. C.) 495; Morton v. Walker, 7 How. (Miss.) 554; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309; Allen v. Johnson, 4 J. J. Marsh. (Ky.) 235; Williams v. Bowdon, 1 Swan (Tenn.) 282; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Biscoe v. Sandefur, 14 Ark. 568; Williams v. Boyce, 11 Mo. 537; Young v. Cleveland, 33 Mo. 126, 82 Am. Dec. 155; First Nat. Bank v. Rogers, 15 Minn. 381 (Gil. 305); Wright v. Young, 6 Or. 87.

[151] Holbrook v. Champlin, 1 Hoff. Ch. (N. Y.) 148. And see First Nat. Bank of Hastings v. Rogers, 15 Minn. 381 (Gil. 305).

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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.[152]

§ 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.[153] 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.[154] In Pennsylvania, when an execution is levied on personal property, but the sale is prevented by an interpleader issue at 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.[155]

§ 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.[156] And where the property is pur-

[152] Newsom v. McLendon, 6 Ga. 392. See, also, First Nat. Bank of Hastings v. Rogers, 13 Minn. 407 (Gil. 376), 97 Am. Dec. 239.

[153] Witherspoon v. Spring, 3 How. (Miss.) 60, 32 Am. Dec. 310; Bank of United States v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; Davis v. Hoopes, 33 Miss. 173 (compare Benton v. Crowder, 7 Smedes & M. [Miss.] 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. Marsh. (Ky.) 547; Young v. Read, 3 Yerg. (Tenn.) 296. See, also, Hoyt v. Hudson, 12 Johns. (N. Y.) 207; Taylor v. Hulme, 4 Watts & S. (Pa.) 407; Cox v. Reed, 27 Ill. 434.

[154] Cole v. Robertson, 6 Tex. 356, 55 Am. Dec. 784; Patton v. Hamner, 33 Ala. 307; Crawford v. State Bank, 5 Ala. 55.

[155] Rice v. Groff, 58 Pa. 116.

[156] Halcombe v. Loudermilk, 48 N. C. 491; Knight v. Church, 73 Hun, 314,

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chased by the judgment-plaintiff himself, for the amount due him, the judgment is wholly extinguished.[157] 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.[158] 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.[159] 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.[160] 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.[161] But if the invalidity of the sale is attributable to 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.[162] But this doctrine, it must be

26 N. Y. Supp. 423; Washburn v. Osgood, 38 Neb. 804, 57 N. W. 529; Shainwald v. Lewis (D. C.) 46 Fed. 839.

157 Kleinhenz v. Phelps, 6 Hun (N. Y.) 568.

158 Cake v. Bird (Pa.) 15 Atl. 774; Jones v. Schmidt, 55 N. J. Law, 504, 27 Atl. 902.

159 Bank of Pennsylvania v. Winger, 1 Rawle (Pa.) 295, 18 Am. Dec. 633.

160 Van Horne v. McLaren, 8 Paige, 285, 35 Am. Dec. 685.

161 Townsend v. Smith, 20 Tex. 465, 70 Am. Dec. 400; Smith v. Reed, 52 Cal. 345; Gooch v. Atkins, 14 Mass. 379; Farmer v. Sasseen, 63 Iowa, 110, 18 N. W. 714; Arnold v. Fuller's Heirs, 1 Ohio, 458.

162 Thomas v. Glazener, 90 Ala. 537, 8 South. 153, 24 Am. St. Rep. 830;

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admitted, is opposed by a very respectable body of authorities.[163] 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.[164]

§ 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.[165] But in case of a judgment against several joint debtors, the arrest of one does not preclude the subsequent taking of the others.[166]

§ 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.[167] So where a plaintiff recovered separate judgments against two joint trespassers, and sued 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

Beall v. Price, 13 Ohio, 368, 383, 42 Am. Dec. 204; Hollister v. Dillon, 4 Ohio St. 197; Halcombe v. Loudermilk, 48 N. C. 491; Freeman v. Caldwell, 10 Watts (Pa.) 10; Lansing v. Quackenbush, 5 Cow. (N. Y.) 38.

163 Cross v. Zane, 47 Cal. 602; Scherr v. Himmelmann, 53 Cal. 312; Adams v. Smith, 5 Cow. (N. Y.) 280; Ritter v. Henshaw, 7 Iowa, 98; Tudor v. Taylor, 26 Vt. 444.

164 Warner v. Helm, 1 Gilman (Ill.) 220; Henry v. Keys, 5 Sneed (Tenn.) 489; Muir v. Craig, 3 Blackf. (Ind.) 293, 25 Am. Dec. 111; Price v. Boyd, 1 Dana (Ky.) 436.

165 Bank of Beloit v. Beale, 7 Bosw. (N. Y.) 611; Fassett v. Tallmadge, 15 Abb. Prac. (N. Y.) 205.

166 Penn v. Remsen, 24 How. Prac. (N. Y.) 503; Raymond v. Butterworth, 139 Mass. 471, 1 N. E. 126. See, also, Kasson v. People, 44 Barb. (N. Y.) 347; Chapman v. Hatt, 11 Wend. (N. Y.) 41.

167 Cattlin v. Kernot, 3 C. B. (N. S.) 796; Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338; King v. Goodwin, 16 Mass. 63.

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judgments was gone.[168] 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,[169] or by the act of the law,[170] or by a discharge under the insolvent laws,[171] or by reason of the plaintiff's refusing to pay the prison fees.[172] 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.[173]

§ 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.[174] 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.[175] 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 pay-

168 Kasson v. People, 44 Barb. (N. Y.) 349. Compare Hoyle v. McCrea, 42 App. Div. 629, 59 N. Y. Supp. 202.

169 Coburn v. Palmer, 10 Cush. (Mass.) 273.

170 Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338.

171 Owen v. Glover, 2 Cranch C. C. 578, Fed. Cas. No. 10,630; Strode v. Broadwell, 36 Ill. 419.

172 Prentiss v. Hinton, 6 Blackf. (Ind.) 35; Hidden v. Saunders, 2 R. I. 391; Nardin v. Battle, 3 East. 87; Lambert v. Wiltshire, 144 Ill. 517, 33 N. E. 538. Per contra, Strawsine v. Salisbury, 75 Mich. 542, 42 N. W. 966.

173 Abbott v. Osgood, 38 N. H. 280.

174 Mumford v. Stocker, 1 Cow. (N. Y.) 178; Griswold v. Hill, 2 Paine, 492, Fed. Cas. No. 5,836. See Lawton v. Perry, 40 S. C. 255, 18 S. E. 861. But a second judgment recovered on the same debt, though for a less amount than that recovered in the first action, is a waiver of the remainder, and works an entire extinguishment of the first judgment. Price v. First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419. And see Wheelock v. Godfrey (Cal.) 35 Pac. 315.

175 Tarver v. Rankin, 3 Ga. 210. And generally, where a person pursues different remedies for the same wrong, and satisfies one judgment, such satisfaction extinguishes all judgments rendered therefor. Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

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ment and insists upon it as a satisfaction of the judgment against himself.[176] Where a judgment is obtained against a defendant in an attachment, and afterwards a judgment for the whole amount is rendered in the same suit against the garnishee, the latter judgment does not extinguish the former.[177]

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.[178] But satisfaction of a judgment cannot be ordered to be entered because of any matter accruing before its rendition.[179] 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.[180] Nor will the court order such entry unless all the parties interested are brought before it and have an opportunity to be heard.[181] 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.[182] 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

176 Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

177 Price v. Higgins, 1 Litt. (Ky.) 273.

178 Briggs v. Thompson, 20 Johns. (N. Y.) 294; Medford v. Dorsey, 2 Wash. C. C. 467, Fed. Cas. No. 9,390; Jones v. Schmidt, 55 N. J. Law, 504, 27 Atl. 902; Foreman v. Bibb, 65 N. C. 128; Reid v. O'Brien, 86 Ill. App. 128; Manker v. Sine, 47 Neb. 736, 66 N. W. 840.

179 Jarman v. Saunders, 64 N. C. 367; Hawkins v. Harding, 35 Ill. App. 25.

180 McCutcheon v. Allen, 96 Pa. 319; Atkinson v. Harrison, 153 Pa. 472, 26 Atl. 294. Satisfaction will not be ordered except upon perfectly clear and conclusive proof of payment. Third Nat. Bank v. Hunsicker, 8 Pa. Co. Ct. R. 635; Shaylor v. Parsons, 1 Pa. Super. Ct. 281; Barker v. Crawford, 58 Hun, 604, 11 N. Y. Supp. 337.

181 In re Beers, 5 Rob. (N. Y.) 643; Mayer v. Sparks, 3 Kan. App. 602, 45 Pac. 249.

182 Long v. Shackleford, 25 Miss. 559.

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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.[183] But where it is made the duty of the prothonotary or clerk of court to enter satisfaction when the return to a writ shows that the money was made, the judgment creditor is not liable for a failure of that officer to enter satisfaction where there is such a return.[184] Independently of such statutes, an action of trespass on the case will lie against a judgment creditor for refusal or neglect, after he has received full payment of his judgment, to satisfy the judgment of record within a reasonable time, upon being duly requested thereto.[185] In Pennsylvania, also, a statute empowers the court itself to enter satisfaction of a judgment on due proof that it has been fully paid. But this, being in derogation of the common law, must be restricted to the very case of actual payment in full. Not everything which could be given in evidence under the plea of payment in a pending adversary proceeding before judgment may be treated as actual payment after verdict and judgment.[186] An action to obtain satisfaction on the record of a judgment which has been paid is not barred by the fact that the person claiming benefits under the judgment has had it assigned to him more than six years before the action was brought.[187] And where a motion to discharge a judgment of record as having been satisfied was overruled on hearing, the adjudication is conclusive, as to the satisfaction, in a subsequent application to revive the judgment, the same having become dormant.[188]

§ 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.[189] But it is said that an entry of satisfaction, indorsed on the judgment, is in

183 Marston v. Tryon, 108 Pa. 270.

184 Bratton v. Leyrer, 12 Pa. Co. Ct. R. 651.

185 McLaughlin v. First Nat. Bank, 72 Ill. App. 476.

186 Felt v. Cook, 95 Pa. 247; Riddle's Appeal, 104 Pa. 171; Anderson v. Best, 176 Pa. 498, 35 Atl. 194.

187 Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

188 Broadwater v. Foxworthy, 57 Neb. 406, 77 N. W. 1103.

189 Kerr's Appeal, 104 Pa. 282; Packard v. Hill, 7 Cow. (N. Y.) 434.

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the nature of a receipt for the amount thereof, and may be explained, qualified, controlled, or even contradicted by parol evidence.[190] 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.[191] 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.[192]

§ 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.[193] So a plaintiff whose judgment is entered satisfied by an attorney

[190] Stewart v. Armel, 62 Ind. 593. A satisfaction piece, signed by the judgment creditor, but placed in his desk without delivery to the judgment debtor or to any one for him, is not effectual to discharge the judgment. Earley v. St. Patrick's Church Soc., 81 Hun, 369, 30 N. Y. Supp. 979. So, also, an unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment, and is not admissible as evidence of a satisfaction. Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[191] Campbell v. Booth, 8 Md. 107.

[192] Allen v. Conrad, 51 Pa. 487.

[193] Russell v. Nelson, 99 N. Y. 119, 1 N. E. 314; Gilpin v. Baltimore & O. R. Co. (Com. Pl.) 17 N. Y. Supp. 520; Murphy v. Flood, 2 Grant, Cas. (Pa.) 411; Bowman v. Forney, 15 Pa. Co. Ct. R. 134; Paul v. Eurich, 3 Pa. Super. Ct. 299; Delta Building & Loan Ass'n v. McClune, 6 Pa. Dist. R. 569; City of Philadelphia v. Simon, 12 Pa. Super. Ct. 159; Ackerman v. Ackerman, 44 N. J. Law, 173; Bradshaw v. Bratton, 96 Va. 577, 32 S. E. 56; Armstrong v. Harper, 65 Ala. 523; State v. Young, 32 Kan. 292, 4 Pac. 309; Bogle v. Bloom, 36 Kan. 512, 13 Pac. 793; McNeal v. Hunt, 6 Kan. App. 670, 50 Pac. 63; Wilson v. Stilwell, 14 Ohio St. 464; Kerr v. Kerr, 81 Ill. App. 35; Cohen v. Camp, 46 Mo. 179. Compare Romain v. Garth, 5 Thomp. & C. (N. Y.) 361. The cir-

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who had no authority to make the entry may maintain an action or application to have the entry cancelled.[194] Where an entry of satisfaction 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.[195] 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.[196] 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.[197] Where a

cuit court of one county cannot annul an unauthorized satisfaction of a judgment entered in the docket kept by the clerk of the circuit court in another county. Burney v. Hunter, 32 Ill. App. 441. But see, per contra, Darrow v. Darrow, 43 Iowa, 411.

[194] Freeman v. Paul, 105 Ind. 451, 5 N. E. 754; Voell v. Kelly, 64 Wis. 504, 25 N. W. 536; Turnan v. Temke, 84 Ill. 286; Moore v. Cairo & F. R. Co., 36 Ark. 262; Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212; Maxfield v. Carr, 8 Kulp (Pa.) 214. But the appearance of an attorney in a case and the satisfaction of the judgment by him are presumed to be by the authority of the client; and such a satisfaction will not be stricken off, years afterwards, when the attorney is dead, on the ground of his want of authority in the premises. Miller v. Preston, 154 Pa. 63, 25 Atl. 1041. And where a client is informed that his attorney has satisfied on the record a judgment in his favor, and accepted securities for a part thereof, and does not then disavow the attorney's act, and such attorney afterwards sues on such securities in the name and with the assent of the client, the latter cannot then repudiate the satisfaction of the judgment and have it stricken off. Whitesell v. Peck, 165 Pa. 571, 30 Atl. 933.

[195] Stuart v. Peay, 21 Ark. 117. The satisfaction of a judgment on a settlement between the parties cannot be rescinded for fraud in the procurement of the settlement, except on condition that plaintiff shall return to defendant whatever he has received pursuant to the settlement; and it is not a sufficient substitute for such return that the court, in setting aside the judgment, has ordered that the amount paid pursuant thereto shall be deducted from the existing judgment or any final judgment recovered in the action. Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018.

[196] Guthrie v. Reid, 107 Pa. 251. See, also, Geissinger's Appeal (Pa.) 4 Atl. 344.

[197] Chapman v. Blakeman, 31 Kan. 684, 3 Pac. 277. See, also, Dwight v.

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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.[198]

§ 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.[199] 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.[200] 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.[201]

St. John, 25 N. Y. 203; Yeates v. Mead, 65 Miss. 89, 3 South. 651; Barrett v. Lingle, 33 Ill. App. 650.

[198] Read's Appeal, 126 Pa. 415, 17 Atl. 621.

[199] Whitehill v. Wilson, 3 Pen. & W. (Pa.) 405, 24 Am. Dec. 326. See Davis v. Bowker, 1 Nev. 487. The holder of a judgment lien cannot release land of his debtor, taken on execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, where the debtor files a refusal to accept the release. Fisler v. Stewart, 191 Pa. 323, 43 Atl. 396, 71 Am. St. Rep. 769.

[200] Rounsaville v. Hazen, 33 Kan. 71, 5 Pac. 422.

[201] Crosby v. Wood, 6 N. Y. 369.

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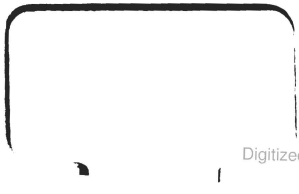
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